

THE INTERNATIONAL CRIMINAL COURT'S ARREST WARRANTS AND UGANDA'S LORD'S RESISTANCE ARMY: RENEWING THE DEBATE OVER AMNESTY AND COMPLEMENTARITY

On October 13, 2005, the International Criminal Court ("ICC") unsealed the arrest warrants for five senior leaders of the Lord's Resistance Army ("LRA"), a rebel group known for its long insurgency against Ugandan President Yoweri Museveni.¹ To ensure the safety of witnesses and victims vulnerable to retaliatory attacks, the warrants had remained under seal since their issuance on July 8, 2005, until adequate security measures could be implemented.² While the arrest warrants remain in heavily redacted form, they assert that the ICC has "reasonable grounds to believe" that senior LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya had ordered the commission of numerous crimes against humanity and war crimes in Uganda since July 2002,³ the starting date for ICC jurisdiction.⁴

BACKGROUND

The LRA has been active since the late 1980s, when Joseph Kony, a self-proclaimed messianic prophet, began his mission to free the Acholi people of northern Uganda by overthrowing the government and installing a system based on the Biblical Ten Commandments.⁵ The LRA was the last of a string of rebel movements that arose after Museveni seized power in 1986.⁶ When popular support, resources, and recruits for the rebellion dwindled, Kony fled to southern Sudan for supplies and weapons. He found safe harbor under the Khartoum government, which linked Museveni with the insurgent Sudanese People's Liberation Army.⁷ Condemning the public's lack of enthusiasm as sympathy for Museveni, the LRA then turned on the very people it claimed to represent. For almost two decades, the LRA has subjected the Acholi to continuous campaigns of murder, mutilation, rape, looting, destruction of property, and abduction—mainly of children—as a method of forced conscription to replenish its ranks.⁸ The ongoing violence has pro-

1. Press Release, International Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders (Oct. 14, 2005), <http://www.icc-cpi.int/press/pressreleases/114.html>.

2. Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, ¶¶ 4–27 (Oct. 13, 2005).

3. International Criminal Court, *supra* note 1.

4. Press Conference, International Criminal Court, Statement by Chief Prosecutor Luis Moreno Ocampo (Oct. 14, 2005), at 2, http://www/icc-cpi.int/library/organs/otp/Uganda-LMO_Speech_14102005.pdf.

5. Kasaija Phillip Apuuli, *The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda*, 15 CRIM. L. F. 391, 392–94 (2004).

6. *Id.*

7. *Id.*

8. Adam Branch, *International Justice, Local Justice*, 51 DISSENT 22, 22–23 (2004).

duced a humanitarian crisis and has devastated the economy of northern Uganda.⁹

More than 20,000 children have been abducted by the LRA over the years, constituting up to eighty percent of the rebel group's membership.¹⁰ Aside from receiving military training, children are abused and often used as laborers, sex slaves, or human shields in combat.¹¹ They are forced to take part in atrocities against their own communities or in the killings of other disobedient children, further isolating the survivors from society and binding them to the LRA.¹² Every night, approximately 40,000 children seek safety from LRA raids by commuting from their rural homes to urban centers, where they sleep on streets or in bus parks, church grounds, and local factories.¹³ Nearly two million people—almost ninety percent of the population of Uganda's three main Acholi provinces—have abandoned their homes in exchange for shelter in crowded camps for internally displaced persons ("IDPs").¹⁴ These "protected villages," which often lack food, clean water, sanitation, and medicine,¹⁵ are safeguarded by local militias or the Ugandan national army (United People's Defense Forces, or "UPDF"). Nevertheless, the inhabitants remain easy targets. They continue to be maimed, raped, murdered, and abducted by the LRA¹⁶—and reportedly mistreated by undisciplined UPDF soldiers as well.¹⁷

In accordance with the limits on the ICC's jurisdiction, the Court's arrest warrants focus on events from 2002 onwards. The ICC alleges that LRA leader Joseph Kony issued specific orders in mid-2002 and late 2003 to attack, kill, loot, and abduct civilian populations, including those living in IDP camps.¹⁸ Luis Moreno Ocampo, the ICC Prosecutor, has submitted evidence supporting the allegation that the LRA commanders named in the warrants directly participated in carrying out these orders.¹⁹ Of the five people identified for arrest, Joseph Kony has the most counts against him: twelve counts of crimes against humanity including murder, enslavement, sexual

9. *Id.* at 23.

10. *Waiting for Elusive Peace in the War-Ravaged North*, IRIN News, June 9, 2005, http://www.irinnews.org/S_report.asp?ReportID=47568&SelectRegion=East_Africa. The LRA customarily abducts children between the ages of eleven and fifteen, but has increasingly targeted children as young as the age of six. U.N. High Commissioner for Human Rights, *Report of the High Commissioner for Human Rights on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda*, ¶ 14, U.N. Doc. E/CN.4/2002/86 (2001).

11. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INTL L. 403, 407–08 (2005).

12. *Id.*

13. Jihun Sohn, UNICEF Executive Director, Ann M. Veneman, *Highlights the Plight of Children Caught in Uganda's Conflict*, UNICEF, July 25, 2005, http://www.unicef.org/infobycountry/uganda_27744.html.

14. *Hunting Uganda's Child-killers*, ECONOMIST, May 5, 2005, at 41.

15. Apuli, *supra* note 5, at 395.

16. *Id.*

17. Branch, *supra* note 8, at 23.

18. International Criminal Court, *supra* note 1.

19. *Id.*

enslavement, rape, and inhumane acts of inflicting serious bodily injury and suffering, as well as twenty-one counts of war crimes, including cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, rape, and the forced enlisting of children.²⁰

REACTIONS

The ICC issued the arrest warrants after a year-long investigation, which began some time after President Museveni formally referred the situation to the Court on December 16, 2003. Never before had a country invoked Articles 13(a) and 14 of the Rome Statute to grant the ICC jurisdiction.²¹ As a result, the unsealing of the arrest warrants marked one of Moreno Ocampo's first formal acts as prosecutor and was hailed as an important step forward for the ICC.

Nevertheless, reactions to this decision have been mixed. United Nations Secretary-General Kofi Annan offered glowing praise, stating that the indictments "send a powerful signal around the world that those responsible for such crimes will be held accountable for their actions."²² Organizations such as Human Rights Watch and Amnesty International likewise applauded the ICC for taking action against the LRA's gross human rights abuses, the former claiming that "the ICC has opened the door for justice to be done."²³

At the same time, many organizations expressed concern for the ICC's failure to take broader action against human rights violations perpetrated on the other side of the conflict, by the UPDF and Ugandan government officials.²⁴ In its attempts to flush out the LRA, for instance, the UPDF bombed and burned down villages, thus fueling the displacement of the Acholi.²⁵ Organizations such as the Refugee Law Project and the Acholi Religious Leaders Peace Initiative have documented numerous accounts of rapes and sexual attacks against women by UPDF soldiers.²⁶ Other alleged UPDF abuses include overzealously killing any civilian found outside IDP camps, effectively holding people captive within their "protected villages."²⁷ Moreno Ocampo defended the ICC's decision, asserting that "[w]e analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity We therefore started with an investigation of the LRA."²⁸

20. Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005), at 12–19.

21. Akhavan, *supra* note 11, at 403.

22. *Annan Hails International Criminal Courts' Arrest Warrants for Five Ugandan Rebels*, U.N. NEWS SERVICE, Oct. 14, 2005, <http://www.un.org/apps/news/printnewsAr.asp?nid=16243>.

23. *ICC Takes Decisive Step for Justice in Uganda*, HUMAN RIGHTS WATCH, Oct. 14, 2005, <http://hrw.org/english/docs/2005/10/14/uganda11880.htm>.

24. *Id.*

25. Branch, *supra* note 8, at 23.

26. Apuuli, *supra* note 5, at 404.

27. Branch, *supra* note 8, at 23.

28. Ocampo, *supra* note 4, at 3.

Moreno Ocampo confirmed that the ICC would continue collecting information on all relevant parties, reserving the right to prosecute others in the future.

Some mediators also disapproved of the arrest warrants, arguing that they undermined peace efforts by alienating rebel forces and precluding the protection offered by the Ugandan government's Amnesty Act of 2000. The Amnesty Act was intended to provide an incentive for defection from the LRA; it guaranteed blanket amnesty for all rebels, regardless of rank, who voluntarily surrendered themselves.²⁹ With amnesty as a negotiating tool, Ugandan minister Betty Bigombe, backed by the United States, Britain, the Netherlands, Norway, and the Catholic Church,³⁰ had organized a face-to-face meeting between senior government officials and LRA leaders in 2004. She came close to brokering a ceasefire agreement before her efforts were foiled at the last minute.³¹ After the release of the arrest warrants, the still-active Bigombe complained that the ICC "rushed too much."³² She felt that rescinding the amnesty option deprived her of a crucial bargaining chip and sent a conflicting message that would undermine the LRA's trust in future negotiations. Archbishop Odama of the Gulu Catholic Archdiocese added, "[t]his is like a blow to the peace process. The process of confidence-building has been moving well, but now the LRA will look at whoever gets in contact with them as an agent of the ICC."³³

Odama and other Acholi religious and political leaders continue to press for traditional justice,³⁴ a process involving confessions of guilt, cleansing rituals, and the eventual acceptance of LRA members back into communities.³⁵ Peter Onega, chairman of the Uganda Amnesty Commission, insists that amnesty still applies to any rebel unidentified by the arrest warrants. Nevertheless, he believes that the ICC's actions may have frustrated attempts at reconciliation by scaring away rebels who were otherwise contemplating defection. The LRA leadership "will be at liberty to tell these people . . . 'don't think we are the only ones wanted by the ICC—your turn is coming' and very few will come out [of the bush] if such a message was driven home," he stated.³⁶

Still, the ultimate impact of the indictments may not be as one-sided as their critics fear. Many of the same arguments against ICC prosecution arose

29. See The Amnesty Act, 2000, Preamble, ¶ 3 (Uganda).

30. Jim Lobe, *Historic ICC Arrest Warrants Evoke Praise, Concern*, INTER PRESS SERVICE, Oct. 14, 2005, <http://www.ipsnews.net/print.asp?idnews=30640>.

31. *Uganda Aide Criticizes Court Over Warrants*, N.Y. TIMES, Oct. 9, 2005, at 20.

32. Lobe, *supra* note 30.

33. *ICC Issues Arrest Warrants for LRA Leaders*, IRIN NEWS, Oct. 7, 2005, http://www.irinnews.org/report.asp?ReportID=49420&SelectRegion=East_Africa&SelectCountry=UGANDA.

34. *The ICC and the Northern Uganda Conflict*, IRIN NEWS, June 9, 2005, http://www.irinnews.org/S_report.asp?ReportID=47573.

35. ECONOMIST, *supra* note 14, at 41.

36. *ICC Indictments to Affect Northern Peace Efforts, Says Mediator*, IRIN NEWS, Oct. 10, 2005, http://www.irinnews.org/report.asp?ReportID=49453&SelectRegion=East_Africa&SelectCountry=UGANDA.

after Uganda first referred the case to the ICC in 2003.³⁷ Nevertheless, it was in the wake of Museveni's referral that Sudan was finally persuaded to end its support for the LRA. The State agreed in a March 2004 Protocol to permit the UPDF to attack LRA bases in southern Sudan, precisely at the moment when LRA abuses had reached their peak.³⁸ Some analysts have argued that the LRA's alienation under the refocused international spotlight helped to pressure its allies into renegotiating their loyalty.³⁹

Although the LRA has staged comebacks before, there is little doubt that Sudan's cutoff has significantly weakened the rebel group.⁴⁰ Deprived of its safe camps and supply lines, the LRA has been forced to drop into "survival mode."⁴¹ No one is certain as to the LRA's present numbers; some have speculated that only a few hundred are left, although Bigombe estimates that 3000 members, of whom 800 are combatants, exist.⁴² The LRA's remaining contingents have been shuttling between Sudan, Uganda, and the Democratic Republic of Congo.⁴³ According to some reports, one of the indicted, Dominic Ongwen, may already have been killed.⁴⁴

Since the ICC referral, a number of former rebels and a high-ranking LRA brigadier have turned themselves in under the much-neglected Amnesty Act of 2000, which had produced few converts until that point. Rather than impede the pursuit of peace, some have argued that ICC involvement has increased the pressure on LRA members to defect.⁴⁵ In light of these developments, ICC supporters assert that not much more can be expected from negotiations with a group that lacks a coherent ideology or clear political objectives, and that the time is ripe for the ICC to take its turn. "I have told people that [LRA leaders] Kony and Otti will never talk peace. The ICC is right to issue the arrest warrants. The time given was enough but they never took advantage of it," said Walter Ochora, local council chairman for the northern district of Gulu.⁴⁶

THE LEGAL IMPLICATIONS

The arrest warrants have renewed discussion over certain controversies that have lain dormant in the Rome Statute since its conception. The issue regarding the ICC's policy on amnesty, for instance, was originally raised in the Diplomatic Conference⁴⁷ in a paper submitted by the U.S. delegation,

37. Apuuli, *supra* note 5, at 406–07.

38. Akhavan, *supra* note 11, at 404.

39. *Id.* at 416–18.

40. *Id.*

41. John Prendergast, *End This African Horror Story*, WASH. POST, Apr. 7, 2005, at A31.

42. ECONOMIST, *supra* note 14.

43. IRIN NEWS, *supra* note 33.

44. *Id.*

45. Akhavan, *supra* note 11, at 419.

46. IRIN NEWS, *supra* note 36.

47. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 67 (M. Cherif Bassiouni et al. eds., Transnational Publishers, Inc. 2002).

while the Rome Statute was still in its drafting stage.⁴⁸ The document questioned whether the ICC should take amnesties into account when deciding whether to exercise jurisdiction. Arguments for amnesty assert that criminal prosecutions prolong conflicts and that more flexible restorative measures might be more appropriate in situations involving mass atrocities with thousands of perpetrators. Nevertheless, due to fears that dictators or war criminals would abuse an amnesty loophole to avoid justice, the delegates did not reach a clear consensus.⁴⁹ As such, the issue was deliberately left open in the Rome Statute, appearing only in Article 53 as a vaguely written provision.

According to Article 53(1)(c), an ICC prosecutor deciding on the exercise of jurisdiction must consider whether, "taking into account the gravity of the crime and interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."⁵⁰ This discretionary provision for jurisdiction seems to comply, albeit uneasily, with existing principles of international law. The 1948 Genocide Convention and the 1949 Geneva Conventions, widely recognized as embodying international common law,⁵¹ created a binding obligation to prosecute such egregious crimes as genocide and "grave breaches" of the Geneva Conventions⁵²—although arguably only in the context of international armed conflict.⁵³ However, the rules concerning crimes against humanity and war crimes are more vague,⁵⁴ as are the ICC's responsibilities in comparison to those of states.⁵⁵ The lack of clarity on the topic leaves some room for amnesty programs like Uganda's to legitimately prevail over ICC jurisdiction, particularly because the charges against the LRA strictly involve war crimes and crimes against humanity. Whether the ICC would have chosen to disregard the country's amnesty policies in the absence of Museveni's express referral is unknown. Still, such a situation may confront the ICC elsewhere in the not-so-distant future. Moreover, the world has yet to see whether the ICC will pay deference to an amnesty program that excuses genocide-level crimes directly criminalized—at least in international conflicts—under common law, thus applying such international legal commitments to a domestic context.

The fact that President Museveni formally requested the ICC's intervention does not eliminate all the legal complications arising from his unprece-

48. Naomi Roht-Arriaza, *Amnesty and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 79 (Dinah Shelton ed., Transnational Publishers, Inc. 2000).

49. *Id.*

50. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, art. 53(1)(c), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

51. Sadat, *supra* note 47, at 63.

52. Thomas Hethe Clark, *The Prosecutor of the ICC, Amnesties, and the "Interests of Justice": Striking a Delicate Balance*, 4 WASH. U. GLOBAL STUD. L. REV. 389, 398 (2005).

53. Sadat, *supra* note 47, at 62.

54. Clark, *supra* note 52, at 399–400.

55. See Roht-Arriaza, *supra* note 48, at 78.

mented move, however. On its face, the referral waives Uganda's right to enforce its Amnesty Act. But the ICC operates on a system of complementarity, in that the Court is intended to complement national efforts rather than displace them. Under Article 17, the ICC must always defer to national proceedings, unless a state is "unwilling or unable genuinely to carry out the investigation or prosecution," among other competency or *res judicata* concerns.⁵⁶ It has been argued that amnesties and truth commissions, so long as their primary purpose is addressing and resolving conflict rather than shielding a perpetrator from criminal responsibility, can qualify as valid attempts at "investigating" crimes.⁵⁷ Additionally, Uganda is known to have a competent and functioning judicial system. This begs the question: can a state with a judicial system that is both willing and able to carry out an investigation or prosecution voluntarily confer jurisdiction to the ICC?

Some analysts, concerned that the ICC may undermine national justice systems, construe the complementarity provisions of the Rome Statute strictly. To guard against the "potentially intrusive powers of an international institution,"⁵⁸ no case is admissible where a country is willing and capable of conducting its own prosecution.⁵⁹ This approach also guards against potential manipulation of the ICC for political ends. Frustrated with its unsuccessful attempts at apprehending Kony, Museveni might have resorted to the ICC as a strategy for mobilizing the international community and increasing his chances of containing the LRA, all the while distancing himself from any negative fallout by leaving the logistics to the Court. The possible use of the ICC as a political tool is troubling, even if the end goals of both parties coincide. Despite these concerns, the ICC has elected to move forward with its prosecutions. With the release of its arrest warrants for the senior leaders of the LRA, the ICC appears to be moving toward a more flexible interpretation of complementarity, a trend that may stir up controversy in the future.

The perennial debate over the benefits of amnesty, on the one hand, and the obligations of international criminal prosecution, on the other, will hardly be resolved by the ICC on its own. However, the recent indictments of Uganda's Lords Resistance Army leaders and the Court's approach to future cases will certainly help to shape future global policy on the issue.

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56. Rome Statute, *supra* note 50, art. 17(1)(a).

57. Roht-Arriaza, *supra* note 48, at 79.

58. Akhavan, *supra* note 11, at 413.

59. Rome Statute, *supra* note 50, art. 17(1)(a).

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