2008

The Adequacy of Uganda's War Crimes Court

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PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

THE ADEQUACY OF UGANDA'S WAR CRIMES COURT

Legal Memorandum

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Public International Law & Policy Group

November 23, 2008

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Fall 2008

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I. Introduction

A. Scope

This memorandum analyzes the adequacy of Uganda's efforts to set up a court on its territory (hereinafter the Ugandan High Tribunal, "UHT") to try both crimes against humanity and war crimes. In setting up the UHT, Uganda seeks to invoke the principle of complementarity that would allow it to assume jurisdiction over crimes that have been subject to the International Criminal Court's (the ICC) jurisdiction. Because Uganda's UHT has yet to emerge from the documents that outline it, the analysis below is primarily of the framework they create. These documents include the text of two agreements made between Uganda and the LRA: the Principal Agreement on Accountability and Reconciliation (AAR) signed in July of 2007 and the Annexure that amended it in February of 2008. An authorizing statute detailing the operation of the court, a proposed rules of procedure, and a domestic definition of the crimes within the jurisdiction of the court have yet to be enacted. In the absence of these elements, a complete analysis is impossible. This memorandum, however, evaluates the how those missing elements impact Uganda's ability to invoke complementarity successfully. And where possible, this memorandum evaluates the capacity of Uganda's judiciary to see if it is sufficient to meet the requirements of complementarity.

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*Uganda has adopted a new War Crimes Tribunal law in order to prosecute major offenders, and thereby invoke complementarity so that the ICC will not exercise jurisdiction over the cases. Write a memorandum analyzing the new law with respect to the following questions: (1) Does it cover all of the offenses within the jurisdiction of the ICC? (2) Does it adequately provide for minimum international standards of due process and fairness? (3) what gaps need to be filled through the promulgation of a set of Rules of Procedure and Evidence, which would supplement the domestic criminal code?

There is no precedent for what Uganda is trying to do. No country has ever asked the ICC to withdraw its jurisdiction. Indeed, no country has referred itself, like Uganda did, to the ICC in the first place. And the mechanisms of complementarity outlined in the Rome Statute have yet to be used. So, the judges, the Prosecutor, and Uganda will have to make arguments based upon the uninterpreted language of the Rome Statute. Therefore, the memorandum that follows begins with a detailed analysis of that language. And two conclusions deal explicitly with the legal mechanisms of complementarity that language creates. Only after a workable meaning is distilled from those legal mechanisms can the adequacy of Uganda's efforts be analyzed.

B. Summary of Conclusions

i. Uganda's claim for complementarity will be judged against Article 17's standard of admissibility

Because both the "interests of justice" standard and the admissibility requirements in the Rome Statute provide Uganda with different ways of invoking complementarity, it is necessary to analyze which route the ICC may force it to take. Although this finding does not directly address the adequacy of Uganda's UHT, it does clarify what the ICC considers adequate. This will become an important reference point for the adequacy analysis that follows later.

While the ICC's prosecutor has the discretion to defer to Uganda's jurisdiction in the "interests of justice," he is not likely to use this discretion. Because the ICC would gain institutional credibility through Uganda's appearance before the Pre-Trial Chamber, Uganda will most likely be forced to navigate the admissibility requirements of the Rome Statute. In other words, Uganda will have to motion the ICC's Pre-Trial Chamber to find the cases presently before it inadmissible. A finding by the Pre-Trial Chamber that the

cases are generally inadmissible would allow Uganda to try the Lord's Rebel Army commanders within its territory.

ii. Article 17 does not require the UHT to comply with international standards of justice.

Although Uganda's investigations and prosecutions must be genuine to avoid the jurisdiction of the ICC, they need not comply fully with international standards of justice. Uganda's deviation from those standards, rather, may only be used by the ICC to demonstrate a lack of genuineness in the proceedings it undertakes. Thus, the shortcomings of the UHT would not carry dispositive weight. Uganda has yet to create the institution that will conduct these investigations and prosecutions, so it is impossible to analyze them against even the most basic standards of justice. But Article 17's deferential standard bodes well for a ruling from the ICC finding the UHT to be adequate once Uganda creates its.

iii. Although Uganda should amend its penal code to define war crimes and crimes against humanity, it may still invoke complementarity without the change.

Article 17 requires only that the same "cases" be investigated and prosecuted by a domestic jurisdiction. Thus, although Uganda has not defined war crimes, crimes against humanity, or genocide in its domestic laws, it is not required to. The ICC has charged LRA commanders with war crimes and crimes against humanity, two crimes that do not formally exist within Uganda's jurisdiction. This does not, however, foreclose the possibility of Uganda successfully invoking complementarity, because Uganda can use its existing penal code which defines murder, rape, kidnapping, and a multitude of other crimes that the LRA commanders committed. So long as those investigations and

prosecutions are genuine, they need not be of the same crimes the ICC identified in its warrants for arrest.

Regardless, the passage of a law that defines war crimes and crimes against humanity is something Uganda should do. In not passing the law, Uganda runs the risk of displaying bad faith in its effort to assume jurisdiction from the ICC. And surely, the absence of such a law can only hurt Uganda's chances of invoking complementarity. Thus, although Article 17 may not require it, Uganda should define war crimes and crimes against humanity, because it is a prudent course of action.

iv. If Uganda charges LRA commanders under newly passed laws defining war crimes and crimes against humanity, it must amend the Constitution's ban on the retroactive application of criminal law.

Uganda's constitution bans the retroactive application of criminal law. Thus, Uganda's High Court may find unconstitutional any charge that Uganda files for war crimes or crimes against humanity, because those crimes had not been defined at the time they were committed. There is the possibility, however, that Uganda's High Court will rule that those crimes had been a part of customary international law for decades and that this fact makes it fully compliant with the Constitution's ban on the retroactive application of criminal law. But it is exactly this type of ambiguity in how domestic law might be interpreted that the International Criminal Tribunal of Rwanda used to deny a transfer request to a national jurisdiction in *The Prosecutor v. Munyakazi.*. If the ICC follows this precedent, Uganda may have to eliminate even the possibility that its charges would be overturned by amending the Constitution.

v. Uganda must create an authorizing statute for the UHT.

In order to find the Ugandan cases inadmissible, the ICC's Pre-Trial Chamber must have evidence that the situation is currently being investigated and prosecuted. The absence of an authorizing statute for the UHT precludes this possibility, because without it, Uganda can neither investigate nor prosecute the LRA commanders in its specialized court. Lacking an authorizing statute, the UHT simply does not exist, making it not only impossible for that court to conduct investigations and prosecutions, but it also prevents the ICC from judging the due process guarantees the UHT has yet to describe.

vi. Systemic problems with Uganda's judiciary do not prevent it from invoking complementarity.

Uganda's judiciary has many shortcomings. These problems include corruption, insufficient resources, and recurring instances of political interference. None of these, however, deny Uganda the possibility of assuming jurisdiction from the ICC. Because the ICC was not meant to be a human rights monitoring body, Uganda must satisfy only basic standards of justice. So long as the UHT can insulate itself from the judiciary's most serious systemic problems, complementarity remains tenable.

vii. Uganda must create an adequate witness protection program to invoke complemenarity.

Currently, Uganda maintains informal policies that protect witnesses in high profile trials. This is not likely to be enough for the ICC's Pre-Trial Chamber. Uganda should request the ICC's assistance in guaranteeing the safety of witnesses and perhaps even model its program after the one the ICC developed to conduct its investigations in Uganda. These steps are necessary precursors to invoking complementarity

viii. Although complementarity may not require it, Uganda should subject its own state actors and members of the LRA to the same processes.

Uganda's AAR and its Annexure create special judicial processes for members of the LRA. And yet, Ugandan state actors are excluded from those processes. In their place, such state actors, regardless of the severity of their crime, may escape formal accountability by being subject to traditional justice mechanisms. Revoking this exemption would prevent the ICC from perceiving that this bifurcated approach is for the purpose of shielding Ugandan state actors from accountability. Such a perception would provide the ICC a basis for opposing Uganda's request for jurisdiction.

ix. The ICC cannot deny Uganda complementarity just because its penal code includes the death penalty as a punishment.

Complementarity does not demand from Uganda absolute compliance with each and every international standard of justice. It may deviate so long as those deviations do not evince an intent to shield perpetrators from liability. Here, the purported international standard of justice, not subjecting individuals to death, is not one that has even ripened into international law. Therefore, Uganda may maintain its death penalty without compromising its ability to assume jurisdiction over the Ugandan cases now before the ICC.

II. Factual Background

A. The Conflict Between Uganda and the Lord's Rebel Army

Since its status as a British colony, Uganda has been divided into its northern region and its southern region.[2] The British sought to control Ugandans by fostering resentment between the two.[3] While benefits like employment in the civil services, education, and economic development were lavished on Ugandans living in the south, the people in the north, predominantly of the Acholi tribe, were relegated to positions of menial labor and military service.[4] The hostility between the two sides continued long after the British left Uganda in 1962 and would provide an animosity sufficiently virile to sustain armed factions for decades to come.[5]

From 1962 until Colonel Idi Amen's coup in 1971, Uganda's history was "littered with armed groups" trying to overthrow the government.[6] Each time a new group assumed power, which was often, it would unleash brutality upon some portion of Uganda's population.[7] This pattern continued until the present government arrived.

In 1986, the National Resistance Movement, a predecessor to Uganda's current and predominantly southern government, successfully overthrew the dictatorship of General Okello.[8] The remnants of the dictatorship's forces fled to northern Uganda,

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[2] Hema Chatlani, Uganda: A Nation in Crisis, 37 Cal. W. Int'l L.J. 277**,** 279 (2007) {reproduced in accompanying notebook at Tab 37}
[3] *Id.*
[4] *Id.* at 280
[5] *Id.*
[6] Human Rights Watch, State of Pain: Torture in Uganda, p. III, March 2004 [hereinafter Torture in Uganda] {reproduced in accompanying notebook at tab 17}
[7] International Crisis Group, Northern Uganda: Understanding and Solving the Conflict, 3, ICG Africa Report N077 (2004) [hereinafter Understanding and Solving the Conflict]{reproduced in accompanying notebook at tab 40}
[8] *Id.*

seeking the aid of the Islamic government in Sudan.[9] Sudan provided that aid, because it viewed the ascendance of the National Resistance Movement in Uganda as a threat to its ability to maintain control over the non-Muslim population in southern Sudan.[10] This is the violent milieu in northern Uganda that provided a young rebel named Joseph Kony the opportunity to assume leadership of a fledgling group called the Lord's Rebel Army.[11]

For almost twenty years, the LRA has fought the Ugandan military, inflicted massacres on civilians, and perhaps most infamously, abducted tens of thousands of children to fight as soldiers in its army.[12] In the north, the LRA has displaced ninety four percent of the population, leaving over half of them with no place to go but the government-sponsored internally displaced people camps.[13] Uganda has responded by attempting to destroy the LRA militarily.[14] It has even tried to lure LRA members out of the organization with promises of amnesty and forgiveness.[15] These efforts have not succeeded.

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[9] Payam, Akhavan, Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court, A.J.I.L. 403 at 407 (2005) {reproduced in accompanying notebook at tab 38}
[10] *Id.*
[11] Northern Uganda: Understanding and Solving the Conflict, *supra* footnote 7, at 1 {reproduced in accompanying notebook at tab 40}
[12] Uganda: A Nation in Crisis, *supra* footnote 2, at 281-282{reproduced in accompanying notebook at Tab 37}
[13] Richard Bailey et. al. When the War Ends, p. 23 Payson Center for International Development (December 2007) {reproduced in accompanying notebook at Tab 26}
[14] Understanding and Solving the Conflict, *supra* footnote 7, at 1 {reproduced in accompanying notebook at tab 40}
[15] Cecily Rose, Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations, B.C. Third World L.J. 345, 345 (2008) [hereinafter A Proposal for Truth-Telling and Reparations] {reproduced in accompanying notebook at tab 41}

B. The Origins of the ICC's Involvement in Uganda

On December 16, 2003, Uganda referred its conflict with the Lord's Rebel Army (the LRA) to the ICC under Article 14.[16] The Office of the Prosecutor (OTP) then initiated an investigation on July 28, 2004.[17] This investigation subsequently produced arrest warrants for the five most senior LRA commanders, including its leader Joseph Kony, on July 8, 2005.[18] The arrest warrants alleged that these five commanders engaged in "numerous acts of murder and enslavement," which amounted to both war crimes and crimes against humanity.[19] And now, the LRA claims that those arrest warrants are the last remaining obstacle to their surrender.[20] They condition their signature on peace documents upon the removal of those warrants.[21]

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[16] Tim Allen, War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention, Crisis States Research Centre in the Development Studies Institute at the London School of Economics (2005) {reproduced in accompanying notebook at tab 41}

[17] ICC Press Release on July 29, 2004, *Prosecutor of the International Criminal Court opens an investigation into Northern Uganda*, www.icc.cpi.int {reproduced in accompanying notebook at tab 42}

[18] Luis Moreno-Ocampo, *Statement by the Chief Prosecutor Luis Moreno-Ocampo on Uganda Arrest Warrants*, The International Criminal Court, October 14, 2005 www.icc-cpi.int {reproduced in accompanying notebook at tab 7}

[19] *Id.*; *See generally* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Okot Odhiambo*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 9}; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Vincent Otti*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 10} ; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Joseph Kony*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 11}; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Dominic Ongwen*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 12}; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Raska Lukwiya*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 13}

[20] Linda M. Keller, Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanism, 23 Conn. J. Int'l L. 209, 221 (2008) {reproduced in accompanying notebook at tab 45}

[21] *Id.*

Regardless, the ICC's actions have occurred in consultation with Uganda's government from the very beginning. Since February of 2004, the OTP conducted 20 field missions to Uganda to meet with local leaders of traditional, religious, and governmental backgrounds.[22] This was in addition to two visiting delegations from Uganda received by the OTP at the Hague.[23] In fact, the OTP collaborated with Ugandan authorities even before the investigation began to set up a witness protection system.[24] And well after the arrival of the arrest warrants, the Ugandan government met with the OTP, didn't ask for the warrants to be withdrawn, and indicated in a joint statement that "peace and justice have worked together thus far and can continue to work together."[25] These actions do not reflect two sides squabbling over jurisdiction. Rather, it appears that the ICC has focused on its true mission which is "not to compete with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished."[26] This mission-oriented mentality has fostered a cooperative relationship between Uganda and the ICC.

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[22] The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003 – June 2006), 16, (2006) {reproduced in accompanying notebook at tab 25}

[23] *See* ICC Press Release on April 16, 2005, *Joint Statement by ICC Chief Prosecutor and the visiting Delegation of Lango, Acholi, Iteso and Madi Community Leaders from Northern Uganda*, www.icc.cpi.int {reproduced in accompanying notebook at tab 48}; *See also* ICC Press Release on March 18, 2005, *Delegation from Uganda holds talks with the Registrar of the ICC*, www.icc.cpi.int {reproduced in accompanying notebook at tab 49}

[24] *See* OTP, *supra* footnote 22, at p. 15 {reproduced in accompanying notebook at tab 25}

[25] ICC Press Release, *Statement by the Chief Prosecutor Luis Moreno-Ocampo*, July 12, 2006 *available at* www.icc.cpi.int. {reproduced in accompanying notebook at tab 53}

[26] Morten Bergsmo and Darryl Robinson, Informal Expert Paper: The Principle of Complementarity in Practice, p. 3, The International Criminal Court (2003). [hereinafter "Informal Expert Paper"] {reproduced in accompanying notebook at tab 36}

The next event that will test the relationship between Uganda and the ICC is Uganda's attempt to invoke the principle of complementarity. At its most basic level, complementarity is the mechanism the ICC uses to defer to investigations, prosecutions, and trials at the national level.[27] Uganda is trying to convince the ICC that it can subject its own international criminals to international standards of justice within its territory.[28] And the UHT its setting up to handle such crimes will be Uganda's proof.

III. Legal Discussion

a. The ICC's Standards for Complementarity

The ICC's Rome Statute creates two avenues through which Uganda may assume jurisdiction: Article 17's rules of admissibility and Article 53(2)(c)'s "interests of justice" clause.[29] The standards provide different criterion to different organs of the ICC, but both afford Uganda the opportunity to invoke complementarity.[30] So the choice for Uganda between the two, then, is tactical.

i. Article 53(2)(c)'s Interests of Justice.

Article 53(2)(c) gives the Prosecutor the discretion to forgo prosecution of the LRA's commanders if he believes that such prosecutions would not be in the "interests of justice."[31] The provision directs the prosecutor to take into account "all the

[27] *Id.*
[28] *Id.*
[29] The Rome Statute of the International Criminal Court, Article 17 and Article 53(2)(c), July 17, 1998 [hereinafter The Rome Statute] {reproduced in accompanying notebook at tab 4}
[30] *Id.*
[31] *Id.* at Article 53(2)(c)

circumstances" in deciphering what decisions such interests require.[32] These include the "interests of victims[,]" the "gravity of the crime[s,]" and the roles of the perpetrators being investigated.[33] What those phrases actually mean has been a subject of much academic debate.

Some have suggested that the criterion Article 52(2)(C) creates is "relatively subjective and indeterminate."[34] Because this ambiguity avoids a "purely mechanical determination" of what prosecutions compromise the interests of justice, it relies overwhelmingly on the unfettered discretion of the Prosecutor.[35] The justification for this is that the Prosecutor needs this latitude to be able to avoid conducting investigations and prosecutions that may "aggravate [an] ongoing conflict or undermine a fragile peace process."[36]

Other experts have interpreted Article 53(2)(C)'s interests of justice standard as specifically creating the space for the Prosecutor to validate and support the amnesty initiatives of domestic countries.[37] These experts generally believe that this prosecutorial discretion is not without limits. The proper boundaries for it should prevent the prosecutor from honoring grants of amnesty in the interests of justice when the criminal allegations are for grave breaches of the Geneva Convention, the amnesty-granting State has failed to take steps to prevent a recurrence of the abuse of human rights, or no

[32] *Id.*
[33] *Id.*
[34] Jens David Ohlin, Applying the Death Penalty to Crimes of Genocide, A.J.I.L. 403, 415 (2005) {reproduced in accompanying notebook at tab 32}
[35] *Id.* at 416
[36] *Id.*
[37] Kathleen Ellen MacMillan, The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda, Cardozo Pub. L. Pol'y & Ethics J. 199, 216 (2007) {reproduced in accompanying notebook at tab 46}

mechanism designed to document the true nature of the crimes exists.[38] These are a few of the conditions that some experts would place on the Prosecutor's discretion under the interests of justice standard.

The ICC, however, has yet to refine the concept. And even the Prosecutor has indicated that he is not sure what impartial standards ought to determine the interests of justice.[39] In any case, because the "interests of justice" are acted upon at the Prosecutor's discretion, Uganda would have to lobby him to invoke Article 53(2)(c).[40]

ii. Article 17's Standard of Admissibility

Article 17 allows Uganda to challenge the admissibility of cases before the ICC's Pre-Trial Chamber.[41] The cases would be inadmissible if Uganda was "investigat[ing] or prosecut[ing]" them.[42] This rule holds unless those proceedings establish that Uganda is "unwilling or unable to genuinely" carry them out. [43] The Pre-Trial Chamber could find

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[38] Michael P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court**,** 32 Cornell Int'l L.J. 507, 526 (1999) {reproduced in accompanying notebook at tab 47}; Other questions meant to guide the discretion of the Prosecutor include the following: "Would an end to the fighting or transition from repressive rule have occurred without some form of amnesty agreement?" "Has the State provided victims with adequate reparation and/or compensation? "Has the State taken steps to punish those guilty of committing violations of international humanitarian law through non-criminal sanctions such as imposition of fines?"

[39] *See* Luis Moreno-Ocampo, International Criminal Tribunals in the 21st Century: Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives, 21 Am. U. Int'l L. Rev. 497, 500 (2006) (Moreno-Ocampo explained that **"**[i]f I decide that the only way to proceed with a case is if I am sure that no one will be killed, this means that any rebel or any State could kill twenty people to stop me from proceeding with the case. If, on the contrary, I ignore the killings, then I do not respect the interests of victims. How can I manage this? What is the meaning of the interests of victims?") {reproduced in accompanying notebook at tab 35}

[40] Rome Statute, *supra* footnote 29, Article 53(2)(C) {reproduced in accompanying notebook at tab 4}

[41] *Id.* at Article 17

[42] *Id.*

[43] *Id.* at Article 17(a)(2)

Uganda "unwilling or unable" only if there was a total or substantial collapse of its judicial system or if that system was otherwise unavailable.[44] The Rome Statute's drafters enumerated these possibilities so as to create "*objective* conditions" that the Pre-Trial Chamber could base their analysis on.[45] This was done to avoid Article 17(3) from becoming a way for the ICC to make "qualitative judgments about the judicial systems of state parties."[46] Because the court is "not a human rights monitoring body", the Pre-Trial Chamber must ensure that Article 17(3)'s standard is a "stringent one" when it adjudicates a case's admissibility"[47] Thus, if Uganda's judicial system does not meet one of those narrowly construed objective conditions, its investigation and prosecution of the wanted LRA commanders would prevent the Pre-Trial Chamber from finding it unwilling or unable.

Under Article 17, for a case to be inadmissible, the investigations and prosecutions must also be "genuine."[48] This language would prevent Uganda from assuming jurisdiction over the LRA commanders if that decision was made for the purpose of "shielding" suspects from criminal liability.[49] The Pre-Trial Chamber will look at factors like "delay, lack of impartiality, longstanding knowledge of crimes

[44] *Id.* at Article 17(3)
[45] Mahnoush H. Arsanjani and W. Michael Reisman, Developments at the International Criminal Court: The Law-In-Action of the International Criminal Court, A.J.I.L 385, 387 (2005) {reproduced in accompanying notebook at tab 29}
[46] *Id.* at 388
[47] Informal Expert Paper, *supra* footnote 26 at p. 15, {reproduced in accompanying notebook at tab 36}
[48] The Rome Statute, *supra* footnote 29, Article 17(1)(a) {reproduced in accompanying notebook at tab 4}
[49] *Id.* at Article 17(2)(a)

without action," and the manner in which Uganda "conduct[s] proceedings."[50] Barring such a finding, however, the existence of genuine investigations and prosecutions conducted by the Ugandan government would require the Pre-Trial Chamber to find the cases before it inadmissible.

iii. Comparing Article 53(2)(c) and Article 17

There are two relevant differences between Article 53(2)(c) and Article 17. The first is temporal. Because the "investigations and prosecutions" envisioned in Article 17 require Uganda to develop specialized bodies to handle them, an appeal based on the "interests of justice" can occur much sooner.[51] It will take many months, if not more than a year, for Uganda to pass all the laws and develop the variety of investigative capacities and legal services needed to assume jurisdiction over international crimes committed by the LRA.[52] The interests of justice, however, do not rely on such institutional developments.[53] Thus, Uganda may lobby the Prosecutor now to withdraw prosecution based on those interests as they currently exist. This favors the use of Article 53(2)(c).

The second difference is that while both mechanisms have yet to be refined by precedent, the murky "interests of justice" found in Article 53(2)(c) are notable for their

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[50] Informal Expert Paper, *supra* footnote 26 at p. 30, {reproduced in accompanying notebook at tab 36}

[51] Rome Statute, Article 17(1)(a), Article 53(2)(c) {reproduced in accompanying notebook at tab 4}

[52] *See* e.g. Rachel Irwin, Uganda's Ability to Try Rebels Questioned, Turkish Weekly November 24, 2008. www.turkishweekly.net ("The legislation propos[ing] to make the crimes of the Rome Statute—which underpins the rules of the ICC—punishable under Ugandan law…has been languishing in Uganda's parliament *since 2004*.") [emphasis added] {reproduced in accompanying notebook at tab 14}

[53] *See generally* Jens David Ohlin, *supra* footnote 34 at p. 415-146 (noting that the interests of justice are so ill-defined as to empower the Prosecutor with unfettered discretion) {reproduced in accompanying notebook at tab 32}

manifest ambiguity.[54] Just what those interests are and how the Prosecutor ought to determine them is left out of the Rome Statute. It will be difficult for Uganda to convince the Prosecutor that it should forgo prosecution based on the "interests of justice" standard that lacks a shared meaning. And the unprincipled discretion inherent to any affirmative application of Article 53(2)(c) creates strong institutional incentives for the Prosecutor to force Uganda to rely on Article 17. Because Article 17 establishes a judiciable standard that Uganda may invoke before the ICC's Pre-Trial Chamber, it shields the Prosecutor from charges that his office was coerced by political pressure. At the same time, Uganda's appearance before the ICC would go far to legitimize the court before the world, a consideration surely not lost to its Chief Prosecutor.[55]

So, although there are some advantages of convenience inherent to Article 53(2)(c), Uganda will most likely be forced to meet Article 17's admissibility burden. The burden is more exacting under Article 17, but at the very least, the burden there is clear. And as the next section demonstrates, Article 17 is but one element that suggests that the ICC has a strong institutional preference for Uganda to try the international crimes within its own jurisdiction.

B. How The Legal Structure of Complementarity Favors Uganda's Exercise of Its Domestic Jurisdiction

The preamble to the Rome Statute is rife with references that express the ICC's almost counterintuitive core conviction: that an end to impunity for *international* crimes

[54] Rome Statute, Article 53(2)(c) {reproduced in accompanying notebook at tab 4}
[55] *See* Jens David Ohlin, *supra* footnote 34, at p. 404 (explaining that **"**the voluntary referral of a compelling case by a state party represented both an early expression of confidence in the nascent institution's mandate and a welcome opportunity to demonstrate its viability." {reproduced in accompanying notebook at tab 32}

will come only when *national* jurisdictions sit in judgment of them.[56] This preface notes that prosecution of those crimes requires "measures at the national level."[57] It reminds us that every state has a duty to exercise jurisdiction over the alleged criminals responsible.[58] And most importantly for our purposes here, the Preamble emphasizes that the ICC is an institution complementary to national jurisdictions.[59] Thus, international justice, at the point it earns the name, is national justice.[60] With this in mind, it is easy to imagine that the ICC is encouraged by Uganda's efforts to set up a court of its own.

The very idea of complementarity suggests that the ICC prefers that Uganda succeed in doling out a justice that meets international standards. The ICC's Prosecutor made this much clear a few years ago when he identified his institution's key lever as its "impact on national systems."[61] Elaborating on this point, the President of the ICC, Judge Philippe Kirsch, noted that his body was a "court of last resort[,]" relegating it to a

[56] Rome Statute, *supra* footnote 29, Preamble {reproduced in accompanying notebook at tab 4}
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *See* Informal Expert Paper, *supra* footnote 26, at p. 3, {reproduced in accompanying notebook at tab 36} "The complementarity regime serves as a mechanism to en-courage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes."; *See also* Luis Moreno-Ocampo, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, The ICC (June 16, 2003), {reproduced in accompanying notebook at tab 6} "As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."
[61] Luis Moreno-Ocampo, *supra* footnote 39, at p. 49 {reproduced in accompanying notebook at tab 35}

judicial backstop relevant only when national courts fail.[62] All of this is indicative of an institutional disposition that favors international justice at the national level.

This disposition is also enshrined in the legal mechanisms of complementarity. Article 17 of the Rome Statute requires the ICC to defer investigation and prosecution responsibilities to Uganda so long as it finds that its judiciary is not "unwilling or unable genuinely to carry out" those proceedings.[63] This phrase establishes a modest threshold that provides the ICC "a certain scope to assess the objective quality of a national proceeding."[64] But that scope is narrow. The ICC may maintain jurisdiction only when a state, whether lacking the ability or willingness, does not "genuinely" investigate and prosecute such crimes.[65] And neither a "comparative lack of resources" nor a "lack of full compliance with all human rights standards" would put into question the genuineness of Uganda's proceedings.[66] In fact, a policy paper commissioned by the ICC eliminated even this narrow scope by indicating that "only where there is a clear case of failure to take national action" should the Prosecutor assume jurisdiction.[67] The scope of this standard provides Uganda with much room for error as it navigates the process of trying international crimes in its courts.

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[62] Philippe Kirsch, The Role of the International Criminal Court in Enforcing International Criminal Law, 22 Am. U. Int'l L. Rev. 539, 543 (2007) {reproduced in accompanying notebook at tab 34}
[63] Rome Statute, *supra* footnote 29, Article 17 {reproduced in accompanying notebook at tab 4}
[64] Informal Expert Paper, *supra* footnote 26, at p. 8, {reproduced in accompanying notebook at tab 36}
[65] Rome Statute, *supra* footnote 29, Article 17 {reproduced in accompanying notebook at tab 4}
[66] Informal Expert Paper, *supra* footnote 26, at p. 8, {reproduced in accompanying notebook at tab 36}
[67] International Criminal Court, Paper on Some Policy Issues Before the Office of the Prosecutor, p. 5 (September 2003) {reproduced in accompanying notebook at tab 16}

What all of this means is that the ICC is simply too firmly predisposed to an outcome that finds Uganda assuming jurisdiction over international crimes committed on its territory to squabble over small details. This predisposition has the effect of mitigating the gravity of certain problems Uganda will face as it sets up the UHT and begins its own investigations and prosecutions. Keeping this in mind, the gravity of those problems is assessed below.

C. UHT's Jurisdiction

i. Jurisdiction Over Crimes Covered by the Rome Statute

Although Uganda has signed the Rome Statute, it has not passed domestic legislation defining genocide, war crimes, and crimes against humanity.[68] Out of these three, Uganda may not need to pass a law defining genocide, because none of the ICC's arrest warrants allege that the LRA committed any acts of genocide.[69] But Uganda will need to pass a law that defines the crimes alleged in those arrest warrants: war crimes and crimes against humanity.[70] The Uganda Penal Code does contain definitions of murder,

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[68] *See* Amnesty International, Uganda: Agreement and Annex on Accountability and Reconciliation Falls Short of a Comprehensive Plan to End Impunity, March 2008 {reproduced in accompanying notebook at tab 24}; *See also* Rachel Irwin, *supra* footnote 52{reproduced in accompanying notebook at tab 14}

[69] *See generally* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Okot Odhiambo*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 9}; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Vincent Otti*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 10} ; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Joseph Kony*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 11}; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Dominic Ongwen*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 12}; *See also* Judge Fatoumata Dembele Diarra et. al., *Warrant of Arrest for Raska Lukwiya*, Pre-Trial Chamber II (July 2005) {reproduced in accompanying notebook at tab 13}

[70] *See generally, Id.*

rape, theft, and other crimes that reflect the actions of the LRA in isolation.[71] But even if Uganda were to charge the LRA's commanders with all of these crimes, the aggregate could still not reflect how the crimes were part of a "widespread or systematic" program to engage in a "large-scale commission" of such crimes.[72] Committing those standard crimes as part of a broader policy is the defining feature of a crime against humanity just as that same association makes a war crime significant enough for the ICC to assume jurisdiction over it.[73] The absence of these definitions from Uganda's penal code prevents the UHT from having have jurisdiction over the same crimes as the ICC.

Passage of a law defining war crimes and crimes against humanity, however, might not be required by the inadmissibility standard in Article 17.[74] The language of this standard makes no suggestion that Uganda must charge the LRA commanders with the same crimes that the ICC's Prosecutor did.[75] Instead, Article 17 requires only that the "case" be "investigated or prosecuted" by Uganda.[76] The investigation and prosecution must meet the minimal requirements of being genuine, but they could be just as serious if Uganda charged the LRA commanders with murder, rape, enslavement, and other crimes

[71] *See generally*, The Penal Code Act of Uganda{reproduced in accompanying notebook at tab 1}
[72] Rome Statute, *supra* footnote 29, Article 7, 8 {reproduced in accompanying notebook at tab 4}
[73] *Id.* (noting that the ICC will have jurisdiction of war crimes "in particular when committed as *part of a plan or policy or as part of a large-scale commission* of such crimes." [emphasis added]) {reproduced in accompanying notebook at tab 4}
[74] *Id.*
[75] *Id.*
[76] *Id.*

already defined in Uganda's penal code.[77] That is not to say that Uganda should not pass a law incorporating war crimes and crimes against humanity into the penal code. It may very well increase the credibility of the proceedings at the UHT to do so. Regardless, the point is that the standards of complementarity do not seem to require Uganda to assume jurisdiction over all the same crimes so long as it does over all the same cases.

ii. Jurisdiction Over Crimes Defined and Applied Retroactively

Even if Uganda passes a law that adds war crimes and crimes against humanity to its penal code, the UHT might still find it unconstitutional to charge the LRA's commanders with crimes that were not legally defined at the time they were committed. As noted above, Uganda's penal code does not currently, nor did it at some point in the past, include war crimes or crimes against humanity.[78] This creates a potential problem, because the Ugandan Constitution articulates a right to a fair hearing that expressly prohibits Uganda from charging or convicting someone for a "criminal offense which is founded on an act or omission that did not at the time it took place constitute a criminal offence."[79] Any attempt to charge the LRA commanders for crimes defined after they committed them may violate this limitation. Thus, there is a chance that Uganda's courts would not allow themselves to try the LRA commanders for crimes that the war crimes and crimes against humanity that the ICC alleged they committed.

A solution to this problem is for Uganda to amend its constitution to exempt war crimes and crimes against humanity from the prohibition against retroactive application.

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[77] *See generally,* The Penal Code Act of Uganda, *supra* footnote 71 {reproduced in accompanying notebook at tab 1}
[78] *Id.*
[79] Constitution of the Republic of Uganda, Section 28(7) (1995) {reproduced in accompanying notebook at tab 38}

This would make clear that Uganda's constitution presents no barrier to the exercise of domestic jurisdiction. It would ensure the Pre-Trial Chamber that the UHT would have the same jurisdictional reach as the ICC.

Another possible solution would be for Uganda's courts to hold that the prohibition on retroactive application of criminal law does not apply to war crimes and crimes against humanity, because customary international law defined them more than half a century ago. After World War II, neither crime had ever been formally defined by a court.[80] And yet, the International Military Tribunal, founded after the end of that war, defined both crimes and allowed prosecutors to apply them to crimes that occurred before the definitions were incorporated into the court's charter.[81] This was because war crimes and crimes against humanity were both "grounded in existing conventional and customary international law" well before World War II had even begun.[82] Ugandan judges could argue that, because these crimes had been defined by customary international law long ago, applying long-held international accepted definitions to the commanders of the LRA is not retroactive. Such an interpretation would resolve the possibility of a constitutional prohibition against retroactive application of war crimes and crimes against humanity.

Because the Pre-Trial Chamber does not know how Ugandan Court's will rule in the future, *Munyakazi* suggests that the possibility of a favorable interpretation of the constitutional prohibition against retroactive application may not be enough for them to allow Uganda to try the LRA commanders. In *Munyakazi*, the prosecution asked the

[80] Theodor Meron, Reflections on the Prosecution of War Crimes by International Tribunals, 100 A.J.I.L. 551, 564 (2006) {reproduced in accompanying notebook at tab 2}
[81] *Id.*
[82] *Id.* at 567

International Criminal Tribunal for Rwanda (the "ICTR") to transfer a defendant to Rwanda's domestic court system.[83] The standard for such transfers required that Rwanda's court would not impose a life sentence served in isolation on the defendant.[84] The prosecution submitted as proof that Rwanda would not impose this punishment its passage of the Transfer Law that does not provide for a life sentence served in isolation.[85] There was some ambiguity, however, as to whether this law or the Abolition of the Death Penalty Law which did allow Rwanda to impose "life imprisonment with special provisions" would actually apply to the defendant's case.[86] *Munyakazi* held that, because "it [was] not up to the Trial Chamber to determine how these laws could be interpreted," Rwanda's courts might sentence the defendant to life imprisonment served in isolation in contravention to the ICTR's rules governing transfer.[87] This possibility was enough to deny the prosecution's request for transfer.[88]

So too, here, it is possible that Uganda's courts will interpret their constitution in a way that does not allow the retroactive application of war crimes and crimes against humanity to the actions of the LRA commanders. It is also possible that they might not. As *Munyakazi* suggests, the ICC's Pre-Trial Chamber is not likely to resolve this ambiguity. Rather, its analysis will acknowledge the possibility of both outcomes. The difference between *Munyakazi* and the present case, however, is that the ICTR set out a bright line standard of punishment that was clearly not met by Rwanda. This is in contrast to the

[83] Judge Fausto Pocar et. al., *The Prosecutor v. Yusuf Munyakazi,* p.3, Appeals Chamber for the International Criminal Tribunal for Rwanada (October 8, 2008) {reproduced in accompanying notebook at tab 20}
[84] *Id.*
[85] *Id.* at 5
[86] *Id.*
[87] *Id.* at 9
[88] *Id.* at 9

requirements of complementarity. As stated above, complementarity does not necessarily require Uganda to charge the LRA commanders with war crimes and crimes against humanity. It may be enough to simply pursue the cases using existing Ugandan law. Thus, it may not matter whether or not Uganda can charge the LRA commanders with war crimes and crimes against humanity. If, however, the Pre-Trial Chamber disagrees with this analysis and requires Uganda to charge them with such crimes, *Munyakazi* suggests that a constitutional amendment resolving the ambiguity may be necessary.

D. Due Process Guarantees

i. The Absence of UHT's Authorizing Statute

Uganda lacks an authorizing statute for the UHT that will try international crimes. Three judges have been named to the Court, but it has no rules and procedures, support structure, budget, or any of the other institutional requirements that a court depends upon to dispense justice.[89] An authorizing statute would outline such operations.[90] These operations are more than a formality, because they indicate the quality of due process guarantees that the UHT would provide. And without this outline, it is not likely that the ICC's Pre-Trial Chamber will deploy its imagination to fill in this necessary piece to the administration of justice.

Additionally, without an authorizing statute, the ICC's Pre-Trial Chamber could not determine the adequacy of Uganda's investigation and prosecution of the LRA commanders. This is because the absence of an authorizing statute precludes those proceedings from even beginning. Without it, Uganda could not satisfy Article 17's

[89] Rachel Irwin, *supra* footnote 52{reproduced in accompanying notebook at tab 14}
[90] *See generally*, Iraqi High Criminal Court Law, No. 4006 (2005) {reproduced in accompanying notebook at tab 23}

requirement that the LRA's international crimes are "being investigated and prosecuted" at the national level.[91]

ii. The Availability of Fair, Impartial Trials

(a) The Institutional Capacity of Uganda's Judicial System

Uganda's judicial system has many problems. Some reports indicate that "at least half of the defendants are encouraged to pay a bribe."[92] Others have referred to the "widespread corruption in the police and judiciary."[93] This consensus on the "common problem" of judicial corruption in Uganda raises questions about Uganda's ability to try international crimes in its courts.[94] It is compounded by the absence in Uganda of basic resources to investigate and prosecute domestic cases.[95] One Ugandan official estimates that the current backlog of criminal cases will "take up to 300 years" to eliminate using the current resources available.[96] Such deprivation extends to Uganda's Inspectorate, the government's watch dog, which has only one copy of the country's laws.[97] Even at Uganda's highest court, the library there does not contain "all the necessary laws"

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[91] Rome Statute, *supra* footnote 29, Article 7, 8 {reproduced in accompanying notebook at tab 4}
[92] Brooke Oppenheimer, From Arrest to Release: The Inside Story of Uganda's Penal System, Ind. Int'l Comp. L. Rev. 117, 138, (2005) {reproduced in accompanying notebook at tab 33}
[93] Stefano Migliorisi and Carlos Montes, Evaluation of EC Country Strategy: Uganda 1996-2000, Investment Development Company, (2001) {reproduced in accompanying notebook at tab 21}
[94] U.S. Department of State, Uganda: Country Reports on Human Rights Practices, p. 11, March 4, 2008, *available at* www.state.gov {reproduced in accompanying notebook at tab 18}
[95] International Bar Assocation, Judicial Independence Undermined: A Report on Uganda, p. 32-33, (2007) {reproduced in accompanying notebook at tab 22}
[96] *Id.*
[97]

relevant to the gamut of judicial proceedings before the Court.[98] These deficiencies are severe. But the question is whether they are enough to put in doubt Uganda's ability to investigate and prosecute international crimes.

They are not. First, Article 17 requires only that Uganda have the ability to carry out investigations and prosecutions "genuinely." Perhaps such genuineness is impossible without a baseline of resources but Article 17 does not require investigations and prosecutions to be well endowed.[99] This is evident from earlier drafts of the Rome Statute that proposed requiring states to "effectively" carry out domestic proceedings.[100] This wording was rejected and replaced with "genuinely" to reflect the concern that a stronger word might allow the ICC to judge national court systems against too high a standard.[101] Under the lower standard, there is nothing so lacking in Uganda that its ability to deploy limited resources to pursue a genuine investigation and prosecution of international crimes becomes suspect. Second, because Article 17 instructs the ICC to determine Uganda's inability to genuinely carryout proceedings in reference to a "total or substantial collapse or unavailability" of Uganda's judicial system, the language was never meant to encompass Uganda's situation.[102] Ugandan courts exist and function, though they may not do so in optimal ways. Thus, despite the corruption and lack of resources in

[98] *Id.*
[99] *See generally* Informal Expert Paper, *supra* footnote 26 at p. 8, {reproduced in accompanying notebook at tab 36}
[100] *Id.*
[101] *Id.*
[102] Rome Statute, *supra* footnote 29, Article 17(3) {reproduced in accompanying notebook at tab 4}

Ugandan courts, these maladies do not rise to the manifest inability Article 17 seems to require.

Furthermore, Article 17 requires the ICC's Pre-Trial Chamber to focus on Uganda's ability to handle the particular case at issue rather than all of the domestic cases within its jurisdiction.[103] This fact ends up cutting both ways for Uganda. On one hand, the prevalence of defendants paying judges a bribe becomes much less relevant. Uganda has selected three prominent jurists to preside over its special Court, one of whom was a judge at the Special Court for Sierra Leone, with few questioning their integrity.[104] The possibility that a panel of three well respected judges, with significant international experiences, will be bribed is no where near grand enough for the Pre-Trial Chamber to declare Uganda unable to investigate and prosecute international crimes. On the other hand, the backlogs found generally throughout Uganda may also be found in Uganda's special Court. With only one panel of three judges, the special Court could try only one case at a time. Even if just a few cases reach the Court, defendants may be forced to wait years before their case is tried. But while this is less than ideal, the length of delay is unlikely to negate Uganda's quest for jurisdiction. The average delay for a defendant's trial before the International Criminal Tribunal for Rwanda, for example, is eight years and twelve

[103] *See generally* Informal Expert Paper, *supra* footnote 26 at p. 11, {reproduced in accompanying notebook at tab 36}
[104] *Uganda Sets up War Crimes Court*, BBC News, May 26, 2008, www.bbc.co.uk {reproduced in accompanying notebook at tab 50}

days.[105] If an internationalized body such as the ICTR has tolerated such delays, it would be untenable for the ICC to hold Uganda to a higher standard. Regardless, Uganda can preempt any concern the ICC might have with trial delays by creating multiple trial chambers for its special Court. This would be a simple solution to a problem that, truth be told, may not pose a mortal threat to Uganda successfully invoking complemenetarity.

The Pre-Trial Chamber may look to the British case, *Horvath v. Secretary of State for the Home Department*, to define institutional unwillingness or inability.[106] In *Horvath*, a "failure of a state" amounted to an institutional unwillingness or inability only when it neglected to execute a duty owed to its citizens.[107] Britain denied a refugee's application for asylum because the basis of his claim relied on discrimination by private actors. *Horvath* indicated that the refugee's home state established a duty to prevent such discrimination. The Court held that the refugee's home state was "unable or unwilling" because it refused to "discharge *its* duty."[108] The situation is analogous here. Uganda has a duty under the Rome Statute to "genuinely" investigate and prosecute international crimes within its territory.[109] That is the duty. The problems in Uganda's judicial system, though serious, do not evince a systemically cynical effort to avoid genuine prosecutions and investigations for the limited set of cases

[105] Hirondelle News Agency, Rwanda: ICTR Defendant Laments His Trial As Longest in Modern Criminal History, , September 7, 2008, www.allafrica.com {reproduced in accompanying notebook at tab 51}
[106] *See* Informal Expert Paper, *supra* footnote 26 at p. 35, (noting that *Horvath v. Secretary of State for the Home Department* provides background on the concept of unwillingness and inability){reproduced in accompanying notebook at tab 36}
[107] *Horvath v. Secretary* {reproduced in accompanying notebook at tab 52}
[108] *Id.* {reproduced in accompanying notebook at tab 36}
[109] Rome Statute, *supra* footnote 29, Article 17 {reproduced in accompanying notebook at tab 4}

it will bring before its special Court. Thus, unlike the native state in *Horvath,* Uganda met its duty. Genuineness is the ICC's standard for complementarity ICC, and so long as its burden is met, the secondary jurisdiction triggered by inability or unwillingness in *Horvath* does not come into play.

(b) Access to Witnesses

The *Prosecutor v. Munyakazi* suggests that Uganda must ensure that potential witnesses generally "feel secure enough to testify in [the] transferred case[.]"[110] In *Munyakazi,* the ICTR upheld the Trial Chamber's refusal to transfer a case to Rwanda's national jurisdiction.[111] The Court reasoned that, because the witness protection service "currently lacks resources and is understaffed," witnesses who would "refus[e], out of fear, to testify in defense of people they knew to be innocent" would not be persuaded to reconsider in light of the inadequate service.[112] Thus, the problem the Court identified generally was a lack of access to witnesses. And this absence of access, the Court explained, occurred both because of a general climate that fostered a "fear of harassment, arrest and detention" as well as a deficient witness protection service to mitigate that climate.[113] This was enough of a reason to deny transfer to Rwanda's courts.[114]

If the ICC's Pre-Trial Chamber were to follow *Munyakazi*, Uganda would fail the standard it set forth. Whereas Rwanda at least had a witness protection program, Uganda

[110] *The Prosecutor v. Yusuf Munyakazi, supra* footnote 82, at p.15, {reproduced in accompanying notebook at tab 20}
[111] *Id.* at 17
[112] *Id.*
[113] *Id.* at 14
[114] *Id.* at 17

lacks one altogether.[115] In its place, Uganda deploys informal policies of guarding witnesses in secure locations when they are involved in a high profile case, but yet, these precautions did not mollify "concerns over intimidation" and "instances of witnesses disappearing" persisted."[116] And because the Ugandan government failed to protect civilians in the north during the conflict with the LRA, a "lack [of] faith in the Ugandan government's ability to protect them" will deter witnesses from testifying."[117] This is exactly the mix of factors, insufficient witness protection amidst a fearful environment, that led *Munyakazi* to deny transfer to a domestic jurisdiction.

There is a relevant difference between the facts in *Munyakazi* and the ones Uganda will confront. *Munyakazi* deals with a different, more exacting standard than the requirements of complementarity Uganda is attempting to fulfill. The applicable rule in *Munyakazi* was Rule 11*bis* which conditions transfer from the ICTR to Rwanda's domestic jurisdiction only if it is "satisfied that the accused will receive a fair trial" among other things.[118] This standard creates an absolute threshold a national jurisdiction must meet to receive a case from the ICTR. The Rome Statute's Article 17 sets a much lower threshold. Uganda need not convince the ICC that its trial will be fair but rather that its investigation and prosecution will be "genuinely" carried out.[119] This does not eliminate entirely the relevance of human rights standards as they provide indicators of a

[115] Human Rights Watch, Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation, p. 9 (February 2008) {reproduced in accompanying notebook at tab 19}
[116] *Id.*
[117] *Id.*
[118] *The Prosecutor v. Yusuf Munyakazi*, *supra* footnote 82, at p.2, {reproduced in accompanying notebook at tab 20}
[119] Rome Statute, *supra* footnote 29, Article 17 {reproduced in accompanying notebook at tab 4}

fair trial, but it limits the Pre-Trial Chamber to deciding whether the proceedings are "so inadequate" that they cannot be considered "genuine."[120] Article 17 is much more forgiving than *Munyakazi's* Rule 11*bis.*

But even under Article 17's more generous language, Uganda must set up an apparatus to protect witnesses. For Uganda to avoid taking modest and sensible accommodations to preserve the safety of witnesses would put into question its desire to proceed "genuinely" with investigations and prosecutions. Witness testimony is so fundamental to court proceedings that failing to make even the most basic provisions that encourage individuals to provide it compromises the truth finding function so central to a court's purpose. A fully functioning witness protection program is a must.

Both the AAR and its Annexure, the documents that set out Uganda's special Court, acknowledge the importance of a witness protection program.[121] The AAR notes that "measures shall be taken to ensure the safety and privacy of witnesses" and directs "particular protection" to be provided to child witnesses and victims of sexual crimes.[122] The Annexure orders Uganda to "make provision[s] for witness protection[.]"[123] But both of these documents require the Ugandan government to implement legislation based upon the framework they outline. So, neither the AAR nor its Annexure actually establish anything at all.

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[120] Informal Expert Paper, *supra* footnote 26, at p. 8, {reproduced in accompanying notebook at tab 36}
[121] Agreement on Accountability and Reconciliation, Section 3.4, (June 2007) {reproduced in accompanying notebook at tab 3}
[122] *Id.*
[123] Annexure to the Agreement on Accountability and Reconciliation, Section 4(e), (February 2008) {reproduced in accompanying notebook at tab 5}

That is not to say that Uganda must build its witness protection program from scratch. In conducting its investigation, the ICC's Registrar developed a witness protection program for individuals who put themselves at risk by offering up information.[124] The ICC would welcome Uganda's efforts to take control of that program or create another one similar to it.[125] Such assistance is an aspect of complementarity envisioned by Article 93 of the Rome Statute.[126] It establishes "partnership" as a guiding principle of the ICC's approach to complementarity.[127] This includes "certain forms of assistance to facilitate national efforts" which may encompass help with a witness protection program.[128] Uganda may even be able to agree to a "consensual division of labour" that leaves the ICC in charge of managing the program.[129]And the ICC is, of course, unlikely to find inadequate a witness protection program it helped design.

(c) The Exclusion of Ugandan State Actors from UHT's Jurisdiction

A central presumption of complementarity is that states assume jurisdiction over all the crimes that the ICC's Rome Statute covers. If Uganda does not investigate or prosecute all those crimes, this jurisdictional gap may place in jeopardy its quest for complementarity. In this case, there is not a jurisdictional gap per se, but Uganda's AAR

[124] The Office of the Prosecutor, *supra* footnote 22, at p. 15, {reproduced in accompanying notebook at tab 25}
[125] Informal Expert Paper, *supra* footnote 26, at p. 5-7, {reproduced in accompanying notebook at tab 36}
[126] Rome Statute, *supra* footnote 29, Article 93{reproduced in accompanying notebook at tab 4}
[127] Informal Expert Paper, *supra* footnote 26, at p. 5, {reproduced in accompanying notebook at tab 36}
[128] *Id.*
[129] *Id.* at 19

and its Annexure treat state perpetrators differently than members of the LRA.[130] If this difference exists to shield Ugandan state actors from criminal responsibility, the ICC may reject Uganda's quest for complementarity.[131]

There is no meaningful difference between the ICC's investigations and those envisioned by Uganda's AAR and its Annexure. Uganda directs its investigations to identify the planners of "widespread, systematic, or serious attacks" against civilians.[132] The goal is for these investigations to reflect the "broad pattern" of crimes committed during the conflict.[133] This language suggests that Uganda's special Court will conduct investigations of both the LRA and Ugandan state actors equally based on the standard articulated in the Annexure. This is exactly what the ICC's Prosecutor did during his investigation of international crimes committed in Uganda.[134]

Uganda does depart from the ICC's approach, however, by creating a bifurcated system that places individuals in different judicial venues according to their political affiliation. The AAR and its Annexure make clear that Ugandan state actors, both military and civilian, will not be subject to the judicial processes of the UHT.[135] While the Annexure assures that military justice will not be used to try Uganda's military criminals, it also raises the possibility that Uganda will allow perpetrators of serious

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[130] Agreement on Accountability and Reconciliation, *supra* footnote 120, at Section 4.1, (June 2007) {reproduced in accompanying notebook at tab 3}
[131] Rome Statute, *supra* footnote 29, Article 17(2)(a){reproduced in accompanying notebook at tab 4}
[132] Annexure to the Agreement on Accountability and Reconciliation, *supra* footnote 122, at Section 13(a) {reproduced in accompanying notebook at tab 5}
[133] *Id.*
[134] *See* Luis Moreno-Ocampo, *supra* footnote 39, at p. 502 {reproduced in accompanying notebook at tab 35}
[135] Annexure to the Agreement on Accountability and Reconciliation, *supra* footnote 122, at Section 23 {reproduced in accompanying notebook at tab 5}

international crimes to escape formal accountability.[136] This differs significantly from the ICC's approach. The ICC did issue arrest warrants only of individuals affiliated with the LRA.[137] But these warrants were issued because the ICC found "the crimes committed by the LRA [to be] much more grave than those committed by the Ugandan army."[138] Uganda has not conducted its own investigations that have reached a similar conclusion. This creates a unique problem for Uganda, because the possibility exists that, in investigating Ugandan state actors, evidence will surface that a Ugandan state actor was either complicit in the LRA's most serious crimes or perpetrated international crimes against civilians of comparable gravity to the LRA's crimes. If such a situation does arise, Uganda will not, as the AAR and its Annexure indicate, be able to bring formal charges in the UHT against these individuals simply because of their status as Ugandan state actors.[139] The ICC may consider this an example of a "procedural irregularit[y] indicating a lack of willingness to genuinely investigate or prosecute" the crimes of Ugandan state actors.[140] On this basis, the ICC could deny Uganda's ability to invoke complementarity.[141]

Such a finding would depend on one of the hypothetical fact situations described above: a Ugandan state actor is complicit with the LRA's crimes or commits crimes of

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[136] *Id.*
[137] *See generally* ICC press release, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants*, October 14, 2005. {reproduced in accompanying notebook at tab 7}
[138] *See* Luis Moreno-Ocampo, *supra* footnote 39, at p. 501-502 {reproduced in accompanying notebook at tab 35}
[139] Agreement on Accountability and Reconciliation, *supra* footnote 120, at Section 4.1, (June 2007) {reproduced in accompanying notebook at tab 3}
[140] Informal Expert Paper, *supra* footnote 26, at p. 14, {reproduced in accompanying notebook at tab 36}
[141] Rome Statute, *supra* footnote 29, Article 17 {reproduced in accompanying notebook at tab 4}

comparable gravity. The ICC's investigation did not uncover examples of either of these.[142] It is conceivable, however, that years of investigations might demonstrate one to be true.

Additionally, preventing Ugandan state actors from appearing before the special Court would create a paradox within the meaning of Uganda's AAR and its annexure. The requirement that Uganda's investigations and prosecutions both reflect the "broad pattern" of serious crimes committed during the conflict suggest that prosecutions of Ugandan state actors are necessary because these crimes are of the type committed during the conflict. [143] Ugandan state actors committed crimes against civilians that include murder, rape, torture, and forced displacement to name a few.[144] There are even allegations that Uganda's army forced child soldiers fleeing the LRA to serve in its military.[145] These may not be the most serious crimes of those committed during the conflict, but they are nevertheless quite serious. To prevent the UHT from hearing these cases, Uganda will not be able to reflect the broad pattern of crimes perpetrated during its conflict with the LRA.

Uganda may respond by citing the ICC's Pre-Trial Chamber decision in the situation in the Democratic Republic of Congo holding that a crime subject to its jurisdiction must be "either systematic or large-scale" and cause "social alarm…in the

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[142] *See* Luis Moreno-Ocampo, *supra* footnote 39, at p. 502 {reproduced in accompanying notebook at tab 35}
[143] Annexure to the Agreement on Accountability and Reconciliation, *supra* footnote 122, at Section 23 {reproduced in accompanying notebook at tab 5}
[144] *See generally,* Torture in Uganda *supra* footnote 6, {reproduced in accompanying notebook at tab 17}

[145] *See* Amnesty International, *supra* footnote, at p. 67{reproduced in accompanying notebook at tab 24}

international community."[146] Thus, Uganda must only subject those criminals that meet this criterion to formal judicial processes. Uganda could argue that the crimes perpetrated by its army were incidents that lacked a systematic character and that at no time raised the ire of the international community. But even this would not make it acceptable to excuse Ugandan state actors from formal judicial processes. Regardless of how episodic the Ugandan army's crimes were, to create a principle that excludes them from formal accountability before an investigation confirms their episodic nature is inconsistent with an intent to bring all perpetrators to justice. It suggests a desire to shield Ugandan state actors from the justice the LRA will face which could provide a basis for the ICC to find Uganda unwilling to prosecute. Such a finding would prevent Uganda from invoking complementarity.

This problem could be fixed quite simply by revoking 4.1 of the AAR. It would then be up to the prosecutor, guided by facts generated through investigations, to prosecute those most responsible for the international crimes committed in Uganda. There is a possibility that the special Court may still see only members of the LRA before it. This result, however, would be produced by an impartial principle seeking those most responsible.

(d) The Death Penalty

Uganda's penal code allows a court to impose the death penalty for crimes including rape, murder, and defilement.[147] The ICC's Rome Statute does not.[148] This

[146] Katherine Clearly and Susana SaCouto, The Gravity Threshold of the International Criminal Court, 23 Am. U. Int'l L. Rev. 807, 811 (2008) {reproduced in accompanying notebook at tab 44}

discrepancy, however, does not create an absolute bar preventing Uganda from assuming jurisdiction.

The standard Uganda must meet to assume jurisdiction over the international crimes committed on its territory is to conduct investigations and prosecutions "genuinely."[149] This standard of genuineness does not suggest that Uganda must comply with every principle of human rights.[150] As explained earlier, the ICC is not a "human rights monitoring body."[151] Its role is "not to ensure perfect procedures and compliance with all international standards."[152] So long as its deviation from international standards does not put into question Uganda's intent, the ICC is obligated to allow Uganda to assume jurisdiction.[153]

Furthermore, the death penalty is still a punishment that international law allows. State practice has effectively prevented a ban on the death from becoming part of customary international law, because only about half the countries in the world have eliminated the punishment.[154] The International Covenant on Civil and Political Rights

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[147] Penal Code Act of Uganda, *supra* footnote 71, at Section 128, 129, 188 {reproduced in accompanying notebook at tab 1}
[148] *See generally* Rome Statute, *supra* footnote 29, {reproduced in accompanying notebook at tab 4}
[149] Rome Statute, *supra* footnote 29, Article 17(a) {reproduced in accompanying notebook at tab 4}
[150] Informal Expert Paper, *supra* footnote 26, at p. 8, {reproduced in accompanying notebook at tab 36}
[151] *Id.*
[152] *Id.*
[153] Rome Statute, *supra* footnote 29, Article 17(2)(b) {reproduced in accompanying notebook at tab 4}
[154] Association of American Law Schools Panel on the International Criminal Court, 36 Am. Crim. L. Rev. 223, 239 (1999) {reproduced in accompanying notebook at tab 44}

(the "ICCPR") also tacitly recognizes the legality of the death penalty.[155] This is evident because ICCPR restricts its imposition to the "most serious crimes" and provides defendants sentenced to death with a few procedural guarantees.[156] Thus, international law has yet to reject the death penalty.

The ICC is not likely to demand that the UHT comply with standards beyond those specified in the Rome Statute or international law.[157] To require the UHT to forgo the death penalty in order to invoke complementarity would make that demand. It is why Uganda can maintain the death penalty as a punishment for perpetrators that are found guilty of international crimes.[158]

IV. Summary and Conclusions

Uganda has only begun the process of setting up the UHT. As such, the analysis above is necessarily incomplete. This memorandum does, however, provide insight into the three questions that prompted it.

Does Uganda's War Crimes Tribunal law cover all of the offenses within the jurisdiction of the ICC? The preceding discussion has shown that Uganda has yet to pass such a law that could be evaluated itself. In its place, there is the AAR and its Annexure which suggest the type of War Crimes Tribunal law that Uganda intends to pass. But as

[155] International Covenant on Civil and Political Rights, Article 6(2) {reproduced in accompanying notebook at tab 8}
[156] *Id.*
[157] *Id.*
[158] The cases before the various international tribunals are inapplicable, because the Rule 11*bis* governing transfer denies a country's request if the transferee may be subject to the death penalty. The Rome Statute governs in this case, not the rules of other tribunals. It does not provide Uganda such a requirement. Thus, the cases supply no reasoning that may appropriately be imported to the present matter.

it currently stands, Uganda's jurisdiction falls short of the ICC's. Its penal code lacks definitions for war crimes and crimes against humanity. The ICC has already utilized its jurisdiction over both of these crimes when it issued arrest warrants for LRA commanders who allegedly perpetrated them. Until Uganda amends its penal code, it cannot do the same. Thus, the simple answer to the first question is no. At this point, Uganda's jurisdiction does not cover the same crimes as the ICC.

However, the analysis above demonstrated that the ICC's standard for complementarity does not require a country to charge its criminals with all the same crimes covered by the Rome Statute. Rather, Uganda can meet a much lower threshold to invoke complementarity: it must investigate and prosecute the same cases genuinely. Uganda could meet this threshold by investigating and prosecuting the LRA commanders for murder, rape, and other crimes already defined by its penal code. Thus, a jurisdictional disparity between the ICC and Uganda does not necessarily speak to the adequacy of Uganda's future War Crimes Tribunal Law.

Does Uganda's War Crimes Law adequately provide for minimum international standards of due process and fairness? Once again, without the statute, it is difficult to say. By necessity then, the above analysis focused on the current capacity of Uganda's judicial system. And it concluded that there are several serious deficiencies in the judiciary. Most notably, the absence of an effective witness protection program is incompatible with international standards of justice. Left this way, it may even provide the ICC with a basis for rejecting Uganda's request for jurisdiction. Other systemic problems, however, like corruption and a lack of resources are not likely to jeopardize complementarity. This is because, for purposes of complementarity, the ICC defines

adequacy much less rigorously than international standards of due process would. In other words, the ICC is not a human rights monitoring body. To invoke complementarity, Uganda must only be sure not to conduct investigations and prosecutions for the purpose of shielding suspects from accountability.

By excluding Ugandan state actors from the UHT, Uganda may create the appearance of shielding its citizens from accountability. As described earlier, there is a possibility that later investigations will uncover Ugandan state actors that committed crimes of equal gravity to those allegedly perpetrated by the LRA. If the LRA commander gets sentenced to death of his crime and the state actor does nothing more than attend a traditional justice ritual, this disparity will create at least the appearance of bias. To avoid this, Uganda could bring before the UHT those most responsible for the most heinous crimes committed, regardless of their affiliation This would bolster the impartiality of future court proceeding, making complementarity a surer bet.

Additionally, because the death penalty comports with international standards of justice, Uganda's use of it does not provide the ICC with a basis for opposing complementarity. So long as Uganda conducts investigations and prosecutions genuinely, the ICC must defer to Uganda's national jurisdiction regardless of the shortcomings of its justice system.

And finally, what gaps need to be filled to supplement the domestic criminal code? As noted above, it would probably be wise, though not absolutely necessary, for Uganda to incorporate definitions of war crimes and crimes against humanity into its penal code. But beyond this, so much of Uganda's future UHT has not yet been defined that it is premature to fine tune the institution by filling in gaps. That is why this question

received the least coverage in the discussion above. But generally speaking, Uganda's domestic laws comport with international standards of justice as does its Constitution. Indeed, Uganda is a signatory to the International Covenant on Civil and Political Rights. The problem for Uganda is not of a technical, legal nature. It is a problem of implementation. This is why the reality of Ugandan justice received more attention than its theoretical ideal.

In sum, the ICC will not demand much from Uganda. What is adequate, then, begins with very little. Uganda must create an institution that genuinely investigates and prosecutes those who have committed crimes during its conflict with the LRA. The key word is genuine. It is the word that communicates the meaning of adequacy. And barring some very brazen choices, Uganda will be able to create a court on its territory to which the ICC may defer.