AMNESTY: AN "OLIVE BRANCH" IN JUSTICE?

AMNESTY ADVOCACY TOOL FOR UGANDA

Avocats Sans Frontières

Avocats Sans Frontières

Avocats Sans Frontières is an international nongovernmental organisation. Its mission is to independently contribute to the creation of fair and equitable societies in which the law serves society's most vulnerable groups. Its aim is to contribute to the establishment of institutions and mechanisms allowing for independent and impartial access to justice, capable of assuring legal security, and able to guarantee the protection and effectiveness of fundamental rights (civil and political, economic and social).

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Cover picture: the July 17th International Criminal Justice Day activity in 2011 - during the matching © ASF

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The opinions and facts presented in this publication are the sole responsibility of ASF.

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FOREWORD

In May 2012, the Ugandan Amnesty Act will finally lapse and a crucial decision will be taken by relevant bodies such as Parliament, the Ministry of Justice and Constitutional Affairs and the Ministry of Internal Affairs on whether this law should be completely done away with, renewed with modifications or kept in its current form. This year is therefore a crucial one for Avocats Sans Frontières and all other stakeholders involved in transitional and international criminal justice activities in Uganda.

Under its international criminal justice project Avocats Sans Frontières has decided to publish this advocacy tool titled **"Amnesty: An "Olive Branch" in Justice?"** as a first step towards not only raising awareness on the ongoing decision making process but also as an avenue to make pertinent recommendations in the event that the Amnesty Act is modified.

In this publication, a review of the Constitutional Court decision which emanated from the first case of the International Crimes Division-*Uganda versus Thomas Kwoyelo* (ICD Case No. 02/10) is provided. The publication focuses on the decision adopted by the Constitutional Court on Thomas Kwoyelo's entitlement to Amnesty. In their ruling, the Learned Justices of the Constitutional Court found that the failure of the Directorate of Public Prosecutions and the Amnesty Commission to act on Thomas Kwoyelo's amnesty application was discriminatory and therefore contravened his rights under Articles 1, 2, 20 (2), 21 (1) and (3) of the Constitution of the Republic of Uganda. The Attorney General has since appealed against this decision in the Supreme Court. The final position of the Court is still pending.

This landmark ruling of the Constitutional Court of Uganda ignited the debate on the legality of amnesty and its relevance in post conflict situations. A December 2011 research study set out by the Justice and Reconciliation Project, a local non-governmental organization based in Gulu, reveals that the people of Northern Uganda still firmly support the amnesty legal regime. The fate of those who are still under LRA captivity and who would need to benefit from amnesty upon their return home is often recalled by the victims of the LRA conflict.

In this publication, Avocats Sans Frontières makes reference to the UN Tool on Amnesties, scholarly works and media articles on amnesties in order to come up with practical recommendations that can ensure that amnesty can serve the dual purpose of being a justice and peace tool in post-conflict Northern Uganda. The views expressed by

Members of Parliament in April 2010 when the Minister of Internal Affairs appeared before them requesting to exclude some people from being granted amnesty, have also been cited in this publication in a bid to point out some of the existing loopholes within Uganda's amnesty legal framework and also to provide guidance on possible recommendations.

Avocats Sans Frontières recommends that amnesty should not be granted to persons who bear the greatest responsibility in the commission of international crimes; amnesty grants should be conditional; the law should allow for relinquishment of amnesty; amnesty decisions should be appealable before Courts of law and Parliament should maintain an oversight role in future amnesty legislation.

Avocats Sans Frontières remains committed to the fight against impunity and redress for victims in Uganda and believes that constant legal revisions should be undertaken to ensure the effective prosecution of international crimes.

Séverine Moisy
Head of Mission, ASF Uganda

LIST OF ABBREVIATIONS

ASF	Avocats Sans Frontières
GOU	Government of Uganda
ICC	International Criminal Court
LRA	Lord's Resistance Army

INTRODUCTION

Avocats Sans Frontières recently launched a multi-country project promoting the Rome Statute System and the effectiveness of the International Criminal Court in Uganda, Burundi, Democratic Republic of Congo, Colombia, East Timor and Nepal. The overall objective of the project is to contribute to greater accountability for gross human rights violations and redress for victims by strengthening the Rome Statute system and the International Criminal Court. The Ugandan component of the project seeks to reinforce the capacity of lawyers and civil society organizations working closely with victim communities to create a network of actors with a theoretical and practical understanding of international criminal justice principles. The project also focuses on enhancing judicial and legal activism to ensure that Uganda honors its international and domestic obligations to effectively prosecute international crimes.

OBJECTIVE OF THE PUBLICATION

This publication aims at proposing recommendations to relevant stakeholders, addressing the amnesty question in Uganda.

UGANDA VERSUS THOMAS KWOYELO ALIAS LATONI[1]: THE COMPLEMENTARITY LITMUS

On 11th July 2011, Thomas Kwoyelo became the first person to be charged before the International Crimes Division of the High Court of Uganda. During his first appearance, he pleaded not guilty to 12 main counts and 53 alternative counts embedded in the Geneva Conventions Act Cap. 363 and the Penal Code Act Cap. 120 respectively. None of the charges in this case were brought under the International Criminal Court Act No. 11 of 2010 since it commenced on 25th June 2010 and therefore did not cover acts alleged to have been committed by Thomas Kwoyelo prior to this date. Article 28 (7) of the Ugandan Constitution provides that no person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.

The establishment of the War Crimes Division, now known as the International Crimes Division, in 2008 was in part an implementation of key aspects of Agenda Item No. 3 of the Juba Peace Agreement which was entered into by the Government of Uganda and the Lord's Resistance Army[2]. Specific sections of Agenda Item No. 3 focused on the use of formal justice mechanisms as means of dealing with the conflict situation. Under Section 2.1, the parties agreed that they would promote national arrangements, consisting of formal and non formal institutions and measures for ensuring justice and reconciliation with respect to the conflict.

This Division and the commencement of the Thomas Kwoyelo trial in Uganda marked the beginning of a practical application of the principle of complementarity which is the cornerstone of the Rome Statute that led to the creation of the International Criminal Court. Specific mention of this principle can be found under Article 1 of the Rome Statute which provides as follows,

"An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be <u>complementary</u> to national jurisdictions..."

The principle of complementarity reconciles the States' primary duty to exercise jurisdiction over international crimes with the establishment of a permanent

[1] HCT-00-ICD-CASE NO. 02/10.
[2] It is to be noted that although Agenda Item No. 3 was agreed upon by the Parties, the comprehensive peace agreement has never been signed by the LRA.

International Criminal Court endowed with jurisdiction over the same crimes. Admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed.[3] Accordingly, admissibility can be regarded as the tool allowing the implementation of the principle of complementarity in respect of a specific scenario.

Article 17 is the statutory provision governing the assessment of the admissibility of a case. Pursuant to Article 17 (1), a case is inadmissible where:

a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is willing or unable genuinely to carry out the investigation or prosecution;
b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, Paragraph 3;
d) The case is not of sufficient gravity to justify further action by the Court.

The commencement of the Kwoyelo trial before the International Crimes Division was evidence of Uganda's commitment towards the fight against impunity. According to Legal Notice No. 10 of 2011, "The High Court (International Crimes Division) Practice Directions, 2011"., the Division has jurisdiction over any offence relating to genocide, piracy and any other international crimes as may be provided for under the Penal Code Act Cap. 120, the Geneva Conventions Act Cap. 363, the International Criminal Court Act No. 11 of 2010 or under any other penal enactment.

Recent developments in the Thomas Kwoyelo case have, however, brought to light a cross-section of challenges that the Division faces in the course of executing its legal mandate. The most significant of these is Uganda's current legal framework that legalizes amnesty for persons who are involved in armed conflict against the Government of the Republic of Uganda.

[3] Situation in Uganda, in the Case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen* (Decision on the admissibility of the case under Article 19 (1) of the Statute)

PITFALLS OF COMPLEMENTARITY:
RETRIBUTIVE JUSTICE IN THE FACE OF AMNESTY

According to the concept of positive (or proactive) complementarity, the ICC is called to motivate and assist national legal bodies in their activities to prosecute crimes of an international dimension on the national level[4].The establishment of the International Crimes Division, along with the creation of a specific War Crimes Investigation Unit within the Uganda Police Force, is often presented as evidence of the influence of this principle in the Ugandan system. However, the sole focus of the principle of complementarity on the retributive model of justice[5] which emphasizes the criminal responsibility of perpetrators of such crimes brings with it a number of challenges, particularly in post conflict situations where restorative models of justice[6] are called for. Further, the existence of legal regimes that allow perpetrators of crime to apply for amnesty in certain jurisdictions also make it increasingly difficult for the retributive justice model to be operationalized.

The United Nations [7] uses the word "amnesty" to refer to legal measures that have the effect of;

a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
b) Retroactively nullifying legal liability previously established

[4] See Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) Available at < http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf >. See also Assembly of State Parties, *Report of the Bureau on the Strategic Planning Process of the International Criminal Court*, 5th Session, the Hague, ICC-ASP/5/30 (20 November 2006) 21 and 24. Available at <http://www.icc-cpi.int/library/asp/ICC-ASP-5-30_English.pdf>

[5] See definition of "retributive justice" as enunciated in Wikipedia- **Retributive justice** is a theory of justice that considers that punishment, if proportionate, is a morally acceptable response to crime, with an eye to the satisfaction and psychological benefits it can bestow to the aggrieved party, its intimates and society
Found at http://en.wikipedia.org/wiki/Retributive_justice (Accessed on 2nd March 2012)

[6] See explanation on "restorative justice" as highlighted at http://www.cscsb.org/restorative_justice/what_is_restorative_justice.html: Restorative Justice is a community-based approach to dealing with crime, the effects of crime, and the prevention of crime. Most people who move through the current system of criminal justice do not find it a healing or satisfying experience. A Restorative Justice process operates from a belief that the path to justice lies in problem solving and healing rather than punitive isolation. Some of these restorative models of justice include but are not limited to the establishment of Truth and Reconciliation Commissions, adoption of traditional justice mechanisms *et cetera.*

[7] United Nations, Rule-of-Law tools for post-conflict states Amnesties, page 5

Under this definition, amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law. The Uganda amnesty law, which gives reporters time following the law's enactment or renewal to surrender, only partly mirrors this definition since, within this time period, reporters can commit crimes for which they would later receive amnesty[8]. It therefore to a limited extent applies to crimes which have not yet taken place.

Further, the UN Tool on Amnesty distinguishes pardons from amnesties. According to the tool, pardon refers to an official act that exempts a convicted criminal or criminals from serving his, her or their sentence(s) in whole or in part without expunging the underlying conviction. Section 2 of Amnesty Act 2000 of Uganda has broadened the definition of amnesty to mean a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State. Under this definition, the Amnesty Commission established under Section 7 of Amnesty Act 2000 has to date granted amnesty to over 26,200 rebels.[9] Out of this number about approximately 13,000 individuals were part of the LRA, the rebel outfit that actively contributed to the 20 year insurgency in Northern Uganda.

The purpose of the Ugandan Amnesty law is encompassed in the rather elaborate preamble of Amnesty Act 2000 which provides as follows: *"An Act to provide for an Amnesty for Ugandans involved in acts of a war-like nature in various parts of the country and for other connected purposes."*

The enactment of this law is presented as a symbol of the Government's commitment towards promoting a policy on reconciliation in order to establish peace, security and tranquility in parts of the country that had hitherto been involved in hostilities against the Government. During the Juba Peace Talks in 2006, the Government of Uganda offered to grant amnesty to all combatants upon successful completion of the Juba Peace Talks and also to engage the cultural, religious leaders and all stakeholders in a bid to reconcile the combatants with their communities[10].

[8] See Uganda Amnesty Act, Section 2 : "An amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January 1986, engaged in or *is engaging in war or armed rebellion* against the Government of the Republic of Uganda".

[9] See article in Issue No. 201 of the Independent Magazine February 17-23 2012 "Is the Uganda Amnesty Commission still relevant?".

[10] R. Rugunda, *"Government Position on Kony Peace Talks in Juba"*, The New Vision newspaper 18th July 2006, Uganda's Minister of Internal Affairs stated*: " Uganda's position is that if Joseph Kony (the LRA leader) respects the truce, we shall convince the ICC not to arrest him."* This makes one presuppose that the rebel leader would benefit from the amnesty laws of Uganda.

The views of the proponents of the amnesty law are informed by an approach that gives precedence to peace over justice. Among others, Desmond Tutu, a South African Nobel Peace Prize Winner and activist against apartheid, argues that amnesty programs offer an opportunity at reconciliation, stressing that criminal prosecutions are unlikely to further tasks of national forgiveness and, thus, future peace.[11] Other authors argue that this path can ultimately permit a greater respect for human rights than alternative paths.[12]

Between the 28th of November and 6th December 2011, the Justice and Reconciliation Project,[13] a local NGO based in Gulu District- one of the affected areas in the LRA-GOU conflict, carried out a rapid research in selected communities to gauge the perceptions and opinions on amnesty and whether it is still relevant today in post-conflict Northern Uganda. In this research, the organization spoke to 44 respondents-with a gender ratio of 26 male to 18 female-including local leaders, religious leaders, victims, formerly-abducted persons, and other community members, along with representatives of civil society organizations. The analysis revealed that an overwhelming majority of the sample group still strongly support amnesty and consider it as vitally important for sustainability of the prevailing peace, reconciliation and rehabilitation. From their survey, a resounding 98% of respondents thought that the amnesty law was still relevant and that it should not be abolished. A similar study by the Refugee Law Project published in February 2005 also found that there was overwhelming support for the amnesty process throughout the country.[14]

However, the reality is that peace and justice both contribute to sustainability of any post conflict society. Argentina, which experienced a back and forth between amnesty and prosecution over a thirty year period, until a legislation eventually annulled the amnesty in 2005 following the *Simon* case[15], exemplifies in this perspective the constant

[11] See Desmond Mpilo Tutu, *"No Future Without Forgiveness"* 58, (stating "[t]he solution arrived at was not perfect but it was the best that could be had in the circumstances-the truth in exchange for the freedom of the perpetrators."

[12] See G. Teitel, *"Transitional Justice"* 53 (arguing "amnesties can advance the normative project of the political transition")

[13] Justice and Reconciliation Project: *"To pardon or to punish? Current perceptions and opinions of Uganda's Amnesty in Acholi-land"* : Found at http://justiceandreconciliation.com/2011/12/to-pardon-or-to-punish-current-perceptions-and-opinions-on-uganda%E2%80%99s-amnesty-in-acholi-land/ accessed on 16th March2012

[14] Refugee Law Project: *"Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for conflict resolution and long-term reconciliation"* In this study, a total of 409 individuals were interviewed including those eligible for amnesty (former rebel combatants, returned abductees and collaborators)

[15] The chronology of transitional justice in Argentina was (1) revoke self-amnesty in 1983; (2) establish trials and truth commission; (3) following military backlash against trials, introduce two amnesties in 1986 and 1987; (4) then pardons for those military officials who had been convicted in 1989 and 1990. The amnesty was then derogated in 1998 and following the Simon case, a new

battle for dominance between amnesty and criminal liability- a creation of the "peace versus justice" phenomena which can seldom be balanced. Both phenomena can be pursued in post conflict societies if certain criteria are adopted. The following analysis of the status of amnesties under international law and the practical implementation of the Ugandan Amnesty law in the Kwoyelo case lay the grounds for such a reflection.

legislation annulled the amnesty in 2005. See Jose Sebastien Elias, *"Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty" Laws"* (2007) Yale Law School Legal Scholarship Repository who states that one of the arguments that could explain why the "amnesty" laws could be legitimately removed from the legal order exactly as if they had never existed is that they did not represent a moment of true reconciliation but were, instead, the result of intense pressures and military threats.

AMNESTIES UNDER INTERNATIONAL LAW: A LEGAL LIMBO

There is no customary or treaty rule prohibiting amnesties[16].

Some domestic jurisdictions such as South Africa have upheld the legitimacy of amnesty laws. In the case of ***Azanian Peoples Organization (AZAPO) and Others versus The President of the Republic of South Africa***[17], the applicants sought an order declaring Section 20 (7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 unconstitutional because it permitted the Committee on Amnesty to grant amnesty to a perpetrator of an unlawful act associated with a political objective and committed prior to 6th December 1993. The Court disagreed with the applicant's position and held that amnesty for criminal liability was permitted by the epilogue because without it there would be no incentive for offenders to disclose the truth about past atrocities. In their opinion, the truth might unfold with such an amnesty, assisting in the process of reconciliation and reconstruction. This ruling portrays a direct linkage between amnesty and other transitional justice processes. It is important to note that although the South African amnesty process was a unique form of amnesty that has not exactly been replicated elsewhere, amnesty could therefore be viewed as a tool that can promote not only peace but reconciliation as well.

International jurisprudence has nevertheless taken on a rather nuanced position on the question of amnesty in comparison to domestic jurisdictions. The generally accepted international human rights law position is that amnesties are incompatible with general human rights guidelines. In 1994, the United Nations Human Rights Committee, in its General Comment No. 20 on Article 7 of the International Convention on Civil and Political Rights stated the following:

"The committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

[16] See W. Burke-White, *"Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation"* (2001)42 Harvard International Law Journal 467.
[17] CCT 17/96 Constitutional Court 25th July 1996.

Likewise, the UN tool on amnesty in post conflict situations clearly highlights the impermissibility of amnesties when they:

a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender specific violations;

b) Interface with victims' right to an effective remedy, including reparation; or

c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.[18]

Further, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations.

Such findings found a judicial echo in ***Prosecutor v. Morris Kallon & another***[19]. In this case the Appeals Chamber of the Special Court for Sierra Leone continued to prosecute the accused persons despite the presence of a domestic law permitting amnesty for the two. In the opinion of the court, the Lome Agreement created rights and obligations that are to be regulated by the domestic laws of Sierra Leone. Consequently, whether it is binding on the Government of Sierra Leone or not does not affect the prosecution of an accused in an international tribunal for international crimes. In this case, the Appeals Chamber noted that there is a "crystallizing international norm that a Government cannot grant amnesty for serious violations of crimes under international law".

The absence of clarity on the legality of amnesties under international law can be explained by the fact that amnesties tend to be used as reconciliation tools in post conflict situations. To have an international position that attempts to declare amnesties as illegal could be seen as detrimental to peace efforts in many jurisdictions. The suggested trend therefore is to maintain amnesties but only sustain modifications regarding the procedure to be followed prior to granting them and also limiting the categories of persons who can be granted such amnesty.

[18] *Op. cit.,* note 6.
[19] Case No. SCSL-2004-15-PT; Case No. SCSL-2004-16-PT [2004] SCSL 2

THE ROME STATUTE AND AMNESTIES

The Rome Statute neither contains a provision that permits the grant of amnesties nor one that declares that amnesties are illegal.

Some authors have however argued that prosecutions under the Rome Statute are restricted in a number of circumstances that could conceivably protect an amnesty.[20] For instance, the Security Council has the power to defer an investigation or prosecution.[21] Likewise, according to Article 53 (1) (c) of the Rome Statute, the Prosecutor can be guided by the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator and his or her role in the alleged crime to decide that "there are substantial reasons to believe that an investigation would not serve the interests of justice". Even though there is a clear difference between the concepts of the interests of justice and the interests of peace - the latter falling within the mandate of institutions other than the Office of the Prosecutor- such a broad phrasing could, at least theoretically, give the Prosecutor the latitude to take into account the question of national amnesty programs which might be beneficial to victims [22].

During the ratification of the Rome Statute, countries such as Colombia and Uruguay made clear declarations or reservations concerning the applicability of amnesties in their domestic jurisdictions. Colombia ratified the Statute with six interpretive declarations, including the following explicit reference to amnesties;

"None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia."[23]

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[20] See e.g. Dwight G. Newman, *"The Rome Statute, some reservations concerning amnesties, and a distributive problems"* 2005 AM.U.INT'L L.REV.

[21] Article 16 of the Rome Statute (upon the Security Council's request an investigation or prosecution shall cease for a period of twelve months)

[22] It is nevertheless important to note that the Policy paper released by the Office of the Prosecutor states that "The investigations conducted in the situations of the DRC, Uganda and Darfur all required consideration of the question of the interests of justice prior to proceeding for an application for arrest warrants or summonses. The situation of Uganda has perhaps attracted the most attention, given the attempts by various parties to resolve the conflict between the Government of Uganda and the LRA. This situation demonstrates well the exceptional nature of the provision on the interests of justice as well as the differences between this concept and the interests of peace". See Office of the Prosecutor, *Policy Paper on the Interests of Justice,* CC-OTP-2007, September 2007, p.4 (available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Policy+Paper+on+the+Interests+of+Justice.htm)

[23] Rome Statute, Declaration of Colombia, para. 1 (August 5th,2002)

Uganda has not made any such declarations or reservations to the Rome Statute despite having the opportunity to do so prior to ratifying the Statute. The country has also gone ahead to domesticate the Rome Statute through the ICC Act No. 11 of 2010. One of the main purposes of the law is to give the force of law in Uganda to the Statute and to also implement the obligations assumed by Uganda under the Statute. These obligations include the investigation and prosecution of perpetrators of international crimes, an obligation that the state and mandated institutions cannot effectively fulfil with the amnesty law in its current form.

ANALYSIS OF THE CONSTITUTIONAL COURT RULING IN THE KWOYELO CASE[24]

In August 2011, the Constitutional Court handed down a landmark ruling that once again ignited the debate on the relevance of amnesty as a tool for conflict resolution. In its ruling, the Constitutional Court declared that the applicant, Thomas Kwoyelo was entitled to a grant of amnesty. This same ruling was reiterated by the High Court[25] when Justice V.T. Zehurikize granted the order of mandamus sought by Thomas Kwoyelo, to compel the Directorate of Public Prosecutions and the Amnesty Commission to grant him an amnesty certificate.

RELEVANT COURT DECLARATIONS

Blanket Amnesty vis–a-vis Section 2 of the Amnesty (Amendment Act), 2006

Section 3 of Amnesty Act 2000 declared amnesty in respect of any Ugandan who at any time since the 26th day of January 1986 was engaged in or was engaging in war or armed rebellion against the Government of the Republic of Uganda. Such reporter is only issued an amnesty certificate as prescribed in the regulations to the Act after he or she has renounced and abandoned involvement in the war or armed rebellion and surrendered any weapons in his or her possession.

Further, Section 2A of the Amnesty (amendment) Act, 2006 introduced a new aspect to the amnesty law when it provided:

"Notwithstanding the provisions of Section 2 of the Act a person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister by statutory instrument by statutory instrument made with the approval of Parliament."

The Constitutional Court interpreted these two provisions as follows:

"...The DPP can still prosecute persons who are declared ineligible for amnesty by the Minister responsible for Internal Affairs or those who refuse to renounce rebellion. He can also prosecute any Government agents who might have committed grave breaches

[24] Constitutional Reference No. 36 of 2011
[25] Thomas Kwoyelo alias Latoni versus Attorney General HCT-00-CV-MC-0162-2011

of the Geneva Conventions Act, if any. The Amnesty Act unlike the South Africa Truth and Reconciliation Act did not immunise all wrongdoers..." [26]

The inclusion of Section 2A of the Amnesty Amendment Act is what informed the decision of the Constitutional Court of Uganda when it declared that Uganda does not offer blanket amnesty. The fact that Members of Parliament prevented the Minister of Internal Affairs from effecting his powers under Section 2A, thereby granting a *de facto* blanket amnesty, was not examined by the Court.

On the 13th day of April 2010, the Minister of Internal Affairs made an appearance before Parliament to exercise the power accorded to him under this new amendment. However, the Members of Parliament rejected his request to exclude Joseph Kony, Dominic Ongwen, Okot Odhiambo and Thomas Kwoyelo from being granted amnesty. In rejecting this request, some of the MPs were of the view that there were no sufficient grounds laid for the request. The request was therefore trashed by some Members of Parliament for procedural rather than substantive grounds. [27] During this session, the Members of Parliament also discussed the implications of amnesty on the overall peace process. However, some legislators appeared to be unaware of the whole amnesty process and how the said provision operates.[28]

The discussion during the Parliamentary session is evidence of the fact that despite the fact that the 2006 amnesty amendment provided for a process purporting to exclude some persons from amnesty, this power has not been exercised. This is particularly so because the Act has given the approval mandate for a provision of this nature to Parliamentarians whose decisions are often guided by political interests rather than broader national and international peace and justice policy objectives.

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[26] One should nevertheless recall that if the South African amnesty did offer amnesty to offenders from both state and non-state groups, this was an individual and conditional process. Offenders had to apply and comply with conditions and only 1,117 were finally granted amnesty.

[27] See remarks by one Member of Parliament in Parliamentary Hansard 13th/04/2010 :
"First no sufficient grounds have been laid for this request. The information here is insufficient. We are not given details for this motion. Actually, there is no motion detailing the reasons as to why the Minister would seek this approval. I thought it would be in form of a motion. I do not even know how the Minister is initiating business here. Is this a petition? What is it? In my opinion, it should have been a motion…"
(The MPs reaction to the request leaves one question unanswered-"should procedure be followed to the latter in matters relating to international crimes and broader peace?")

[28] See Parliamentary Hansard 13th/04/2010 *"…This urgent request was a bit unclear because I thought application for amnesty should be done by these people whose names appear here. Therefore, how do we decide on their behalf and make this kind of arrangement yet tomorrow, when given time, since the peace process is going on, they may apply for amnesty…"*

Non-discrimination as a basis for the decision of the Constitutional Court

The Learned Justices of the Constitutional Court also held as follows:

"We are satisfied that the applicant has made out a case showing that the Amnesty Commission and the Director of Public Prosecutions have not accorded him equal treatment under the Amnesty Act. He is entitled to a declaration that their acts are inconsistent with Article 21 (1) (2) of the Constitution and thus null and void."

This ruling on the question of non-discrimination was guided by the arguments presented by the applicant's lawyers, who argued that failure by the DPP to certify this amnesty grant and yet doing the same for other culprits infringed on the applicant's right to non-discrimination under Article 21 of the Constitution.

This was a rather precarious position for the Court to adopt. International criminal law indeed distinguishes between different categories of actors in armed conflict, setting different legal regimes for top commanders and perpetrators tasked with carrying out the orders of the top commanders. In this perspective, to resort to the question of non-discrimination as a basis for declaring an amnesty for certain perpetrators leaves the Ugandan legal system wanting. What was required of the courts of law on this occasion was an exercise of judicial activism that would push for an amnesty law that categorizes the persons who should be entitled to a grant of amnesty and those to whom this right should be denied.

The purpose of the Amnesty Law vis-a-vis the victims' right to know the truth

The Constitutional Court also grounded its final decision on the purpose of the Act embedded in its preamble. The Court stated as follows:

"...At the time when the Act was enacted, this country was faced with a political rebellion in Northern Uganda. The Act was meant to be used as one of the many possible ways of bringing the rebellion to an end by granting amnesty to those who renounced their activities. There is nothing unconstitutional, in our view in the purpose of the Act. The mischief which it was supposed to cure was within the framework of the Constitution. The Act is also in line with national objectives and principles of State policy and our historical past which was characterized by political and constitutional instability."

Albeit rightly stating the law, it appears that the Court did not consider the perception of victims on issues pertaining to amnesty for perpetrators.

According to the UN General Assembly Resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law, states are under an obligation to adopt appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice. Guideline 3 of the same resolution provides that in case of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Guideline VII, one of the remedies a victim is entitled to is the right to equal and effective access to justice and also the right to access relevant information concerning violations.

Based on the provisions of this international instrument focusing on victims' rights and remedies, the court ought to have highlighted the negative effect of the amnesty offered under the Amnesty Act on the right of certain victims to access justice for the crimes perpetrated against them.

The law as it stands indeed places minimal obligations on the persons who are granted amnesty. These obligations as per Section 4 of the Amnesty Act include reporting to the nearest Army or Police Unit, a Chief, a member of the Executive Committee of a local Government Unit, a magistrate or a religious leader within the locality, renouncing and abandoning involvement in the war or armed rebellion and surrendering at any such place or to any such authority or person any weapons in his or her possession. Amnesty certificates are granted as soon as this process is followed.

A quick perusal of the amnesty application form shows that reporters are only required to fill a confidential form in which they provide very limited information on the criminal acts they have committed. The most important requirement that a reporter has to fulfil prior to being granted amnesty is to make a declaration renouncing rebellion. Therefore from this perspective, amnesty as granted under Ugandan law does not give the victims an opportunity to know the crimes that the persons who have been granted amnesty have committed. The law neither imposes any civil responsibility on persons that are granted amnesty nor obliges them to tell their communities the kind of crimes they

committed. This therefore means that the reconciliation that is believed to be brought on by this type of amnesty is actually unrealistic. The state should not purport to grant a pardon by way of amnesty without having all the facts on the table. This aspect is very important if any national amnesty program is to build sustainable peace and reconciliation. The Constitutional Court, in its decision, failed to come out clearly on the interface between Uganda's criminal justice system and the amnesty law and which of the two should take precedence over the other and under what circumstances.

RECOMMENDATIONS

The following recommendations are made on the basis of certain provisions of the Juba Peace Agreement. The Agreement provided for the use of both retributive and restorative justice mechanisms in the pursuit of peace in Northern Uganda. The parties to the Juba Peace agreement acknowledged that modifications may be required within the national legal system to ensure a more effective and integrated justice and accountability response. Section 5.6 of the Peace Agreement specifically stated that the Government will introduce any necessary legislation, policies and procedures to establish the framework for addressing accountability and reconciliation and shall introduce amendments to any existing law in order to promote the principles in this Agreement.

Below are some of the practical recommendations that ASF proposes should be integrated within Uganda's legal system as we approach May 2012 when a final decision on the renewal or non-renewal of the Amnesty Law will be taken.

- **Amnesty should not be granted to persons who are most responsible for committing international crimes**

In the Parliamentary session of 13th April 2010, one Member of Parliament raised an important question when the Minister of Internal Affairs presented the list of names of persons who should be declared ineligible for a grant of amnesty. She asked: *"...what criterion did you use for selecting these particular individuals?"*[29]

This question should be properly addressed in the event that the law is renewed with modifications in May 2012.

ASF proposes that this criterion should be based on the categories of crimes committed by persons seeking amnesty. Those who bear the greatest responsibility in the commission of the most serious crimes of concern for the international community as a whole should not be granted amnesty.

The Amnesty Law of Uganda in its current form permits all persons to be granted amnesty regardless of the role they played in a conflict situation. This in essence means that master-minders of conflict and victims such as abducted persons are all entitled to be granted amnesty as long as they follow the procedure highlighted in the Act.

[29] Source: Parliamentary Hansard 13th/04/2010

The absence of a provision within the law that portrays a clear cut a difference between those "most responsible" and those "least responsible" for committing international crimes presents an unfair exoneration process.

Since amnesty is of utmost importance particularly when it comes to reintegrating abducted persons with their communities, it can still be maintained but persons that have a direct hand in the atrocities committed should not be extended this olive branch in the form of amnesty. In this sense, the fact that ICC indictee Dominic Ongwen was also forcibly abducted as a child into the LRA seems to be indicative of the idea that such circumstance can only play as a mitigating factor of duress

The question of what makes one most responsible should be clearly stipulated in the law and leverage should be given to the determining body to refer to international and domestic legal principles in order to come to a final decision.

Such a step will ensure that Uganda balances its obligations to fight impunity and yet at the same time uses amnesty to build sustainable peace.

- **Amnesty grants should be conditional**

No person should be granted amnesty that comes with no additional obligations. Amnesty should only be granted to persons who declare the truth about the crimes they committed.

Under the current amnesty law, reporters do not make any particular statements related to the actual crimes they committed. The most important requirement prior to being granted amnesty is that they renounce rebellion. In the absence of this, amnesty cannot contribute to complete healing of communities. The affected communities should be able to participate in hearings of this nature in which persons declare the atrocities committed and seek their forgiveness. There should be a direct linkage between the amnesty process and the traditional justice process which focuses on reconciling the affected communities.

Amnesty should, therefore, be denied to perpetrators of gross human rights abuses who refuse to cooperate with the Commission or who refuse to make a full disclosure of their

crimes. This recommendation is informed by a position that has been articulated by some scholars who have presented a good case for the use of conditional amnesties.[30]

- **The law should allow for relinquishment of amnesty**

There have been consistent complaints regarding persons who are granted amnesty but still go on to commit the same or worse crimes.[31]

It is important to note that according to Section 6A (1) of the Amnesty (Amendment) Act 2002, a person granted an amnesty under this Act who, after being granted amnesty, commits an act mentioned in Section 3 shall not be granted an amnesty for the latter act and is therefore liable to prosecution. [32] It is further provided that where a person mentioned in subsection (1) of this section surrenders and satisfies the Commission that exceptional circumstances exist in his or her case, such person shall not be prosecuted for the act committed. These exceptional circumstances according to Section 6A (3) of the amendment include the abduction of a person since the last grant of amnesty and the commission of the act under duress, coercion or undue influence.

The body mandated to grant amnesty should, however, also have the power to relinquish a grant of amnesty for reasonable cause as may be defined by the law. In this case reasonable cause may entail the fact that a person did not disclose all the facts concerning the crimes he or she committed, the fact that a person is still committing the same crimes for which he was granted the amnesty in question *et cetera*.

Along those lines, it has been argued that one of the major tools that South Africa ought to have used to encourage the telling of the full truth is revocation of amnesty where it is subsequently discovered that full disclosure has not been made[33]. This would mean that the evidence supplied by a perpetrator could be used in a subsequent trial against

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[30] J. Dugard, *"Dealing with crimes of a past regime; Is amnesty still an option?"* (2000) 12 Leiden Journal of International Law 1001-1015
The author seems to suggest that conditional amnesties granted by bodies such as the South African Truth and Reconciliation Commission should be recognized by the international community. This is a useful compromise to ensure that justice is not entirely sacrificed to the cause of peace. He suggests that Amnesty Committees should conduct their hearings in public and both applicants and victims should be permitted legal representation.

[31] Parliamentary Hansard 13th/04/2010 -*"…one of the top rebel leaders that came out of the bush and was a terrible murderer, his name is Onen Kamudur. To the shock of many, he became a state witness, until when the Police later on nabbed him while engaged in his habit; he continued doing what he used to do in the bush until he was nabbed. Now he is in custody."*

[32] Section 3 of the Amnesty Act provides for circumstances under which a grant of amnesty may be made.

[33] Jonathan Klaaren, *"Domestic Amnesty and International Jurisdiction"* University of Witwatersrand

the perpetrator in respect of the offence for which indemnity was granted. Little or no further investigation would be required. The threat of sanction becomes a real one.

- **Amnesty decisions should be appealable before courts of law**

Based on the Thomas Kwoyelo experience in which an amnesty matter went before a court of law, persons and victims of crime should have a right to appeal against the decision of any institution set up to consider amnesty applications and grant amnesty certificates.

This will protect the fairness concept embedded in the Constitution of Uganda and also allow persons to challenge a decision taken by the established body. The Thomas Kwoyelo case has depicted the Amnesty Commission as a body that has unfairly denied the applicant his right to a grant of amnesty, an aspect that can only be rectified with a law in place that directly allows persons to challenge such decisions.

- **Parliament should only maintain an oversight role in future amnesty legislation**

Currently, Parliament plays a central role within the amnesty legislation. Under Section 2A of the Amnesty (Amendment) Act 2002 it has indeed been given the mandate to approve the list of persons that the Minister of Internal Affairs decides to exclude from a grant of amnesty.

With the role of the courts and committees set up to grant amnesty being emphasized, Parliament's interface with any amnesty issues should be limited to decisions on the content of the law itself (that is, making of regular amendments and/or taking any other legislative decisions) and a supervisory role over the different established committees with the sole aim of ensuring that they have proper and sufficient human and financial resources to carry out their duties.

Given the lengthy Parliamentary processes and the fact that decisions in Parliament are often guided by political inclination, it is only prudent that Parliament should not be one of the institutions to take a decision on who should be excluded from a grant of amnesty.

CONCLUSION

In May, the law on amnesty should be renewed albeit with modifications that can allow the criminal justice mechanisms to co-exist alongside the transitional justice mechanisms. The interests of persons forced into rebellion through abduction should be balanced against the interest of justice through amendments that reflect Uganda's commitment to its international and national obligations aimed at fighting against impunity and protecting victims' rights.