



JUSTICE AT CROSS ROADS? A SPECIAL REPORT ON THE THOMAS KWOYELO TRIAL

In March 2009, Thomas Kwoyelo a former LRA (Lord's Resistance Army) commander was captured by the UPDF (Uganda People's Defence Forces) in Garamba in the Democratic Republic of Congo.

On 6 September 2010, Thomas Kwoyelo was charged by the DPP with various offences under Article 147 of the Geneva Conventions Act before Buganda Road Court where he was committed for Trial before the International Crimes Division. On 11th of July 2011, he appeared before the International Crimes Division for pleas taking, where his indictment was amended from 12 counts to 53 counts of war crimes under the Geneva Conventions Act, with alternative charges including murder, kidnapping with intent to murder, attempted murder and robbery under the Penal Code Act Cap 120.

All charges were read to him and he pleaded 'not guilty'. The matter was adjourned for the hearing of preliminary objections. The preliminary objections were heard on the 15th August 2011, where his lawyers requested for a constitutional reference contending that he was indicted for offences for which he qualified for amnesty under the Amnesty Act.

On 16th August 2011, the Constitutional Court heard the Constitutional Reference by the International Crimes Division in the case of Uganda Vs. Thomas Kwoyelo about his application for a grant of Amnesty with respect to his alleged involvement in the commission on International Crimes during the Northern Uganda Conflict between 1993 - 2005.

Issues before the Constitutional Court were:

- 1. Whether the failure by the Director of Public Prosecutions(DPP) and the Amnesty Commission to act on the application by the accused person for grant of a certificate of Amnesty, whereas such certificates were granted to other persons in circumstances similar to that of the accused person, is discriminatory, in contravention of, and inconsistent with articles 1,2,20(2), 21(1) and (3) of the Constitution of the Republic of Uganda.*
- 2. Whether indicting the accused person under Article 147 of the Fourth Geneva Convention of 12th August 1949 and section 2(1)(d) and € of the Geneva Conventions Act, Cap 363(Laws of Uganda) of offences allegedly committed in Uganda between 1993 and 2005 is inconsistent with, and in contravention of Articles 1,2,8(a) and 287 of the Constitution of the Republic of Uganda, and objectives of III and XVIII(b) of the National objectives and Directives Principles of State Policy, contained in the 1995 Constitution of the Republic of Uganda.*

Note: this challenge was thereafter dropped by applicant and was not considered by Constitutional Court.

3. *Whether the alleged detention of the accused in a private residence of an unnamed official of the Chieftaincy of Military Intelligence(CMI) is in contravention of and inconsistent with articles 1,2,23(2),(3), 4(b), 24 and 44(a) of the Constitution of the Republic of Uganda.*

Note: This issue was not considered by Constitutional Court.

4. *Whether sections 2, 3, and 4 of the Amnesty Act are inconsistent with Articles 120(3) (b)(c) and (d/0 (5)(6), 126(2)(a), 128(1) and 287 of the Constitution.*

Note: Submission by the Respondent, which the Constitutional Court considered in the ruling on the grounds that “it touched on the legality and constitutionality of an Act of Parliament, under which the applicant was claiming he had acquired a right to be granted amnesty.” (Ruling of the Constitutional Court, Constitutional Petition No. 036/11(REFERENCE) Arising out of HCT – 00 – ICD – Case No. 02/10)

In determining the above issues, the Court made a number of considerations, however it focused its deliberations and delivered its ruling on issues (1) and (4) relating to the equal protection challenge submitted by the Applicant and the constitutionality of the Amnesty Act challenge submitted by the Respondent.

Constitutional Court ruling

On September 22, 2011, the Constitutional Court delivered its ruling in respect to the referral by the International Crimes Division in the case of Uganda Vs. Thomas Kwoyelo. The Court found in favor of the applicant on his equal protection challenge and upheld the constitutionality of the Amnesty Act. On these grounds, the Court ordered the trial against Mr. Kwoyelo to be ceased and ordered his subsequent release. Specifically, the Court made the following conclusions:

Regarding equal treatment before the law:

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. We find so. We order that the file be returned to the court which sent it with a direction that it must cease the trial of the applicant forthwith (Ruling of the Constitutional Court , Constitutional Petition No. 036/11(REFERENCE) Arising out of HCT – 00 – ICD – Case No. 02/10)

Regarding the independence of the DPP:

We do not think that the Act was enacted to whittle down the prosecutorial powers of the DPP or to interfere with his independence...(Ruling of the Constitutional Court , Constitutional Petition No. 036/11(REFERENCE) Arising out of HCT – 00 – ICD – Case No. 02/10)

Regarding Uganda's international law obligations:

We think her (Principal State Attorney) concerns were addressed by the provisions of the Act, in that not all rebels were granted amnesty, since the Minister can declare some ineligible for amnesty. Ruling of the Constitutional Court , Constitutional Petition No. 036/11(REFERENCE) Arising out of HCT – 00 – ICD – Case No. 02/10)

Implications of the Court ruling

This decision has created serious concern with regard to its implications on the pursuit of justice and accountability in Uganda. In particular, the decision has implications for Uganda's national and international human rights obligations and its duty to ensure justice for victims of these violations.

1. Uganda's International law obligations and Foreign Policy

Uganda is a party to several international human rights law treaties binding the State to respect fundamental rights of its people. The International Covenant on Civil and Political Rights, to which Uganda is a party, places a duty on the State party to *respect* and *ensure* the rights of all individuals in the Covenant. This duty includes an obligation to adopt measures to prevent the reoccurrence of such acts and to repair victims when their rights are violated. Specifically, this duty requires the State to promptly investigate, prosecute and punish perpetrators for crimes, to respect due process and to ensure a remedy for the victims. Such obligations apply to State parties, including Uganda, regardless of whether the abuses were committed in peace or war time.

Uganda is further a party to the four Geneva Conventions governing the laws of war, establishing protection standards for civilians and obliging State parties to penalize persons for grave breaches of the treaty.¹ The Geneva conventions defines grave breaches as crimes: "involving any of the following acts, if committed against persons or property protected by the Convention: **wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.** Thomas Kwoyelo was charged under Art.147 of the Geneva Conventions Act, falling within Uganda's obligations under this treaty.

Uganda is also a party to the Rome Statute, creating the International Criminal Court, and binding State parties to prosecute individuals for genocide, war crimes and crimes against humanity.² The ICC is meant to bring charges against "the most serious crimes of concern to the international community as a whole, interpreted to mean a requirement to investigate and

¹ Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Geneva IV) requires that "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." Geneva IV, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146.

² See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), Preamble: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation...; and that "States Parties recognize that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

prosecute those who bear the greatest responsibility, such as the leaders of the state or organization allegedly responsible for those crimes.³

Ratification of the Geneva Conventions and Rome Statute represents an international commitment by Uganda to seek justice and accountability for violations of international humanitarian law and international criminal law. Uganda has further domesticated both of the conventions as part of its national law, making her obliged to respect those provisions. This reinforces Uganda's good reputation in ratification and domestication of international laws and its duty to apply the law.

International bodies, including the UN Human Rights Council has adopted several resolutions calling on member States for the investigation and prosecution of violations of international humanitarian law in the context of non-international armed conflicts, in countries such as Burundi, Rwanda, Sierra Leone, Sudan and former Yugoslavia. The trend towards a universal obligation to combat impunity for serious crimes is summed up in a statement by the President of the Security Council, finding that, "The Council intends to continue forcefully to fight impunity with appropriate means and draws attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and 'mixed' criminal courts and tribunals, and as truth and reconciliation commissions," Statement of the President of the Security Council (June 22, 2006)

Given the international obligation to prosecute war crimes, crimes against humanity and genocide, the enactment of amnesty laws, which prevent the investigation, prosecution and punishment of such crimes, conflicts with this international obligation. Amnesties with this effect are therefore not recognized as a bar to criminal prosecution under international law. National amnesty laws found to shield perpetrators from prosecution for serious human rights violations and war crimes have been struck down by international courts or overridden for contravening international law principles and State obligations.⁴ Statutes for the hybrid criminal tribunals such as the Special Court of Sierra Leone and the Extraordinary Chambers in Cambodia explicitly state that national amnesties for international crimes within their jurisdiction shall not bar prosecution.⁵

International practice by human rights courts and criminal tribunals affirm this rule. The Inter-American Court on Human Rights, has issued a number of rulings on the issue, finding that, "the States cannot neglect their duty to investigate, identify and punish those persons responsible for crimes against humanity by enforcing amnesty laws or other similar domestic provisions."⁶ The Special Court for Sierra Leone ruled on a challenge to its jurisdiction based on the amnesty clause of the Lome Agreement. Relying on a universal jurisdiction analysis, the court found that it had jurisdiction to prosecute crimes under international law regardless of the domestic legality of the amnesty provisions of the Lome Agreement.⁷ Finally, the International Tribunal for the former Yugoslavia has found that an individual could be prosecuted for torture before an international tribunal even if the action in question had been the subject of an amnesty.⁸ The Court focused on the duty to prosecute international crimes over the legitimacy of the amnesty itself.

³ Rome Statute of the International Criminal Court, Preamble and Art.5

⁴ *Loayza Tamayo v Peru* (Reparations) Inter-Am Ct HR (1998); *Barrios Altos v. Peru*, Inter-Am Ct HR, (2001)

⁵ Statute of the Special Court of Sierra Leone, Art.10; and Law to amend the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of /Crimes Committed During the Period of Democratic Kampuchea, 2004 (Cambodia) Art. 40; Mallinder, L. Amnesty, Human Rights and Political Transitions (2008), 258-259.

⁶ *Almonacid-Arellano et al v. Chile*, Inter-Am Ct HR (2006)

⁷ Mallinder, L. Amnesty, Human Rights and Political Transitions (2008), 258-259.

⁸ *Prosecutor v Anto Furundzija*, Case No IT-95-17/1-T, Judgment (10 Dec 1998) [155], as above.

In sum, blanket amnesties having the effect of protecting all individuals without regard to the nature of the crimes committed, therefore shielding individuals suspected to have perpetrated serious human rights violations and war crimes, contravene a State's international law obligations. While there is inconsistent practice on amnesty laws amongst States, it is now well established that national laws preventing an obstacle to prosecution for serious human rights violations, crimes against humanity and war crimes violates international law obligations.

This principle is affirmed in the Juba Agreement; *"Formal Courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes especially crimes amounting to international crimes during the course of conflict."* (Clause 6.1, Agreement on Accountability and Reconciliation Between the Government of Uganda and the Lord's Resistance Army/Movement, JUBA/SUDAN). This further reinforces Uganda's commitment to honor its international obligations.

In view of this, the accused, Thomas Kwoyelo was indicted principally for the alleged commission of international crimes as provided in the Geneva Conventions Act.

2. Uganda's National obligations

The Constitution of the Republic of Uganda, which is the Supreme Law of Uganda, promotes the rule of law and provides for the protection of rights of all individuals, in line with national and international aspirations provided in its National objectives and Directive Principles of State Policy, which state that;

- (i) *The foreign policy of Uganda shall be based on the principles of promotion of the national interest of Uganda; respect for international law and treaty obligations;*
- (ii) *Uganda shall actively participate in international and regional organisations that stand for peace and for the well-being and progress of humanity. (XXVIII, Foreign policy objectives).*

Secondly, the Agreement on Accountability and Reconciliation, signed in 2007, marked a commitment by the parties to pursue justice, accountability and reconciliation for atrocities committed during the conflict in Northern Uganda. A number of provisions in the Agreement clearly call for accountability and the adoption of necessary mechanisms to achieve this goal. The government has since adopted a number of measures towards the implementation of this Agreement, including the adoption of the International Crimes Bill and the creation of the International Crimes Division of the High Court, with jurisdiction to try international crimes. Key provisions relating to accountability include:

Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict...(Clause 4.1, Agreement on Accountability and Reconciliation Between the Government of Uganda and the Lord's Resistance Army/Movement, JUBA/SUDAN)

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In order to achieve finality of legal process, accountability and reconciliation procedures shall address the full extent of the offending conduct attributed to an individual.....(Clause 3.9 Finality and Effect of Proceedings, Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement, JUBA/SUDAN)

The Juba Peace Agreement provides an overarching, national, legal and policy framework for the pursuit of justice and accountability for crimes perpetrated during the conflict in Northern Uganda.

3. Justice for Victims

The armed conflict in Northern Uganda resulted in thousands of victims and displaced persons, notably women and children. Justice may include a wide range of options, such as the right to a remedy, fair trial, right to participate in proceedings that affect them and right to access information concerning proceedings. Article 50(1) of the Constitution of the Republic of Uganda recognizes all these rights as expressed; with regard to the right to redress, it states:

Any person, who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

In post-conflict settings, a victim's right to access to justice and information about gross violations of human rights and serious international crimes perpetrated against him/her, is particularly protected, and recognized as fundamental to the victim's recovery and rehabilitation; this duty is embodied in State obligations under the Universal Declaration of Human Rights and the International Covenants on Human Rights.⁹ UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law is the most recent UN instrument to specify the rights of victims to access to justice and information about violations perpetrated against them. The right to access to information in the process of redress for victims has been recently recognized by the United Nations Human Rights Council that adopted a resolution in October 2009 providing that, *"the public and individuals are entitled to have access to the fullest extent practicable, to information regarding the actions and decision-making processes of Government."*

Further, the Juba Peace Agreement (Agreement on Accountability and Reconciliation) recognizes the suffering of victims in its Preamble and declares its commitment to preventing impunity and promoting redress for victims. Specific provisions relating to victims include:

⁹ Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, Principle 11.

The Government shall promote the effective and meaningful participation of victims in accountability and reconciliation proceedings, consistently with the rights of the other parties in the proceedings. (Section 8.1)

Victims have the right of access to relevant information about their experiences and to remember and commemorate past events affecting them. (Section 8.3)

As a member of the international community and a party to numerous international treaties protecting victims' rights, Uganda has a duty to uphold this right.

The victims of the Northern Uganda conflict have for a long time anticipated justice. While the adoption of alternative justice mechanisms are common in post-conflict periods, and sanctioned by the Juba peace agreement (Agreement on Accountability and Reconciliation), criminal justice for serious crimes is a recognized obligation to honor the victims and their suffering. It is questionable at this point, whether justice through formal court proceedings will be realized for the large number of victims by ceasing this trial.

4. Security and social reintegration of the accused and others similarly situated:

What next for Mr. Thomas Kwoyelo; in the event that the decision of the Constitutional Court is effected, it may seem as "freedom" for the accused person, however he may be faced with broader challenges like his security and reintegration in a community that he is perceived to have wronged. Will the community accept him? Will he pursue other justice processes like traditional justice? In this regard will he willingly seek forgiveness as required by the "Mato Oput" process? Is he willing to tell the truth?

Amnesty v. Accountability: Can these processes be pursued simultaneously?

In 2000, the Amnesty Act of Uganda was first adopted with the intent to end hostilities in the North and to bring warring parties to the negotiating table. The Amnesty Act has since been renewed numerous times and is currently still in effect. Since its establishment, the Amnesty Commission has granted a total of 24,066 certificates of amnesty to ex-combatants.

The Amnesty Act of 2000 provides that:

"Amnesty is extended to all Ugandans who have been involved in insurgency through: (a) actual participation in combat; (b) collaborating with insurgents; (c) committing other crimes to support insurgency; or (d) in any other way assisting others involved in insurgency". (Section 3(1))

Subsequent amendments have been adopted. The latest amendment in 2006 makes reference to persons who may be found to be ineligible for Amnesty: *"a person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister by statutory instrument made with the approval of parliament."* The 2006 amendment does not make reference to the criteria by which individuals may be considered to be ineligible for amnesty, nor does it make the designation of ineligibility of amnesty a requirement by law. Consequently, the power to declare an individual ineligible for amnesty remains at the discretion of the Minister and Parliament.

In effect, amnesty under the Amnesty Act may be granted to any and all those who renounce rebellion and seize hostilities, regardless of the nature of crimes an individual has committed.

In contrast, the Juba peace agreement constitutes a key legal framework on accountability for serious crimes perpetrated during the armed conflict in Northern Uganda. It establishes clear commitments by the parties to the pursuit of justice and calls for necessary amendments of national legislation or the introduction of new legislation and relevant policies to ensure implementation of the agreement. Key provisions on this point include:

The Government will introduce any necessary legislation, policies and procedures to establish the framework for addressing accountability and Reconciliation to any existing law in order to promote the principles under this agreement. (Clause 5.6, Agreement on Accountability and Reconciliation Between the Government of Uganda and the Lord's Resistance Army/Movement, JUBA/SUDAN), and it will,

Introduce any amendments to the Amnesty Act or the Uganda Human Rights Act in order to bring it into conformity with the principles of this Agreement. (Clause 14.4, Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement, JUBA/SUDAN)

In light of the commitments made in Juba and Uganda's international obligations, the provisions of the Amnesty Act appear to present a challenge to the State's ability to fulfill its duty to ensure justice and accountability for serious human rights violations, crimes against humanity and war crimes committed in Uganda. While at the time of its adoption, the Amnesty Act was intended to promote peace and encourage the end to hostilities, ten years later, key questions arise about the Act's relevance in the current context and its impact on Uganda's national and international obligations. Key issues include: has the Amnesty Act outlived its purpose? Is it still relevant in the current context? Can Amnesty be pursued alongside other transitional justice processes? It is also critical to evaluate whether the Amnesty Act has promoted reconciliation, whether it facilitated the end to rebellion in Northern Uganda and whether it has addressed the victims concerns.

Way Forward

The sector is concerned about the serious implications created by the ruling of the Constitutional Court especially with regard to our own commitments at the Juba Peace process, our international obligations, and our obligations to the victims of crimes. The Juba Peace Agreement marked the end of hostilities and simultaneously launched the transitional justice process in Uganda, in which the Sector is a key player in its effective implementation.

Transitional Justice has since been high on the agenda for the sector. This has been matched by considerable commitment of resources by the Government and stakeholders to the pursuit of justice, as well as notable efforts by the sector institutions to achieve this goal. This is further demonstrated by the adoption of the International Crimes Bill and the establishment of the International Crimes Division at the High Court in 2008 to pursue accountability and justice for international crimes. As such, the sector is committed to supporting the pursuit for justice, accountability and reconciliation through the adoption of a coherent and integrated transitional justice policy.

The sector believes in due process and the rule of law in the administration of justice and this must be seen to be done in its totality for justice to be realized. Letting the accused person "off the hook" without establishing the extent of his responsibility for the alleged commission of

international crimes, denies victims the right to justice and a remedy and prevents the State from fulfilling its duty to investigate, prosecute and punish perpetrators of serious crimes.

Promoting due process and the rule of law constitute important commitments, nationally and internationally, to which Uganda cannot be seen to violate. In this regard, the sector is of the view that that the matters before the constitutional court especially with regard to the constitutionality of the Amnesty Act, in relation to the provisions as listed above need to be critically analysed for the proper dispensation of justice.

At present, the case is on appeal to the Supreme Court for final deliberation and decision.

Finally, the utmost priority of the sector is to ensure effective justice and reconciliation for the victims in the conflict and by using all the appropriate means and mechanisms available to achieve this goal. In this regard, the sector advocates for more sustainable and comprehensive solutions for victims to the conflict, which include;

1. Resettlement and reintegration
2. Justice and Accountability measures, including alternative accountability mechanisms,
3. Peace and Reconciliation measures
4. Access to justice
5. Reparations for victims of human rights violations and mass crimes
6. Victim and witness protection.

These are essential elements to the pursuit of a comprehensive and effective transitional justice process in Uganda.

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