

**ISLAMIC UNIVERSITY IN  
UGANDA**

**JOURNAL OF COMPARATIVE LAW**

# NATIONAL JUDICIAL PRACTICE IN THE FIGHT AGAINST IMPUNITY FOR INTERNATIONAL CRIMES IN VIEW OF THE AMNESTY ACT OF UGANDA AS INTERPRETED IN THE CASE OF UGANDA V THOMAS KWOYELO

By  
Saidat Nakitto Ph.D\*

## Abstract

*The Amnesty Act of Uganda was enacted in 2000 to enable the armed personnel who were fighting the Government of Uganda to seek for amnesty and denounce the armed rebellion. This was aimed at restoring peace in regions where these armed conflicts had persisted including northern Uganda. However, the Act permits issuance of amnesties without regard to the nature of crimes committed by the applicants. Consequently, many perpetrators of international crimes continue to benefit from amnesty which has inhibited the fight against impunity for such crimes. The attempts by national courts to interpret the Act as permitting investigations and prosecutions of international crimes may not enhance such proceedings since the same courts upheld the constitutionality of the Act, yet in its current form, it shields perpetrators of these crimes from prosecution. There is need for amendment of the Act to expressly exclude perpetrators of international crimes from amnesty.*

## Introduction

Northern Uganda has been embroidered in a series of armed conflicts since January 1986 between the Government of Uganda (GoU) and various armed groups including the Lord's Resistance Army (LRA) in northern Uganda 'a quasi-religious armed group' led by Joseph Kony.<sup>1</sup> This conflict has been referred to, among others, by Jan Egeland, the former UN undersecretary -General, as 'one of the world's worst and most neglected humanitarian crises';<sup>2</sup> and as 'one of the most deadly insurgent movements in Africa'<sup>3</sup> leading to devastating effects on civilian population and their properties for over a decade. Several atrocities were committed by both, the GoU and LRA<sup>4</sup> including massive deaths and displacement of over 90% of

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\*Lecturer, Islamic University in Uganda (PhD, Brunel University; LLM in Human Rights Law, University of Nottingham and LLB, Makerere University. It should be noted that parts of this article are contained in my PhD thesis submitted to Brunel University.

<sup>1</sup> Kasaija Phillip Apuuli, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum*, 391-409, 392.

<sup>2</sup> Liu Institute for Global Issues, 'Justice and Reconciliation Project: Annual Report 2007', 4-16, 4, available at <<http://justiceandreconciliation.com/2008/01/2007-annual-report/>>, last visited, 30 April 2018.

<sup>3</sup> John Ahere and Dr Grace Maina, 'The Never-ending Pursuit of the Lord's Resistance Army: An Analysis of the Regional Cooperative Initiative for the Elimination of the LRA' (24 March 2013) ACCORD *Policy and Practice Brief*, 1-11, 1.

<sup>4</sup> Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011) 139.

the population in northern Uganda, massive abduction of civilians including children,<sup>5</sup> among others.

Early attempts at peace talks to end the conflict started in the 1990s which engaged several organisations, though they were not successful.<sup>6</sup> With increased military attacks by LRA against civilian population, the government moved all the rural people into ‘protected villages’, accounting for 80% of the population of Gulu district alone, by February 1997.<sup>7</sup> Upon failure to resolve the armed conflict through military might and the failure of various peace talks, the GoU enacted the Amnesty Act (2000) granting amnesty to all Ugandans fighting against GoU since 1986<sup>8</sup> when the National Resistance Movement/Army (NRM/A) attained political power.<sup>9</sup> Notably, many LRA armed personnel and commanders have benefitted from amnesty and by 2015 an estimated number of more than 27,000 armed personnel are reported to have received amnesty including senior commanders of the LRA such as Kenneth Banya and Sam Kolo Otto.<sup>10</sup> This brings into question the commitment of the GoU to prosecute perpetrators of international crimes.

This article examines the jurisprudence of national courts in the case of *Uganda v Thomas Kwoyelo*<sup>11</sup> to determine the extent to which these courts have advanced the fight against impunity for international crimes committed in northern Uganda. With this introduction, the article addresses the following issues; Firstly, highlights key provisions of the Amnesty Act to show how the Act sets out blanket amnesties irrespective of the crimes committed.

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<sup>5</sup> Errol p. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing Ltd 2010) 97; see also Nick Grono and Adam O’Brien, ‘Justice in Conflict? The ICC and Peace Processes’ in Nicholas Wadell and Phil Clark (eds), *Courting Conflict? Justice Peace and the ICC in Africa* (Royal African Society, March 2008) 13-20, 14.

<sup>6</sup> Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011) 137-139; see also Chris Dolan, ‘Peace and Conflict in Northern Uganda 2002-06’ in OkelloLucima (eds), *Protracted Conflict, Elusive Peace: Initiatives to end the Violence in Northern Uganda 2002-09 and the Juba Peace Process* (update to issue 11, 2010) (Accord, Conciliation Resources, 2010) 8-9, 9.

<sup>7</sup> Mark Bradbury, ‘An Overview of Initiatives for Peace in Acholi, Northern Uganda’ (The Collaborative for Development Action (CDA) October 1999) 3, available at <<http://www.cdacollaborative.org/publications/reflecting-on-peace-practice/rpp-case-studies-and-field-visit-reports/an-overview-of-initiatives-for-peace-in-acholi,-northern-uganda/>>, last viewed, 30 April 2018.

<sup>8</sup> Amnesty Act (2000) Cap 294, sec 2(1).

<sup>9</sup> Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 128.

<sup>10</sup> Integrated Regional Information Network (IRIN), ‘Forgive and Forget? Amnesty Dilemma Haunts Uganda’, Samuel Okiror, 12 June 2015, available at <<http://www.irinnews.org/report/101625/forgive-and-forget-amnesty-dilemma-haunts-uganda>> last visited, 30 April 2018.

<sup>11</sup> *Uganda v Thomas Kwoyelo* (Constitutional Appeal No. 01 of 2012), Supreme Court of Uganda (8 April 2015) (hereinafter, *Thomas Kwoyero Case*), Judgment of Hon. Dr. Esther Kisaakye, 6 (on file with the author).

Secondly, judicial decisions of the Constitutional Court of Uganda and Supreme Court of Uganda are examined with respect to two issues; 1) effect of the Amnesty Act on prosecutorial powers of the DPP and 2) effect of the Amnesty Act on the 1995 Constitution of Uganda and Uganda's international law obligations. Thirdly, the effect of these decisions on the fight against impunity in Uganda is examined. Lastly, is the conclusion that the enactment of the Amnesty Act of Uganda to ensure that armed personnel denounce the war in northern Uganda was a welcomed idea as it symbolised the need for peaceful resolution to armed conflicts. However, this has impeded national investigations and prosecutions of perpetrators of international crimes in Uganda due to the lack of exclusion of these crimes from amnesty. Without amending the Amnesty Act to exclude international crimes from amnesty, less will be done by national courts to limit the operation of the Amnesty Act in Uganda.

### **Issuance of Amnesty in Uganda**

The term 'amnesty' is defined in section 2 as 'a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'.<sup>12</sup>The effect is to bar criminal prosecution and punishment of any person for crimes committed. Issuance of amnesty in Uganda is an old practice previously used as a mechanism of shielding state agents from prosecution for their crimes and also persuading 'armed opposition groups' to disarm to ensure an end to armed conflicts.<sup>13</sup>

Right from independence, through President Idi Amin's regime in 1978 to President Yoweri Museveni's National Resistance Movement (NRM) regime in 1987, amnesties have been issued in a bid to solve political crises and disarm opposition forces.<sup>14</sup> Some amnesties excluded certain crimes and were limited in duration.<sup>15</sup>Other amnesties were specific such as amnesties

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<sup>12</sup>Amnesty Act (2000) sec 1(a).

<sup>13</sup> Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 206-207; see also Kasaija Phillip Apuuli, 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda' (2005) 5(2) *African Journal on Conflict Resolution* 33-61, 43.

<sup>14</sup> The Parliament of Uganda, 'Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000' (August 2013) para. 3.3.

<sup>15</sup> For instance, the 1987 amnesty law introduced by President Yoweri Museveni offered immunity to all opposition forces, combatant and non-combatants, their supporters as well as former employees of previous governments excluded 'heinous crimes' classified in its Article 2 as 'genocide, murder, kidnapping and rape.' This law was for a limited period of 3 months, renewable for another 3 months; See Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' Working Paper No.1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009) 19.

granted to insurgents like the UPDA,<sup>16</sup> which culminated into the surrender of its combatants and the subsequent ‘Peace Accord’ of 1988 between the GoU and the UPDA.<sup>17</sup> More so, other amnesties were in form of presidential pardons like those offered to military personnel of the West Nile Bank Front (WNBF),<sup>18</sup> the Allied Democratic Forces (ADF)<sup>19</sup> and later to the LRA in 1997.<sup>20</sup>

It was hoped that amnesty will act as an incentive to the LRA leaders to abandon hostilities, as well as increase defection of abductees<sup>21</sup> who were mainly child soldiers so as to avoid harming or punishing them<sup>22</sup> as the majority had been recruited forcefully into LRA forces.<sup>23</sup> Thus, the Acholi society lobbied for general amnesty for the LRA and prepared to receive LRA returnees back into the community ‘as their prodigal children.’<sup>24</sup> Therefore, with the popular support for amnesty in northern Uganda especially among the Acholi community who favoured pardoning the rebels in a bid to end the armed conflict;<sup>25</sup> together with government consultation of various stake holders like leaders of districts, churches and NGOs in 1998; general

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<sup>16</sup> Barney Afako, ‘Reconciliation and Justice: “MatoOput” and the Amnesty Act’ in OkelloLucima (eds), *Protracted Conflict, Elusive Peace: Initiatives to end the Violence in Northern Uganda 2002-09 and the Juba Peace Process* (update to issue 11, 2010) (Accord, Conciliation Resources, 2010) 64-67, 65.

<sup>17</sup> Louise Mallinder, ‘Uganda at a Crossroads: Narrowing the Amnesty?’ Working Paper No.1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Institute of Criminology and Criminal Justice, Queen’s University Belfast, March 2009) 19.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, 19.

<sup>20</sup> Ibid.

<sup>21</sup> Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 206; see also Renée Jeffery, ‘Forgiveness, Amnesty and Justice: The Case of the Lord’s Resistance Army in Northern Uganda’ (2011) 46(1) *Cooperation and Conflict* 78-95, 87 and Kasajja Phillip Apuuli, ‘Peace Over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) VS The International Criminal Court (ICC) in Northern Uganda’ (2011) 11(1) *Studies in Ethnicity and Nationalism* 116-129, 122.

<sup>22</sup> Renée Jeffery, ‘Forgiveness, Amnesty and Justice: The Case of the Lord’s Resistance Army in Northern Uganda’ (2011) 46(1) *Cooperation and Conflict* 78-95, 86.

<sup>23</sup> Roco Wat I Acoli, ‘Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration’ (September 2005) Liu Institute for Global Issues, Gulu District NGO Forum with the assistance of Ker Kwaro Acholi, 3.

<sup>24</sup> Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 206.

<sup>25</sup> Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011) 159; 4; see also Eric Blumenson, ‘The Challenge of A Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court’ (2006) 44 *Columbia Journal of Transitional Law* 797-867, 806 and Alexander K.A. Greenawalt, ‘Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court’ (2009) 50(1) *Virginia Journal of International Law* 107-162, 149.

amnesties were granted to the LRA to disarm<sup>26</sup> after domestic<sup>27</sup> and international pressure was mounted to end the LRA rebellion. This resulted into the enactment of the Amnesty Act 2000, offering ‘pardon to all Ugandans engaged or engaging in acts of rebellion against the government of Uganda since 26 January 1986.’<sup>28</sup> Notably, the Act does not mention any end date which means that crimes committed in the future are also considered under the Amnesty Act until when the Minister of Internal Affairs declares the lapsing of Part II of the Amnesty Act.<sup>29</sup>

The Act further provides that the person who engages in war or armed rebellion with the GOU by actual participation, collaboration with perpetrators of the war, assists or aids others in prosecution of the war or commits any other crime in furtherance of the war shall not be prosecuted.<sup>30</sup> This in effect completely exonerate the amnesty applicant from liability for any crime committed. The Act does not distinguish between the types of crimes committed and is silent on the requirement of certifying eligibility for amnesty as the case for amnesties issued under section 3(3) and 3(4) of the Amnesty Act which require the DPP to take into consideration of certain factors before certifying that the applicant is eligible for amnesty.<sup>31</sup> This occurs with respect to a few persons who are in custody but not the majority who voluntarily surrender as anticipated under section 3(1) of the Amnesty Act.

Perhaps that is why some scholars have argued that the Amnesty Act granted blanket amnesty to rebels who dis armed voluntarily.<sup>32</sup> This is based

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<sup>26</sup> Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International 2002) 39.

<sup>27</sup> In 1998, more pressure emanated from the civil society including religious and cultural leaders, led by the Acholi Religious Leaders Peace Initiative (ARLPI) who advocated for ‘blanket amnesty for all insurgents’ and a peaceful resolution of the conflict; as well as the Uganda Human Rights Commission, the Acholi Parliamentary Association and Kacoke Madit, an Acholi diaspora association. See Louise Mallinder, ‘Uganda at a Crossroads: Narrowing the Amnesty?’ Working Paper No.1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Institute of Criminology and Criminal Justice, Queen’s University Belfast, March 2009) 20.

<sup>28</sup> Amnesty Act (2000) sec 2(1).

<sup>29</sup> Amnesty (Amendment) Act (2006), sec 16(3).

<sup>30</sup> Amnesty Act (2000) sec 2(1)-(2).

<sup>31</sup> These provisions require the DPP to certify that he or she is satisfied that the amnesty applicant falls within the provisions of section 3 and that the person is not charged with any other offence not covered under section 3 (see Amnesty Act (2000) sec 3(3)). The DPP is also required to investigate all the cases the person is charged with and take steps to ensure the release of this person if he or she qualifies for amnesty and after renouncing the rebellion (sec 3(4)).

<sup>32</sup> See for example, Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011) 159; Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International 2002) 41; Mahnoush H. Arsanjani and W. Michael Reisman, ‘The Law-in-Action of the International Criminal Court’ (2005) 99(2) *The American Journal of International Law* 385-403, 392 and Alexander K.A.

on the fact that the only conditions set out in the Act before amnesty is granted are that; (1) the person should report to a designated place,<sup>33</sup> (2) renounce and abandon the war or armed rebellion and (3) surrender any weapons in his her possession. Upon which he or she shall be given a certificate of amnesty.<sup>34</sup> This immunises such a person from criminal liability and no requirement for truth-telling or participation in any transitional justice mechanism are required.

An Amnesty Commission was established in 2002 to implement this Act. This Commission has got a 'wide mandate' which encompasses persuading opposition military personnel to embrace amnesty, as well as monitoring programs of disarmament, demobilization, reintegration and resettlement of former members of the opposition forces and community sensitization about the Amnesty Act.<sup>35</sup> The Amnesty Commission was entrusted with the responsibility of granting amnesty to 'reporters'<sup>36</sup> who were associated with rebel activities upon denouncing and abandoning such activities; who signed a declaration, registered and then issued with an Amnesty Certificate mentioned above. This is accompanied with a package for resettlement which encompassed materials in kind like seeds and farming equipment, household utensils and beddings as well as cash.<sup>37</sup> It is noteworthy that the activities of the Amnesty Commission are funded by various stakeholders including the European Union, USAID, DANIDA, Britain, Ireland, Saudi Arabia, and the Netherlands.<sup>38</sup> However, the Commission faces

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Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50(1) *Virginia Journal of International Law* 107-162, 113.

<sup>33</sup> These include the 'nearest police unit, a chief, a member of the executive committee of a local government unit, a magistrate or a religious leader within the locality'. See Amnesty Act (2000) sec 3(1).

<sup>34</sup> See Amnesty Act (2000) sec 3(1)(a)-(d).

<sup>35</sup> Cecily Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations' (2008) 28(2) *Boston College Third World Law Journal* 345-400, 354.

<sup>36</sup> A reporter is a person who seeks to be granted amnesty under the Act, see Amnesty Act (2000) sec 1(e).

<sup>37</sup> Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 210; see also Renée Jeffery, 'Forgiveness, Amnesty and Justice: The Case of the Lord's Resistance Army in Northern Uganda' (2011) 46(1) *Cooperation and Conflict* 78-95, 86 and Kasaija Phillip Apuuli, 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda' (2005) 5(2) *African Journal on Conflict Resolution* 33-61, 45.

<sup>38</sup> Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' Working Paper No.1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009) 29.

financial constraints<sup>39</sup> leading to a backlog of reporters who fail to obtain the reinsertion packages.<sup>40</sup>

That notwithstanding, it is arguable that the Amnesty Act in its current form provides for blanket amnesties and needs reform to ensure that Uganda prosecutes perpetrators of international crimes committed during the war in northern Uganda. Thus, the discussion that follows examines the jurisprudence of national courts in Uganda to establish whether these courts advance the fight against impunity for international crimes.

### **Judicial Decisions of the Constitutional Court of Uganda and Supreme Court of Uganda**

Thomas Kwoyelo a former commander of the Lord's Resistance Army (LRA) was captured by the Uganda People's Defence Forces (UPDF) in the Democratic Republic of Congo (DRC) in 2008.<sup>41</sup> On 6 September 2010, the DPP brought charges against Thomas Kwoyelo before the Chief Magistrates Court at Buganda Road for various crimes under the Geneva Conventions Act.<sup>42</sup> Criminal proceedings against Thomas Kwoyelo were commenced before the ICD on 11 July 2011<sup>43</sup> and the charge sheet was amended by adding other charges in the alternative, under the Penal Code Act of Uganda (1950).<sup>44</sup> A reference was made to the Constitutional Court of Uganda by the ICD on objections from Thomas Kwoyelo's defence team that 'he was indicted for offences for which he qualified for amnesty under the Amnesty Act.'<sup>45</sup> Thus, Thomas Kwoyelo challenged unequal treatment by the DPP for declining to grant him amnesty like other former LRA commanders. The decision of the Constitutional Court was made on 22 September 2011 upholding the constitutionality of the Amnesty Act basing on the purpose of this Act<sup>46</sup> and directed the ICD to 'cease the trial' against Thomas Kwoyelo.<sup>47</sup> The Attorney General lodged an appeal to the Supreme Court on

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<sup>39</sup> The Commission has experienced financial constraints since inception which have inhibited its efficient operation. It is mentioned that in the Financial Year 2011/12 that it was 'underfunded to the tune of UGX. 3.12bn while in the FY 2010/11 and 2009/10, the annual funding gap averaged UGX. 3bn.' See The Parliament of Uganda, 'Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000' (August 2013) para. 12.2.

<sup>40</sup> Louise Mallinder, 'Uganda at a Crossroads: Narrowing the Amnesty?' Working Paper No.1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009) 30.

<sup>41</sup> *Thomas Kwoyero Case*, above n 11, independent judgment of Hon. Dr. Esther Kisaakye, 2.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 6.

<sup>45</sup> *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Petition No. 036/11) Constitutional Court of Uganda (21 September 2011) 4-5.

<sup>46</sup> *Ibid.*, 20.

<sup>47</sup> *Ibid.*, 25.



11 April 2012.<sup>48</sup> The Supreme Court delivered its judgment on 8 April 2015 upholding the constitutionality of the Amnesty Act as well as the DPP's prosecutorial powers and ordered that the trial against Thomas Kwoyelo should continue.<sup>49</sup> Details of these decisions are examined below.

*Effect of the Amnesty Act (2000) on Prosecutorial Powers of the Director of Public Prosecutions (DPP)*

National courts in Uganda decided that the Amnesty Act does not infringe the DPP's prosecutorial powers. Notably, the Constitutional Court of Uganda majorly discussed the role of the DPP under the Amnesty Act and failed to balance this discussion with the constitutional duties of the DPP. The court cited section 3(3) of the Amnesty Act which requires the DPP to certify that the amnesty applicant (in lawful detention) satisfies conditions under section 2 of the Amnesty Act and that such a person is 'not facing any other criminal charges unrelated to the rebellion.'<sup>50</sup> If the person qualifies for amnesty, the DPP is required to take steps to ensure that this person is released.<sup>51</sup>

Basing on the above provision, the court held that the Amnesty Act did not infringe the DPP's prosecutorial powers of the reasoning thus: 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 of the Geneva Conventions Act, if any ... The powers of the DPP to prosecute in our view were not infringed upon by the impugned sections. They are valid.<sup>52</sup>

Impliedly, the DPP still has powers over military personnel who are ineligible for amnesty for instance, persons included on the list issued by the Minister of Internal Affairs as ineligible for amnesty; or members of the opposition armed forces who refuse to renounce the rebellion; or state military forces who are not beneficiaries under the Amnesty Act.

This argument is implausible because the Amnesty Amendment Act (2006)<sup>53</sup> which entrusts the Minister with powers to declare persons ineligible

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<sup>48</sup> Kasande Sarah Kihika and Meritxell Regué, 'Pursuing Accountability for Serious Crimes in Uganda's Courts: Reflections on the Thomas Kwoyelo Case' ICTJ (January 2015) 6, available at <<http://www.ictj.org/publication/pursuing-accountability-serious-crimes-uganda>> last visited, 30 April 2018.

<sup>49</sup> *Thomas Kwoyero Case*, above n 11, 65-66.

<sup>50</sup> *Ibid*, judgment of the Constitutional Court, 22. See also Amnesty Act (2000) sec 2(1).

<sup>51</sup> Amnesty Act (2000) sec 3(4).

<sup>52</sup> *Thomas Kwoyero Case*, above n 45, judgment of the Constitutional Court, 23 emphasis added.

<sup>53</sup> Amnesty (Amendment) Act (2006), sec 2A provides; '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 made with the approval of Parliament.' Available at <<https://www.legal->

for amnesty has never been implemented. Additionally, prosecution of state agents who may have committed grave breaches of the Geneva Conventions Act is practically not feasible. Under article 120(3)(b) of the 1995 Constitution of Uganda, the DPP has the function of instituting ‘criminal proceedings against any person or authority in any court with competent jurisdiction *other than a court martial*.’<sup>54</sup> Further still, military personnel of Uganda are subject to military law under section 119(1)(a)-(b) of the Uganda Peoples Defence Forces Act (UPDF) Act (2005). The DPP may not be in position to proceed against state agents. The decision of the Constitutional Court that the DPP had the option of prosecuting state agents or persons declared ineligible for amnesty is not feasible in practice.

With regard to Supreme Court of Uganda, the court cited article 120(3) of the 1995 Constitution of Uganda which provides for functions and powers of the DPP<sup>55</sup> as well as section 3(3)-(4) of the Amnesty Act which provide for the role of the DPP.<sup>56</sup> The court stated that the ‘legislature would not have spelled out such a role of the DPP if it was not mindful of the Constitutional position of the DPP.’<sup>57</sup> The court added that the DPP was required to satisfy himself that the person applying for amnesty fulfils conditions under the Amnesty Act and other laws of Uganda.<sup>58</sup> Failure of the conditions, the DPP would exercise his prosecutorial powers<sup>59</sup> without giving reasons for declining to certify amnesty.<sup>60</sup> Thus, the court concluded that ‘... the powers of the DPP to prosecute have not been violated or impinged upon in any way which is inconsistent with the Constitution.’<sup>61</sup>

Therefore, both the Constitutional Court and the Supreme Court decided that the Amnesty Act did not violate the DPP’s prosecutorial powers since the DPP could prosecute persons ineligible for amnesty. Thus, declared the Amnesty Act as valid law. Implicitly, these decisions endorsed issuance

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[tools.org/uploads/tx\\_ltpdb/AmnestyAmendment\\_Act\\_2006\\_02.pdf](https://tools.org/uploads/tx_ltpdb/AmnestyAmendment_Act_2006_02.pdf)> last visited, 30 April 2018.

<sup>54</sup> 1995 Constitution of Uganda, emphasis added.

<sup>55</sup> *Thomas Kwoyero Case*, above n 11, 24. The functions of the DPP under Article 120(3)(a)(b) of the 1995 Constitution of Uganda include directing ‘the police to investigate any information of a criminal nature’ as well as ‘institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial’.

<sup>56</sup> *Thomas Kwoyero Case*, above n 11, *Ibid*, 26. Under the Amnesty Act (2000), above n 72, sec 3(3) provides that a reporter in custody ‘shall not be released from custody until the Director of Public Prosecutions has certified that he or she is satisfied’ that; (a) ‘the person falls within the provisions of section 3 and that (b) ‘he or she is not charged or detained to be prosecuted for any offence not falling under section 3.’ This is done under section 3(4) where the DPP is required to investigate the case of this person for criminal offences and if the person qualifies for amnesty, the DPP takes steps to enable release of this person from custody.

<sup>57</sup> *Thomas Kwoyero Case*, above n 11, *Ibid*.

<sup>58</sup> *Ibid*, 27.

<sup>59</sup> *Ibid*, 31, 50.

<sup>60</sup> *Ibid*, 34 and 56.

<sup>61</sup> *Ibid*, 35, 65.

of amnesty to persons alleged to have committed ICC crimes since no clear criteria is established under the Amnesty Act to determine the nature of crimes committed by amnesty applicants.

*Effect of the Amnesty Act (2000) on the 1995 Constitution of Uganda and Uganda's International Law Obligations*

National courts in Uganda decided that the Amnesty Act was constitutional and did not infringe Uganda's international law obligations. The Constitutional Court of Uganda relied on the purpose of enacting the Amnesty Act by Parliament as intended to cure a mischief (quelling the rebellion) and held that 'there was nothing unconstitutional ... in the purpose of the [Amnesty] Act.'<sup>62</sup> However, the court did not examine the effect of amnesty on international law obligations of Uganda. The court merely stated that there were no 'uniform international standards or practices which prohibit states from granting amnesty'.<sup>63</sup> No reference was made to any international law norms; thus, the statement was not supported by evidence.

On the contrary, the Supreme Court noted that while 'there are no uniform standards or practices in respect of amnesty ... there appears to be a minimum below which amnesty may not be permitted in respect of grave crimes as recognized in international law.'<sup>64</sup> Thus, the court analysed provisions of the Amnesty Act and stated that the purpose and implementation of the Amnesty Act would not 'include granting amnesty to grave crimes committed by an individual or group for purposes other than in furtherance or cause of war or rebellion.'<sup>65</sup> The person applying for amnesty must show that he or she committed crimes while participating in war or armed rebellion.

According to the Supreme Court, participating in the war or armed rebellion did not encompass 'wilful murder of innocent civilians, men, women and children.'<sup>66</sup> Such crimes cannot be regarded as having been committed in 'furtherance of the war or rebellion'<sup>67</sup> for purposes of issuance of amnesty. The court held that crimes which are 'committed NOT in furtherance of the rebellion or in the cause of war are grave breaches which must be punished.'<sup>68</sup> Basing on this reasoning, the court concluded that since the Amnesty Act 'does not grant blanket amnesties for all crimes', it was not

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<sup>62</sup> *Thomas Kwoyero Case*, above n 45, judgment of the Constitutional Court, 20.

<sup>63</sup> *Ibid*, 24.

<sup>64</sup> *Thomas Kwoyero Case*, above n 11 (judgment of the Supreme Court) 63.

<sup>65</sup> *Ibid*, 30. This was supported with Sec 2(2) which provides; 'A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for *the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion*. See Amnesty Act (2000) emphasis added.

<sup>66</sup> *Ibid*, 53; see also 41, 43.

<sup>67</sup> *Ibid*, 41 and 62-63.

<sup>68</sup> *Ibid*, 41.

‘inconsistent with Uganda’s international law obligations...’<sup>69</sup> and ‘does not violate the Constitution of Uganda.’<sup>70</sup>

Therefore, both the Constitutional Court and the Supreme Court decided that the Amnesty Act is not contrary to international law obligations of Uganda. The Constitutional court relied on the purpose of enacting the Amnesty Act and the Supreme Court relied on conditions provided under the Act which the DPP had to consider before certifying amnesty.

### **Effect of Judicial Decisions in *Thomas Kwoyelo Case* on the Fight against Impunity in Uganda**

The decisions of the Constitutional Court and Supreme Court in Uganda raise important issues regarding the fight against impunity for international crimes committed in Uganda. Both courts upheld the constitutionality of the Amnesty Act and declared that the Act does not infringe the DPP’s prosecutorial powers. However, these courts never examined the effect of amnesties issued under section 3(1) of the Amnesty Act which are not certified by the DPP.<sup>71</sup>

Many amnesties may be issued by designated authorities to persons who voluntarily surrender after renouncing the rebellion. Since such persons are not in custody, their applications for amnesty are not subject to certification by the DPP. It is not clear whether authorities who issue these amnesties assess the nature of crimes committed by amnesty applicants to determine their eligibility for amnesty.

Nowhere in the judgments of both courts was this category of amnesties examined. Thus, the legality of amnesties issued under section 3(1) by other authorities without certification of the DPP was left unanswered. Both courts missed the opportunity to make pronouncement on lack of harmonisation of the Amnesty Act with the 1995 Constitution of Uganda. In effect, courts in Uganda endorsed validity of amnesty which shields perpetrators of international crimes from prosecution hence curtailing domestic proceedings for these crimes.

In the absence of clear procedural guidelines for issuing amnesty, amnesties issued without the DPP’s role will remain questionable as regards to fulfilling the international legal obligations of Uganda. This sustains the argument that amnesties issued without certification of the DPP are blanket amnesties and curtail prosecutorial powers of the DPP. The Amnesty Act in its current form curtails investigations and prosecutions for international crimes hence limiting Uganda’s fulfilment of its international law obligations as set out in various treaties such as the Geneva Conventions with respect to

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<sup>69</sup> Ibid, 65, 43.

<sup>70</sup> Ibid, 65.

<sup>71</sup> Amnesty Act (2000) sec 3(1).

grave breaches.<sup>72</sup>This is exacerbated by judicial decisions of courts in Uganda which endorsed constitutionality of the Amnesty Act.

Therefore, the judicial decisions of the Constitutional Court and Supreme Court in Uganda seem to have made less impact on the fight against impunity for international crimes in Uganda. By endorsing the Amnesty Act as valid, many perpetrators of these crimes were afforded an opportunity to voluntarily surrender and denounce their involvement in the war. Such persons are eligible for amnesty as per section 3(1) without the DPP's role of certifying eligibility for amnesty. This curtails prosecutorial powers of the DPP and inhibits the GoU from fulfilling its international law obligations of ensuring that perpetrators of international crimes are investigated and prosecuted.

### **Conclusion**

The armed conflict in northern Uganda led to wanton violations of human rights of the people in this region and beyond. Such state of affairs prompted the GoU to engage other means possible after military action failed to forestall the armed rebellion as mentioned already. The enactment of the Amnesty Act was meant to entice the rebels to denounce the rebellion to ensure that peace was restored in northern Uganda. However, amnesties granted shielded all categories of perpetrators from criminal liability to the extent of benefiting military commanders of the LRA such as Sam Kolo. This has had far reaching impact on Uganda's international legal obligations to address grave breaches of the Geneva Conventions.<sup>73</sup>

The interpretation provided by national courts of the Amnesty Act may not be that useful in ensuring that the GoU fulfils its legal obligations of investigating and prosecuting perpetrators of grave breaches of the Geneva Conventions mentioned above. This because these courts did not pronounce the Amnesty Act as unconstitutional which means that the Act continues to operate as valid with the possibility of benefitting perpetrators of international crimes. The current debate on the need to amend the Amnesty Act to limit the amnesties by excluding perpetrators of international crimes is welcome and it is yet to be seen whether the proposed amendments to the Act<sup>74</sup> will soon

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<sup>72</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31, art 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949) 75 UNTS 85, art 50; Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135, art 129 and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287, art 146 (hereinafter, Geneva Conventions), all available at <<https://www.icrc.org/ihl>> last visited, 30 April 2018.

<sup>73</sup> This is set out under the Geneva Conventions Act (1964), sec 2(1).

<sup>74</sup> According to the Report by the Justice Law and Order Sector, the Amnesty Amendment Bill 2015 is yet to be passed the relevant Ministries for consideration. The proposed amendment provides for conditional amnesty to persons 'involved in acts associated with war or armed

be operationalized to pave way for national trials for perpetrators of international crimes.

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rebellion' against the GoU but excludes persons alleged to have committed international crimes. See The Justice Law and Order Sector (JLOS), 'Annual Performance Report 2015/16', 36-37 and 20.

