

## SEEKING JUSTICE IN UGANDAN COURTS: AMNESTY AND THE CASE OF THOMAS KWOYELO

Uganda has long been plagued with an internal conflict involving the national government and the Lord's Resistance Army ("LRA"), a rebellion group infamous for abducting children and forcing them to fight as soldiers in war.<sup>1</sup> Until 2003, the Ugandan government had handled the conflict without attracting much international attention.<sup>2</sup> In that year, however, Ugandan President Yoweri Museveni referred the situation to the International Criminal Court ("ICC"), asking the prosecutor to undertake an investigation of the war crimes committed by the LRA.<sup>3</sup> The ICC chief prosecutor, Luis Moreno Ocampo, initiated an investigation and issued arrest warrants for five major leaders in the LRA.<sup>4</sup>

Five years later, in 2008, Uganda established the International Crimes Division ("ICD"), a division within its High Court, to try individuals for war crimes.<sup>5</sup> In September 2011 the ICD tried its first case in which Uganda prosecuted a former LRA colonel, Thomas Kwoyelo, for fifty-three charges of war crimes.<sup>6</sup> The ICD ultimately granted Kwoyelo

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1. GUS MARTIN, UNDERSTANDING TERRORISM: CHALLENGES, PERSPECTIVES, AND ISSUES 186 (3d ed. 2009).

2. JACQUELINE GEIS & ALEX MUNDT, WHEN TO INDICT? THE IMPACT OF TIMING OF INTERNATIONAL CRIMINAL INDICTMENTS ON PEACE PROCESSES AND HUMANITARIAN ACTION 5 (Brookings Institution, 2009), available at [http://www.brookings.edu/~media/research/files/papers/2009/4/peace%20and%20justice%20geis/04\\_peace\\_and\\_justice\\_geis.pdf](http://www.brookings.edu/~media/research/files/papers/2009/4/peace%20and%20justice%20geis/04_peace_and_justice_geis.pdf); see also Heidi Rose, Irene Sattarzadeh & Erin Baines, *Northern Uganda—Human Security Update: Pursuing Peace and Justice International and Local Initiatives; Conflict and Development Programme*, LIU INST. FOR GLOBAL ISSUES, at 2 (May 2005) [hereinafter Rose et al.], [http://www.ligi.ubc.ca/sites/liu/files/Publications/HSUpdate-Northern\\_UgandaMay05.pdf](http://www.ligi.ubc.ca/sites/liu/files/Publications/HSUpdate-Northern_UgandaMay05.pdf).

3. Rose et al., *supra* note 2, at 2. Although Museveni's referral to the ICC was initially viewed by the international community as groundbreaking, the action was later perceived as a maneuver by the President to improve his public image internationally. *Id.*

4. The five arrest warrants are for Joseph Kony—the alleged Commander-in-Chief of the LRA, Vincent Otti—the alleged Vice-Chairman and Second-in-Command of the LRA, Okot Odhiambo—the alleged Deputy Army Commander of the LRA, Dominic Ongwen—the alleged Brigade Commander of the Sinia Brigade of the LRA, and Raska Lukwiya—the alleged Deputy Army Commander for the LRA. *Situations in Uganda*, INT'L CRIM. COURT, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx) (last visited Mar. 28, 2013).

5. *Uganda: International Crimes Division of the High Court of Uganda*, JUSTICE IN PERSPECTIVE, <http://www.justiceinperspective.org.za/africa/uganda/commission-of-inquiry-into-the-disappearances-of-people-in-uganda.html> (last visited Feb. 12, 2013).

6. *Id.*

amnesty for the fifty-three charges, pursuant to the Amnesty Act of Uganda.<sup>7</sup>

Part I of this Note outlines the background of the conflict in Uganda, the problems and benefits that came with the ICC intervention in 2003, the establishment of the ICD, and an overview of the Amnesty Act of 2000. Part II focuses specifically on the facts and holdings of the Kwoyelo case, and will evaluate, in light of this precedent, whether the ICD can truly allow Uganda to fulfill its obligations under international and domestic law. Finally, this Note concludes with a discussion about Uganda's international obligations and the effectiveness of the Amnesty Act and recommends various ways for the Ugandan government to amend the law in order to preserve amnesty while effectively pursuing justice.

## I

### A. *History of the LRA and the Ugandan Government*

The LRA originated in northern Uganda in 1988 when its founder, Joseph Kony, declared his desire to overthrow the Ugandan government and rule Uganda according to the Bible's Ten Commandments.<sup>8</sup> Scholars have speculated that the LRA developed as an attempt by Ugandans in the north to regain the power they lost in 1986 with the rise of the current president, Yoweri Museveni.<sup>9</sup>

To maintain its size and prominence, the LRA engages in child abductions—kidnapping young boys and girls to serve as soldiers and sex slaves.<sup>10</sup> These children are often forced to walk on long marches, endure beatings, and fight one another.<sup>11</sup> Once abducted, many of these children never return home.<sup>12</sup>

7. *Ugandan LRA Rebel Thomas Kwoyelo Granted Amnesty*, BBC NEWS (Sept. 22, 2011), <http://www.bbc.co.uk/news/world-africa-15019883>.

8. Ksaija Phillip Apuuli, *The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda*, 15 CRIM. L.F. 391, 392–94 (2004). Kony declared himself to be a messianic prophet who wanted to return power to the Acholi populations of the country. *Id.*

9. *Id.* Apuuli notes that the people of northern Uganda had ruled the country for twenty-two years prior to 1986. *Id.* Kony pledged that he would overthrow the government and purify the Acholi people of “witches and sinners.” Human Rights Watch/Africa Human Rights Watch Children's Rights Project, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda*, at 12 (1997), available at <http://www.hrw.org/legacy/reports97/uganda/#IL.%20THE%20ABDUCTION%20OF%20CHILDREN%20BY>.

10. Phuong N. Pham, Patrick Vinck & Eric Stover, *The Lord's Resistance Army and Forced Conscriptation in Northern Uganda*, 30 UNIV. HUM. RTS. 404, 404–11 (2008).

11. Human Rights Watch/Africa Human Rights Watch Children's Rights Project, *supra* note 9, at 14–15. Human Rights Watch reports that children are frequently beaten or forced to beat other

To avoid LRA abduction, Ugandan children commute from their rural and remote villages to more populated towns where they sleep on the streets, in parks, or in churches.<sup>13</sup> Furthermore, the United Nations estimates that there are approximately 1.2 million internally displaced persons who have fled their homes in fear of the LRA.<sup>14</sup> The LRA terrorizes the Acholi population in northern Uganda by killing citizens, looting homes and public buildings, and burning villages and fields.<sup>15</sup>

Although discussion regarding the conflict in northern Uganda usually centers on the LRA's abuses of children, the Ugandan government has also been accused of recruiting children for its armed forces.<sup>16</sup> Moreover, the Ugandan Constitution explicitly states that no children under the age of sixteen can be recruited to serve in the army,<sup>17</sup> yet there is little enforcement of the law to protect the rights of children on the ground.<sup>18</sup>

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children and are repeatedly told that they will be killed if they try to run away. *Id.* Children who fall behind during marches or fail to obey orders are also killed. HUMAN RIGHTS WATCH, *STOLEN CHILDREN: ABDUCTION AND RECRUITMENT IN NORTHERN UGANDA 2* (Mar. 2003), available at <http://www.hrw.org/sites/default/files/reports/uganda0403.pdf>.

12. According to a 2006 Security Council report, approximately 2 million people have been displaced, and an estimated 100,000 people are reported to have died as a result of the prolonged conflict. U.N. Secretary-General, *Report of the Secretary-General pursuant to resolutions 1653 and 1663 (2006)*, ¶ 3, U.N. Doc. S/2006/478 (Feb. 16, 2012), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Uganda%20S2006478.pdf>. Although the total number of abducted children is unknown, approximately 20,000 have returned home. *Id.* ¶ 15. The rate of abductions increased dramatically in early 2002, when a military offensive launched by the Uganda People's Defense Force resulted in the LRA returning to Uganda from their camps in Southern Sudan. HUMAN RIGHTS WATCH, *supra* note 11, at 2.

13. See Jihun Sohn, *Unicef Executive Director, Ann M. Veneman, Highlights the Plight of Children Caught in Uganda's Conflict*, UNICEF (July 25, 2005), [http://www.unicef.org/infobycountry/uganda\\_27744.html](http://www.unicef.org/infobycountry/uganda_27744.html). UNICEF estimates that 40,000 of these "night commuters" travel from their homes to the towns every night. *Id.*

14. Apuli, *supra* note 8, at 395. These individuals escape to camps called "protected villages" where they think they will be safe from the LRA. *Id.* The LRA often targets these camps, however, as they are typically filled with young children. *Id.*

15. HUMAN RIGHTS WATCH, *supra* note 11, at 4.

16. *Id.* at 19. Children are typically recruited into local defense units to provide security for camps or villages. *Id.* However, the Human Rights Watch reports that many children do not return to their home areas and are eventually used to fight with the UPDF against the LRA. *Id.* One source reported that in August 2000, the Ugandan Government transported 703 youths to Kyankwanzi for military training. COALITION TO STOP THE USE OF CHILD SOLDIERS, *supra* note 2. The Ugandan government has also reportedly facilitated recruitment of children by its allies in the Democratic Republic of Congo and trained them in Uganda. *Id.*

17. CONST. OF THE REPUBLIC OF UGANDA art. 34(3)-(5) (1995) (Uganda). The Constitution states that children "[s]hall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development." *Id.* Furthermore, the National Resistance Army Statute 3/92, the Conditions of Service Men Regulations 1993, and the Conditions of Services (Officers) Regulations of 1993 all require that any recruit must be over 18 and under 30 years of age.

18. COALITION TO STOP THE USE OF CHILD SOLDIERS, *CHILD SOLDIERS 1379 REPORT 31*, at 96 (2002), available at [http://www.essex.ac.uk/armedcon/story\\_id/1379%20Report%20.pdf](http://www.essex.ac.uk/armedcon/story_id/1379%20Report%20.pdf).

The Government of Uganda reportedly admitted that Museveni's National Resistance Army used child soldiers in the 1980s.<sup>19</sup> Furthermore, a 2000 US State Department report stated that some national recruiters knowingly allow children under the age of seventeen to enlist.<sup>20</sup> The same report stated that the national army detained LRA child soldiers for several months and used the children to help find LRA landmines and army caches.<sup>21</sup>

### B. International Intervention

Since the beginning of the conflict with the LRA, the Ugandan government has maintained that the struggle is confined to Uganda and should be handled by Uganda alone, without international intervention.<sup>22</sup> Although the Ugandan government allowed humanitarian aid to come into the country, few other international organizations were permitted to provide resources.<sup>23</sup> However, this tradition of isolationism ended in 2003 when Museveni reached out to the international community and referred to the ICC a prosecution regarding the LRA's crimes against humanity.<sup>24</sup> In 2004, the Chief Prosecutor for the International Criminal Court, Luis Moreno Ocampo, opened an investigation into the conflict.<sup>25</sup> On October 14, 2005, Ocampo unsealed the warrants of arrest for the five leaders of the LRA, which had been issued and sealed by Pre-Trial Chamber II of the ICC on July 8th, 2005.<sup>26</sup>

19. COALITION TO STOP THE USE OF CHILD SOLDIERS, *supra* note 2, at 96.

20. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *Uganda: Country Reports on Human Rights Practices*, US DEP'T OF STATE (Feb. 23, 2001), <http://www.state.gov/j/drl/rls/hrrpt/2000/af/847.htm>.

21. *Id.*

22. Apuuli, *supra* note 8, at 396.

23. *Id.* at 396-97.

24. *Id.* at 397.

25. Press Release, International Criminal Court (ICC), Prosecutor of the International Criminal Court opens an investigation into Northern Uganda (2004), available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx); see also ICC: Investigate All Sides in Uganda, HUMAN RIGHTS WATCH (Feb. 5, 2004), <http://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda>. In 2004, the ICC prosecutor, Luis Moreno Ocampo, announced that he would begin an ICC investigation into crimes committed in Uganda after Museveni referred the crimes of the Lord's Resistance Army to the court. Uganda was the first government to refer a case to the ICC since the court began its work. The Ugandan Government ratified the Rome Statute in 2002, and by referring the case to the ICC, the government committed to fully cooperate with the investigation. *Id.*

26. The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Case No. ICC-02/04-01/05 (Mar. 10, 2009) (description of case and documents involved are available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related)

After the arrest warrants were unsealed, peace negotiations known as the “Juba peace talks” began between the government of Uganda and the LRA.<sup>27</sup> In June of 2007, the delegates signed an Agreement on Accountability and Reconciliation, which established a framework to pursue peace and end the conflict with the LRA.<sup>28</sup> The Agreement stated specifically that “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.”<sup>29</sup> The Agreement also discussed the need to provide reparations for victims and representation for the accused, and it obligated the Ugandan government to “address conscientiously” the ICC arrest warrants relating to the members of the LRA.<sup>30</sup>

In February 2008, the Government and the LRA signed an Annexure to the Agreement, which specified the mechanisms that would be established to achieve the stated goals of the Juba peace talks.<sup>31</sup> One of the provisions of the Annexure provided for a special division of the High Court of Uganda to try persons responsible for serious crimes.<sup>32</sup> Under the principle of “complementarity,” a state’s domestic courts are given primacy of jurisdiction for prosecuting individuals unless the ICC determines the state is “unwilling or unable genuinely to carry out the prosecution.”<sup>33</sup> The Juba Peace talks never resulted in a final peace accord because Joseph Kony

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[%20cases/icc%200204%200105/Pages/uganda.aspx](http://www.pulp.up.ac.za/pdf/2011_04/2011_04.pdf)). The five original arrest warrants were for Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwya. *Id.* Together they had over 80 charges against them for crimes against humanity and war crimes. *Id.*

27. Thomas Unger & Marieke Wierda, *Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice*, in BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT 263, 270 (Kai Ambos, Judith Large, & Marieke Wierda eds., 2009). These peace talks were mediated by the Vice President of the Government of South Sudan, Riek Machar. *Id.* LRA leaders at the time maintained that the ICC arrest warrants would remain an obstacle to the success of the peace talks. *Id.* Some scholars, however, speculated that the arrest warrants isolated LRA members and incentivized them to participate in the peace talks. Benson Olugbuo, *Positive Complementarity and the Fight Against Impunity in Africa*, in PROSECUTING INTERNATIONAL CRIMES IN AFRICA 205 (Chacha Murungu & Japhet Biegon eds., 2011), available at [http://www.pulp.up.ac.za/pdf/2011\\_04/2011\\_04.pdf](http://www.pulp.up.ac.za/pdf/2011_04/2011_04.pdf).

28. Thomas Unger & Marieke Wierda, *supra* note 27, at 272.

29. *Id.*

30. *Id.*

31. *Id.* The Annexure included provisions for (1) the establishment of a special division of the Ugandan High Court to try those responsible for serious crimes; (2) a “commission of inquiry into the past and related events”; (3) reparations; and (4) traditional justice. *Id.*

32. *Id.*

33. Rome Statute of the International Criminal Court art. 17(1)(a), opened for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), available at <http://untreaty.un.org/cod/icc/statute/rome.htm>.

failed to appear on the two separate occasions set for the signing.<sup>34</sup> He cited the ICC indictment as a reason for his failure to sign the peace deal.<sup>35</sup>

### C. *Establishment of the International Crimes Division*

Judicial power in Uganda is constitutionally vested in courts that are established in a hierarchy.<sup>36</sup> The ICD was established in 2009 by the Ugandan government as part of its efforts to implement the Juba peace agreements.<sup>37</sup> The ICD is a special division of the High Court and is not an international court. The ICD has jurisdiction over serious international crimes, including genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy, and any other international crime defined in Uganda's Penal Code Act, the 1964 Geneva Conventions Act, the 2010 International Criminal Court Act, and any other criminal law.<sup>38</sup> The division sits as a bench of three judges in war crimes proceedings, but there are five judges appointed to the ICD.<sup>39</sup>

Although Uganda signed the Rome Statute in 1999 and ratified the Statute in June 2002, Uganda only implemented the Statute into law in 2010 with the International Criminal Court Act.<sup>40</sup> The ICC Act of 2010 allows Ugandan courts to try crimes against humanity, war crimes, and genocide as defined under the Rome Statute.<sup>41</sup> The goals of the ICC Act explicitly include provisions for giving the Rome Statute force of law in Uganda and implementing Uganda's international obligations under the

34. Olugbuo, *supra* note 27, at 272.

35. *Id.* at 249.

36. CONST. OF THE REPUBLIC OF UGANDA arts. 129–38 (1995) (Uganda). The Supreme Court occupies the highest prong of the hierarchy as the most superior court, followed by the Court of Appeal, the high court, and other subordinate courts. *Id.*

37. *Frequently Asked Questions on the International Crimes Division of the High Court of Uganda*, THE JUDICIARY OF THE REPUBLIC OF UGANDA, [http://www.judicature.go.ug/index.php?option=com\\_docman&task=doc\\_details&Itemid=91&gid=66](http://www.judicature.go.ug/index.php?option=com_docman&task=doc_details&Itemid=91&gid=66) (last visited Feb. 16, 2012). The International Crimes Division was initially called the War Crimes Division and was established in 2008. *Id.*

38. *Id.* at 1–2.

39. *Id.* at 2. The Head of the Division is Honorable Justice Dan Akiiki-Kiiza, the Deputy Head of the Division is Honorable Justice Elizabeth Nahamya Ibanda, and the other judges are Honorable Justice Alfonse Chigamoy Owiny Dollo, Honorable Justice Ezekiel Muhanguzi, and Honorable Justice A.S. Choudry. *Id.*

40. *Uganda*, COALITION FOR THE INT'L CRIM. CT., <http://www.iccnw.org/?mod=country&iduct=181> (last visited Mar. 18, 2013); *see also* International Criminal Court Act 2010, UGANDA GAZETTE, No. 39, vol. CIII, 37, 49 (June 25, 2010).

41. ICC Act, *supra* note 40. The ICC Act, however, only provides two provisions for victims in Ugandan courts: (1) Protection before the courts as a witness, and (2) the enforcement of orders for victim reparation made by the ICC. *Id.*

Rome Statute.<sup>42</sup> The Uganda Human Rights Coalition has recommended that the Bill should be amended to provide for the proceedings of the War Crimes Division of the High Court, for witness and victim protection, and to clarify when the Amnesty Act of 2000 will be applied.<sup>43</sup>

#### *D. Amnesty Act of 2000*

The Amnesty Act of 2000 was the result of pressure from religious and cultural leaders within Uganda to end the LRA's rebellion in the country through peaceful, rather than militaristic, means.<sup>44</sup>

The Act is somewhat unusual in that it pardons all Ugandans, regardless of age, who have engaged in acts of rebellion against the

42. See Olugbuo, *supra* note 27, at 215–16. The provisions also included,

[1] making further provision in Ugandan law for the punishment of international crimes including genocide, crimes against humanity, and war crimes; [2] enabling Uganda to cooperate with the ICC in performance of its functions; [3] providing for arrest and surrender to the ICC of persons alleged to have committed crimes referred to in the Rome Statute; [4] providing for various forms of requests for assistance to the ICC; [5] enabling Ugandan courts to try, convict, and sentence persons who have committed crimes referred to in the Rome Statute; [6] enabling the ICC to conduct proceedings in Uganda; and [7] providing for the enforcement of penalties and other orders of the ICC in Uganda.

*Id.*

43. UGANDA HUMAN RIGHTS COMM'N, 11TH ANNUAL REPORT 21 (2008), available at [https://docs.google.com/viewer?a=v&q=cache:HVViPfl-KQUJ:www.uhrc.ug/index.php?option%3Dcom\\_docman%26task%3Ddoc\\_download%26gid%3D100%26Itemid%3D138+human+rights+division+11th+annual+report&hl=en&gl=us&pid=bl&srcid=ADGEEShP22UnNETa3NzTeqwHq5Z5CDr9itT9fj3DStJ0yh\\_c\\_lh-iEtbTov-ge-wfZeXLV3vHdPyQmJLdsSpGiMpwC7jx6TX\\_Z8unY0mTRERZWkHJiE2g4vTO04MROfj8pRK7eTVzEwW1&sig=AHIEtbT1xi5q2S--NcyV9shA262IZts0w](https://docs.google.com/viewer?a=v&q=cache:HVViPfl-KQUJ:www.uhrc.ug/index.php?option%3Dcom_docman%26task%3Ddoc_download%26gid%3D100%26Itemid%3D138+human+rights+division+11th+annual+report&hl=en&gl=us&pid=bl&srcid=ADGEEShP22UnNETa3NzTeqwHq5Z5CDr9itT9fj3DStJ0yh_c_lh-iEtbTov-ge-wfZeXLV3vHdPyQmJLdsSpGiMpwC7jx6TX_Z8unY0mTRERZWkHJiE2g4vTO04MROfj8pRK7eTVzEwW1&sig=AHIEtbT1xi5q2S--NcyV9shA262IZts0w).

The Commission stated that, “the ICC Bill generally makes a good attempt to fulfill Uganda’s international obligations as laid out in the Rome Statute.” *Id.* at 21. However, the Commission recommended that the title of the law should be changed to reflect the fact that the Bill does not only domesticate the Rome Statute but it also provides for the trial of international crimes as well as the operation of the War Crimes Court. *Id.* The Commission stated several other concerns, including the fact that the bill makes no reference to the Amnesty Act, despite its significant and inevitable implications on the Act. *Id.*

44. Lucy Hovil & Zachary Lomo, *Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation* 6 (Refuge Law Project, Working Paper No. 15, 2005), available at [http://www.refugeelawproject.org/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/working_papers/RLP.WP15.pdf). The Refugee Law Project is a project within the Faculty of Law of Makerere University and works to protect and promote the rights of forced migrants in Uganda. On May 23, 2012, Part II of the Amnesty Act, which governed the granting of amnesty of war criminals, was allowed to expire. Mark Kersten, *The Path Toward Prosecution: An End to Amnesty in Northern Uganda*, JUSTICE IN CONFLICT (June 11, 2012), <http://justiceinconflict.org/2012/06/11/the-path-towards-prosecution-an-end-to-amnesty-in-northern-uganda/>. One year later, however, in May 2013, the government reinstated the Act in the same form that it took in 2012. Cissy Makumbi & James Owich, *Acholi leaders welcome extension of amnesty*, THE DAILY MONITOR (May 28, 2013), <http://www.monitor.co.ug/News/National/Acholi-leaders-welcome-extension-of-amnesty/-/688334/1865314/-/m8wd59/-/index.html>.

government of Uganda since January 26, 1986.<sup>45</sup> To receive amnesty under the law, individuals are required to report to an army unit, a police unit, or a similarly recognized official, renounce and abandon involvement in the war or armed rebellion, and surrender any weapons in their possession.<sup>46</sup> The Act also establishes the Amnesty Commission to carry out the orders of the Act.<sup>47</sup> By the fall of 2011, an estimated 24,066 reporters had been received by the Amnesty Commission and granted Amnesty.<sup>48</sup> Subsequent amendments to the Act had been adopted, the latest of which was made in 2006, providing that some individuals, at the Foreign Minister's discretion, may not be eligible for amnesty.<sup>49</sup>

The Amnesty Act was in force when Thomas Kwoyelo, a mid-ranking LRA official, was arrested in 2008.

45. AMNESTY ACT art. 2 (2000) (Uganda), available at <http://www.ulii.org/ug/legislation/consolidated-act/294>. The Act specifically provides that engaging in war or armed rebellion can include, "actual participation in combat; collaborating with the perpetrators of the war or armed rebellion; committing any other crime in the furtherance of the war or armed rebellion; or assisting or aiding the conduct or prosecution of the war or armed rebellion." *Id.*

46. *Id.* art. 3. After taking these steps, the individual becomes a "reporter" under the Amnesty Act and receives an Amnesty certificate. *Id.*

47. *Id.* arts. 6–7. The Act states, "The Amnesty Commission shall be composed of the following persons appointed by the President with the approval of Parliament—a chairperson who shall be a judge of the High Court or a person qualified to be a judge of the High Court; and six other members who shall be persons of high moral integrity." *Id.* The functions of the Commission laid out by the Act include the monitoring of the programs of:

- (i) demobilization; (ii) reintegration; and (iii) resettlement of reporters; to coordinate a program of sensitization of the general public on the amnesty law; to consider and promote appropriate reconciliation mechanisms in the affected areas; to promote dialogue and reconciliation within the spirit of this Act; to perform any other function that is associated or connected with the execution of the functions stipulated in this Act.

*Id.* art. 8.

48. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC 10, 24, Const. Pet. No. 036/11 (Uganda), available at <http://www.ulii.org/ug/judgment/2011/10>. More specifically, 274 people were granted amnesty in 2010, and 29 people were granted amnesty in 2011. *Id.* at 11.

49. *Id.* at 8–9. Specifically, the amendment states that, "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. *Justice At Cross Roads? A Special Report on the Thomas Kwoyelo Trial*, JUSTICE LAW AND ORDER SECTOR, at 7 (2011) (on file with author). This amendment, however, does not indicate any 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. *Id.* However, there has been no indication that the Minister uses this power frequently, and the effect is still blanket amnesty for any who renounce the LRA and its practices. *Id.*



## II

A. *The Case Against Thomas Kwoyelo*

The first case addressed by the International Crimes Division was against Thomas Kwoyelo, a former combatant and colonel in the LRA.<sup>50</sup> According to his affidavit, Kwoyelo was abducted by the LRA in 1987 when he was thirteen years old, remained in captivity, and eventually became one of the commanders of the LRA.<sup>51</sup> In 2008, Kwoyelo was taken into custody after a battle between the Ugandan army and LRA combatants in the Democratic Republic of Congo.<sup>52</sup> He was taken to Uganda for medical treatment, where he was arrested.<sup>53</sup>

While in detention, Kwoyelo made a declaration renouncing rebellion and seeking amnesty, pursuant to the Amnesty Act.<sup>54</sup> The declaration was submitted to the Amnesty Commission. In March 2010, the Commission forwarded Kwoyelo's application to the Director of Public Prosecutions ("DPP") for consideration with a recommendation that Kwoyelo benefit from the amnesty process.<sup>55</sup> At the time the Constitutional court delivered its holding, the DPP had not responded to the letter of the Commission.<sup>56</sup> The DPP initially charged Kwoyelo with crimes under Uganda's penal code,<sup>57</sup> but he was later charged with violations of Uganda's 1964 Geneva Conventions Act.<sup>58</sup> He was committed for trial to the International Crimes Division of the High Court.<sup>59</sup> At court he pleaded "not guilty" to the charges against him.<sup>60</sup>

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50. *Uganda: Q&A on the trial of Thomas Kwoyelo*, HUMAN RIGHTS WATCH REPORT (July 7, 2011), <http://www.hrw.org/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo>.

51. *Thomas Kwoyelo alias Latoni* [2011] UGCC at 3.

52. *Id.*

53. *Uganda: Q&A on the trial of Thomas Kwoyelo*, *supra* note 50.

54. *Thomas Kwoyelo Alias Latoni v. Uganda* [2011] UGCC at 4.

55. *Id.* at 4.

56. *Id.*

57. *Thomas Kwoyelo Alias Latoni v. Uganda* [2011] UGCC at 4.

58. GENEVA CONVENTIONS ACT 1964 art. 2 (Oct. 16, 1964) (Uganda), *available at* <http://www.ulii.org/ug/legislation/consolidated-act/363>. Kwoyelo was specifically charged with willful killing, taking hostages, and extensive destruction of property. Article 2 of the Act states that,

Any person, whatever his or her nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the conventions as is referred to in the following articles respectively of those conventions . . . in the case of a grave breach involving the willful killing of the person protected by the convention in question, to imprisonment for life; in the case of any other grave breach, to imprisonment for a term not exceeding fourteen years.

*Id.*

59. *Id.*

60. *Justice At Cross Roads?*, *supra* note 49, at 1.

The case was adjourned for the hearing of preliminary objections, which were heard on August 15, 2011.<sup>61</sup> Kwoyelo's lawyers at that time requested a constitutional reference, contending that Kwoyelo had been indicted for offenses that should have fallen within the ambit of the Amnesty Act.<sup>62</sup> Kwoyelo argued that similarly situated individuals had been granted amnesty, and that by not receiving his certificate he was being deprived of equal protection of the law under Article 21 of the Ugandan Constitution.<sup>63</sup>

For his defense Kwoyelo raised several constitutional challenges to his indictment. Based on those challenges, the court faced the issue of whether the failure of the Director of Public Prosecutions and the Amnesty Commission to act on Kwoyelo's application for a grant of a Certificate of Amnesty violated the Constitution of Uganda,<sup>64</sup> and whether Sections 2, 3 and 4 of the Amnesty Act violate the Ugandan Constitution.<sup>65</sup>

The prosecutor in the case, Patricia Muteesi, argued that the Amnesty Act is unconstitutional because (1) it violates the Ugandan Constitution,

61. *Justice at Cross Roads?*, *supra* note 49, at 1.

62. Thomas Kwoyelo Alias Latoni v. Uganda [2011] UGCC at 4. He further contended that other LRA commanders, including Kenneth Banya, Sam Kolo, and 26,000 other rebels who were captured in similar circumstances were granted certificates of amnesty by the DPP and the Amnesty Commission. *Id.*

63. *Id.* Article 21 of the Ugandan Constitution, entitled "Equality and freedom from discrimination," states,

{1} [a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. (3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

CONST. OF THE REPUBLIC OF UGANDA art. 21 (1995) (Uganda).

64. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 1. Kwoyelo claimed that the failure to grant him a Certificate of Amnesty, when such certificates were granted to other persons in similar circumstances, violated Articles 1, 2, 20(2), 21(1) & (3) of the Ugandan Constitution. *See* CONST. OF THE REPUBLIC OF UGANDA (1995) (Uganda).

65. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 1. The Senior Principal State Attorney, Patricia Muteesi, raised the issue of whether the Amnesty Act violates Articles 120 (3)(b)(c) and (d)(5)(6) (Duties of the DPP), 126(2)(a) (Exercise of Judicial Power), 128(1) (Independence of the Judiciary), and 287 (International Agreements) of the Ugandan Constitution. *See* CONST. OF THE REPUBLIC OF UGANDA (1995) (Uganda). This issue went to the Constitutional Court of Uganda. *Justice at Cross Roads?*, *supra* note 49, at 1. Since any law which is inconsistent with the Constitution would be null and void to the extent of the inconsistency, the court needed to decide this issue before the ICD could proceed on the merits of Thomas Kwoyelo's case. *Id.* at 2. Accordingly, the Constitutional court made its decision regarding the constitutionality of the Amnesty Act, and then sent its holding back to the ICD to determine the merits of Kwoyelo's case. *Id.*

and (2) it violates Uganda's obligations under international law.<sup>66</sup> Muteesi argued that the Amnesty Act infringes on the constitutional independence of the DPP.<sup>67</sup> She argued that because the Constitution states that the DPP shall not be subject to the control of any person or authority, including Parliament, the DPP has authority to decide when a grant of amnesty is appropriate.<sup>68</sup>

Muteesi also argued that the Amnesty Act is inconsistent with Article 287 of the Constitution because it grants blanket amnesty to perpetrators of any war crimes, including breaches of the Geneva Conventions on the Law of War.<sup>69</sup> She argued that it also violates principles of international law, which are reflected in treaties to which Uganda is a signatory<sup>70</sup> and

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66. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 12–18.

67. *Id.* Article 120(3)(b)(c) of the Ugandan Constitution deals with the functions of the DPP, and states in relevant part that the DPP has the power to “institute criminal proceedings *against any person or authority in any court* with competent jurisdiction other than a court martial,” as long as the DPP exercises her powers with regard to the public interest, the interest of the administration of justice, and the need to prevent abuse of the legal process. CONST. OF THE REPUBLIC OF UGANDA art. 120(3)(b)(c) (1995) (Uganda). Article 120 also states that the DPP “shall not be subject to the *direction or control of any person or authority.*” *Id.* art. 120(6) (emphasis added).

68. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 13. The Amnesty Act effectively subjects the independence of the DPP to the control of the Parliament, which is unconstitutional. *Id.* The prosecutor argued that the DPP should have the discretion that is granted in the Constitution to be guided by public interest and the administration of justice and the need to prevent abuses in the legal process. *Id.* All of these grants were overridden by the Amnesty Act's grant of blanket amnesty to all war criminals. *Id.* She argued that this denied the DPP the opportunity to consider the facts, the circumstances of individual cases, the available evidence, and to then make the important decision of whether or not to prosecute. *Id.*

Muteesi argued that the DPP should have had the authority to consider the circumstances of Kwoyelo's renunciation (and the fact that he only renounced the LRA *after* he was already captured), the nature of his offenses (and whether or not they violated international law, whether Uganda had an international obligation to prosecute Kwoyelo, and the interest of Uganda's foreign policy of supporting the prosecution of international crimes, as illustrated by its enactment of the ICC Statute and the establishment of the ICD of the High Court). *Id.*

69. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 16. Article 287 of the Ugandan Constitution states:

Where- (a) any treaty, agreement, or convention with any country or international organization was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962 and was still in force immediately before the coming into force of this Constitution; or (b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement, or convention shall not be affected by the coming into force of this Constitution; and Uganda or the government as the case may be, shall continue to be party to it.

CONST. OF THE REPUBLIC OF UGANDA art. 287 (1995) (Uganda).

70. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 16. Muteesi argued that Article 287 recognizes the validity of ratified treaties under Ugandan laws (like the Geneva Conventions Act, which defines criminal offenses and prescribes maximum sentences for grave breaches of those conventions). *Id.* She argued that the applicant is being prosecuted for crimes that fall within the ambit of that Act. *Id.* She further argued that international law principles oblige any country that is a party to a treaty to observe its obligations under that treaty. *Id.* She also cited Article 26 of the 1969 Vienna

international case law.<sup>71</sup> Muteesi concluded by stating that blanket amnesty is in violation of Uganda's international law obligations and that the applicant cannot claim entitlement to amnesty under sections two and three of the Act because they are null and void under Article 21(1) of the Constitution of Uganda.<sup>72</sup>

Kwoyelo's defense lawyer reiterated the argument that under Article 21 of the Ugandan Constitution, all persons are to be treated equally under the law, and that the Amnesty Act grants rights that are to be enjoyed equally by all Ugandans.<sup>73</sup> He also defended blanket amnesty, stating that it was enacted in response to the civil war in Uganda as an attempt to establish national unity and stability,<sup>74</sup> and pointed out that there is precedent for blanket amnesty in other countries.<sup>75</sup> Finally, he argued that under Article 28 of the Constitution, Ugandans are protected from prosecution resulting from offenses for which they have been pardoned.<sup>76</sup>

The Ugandan Constitutional Court upheld the constitutionality of the Amnesty Act.<sup>77</sup> The Court stated that the Ugandan Amnesty Act does not

Convention on the Law of Treaties, which Uganda ratified. Article 26, known as the *Pacta sunt servanda* article, states that, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

71. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 16. Specifically, she cited *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. Series C No. 75 (Mar. 14, 2001) (holding that the amnesty laws of Peru, which prevented the investigations and prosecutions of state agents who were responsible for the assassinations of 15 people and injury of four others constituted violations by Peru of its obligations under the Inter-American Convention on Human Rights), *Prosecutor v. Morris Kallon & Brima Bazzy Kamara*, Case No. SCSL 2004-15-AR72(E), Judgment (Special Court for Sierra Leon Mar. 13, 2004) (holding that insurgents are subject to international humanitarian law and must observe the Geneva Conventions), and *Prosecutor v. Anto Furundajija*, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (holding that there is an international prohibition against torture which is standard in the international community, and that a state cannot take measures to absolve its perpetrators through amnesty). *Id.* at 1, 415–31.

72. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 17.

73. *Id.* at 18.

74. *Id.* Alaka Caleb, Kwoyelo's lawyer, argued that the Amnesty Act does not take powers away from the Courts or the DPP; he pointed out that in 2006, the Act was amended and the Minister was given powers to specify rebels who were ineligible for amnesty. *Id.*

75. *Id.* The Truth and Reconciliation Act, for example, was upheld in South Africa. *Id.* This Act established a commission whose main objective was to promote national unity and reconciliation of conflict by facilitating the grant of amnesty to all persons who made full disclosure of all relevant facts relating to criminal acts associated with any political objective. *Id.*

76. *Id.* Specifically, Article 28(10) states that, "No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence." CONST. OF THE REPUBLIC OF UGANDA art. 28(10) (1995) (Uganda). The defense lawyer used this Article to support the argument that a pardon is a constitutionally protected right which all individuals must have equal access to exercise. *Id.*

77. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 12–18. The Court clarified that the Act does not purport to grant amnesty to Ugandan government officials or military members, but

grant blanket amnesty to all wrongdoers.<sup>78</sup> The Court also outlined the role of the Amnesty Commission, which was granted certain authority to carry out the Amnesty Act as necessary.<sup>79</sup> The Court rejected the argument that the Amnesty Act cut away at the DPP's powers stating, "We do not think that the Act was enacted to whittle down the prosecutorial powers of the DPP or to interfere with his independence."<sup>80</sup> The court also noted that the DPP in this case did not give any objective or reasonable explanation for why he did not sanction the application for Thomas Kwoyelo for amnesty after having sanctioned 29 other individuals charged with war crimes in 2011.<sup>81</sup> With respect to Muteesi's arguments regarding Uganda's international obligations, the Court noted that the indictments of the five individuals by the ICC demonstrates that Uganda is aware of its international obligations, and that the Amnesty Act does not impair those obligations.<sup>82</sup>

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instead it only applies to the LRA rebels who are currently engaged in the conflict. *Id.*

78. *Id.* at 21. The court stated that the Act does not apply to any government official or to the government army personnel who may have violated national or international law. *Id.* This differs from the South African Truth and Reconciliation Act, for example, which granted amnesty to all wrongdoers within the apartheid government and within the rebel ranks. *Id.*

79. *Id.* The functions of the Amnesty Commission are set out in Article 8 of the Amnesty Act. Section 8 states that the Commission's functions are:

- (a) to monitor programs of- (i) demobilization; (ii) reintegration; and (iii) resettlement of reporters;
- (b) to coordinate a program of sensitization of the general public on the amnesty law;
- (c) to consider and promote appropriate reconciliation mechanisms in the affected areas;
- (d) to promote dialogue and reconciliation within the spirit of this Act;
- (e) to perform any other function that is associated or connected with the execution of the functions stipulated in this Act.

AMNESTY ACT art. 8 (2000) (Uganda).

80. Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 23. The court goes on to state that the DPP can still prosecute persons who are declared ineligible for amnesty by the minister, or those who refuse to renounce rebellion. *Id.* at 23. He can also prosecute any government agents who might have committed grave breaches of the Geneva Conventions Act. *Id.*

81. *Id.* at 24. In 2010, the year Kwoyelo applied for amnesty, 274 people were granted amnesty. *Id.* Because the applicant had a legal right to be granted amnesty like anyone else who renounced rebellion, the Court held that the DPP failed in his duties to at least explain why he did not act consistently in this case. *Id.* The court stated, "[w]e think it is rather late in the day for the learned DPP to claim his constitutional independence using the applicant. He has failed to furnish any reasonable or objective explanation why the applicant should be denied equal treatment under the Amnesty Act." *Id.* at 25.

82. The Court specifically states:

[T]here is evidence on the record contained in the affidavit of the applicant to the effect that top commanders of the LRA were indicted by the ICC under the Rome Statute. Their indictment clearly shows that Uganda is aware of its international obligations, while at the same time it can use the law of amnesty to solve a domestic problem. We have not come across any uniform international standards or practices which prohibit states from granting amnesty.

Thomas Kwoyelo alias Latoni v. Uganda [2011] UGCC at 24.

On September 22, 2011, the Constitutional Court ordered that the file be returned to the ICD with a direction that it must cease the trial of Kwoyelo.<sup>83</sup> However, prosecutors appealed the decision and Kwoyelo remains in prison.<sup>84</sup>

### B. Analysis

The Ugandan government allowed the Amnesty Act to expire in July 2012,<sup>85</sup> but reenacted the law in its original form in May 2013.<sup>86</sup> The case of Thomas Kwoyelo highlighted and exemplified the flaws of the Amnesty Act and demonstrated why the expiration of the Act in 2012 ultimately would have allowed Uganda to better uphold international and national law, as well as to more effectively serve justice. Amending the Act, however, would be the most beneficial option for Uganda, given the country's general support of amnesty and the purported benefits of amnesty that many supporters continue to assert.<sup>87</sup>

The Amnesty Act as written circumvents the Ugandan Constitution. The powers granted to the DPP in the Ugandan Constitution are explicit,<sup>88</sup>

83. *Id.* The decision was unanimous and signed by all five Justices of Appeal: Twinomujuni, Byamugisha, Nschimye, Arach-Amoko and Remmy Kasule. "Witness to the Trial"; *Monitoring the Kwoyelo Trial, Summary of the ruling*, REFUGEE LAW PROJECT, [http://www.refugeelawproject.org/kwoyelo\\_trial.php](http://www.refugeelawproject.org/kwoyelo_trial.php) (last visited Feb. 10, 2013). However, as of May 28, 2013, Thomas Kwoyelo still had not been released from prison. Cissy Makumbi & James Owich, *Acholi leaders welcome extension of amnesty*, THE DAILY MONITOR (May 28, 2013), <http://www.monitor.co.ug/News/National/Acholi-leaders-welcome-extension-of-amnesty/-/688334/1865314/-/m8wd59/-/index.html>.

84. Rick Anderson, *Little Kony: Thomas Kwoyelo*, SEATTLE WEEKLY NEWS (July 11, 2012), <http://www.seattleweekly.com/home/873062-129/story.html>.

85. Alexis Okeowo, *Thomas Kwoyelo's Troubling Trial*, THE NEW YORKER (July 21, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/07/thomas-kwoyelos-troubling-trial.html>. On May 23, 2012, the Amnesty Act was allowed to expire in Uganda. Mark Schenkel, *Uganda: Amnesty Act without Amnesty*, RADIO NETHERLANDS WORLDWIDE (June 3, 2012), <http://www.rnw.nl/inter-national-justice/article/uganda-amnesty-act-without-amnesty>.

86. Kasper Aggar & Sasha Lezhnev, *Policy Alert: Uganda Reinstates Key Tool to Boost Defections from the Lord's Resistance Army*, ENOUGH PROJECT, <http://www.enoughproject.org/blogs/policy-alert-uganda-reinstates-key-tool-boost-defections-lords-resistance-army> (last visited July 11, 2013).

87. See *infra* note 100; see also Cissy Makumbi & James Owich, *Acholi leaders welcome extension of amnesty*, THE DAILY MONITOR (May 28, 2013), <http://www.monitor.co.ug/News/National/Acholi-leaders-welcome-extension-of-amnesty/-/688334/1865314/-/m8wd59/-/index.html>. Additionally, supporters of the Amnesty Act noted that the Act's expiration in 2012 left dozens of former LRA members who had defected and returned home in that year in a legal limbo, where they had no authoritative protection from the Ugandan government but were also unlikely to face prosecution. See Lisa Dougan, *Ugandan government renews amnesty policy*, INVISIBLE CHILDREN (May 30, 2013), <http://blog.invisiblechildren.com/2013/05/30/ugandan-government-renews-amnesty-policy-ic-citizen/>.

88. CONST. OF THE REPUBLIC OF UGANDA art. 120(3)(b) (1995) (Uganda) (stating that the functions of the DPP include "institut[ing] criminal proceedings against any person or authority in any

and the quasi-blanket amnesty granted through the Amnesty Act circumvents these powers. Amnesty under the Act extends “to any Ugandan,”<sup>89</sup> regardless of the DPP’s opinion regarding whether criminal proceedings are appropriate. Meanwhile, the DPP is charged with protecting the public good and exercising his or her discretion in prosecuting criminals.<sup>90</sup> The law is simply inconsistent with the Constitution.

Furthermore, the Amnesty Act violates Uganda’s international obligations. The Amnesty Act provides near-blanket amnesty for war criminals, while International law obligations require that countries provide protection to citizens and justice for crimes against humanity.<sup>91</sup> Indeed, various UN bodies have indicated that the granting of blanket amnesty is not consistent with international law obligations.<sup>92</sup> Many international human rights groups have expressed concern that the ruling

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*court* with competent jurisdiction . . . .”) (emphasis added). It further confers on the DPP the right to “have regard to the public interest, the interest of the administration of justice, and the need to prevent abuse of the legal process.” *Id.* art. 120(5).

89. AMNESTY ACT art. 2 (2000) (Uganda).

90. See CONST. OF THE REPUBLIC OF UGANDA art. 120 (1995) (Uganda).

91. Uganda has signed several international human rights treaties that seemingly conflict with the blanket amnesty provided by the Amnesty Act. These treaties include the Geneva Conventions, which prohibit ‘grave breaches’ including, “willful killing, torture or inhuman treatment, including biological experiments, willfully 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.” *The Geneva Conventions of 1949 and their Additional Protocols*, INT’L COMM. OF THE RED CROSS (ICRC), <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (last visited Feb. 16, 2012); *How “Grave Breaches” are Defined in the Geneva Conventions and Additional Protocols*, ICRC, <http://www.icrc.org/eng/resources/documents/misc/5zmgf9.htm> (last visited Feb. 16, 2012). Uganda is also party to the International Covenant on Civil and Political Rights, which obligates state governments to respect and ensure the rights of all individuals in the Covenant by protecting its citizens from discrimination, torture, and other human rights violations. The ICCPR also requires that governments provide due process to the accused and provide basic human freedoms. International Covenant on Civil and Political Rights arts. 14, 26, Mar. 23, 1976, 999 U.N.T.S. 171, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. Finally, Uganda is also party to the Rome Statute, which binds states to prosecute individuals for war crimes and crimes against humanity. Rome Statute of the International Criminal Court, *supra* note 33, arts. 6, 7, 86.

92. In 2004, UN Secretary-General Kofi Annan stated that, “[c]arefully crafted amnesties can help in the return and reintegration of . . . groups and should be encouraged, although . . . these can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights.” U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General to the Security Council*, ¶ 32, U.N. Doc. S/2004/616 (Aug. 23, 2004), available at <http://www.ipu.org/splz-e/unga07/law.pdf>. Furthermore, in 2010, the UN Secretary-General released a guidance note in which he stated that the UN should “insist . . . that peace agreements not grant amnesties for war crimes, crimes against humanity, genocide and gross violations of human rights.” U.N. Secretary-General, *Guidance Note of the Secretary General: United Nations Approach to Transitional Justice* (Mar. 10, 2012), available at [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf).

of the court in Thomas Kwoyelo's case will make it impossible for Uganda to comply with those international obligations, as it has created a precedent of granting amnesty for high-ranking officials who are captured.<sup>93</sup>

Rather than allowing the Act to expire last year, the Ugandan legislature should have amended it to specify when individuals, such as those currently sought by the ICC, would not qualify for amnesty.<sup>94</sup> The Amnesty Act as written provides near-blanket amnesty for any Ugandan defectors who seek its protection. However, the 2006 amendment to the Act provides that the Minister of Internal affairs may exclude individuals from amnesty grants at will.<sup>95</sup> The Ugandan legislature can preserve amnesty while avoiding constitutional challenges and international law violations by proactively defining some criteria as to which individuals may be deemed ineligible for amnesty to work in conjunction with the 2006 amendment. The international legal community is not likely to continue to tolerate the Ugandan Amnesty Act uniformly shielding high-profile criminals from liability for their human rights violations.<sup>96</sup> Uganda should amend the Act to define exactly when individuals may qualify for amnesty. This will allow the country to better defend the law on an international stage and to apply the law more fairly internally, thus avoiding constitutional challenges such as Kwoyelo's.

93. For example, the Justice Law and Order Sector stated in its report following the Court's ruling that,

[r]atification of the Geneva Conventions and the 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 those 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.

*Justice at Cross Roads?*, *supra* note 49, at 4.

94. If the Court's concern was equal treatment of citizens under the law, the legislature will need to specify when individuals do not fall within the ambit of the Amnesty Act. Although there is currently a provision allowing the Director of Public Prosecutions to render individuals ineligible, some standards need to be articulated to ensure objectivity and notice of the law for Ugandans. AMNESTY ACT art. 3 (2000) (Uganda).

95. *Id.* 2006 Amend.

96. Indeed, as cited in the JLOS report, courts have stated that,

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.

*Justice at Cross Roads?*, *supra* note 49, at 4.



Equally problematic is the fact that the Amnesty Act does not provide effective incentives for rebels to abandon the LRA. As the Kwoyelo case demonstrated, the law granted amnesty to any war criminal, regardless of the conditions under which the criminal was captured.<sup>97</sup> A far more effective drafting of the Act would provide that individuals who voluntarily renounce the LRA and turn themselves in to the government will be granted amnesty, while those who are involuntarily captured and arrested will be forced to stand trial and face liability for their crimes. This would make soldiers choose between staying in the army and turning themselves in, with very specific consequences for each decision. In the previous Amnesty Act, soldiers had nothing to lose by staying in the LRA.

Complementarity between the ICC and national governments has long been championed by the ICC as a desirable goal in creating a system of prosecutions of international crimes.<sup>98</sup> Article 17 of the Rome Statute states that cases are inadmissible to the ICC unless the State government itself is unwilling or unable to genuinely carry out the prosecution.<sup>99</sup>

As the case of Thomas Kwoyelo demonstrated, the Amnesty Act prevents Uganda from effectively prosecuting war criminals. The ICC must continue to monitor the ICD to ensure that Uganda begins to bring war criminals to justice. If Thomas Kwoyelo had stood trial in front of the ICC, he would have likely faced legal consequences for his actions. The ongoing conflict with the LRA in Uganda is of international concern, and the international community must monitor the ICD to ensure that war criminals are being appropriately prosecuted.

Uganda should revise, rather than repeal the Amnesty Act as it did in June 2012. Interviews conducted in northern Uganda demonstrate

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97. As mentioned by the prosecution team in front of the Constitutional Court, Thomas Kwoyelo only renounced the Lord's Resistance Army after he was captured by the Uganda Peoples' Defence Forces. *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 10 at 3, Const. Pet. No. 036/11 (Uganda).

98. In 2003, the ICC's Prosecutor, Luis Moreno-Ocampo, stated that, "[a]s a consequence of complementarity, the number of cases that reach the court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success." Luis Moreno-Campos, Chief Prosecutor, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), available at <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>. In 2004, he stated that, "[r]ather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible." Luis Moreno-Campos, Chief Prosecutor, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), available at <http://www.iccnw.org/documents/OTPStatementDiploBriefing12Feb04.pdf>.

99. Rome Statute of the International Criminal Court, *supra* note 33, art. 17(1)(a). The Article states that, "the Court shall determine that 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 unwilling or unable genuinely to carry out the investigation or prosecution." *Id.*

overwhelming support for the amnesty process.<sup>100</sup> The Amnesty Commission's database indicates that tens of thousands of former rebels have reported and been granted amnesty under the Amnesty Act, which ultimately (and importantly) diminishes the ranks of the organization.<sup>101</sup> Furthermore, amnesty advocates emphasize that many of the arrested soldiers were abducted and abused children who, while war criminals, are also victims themselves.<sup>102</sup>

The Amnesty Act as it currently stands, however, is ineffective and fails to comply with general understandings and requirements of justice within the international community.<sup>103</sup> Leaders within the international community have expressed that Amnesty Acts generally fall far short of international standards,<sup>104</sup> and international commissions have expressed the same opinion.<sup>105</sup>

100. Hovil & Lomo, *supra* note 44, at 9. Individuals who were interviewed intimated that amnesty is seen as the greatest hope for resolving the conflict and reaching peace, given that a military solution has failed for over 18 years and necessarily results in the killing of children who were abducted by the LRA and presently serve as soldiers. *Id.* One of the cultural leaders in Kitgum said that Ugandans support amnesty, "so that our children in the bush can come back home." *Id.* Furthermore, the Act is considered to be reflective of Acholi traditional culture, which attempts to address crimes through compensation, acceptance of guilt, and reconciliation. Rose, *supra* note 2, at 6. Indeed, the preamble to the Act states that, "it is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities." AMNESTY ACT, pmbl. (2000) (Uganda).

101. JAMES BEAN, PRELIMINARY ANALYSIS: REPORTER PROFILING FROM THE AMNESTY COMMISSION OF UGANDA 7 (2008), available at [http://uganda.iam.int/documents/Preliminary.Analysis.07.12.08%20\\_finalAC.rev.8\\_.pdf](http://uganda.iam.int/documents/Preliminary.Analysis.07.12.08%20_finalAC.rev.8_.pdf). The LRA's Chief spokesperson, Brigadier Sam Kolo, number three Brigadier Kenneth Banya, and Chief Operations Officer Brigadier Onen Kamdulu have all emerged from combat and have been granted amnesty by the government. Kasaija Phillip Apuuli, *Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda*, 5 AFR. J. CONFLICT RESOL. 33, 45-46 (2005) [hereinafter *Amnesty and International Law*], <http://www.ajol.info/index.php/ajcr/article/viewFile/39391/30316>.

102. Hovil & Lomo, *supra* note 44, at 9.

103. *Amnesty and International Law*, *supra* note 101, at 46-47. Apuuli states that, "amnesty constitutes a declaration that the government intends to obliterate (not merely forgive) a crime . . . amnesty attempts to edit life's un-editable record, and for this reason, amnesty for crimes against humanity and war crimes is inconsistent and incompatible with international law." *Id.* at 46 (internal citations omitted).

104. *Id.* at 48. Cherif Bassoui has stated that, "for the four jus cogens crimes of genocide, crimes against humanity, war crimes and torture . . . there should be no general amnesty." *Id.* (internal citations omitted).

105. *Masacre Law Hojas v. El Salvador*, Case 10.287, Inter-Am. Comm'n H.R., Report No. 26/92, OEA/Ser. L/V/II.83.doc 14, at 83 (1993), available at <http://www1.umn.edu/humanrts/cases/26-92-EL-SALVADOR.htm>. In 1992, the Inter-American Commission of Human Rights stated that the, "application of the Salvadoran amnesty decree constitutes a clear violation of the Salvadoran Government to investigate and publish the violations of the rights of the Las Hojas victims." *Id.* The Commission also stated that, "[t]he present Amnesty law, as applied in these cases . . . denies the fundamental nature of the most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders." *Id.*

The effectiveness of the ICD remains shrouded in ambiguity. If Uganda reconsiders a revision of the Amnesty Act in the future, the Act should clearly articulate to whom amnesty may be applied. Furthermore, amnesty in the future should be conditioned on soldiers' intentional and willing defection by their own choosing, rather than making amnesty available to any soldier, captured or not. Amnesty is worth preserving in Uganda, given the country's general support for the law, but it needs to be significantly altered. The expiration of the Amnesty Act last year better served justice than the currently reenacted version of the Act.

#### CONCLUSION

On January 25, 2012, the Ugandan Supreme Court upheld the Constitutional Court's decision and ordered the release of Kwoyelo.<sup>106</sup> However, less than two weeks later, on February 5, 2012, DPP Richard Buteera refused to grant the certificate of amnesty to Thomas Kwoyelo as he was ordered to do by the court.<sup>107</sup> The proceedings are ongoing. If Uganda intends to comply with international standards and work towards an end to the conflict, the legislature must intervene to prescribe a standard by which prosecutions such as these will proceed in the future. Although the Amnesty Act has been reinstated, the ICD must diligently pursue prosecutions of war crimes, and the ICC must monitor the Division to make sure this happens. If the Ugandan legislature revisits the Amnesty Act, it should significantly alter the conditions and language of the law to allow Uganda to meet its international and national legal obligations.

*Kirsty McNamara\**

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106. The decision was made by Justice Vincent Zehurikize. Edward Anyoli, *DPP rejects Kwoyelo Amnesty*, NEW VISION: UGANDA'S LEADING DAILY (Feb. 5, 2012), <http://www.newvision.co.ug/news/628800-dpp-rejects-kwoyelo-amnesty.html>.

107. *Id.* A press release from Buteera's office stated that, "[t]his office maintains the position that under the principles of international law, no amnesty can be granted to persons accused of committing war crimes under the Geneva Convention. The war crimes he is charged with include killings and infliction of grave injuries." *Id.*

\* J.D. (2013), Washington University in St. Louis School of Law; B.A. (2008), University of Michigan (Ann Arbor). Many thanks to the editing staff of the Global Studies Law Review and to my parents, Leslie and Sean, for their endless patience and support.