YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW - VOLUME 14, 2011
CORRESPONDENTS' REPORTS

UGANDA[1]

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Legislation — Implementation of the Rome Statute

☛ *International Criminal Court Act, 2010*
<http://www.ucicc.org/documents/Legal/ICC%20Act%202010.pdf>

On 25 May 2010, the Ugandan parliament adopted the *International Criminal Court Act, 2010*, which came into force on 25 June 2010. Uganda had ratified the *Rome Statute* on 14 June 2002 and had introduced the bill for approval in 2006.

The Act addresses the prosecution of accused for international crimes in Uganda and also issues of cooperation between Uganda and the ICC. In relation to the former, the Ugandan International Crimes Division (formerly the War Crimes Division) will have jurisdiction to hear cases arising under the Act. As a preliminary issue, any prosecution under the Act must receive the consent of the Director of Public Prosecutions (section 17). Even where there is no consent, a suspect may nevertheless be arrested, a warrant may be issued for his or her arrest, he or she may be remanded in custody or on bail. Subject matter jurisdiction under the Act is limited to genocide (section 7), crimes against humanity (section 8) and war crimes (section 9) as they are defined in the *Rome Statute*. The maximum penalty for these crimes is life imprisonment. The Act also adopts a conditional universal jurisdiction clause so that where the alleged crime has taken place outside the territory of Uganda, the jurisdiction of the WCD is limited to four situations: (1) where the accused is a citizen or permanent resident of Uganda; (2) where the accused is employed by Uganda in a civilian or military capacity; (3) where the accused has committed the offence against a citizen or permanent resident of Uganda; and (4) where, following the offence, the accused is located in Uganda (section 18). The Act incorporates general principles of criminal law including *ne bis in idem*, strict interpretation of crimes, the effect of changes in the law, modes of liability, exclusion of jurisdiction over minors, exclusion of statute of limitations, mental elements, grounds for excluding criminal responsibility, mistake of fact or law and superior orders (section 19). The Act also allows the International Crimes Division to have regard to the Elements of Crime for the purpose of interpreting the offences. Finally, while the Act adopts both the *Rome Statute* and Ugandan law as applicable sources of law, it specifies that any inconsistency between these two is to be resolved in favour of the *Rome Statute* law.

There are, however, notable omissions from the Act. There is no prohibition of criminal responsibility where the conduct was not a crime at the time of its commission (*nullen crimen sine lege*); there is no principle of *nulla poena sine lege*; there is no prohibition of retroactivity; there is no provision on the irrelevance of official capacity; there is no provision explicitly designating treaties and the principles and rules of international law including the law of armed

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conflict as sources of law; and finally, there is no requirement that sources of law be interpreted consistently with internationally recognized human rights. The absence of these provisions might give rise to concerns about fair trial standards in proceedings instituted under the Act before the International Crimes Division.

As to issues of cooperation between Uganda and the ICC, the Act provides sections on requests of assistance, arrest, surrender, collection of evidence, witnesses, enforcement of penalties, investigations and sittings of the ICC in Uganda.

There are also provisions for offences against the administration of justice including corruption, bribery and false evidence offences. However, these appear to apply only to proceedings before the ICC and not before the International Crimes Division.

Cases — Thomas Kwoyelo — Amnesty

- *Kwoyelo v Uganda* [2011] UGCC 10 (21 September 2011) (Constitutional Court of Uganda) <http://www.ulii.org/ug/judgment/2011/10>

On 11 July 2011, the criminal trial of Thomas Kwoyelo, former child abductee by the Lord's Resistance Army (LRA) and later commander of the same group, began before the International Crimes Division of the Ugandan High Court (ICD). Kwoyelo faced 12 charges of war crimes under the *Geneva Convention Act 1964* Cap 363[2] (the first charges ever to be laid under the Act) including the taking of hostages, wilful killing civilians, and extensive destruction of property as well as 53 alternative charges under the *Penal Code* for acts taking place from 1993–2005 in Pabbo and Lamogi sub-counties in Amuru District.[3] On 5 August, the ICD transmitted a constitutional reference to the Constitutional Court of Uganda seeking clarification of certain issues arising in the criminal case including whether the failure of the Director of Public Prosecutions and the Amnesty Commission to process Kwoyelo's application for amnesty was a violation of his constitutional rights. On 22 September, in response to this request, the Constitutional Court ordered that the ICD cease the criminal trial on the basis that Kwoyelo was entitled to amnesty from criminal proceedings under the *Amnesty Act 2000* Cap 294.[4] Following this decision, the State appealed the ruling to the Court of Appeal, which on 10 November upheld the Constitutional Court's decision. On the same day, the ICD complied with the Constitutional Court and ceased the criminal proceedings against Kwoyelo. It also referred the issue of his release to the DPP and the Amnesty Commission. On or around 17 November 2011, Kwoyelo applied to the High Court for an order directing the DPP and the Amnesty Commission to certify his amnesty under the Act and to release him.[5] By the end of 2011, this application had not yet been adjudicated.

There were two relevant issues before the Constitutional Court: (1) whether the *Amnesty Act 2000* was constitutional; and if yes, (2) whether Kwoyelo was entitled to amnesty under that Act based on his declaration of 21 January 2010.

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[2] See <http://www.ulii.org/ug/legislation/consolidated-act/363>.

[3] Uganda Coalition on the International Criminal Court, *The Case of Thomas Kwoyelo* (30 May 2012) <http://www.ucicc.org/index.php/icd/about-kwoyelo>.

[4] See <http://www.ulii.org/ug/legislation/consolidated-act/294>.

[5] Evelyn Akullo Otwili, 'Updates on the High Court Ruling of Ex−LRA Commander Thomas Kwoyelo' (Justice and Reconciliation Project, 27 January 2012) <http://justiceandreconciliation.com/wp-content/uploads/2012/01/JRP-Updates-on-Kwoyelo-27Jan2012.pdf>.

The issue of the constitutionality of the *Amnesty Act* was not transmitted to the Court by the ICD in its reference but was raised by the respondent directly before the Court. Although apparently not bound to do so, the Court nevertheless exercised its discretion to respond to the issue 'because it touched on the legality and constitutionality of an Act of Parliament' and '[t]he court could not close its eyes to an alleged illegality and has a duty to investigate the allegation.'

The respondent made three submissions arguing that the *Amnesty Act* was unconstitutional but failed on all three arguments. First, it argued that the Act violated the constitutionally protected independence of the DPP. Second, the respondent argued the Act violated the constitutionally protected independence of the judiciary because the Act required judges to discontinue criminal proceedings when an individual has been granted an amnesty. Third, the respondent argued the Act was a violation of international law as recognized under the constitution because the blanket amnesty created by the Act would prevent prosecution of grave breaches under the *Geneva Conventions* and such blanket amnesty would be in violation of Uganda's international law obligations.

In concluding that the Act was constitutional, the Court noted first that the *Amnesty Act 2000* was enacted under a valid constitutional power:

> There is nothing unconstitutional in our view in the purpose of the Act. The mischief which it was supposed to cure was within the framework of the constitution. The Act is also in line with national objectives and principles of State policy and our historical past which was characterized by political and constitutional instability.

Moreover, the Court found the Act did not interfere unlawfully with the prosecutorial powers and independence of the DPP as the DPP was still entitled to prosecute members of the government, government forces and those rebels who were specifically declared ineligible for amnesty by the government. As to the second argument raised by the respondent, the Court did not respond directly. However, it is possible that this argument could have been rejected on the basis that Courts are constitutionally required to observe pardons granted by the government. Article 28(10) of the *Constitution* recognizes and protects pardons:

> 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.

Moreover, the Court noted that amnesty under the Act was defined, *inter alia*, as a pardon. On this basis it might be assumed that the Act did not interfere with the independence of the judiciary because the *Constitution* already limited the judiciary's power in respect of amnesties. Third, the Court found that the granting of amnesty itself was not a violation of international law as no such prohibition existed under international law.

As to the second issue, the Court found that Kwoyelo was entitled to amnesty under the Act. First, it is necessary to explain the events leading up to the criminal trial before the ICD. On 21 January 2010, while he was in detention at Upper Prison Luzira after having been captured in 2008 by Ugandan military forces in the DRC, Kwoyelo purported to make a declaration under s 3 of the *Amnesty Act 2000* renouncing involvement in the war or armed rebellion between the LRA and the Ugandan government forces to the officer in charge of the prison. Under s 3(3) of the Act, Kwoyelo was not to be released from the prison until the DPP certified that Kwoyelo satisfied the criteria for amnesty and also certified that Kwoyelo was not being held for any other

offences. The DPP was also under the duty to investigate the circumstances of Kwoyelo's application and to cause his release if he qualified for amnesty (s 3(4)). Despite Kwoyelo's declaration claiming amnesty and despite the DPP's duties, the DPP refused to release Kwoleyo and on 6 September 2010, charged him with multiple offences under Ugandan criminal law relating to his involvement with the LRA.

Before the Constitutional Court, Kwoyelo argued he was entitled to amnesty under the *Amnesty Act 2000* on the basis of his declaration of 21 January 2010. In particular, he argued that the DPP's (and also the Amnesty Commission) failure to certify his qualification for amnesty was a violation of his constitutional right to equality before the law.

There appeared to be no issue as to whether Kwoyelo satisfied the criteria under the Act. The real issue was whether the DPP had the discretion to prosecute Kwoyelo despite the fact that he fulfilled the criteria under the Act. It seemed clear that the Act could not be interpreted as granting the DPP the discretion to prosecute Kwoyelo when he was entitled to an amnesty because under Article 28(10) of the *Constitution*, the DPP was under a duty to recognize the pardon: 'This pardon is general in nature and it applies to all criminal offences under the statute books. It operates as a bar in criminal prosecution. It is a constitutional command which has to be obeyed by everyone the DPP and the courts inclusive.' The Court concluded therefore that the DPP did not have the discretion to prosecute an individual under the Act because it was required under the Constitution to recognise the amnesty.

The Court found that the DPP, in failing to certify that Kwoyelo fell within the criteria of the *Amnesty Act 2000* and that he was not subject to any other charges, failed in its duty under that Act to cause the release of Kwoyelo after he applied for amnesty. Crucially, this failure constituted an infringement of Kwoyelo's constitutional right of equal treatment before the law. This conclusion was based on the fact that the DPP had already sanctioned a high number of amnesties of ex-rebels (since the Act came into force, the DPP had sanctioned the amnesty of 24,066 people, in 2011, it had sanctioned 29 people and in 2010, the year of Kwoyelo's request, it sanctioned 274 people) and it could provide no reasonable and objective explanation for its refusal to sanction Kwoyelo's amnesty as well. Indeed, the Court found that the unequal treatment might have been justified in the case of reasonable and objective explanation by the DPP but given there was no such explanation available, no justification could be sustained.

There were two particularly relevant aspects to this case from the point of view of IHL. First, even if Kwoyelo were denied amnesty and were put on trial, it would have been uncertain whether the war crimes charged were appropriate in the circumstances. As previously noted, the war crimes charges were laid under the *Geneva Conventions Act 1964*, which criminalises grave breaches as identified in the *Geneva Conventions*. These grave breaches are limited, however, to international armed conflict, meaning that the *Geneva Conventions Act 1964* does not criminalise any conduct taking place in non-international armed conflict. It would therefore be necessary to show that the conduct connected to the charges occurred during and had a nexus with an international armed conflict. However, given that the LRA is a non-State armed group, the LRA can only possibly be engaged in a non-international armed conflict with the government of Uganda. Thus, the International Crimes Division would not have *prima facie* jurisdiction to entertain charges of the war crimes under the Act. The principal exception to this conclusion would be if it can be shown that the LRA was being used as a proxy force by another State in its struggle with the Ugandan government and thus that the non-international armed conflict had been internationalised by the intervention of another State. In particular, according to the

authorities in *Nicaragua* and *Tadić*,[6] it would need to be established that another State (for instance, Sudan), exercised either overall control or effective control over the conduct of the LRA during the period in which it is alleged Kwoyelo committed the crimes. It is well-known that during the 1990s Sudan provided support to the LRA against the Ugandan government in retaliation for Uganda's support for the SPLA. However, whether that support reached the threshold of overall control or effective control will not be considered here in the interests of space.

Second, the Constitutional Court recognised that international law contains no prohibition on amnesties for domestic prosecution. Whether this refers to blanket amnesties or less-than-blanket amnesties is unclear as this case considered only an amnesty for which there were exceptions available (government forces were not covered and the government had the power to exempt certain individuals from availing themselves of rights under the Act). However, what the Court seemed to fail to take into account on this issue, as was submitted by the respondent, was that the *Geneva Conventions* actually oblige Uganda to bring individuals suspected of grave breaches of the *Geneva Conventions* before its courts.[7] Presumably, this excludes the possibility of granting amnesties to those suspected of war crimes. Similarly, the ICRC Study identifies a customary international law rule urging States to grant amnesty to participants in non-international armed conflict, except where they are suspected of committing war crimes.[8] Thus, while there may be no general prohibition on amnesties, other positive obligations to act may constitute *de facto* prohibitions on granting amnesties and in this respect, the decision of the Court may be doubtful.

Treaty Action — Establishment of the Ugandan IHL National Committee

The Ugandan international humanitarian law (IHL) national committee was established in 2010 following a resolution of 29 May 2009 Resolutions on IHL of the Office of the Prime Minister, which holds the chairmanship of the Committee. The mandate of the Committee is to prioritize the status and functions of the committee; and to work on pending IHL legislations in Uganda.[9]

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[6] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, para. 115; *Prosecutor v Tadić* (ICTY, Appeals Chamber, Judgement) para. 120.
[7] *Geneva Convention IV*, art 146.
[8] ICRC Study, Rule 159.
[9] ICRC, 'Table of National Committees and Other National Bodies on International Humanitarian Law' (31 October 2011) <http://www.icrc.org/eng/assets/files/other/national-committes-icrc-30-10-2011-eng.pdf>.