

**“Seminar on international criminal justice, challenges for domestic prosecutions and programmes for victims’ access to justice and reparations.”**

*Scheduled to take place on the 26th of September, 2013*

*In the conference room of the Parliament of the Republic of Uganda.*

*The complex nature of the conflict, states cooperation & capacity to prosecute international crimes.*

*Women’s Initiatives for Gender Justice: Ms. Jane Adong Anywar*

## ***My Lords, Honourable Members of Parliament, Ladies and Gentlemen***

### ***Women's Initiatives for Gender Justice:***

I am representing the Women's Initiatives for Gender Justice. The Women's Initiatives is an international women's human rights organisation that advocates for accountability through the International Criminal Court (ICC) and through domestic mechanisms, including peace negotiations and justice processes. WI's Uganda programme monitors the progress and challenges in establishing an effective national mechanism to try conflict-related crimes including sexual violence, in the Ugandan context. In addition, we also advocate for the participation of women and the integration of gender provisions within peace processes and reconciliation efforts from the perspective of victims/survivors and women's rights activists in armed conflict situations.

We work with women most affected by the conflict situations under investigation by the ICC. We have over 6,000 grassroots members and partners across multiple armed conflicts as well as four offices located in Kitgum and Kampala in Uganda, Cairo in Egypt and The Hague in the Netherlands. The Women's Initiatives is legally registered in both Uganda and the Netherlands.

The Women's Initiatives has been working in Uganda since 2004. During this period, we have seen our partners and members, who are grassroots women's rights and peace activists, increase from the initial 200 members. Our key partner organisation, the Greater North Women's Voices for Peace Network, now has it-self over 5,180 members.

Our legal monitoring of the ICC and ICD is published yearly in the GRC and our other publications.  
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We also publish the ***Legal Eye on the ICC***, a regular eLetter from the Women's Initiatives for Gender Justice. In the *Legal Eye* you will find summaries and gender analysis of judicial decisions and other legal developments at the International Criminal Court (ICC), and discussion of legal issues arising from victims' participation before the Court, particularly as these issues relate to the prosecution of gender-based crimes in each of the Situations under investigation by the ICC. The Court currently has eight Situations under investigation: Uganda, the Democratic Republic of the Congo (DRC), Darfur (Sudan), the Central African Republic (CAR), Kenya, Libya, Côte d'Ivoire and Mali.

In addition to the *Legal Eye on the ICC*, we also produce ***Women's Voices***, a regular eLetter providing updates and analysis on political developments, the pursuit of justice and accountability, the participation of women in peace talks and reconciliation efforts from the perspective of women's rights activists within armed conflict situations, specifically those countries under investigation by the ICC<sup>1</sup>.

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<sup>1</sup> For more information about the work of the Women's Initiatives for Gender Justice and previous issues of *Women's Voices* and *Legal Eye on the ICC* can be found on our website at [www.iccwomen.org](http://www.iccwomen.org).

## ***The complex nature of the conflict:***

UN ICTR: ethnic cleansing

UN ICTY: address crimes committed from 1991 to 2001 against members of various ethnic groups in Croatia, Bosnia and Herzegovina, Serbia, Kosovo and the Former Yugoslav Republic of Macedonia.

SCSL: to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed in Sierra Leone after 30 November 1996 and during the Sierra Leone Civil War. In addition, the court would have jurisdiction to prosecute those who violated the Geneva Convention of 1949, as well as Sierra Leone's Prevention of Cruelty to Children Act, 1926 for the abuse of girls and Malicious Damage Act 1861.

CAR: Three main rebel groups have been operating in CAR over the last few decades: the Convention of Patriots for Justice and Peace (CPJP); the Union of Democratic Forces for Unity (UFDR); and the Popular Army for the Restoration of Democracy (APRD). There are also other smaller rebel groups operating in the country, and particularly in the north. The situation is further complicated by a long history of neighbouring militias entering CAR territory, most notably Uganda's Lord's Resistance Army (LRA), which is notorious for brutal attacks against civilians, and is often pursued by the Ugandan Peoples Defence Force (UPDF).

DRC: The war had an economic as well as a political side. Fighting was fuelled by the country's vast mineral wealth, with all sides taking advantage of the anarchy to plunder natural resources. There has also been a lot of involvement, on either side, by other countries in the DRC crises.

Uganda: LRA insurgency

LRA insurgency: There is some evidence to suggest that the original intention of this movement was to draw attention to, and seek redress for, the economic disparities between the North and the rest of the country, and to seek greater representation in public office and civil service posts. However, irrespective of the LRA's original intention, for more than two decades its strategies and practices have led to widespread violence, suffering, terror and poverty for communities across four countries - Uganda, the Democratic Republic of the Congo (DRC), Southern Sudan and the Central African Republic (CAR).

It is also alleged that the state security organ, that was supposed to protect the defenceless citizens, also on numerous occasions assaulted and even sexually abused those they are employed and paid to protect.

In addition to the above, those taken into captivity at times willfully or forcefully contributed to the plight of the defenceless victims.

Women's Initiatives and our over 5000 partners from the greater north have always maintained that in relation for liability for rape, defilement and any other gender based crime against the abductees, unless otherwise proven, there is evidence that those abducted were forced to kill; there is no evidence that they were forced to rape or otherwise sexually violate a victim. Once an abductee, given an opportunity either to protect or abused, willingly opted to abuse the person he/she could have protected then the person is criminally liable.

The fact that the conflict had a spill-over effect into neighboring states where it has, for the past 7 years or so, continued to wreak havoc also adds to the complex nature of the conflict..

### ***Juba Peace Agreement:***

The agreements signed in Juba between May 2007 to March 2008 supports the root cause of the LRA conflict i.e. that GoU conceded to the fact that there was marginalization<sup>2</sup>, regional in-balance<sup>3</sup>; need to fast track the economic and social development of north and north eastern Uganda<sup>4</sup>; recognition of substantial loss of livestock and the need to fast track re-stocking programmes<sup>5</sup>;

The complexity of the LRA conflict and the issue as to who could be considered as a perpetrator given that many were abducted and forced to kill was, to an extent, addressed in the Juba Peace Agreement. The Juba Peace Agreement under Agenda Item 3 on Agreement on Accountability and Reconciliation and its Annexure provided for the establishment of a special court (as a formal mechanism) and the adoption, with modification where necessary, of traditional mechanisms of accountability as well as any other appropriate alternative justice mechanisms.

Provision in the Agreement for state actors to be subjected to existing criminal justice processes and not to special justice processes under the Agreement<sup>6</sup>, unless otherwise proven, does not promote equality of treatment to potential perpetrators as required by law.

Other factors that contributes to the complex nature of the conflicts and impacts on prosecution includes:

- Scale of the offences and area covered
- Evidence obtained after long period and no longer fresh
- Attitude of victims and witnesses i.e. fear or loss of interest
- Reparation for victims as opposed to government programmes for economic development
- Global concerns and involvement given the heinous nature of the offences

### ***states cooperation:***

Initially the ICC received positive cooperation from those who are State parties and those not party to the Rome Statute<sup>7</sup>.

*A history of Africa's involvement with international justice:*

1. 47 OAU members participated in the Rome Conference that created the ICC.
2. The legal adviser of the OAU participated in the Rome

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<sup>2</sup> Agreement on Comprehensive Solutions at C.2.1c);d);e);4.0;

<sup>3</sup> Agreement on Comprehensive Solutions at C. 4.0; 5.0; 6.0; 8.1

<sup>4</sup> Agreement on Comprehensive Solutions at 10.1 to 10.2.

<sup>5</sup> Agreement on Comprehensive Solutions at 13.

<sup>6</sup> Agreement on Accountability and Reconciliation at 4.1.

<sup>7</sup> As of 17 August 2012 there were 121 ICC State Parties: African States 33; Asia-Pacific States 18; Eastern European States 18; Group of Latin American and Caribbean States (GRULAC) 27 and Western European and Other Group (WEOG) 25. TOTAL 121. Women's Initiatives for Gender Justice Gender Report Card on the ICC (GRC) 2012 (Special Edition) p. 68 and 69. To date they are 122 state parties.

Conference.

3. The 2004-2007 Strategic Plan of the AU urged AU member states to Ratify the Rome Statute

4. The AU has always endorsed highly qualified Africans to fill key positions at the ICC e.g. Chile Oboe Osujje ICC Judge in Ruto and Chang's case and Fatou Bensouda the ICC Prosecutor.

5. The Constitutive Act of the AU rejects impunity.

6. Africa contributed the Dakar principles to international law.

Several State parties referred cases to ICC<sup>8</sup>.

In 2003, the Government of Uganda referred the conflict in the North to the ICC. This triggered an independent investigation by the ICC with a focus on major incidents including massacres, abductions, sexual violence, mutilations and general acts constituting cruel treatment of the civilian population. In October 2005, the Court announced the issuance of five warrants of arrest for the senior commanders of the LRA – General Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya<sup>9</sup> – for war crimes and crimes against humanity including charges of rape and sexual enslavement.<sup>10</sup>

Why the change in attitude:

Of late there is a move by African States (and this is obvious in the spoken and written actions of AU member states) for State Parties from Africa to withdraw from the ICC. The intention for withdrawal is based on a number of allegations the most prominent being that ICC targets Africa's weaker States.

WI is aware that under the Rome Statute, the ICC is not a court of first instance; it complements national jurisdictions<sup>11</sup>. We are also mindful of the fact that the ICC, normally, targets the most senior perpetrators for prosecution.

We are not opposed to the establishment of comprehensively funded, strongly resourced, legally sound and politically backed regional courts that fearlessly pursues justice for the victims of conflicts. There may be complementarity benefits in having a regional court that can deal with war crimes, crimes against humanity and genocide. Our concerns are whether this would be used to avoid accountability, pardon AU leaders, and ensure they couldn't come before the ICC.

We wonder whether the initiative by the AU and other regional bodies e.g. the East African Legislative Assembly (EALA)<sup>12</sup> demonstrates a genuine commitment by African States to bring to justice and not to shield the perpetrators of such crimes.

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<sup>8</sup> The first three Situations to come before the Court (Uganda, the Democratic Republic of the Congo and the Central African Republic) were referred by the Governments of the respective countries, all ICC States Parties. The Un Security Council has referred two Situations to the Court: in 2009, the Situation in Darfur and, in 2011, the Situation in Libya; neither Sudan nor Libya is an ICC State Party. The Office of the Prosecutor has so far initiated two investigations *proprio motu*: Kenya and Côte d'Ivoire. Women's Initiatives for Gender Justice Gender Report Card on the ICC (GRC) 2012 (Special Edition) p. 95.

<sup>9</sup> ICC proceedings against Raska Lukwiya were discontinued in July 2007 following confirmation of his death in a gun battle between the LRA and the UPDF. In 2008 there were credible reports that Vincent Otti had been killed by the LRA on the orders of General Kony. The death of Vincent Otti remains unconfirmed and as such the ICC retains this arrest warrant.

<sup>10</sup> Charges for gender based crimes are brought solely against the LRA Leader, Joseph Kony and Deputy Leader, Vincent Otti.

<sup>11</sup> Rome Statute at paragraph 10

<sup>12</sup> EALA in empowering the East African Court of Justice with criminal jurisdiction to try international crimes including those under the Rome Statute.

Equally of concern is the call by AU Assembly's for African State Parties to the Rome Statute and African non-State Parties to consider concluding bilateral agreements on the immunities of their Senior State officials. We are mindful that the focus of opposition to ICC proceedings continues to be in relation to those ICC proceedings directed against current African State Leaders<sup>13</sup>. The focus being promoted under the guise of immunities of member states Senior State officials. We want to point out that the global concern that led to the creation of ad hoc courts and finally the establishment of a permanent court (i.e. ICC) to try international humanitarian crimes is the efforts to end impunity for heinous crimes that shock human conscience. The focus is not the states or head of states the focus is protection of victims and investigation of heinous crimes irrespective of who the perpetrators are; the ICC is not established to investigate or prosecute states it is about prosecution of individuals whether they are still in power or not.

Specifically, we are uncomfortable with: AU's efforts in relation to ICC proceedings against President Omar al Bashir of the Sudan<sup>14</sup> and the Kenyan situation as contained in the Implementation of the Decisions on the International Criminal Court by the Assembly that requests for the deferral of proceedings in the two situations<sup>15</sup>; AU Assembly decision on the Abuse of the Principle of Universal Jurisdiction [Assembly/AU/Dec.419XIX], calling for member states to use the UN General Assembly debate on universal declaration to express their concerns (as also indicated in previous Decision by the AU Assembly) that "warrants of arrest issued on the basis of the abuse of principle of universal declaration shall not be executed in any Member State"; the endorsement by AU Assembly for referral to the International Court of Justice (ICJ) of the recommendation by African Ministers of Justice/Attorney Generals for the UN General Assembly to request an advisory opinion from the ICJ on the question of immunities of Heads of States and other senior officials of States that are not Party to the Statute; the support and encouragement by AU Assembly to the Recommendation by African Ministers of Justice and Attorney Generals for the adoption of an African Model National Law on Universal Jurisdiction over International Crimes; support for Decision Assembly/AU/Dec.296 (XV) adopted by the Fifteenth Ordinary Session in Kampala, Uganda in July 2010 requesting Member States to balance, where applicable, their obligations to the AU with their obligations to ICC<sup>16</sup>; the criticism and reprimand lashed at Malawi for not supporting Bashir's invitation to the scheduled AU meeting in Malawi<sup>17</sup>; the change of venue for the 19<sup>th</sup> Summit from Malawi to Addis Ababa simply because Malawi, as a party to the Rome Statute, insisted Bashir was not welcomed to Malawi<sup>18</sup>. We note that the requests to set up an ICC liaison office in Addis Ababa where the AU headquarters are

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<sup>13</sup> To date there are seven situations before the ICC. Cases referred by the respective Government to ICC are: DRC (March 2004); Uganda (July 2004); CAR (December 2004); Côte d'Ivoire (October 2011). Cases referred by UNSC to ICC: Darfur (March 2005); Libya (February 2011). Kenya (2011) Prosecutor of ICC initiative in the exercise of his *proprio motu* powers under Article 15 started an investigation in the Kenya case.

<sup>14</sup> AU is highly critical of this move. Jean Ping, the AU Chairperson, is quoted to have stated as follows, "The AU's position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace. See "World Reaction-Bashir Arrest" (4<sup>th</sup> March 2009) BBC, available at: <http://news.bbc.co.uk/2/hi/africa/7923797.stm> (last accessed on 4th June 2012)

<sup>15</sup> Assembly/AU/Dec.419(XIX) at pp.9-10.

<sup>16</sup> On 27 July 2010, the AU issued a declaration explicitly calling on AU Member States not to cooperate with the ICC. For more information see Gender Report Card 2010, p. 101-104 and Gender Report Card 2011 p. 156

<sup>17</sup> <http://www.sudantribune.com/Malawi-gives-up-AU-summit-over-42868>

<sup>18</sup> Malawi had allowed Bashir to attend a meeting in Malawi in October 2011 and the ICC Pre-Trial Chamber held in December 2011 that Malawi had acted contrary to its obligations under the Rome Statute. See also "Ethiopia to host African Union Summit after Omar Al-Bashir Malawi Row" Found at [www.bbc.co.uk/news/world-africa-18407396](http://www.bbc.co.uk/news/world-africa-18407396) (last accessed on 10th July 2012)

located have so far been met with immense resistance<sup>19</sup>. We are aware of AU's refusal to sign the Draft Memorandum of Understanding between AU and ICC.

Of the 54 AU Member States, 33 are State Parties to the Rome Statute. Evidently the potential for conflict is great be it in relation to Member States obligations under the Rome Statute or AU Member States commitments under various AU Decisions and statutes as listed above (including AU's commitment to fight impunity<sup>20</sup>) and the importance of putting the interests of victims at the center/top of all actions in sustaining the fight against impunity. A move to protect the elite from prosecution by according special treatment to African Heads of States and senior officials could be seen as a sign of partiality by AU. This is contrary to ICC Pre-Trial Chamber decision that customary international law does not provide immunity for Heads of States before international tribunals and circumvents interpretation to the Vienna Convention on Diplomatic relations and other treaties providing immunity to State representatives to international organisations, the UN General Convention on Privileges and Immunities and Article 98 of the Rome Statute. It also denies justice to victims, especially victims of gender based crimes and violence.

While we appreciate some of the positive aspect of the Draft Model Law e.g. Article 9(f) that expands the definition of genocide by including "Acts of rape that are intended to change the identity of a particular group", we however strongly feel that this expansion could be achieved through amendment of the Rome Statute or by interpretation of the Rome Statute through ICC case law. In the present state, the Draft Model Law is open to abuse and could jeopardise the fight against impunity as enshrined in the Rome Statute<sup>21</sup>. It is our considerate opinion that the potential conflict listed above also goes against AU objectives.

In conclusion, African States are free to establish a court to try heinous crimes and offences under the Rome Statute since the ICC will always try the senior perpetrators only. The language used by African states, resolutions passed and draft laws that aim at exonerating certain categories of offenders is what leads one to question the need by African states not only to establish a court for Africa but also to withdraw from the ICC.

### ***capacity to prosecute international crimes:***

- Jurisprudence evolving: This is a new area for the Judges and all involved so there is need for training in order to develop the capacity for effectiveness.
- Conflict of laws: The civil law and criminal law from the various countries differ with some using the adversarial prosecution methods under common law and others the civil law procedures. Combining the two systems usually has demonstrated challenges to the court officials.
- Qualification and experience: Judges of International courts are not limited to those with legal backgrounds only. Even Diplomats could be appointed as Judges. This has its challenges.

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<sup>19</sup> See, "Addis Ababa Office Opening Still on Hold" (4th February 2011) Radio Netherlands Worldwide(RNW) Available at [www.rnw.nl/international-justice/print/292628](http://www.rnw.nl/international-justice/print/292628) (last accessed on 10th July 2012) .

<sup>20</sup> Especially under Article 4(h) and 4(o) of the Consultative Act of the AU.

<sup>21</sup> Uganda is in the process of moving Parliament to amend the Constitution and grant the President not only immunity when in office but total immunity even after he/she ceases to be President.

- Investigation e.g. expertise; forensic evidence; PF3; financial implications; corruption. It has been demonstrated that there is need for more training and capacity building and reforms in these areas for effective investigation.
- Insufficient provisions for witness protection and victim participation. This applies especially to ICD where the RPE is yet to be developed and adopted.
- Lack of provision for reparation: This applies to ICD.
- Inequality of arms between defence and prosecution. This problem is raised by Defence counsels appearing before international courts and applies to cases before ICD as well.
- Insufficiency and lack of sustainable financial support. This applies across board.
- Amnesty. This is discussed below in relation to ICD.

Recent convictions at the International Criminal Court (ICC) and the Special Court for Sierra Leone of militia leader Thomas Lubanga<sup>22</sup> and the former President of Liberia Charles Taylor<sup>23</sup> respectively, further institutionalise normative expectations of accountability for international crimes including war crimes, crimes against humanity and genocide.

While these Courts necessarily focus on those considered most responsible for the commission of crimes within their jurisdiction, communities - both local and global - are demanding a reduction in impunity and more frequent domestic trials for lower-ranked perpetrators responsible for committing similarly grave crimes.

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

In 2009, the Government of Uganda proceeded with implementing aspects of the signed Juba peace agreements including the establishment of a special division to hold national trials of serious crimes, as outlined in the peace agreement on Accountability and Reconciliation.<sup>24</sup> This agreement also stipulates that military personnel will be tried by military courts only. As such the intention of the special division was always clearly to focus on members of the LRA alleged to have committed serious crimes, but not on others also responsible for comparable acts committed during the conflict.

The inclusion of national prosecutions within the basket of justice and reconciliation initiatives was welcomed by large sections of the community, in particular women's rights and peace advocates and their networks. However, in the implementation phase, steps taken by the Ugandan Government have inadvertently weakened the foundation of the national prosecution regimen in critical ways.

In 2008, in partial fulfillment of its obligations under the Peace Agreement on Accountability and Reconciliation, the Government established the War Crimes Division of the High Court which was eventually reconstituted in 2011 as the International Crimes Division (ICD), without having tried any cases.<sup>25</sup> The ICD was established pursuant to a Legal Notice issued by the Chief Justice on 31 May

<sup>22</sup> Trial Chamber I, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, 14 March 2012.

<sup>23</sup> *Prosecutor v. Charles Ghankay Taylor*, Trial Judgment, SCSL-03-1-T, 26 April 2012.

<sup>24</sup> Agreement on Accountability and Reconciliation and its Annexure signed in Juba on 29 June 2007 and 19 February 2008.

<sup>25</sup> For a detailed discussion of the developments at first the WCC and now the ICD, see Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2010*, p 90-93 and *Gender Report Card on the International Criminal Court 2011*, p 139-141.



2011.<sup>26</sup> However, under Ugandan law the power to legislate by such notice requires the authorisation of Parliament, which was reportedly neither sought nor obtained in the establishment of the ICD. The Chief Justice purportedly issued the Legal Notice under powers conferred by Article 133(1)(a) and (b) of the Ugandan Constitution.<sup>27</sup> However, this Article does not confer on the Chief Justice the power to legislate. As such, there are questions amongst members of civil society voiced, particularly by local women's rights and peace networks as well as the legal community about the constitutionality of the ICD.

As it stands, the ICD is mandated to try war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and other international crimes defined in the Uganda International Criminal Court Act 2010 (ICC Act), the Geneva Conventions Act of Uganda (1964) and the Ugandan Penal Code Act.

Possessing a multiplicity of legal frameworks is not inherently problematic, however in this case, the legal jurisdictions lack coherence and in some respects are also contradictory. As noted by Human Rights Watch "[ ] war crimes under the Geneva Conventions Act relate to international armed conflicts, and the judges have yet to make any findings as to whether the northern Uganda conflict was an international or non-international armed conflict".<sup>28</sup>

In addition, the limitation of the temporal jurisdiction of the Ugandan ICC Act to crimes committed after 25 June 2010, the date the ICC Act was published in the Uganda Gazette, prevents the ICD from utilising the most progressive and comprehensive law within its legislative framework. Women's rights and peace advocates from the Greater North of Uganda as well as international women's rights partners, have raised questions about this limitation, especially as it relates to the provisions for the prosecution of gender-based crimes, witness protection measures, the participation of victims within the legal proceedings, legal aid for indigent victims and accused, and the construction of a reparations mechanism. All of these principles are embodied within the Rome Statute of the ICC and now Ugandan law, with the adoption of the ICC Act.

During the development of the domestic ICC Bill, the Greater North Women's Voices for Peace Network (GNWVPN) and the Women's Initiatives for Gender Justice critiqued multiple drafts of the Bill and highlighted each of these areas while also emphasising that the date of jurisdiction should at least be effective from 1 July 2002, the date the Rome Statute came into force. Although, in light of the 26-year conflict even this expansion is considered grossly inadequate, it was argued by these groups that expanding the temporal jurisdiction of the ICC Act would enable the ICD to investigate a larger period of crimes including the attacks in Uganda allegedly committed by the LRA in 2005 in response to the ICC indictments.

Finally, the existing Amnesty Act contradicts the ICD's legal framework, as has been evidenced in the first trial, *Thomas Kwoyelo alias Latoni v Uganda*.

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<sup>26</sup> No. 10 of 2011 published on 31 May 2011 'The High Court (International Crimes Division) Directions, 2011'.

<sup>27</sup> The Ugandan Constitution is based on the doctrine of separation of powers. Article 133(1)(a) and (b) provide out that: '(1) The Chief Justice (a) shall be the head of the judiciary and shall be responsible for the Administration and supervision of all courts in Uganda; and (b) may issue orders and directions to the courts necessary for the proper and efficient administration of justice'. Article 133(1)(a) and (b) thus does not explicitly confer on the Chief Justice the power to legislate.

<sup>28</sup> 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division', *Human Rights Watch*, January 2012, p 15, available at [http://www.hrw.org/sites/default/files/reports/uganda0112ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_0.pdf), last visited on 3 May 2012.

## First Trial

The first trial before the ICD, popularly known as “the Kwoyelo trial”,<sup>29</sup> began on 11 July 2011 in Gulu. A former colonel in the LRA, Kwoyelo has been in custody since March 2009, and was originally charged under the Ugandan 1964 Geneva Conventions Act with 12 counts of destruction of property, willful killing and taking hostages.<sup>30</sup> At the start of the trial, the indictment was amended to include murder, attempted murder, kidnapping, kidnapping with intent to murder, robbery and robbery using a deadly weapon, charged under the Ugandan Penal Code Act.<sup>31</sup> Kwoyelo pleaded not guilty to all charges.<sup>32</sup> Notably, there were no charges for gender-based crimes in this case despite Kwoyelo’s rank within the LRA and the multiple sources describing the militia’s practice of assigning abducted girls and young women to senior officers and commanders for sexual and domestic purposes. It is also noteworthy that no charges were brought under the Ugandan ICC Act although some of the incidents for which Kwoyelo is charged are also incidents which have been the subject of ICC investigations.<sup>33</sup>

At the ICD hearing on 15 August 2011, the Defence raised several issues, including a challenge to the case on the basis of the accused’s application for amnesty under the Uganda Amnesty Act.<sup>34</sup> According to the Refugee Law Project, Kwoyelo applied for amnesty on 2 January 2010 but received no response from the Director of Public Prosecutions (DPP).<sup>35</sup> In March 2010, the Amnesty Commission wrote to the DPP requesting certification “to enable the Amnesty Commission to grant an amnesty certificate”.<sup>36</sup> However, according to the Refugee Law Project “a response to this letter never came”.<sup>37</sup> The Defence, in consultation with and with the consent of the DPP requested referral of these issues to the Constitutional Court, which was granted by the ICD. The Constitutional Court ultimately decided in Kwoyelo’s favour and directed the ICD to stop all proceedings.<sup>38</sup> Appeals of this order are ongoing, and Kwoyelo remains in custody.

Under the Amnesty Act,<sup>39</sup> an amnesty is “declared in respect of any Ugandan who has, at any time since 26 January 1986, engaged in or is engaging in war or armed rebellion against the Government of the Republic of Uganda by 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”.<sup>40</sup> The Act

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<sup>29</sup> *Uganda v. Kwoyelo Thomas alias Latoni* (Record of Proceedings) Case No. 0002 of 2011

<sup>30</sup> ‘Uganda Set for First War Crimes Trial’, Institute for War and Peace Reporting (IWPR), 14 July 2010, available at <http://iwpr.net/report-news/uganda-set-first-war-crimes-trial>, last visited on 3 May 2012. According to the Indictment filed by the DPP all the attacks by the LRA that took place in Kilack County, Amuru District between 1987 and 2005 were either commanded by Kwoyelo or were carried out with Kwoyelo’s knowledge and authority.

<sup>31</sup> Amended Indictment, *Prosecutor v. Kwoyelo Thomas alias Latoni*.

<sup>32</sup> Record of Proceedings in HCT-00-ICD-CASE No. 0002 of 2010 held in Gulu on 11 July 2011.

<sup>33</sup> See *OTP Weekly Briefing*, Issue #65, 23-29 November 2010, available at <http://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf>, last visited on 3 May 2012, p 1.

<sup>34</sup> The three issues related to amnesty, disclosure of mitigating/exculpatory evidence and proceeding under the Geneva Convention of 1949. During the Constitutional Direction Proceedings before the Registrar Court of Appeal, Defence revised the 3 issues and dropped the issue relating to the Geneva Conventions Act and proceeded with issue relating to Director of Public Prosecutions failure to process Kwoyelo’s application for amnesty when duly referred to the Director of Public Prosecutions for action. Prosecution had no objection but, with leave of court, added the issue regarding the constitutionality of sections 2, 3 and 4 of the Amnesty Act.

<sup>35</sup> “Witness to the Trial”, Monitoring the Kwoyelo Trial’, *Refugee Law Project*, Issue 1, 11 July 2011, available at [http://www.refugeelawproject.org/others/Newsletter\\_on\\_Kwoyelo\\_trial\\_progress\\_Issue\\_1.pdf](http://www.refugeelawproject.org/others/Newsletter_on_Kwoyelo_trial_progress_Issue_1.pdf), last visited on 3 May 2012, p 1.

<sup>36</sup> “Witness to the Trial”, Monitoring the Kwoyelo Trial’, *Refugee Law Project*, p 1.

<sup>37</sup> “Witness to the Trial”, Monitoring the Kwoyelo Trial’, *Refugee Law Project*, p 1.

<sup>38</sup> Ruling of the Constitutional Court dated 22 September 2011. Constitutional Petition No. 036/11 [arising out of HCT-00-ICD-Case No. 02/10].

<sup>39</sup> Amnesty Act 2000.

<sup>40</sup> Section 3, Amnesty Act (CAP 294).

further provides that a person who qualifies under the Act “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”.<sup>41</sup>

Conversely, the Amnesty (Amendment) Act of 2006<sup>42</sup> provides that a person shall not be eligible for amnesty if he or she is declared not eligible by the Minister by statutory instrument made with the approval of Parliament. The conditions for declaring an individual ineligible for amnesty are unclear and the powers to do so remain discretionary.

Over the course of its work, the Amnesty Commission has granted more than 24,000 certificates of amnesty to ex-combatants.<sup>43</sup> Approximately half of the beneficiaries are individuals affiliated with the LRA including members more senior than Kwoyelo, some of whom are allegedly responsible for the retaliatory massacres committed in the DRC by the LRA during Operation Lightning Thunder.<sup>44</sup> To date, no one has been denied amnesty.

### **Accountability**

Since 2008, the GNWVPN and the Women’s Initiatives for Gender Justice have advocated for the Amnesty Act to be allowed to lapse and for it to be replaced by the justice and reconciliation instruments proposed under the Juba Peace Agreements. These groups have also called upon the Government of Uganda to harmonise the legal framework of these mechanisms to ensure coherence and effective implementation.

Members of the GNWVPN believe that in its current form, the Amnesty Act does not foster justice and reconciliation but rather contributes to negative attitudes towards those granted amnesty.<sup>45</sup> It appears that the Act and the work of the Commission are considered by large sections of the community to provide support to former perpetrators while no support is being provided to victims by the Government and district councils. In addition, according to local women’s rights actors, even among those granted amnesty the “treatment is not equal with former commanders treated considerably better than those abducted, especially the female abductees”.<sup>46</sup>

During 2011 and 2012, the Ugandan Justice, Law and Order Sector (JLOS) convened several technical meetings and community consultations with stakeholders regarding the future of the Amnesty Act, and whether it should be extended or allowed to lapse. On 25 April 2012, the JLOS Formal Criminal Jurisdiction Sub-Committee on Amnesty issued its findings which included recommendations to allow the Amnesty Law to lapse when its mandate expires on 24 May 2012 and to “allow the Amnesty Commission to wind up its activities in the area of reintegration and support to reports for an additional 6-12 months”.<sup>47</sup>

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<sup>41</sup> Section 3(2), Amnesty Act (CAP 294).

<sup>42</sup> Effective from 19 July 2006.

<sup>43</sup> This number includes 29 persons granted amnesty in 2011. Kwoyelo applied for amnesty in 2010. In that year 274 people were granted amnesty which was apparently sanctioned by the DPP. Records of ruling of Constitutional Court on Constitutional Petition No. 036/11 (REFERENCE) Arising out of HCT-00-ICD-Case No. 02/10 Thomas Kwoyelo alias Latoni v. Uganda at p. 24

<sup>44</sup> Justice for Serious Crimes Before National Courts: Uganda’s International Crimes Division’, *Human Rights Watch*, January 2012, p 14.

<sup>45</sup> Consultations with the Greater North Women’s Voices for Peace Network by the Women’s Initiatives for Gender Justice, May 2012.

<sup>46</sup> Consultations with the Greater North Women’s Voices for Peace Network by the Women’s Initiatives for Gender Justice, May 2012.

<sup>47</sup> Amnesty Law (2000) Issues Paper, Transitional Justice Working Group - JLOS, April 2012, p 26.

The responsible Minister, in the exercise of the power conferred on him by Parliament, issued an instrument for the lapse of Part II of the Amnesty Act<sup>48</sup>. The said Minister later reversed this position and allegedly restored Part II of the Amnesty Act despite advice by the Attorney General that the Minister could not restore Part II<sup>49</sup>. The Minister then issued another statutory instrument extending the existence of the Amnesty Act to 25<sup>th</sup> day of May 2015<sup>50</sup>. This was contrary to the recommendation by JLOS, the technical experts and communities JLOS consulted. Under the consultation by JLOS it was recommended that the Amnesty Act be reviewed with a view to amendment so as to provide that those who have committed offences under the Rome Statute (WI's added especially gender based crimes) should not be granted amnesty.

**In conclusion, WI's and the over 5000 members from the areas you represent strongly feels that the ongoing coexistence of the Amnesty Act in its current form alongside the ICD is proving to be a serious impediment to the accountability demanded by the community and guaranteed under the Juba Peace Agreements. Without the harmonisation of Ugandan laws by the Government, the Amnesty Act will continue to hinder efforts towards domestic prosecutions for war crimes, crimes against humanity and genocide.**

Thank you.

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<sup>48</sup> The Amnesty Act (Declaration of Lapse of the Operation of Part II) Statutory Instrument No. 34 of 2012.

<sup>49</sup> The Amnesty Act (Revocation of Statutory Instrument No. 34 of 2012).

<sup>50</sup> The Amnesty Act (Extension of Expiry Period) Instrument, 2013.