



## **THE AMNESTY LAW (2000) ISSUES PAPER**

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**REVIEW BY THE TRANSITIONAL JUSTICE WORKING GROUP**

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## Introduction

On 19 February 2008, the Government and LRA signed an Annexure to the Agreement on Accountability and Reconciliation, (Annex)<sup>1</sup> which provides a framework for implementing the Agreement. Drawing on key principles in the Annex, the Government is embarking on the process of developing a national transitional justice policy in the spirit of the Juba Agreement and that will be accompanied by a number of accountability and reconciliation mechanisms to address human rights violations committed during the conflict.

In July 2008, the International Crimes Division (ICD) (previously War Crimes Division) of the High Court was established by administrative decree, a body provided for in clauses 7-9 of the Annex, to try individuals who are alleged to have committed serious crimes during the conflict. The ICD has the authority to try genocide, crimes against humanity, war crimes, and any other international crime defined in Uganda's Penal Code Act, the 1964 Geneva Conventions Act, the 2010 International Criminal Court Act, or any other criminal law.

The ICD operates alongside Uganda's Amnesty Act 2000, which was introduced in the midst of the conflict with the intent of ending hostilities in the north and bringing the warring parties to the negotiating table. It is still in effect today, having been renewed numerous times and amended twice. The Amnesty Act of 2000 provides that:

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

Those criminally charged or under lawful detention are also deemed to be granted amnesty upon renouncing rebellion, except when the individual is charged with crimes not falling under the Amnesty Act. As stated here, the provision has resulted in a general amnesty whereby no offences were excluded and all forms of insurgency were covered.

The Act is due to expire in May 2012. Whether it will be renewed again is a matter of national interest. As primary duty bearer, the State has an obligation to pursue accountability for war crimes and to deliver justice and reparations to the victims. Similarly, victims of gross human rights violations and war crimes have a right to justice and an effective remedy for harm suffered. The co-existent nature of the Amnesty Act with other national laws intended to promote accountability for serious crimes presents an obstacle to the State's capacity to fulfill its duty to pursue justice and accountability of war crimes and gross human rights violations.

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<sup>1</sup>Appendix II, Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008.

This paper seeks to assist members of the Formal Criminal Jurisdiction Sub-Committee of the Transitional Justice Working Group (JLOS) in their review of the Amnesty Act by highlighting the key considerations for the possible lapse or renewal of the Amnesty Act of Uganda. Some of these considerations include:

- (1) The conflict of laws between Amnesty and co-existing national laws;
- (2) The conflict of laws between Amnesty and international law obligations;
- (3) The role and purpose of the Amnesty Act (past and present);
- (4) The effects of the Amnesty Act;
- (5) Community views and experience;
- (6) Gender perspective/impact on women; and
- (7) Amnesty within Uganda's national transitional justice policy.

This paper was informed by a number of reference documents, field reports/studies, and national consultations and dialogues. The issue of amnesty, its role, purpose and effects were the subject of public debate and views were collected from a wide variety of stakeholders. In addition to consideration of national and international legal instruments, the paper considers findings from: (1) *Dialogue: Crossroads of Amnesty and Justice*, Conference on Amnesty organized in Kampala by Refugee Law Project, UN Office of the High Commissioner for Human Rights & UNWomen; (2) *Community Dialogue on Amnesty*, Conference on Amnesty organized in Kitgum by JLOS, OHCHR & UNWomen; (3) National Transitional Justice Audit undertaken by RLP; (4) Consultative meeting on the future of Amnesty organized by the Northern Uganda Transitional Justice Working Group. Position papers from Justice and Reconciliation Project (Gulu), *Avocats sans Frontiers*, and UNWomen were also considered. The views of key stakeholders, such as the officials within the Ministry of Justice and Constitutional Affairs, the Ministry of Internal Affairs<sup>2</sup>, the Amnesty Commission<sup>3</sup>, victim associations<sup>4</sup>, legal specialists<sup>5</sup> and international law experts.<sup>6</sup>

It should be noted that the Formal Criminal Jurisdiction Sub-Committee appreciates the value of comprehensive national consultations to inform the process, however time did not allow for this. This notwithstanding, the findings in this paper reflect broad consultations with key stakeholders in several districts, namely those most affected by the conflict and from where most reporters originate, thus the process is grounded in informed views and analysis of the key legal, social and political considerations at stake.

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<sup>2</sup> Interview with Permanent Secretary, Ministry of Internal Affairs (15 March 2012)

<sup>3</sup> Interview with Secretary, Amnesty Commission (20 April 2012).

<sup>4</sup> Uganda Victims Foundation; AYINET; Greater Women's Voice for Peace Network, FAPAD, CCF, Kitgum Women's Initiative for Peace (November 2011; March 2012).

<sup>5</sup> First Parliamentary Council, MOJCA; Legal Advisor to AG, MOJCA.

<sup>6</sup> Prof. C.Mbazira, Makerere University School of Law; Louise Mallinder, Notes for UCICC Consultation on Amnesty Act of Uganda.

## **Background**

The Juba Agreement on Accountability and Reconciliation (‘Agreement’), signed in 2007, provides the overarching legal framework for the analysis of the Amnesty law. The Agreement was adopted with the intent to prevent impunity for serious crimes, human rights violations and the desire to honor the suffering of victims.<sup>7</sup> It calls for the prevention of impunity for such crimes and promotes redress in accordance with the Constitution and international obligations. It therefore calls for the promotion, strengthening and establishment of different justice mechanisms to give effect to these commitments.

The Agreement emphasizes the use of formal justice mechanisms to pursue justice for war crimes. Specifically, it stipulates 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>8</sup> In addition, informal justice processes are to be promoted to complement the formal processes.

In light of the above, the Agreement calls for legislative and policy changes to give effect to the Agreement and the principles contained therein. Specifically, Section 5.6 and 14.4 call on the Government to ‘introduce amendments to any existing law in order to promote the principles in this Agreement’ and to ‘introduce any amendments to the Amnesty Act or the Uganda Human Rights Commission Act in order to bring it into conformity with the principles of this Agreement.’

Consequently, it can be understood by the provisions cited above that the drafters of the Agreement were aware of the potential legal conflicts that would arise between the Amnesty Act and the other justice mechanisms contemplated in the Agreement. As such, the review and amendment of the Amnesty was specifically stipulated in the Agreement.

### **I. Amnesty Act of 2000 and its Amendments**

In addition to the provision cited above, the Amnesty Act of 2000 provides that:<sup>9</sup>

*An Amnesty is declared in respect of any Ugandan who has at any time since the 26<sup>th</sup> day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by –*

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<sup>7</sup> Preamble, Agreement on Accountability and Reconciliation between Government of the Republic of Uganda and the Lord’s Resistance Army Movement, Juba, Sudan (2007).

<sup>8</sup> Section 4.1 (Accountability), Agreement on Accountability and Reconciliation between Government of the Republic of Uganda and the Lord’s Resistance Army Movement, Juba, Sudan (2007).

<sup>9</sup> Amnesty Act 2000, s. 3(1).

- (a) actual participation in combat;*
- (b) collaborating with the perpetrators of the war or armed rebellion;*
- (c) committing any other crime in the furtherance of the war or armed rebellion; or*
- (d) assisting or aiding the conduct or prosecution of the war or armed rebellion.*

*A reporter shall be taken to be granted amnesty declared under section 3 if the reporter*

- (a) Reports to the nearest Army or Police Unit, a chief a member of the Executive Committee of a local government unit, a magistrate or a religious leader within the locality;*
- (b) Renounces and abandons involvement in the war or armed rebellion;*
- (c) Surrenders at any such place or to any such authority or person any weapons in his or her possession; and*
- (d) Is issued with a Certificate of Amnesty as shall be prescribed in regulations to be made by the Minister.*

It stipulates that individuals who fall within the scope of the amnesty “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>10</sup> According to the Act, Amnesty is granted to anyone who ‘renounces rebellion’, and as such, treats all reporters alike, overlooking the category of crimes allegedly committed (including war crimes, crimes against humanity or gross human rights violations) and failing to require any accounting of the facts/truth in exchange for amnesty. In terms of the pursuit of accountability for war crimes, crimes against humanity and gross human rights violations, the Amnesty Act is a *dejure* and *defacto* blanket amnesty.

Coupled with the granting of amnesty, the Act provides a mechanism to facilitate the reintegration of reporters. The reintegration aspect has consisted of a material support ‘package’ of a modest cash sum and basic tools/equipment for farming/living to reporters.

#### **A. Amendments to Amnesty**

Subsequent amendments to the Act have since been adopted. Namely in 2006, the amendment makes reference to persons who may be found to be ineligible for Amnesty. It states, “*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.*” This amendment does not stipulate the criteria by which individuals may be considered to be ineligible for amnesty, nor does it make the designation of ineligibility of amnesty under certain circumstances mandatory by law. Consequently, the conditions for declaring an individual ineligible for amnesty are unclear and the powers to do so remain discretionary.

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<sup>10</sup> *Id.*, s. 3(2).

The amendment does not specifically indicate that persons suspected of crimes against humanity, war crimes or gross violations of human rights can be found ineligible for amnesty, as Uganda's obligations under international law would dictate. In effect, amnesty under the Amnesty Act may be granted to any and all those who renounce rebellion, regardless of the nature of crimes an individual has committed.

To date no individual has been declared ineligible for amnesty. Such a declaration is long overdue as there was agreement from Government that this would happen before the ICD commenced operations. To date, the ICD has heard one case which is currently sub judice.

## **B. Critique of the Amnesty law**

The amnesty conferences organized in Kampala (Nov 2011) and Kitgum (March 2012) highlighted a number of ambiguities and weaknesses in the Amnesty law that could be the subject of further amendment, and/or the creation of new mechanisms to respond to the needs of victims. These include:

- Unconditional amnesty: At present, the Act does not require truth-telling in exchange for amnesty. Amnesty is being extended even to those captured on the battlefield, while the Act requires that individuals 'renounce rebellion', indicating a willingness to disarm. The issue here is that amnesty was conceived of as a reward for those voluntarily surrendering and demobilizing, therefore, those defeated/captured in battle should not be rewarded in the same manner;
- The Act extends to persons taking up arms against the government, and fails to address accountability of actions by government forces;
- The Act does not indicate criteria for renewal;
- The Amnesty Commission has not done enough to assist reporters with reintegration, thus in most cases reporters are back in their communities but meaningful reintegration has not occurred;
- Linking reintegration to amnesty is problematic because there is a wider pool of persons (victims, abducted youth, captive women and girls) who did not participate actively in combat but who are victims with needs for rehabilitation and reintegration. This group has been left out of AC's reintegration programming;
- Community members critique their lack of involvement in awarding amnesty. They observe that the granting of amnesty is an exclusive relationship with central government. In order for the reporters to be welcomed back to their communities, this requires a confession/truth-telling by the perpetrator with a request of forgiveness to the community. The failure to involve communities has resulted in the lack of reintegration of reporters.

## II. Key Considerations regarding the Amnesty Act 2000

### A. Conflict of laws

The Amnesty Act in its current form presents a number of challenges for the effective application of co-existent national laws and Uganda's international law obligations.

#### 1. Compatibility of Amnesty with other National Laws

The Amnesty law creates obstacles to effective protection of a number of fundamental rights and freedoms protected in the Constitution of Uganda. Specifically, the Amnesty Act presents an obstacle to the enforcement of provisions within Chapter IV of the Constitution, namely Art.20, (duty to respect rights), Art.22 (right to life), and Art.24 (respect for human dignity and protection from inhuman treatment). In so far as the rights and freedoms in Chapter IV of the Constitution are guaranteed to *all individuals*, the State is the primary duty bearer to ensure these rights are fulfilled. In contrast, the absolute power of the Amnesty Commission to grant a certificate barring prosecution of an individual for serious crimes violates the rights of victims to life, human dignity and protection from inhuman treatment. By absolving perpetrators of criminal responsibility for serious crimes, victims are denied any form of justice or reparation. As such, the Amnesty law, in effect, prevents the State from fulfilling its duty to pursue justice for serious crimes or to provide a remedy to the victims.

The *Juba Agreements*, particularly *the Annexure on Agreement on Accountability and Reconciliation*, reflect commitments grounded in Uganda's constitutional and international law obligations to pursue justice and promote redress for human rights violations and serious crimes.<sup>11</sup> The Agreement further draws on the State's commitments contained in the National Objectives and Directive Principles of State Policy, namely the objective to establish institutions and procedures for the resolution of conflicts fairly and peacefully.

Specific provisions in the Annexure call for: accountability of perpetrators of serious crimes and human rights violations, the duty to provide redress to the victims, and an obligation of the State to adopt necessary legislative reforms, *including amendments to the Amnesty Act*, in order to bring it into conformity with the principles of the Agreement.<sup>12</sup> In so far as the Agreement calls for accountability of serious crimes and human rights violations committed during the conflict in Northern Uganda, the Amnesty Act presents a conflict with this obligation by barring such investigation, prosecution and punishment of serious crimes.

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<sup>11</sup> Agreement on Accountability and Reconciliation, Preamble; Art.50 and 126 of the Constitution of Uganda.

<sup>12</sup> Agreement on Accountability and Reconciliation, Principle 2 (Commitment to Accountability and Reconciliation), Principle 4 (Accountability), Principle 6 (Formal Justice Processes), Principle 9 (Reparations) and Principle 14.4 on Government obligations.



The *International Criminal Court Act* (2010) and *Geneva Conventions Act* (1964) are national laws adopted in conformity with the international instruments to which Uganda is a party. Both instruments are premised on the obligation to investigate, prosecute and punish serious crimes including war crimes, crimes against humanity and genocide. The Amnesty Act provides amnesty to all individuals who ‘renounce rebellion’ regardless of the crimes they have committed, thereby barring prosecution and fostering impunity for such crimes.

## **2. Compatibility of Amnesty with International Law and Jurisprudence**

National laws that prevent the State from fulfilling its duties to investigate, prosecute and punish human rights violations, war crimes and crimes against humanity present an obstacle to a State’s ability to comply with its international obligations.<sup>13</sup> The Amnesty Act of 2000 in Uganda presents such a challenge.

### **a. International Human Rights Obligations**

Uganda is a party to the International Covenant on Civil and Political Rights. Article 2(1) of the ICCPR places a fundamental duty on the State to *respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant*. Where a breach of the treaty occurs, regardless of the individual responsible, the State is expected to adopt positive measures to prevent the recurrence of violations and to provide an adequate remedy to the victims. Article 2(1) is now understood as an obligation by the State to investigate, prosecute and punish violations of human rights in order for the State to adequately meet its duty to respect and ensure all rights to individuals in the Covenant.<sup>14</sup>

Uganda has obligations under the ICCPR triggered by its accession to the treaty; the first of these being the duty to adopt legislative measures to ensure the Covenant’s domestic enforcement. Substantively, Uganda has a fundamental duty to *respect and ensure* rights in the Covenant, including the positive duty to investigate, prosecute and punish human rights violations. This duty includes Uganda taking steps towards the investigation, prosecution and punishment of crimes committed against individuals within its jurisdiction and the provision of a remedy for the victims. Amnesty laws posing an obstacle to prosecution of human rights violations and preventing a remedy, and leading to total impunity for crimes have been found to be invalid and incompatible with a State’s international obligations by the only international human rights tribunal that has decided repeatedly on this issue.

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<sup>13</sup> Mallinder L. *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008) 248.

<sup>14</sup> *Joaquin Herrera Rubio v Colombia*, Comm No 161/1983, UNHRC, UN Doc CCPR/C/31/D/161/1983 (1987); *Jose Vicente et al v Colombia*, Comm No 612/1995, UNHRC, UN Doc CCPR/C/60/D/612/1995 (1997); *Nydia Ericka Bautista de Arellana v Colombia*, Comm No 563/1993 (1995).

International law and practice confirm that national laws must not prevent a State from fulfilling its international obligations. On this issue, the Inter-American Court on Human Rights is the only human rights tribunal that has repeatedly heard cases dealing with the implications of national amnesties on a State party's duty to investigate and prosecute crimes.<sup>15</sup> The Inter-American Commission and the Court have a rich jurisprudence in this area given the historical context in Latin America whereby a number of countries have adopted amnesty laws (self-amnesties) following periods of human rights violations by repressive regimes in an effort to shield officers from accountability for violations. In such situations, cases have been brought to the Inter-American Commission and Court for adjudication. The issue of amnesty has been considered and decisions adopted as early as 1999 by both the Commission and the Court.

Leading case-law in the Inter-American system has found that States have a fundamental duty to “use the means at its disposal to carry out a serious investigation of violations within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”<sup>16</sup> On amnesties, the I/A Court declared invalid a blanket amnesty in Peru in 2001, which was found to discourage investigations and deny any remedy to the victims; the Court then held that, “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations.”<sup>17</sup> This judgment set precedent for the entire region and was followed by several others whereby the I/A Court has since declared the amnesty laws in Chile, Argentina and El Salvador to be incompatible with the State's duty to prosecute crimes and human rights violations.<sup>18</sup> In the only jurisdiction where national amnesty laws have been challenged at the international level, the I/A Court has found that amnesty laws are incompatible with the duty to respect and ensure rights under the American Convention on Human Rights and thus ordering States to strike the law where a duty to prosecute human rights violations and crimes is frustrated.<sup>19</sup>

While it is acknowledged that many types of amnesties have been adopted across the world, unconditional amnesties with no accompanying accountability measures are particularly

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<sup>15</sup> Up to 2008, the Inter-American Court has issued judgments in no less than 10 cases dealing with the legality of amnesty laws and the States' obligations to investigate prosecute and punish human rights violations. For its part, the Inter-American Commission on Human Rights has decided this issue in no less than 13 cases, especially during the late 1980's and early 1990's before establishment of the I/A Court and during its early years of operation.

<sup>16</sup> *Velasquez Rodriguez v. Honduras*, I/A Court Judgment of July 29, 1988 (Ser.C) No.4, para.174.

<sup>17</sup> *Barrios Altos v. Peru*, I/A Court Judgment of March 14, 2001 (Ser.C) No.75, para 41-44.; *Loayza Tamayo v Peru*, I/A Court Judgment (Reparations) (ser C) No.42 (1998) 168, (“states...may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law.”)

<sup>18</sup> *Selling Justice Short: Why Accountability matters for peace*, HRW report (2009), 17.

<sup>19</sup> *Castillo Paez v Peru*, I/A Court Judgment (ser C) No.34 (1997); *Barrios Altos Case*, I/A Court Judgment (ser C) No 74 (2001); *La Cantuta v Peru*, I/A Court Judgment (ser C) No.162 (2006); *Almonacid-Arellano et al v Chile*, I/A Court Judgment (ser C) No.154 (2006).

problematic in terms of States' compliance with international obligations. In recognition of this incompatibility, several countries (Democratic Republic of Congo, Ivory Coast, Ethiopia, Venezuela) have adopted legislation prohibiting amnesties for the most serious crimes or that contain explicit exceptions to general amnesties for crimes under international law."<sup>20</sup>

## **b. International Criminal Law Obligations**

Uganda is party to instruments governing serious international crimes, including the Geneva Conventions prohibiting violations of international humanitarian law and the Rome Statute of the International Criminal Court, prohibiting the crimes of genocide, crimes against humanity and war crimes. Uganda is also a party to the Pact on Stability, Security and Development in the Great Lakes Region, including the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination.<sup>21</sup> Ratification of these instruments 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 the Geneva Conventions and the Rome Statute as part of its national law, making her obliged to respect those provisions.

The Rome Statute of the ICC establishes the duty to prosecute serious violations of international law, first in its Preamble and then in Article 17 of the Statute, whereby national courts have not only the first opportunity to prosecute international crimes, but an obligation to prosecute them, thereby placing on the State the primary responsibility of bringing perpetrators of crimes within the jurisdiction of the ICC to justice. Uganda domestication of both the Geneva Conventions and the Rome Statute signify that these instruments have become part of national law and therefore, the obligations are directly enforceable in Uganda.

In practice, UN bodies have repeatedly adopted a position against amnesties regarding the most serious crimes. For example, the UN special representative attached a reservation when signing the 1999 Lome Peace Accord in Sierra Leone stating that, "The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."<sup>22</sup> Further, the position was echoed in a report by the UN

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<sup>20</sup> *Selling Justice Short: Why Accountability matters for peace*, HRW report (2009), 15.

<sup>21</sup> The Pact on Stability, Security and Development in the Great Lakes Region was adopted by member states of the International Conference on the Great Lakes Region (ICGLR) in December 2006. The ICGLR was established by the eleven Member States of the Great Lakes Region in 2004 as a forum for resolving armed conflict, maintaining peace, security, stability, and laying the foundation for post-conflict reconstruction in the Region. The Member States are Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda, and Zambia. See: <http://www.lse.ac.uk/collections/law/projects/greatlakes/ihl-greatlakes-summary.htm>

<sup>22</sup> 1999 Lome Peace Accord, Sierra Leone in *Selling Justice Short: Why Accountability Matters for Peace*, HRW Report (2009) 16.

Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, as well as in a UN Security Council Resolution on the same issue stating that, “states should reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, and ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.”<sup>23</sup>

This position was reiterated in the Statute of the Special Court for Sierra Leone (SCSL), which included specific provisions on amnesty, providing that, “an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”<sup>24</sup> The SCSL went on to hear a case challenging its jurisdiction based on the amnesty clause in the *Lome* agreement. The Court found that it had jurisdiction to prosecute crimes under international law regardless of the domestic legality of the amnesty provisions of the *Lome* Agreement. It placed emphasis on the international nature of crimes against humanity and war crimes and held that these crimes subject to universal jurisdiction.<sup>25</sup>

To date there have been few judgments by international criminal tribunals in which the question of amnesties has arisen, however there is one example where an international court has exercised jurisdiction to rule on national amnesties. The ICTY considered this issue in *Prosecutor v Anto Furundizija*, whereby the accused was found to have committed war crimes, particularly torture and acts of sexual violence, against individuals he interrogated. The tribunal found that an individual could be prosecuted for torture before an international tribunal, a foreign state and a subsequent regime even if the action in question had been the subject of an amnesty.”<sup>26</sup>

In situations where the applicability of amnesty laws has arisen before international criminal tribunals, these courts have found that amnesties do not constitute a bar to prosecution of serious crimes. The law and practice establishes the duty to investigate, prosecute and punish such crimes regardless of a national amnesty law in effect.

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<sup>23</sup> UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616, August 23, 2004, cited in *Selling Justice Short: Why Accountability Matters for Peace* (2009) 16.

<sup>24</sup> Statute of the Special Court of Sierra Leone, Art.10<sup>24</sup> 1999 Lome Peace Accord, Sierra Leone in *Selling Justice Short: Why Accountability Matters for Peace*, HRW Report (2009) 16.

<sup>24</sup> UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616, August 23, 2004, cited in *Selling Justice Short: Why Accountability Matters for Peace* (2009) 16.

<sup>24</sup> Statute of the Special Court of Sierra Leone, Art.10

<sup>25</sup> Decision on the challenge to jurisdiction: *Lome Accord Amnesty in Prosecutor v Morris Kallon, Brima Bazzy Kamara*, SCSL-2004-15-PT-060-I, SCSL-2004-15-PT-060-II, Appeal (13 March 2004) 67, cited in Mallinder L. *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008) 259.

<sup>26</sup> *Prosecutor v Anto Furundizija*, Case No IT-95-17/i-T, Judgment (10 Dec 1998) 155, cited in cited in Mallinder L. *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (2008) 249.

### 3. Obligation to Prosecute Conflict-related Sexual & Gender-based Violence<sup>27</sup>

Uganda has a strong legal framework for securing justice and accountability for conflict-related SGBV crimes. The Agreement on Accountability and Reconciliation seeks to address “serious crimes, human rights violations and adverse socio-economic and political impacts from the conflict” and calls for the special needs of women and children to be recognized and addressed with the experiences, views, and concerns of women taken into account. It provides for an accountability process that protects the dignity, privacy and security of women who have been subjected to gender-based crimes and encourages the participation of women in processes for implementing the Agreement.<sup>28</sup>

Further, the ICC Act allows courts in Uganda to try crimes against humanity, war crimes and genocide defined under the Rome Statute.<sup>29</sup> The Rome Statute contains specific reference to gender-based violence as a possible war crime and crime against humanity. Included in this definition are rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and “any other form of sexual violence of comparable gravity.”<sup>30</sup>

At the international level, the UN Security Council has adopted five resolutions on women, peace and security, namely Security Council Resolutions 1325 (2000), 1820 (2009), 1888 (2009), 1889 (2010) and 1960 (2011). Uganda is a party to all these Resolutions. Together they guide and promote the rights of women in conflict and post-conflict situations. Specifically in relation to amnesty and prosecution, Security Council Resolution 1820 notes that rape and other forms of sexual violence can constitute a war crime, crime against humanity or a constituent act with respect to genocide and stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes. It calls upon Member States to comply with their obligations to prosecute perpetrators of sexual violence, ensuring that all victims, particularly women and girls, have equal protection under the law and equal access to justice. It reiterates the importance of ending impunity for sexual violence as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation.<sup>31</sup>

Security Council Resolution 1888 recalls Member State’s responsibility to prosecute and end impunity for war crimes, crimes against humanity and genocide, noting with concern the limited number of perpetrators of sexual violence brought to justice. It reaffirms that ending impunity is

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<sup>27</sup> UNWomen submission on Amnesty to JLOS for consideration (22 April 2012).

<sup>28</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, 29 June 2007, See Preamble and Clause 11.

<sup>29</sup> Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9.

<sup>30</sup> *Id.*, art.7(1).

<sup>31</sup> UN Security Council, Security Council Resolution 1820 (2008), 19 June 2008, S/RES/1820 (2008), para 4.

essential if a society is to come to terms with past abuses committed against civilians and prevent future abuses.<sup>32</sup>

In addition to the international policy framework on women, peace and security, Uganda is party to a number of regional instruments that seek to protect the rights of SGBV victims during and post conflict. These include the Pact on Security, Stability and Development in the Great Lakes Region (Great Lakes Pact) developed by the International Conference on the Great Lakes Region (ICGLR) of which Uganda is a member . The Great Lakes Pact entered into force in June 2008 and incorporates ten protocols including the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children. Objectives of this Protocol include providing protection for women and children against impunity for sexual violence and establishing a legal framework under which Member States undertake to prosecute and punish perpetrators of sexual violence in the Great Lakes Region.<sup>33</sup>

Building on the Great Lakes Pact, in June 2008, a regional meeting lead by Member States of the ICGLR adopted the *Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region*. Recommendations include that Member States should not grant amnesty to perpetrators of SGBV and where necessary should amend laws to conform to the ICGLR Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children.<sup>34</sup>

In December 2011, Heads of Member States of the ICGLR issued a Declaration with respect to SGBV which includes a commitment to ending impunity for SGBV through establishing appropriate mechanisms for investigating and prosecuting sexual violence crimes that amount to genocide, war crimes or crimes against humanity in the region.<sup>35</sup>

Uganda has also ratified the African Charter on Human and Peoples' Rights,<sup>36</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, commonly known as the Maputo Protocol<sup>37</sup> which commits State Parties to protecting civilians including women during armed conflict and ensuring perpetrators of war crimes, genocide and/or crimes against humanity are brought to justice before a competent criminal jurisdiction.<sup>38</sup>

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<sup>32</sup> UN Security Council, Security Council resolution 1888 (2009), 30 September 2009, S/RES/1888 (2009)

<sup>33</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, art. 2 (1, 2), 30 November 2006.

<sup>34</sup> The Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region, Goma, 18 June 2008, Recommendation 19, 23.

<sup>35</sup> Declaration of the Heads of State and Government of the Member States of the International Conference on the Great Lakes Region at the Fourth Ordinary Summit and Special Session on Sexual and Gender Based Violence (SGBV), 15-16 December 2011, Munyonyo Commonwealth Resort, Kampala Uganda, para 9.

<sup>36</sup> Uganda ratified the African Charter on Human and Peoples' Rights on 10 May 1986.

<sup>37</sup> Uganda ratified the Maputo Protocol on 22 July 2010.

<sup>38</sup> Maputo Protocol, art.11(3).

In addition to these regional human rights instruments, Uganda has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>39</sup> which provides a global framework for the protection of women's rights. Article 2 of CEDAW establishes an important framework for delivering justice to victims and survivors of conflict including establishing legal protection of the rights of women on an equal basis with men and ensuring through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.<sup>40</sup>

As a party to the above instruments, the Government of Uganda is obligated to adopt measures to ensure accountability for conflict related crimes experienced by women, particularly sexual violence, and promote understanding of the impact of armed conflicts on women and girls. The Amnesty Act in its present form, giving a blanket amnesty to all crimes, does not permit the fulfillment of these obligations. It is therefore imperative that the law be harmonized to ensue Uganda's capacity to fulfill its obligations under these instruments.

## **B. Role & Purpose of the Amnesty Act**

Originally adopted for a six month period to encourage the end to hostilities, the Act has since been extended numerous times and currently remains in effect. Since its establishment, the Amnesty Commission has granted a total of 26,232 certificates of amnesty to ex-combatants.<sup>41</sup> In the last six months, the A/C reports that 70 combatants from DRC and Central African Republic have requested amnesty, while 350 others who returned directly to their communities in Uganda were given amnesty within the same time period.<sup>42</sup>

Approximately half of the beneficiaries are individuals affiliated with the LRA. The other amnesty beneficiaries are from other armed opposition groups.<sup>43</sup> To date, all who have met the requirements have been granted amnesty. The only contentious case regarding the award of amnesty is that of Mr. Thomas Kwoyelo, who was captured on the battlefield and who is charged

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<sup>39</sup> Uganda ratified CEDAW on 22 July 1985.

<sup>40</sup> CEDAW, art.2(c).

<sup>41</sup> Statement by Amnesty Commission on Community Dialogue meeting, JLOS & UN Office of the High Commissioner for Human Rights (15-16 Kitgum, March 2012).

<sup>42</sup> Id.

<sup>43</sup> The violence of the LRA is just one of several uprisings in Uganda. In recent decades, there have been many other armed groups. Some of these groups such as the Holy Spirit Forces Army were related to the LRA, whereas others, such as the Allied Democratic Forces (ADF), which operates in western Uganda, are fighting the central government for different reasons. In addition, there are local militias, known as Local Defence Units (LDUs) and armed groups known as *boo kec* who are believed to comprise armed deserters from the UPDF and rebel forces. These other non-state armed groups are also eligible for amnesty under the Amnesty Act 2000: see Louise Mallinder, *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper No. 1, BEYOND LEGALISM: AMNESTIES, TRANSITION AND CONFLICT TRANSFORMATION (March 2009) p 16-17.

with the commission of crimes under the Geneva Conventions Act; his claim against the denial of amnesty is being heard by the Constitutional Court of Uganda.<sup>44</sup>

The A/C also has a reintegration mandate, whereby each reporter receives a modest cash allowance, home items and garden items, yet in practice, only 5335 out of the total 26,232 reporters have been formally reintegrated.<sup>45</sup>

Arguments to maintain the amnesty are grounded in the community's perception that the war is not yet over and that amnesty plays a role in allowing those in captivity to return home. In terms of those in captivity, this assumes that those in captivity will be encouraged to abandon hostilities if an amnesty is in effect. It overlooks the fact that the Amnesty law was intended to benefit those who 'took up arms against the State' and who agreed to 'renounce rebellion', as in the commanders and those who voluntarily took up arms. It was meant to be a 'reward' of 'no prosecution' in exchange for abandoning hostilities. Those who were forcibly recruited and held in captivity did not join the rebellion voluntarily, and many are not engaged directly in hostilities. Thus, it is not clear to what extent the Amnesty law is playing any role in influencing combatants to abandon hostilities.

Since the signing of the Juba annexure on Accountability and Reconciliation, and due to a combination of factors, the conflict-affected regions are no longer plagued by live hostilities. Displaced populations have returned home; former combatants have benefitted from amnesty and returned to their communities; reconciliation efforts through traditional ceremonies have been conducted; and State sponsored peace recovery and development projects have been adopted (PRDP, etc). Further, the GoU, with the support of the international community, is actively pursuing the remaining individuals, those most responsible for the atrocities and taking up arms against the State. These measures have contributed to relative peace in the sub-region.

Consequently, it appears that the Amnesty Act, given the current context, has fulfilled and outlived its original role and purpose. Indeed, this was a common view expressed in consultations on the Act with key stakeholders, both government and non-state actors.<sup>46</sup>

On the other hand, it was also noted that the Amnesty Commission continues to issue certificates to reporters at present, providing justification for the Act. However, this must be interrogated further. At present, there is no evidence to show that combatants are making use of amnesty according to the intent of the Act. Rebel commanders still in the bush have not opted for Amnesty, despite having this as an option since 2000. Given that rebel group leaders rely heavily on the forced recruitment of youth, these youth are not only taking up arms against their will, but

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<sup>44</sup> *Uganda v. Thomas Kwoyelo*, Constitutional Petition No.036/11 (Reference) [Arising out of HCT-00-ICD-Case No.02/2010]

<sup>45</sup> Amnesty Commission submission to JLOS (March 2012)

<sup>46</sup> OHCHR & RLP Amnesty conference (November 2011); and OHCHR & JLOS Amnesty dialogue (March 2012)



are more often than not subject to cruel, unusual and inhuman treatment during their ‘captivity’. The Amnesty Act, as worded, was meant to encourage *individuals who took up arms against the State* to abandon hostilities in exchange for protection from criminal prosecution and assisted reintegration. Thus, this provision was meant to target those who intentionally took up arms against the State. There is no available data to show that forced recruits subject to abuse and torture are influenced by the existence of the Amnesty Act. Under these conditions, most forcibly recruited youth, if given the chance, would not be fighting; rather, these individuals are most in need of rehabilitation and reintegration assistance. Thus, it appears that additional measures could be adopted to promote more meaningful reintegration of reporters in the place of Amnesty and which would better correspond to the current context and conditions of forced recruits.

The Amnesty Act was originally meant to encourage the end to hostilities. Given the current context of relative peace and the Government’s actions to promote post-conflict reconstruction and recovery, it appears that the Act has outlived its intended role and purpose.

### **C. Effects of the Amnesty Act**

#### **1. Legal Effects**

The legal effect of the Amnesty Act creates an obstacle to Uganda’s ability to pursue justice for war crimes and crimes against humanity committed during the armed conflict in Northern Uganda. This is most obvious in the recent case of *Uganda v. Thomas Kwoyelo*. The case highlights the conflict of laws raised by the Amnesty Act, and the inability of the Directorate of Public Prosecutions, a constitutionally mandated Government entity to pursue justice in the public interest, to adequately fulfill its mandate and function. Both in law and practice, the Amnesty Act and its implementation frustrates and limits the powers of the DPP. This is demonstrated by the Amnesty Commission working in isolation and having repeatedly granted certificates of amnesty upon request without first communicating/cross-checking information with the DPP. As a result, the DPP has been prevented from pursuing investigations and filing charges against persons having received amnesty, even when investigations were ongoing against particular individuals. The powers and independence of the DPP is stated in the Constitution of Uganda. By providing the Amnesty Commission with full discretionary power to grant a request and consequently barring them from prosecution, this has direct implications on the role and function of the DPP to pursue justice in the public interest.

As the Act is national in scope, it is not limited to shielding perpetrators from accountability for serious crimes solely in the context of Uganda’s conflict in the North, but extends to any person who has taken up arms against the State. This is likely to lead to widespread impunity for serious crimes and human rights violations, significantly preventing Uganda from meeting its national and international obligations to pursue justice for such crimes, and denying victims the right to justice and a remedy.

## **2. Effects on Reporters**

Reporters have received two forms of benefits in exchange for *renouncing rebellion*: the promise of ‘no prosecution’ for taking up arms against the State or any crimes committed during hostilities; and a modest material ‘re-insertion’ package. While this has allowed many abducted youth to return to their communities not empty-handed, the package has been far from adequate to achieve meaningful reintegration of reporters into their communities. Communities indicate that meaningful reintegration should include education support, livelihood support, psychosocial support, medical treatment for illnesses contracted due to their experience in captivity, efforts to involve community and foster reconciliation between the reporter and his family/community. Further, there should be a link between amnesty and traditional justice mechanisms, which play a key role in social and cultural reintegration of reporters in their communities. Thus, meaningful reintegration cannot take place in isolation but must involve the whole community, which has also been affected by the conflict.

In some districts, reporters have been known to experience discrimination, social rejection and exclusion linked to their association with the rebels. Discrimination and social stigma against female reporters returning with children born while in the ‘bush’ has been particularly damaging to women and their ability to reintegrate and rebuild their lives. This has created additional challenges in recovery, reintegration and rebuilding one’s life. The amnesty package overlooks the particular vulnerabilities experienced by returnees and the need to involve the community in their reintegration.

Reintegration of reporters without similar initiatives adopted for victim communities creates an imbalance and generates new tensions amongst communities who have all suffered in multiple ways from conflict. Given that ‘re-insertion’ packages are linked to receiving a certificate, many abducted youth and women have not wanted to apply for amnesty because it is geared to those who participated in hostilities (not all actively participated) and some preferred not to associate themselves with the certificate because they did not voluntarily take up arms against the State, thus applying for amnesty would ‘brand’ them as rebels and subject them to social rejection.

### **D. Community Views on the Amnesty Act**

One of the most cited effects of the Amnesty Act by victims and members of war-affected communities is the imbalance between the measures adopted by the GoU in favor of former combatants/reporters through the Amnesty Act, and the lack of government assistance/programs tailored to directly compensate victims of mass crimes for harm sustained during the conflict. The imbalance is perceived as a ‘reward’ to perpetrators, constituting an additional injustice to victims who did not participate in hostilities and who continue to suffer with the consequences of the abuses. In most cases, community members preferred that victims be compensated/repaid

for the harm they suffered to correct the 'justice imbalance'. Further, victims consistently supported a truth-seeking process to address the accountability gap and indicated that truth-telling accompanied by reparations is needed to achieve meaningful justice and reconciliation after conflict.

Community views revealed the failure of the Amnesty Act/Commission to adequately 'reintegrate' former combatants. Adequate reintegration should involve the communities and include mental and physical health rehabilitation; livelihood support; education support; and measures to address stigma, exclusion in society. Due to resource constraints or a limited mandate, these measures were not adopted. As a result, community members find that former combatants have returned home, but struggle to be fully reintegrated without into their communities. It was stated that mental illness, depression, trauma and joblessness are prevalent amongst this group.

Overall, it is apparent from the different consultations held of late that community perceptions have shifted over time as the context in the region has stabilized. While a good majority would like to see a form of amnesty maintained (to encourage those still in captivity to return), most are demanding for the adoption of additional measures to achieve justice, accountability, truth and reparations for conflict-related crimes. It is believed that meaningful justice and long-term peace will not come without public truth-telling and reparations for the victims. Indeed, it was a common view that without truth-telling, reparations and reintegration, the cycle of conflict in Uganda will continue and take on new forms.

## **1. TJ Audit findings on Amnesty (September 2011-February 2012)**

Of late, a nation-wide study is being conducted by Refugee Law Project to document and map the history of conflict in Uganda and to identify outstanding accountability and reconciliation needs related to these conflicts. The study covers seven districts per region- north, south, east, and central. In each district, focus group discussions were held with adult men, women, youth and CSOs. Overall findings on amnesty revealed that, in northern Uganda, amnesty is still viewed positively as one of the important TJ mechanisms to end hostilities, to promote return and DDR. It was seen as the only antidote to a preferred, but ineffective, military solution to end the conflict. The need to rescue abductees still in captivity was expressed. Without amnesty, it is feared that many children will not be able to return home.

*Specific findings on amnesty include the following:*

- Continuation of the Amnesty Act is indispensable in keeping the option for the peace negotiations open. Many interviewed believe that if the act is allowed to expire, some ex-combatants may feel threatened to resume hostilities;
- People across districts acknowledged the role amnesty has played in peace-building, but called for it to be made more 'victim compatible'.

- There were demands for amnesty to be linked to other TJ mechanisms such as reparations;
- Some respondents said there is need for returnees seeking amnesty to be subjected to traditional justice processes like *mato oput* and truth-telling to contribute to historical clarification;
- To address the question of impunity, there could be a designated statutory instrument to exclude those indicted by the International Criminal Court (ICC);
- Amnesty should be narrowed so that it is only awarded to those who voluntarily surrendered and not to those who were captured in battle;
- Amnesty should be conditional upon truth-telling and an apology.

## **2. Amnesty consultative meeting (Kampala, November 2011)**

In an effort to think through the possible options for the future of the Amnesty Act, a one day consultative meeting was organized in Kampala by the UN-Office of the High Commissioner for Human Rights, UNWomen and RLP, with the active participation of JLOS member institutions in presenting and engaging in the debate. A wide cross section of stakeholders were invited to deliberate on the role and purpose of the amnesty act, its impact on accountability and reconciliation for conflict-affected communities, and its impact on the rights of women and accountability for gender-based crimes. General findings from the meeting included the following: A strong consensus among participants that while amnesty has made an important contribution to facilitating peace, the Act cannot continue in its current form, as it is affecting the delivery of meaningful justice to victims by undermining accountability mechanisms for international crimes, impacting on ongoing criminal justice processes and condoning impunity for sexual and gender based crimes. A minority view expressed interest in maintaining the Amnesty Act as is, emphasizing the important role the Act has played in securing peace in the North and allowing the return of forcibly abducted children.

Among participants calling for amendment of the Act, many argued that there must be conditions attached to amnesty and not all perpetrators should be eligible, particularly high-level perpetrators and those responsible for the commission of international crimes. There were also calls for a broader transitional justice process that addresses the actions of all parties to the conflict and that includes a limited form of amnesty, which can exist alongside other formal and informal justice and accountability mechanisms. In particular, there was support for the creation of a national truth telling body and delivery of reparations in conjunction with, but distinct from, development assistance for conflict-affected communities in the greater north of Uganda.

Specific recommendations from the Kampala conference are integrated below in the recommendations section of this paper.

## **3. Amnesty community dialogue (Kitgum, March 2012)**

As a follow-up to the Kampala meeting, JLOS in collaboration with UN-OHCHR and UNWomen held a community dialogue in Kitgum on March 15-16, 2012 whereby representatives of local government, civil society organizations based in the North, victims groups, women's groups, religious and traditional leaders, members of Parliament, particularly the Northern Uganda Parliamentary Group, and JLOS member institutions were present. Over 75 persons participated and contributed to focus group discussions on possible options for the future of Amnesty. Overall findings from the conference include: there was overwhelming consensus that the Amnesty Act in its current form has created tension among war-affected communities and victims who feel that it prioritises the needs of ex-combatants and reporters over the reparative needs of victims. There was acknowledgement of the role amnesty has played in bringing peace to northern Uganda, but many participants felt that 12 years later the dynamics and context have changed, calling for amendments to the Act or expiry of the Act with the adoption of new transitional justice mechanisms to fill the gap and respond more adequately to victims needs for truth, justice and reparations than what amnesty is capable of at present.

Participants were divided on the future of the Amnesty Act and Amnesty Commission. Some were of the view that the act should be allowed to expire and be replaced by a comprehensive body that:

- *Assists with the reintegration and reconciliation of ex-combatants without granting amnesty;*
- *Governs a truth-telling process—namely through a truth and reconciliation commission (TRC);*
- *Provides remedy and reparation to victims.*

Others felt that the Amnesty Act is still relevant (because there are still combatants who have yet to return) and should remain, provided that it is amended:

- *to exclude those 'most responsible' for grave crimes such as war crimes, crimes against humanity, genocide and sexual and gender-based crimes; and,*
- *to contain conditions for reporters to participate in a public truth-telling process and acknowledge and apologise for crimes committed before being granted amnesty.*

#### **4. NUTJWG consultation on the future of Amnesty (Gulu, March 2012)**

On March 30, 2012, the Northern Uganda Transitional Justice Working Group held a consultation on the future of the Amnesty Act, whereby a wide cross-section of civil society organizations, religious and community leaders, victims' groups from the Northern region were represented. Overall consensus amongst participants was that the Act should be extended with

significant amendments and reforming the mandate of the Amnesty Commission, to include other transitional justice functions, such as:

- The objectives of the Amnesty Act should be amended to reflect the current realities and emerging concerns;
- Carry out an analysis of international law to ensure that the Act is reflective international law and practice in area of transitional justice;
- Clearly identify which crimes are exempt from amnesty, such as genocide, crimes against humanity, war crimes, and grave breaches of the 1949 Geneva Conventions;
- Truth-telling is necessary and should be catered for in the Act (conditional amnesty in exchange for truth-telling);
- Aspects of traditional justice should be incorporated in the Act;
- Amnesty Commission should have the mandate to investigate/verify the story of the returnee;
- Amnesty Act must be gender-sensitive and better cater for female returnees, including those who were not actively involved in hostilities;
- Treatment of those actively involved in hostilities should be separated from those were were not actively engaged (those held captive, sex slaves, other non-combat assistance roles), thus children under age 15 (abducted youth) should not have to go through the amnesty process but should benefit from a reintegration package;
- Emphasis should be placed on reintigration assistance/support to returnees;
- More sensitization on Amnesty and its provisions is required in the communities;
- A mechanism to deliver reparations to the vast majority of victims must be established; the proposal was to amend the Amnesty Act to include reparations to victims.
- The composition of the Amnesty Commission should include CSO's, victims and religious and cultural leaders;
- Increase term of the Act and the Commission to five years.

## **5. Gender perspective/impact on women**

The Amnesty Act has had specific effects on the rights and welfare of women in two ways: the lack of gender-sensitive reintegration assistance and support to female returnees; and total impunity for sexual and gender based crimes (SGBV) that women suffered during the conflict.

Firstly, there was an outcry from the community that women victims of SGBV are suffering doubly by the fact that they continue to bear the consequences of SGBV committed during the

war (trauma-unwanted pregnancies-physical & reproductive injuries-HIV/AIDs, stigma and social exclusion), and are forced to face their tormentors in the community due to the amnesty law, which requires no accountability for crimes committed during the conflict.<sup>47</sup> While reporters have returned home with the security of ‘no punishment’ for their actions, women victims of SGBV suffer the consequences of the abuses and the injustice of facing their tormentors who can at any time re-victimize them at will.<sup>48</sup>

Secondly, there was consensus among participants in the Kampala and Kitgum meetings that reintegration packages needed to become gender sensitive, acknowledging that men and women have different experiences of conflict and different needs upon return. In particular, many women and girls returning from home had experienced rape and other forms of gender-based violence that resulted in unwanted pregnancies/children, HIV/AIDS and other reproductive illnesses and injuries that require special treatment and support.<sup>49</sup> Gender sensitive materials to assist female returnees with reintegration were not included. In addition, no effort was made to ensure the benefits going to male captors were premised on the need to provide support to their children born of war time violations. Indeed, within the community some men claim because they have received amnesty, they are not responsible to provide any assistance to the children they fathered, meaning the sole responsibility is left to the girls and women who were themselves abducted.

#### **E. Amnesty within Uganda’s national transitional justice process**

Transitional Justice has emerged as one of the key thematic areas for JLOS. This focus aims to promote justice and accountability for past human rights violations and war crimes; to enhance access to justice and basic services for victims in Uganda’s conflict-affected areas, with emphasis on the rights of vulnerable groups (women, children); and to contribute to strengthening the rule of law across the country, especially in areas where justice sector institutions and service delivery have been weakened by conflict.

The annexure to the Final Peace Agreement at Juba on Accountability and Reconciliation calls on the GoU to adopt both formal justice and alternative justice mechanisms to promote sustainable peace and reconciliation. In the spirit of Juba, JLOS has embarked on a process to adopt a national transitional justice policy that will set forth the GoU’s goals and strategy towards achieving justice and reconciliation for conflict-related crimes. This will include the adoption of a relevant policy and legal framework accompanied by institution building and strengthening. As such, Amnesty must be considered in light of the overarching goals of this

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<sup>47</sup> *Community Dialogue on Amnesty*, Kitgum, 15-16 March 2012 ; JRP submission to JLOS on Amnesty (22 April 2012), p8-9.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

policy. In particular, the policy will address multiple accountability mechanisms, including criminal prosecutions for war crimes. Amnesty is therefore expected to complement and reinforce the policy and existing accountability mechanisms.

Community views strongly support the integration of amnesty in a broader transitional justice process. A theme reiterated throughout the Kampala and Kitgum conferences was the need to ensure amnesty complements and accommodates other transitional justice mechanisms including formal justice, truth-telling, traditional justice and reparations. For example, many participants called for amnesty in exchange for truth-telling, while others proposed that amnesty not be awarded to the key perpetrators (those with greatest responsibility). There were also strong calls for the Government to introduce programs and mechanisms to assist with psychosocial support, rehabilitation of victims and reconciliation among communities. These calls included the need for Government to introduce a truth seeking body that would ensure the meaningful participation of victims at all stages of the process and have a specific mandate to investigate gender based crimes. One participant commented ‘We need a truth-telling body as fast as yesterday.’ The demand for reparations was equally consistent and widespread. The delivery of reparations is seen to correct the imbalance to date, and will allow harms suffered by victims (not involved in hostilities) to be addressed.

### **III. THE WAY FORWARD: OPTIONS FOR AMNESTY IN UGANDA**

A strong consensus emerged from the consultative meetings and TJ audit/study on amnesty that while amnesty has made an important contribution to facilitating peace, the Act cannot continue in its current form as it is affecting the implementation of meaningful justice for victims by undermining accountability mechanisms for international crimes, impacting on ongoing criminal justice processes and condoning impunity for sexual and gender based crimes. This view was also shared by the Amnesty Commission itself in its submission to JLOS.<sup>50</sup> Four options emerged during the discussions; meanwhile views were divided, whereby strong support was expressed for a total lapse and others for an extension with amendment. In both cases, there was strong support for the adoption of additional transitional justice mechanisms to respond to victims’ demands for justice, truth and reparations.

#### **A. Natural Lapse of the Amnesty Act**

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<sup>50</sup> Amnesty Commission submission to JLOS on the future of Amnesty (15-16 March 2012)



Some views were in strong support of allowing the Act to lapse, with the reasoning that the Act has outlived its originally intended purpose. This is based on the premise of relative peace restored to Uganda, accompanied by Government programs to promote post-conflict recovery and reconstruction.

This same group proposed that the Amnesty law should be replaced by a truth-seeking body and reparations for victims to correct the justice imbalance of rewarding only former combatants to the exclusion of the majority of victims. To fill the gap, an aspect of amnesty could be incorporated into a new truth-seeking body as was done in South Africa to promote the right to truth of victims to know the facts of what transpired during the war and to know the fate of loved ones. Further, those supporting the lapse of the Act acknowledged a significant change in the local context, whereby victims are now more strongly advocating for accountability of perpetrators in comparison to when the law was first adopted and the community prioritized peace at all costs. These views were most strongly expressed by Bishop Ochola, religious leader in the North. Women's groups and advocates also strongly support the adoption of accountability mechanisms for sexual and gender based crimes, which has not been possible through the current

***Support for lapse of the Act should be coupled with additional measures to fill the gap:***

- The GoU could reassert its intent to pursue criminal accountability only against key individuals responsible (top and mid-level commanders) for war crimes and crimes against humanity (allowing for the majority of those in captivity to return safely and benefit from reintegration support/assistance); and,
- In tandem, GoU should proceed to establish a truth-seeking mechanism to promote restorative justice for conflict-related crimes; this would allow victims, the community and nation as a whole to provide accounts of their experiences during the conflict as a form of accountability and reconciliation for abuses committed during the conflict.
- The truth-seeking body could incorporate an element of amnesty from prosecution for lesser offenders in exchange for the truth/information about events that occurred during the conflict, as was done in South Africa;

***Implications:*** option one caters for legal and institutional conflicts, including pursuing justice against perpetrators of war crimes and crimes against humanity; it responds to community views and expectations to see the adoption of other transitional justice mechanisms such as truth-seeking, traditional justice and reparations; it allows the majority of abducted youth 'to return home' without the threat of prosecution; and it complements and reinforces the overarching goals of the national transitional justice policy being developed for Uganda.

**B. Partial Lapse**

In accordance with the Amnesty (Amendment) Act, 2006, the Minister can declare a lapse of Part II of the Act, leaving the Amnesty Commission to continue its work exclusively on reintegration of returnees in the communities, with the exception of issuing amnesty certificates.<sup>51</sup>

**Implications:** this option is a mediated approach and caters for legal and institutional conflicts, including pursuing justice against perpetrators of war crimes and crimes against humanity and it responds to community views and recommendations that the Amnesty Commission should focus more on reintegration of reporters within their communities. By enhancing reintegration measures, this creates a meaningful and more attractive incentive for the majority of abducted youth ‘to return home’ with the promise of more socially oriented measures to rebuild their lives. Finally, it complements and reinforces the overarching goals of the national transitional justice policy being developed for Uganda.

### C. Extension without Amendment

This proposes no substantive change to the Amnesty Act. This implies that: (1) legal conflicts between the Act and Uganda’s national and international law obligations will persist; and, (2) the DPP is prevented from engaging in its independent functions to pursue justice in the public interest.

**Should the Amnesty Act be extended as is:**

- the 2006 amendment should be applied (Section 2A of the Act as amended in 2006 gives the Minister power to exclude persons from amnesty);<sup>52</sup>
- specific criteria must be established for the “Persons ineligible for amnesty” provision as per the 2006 amendment;
- criteria should be grounded in the link between certain individuals and their ‘command responsibility’ for the commission of specific categories of crimes including: war crimes, crimes against humanity and other serious crimes under the ICC Act and Geneva Conventions Act, including SGBV crimes.
- Those persons deemed responsible should be declared ‘ineligible’ for the award of amnesty as per Section 2A of the Act.

**Implications:** Such a declaration would allow the International Crimes Division of the High Court of Uganda to become operational and enable Uganda’s compliance with its national,

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<sup>51</sup> Amnesty (Amendment) Act, 2006, Insertion of section 16: “The Minister may, by statutory instrument, declare the lapse of the operation of Part II of this Act.”

<sup>52</sup> Amnesty (Amendment) Act, 2006, Insertion of section 2A: “Persons ineligible for Amnesty: Notwithstanding the provisions of section 2 of the Act, a person shall not be eligible for grant of amnesty if he or she is declared not eligible by the Minister by stator instrument made with the approval of Parliament.”

regional and international obligations.<sup>53</sup> Therefore, this declaration could cure the most serious legal conflicts between the Amnesty Act and the obligations to prosecute serious conflict-related crimes contained in the instruments enumerated in this paper.

#### **D. Extension with Amendment**

Based on the consultations and studies conducted on amnesty, there was broad support expressed for maintaining the Act with amendments. The main reason for support of this position is based on the premise that the ‘war is not yet over’ and that amnesty still provides an opportunity for abducted youth in captivity ‘to return home’ safely. At the same time, there was recognition that amnesty as it stands presents problems in terms of its ‘unconditional’ nature and does not adequately provide for other accountability mechanisms. Suggested amendments include:

##### ***Suggested amendments:***

- Conditions and criteria should be linked to Amnesty: it should be conditional on truth-telling;
- High level perpetrators and those responsible for the commission of international crimes, including SGBV crimes, should be excluded from the award of amnesty;
- Amnesty should complement traditional justice mechanisms (returnees to go through traditional justice process upon return to the community to facilitate reintegration and reconciliation at the community level);
- Amnesty should only be awarded to those who voluntarily surrendered and not to those who were captured in battle;
- A formal link should be established between the Amnesty process and the functions of the Directorate of Public Prosecutions, in particular, the Amnesty Commission should be obliged to inform DPP of persons requesting amnesty and secure approval of DPP prior to issuing certificates to those under investigation or with pending criminal charges;
- The award of amnesty must be removed from the process of reintegration; one proposal is that, treatment of those actively involved in hostilities should be separated from those who were not actively engaged (those held captive, sex slaves, other non-combat assistance roles);
- Emphasis should be placed on more robust reintegration assistance to returnees and their communities;
- Reintegration packages must be gender sensitive and cater for the needs of female returnees;

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<sup>53</sup> Discussion by Formal Criminal Jurisdiction Sub-Committee, TJWG; Proposal by UNWomen to JLOS on Amnesty (22 April 2012).

- The composition of the Amnesty Commission should include CSO's, victims and religious and cultural leaders;
- Amnesty must be linked with other proposed and ongoing transitional justice processes such as truth-seeking, traditional justice, reparations and judicial accountability.

**Implications:** Amendments as suggested would cater for legal and institutional conflicts, including pursuing justice against perpetrators of war crimes and crimes against humanity; eliminate the 'blanket' nature of amnesty by establishing criteria to promote accountability (amnesty in exchange for truth); ensure that those who receive amnesty have in fact expressed intent to 'renounce rebellion'; allow the DPP to perform its independent functions to pursue justice unfettered; and, de-linking amnesty from reintegration extends reintegration assistance to those captured by rebels, but not active in hostilities, thus catering for women and girls largely left out of the amnesty process.

#### **E. A Call for Transitional Justice Mechanisms**

The review process revealed a strong call by stakeholders for the adoption of much desired TJ mechanisms in the spirit of the Juba Agreements. Community consultations confirmed the need to correct the 'justice imbalance' by addressing victims' harm suffered in the conflict. This can best be done through the prompt adoption of the national transitional justice policy to promote reparations, reconciliation and reintegration through specialized programs/institutions. This will serve to promote long-lasting peace, recovery and justice for victims of the conflict. Specific recommendations included:

1. Adopt a victims' assistance program and reparations policy to ensure victims' right to effective and prompt remedy and reparation after conflict;
2. Establish a truth-seeking mechanism in line with the Juba Peace Agreement on Accountability and Reconciliation; and,
3. Support the use of traditional justice mechanisms for purposes of reintegration and reconciliation.

#### **IV. Conclusion**

The various consultative meetings and studies conducted on amnesty conclude that Amnesty in its current form cannot be justifiably maintained. Deliberations by the Formal Criminal Jurisdiction Sub-Committee of the TJWG have come to the same conclusion. The current 'blanket' amnesty poses conflicts of a legal nature with co-existent national laws that call for accountability for war crimes and other serious crimes. At the same time, the amnesty law contravenes Uganda's international legal obligations under the Rome Statute, the Geneva

Conventions and other human rights treaties (ICCPR) that protect victims' rights to a remedy for rights violations.

In terms of Amnesty's current role and impact in society, in light of its original objective, findings show that Amnesty has largely outlived its originally intended purpose. General consensus is that Amnesty has served a critical role in achieving peace in the region; yet the context has significantly evolved since 2000. In particular, community views and expectations are calling for measures of accountability, truth-telling and reparations, which they confirm will go a long way in terms of delivering justice to victims for conflict related crimes.

Further, JLOS is undertaking a process to develop a national policy on Transitional Justice that will constitute the framework for an integrated and holistic approach to justice and accountability through the adoption of both formal and informal justice mechanisms. The policy seeks to give effect to the Juba Peace Agreement, and reflects the expressed interests of victims and war-affected communities. As such, development of a comprehensive transitional justice policy requires relevant legal reforms to accommodate the evolved context and additional transitional justice mechanisms. Indeed, this will contribute to building sustainable peace in the region.

Notwithstanding, there is community concern that a total lapse of amnesty would leave the 'captive' youth without any options for returning home. As such, there is still support for Amnesty, if only to give these youth an option for return. At the same time, this group has a number of reservations with the current amnesty and proposes several amendments calling for conditional and qualified amnesty, as well as the adoption of other transitional justice measures to promote truth-seeking, reparations, and the promotion of traditional justice mechanisms to achieve reconciliation.

In sum, broad support for additional accountability mechanisms and enhanced reintegration for reporters and their communities suggest that new transitional justice mechanisms must be considered alongside amnesty. This would best be achieved through the adoption of the national Transitional Justice policy for Uganda and adoption of relevant mechanisms to implement the policy.

***JLOS is currently considering the findings of the amnesty review process and the four possible options for the future of amnesty. It is expected to adopt its decision in May prior to the expiration of the Amnesty Act on May 24, 2012.***