

CHAPTER FOUR

SHORT OF INTERNATIONAL OBLIGATIONS? UGANDA'S AMNESTY ACT AND THE AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION

4.1 Introduction

The previous chapter established the international obligations of states in respect to international crimes. As established in chapter two, the parties to the LRA conflict perpetrated war crimes and crimes against humanity and the need for accountability in line with international obligations is not lost on them. On 29 June 2007, as part of the peace pact negotiated in Juba, the LRA and the government of Uganda signed the Agreement on Accountability and Reconciliation and on 19 February 2008 appended the Annexure to the Agreement.¹ The Agreement and the Annexure sets out the framework for implementing accountability for the crimes perpetrated in the LRA conflict and are aimed at addressing 'serious crimes, human rights violations and adverse socio-economic and political impacts' of the protracted conflict.² The parties reached the Agreement in recognition of the need to prevent impunity and ensure reparations for victims of the LRA conflict in line with the Constitution of Uganda, international legal obligations of Uganda and requirements of the Rome Statute in particular the principle of complementarity.³ Whether the Agreement sets the right framework to meet this goal is discussed later in the chapter.

Prior to the signing of the Agreement, in the late 1990's the protracted conflict, with its attendant human and material cost, generated a remarkable movement among the victim community in Northern Uganda to lobby for amnesty as a conflict resolution measure. Acholi cultural leaders under the institution *Ker Kwaro Acholi* and religious leaders under the umbrella interdenominational organisation, the Acholi Religious Leaders' Peace Initiative (ARLPI) led this lobby. These groups represented the communities in Northern

¹ The Agreement on Accountability and Reconciliation and its Annexure is annexed to this thesis as Annexure A.

² Agreement on Accountability and Reconciliation preamble paras 2, 3, 4 & 5.

³ Agreement on Accountability and Reconciliation preamble para 3.

Uganda and argued that dialogue with the rebels was possible and a more worthy solution to the conflict than military pursuits that had caused suffering for more than a decade.⁴

An amnesty bill (1999) modelled on the Amnesty Statute of 1987 was crafted. The 1987 Statute formed part of the peace deal with the UPDF and sought to encourage the various fighting groups and their sponsors to end their activities. This statute excluded crimes such as genocide, murder, kidnapping and rape from its ambit.⁵ Likewise, the 1999 amnesty bill sought to exclude those crimes. The ARLPI however, rejected this limitation and strongly advocated for the adoption of a blanket amnesty without any limitations. These leaders stated that a blanket amnesty would be in line with the aspirations of the people of Acholi at home and in the Diaspora. They justified this assertion stating that most combatants in the LRA, involved in the commission of mass atrocities were forcibly abducted and victimised, therefore deserved amnesty. That and also the profound war weariness, suffering and the diminished trust in a military solution created an environment where amnesty and peace talks were perceived as a more worthy conflict resolution measure. The victim community believed that any threat of prosecution, even of a minority of combatants, would pose an obstacle to peaceful resolution of the conflict.⁶

The supporters of the Amnesty Act adopted in 2000⁷ viewed it as a significant step towards ending the conflict in Northern Uganda and working towards a process of national reconciliation. As the preamble to the Act emphasized, the Act is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities.⁸ Its provisions granting a blanket amnesty represented a radical response to the conflict that sought to balance the immediate needs of peace and

⁴ CR Soto 'Tall Grass: Stories of Suffering and Peace in Northern Uganda' (2009) 39.

⁵ B Afako 'Reconciliation and Justice: 'Mato Oput' and the Amnesty Act' in O Lucima (ed) *Protracted Conflict, Elusive Peace: Initiatives to End the Violence in Northern Uganda* (2002) 66; further discussion on the statute is contained in chapter one of this thesis.

⁶ As above.

⁷ Amnesty Act, 2000; The Amnesty (Amendment) Act, 2002; The Amnesty (Amendment Act) Act, 2006' (September 2006) Cap 294 Laws of Uganda; members of insurgent groups that have applied and received amnesty includes; Action to Restore Peace; Allied Democratic Forces; Force Obote Back Again; National Union for the Liberation of Uganda; Uganda National Freedom Movement; Uganda National Rescue Front; Uganda People's Army and the West Nile Bank Front.

⁸ Amnesty Act preamble para 2.

end of hostilities to ensure reconciliation and the desire to restore and rebuild communities devastated by conflict.⁹

It is hardly surprising that serious concerns have been raised on the concept of a ‘blanket amnesty’, offering amnesty to those who have committed or may have committed international crimes. The Amnesty Act raised serious and complex questions about the concept of accountability in conflict and post-conflict situations. Part II of the Act that granted blanket immunity to all persons engaged in armed rebellion in Uganda, had long been overtaken by the Agreement on Accountability and Reconciliation and its Annexure that recognised the need for accountability for the crimes committed during the conflict. In addition, the International Crimes Division of the High Court of Uganda was specifically created in 2008 to prosecute those responsible for international crimes committed in the LRA conflict. Nonetheless, in 2010, the government renewed the Act for a further two-year period, contradicting these commitments.¹⁰

In February 2012, the Justice Law and Order Sector (JLOS) Transitional Justice Working Group (TJWG) met in Kampala to address key issues regarding the Amnesty Act, in anticipation of the lapse of the Act in May 2012. The meeting concluded that a review of the Amnesty Act was necessary in order to address the inconsistencies between the Act and Uganda’s international obligation and also other laws in Uganda for instance the International Criminal Court Act (ICC Act) and the Geneva Conventions Act. A review of the Amnesty Act was also considered necessary in light of the development of transitional justice mechanisms envisioned in the National Transitional Justice Policy that the TJWG is developing.¹¹ Several review meetings took place thereafter and on 24 May 2012, the Chair

⁹ Amnesty Commission *An Act of Forgiveness: A guide to the Amnesty Act, 2000; The Amnesty (Amendment) Act, 2002; The Amnesty (Amendment Act) Act, 2006* (September 2006) 3.

¹⁰ The renewal of the Act in 2010 was no doubt was part of the NRM preparation for the 2011 national elections, an attempt to appease the people in Northern Uganda who overwhelmingly supported amnesty. Indeed, for the first time the NRM predominantly won elections in northern and eastern Uganda, regions that traditionally voted for the opposition.

¹¹ The Formal Criminal Jurisdiction Sub-Committee of the TJWG has since the meeting in Feb 2010 been undertaking a review of the Amnesty Act and will consider key legal and policy options for the way forward on Amnesty in light of Uganda’s international obligations, national laws and the National Transitional Justice Policy objectives that the group is developing. In anticipation of the review, the Refugee Law Project and UNOHCHR, in collaboration with UN Women held a one day conference in Nov 2011 entitled ‘Dialogue: The Crossroads of Amnesty and Justice’ to discuss the continued role of the Amnesty Act in creating an

of the TJWG presented the findings of the amnesty review process. TJWG together with the Attorney General reached the consensus that Part II of the law should lapse by May 2012, in accordance to section 16 of the Amnesty (Amendment) Act of 2006. That the Amnesty Commission should maintain its activities in the area of reintegration and support to reporters for an additional 12 months, that JLOS should expedite the adoption of the national transitional justice policy for Uganda, within 12 months, and that the government should adopt a new law to take forward a truth-seeking process that complements traditional justice practices. TJWG further recommended that the truth telling body could incorporate a conditional amnesty for lesser offenses in exchange for the truth and establish a victim assistance program, especially for victims suffering from serious physical and mental injuries and illnesses.¹²

Accordingly, on 23 May 2012, the Minister of Internal Affairs, Hillary Oniek declared the lapse of operation of Part II of the Amnesty Act.¹³ Part II of the Amnesty Act regulated the provisions of the law relating to the grant of amnesty as well as the procedures for the grant of Amnesty in accordance with section 2 of the Amnesty Act. The declaration of a lapse therefore means that amnesty has ceased in Uganda and from 25 May 2012 when the lapse took effect, any person engaged in war or armed rebellion against the government of Uganda shall be investigated, prosecuted and punished for any crime committed in the course of the war if found guilty. On the other hand, persons already issued amnesty certificates when the law operated shall not be subject to prosecution or any form of punishment for conduct during the war.¹⁴

environment for reconciliation, accountability and sustained reintegration and peace in Uganda. The conference had a particular focus on the impact of the Amnesty Act on accountability for international crimes. This conference sparked off nationwide discussion on the Amnesty Act and its relationship to other accountability measures. For more information see <http://jlos.go.ug/uploads/Website%20article%20ANETY-KITGUM.pdf> (accessed 14 April 2012).

¹² Joint Leadership and Steering Committee 'Presentation by Hon Justice Gidudu, Chair Transitional Working Group' (18 May 2012) available at www.jlos.go.ug/page.php? (accessed 10 July 2012).

¹³ Effected under Statutory Instrument No. 34 of 2012, that was signed and gazetted on 1 June 2012. This was by virtue of section 16(3) of the Amnesty Amendment Act of 2006 that provides that the Minister may by statutory instrument; declare the lapse of the operation of Part II of the Act.

¹⁴ Such persons are protected under the Constitutional of Uganda that in art 28(5)(f) provides that no person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.

The Minister also extended the expiry period of Part I, III, and IV of the Amnesty Act for a period of 12 months.¹⁵ Part III of the Act, establishes the Amnesty commission, a demobilisation and resettlement team, and elaborates its functions among other provisions. The extension of this Part means that the Amnesty Commission shall continue with its duties of demobilisation, reintegration, resettlement of reporters, and sensitisation of the public on the Amnesty Law and promote appropriate reconciliation mechanisms to affected communities. The Amnesty Commission and the demobilisation and resettlement must complete these activities within the one year of the extension period.¹⁶ It is however, not clear whether the further recommendations of the TJWG and Attorney General will be incorporated in the accountability process within the specified time.

The 'blanket amnesty' was in operation for eleven years prior to the lapse and without any guidelines on how it would operate alongside other measures of accountability, created a lot of confusion and dissatisfaction among various groups both nationally and internationally. The first part of this chapter therefore, discusses how the Amnesty Act was applied, the challenges to application and its shortcomings in relation to the Constitution of Uganda and Uganda's international obligations. This part concludes that the lapse of Part II of the Amnesty Act paves way for accountability for crimes committed by the LRA during the conflict and allows Uganda to meet its international obligations. The chapter further suggests that even those who benefitted from amnesty should take part in quasi-judicial accountability mechanisms such as a truth telling process and traditional justice. The second part of the chapter analyses the Agreement on Accountability and Reconciliation and its Annexure. This Part highlights the main provisions of the Agreement that relates to accountability measures and discusses how they would operate. The chapter also tests whether these provisions are in line with the Constitution of Uganda and Uganda's international obligations. This part concludes that the provisions of the Agreement on Accountability and Reconciliation and its Annexure establishes a general national framework for further and specific discussion on accountability for mass atrocities perpetrated in the LRA conflict and are in line with Uganda's accountability obligations.

¹⁵ Effected under Statutory Instrument No. 35 of 2012, that was signed and gazetted on 1 June 2012. This was done by virtue of section 16(2) of the Amnesty Amendment Act of 2006.

¹⁶ Interview with Judge Onega chair of the Amnesty Commission conducted on 11 July 2012 in Kampala.

4.2 How the Amnesty Act was applied

The Amnesty Act defined ‘amnesty’ as ‘pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the state’, and conferred upon beneficiaries of the amnesty an irrevocable legal immunity from prosecution.¹⁷ The Act extended amnesty to all those engaged in acts of rebellion against the government of Uganda, ‘through actually participating in combat; collaborating with insurgents; committing other crimes to support insurgency; or in any other way assisting others involved in insurgency at any time since 26 January 1986.’¹⁸ Although the law appeared to be directed at political offences, in particular, engaging in acts of rebellion, it refrained from expressly requiring that the offence be of a political nature. It therefore left no room for excluding international crimes from its scope, as it said nothing of the lawfulness of the conduct of hostilities in terms of IHL before the grant of amnesty.¹⁹

The UN Secretary General in his report on transitional justice affirmed that if carefully crafted, amnesties can help in the return and reintegration of displaced persons and former fighters in the aftermath of armed conflict and that they should be encouraged but that amnesties should not be permitted to pardon international crimes.²⁰ As established in the previous chapter, amnesties and similar measures that pardon perpetrators of international crimes and other gross human rights violations are incompatible with the duty of states to prosecute, impose appropriate punishment on those found guilty, and provide an adequate and effective remedy to victims whose rights have been violated. This is clearly provided for by specific IHL and IHRL instruments such as the Geneva Conventions, Additional Protocol I and CAT.

¹⁷ Amnesty Commission (n 9 above) 5; Constitution of Uganda art 28(10); provides that no person shall be tried for any criminal offence if the person shows that he or she has been pardoned in respect of the act or offence. The pardon granted under the Amnesty Act, therefore confers an irrevocable immunity from prosecution that continues to be effective long after the Amnesty Act has expired. It is important to note that, the definition of amnesty in the Amnesty Act does not appear to bar civil action against perpetrators of crimes.

¹⁸ Amnesty Act sec 3(1); no offences are excluded from the scope of the amnesty and all forms of insurgency activities are covered under this section.

¹⁹ A O’shea *Amnesty for Crimes in International Law and Practice* (2002) 39.

²⁰ Report of the UN Secretary General S/2004/616 para 32.

In the domestic arena, the ‘blanket amnesty’ shrank the states’ human rights obligations under the Constitution of Uganda that provides that rights and freedoms in the Constitution shall be respected, upheld and promoted and that individuals have the right to apply to a competent court for redress in case of violations of those rights.²¹ Further, the provisions of the Amnesty Act contravened the independence and autonomy of the DPP to institute criminal proceedings against any person or authority in any court with competent jurisdiction in Uganda.²² The provisions of the Act were further in collision with Uganda’s laws such as the Geneva Conventions Act that required the state to investigate and prosecute war crimes.²³ Yet, the Constitutional Court of Uganda on 22 September 2011 declared the Amnesty Act, constitutional.²⁴ The Court justified its findings citing Uganda’s history that has been characterised by political and constitutional instability and stated that the aim of the Act to end an armed rebellion, was in line with national objectives and state policy; and that made the Act constitutional.²⁵ The Court however, failed to consider the relevance of the Amnesty Act, in particular the provisions granting a blanket amnesty that had been in operation for eleven years, while the LRA conflict rages on despite its promise of total amnesty and the aim of the Act to end the rebellion.²⁶ The state is set to appeal this decision to the Supreme Court.²⁷

Experiences of states in the aftermath of mass atrocities has shown that amnesties that foreclose prosecution for international crimes are unlikely to be sustainable, even when

²¹ Constitution of Uganda art 20(2) provides that rights and freedoms enshrined in the Constitution shall be respected, upheld and promoted and art 50 provides for the rights of persons to apply to a competent court for redress in case of violations of their rights

²² Constitution of Uganda art 120(3)(b).

²³ Geneva Conventions Act 1964 cap 363 Laws of Uganda domesticates the Geneva Conventions; art 2 provides for the punishment of persons who commit graves of the Convention.

²⁴ *Thomas Kwoyelo alias Latoni v Republic of Uganda* (Constitutional Court of Uganda) ‘Ruling of the Court’ Constitutional Petition No 36/11 (Reference) Arising out of HC-00-ICD Case 02/10 (22 Sept 2011) 19 – 20.

²⁵ As above.

²⁶ According to Judge Onega, the chairman of the Amnesty Commission, several LRA commanders including Gen Caesar Acellam (captured in May 2012) and Okoth Odhiambo (one of the ICC indictees) have called the Commission inquiring about the amnesty showing that the leaders were interested in ending the rebellion but prevented from doing so by the top commander, Joseph Kony. The Chairman opined that the lapse of Part II of the Amnesty Act closes the only window of opportunity that the LRA conflict will be resolved peacefully. Interview conducted on 11 July 2012.

²⁷ The state has filed a notice of appeal but the case will not be heard until quorum that requires the appointment of another Supreme Court judge is established. In Jan 2012, the Judicial Service Commission had a meeting and several candidates have been nominated. Telephone interview with Joan Kagezi, Principal State Attorney in charge of international crimes prosecution conducted on 22 Feb 2012.

adopted in the hope of advancing national reconciliation rather than with the cynical aim of shielding perpetrators from accountability. For instance in Argentina, when the government adopted amnesty laws in the 1980s, it defended its actions on the ground that there was a compelling need for national reconciliation and consolidation of the democratic system.²⁸ In 2003, Argentina's Congress annulled the laws with retroactive effect; two years later, its Supreme Court upheld the Congress's actions. Argentina has since had more transitional human rights trials than any other country in the world and has enjoyed the longest uninterrupted period of democratic rule in its history.²⁹ In other states, courts have progressively cut back on the scope of amnesties that violate their human rights obligations. For instance, in Chile, the courts have interpreted a Pinochet era amnesty narrowly, allowing cases to go forward on legal theories that defy the amnesty's attempt to block all prosecutions.³⁰ The Supreme Court of Uganda will have to look critically at these cases before reaching a decision on amnesty.

In Uganda, a grant of amnesty was contingent upon the offenders reporting to a recognised official, renouncing or abandoning involvement in war or rebellion and surrendering any weapons in possession.³¹ The 'reporter'³² was then issued a certificate of Amnesty.³³ The reporter was required to complete a survey form detailing basic bio data, basic health information, the rebel group one served with, role in the group, why he/she joined the group and a declaration that he/she renounced rebellion. Where a reporter was under lawful detention in relation to an offence related to an armed conflict, he/she was deemed to be granted amnesty if he/she declared to a lawful officer that he/she had renounced rebellion and declared his/her intention to apply for amnesty.³⁴ Such a person was not released from custody until the DPP certified that the person was retained because of

²⁸ *Alicia Consuelo Herrera et al., v Argentina*, Inter-American Commission on Human Rights (Decision of 2 October 1992) para 25.

²⁹ K Sikkink & CB Walling 'The Impact of Human Rights Trials in Latin America' (2007) 44(4) *Journal of Peace Research* 427.

³⁰ Office of the United Nations High Commissioner of Human Rights (OHCHR) *Rule-of-Law Tools for Post-Conflict States: Amnesties* HR/PUB/09/1 (2009) 1.

³¹ Amnesty Act sec 4(1)(a),(b) &(c).

³² Amnesty Act part 1(2) defines a 'reporter' as someone seeking a grant of amnesty under the Act.

³³ Amnesty Act sec 4(1)(d).

³⁴ Amnesty Act sec 4(2)(a) & (b).

his/her involvement in armed rebellion and that he/she was not detained to be prosecuted for any other offence.³⁵

The DPP was charged to investigate all cases of persons in custody who had been charged with criminal offences and to take steps to ensure the release of all those who qualified for a grant of amnesty under the act, if such persons renounced activities in which they had been involved.³⁶ This in effect meant that those who did not ‘renounce’ rebellion were not entitled to a grant of amnesty and in strict sense excluded those who were captured in battle, but did not surrender. In practice though, persons captured in battle received amnesty. This serious loophole left the process susceptible to abuse as it became impossible for the DPP to determine when a perpetrator had not ‘renounced’ rebellion or when the renouncement was not genuine.³⁷

The Amnesty Act establishes an Amnesty Commission, which oversaw the amnesty process and is the lead agency in the implementation of the Act.³⁸ The functions of the Commission include monitoring the demobilisation, reintegration and resettlement of reporters; coordination of a programme of sensitisation of the public on the law; promotion of appropriate reconciliation mechanisms in the affected areas; and promotion of dialogue and reconciliation.³⁹ The Act also established a Demobilisation and Resettlement Team (DRT) whose functions are to decommission arms, demobilise, resettle and reintegrate reporters.⁴⁰ The DRT functions at a regional level, and is responsible for the implementation of the Amnesty Act, under direct supervision of the Amnesty Commission.⁴¹

³⁵ Amnesty Act sec 4(3).

³⁶ Amnesty Act sec 4(4); the grant of amnesty is extended to persons living outside Uganda if they renounce rebellion and report to any Ugandan diplomatic mission or some other organisation authorised to receive such persons by sec 4(5) of the Act.

³⁷ This is clearly illustrated in the case of *Thomas Kwoyelo* (n 18 above); who was captured in battle in 2008, detained for two years, charged with war crimes in 2010 and after his trial was due to commence, made an application for amnesty claiming that he has renounced rebellion, yet there is every indication that legal fees for his defence is obtained from the LRA or LRA supporters in South Sudan. Kwoyelo rejected the lawyers offered to him on state brief and instead choose instruct counsel privately. Discussion with Joan Kagezi on 26 March 2011.

³⁸ Amnesty Act sec 7, 8 & 9.

³⁹ Amnesty Act sec 9.

⁴⁰ Amnesty Act sec 12.

⁴¹ Amnesty Act sec 13; currently, there are 6 DRT offices around the country located in Gulu, Kitgum, Arua, Kasese, Mbale and Kampala, all of which rely heavily on other government agencies, civil society organisations,

On receiving an amnesty certificate, a reporter was entitled to a standard amnesty package which consisted of 263,000 Uganda shillings (about 100 USD) as an allowance and 20,000 Uganda shillings (about 8 USD) as transport money to his/her home of origin. The reporters were also entitled to a home kit, which included a mattress, saucepans, blankets, plates, cups, maize flour and seeds.⁴² Even with the lapse of Part II of the Amnesty Act, there is justification for this allowance and kit, as reporters need assistance to rebuild their lives outside the 'bush'. The Act, however, paid no particular attention to the different categories of returnees and their needs. It for instance, failed to cater for abducted women and children who were forcibly recruited into the LRA, some of whom played the supportive rather combat role in the conflict. There was a further complaint that the government gave preferential treatment to demobilised senior commanders in contrast to the lower ranking commanders and foot soldiers largely composed of formerly abducted persons. The government gave the senior former commanders accommodation, yet the lower ranking commanders and foot soldiers were not entitled to accommodation. That caused resentment and bitterness among the ex-rebels and is an impediment to reconciliation.⁴³

In addition, the amnesty process focused solely on reporters and did not address the material needs of victims in any way.⁴⁴ The amnesty package therefore created resentment among the victimised communities who state that while they continue to suffer and have to rebuild their lives, without assistance from the government, the perpetrators are

the community and donors for successful implementation. The lapse of Part II of the Amnesty Act does not affect these functions.

⁴² Interview with Justice Onega, chair of the Amnesty Commission, conducted on 14 Jan 2011.

⁴³ J Hopwood 'With or Without Peace: Disarmament, Demobilisation and Reintegration in Northern Uganda' (Feb 2008) 6 *Justice and Reconciliation Project Field Notes* 6; in Feb 2008, while in Gulu, I spoke to a group of four formerly abducted children in Gulu town. A 16-year-old boy, who stayed at the World Vision reception centre on return, insisted that he had forgiven his captors and was not ready to talk about anything other than forgiveness. That was until another boy pointed out that their former commander was residing in Acholi Inn, one of the most affluent hotels in Gulu town courtesy of the government. The 16 year old boy then agreed with his friends that given the opportunity, they would kill the commander in question because he made them suffer a lot in the 'bush' and now he is enjoying life, among the elites, well they continue to suffer.

⁴⁴ According to Justice Onega, the Amnesty Commission has seen the need for and applied for funds for packages targeting victims but this has not been forthcoming from either donors or the government. However, the problems the 'amnesty package' has created has been recognised by the government and donors and the most recent re-integration project of the Commission 'Uganda Emergency Demobilisation' that offers skills training to reporters is also being extended to victim communities.

rewarded.⁴⁵ A Refugee Law Project research found that there is too much focus on the ‘amnesty package’, that it distorted the amnesty process, and that the real purpose - peace and sustainable reconciliation was lost.⁴⁶

By June 2010, at least 12,861 LRA members had applied for and received amnesty.⁴⁷ According to the UN Mission in the DRC (MONUC), since 2011, the estimated number of core numbers of the LRA has bounced between 250 and 150 soldiers.⁴⁸ The weaknesses inherent in its provisions and other factors limited the application of the Amnesty Act and created a challenge to its implementation. These challenges affect the entire accountability processes in Uganda as discussed below.

4.2.1 Government’s attitude towards amnesty

Since its inception, the government’s attitude towards amnesty has been controversial and seen as a tactical device to gain an upper hand in the conflict rather than based on a genuine desire to end the conflict through peaceful means and to ensure reconciliation. This sentiment is due to the UPDF’s continuous determination to pursue a military solution to the conflict. For instance the government’s controversial military strategy that began in March 2002 - Operation Iron Fist, shortly after passing of the Act, fully contradicted the aims of the amnesty law. In addition, after the US included the LRA on its State Department’s list of terrorist organisations post 11 September 2001 attacks,⁴⁹ the government of Uganda

⁴⁵ P Acirokop ‘The Potential and Limits of Mato Oput as a Tool for Reconciliation and Justice’ in S Parma et al. (eds) *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (2010) 271; stating that return process is complicated by stigma, persons who return from the ‘bush’ are usually referred to as murderers or rebels and the children have been nicknamed *duk paco* (return home). The children say they find this phrase offensive as people lace it with sarcasm and bitterness angry that they suffered due to the war and now perpetrators are being rewarded. This nickname is derived from a radio programme started by the Amnesty Commission called *duk paco* that seeks to encourage the rebels to return home. Among the items provided as amnesty package are school bags for children with *duk paco* printed on.

⁴⁶ L Hovil & Z Lomo ‘Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: Potential for Conflict Resolution and Long-Term Reconciliation’ (2005) 15 *Refugee Law Project* 26.

⁴⁷ Interview with Judge Onega, chairman of the Amnesty Commission, conducted on 14 Jan 2011; while a few LRA members have been denied amnesty as discussed later in this chapter.

⁴⁸ ‘Questions over the progress of the LRA’ IRIN 24 Feb 2012, available at <http://www.unhcr.org/refworld/docid/4f4cd6cb2.html> accessed 16 March 2012); reports further indicate that the LRA have broken up into very small groups and Kony himself moves with about five to ten soldiers in a vast area sparsely populated that makes finding them very difficult.

⁴⁹ The September 11th attacks were a series of four coordinated suicide attacks by al-Qaeda on the US on September 11 2001. These attacks are commonly referred to as September 11, September 11th or 9/11. The US

adopted the Anti-terrorism Act No 14 of 2002 that lists the LRA in the second schedule as a terrorist organisation; outlaws membership in such organisations; and any contact with the organisations attracts punishment.

In addition, although the government repeatedly stated its intention to negotiate peace with the LRA, those who attempted to have dialogue and breach the communication gap with the rebels in line with the Amnesty Act; (most notably religious and cultural leaders) were accused of being rebel collaborators or sympathisers and at times threatened. For example, the UPDF instructed Father Carlos Rodriguez, a member of the ARLPI to leave Northern Uganda forthwith because of his attempts to reach the rebels and negotiate the release of abducted persons, especially schoolchildren. The army spokesperson, Major Shaban Bantariza advised that he should be deported for his own safety.⁵⁰ In addition, the government has viewed with hostility the fact that LRA leaders sometimes phone religious leaders who are peace activists.⁵¹

At the same time, three years after the enactment of the Amnesty Act, the government referred the situation of the LRA to the ICC that started investigations. Further, in 2008, the government created the ICD with the immediate aim of prosecuting top LRA perpetrators for crimes committed in the conflict in line with the Agreement on Accountability and Reconciliation yet renewed the blanket amnesty in 2010.⁵² This caused considerable confusion due to the obvious contradiction between investigations and prosecutions and the blanket amnesty provided for under the Amnesty Act. The government continuously renewed the Amnesty Act despite ongoing investigations by both the ICC and the ICD, until May 2012.⁵³

responded to the attacks by launching the War on Terror, invading Afghanistan to dispose the Taliban that provided a safe haven for al-Qaeda and by enacting the USA Patriot Act.

⁵⁰ 'Ugandan army Spokesman Major Shaban Bantariza says the Priest Should be Deported' Voice of America February 2004 <http://www.voanews.com/english/archive/2004-02/a-2004-02-12-45-Ugandan.cfm> (accessed 15 Aug 2009).

⁵¹ T Allen *Trial Justice: the International Criminal Court and the Lord's Resistance Army* (2006) 34.

⁵² Annexure to the Agreement on Accountability and Reconciliation clause 23.

⁵³ Amnesty (Amendment) Act 2006 sec 16 provides that the Amnesty Act shall remain in force for a period of two years that may be extended. The Act is due for extension in May 2012.

Perhaps most critical is that despite the eligibility of some people to receive amnesty, the law enforcement and security agencies denied this right to some individuals with no credible explanation. A case in point is that of Thomas Kwoyelo, the first person indicted by the ICD. Two years after his capture and detention, Kwoyelo renounced rebellion before a prison warden and completed the Amnesty Declaration Form.⁵⁴ The Amnesty Commission deemed him to qualify for amnesty in accordance to Section 3 of the Amnesty Act and asked for certification by the DPP in accordance to section 4(4) of the Act but received no response.⁵⁵

Kwoyelo challenged his prosecution by the ICD before the Constitutional Court that found no credible and convincing explanation why others, in similar situations, benefitted from amnesty and Kwoyelo did not and ordered the ICD to cease his trial.⁵⁶ The ICD has since ceased the trial but Kwoyelo.⁵⁷ The State applied to the Constitutional Court for a stay of execution pending an appeal to the Supreme Court. The Constitutional Court denied the stay.⁵⁸ The DPP refused to order the release of Kwoyelo despite an order of mandamus by the High Court to compel the DPP and the Chairman Amnesty Commission to issue him an amnesty certificate and have him released with the immediate effect.⁵⁹ On 30 March 2012,

⁵⁴ *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Court of Uganda) 'Affidavit by Thomas Kwoyelo in Support of the Petition Constitutional Reference 036/11 para 17.

⁵⁵ *Thomas Kwoyelo Alias Latoni v Uganda* (n 18 above) para 18 & 19; during discussions with Judge Onega on 19 Jan 2011 in Kampala, the judge stated that if Kwoyelo or any other rebel approaches his office, he will grant them amnesty in accordance with the Act no matter the interest of the DPP in prosecuting the person in question for crimes committing during the conflict.

⁵⁶ *Thomas Kwoyelo Case* (n 18 above) para 620; the state has filed a notice of appeal but the appeal cannot be heard until an additional judge is appointed to the Supreme Court that presently lacks quorum.

⁵⁷ *Uganda v Kwoyelo Thomas alias Latoni* (International Crimes Division of the High Court of Uganda) HCT-00-ICD-CASE NO. 0002 of 2010 (11 Nov 2011); the ICD made an order to cease the trial of Kwoyelo forthwith and ordered the DPP and the Chairman Amnesty to comply with the provisions of the Amnesty Act.

⁵⁸ *Uganda v Kwoyelo Thomas alias Latoni* (Constitutional Court of Uganda) Constitutional Application No. 50/11 (Arising out of Constitutional Reference No 36/11) (10 Nov 2011) 2; the Court found that the State had not made a case to warrant the grant of stay of execution and dismissed the application. The Court promised to furnish the reasoning behind the ruling at a later date.

⁵⁹ *Kwoyelo Thomas alias Latoni v Attorney General* (High Court of Uganda, Civil Division) HCT-00-CV-MC-0162-2011 (25 Jan 2012) 19 & 20; the Court ordered the Chairman Amnesty Commission and the DPP to grant a certificate of Amnesty to Kwoyelo immediately and release him; see also 'DPP Rejects Kwoyelo's Amnesty' the New Vision 5 Feb 2012; the DPP maintained that Kwoyelo is charged with grave breaches of the Geneva Convention therefore not eligible to receive amnesty; telephone interview with Joan Kagezi senior principal State Attorney in charge of international crime trials. It appears that the fear that the DPP and his team are not willing to express is that Kwoyelo is a flight risk. With the connections he has with the LRA or its supporters in Sudan (from where the fees for his defence allegedly remitted) he potentially has people to give him sanctuary out of Uganda. That means that in the event that the Supreme Court overturns the ruling of the Constitutional

the Supreme Court issued an interim order staying execution of any consequential orders arising from the Constitutional Reference, pending hearing and determination of the main application for stay of execution.⁶⁰ On 5 April 2012, the High Court issued an order staying the execution of the order of mandamus granted by the Court pending the state's intended appeal against the order.⁶¹

The seemingly haphazard way in which the government applied the Amnesty Act is further illustrated by the case of Okello Solomon Patrick alias Okello Mission who joined the LRA during the Juba talks in 2006. He is known to have played a key role in explaining to Kony technical issues raised during the peace talks. The UPDF captured Okello Mission in March 2010 in South Sudan; he claimed that he had gone there to renew peace talks on behalf of Kony. He has been detained with no charge since in the Chieftaincy of Military Intelligence (CMI) safe house in Kawempe, a Kampala suburb. Despite the provisions of the Amnesty Act, the Ugandan authorities said that they would charge for with treason, but have not yet done so.⁶²

To date, the government has not given any explanation as to why it granted amnesty to some people yet denied others, like Kwoyelo. Even with the lapse of Part II of the Act, it is not clear which offenders the government intend to prosecute before the ICD. For instance, Gen Caesar Acellam, who was captured on 13 May 2012, did not apply for amnesty before the lapse of Part II of the Act but it is not yet clear if the UPDF will release him to the custody of the ICD for trial. The DPP has already prepared an indictment for him and hope to start trial soon.⁶³ Since the capture of Gen Acellam, the UPDF has printed and distributed defection fliers with his photograph throughout the LRA affected regions in South Sudan, DRC and Central African Republic. The fliers advises the LRA fighters to put down arms and

Court, it will be hard or impossible to secure his arrest. In addition, if granted, the amnesty would not be reversible.

⁶⁰ *Attorney General v Thomas Kwoyelo alias Latoni* (Supreme Court of Uganda at Kampala) Constitutional Application No. 01 of 2012 (Arising from Constitutional Reference No. 36 of 2011) (30 March 2012).

⁶¹ *Attorney General v Thomas Kwoyelo alias Latoni* (High Court of Uganda at Kampala) Miscellaneous Application No. 179 of 2012 (Arising out of Miscellaneous Cause No. 162 of 2011) (5 April 2012).

⁶² L Cakaj, (September 2011) 'Too Far from Home: Demobilising the Lord's Resistance Army' Enough Project (September 2011) <http://www.enoughproject.org> (accessed 15 April 2011).

⁶³ Interview with Joan Kagezi the senior principal State Attorney in charge of international crimes prosecution, conducted on 6 July 2012.

stop fighting with a promise that they would not be harmed, indicating that Acellam has not been harmed by the UPDF.⁶⁴ In addition, the US is working with UN missions and military forces in the region to expand communications, including through distributing leaflets and radio broadcasts urging LRA fighters to defect, surrender peacefully and return home.⁶⁵ These leaflets and broadcasts say nothing of the lapse of Part II of the Amnesty Act and the fact that the ICD operations continue and that it prepares to prosecute commanders like Thomas Kwoyelo. The LRA commanders must be fully aware of the contradictions that they communicate to the fighters.⁶⁶

Further, the government of Uganda has used amnesty as a political gimmick to dissuade political dissent aimed at it. For example, the police arrested Kiiza Besigye, leader of the Forum for Democratic Change (FDC) the main opposition party in Uganda on 14 November 2005 on charges of treason. Besigye claims that his co-accused were subjected to torture to confess to belonging to a rebel group, the Peoples' Redemption Army (PRA) that he claims was conjured up by the government and does not exist.⁶⁷ The accused persons in the treason trial were forced to apply for amnesty to avoid prosecution.⁶⁸ This weakens the assumption of fairness and affects the legitimacy of the Amnesty Commission and law enforcement institutions. This, together with the lapse of the Part II of the Amnesty Act jeopardises the potential of ending Uganda's cycles of violence and the potential for reconciliation.⁶⁹

⁶⁴ See <http://www.lracrisistracker.com/> for more details on the defection fliers.

⁶⁵ 'Statement by Ambassador Jeffrey DeLaurentis, U.S. Alternate Permanent Representative to the United Nations for Special Political Affairs, At a Security Council Briefing on UNOCA/LRA' (29 June 2012) available at <http://usun.state.gov/briefing/statements/194265.htm> (accessed 12 July 2012).

⁶⁶ Cakaj (n 53 above).

⁶⁷ The existence of this rebel group is disputed; the government has asserted its existence for several years although it has occasionally called the group 'dormant'. The government alleges that the rebel group is based in Eastern DRC and has links to Rwanda. The government further alleges that, renegade Ugandan army officers including the FDC President, Kizza Besigye, founded the group. The FDC and Rwandan President dispute the existence of such a group. In 2004, the government estimated that PRA consisted of 2000 rebels that were ready to attack Uganda. As a result, in Dec 2004, Uganda deployed troops along the border, later making way into the DRC where the UPDF were accused of looting and other atrocities against civilians in the DRC. See 'Uganda Deploys troops along on Congo Border' People's Daily online 2 Dec 2004; for more on the resulting ICJ case against Uganda, see chapter one of this thesis.

⁶⁸ 'Nine more PRA Suspects Freed Friday' the Daily Monitor 16 Feb 2007 1.

⁶⁹ Hovil & Lomo (n 39 above) 19 -20.

4.2.2 Resource and time-bound limitation

The Uganda Amnesty Commission is underfunded and resource issues have severely constrained its effectiveness. For instance, many reporters have not received a resettlement package. In addition, the Commission has not been able to implement reintegration and resettlement programs due to lack of resources.⁷⁰ This remains a critical issue as the Commission must continue with its duties including the demobilisation, reintegration, and resettlement of reporters. In addition, since the lapse of Part II of the Amnesty Act, the Commission has not received funds to sensitise the public on this and to perform its other roles. The government must therefore better fund the Commission and the DRT to enable them perform this broad and more relevant function of reintegrating reporters and encouraging reconciliation within the limited time.⁷¹

4.2.3 Crimes committed in other states and universal jurisdiction

Although the DPP's office has clearly stated that it does not intend to indict persons who benefitted from the amnesty process because the Constitution of Uganda protects them,⁷² offences committed by the LRA involve not only Uganda territories but also South Sudan, the DRC and Central African Republic. The other states have a right to assert jurisdiction over persons granted amnesty in Uganda. If this happens, Uganda will be obliged to extradite such persons to face trial in the requesting state.⁷³ In addition, the crimes perpetrated in the conflict in Northern Uganda are matters covered by universal jurisdiction,

⁷⁰ Interview with Justice Onega conducted on 14 Jan 2011 in Kampala.

⁷¹ C Rose 'Looking beyond Amnesty and Traditional Justice and Reconciliation Mechanism in Northern Uganda: A Proposal for Truth Telling and Reparations' (2008) 28(2) *Boston College Third World Law Journal* 358; Citizens for Global Solutions 'In Unchartered Waters: Seeking Justice before the Atrocities have Stopped' (2004) 23 *Citizens for Global Solutions* 26.

⁷² Interview with Joan Kagezi, senior principal State Attorney in charge of war crimes prosecutions conducted on 6 July 2012 in Kampala.

⁷³ Geneva Conventions I art 49(2) that requires a state according to its own legislation to extradite offenders of the grave breaches to a requesting state that makes a *prima facie* case. The Extradition Act of Uganda cap 117 of 1964 contains the law relating to the extradition of persons accused or convicted of crimes committed in other jurisdiction, sec 23 only excludes the extradition of persons charged with political crimes.

so any other interested state may request Uganda to surrender persons granted amnesty for purposes of prosecution.⁷⁴

A nationally granted amnesty does not preclude a foreign state from proceeding with prosecutions. In the *Pinochet case*,⁷⁵ involving the request from Spain for the extradition of the former Chilean head of state from the UK, counsel for Pinochet never pleaded for the recognition of the Chilean amnesty to bar the extradition of Pinochet. The English criminal law and the law of extradition appear to contain no principle that could be relied upon to support such an argument. Therefore, although a state may choose to grant amnesty to perpetrators of international crimes, this does not bar other interested states from prosecuting such individuals.⁷⁶

The application of the Amnesty Act had several loopholes and fell short of any accountability goal. It has prevented the prosecution of individuals who may be criminally responsible for international crimes, interfered with the victims' and society's right to know the truth about violations of IHL and IHRL and foreclosed the victims' rights to reparations that would include compensation from perpetrators.⁷⁷ The lapse of Part II of the Act however, opens doors for investigations into the activities of the LRA and possible prosecution of those responsible for international crimes committed during the conflict. Although the Constitution protects those who already received amnesty against criminal prosecution, there is nothing in the law that bars victims from seeking compensation from them through civil suits. In addition, persons granted amnesty should be encouraged to take part in other non-judicial or quasi-judicial processes like a truth telling and traditional justice processes.

⁷⁴ O'shea (n 13 above) 265; also see detailed discussion on international obligations in chapter three of this thesis.

⁷⁵ *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Pinochet Ugarte* (No. 3) [2003] 1 AC 147; J Zalaguet 'Balancing Ethical Imperatives and Political Constraints: The Dilemmas of Democracies Confronting Past Human Rights Violations' (1992) *Hasting Law Journal* 312.

⁷⁶ M Freeman *Necessary Evils: Amnesties and the Search for Justice* (2009) 315.

⁷⁷ As indicated previously, there is nothing in the Amnesty Act that bars victims from pursuing civil cases against perpetrators before the courts in Uganda though the majority of the victims are not aware of this and do not have the money to do so.

Today, the TJWG is developing a National Transitional Justice Policy.⁷⁸ The referral of the Ugandan case to the ICC sparked off the development of the National Transitional Justice Policy and accountability for crimes committed in LRA conflict. The Juba negotiations presented an opportunity to discuss Uganda's international accountability obligations. Whether the resultant Agreement on Accountability and Reconciliation and its Annexure addressed the issue is discussed next.

4.3 The Agreement on Accountability and Reconciliation and its Annexure

The Agreement on Accountability and Reconciliation and its Annexure represents the compromise reached between the LRA and the government of Uganda in Juba. The government agreed to the negotiation in an attempt to end the drawn out conflict that had become a political embarrassment. While the LRA agreed to the negotiations with the desire to remove the threats of prosecution by the ICC.⁷⁹ This was clear from the demand of the LRA for a withdrawal of the warrants of arrest issued by the ICC and the response of the government of Uganda that it would meet the demand if a comprehensive peace agreement were reached. The intention of the parties to bypass the ICC proved legally impossible without genuinely addressing the question of accountability for crimes committed in the conflict at the domestic level.⁸⁰ The Agreement on Accountability and Reconciliation and its Annexure therefore set out the framework through which the government would deal with questions of accountability; the measures proposed and the inherent weaknesses are discussed below.

⁷⁸ The Formal Criminal Jurisdiction Sub-Committee of the TJWG has since the meeting in Feb 2010 been undertaking a review of the Amnesty Act and will consider key legal and policy options for the way forward on Amnesty in light of Uganda's international obligations, national laws and the National Transitional Justice Policy objectives that the group is developing. In anticipation of the review, the Refugee Law Project and UNOHCHR, in collaboration with UN Women held a one day conference in Nov 2011 entitled 'Dialogue: The Crossroads of Amnesty and Justice' to discuss the continued role of the Amnesty Act in creating an environment for reconciliation, accountability and sustained reintegration and peace in Uganda. The conference had a particular focus on the impact of the Amnesty Act on accountability for international crimes. This conference sparked off nationwide discussion on the Amnesty Act and its relationship to other accountability measures. For more information see <http://jlos.go.ug/uploads/Website%20article%20ANETY-KITGUM.pdf> (accessed 14 April 2012).

⁷⁹ Another factor that may have been critical for the request for a peace negotiations by the LRA is the signing of a Comprehensive Peace Agreement between the Khartoum government and the leadership in South Sudan that required the withdrawal of the Sudanese Armed Forces from South Sudan, cutting the LRA supply lines and the safe haven they had in South Sudan.

⁸⁰ Wierda & Otim (n 73 above) 22.

4.3.1 Formal prosecutions⁸¹

The Agreement and its Annexure proposes measures of justice,⁸² including both criminal and civil justice measures to be applied to any individual who is alleged to have committed serious crimes or human rights violations.⁸³ The choice of forum is to be informed by the nature and gravity of the conduct and the role of the alleged perpetrator in that conduct.⁸⁴ Formal courts provided for under the Constitution are exercise jurisdiction for serious crimes that includes those amounting to international crimes during the conflict.⁸⁵ During the negotiations, the parties discussed the need for a specific institution to carry out criminal prosecutions for international crimes and the Annexure proposed a Special Division of the High Court to handle crimes of this nature.⁸⁶ The government through a Legal Notice created the ICD, to prosecute individuals alleged to 'have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.'⁸⁷ A proviso in the Agreement excludes state actors from the jurisdiction of the envisaged division.⁸⁸ However, this proviso was not formalised in the Legal Notice creating the ICD whose jurisdiction is not limited to any particular individuals or category of individuals.⁸⁹

⁸¹ Further and detailed discussion on formal prosecutions in Uganda is contained in chapter six of this thesis.

⁸² Agreement on Accountability and Reconciliation preamble para 4 & 5; clause 2.1.

⁸³ Agreement on Accountability and Reconciliation clause 4.1.

⁸⁴ Agreement on Accountability and Reconciliation clause 4.3.

⁸⁵ Agreement on Accountability and Reconciliation clause 6.1.

⁸⁶ Agreement on Accountability and Reconciliation part 5 and Annexure clauses 7, 8 & 9; the negotiators also recognised the limitation of Uganda's laws to adequately address the crimes perpetrated in the LRA conflict and the need to domesticate the Rome Statute was discussed and agreed to, though this discussion is not reflected in any of the provisions of the Agreement and the Annexure. The domestication of the Rome Statute in 2010 was partly as a result of the negotiations in Juba in addition to other factors that played a role; see chapter six for further discussion.

⁸⁷ Agreement on Accountability and Reconciliation clause 4 & Annexure clause 14.

⁸⁸ Agreement on Accountability and Reconciliation clause 4.1; there appears to be no justifiable reason why different processes should apply to different offenders for crimes perpetrated in the same conflict; this appears to be an attempt to shield state actors from prosecutions; indeed, no criminal proceedings have been instituted (at least publically) against state actors for crimes committed in the LRA conflict.

⁸⁹ The High Court (International Crimes Division) Practice Directions, Legal Notice 10 of 2011, Legal Notice Supplements, Uganda Gazette 38 (CIV) 31 May 2011 para 6.

The provision, envisaging domestic trials of international crimes were specifically included to satisfy the ICC complementarity regime.⁹⁰ They were intended to put a halt to the ICC investigations thereby satisfy the LRA demand that ICC arrest warrants be dropped before the signing of a comprehensive peace agreement.⁹¹ The parties included a provision emphasising that Uganda has institutions, customs and laws that are capable of addressing the crimes committed during the conflict,⁹² but failed to assert primacy over international crimes or to establish modalities on how the justice processes in Uganda would collaborate and work alongside the ICC. The International Criminal Court Act 11 of 2010 that domesticates the Rome Statute provides for modalities of cooperation and partly rectifies this oversight. There is however, a further need for a transfer mechanism at the ICC to transfer cases to Ugandan courts at a time when Uganda will be willing to assert jurisdiction over offenders at the ICC.⁹³

4.3.2 Investigations

The Agreement further provides for an investigative unit with a multi-disciplinary character controlled by the DPP that will identify individuals alleged to have planned or carried out international crimes.⁹⁴ According to Barney Afako, the Legal Advisor to the Mediator, the DPP will investigate and prosecute every crime based upon systematic, neutral and independent process of investigation.⁹⁵ The Annexure requires the government to establish a unit that will carry out investigations and provides for its processes, composition and protection guidelines for special groups like children and women.⁹⁶ Barney Afako provided further assurances that the investigations shall be independent, impartial and not

⁹⁰ Agreement on Accountability and Reconciliation preamble para 3.

⁹¹ Wierda & Otim (n 71 above) 21; see also background notes in chapter one of the thesis.

⁹² Agreement on Accountability and Reconciliation clause 5.1.

⁹³ GH Harris 'Closer to Justice: Transferring Cases from the International Criminal Court' (2010) 19(1) *Minnesota Journal of International Law* 212; JM Kamatali 'From the ICTR to the ICC: Learning from ICTR Experience on Bringing Justice to Rwandans (2005) 12 *New England Journal of International and Comparative Law* 90; both authors advocate for the ICC to adopt a transfer mechanism modelled on a similar rule adopted by the ICTR to transfer cases to national jurisdiction to ensure more involvement by local communities.

⁹⁴ Annexure clauses 10, 11, 12 & 13.

⁹⁵ B Afako, 'A Detailed Description of Various Accountability Institutions' (May 2008) *Final Report on the Workshop on Accountability and Reconciliation: Juba Peace Talks* 18.

⁹⁶ Annexure clause 10 & 13.

influenced by any work, not even the investigations by the ICC.⁹⁷ It is unclear if operation of this investigative unit will include investigations into acts of state actors who are shielded from the accountability measures envisaged under the Agreement and Annexure.⁹⁸

4.3.3 Historical clarification and truth telling⁹⁹

The Agreement provides for an inquiry into past violations,¹⁰⁰ and requires the government by law to establish a body to be conferred with all necessary powers and immunities to consider and analyse any relevant matters including the history and manifestations of the conflict. To inquire into human rights violations giving particular attention to experiences of women and children; to hold hearings; to make provisions for witness protection; to promote truth telling; encourage preservation of memory; gather information on disappearance; make recommendations on a regime of reparations; make recommendations to ensure non reoccurrence; and to publish its findings and any other relevant function.¹⁰¹

The body is to be composed of persons of high moral character, integrity, and necessary expertise, reflecting a gender balance and national character.¹⁰² The government is further required to make detailed guidelines on how this body will work and relate to formal prosecutions.¹⁰³ The Agreement and Annexure however fail to establish how this body will relate to formal prosecutions and other measures. It is however, clear from the reading of the provisions that LRA personnel most responsible for international crimes will be

⁹⁷ Afako (n 95 above) 18.

⁹⁸ Joan Kagezi, the Senior Principle State Attorney in charge of international crimes in an interview conducted on 14 June 2011 in Kampala stated that the DPP and investigators have not looked into crimes allegedly committed by state actors but the DPP's office encourages anybody with information to report to them. This clearly is sidestepping the issue, as crimes allegedly committed by the UPDF are clearly documented and readily available to anybody interested in investigating alleged acts. For crimes perpetrated by the UPDF in the LRA conflict, see chapter two of this thesis.

⁹⁹ Further and detailed discussion on a national process of truth telling is contained in chapter eight of this thesis.

¹⁰⁰ Agreement on Accountability and Reconciliation clause 2.2 & 2.3.

¹⁰¹ Annexure clause 4.

¹⁰² Annexure clause 6.

¹⁰³ Annexure clause 5.

prosecuted. A policy document or legislation establishing a truth telling institution should therefore clarify the relation the truth telling institution will have with the ICC and ICD.¹⁰⁴

4.3.4 Reparations¹⁰⁵

The Agreement requires that victims must receive reparations both on a collective and individual basis. The reparations will include a range of measures such as rehabilitation, restitution, compensation, guarantees of non-reoccurrence and other symbolic measures such as apologies, memorials and commemorations.¹⁰⁶ The Agreement provides that the government should pay out compensation out of resources it has identified for that purpose. The government also committed to review its financial and institutional requirements and procedures for reparations to ensure that it adopts the most effective mechanism.¹⁰⁷

In addition, perpetrators appearing before the accountability institutions envisaged are required to pay compensation to victims as part of penalties and sanctions in the proceedings.¹⁰⁸ It is not clear if LRA perpetrators who will appear before these institutions will have money or property to pay compensation to victims.¹⁰⁹ Yet, the Agreement shields state actors who may be better able to pay from accountability procedures envisaged by the Agreement.¹¹⁰ A reparations scheme created must therefore ensure that all victims of the LRA conflict receive some form of reparations to cure this defect.

¹⁰⁴ Further discussion on this is contained in chapter eight of this thesis.

¹⁰⁵ Further discussion on reparations is done in chapter five, six, seven and eight of this thesis.

¹⁰⁶ Agreement on Accountability and Reconciliation clause 9.

¹⁰⁷ Annexure clause 16, 17 & 18.

¹⁰⁸ Agreement on Accountability and Reconciliation clause 6.4 & 9. 2.

¹⁰⁹ OL Ogora 'Acholi Traditional Justice' (May 2008) *Final Report on the Workshop on Accountability and Reconciliation: Juba Peace Talks* 13; in relation to traditional justice process, proposes that compensation should be symbolic and in cases where the perpetrator does not have money or property to satisfy compensation ordered, alternatives penalties like community service should be ordered. The presenter further indicated that Ker Kwaro Acholi has a set of written rules which sets the amount of symbolic compensation depending on the circumstances surrounding a crime that could work as a guide for elders performing Acholi traditional justice rituals.

¹¹⁰ Agreement on Accountability and Reconciliation clause 4.1 & Annexure clause 23; the Constitution of Uganda art 126(2)(c) empowers courts to order adequate compensation to victims of crimes; therefore if responsible state actors are prosecuted in ordinary courts in Uganda, they may be ordered to pay compensation to victims.

4.3.5 Traditional justice¹¹¹

The Agreement promotes the use of traditional justice, in particular mechanisms such as *mato oput*; *culo kwor*; *kayo cuk*; *ailuc* and *tonu ci koka* as practised in the communities affected by the conflict with necessary modification.¹¹² It is however not clear how the processes will deal with inter-ethnic crimes; the actual capacity of traditional structures to take on such massive and transformed duties; and the feasibility of relying on voluntary confessions to propel the process into motion.¹¹³ While the Agreement makes no clarification of this and the modification envisaged, and does not compel persons to undergo traditional justice process,¹¹⁴ it nonetheless provides that the mechanisms shall form a central part of the alternative justice and reconciliation framework.¹¹⁵

It is unclear, for instance, whether the intention is for traditional justice to replace criminal proceedings in some cases and in what circumstances it will be applied. The Agreement generally provides that serious crimes that include international crimes should be addressed through formal prosecutions, traditional justice and any other alternative justice mechanism established.¹¹⁶ This will pose a serious problem in decision of which perpetrator appears before what accountability measure and the reasons why, since these measures do not have the same standards and rigors of prosecution and the punishment levied greatly differs.¹¹⁷ Traditional justice should therefore just complement criminal proceedings in cases of less serious crimes and not be an alternative to it.¹¹⁸

¹¹¹ Further and detailed discussion is done in chapter seven.

¹¹² Agreement on Accountability and Reconciliation clause 3.1.

¹¹³ A more detailed discussion on the role of traditional justice for crimes perpetrated in the LRA conflict is contained in chapter seven.

¹¹⁴ A more detailed discussion on the role of traditional justice for crimes perpetrated in the LRA conflict is contained in chapter seven.

¹¹⁵ Annexure clause 19.

¹¹⁶ Annexure clause 23; this provision is subject to clause 4.1 of the Agreement on Accountability and Reconciliation that provides for formal criminal and civil justice measures and excludes state actors from accountability under the measures envisaged.

¹¹⁷ For instance while persons found guilty in a criminal prosecution are liable to imprisonment and sometimes required to compensate victims; the only punishment envisaged by traditional justice is compensation of the victim and his/her family.

¹¹⁸ Further discussion on this is contained in chapter seven of the thesis.

The Agreement and Annexure also require the government in consultation with relevant stakeholders to examine traditional justice practices in the affected areas paying attention to the role and impact of the processes on women and children.¹¹⁹ This in essence should require an examination of the human rights standards established by IHRL to ensure that the measures adopt the same standards. The government must also ensure that sanctions levied reflect the gravity of the crimes committed and circumstances surrounding the commission to satisfy the requirement of effective remedies provided for in IHRL.¹²⁰

4.3.6 Relationship with the Amnesty Act

Finally, while providing for judicial and non-judicial accountability measures to deal with serious crimes committed during the conflict, the Agreement and its Annexure did not outlaw amnesty for any crime committed during the LRA conflict, neither did it provide modalities on how amnesty would operate alongside the other accountability measures. For instance, the Agreement does not state whether the investigative body to be established¹²¹ would include the power to recommend or award amnesties for crimes committed. Furthermore, the Agreement and Annexure undermined their own commitment to accountability by exempting all persons, including culpable LRA commanders already granted amnesty from any accountability process envisaged.¹²²

Understandably, for continuity and commitment to its policies and laws, the government could not unilaterally revoke amnesty it had already granted. This could have easily derailed the negotiations and the LRA and the victim community at large would have lost faith in the government. It would however have been in good faith for the negotiators to spell out that, even those already pardoned should undergo the other non-prosecutorial options without fear of incriminating themselves to ensure that victims get to know the truth and receive

¹¹⁹ Annexure clause 21.

¹²⁰ Ogora (n 109 above) 13.

¹²¹ Annexure clause 4 & 6.

¹²² Agreement on Accountability and Reconciliation clause 3.10; provides that where a person has already been subjected to proceedings or exempted from liability for any crime or civil acts or omissions, or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct.

reparations. However, a legislation or policy to implement the Agreement and Annexure, can deal with this.

The Agreement is explicit in its requirement for gender considerations in the accountability undertakings. For instance, it provides that the national bodies created must strive to prevent and eliminate gender inequalities that arise during the processes.¹²³ It further provides that special provisions should be made for women, children and victims of sexual violations and crimes,¹²⁴ that the body should recognise their needs and that it should adopt gender-sensitive approaches; and to ensure their experiences, views and concerns are recognised and taken into account. The parties also committed themselves to protect the dignity, privacy and security of women and girls, and encourage and facilitate the participation of women and girls in the processes for implementing the Agreement.¹²⁵

4.4 Conclusion

Part II of the Amnesty Act lapsed on 25 May 2012, but there is a further need for a provision in the National Transitional Justice Policy requiring those granted amnesty to undergo non-prosecutorial options in the accountability mechanisms. This will ensure justice, truth, and reparations for the victims of the LRA conflict. In addition, the Agreement and Annexure should be approached as a foundation for further and specific discussion on accountability. They set the space for 'formal criminal and civil justice measures to be applied to any individual who is alleged to have committed serious crimes, including international crimes and other human rights violations in the course of the conflict, either through special measures or through ordinary courts in Uganda. The Agreement and Annexure also specifies that an 'alternative regime of penalties' will be introduced, and that these shall take into account the gravity of the crimes but also the need for reconciliation, thereby incorporating the demands for justice, truth and reparations.

¹²³ Agreement on Accountability and Reconciliation clause 10.

¹²⁴ Agreement on Accountability and Reconciliation clause 3.4.

¹²⁵ Agreement on Accountability and Reconciliation clause 11.

The lapse of Part II of the Amnesty Act and the Agreement and Annexure therefore are in line with Uganda's international obligations though the implementation depends on the consultations, legislations, policies and the establishment and workings of the institutions envisaged that should clarify some of the outstanding issues. The JLOS TJWJ consultative process aimed at a comprehensive National Policy on Transitional Justice that started in 2009 has taken a very slow pace and the recommendation that the policy should be in place within a year, must be adhered to.¹²⁶ In addition, there has been no concerted effort on the part of the government to document, investigate, and provide victims with access to relevant information concerning the violations they and others in the region suffered due to the conflict. The government is yet to make progress in the pursuit of fair and impartial justice regarding the mass atrocities perpetrated in LRA conflict and there is hardly been any systematic information, outreach or consultation with victims on any development or planning for reparations mechanisms.¹²⁷

The chapters that follow discuss measures provided for in the Agreement on Accountability and Reconciliation specifically the ICD, traditional justice and truth telling process. The next chapter will analyse the intervention of the ICC that set into motion accountability pursuits in Uganda.

¹²⁶ Interview with Ismene Zarifis, Transitional Justice Advisor with JLOS, conducted on 24 Feb 2012. The main complaint by civil society groups is that their involvement in the process is very limited and so is the consultation with the local population, a meeting to ensure more civil society involvement in the process organised by the African Institute for Strategic Research, Governance and Development hosting representatives from 27 different organisations took place in Kampala on 26 Aug 2011

¹²⁷ Uganda Human Rights Commission & United Nations High Commissioner of Human Rights *"The Dust has not yet Settled"*, *Victims View on a Right to Remedy and Reparations: A Report from the Greater North of Uganda* (2011) 61. This is the biggest concern of civil society groups in Uganda today.