

Determined to Reconcile

Making the Most of the Uganda Amnesty Act

“Whereas it is common knowledge that hostilities directed at the Government of Uganda continue to persist in some parts of the country, thereby causing unnecessary suffering to the people of those areas:

AND WHEREAS it is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities:

AND WHEREAS it is the desire and determination of the Government to genuinely implement its policy of reconciliation in order to establish peace, security and tranquillity throughout the whole country”

Preamble Amnesty Act, 2000

As negotiations between the Government of Uganda and the Lord’s Resistance Army (LRA) get underway in Juba, Southern Sudan, it is right to reflect on the question of accountability for crimes committed during this long and brutal insurgency. In December 2003, Uganda referred the situation in Northern Uganda to the Prosecutor of the International Criminal Court (ICC). Subsequently, on the basis of the investigations by the Prosecutor, the judges of the Court issued arrest warrants for five leaders of the LRA, including Joseph Kony. Despite those warrants there has been little progress in efforts to arrest the suspects. Instead Uganda has experienced the frustration of being unable deal a decisive blow to the LRA or indeed to pursue the group into the Democratic Republic of Congo where the bulk of its force is based. This, and the decision by the fledgling Government of Southern Sudan to opt to mediate between the Ugandan government and the LRA, has created a change of heart in Kampala.

Despite some sharp international criticism and more muted national concerns, Uganda has committed itself to extending the amnesty to all leaders of the LRA as long as they renounce rebellion. The Government of Uganda has indicated that it would negotiate in good faith, without any preconditions and would honour the terms of any agreement reached with the LRA. Fears of an apparent rebuff of the amnesty by the LRA seem to have been allayed. Concerns expressed about the amnesty could be allayed by a closer examination of the principles of the amnesty. In the light too of the central role for the amnesty process in the negotiations and the intense scrutiny to which the amnesty process is being subjected, it is important to clarify the mechanisms and the content of the Uganda Amnesty Act. This note highlights key principles of the Act especially those reflecting the principle of reconciliation and accountability. It also discusses the latest amendment to the Amnesty Act (Section 2A) the scope of which appears of be widely misunderstood.

Provisions of the Amnesty Act

Why was the Amnesty Act enacted?

As seen from the preamble to the Act, persistent and destructive insurgency in Uganda gave rise to the search for alternatives for ending the conflict. This social and political context was cited in the preamble to the Act, as enacted in January 2000. The preamble makes clear that the Amnesty Act was passed as a part of the Government's concern to end conflict and the 'unnecessary suffering' of its citizens, and its option to pursue a policy of reconciliation rather than foment continuing political discord. Uniquely, the amnesty reflected not only the Government's policy, but also the aspirations of the people of Uganda to end war and to pursue reconciliation and reconstruction of their communities. The preamble is a salutary reminder of the underlying principles and dilemmas which gave rise to the amnesty and which are worth revisiting in order to ensure the most faithful implementation of the Act.

Definition - What is the amnesty?

Section 1. *"amnesty" means a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the state;*

The effect of the declaration of amnesty is that the beneficiary cannot thereafter be subjected to formal criminal proceedings of prosecution or punishment on account of crimes committed in those crimes. This point is repeated in Section 2 (2). We note here that the amnesty only applies to formal criminal proceedings and does not extend to any other proceedings. Being granted an amnesty does not exclude an individual from civil liability, even though in practice such actions have not been brought against individuals.

What conduct is subject to the amnesty?

Section 2. (1) *An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by –*

- (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 war or armed rebellion; or*
- (d) assisting or aiding the conduct or prosecution of the war or armed rebellion.*

Section 2 (2). *A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for participation in the war or rebellion or for any crime committed in the cause of the war or armed rebellion.*

Any Ugandan who has been involved in armed rebellion or war against the Movement (then National Resistance Movement) Government since it came to power in 1986, can apply for amnesty if they do not already have a previous pardon. There are a number of features of the amnesty to note from this provision: (i) the amnesty is only for Ugandans (ii) the amnesty is exclusively for individuals (This derives from the principle that criminal responsibility in general attaches to individuals. Strictly speaking, only the individual may reject the amnesty for himself or herself.); (iii) the amnesty covers current and past activities; (iv) the amnesty is comprehensive and, subject to potential exceptions in Section 2A and 5A (discussed below), does not

exclude any crimes including crimes introduced after the coming into force of the Amnesty Act, such as Anti-Terrorism Act, 2002 crimes.

General Principles of the Amnesty Process

Principle 1 - Procedural Simplicity

Section 3 sets out the criteria for claiming amnesty. Here, Parliament sought to emphasize procedural simplicity in order to make it as easy as possible for individuals (reporters) to claim the amnesty. Simplicity is particularly important because of the number of potential reporters who are often plagued by fears that they would be subjected to involved criminal or other retributive processes should they return. Simple procedures allow reporters to return to the communities in greater confidence that they can find an appropriate person to turn to. Thus the amnesty can be claimed anywhere in Uganda where there is a chief, local councillor, religious leader, army or police personnel, or courts. For those abroad, Uganda's missions or other international organizations can also receive amnesty applications and the declaration of renunciation of rebellion (see section 3 (5)).

Section 3. (1) A reporter shall be taken to be granted the 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.*

Principle 2 - Genuine repentance

Whereas procedural simplicity brings the process nearer to potential reporters, Section 3 of the Act also makes it a requirement that reporters must genuinely abandon and renounce (see 3 (1) (b)) the acts of rebellion described in section 2. Whenever a person claims the amnesty it is a requirement that the person should come in good faith and declare their abandonment and renunciation of rebellion. The principle here is that **only the truly repentant can benefit from the amnesty**. Previously this implicit requirement of good faith has not been addressed through a simplified application procedure, but one which nevertheless requires a personal declaration to be made by each reporter. To put the principle in another way, Parliament could not have intended to extend amnesty to those who have not abandoned rebellion.

Genuine repentance – Excluding repeat offenders

Section 5A (Inserted by Act 16 of 2002)

(1) A person granted an amnesty under this Act, who after the grant to him or her of the amnesty commits an act mentioned in section 3—

- (a) shall not be granted an amnesty for that act; and*
- (b) is liable to prosecution for that act.*

(2) Where a person mentioned in subsection (1) of this section surrenders and satisfies the Commission that exceptional circumstances exist in his or her case, the provision of subsection (1) shall not apply to that person.

*(3) Exceptional circumstances, shall mean any of the following—
(a) that the person has been abducted since the last grant of amnesty;
(b) that the act was committed under duress, coercion or undue influence.*

(4) Where a person to whom subsection (1) applies, indicates that exceptional circumstances exist in his or her case to the satisfaction of the Court before which he or she is being tried, the Court shall refer the matter to the Amnesty Commission.

The requirement for genuine repentance has now been underlined by the introduction of section 5A of the Amnesty Act. This provision was introduced in 2002 amidst concerns that unrepentant claimants might abuse the Act. It is designed to exclude from amnesty all those who return to insurgency after being granted amnesty. Arguably, this section simply clarifies the existing legal position, and just like section 3, it is intended to exclude those who are not genuinely repentant. By introducing the defence notion of ‘exceptional circumstances’ the section ensures that those forced back into rebellion continue to benefit from the amnesty.

Initial Proceedings - Testing Repentance

The Commission is entitled to adopt processes which would satisfy it at the outset that an individual who presents himself or herself for amnesty, for the first time has genuinely abandoned rebellion. Given the large numbers of reporters (now in excess of 15,000), the Commission may quite rationally decide to retain simplified procedures for the majority of reporters. Currently, these involve an oral interview and the completion of a detailed questionnaire and a formal declaration. In general, this is sufficient since most reporters have not been responsible for the most serious crimes and communities understand this. There is, however, an important minority of individuals in relation to whom the Commission would be fully entitled to adopt more elaborate procedures prior to the grant of amnesty. This could include requiring the reporter to acknowledge in some detail their involvement in rebellion and the deeds amnestied by Section 2 of the Act.

Initial Proceedings – Exploring exceptional Circumstances

The role of the Commission stipulated in Section 5A is more explicit, although the section still does not stipulate procedures for how the Commission should determine whether exceptional circumstances exist in a repeat-offender’s case. As with much principal legislation such details are left for administrative measures or subsidiary legislation. General principles of administrative law require that fair and transparent procedures be adopted by the Commission to determine the eligibility of repeat-offenders for the amnesty. These include the duty to: hear the other side of the reporter’s case; avoid the appearance of bias; disclose its reasons for finding against the repeat-reporter and, generally to ensure observance of ‘due process’. Fairness would require standardising the procedures so that each reporter can know what to expect (some differentiation, for example, on the basis of age would be justified).

These above safeguards would also apply to any additional procedures adopted for dealing with first time applicants. For them and repeat applicants alike, **special procedures would ensure that only the genuinely repentant benefit from the amnesty**. This principle protects the obvious public interest in excluding unrepentant reporters. Section 5A procedures in addition protect the rights of those who have unwillingly been drawn back into insurgency.

Principle 3 - Reconciliation and Social Reintegration

The functions of the Amnesty Commission outlined in the Act give prominence to the promoting reconciliation, continuing from the emphasis in the preamble.

- Section 8.** *The Commission shall have the following functions –*
- (a) *to monitor programmes of –*
 - (i) *demobilization;*
 - (ii) *reintegration; and*
 - (iii) *resettlement of reporters;*
 - (b) *to co-ordinate a programme of sensitisation of the general public on the amnesty law;*
 - (c) *to consider and promote appropriate reconciliation mechanisms in affected areas;*
 - (d) *to promote dialogue and reconciliation within the spirit of this Act;*
 - (e) *to perform any other function that is associated or connected with the execution of the functions stipulated in this Act.*

The idea of reintegration (section 8 (a) (ii)) goes beyond economic concerns, and includes re-socialization of the individual within the community. Because of their actual or perceived conduct during rebellion, reporters might experience difficulties being accepted back into communities. It is the role of the Commission to work for their full acceptance in the community. Reintegration in this respect is inextricably linked to reconciliation. Without the latter the former is impossible; and without genuine repentance and a willingness to acknowledge the conduct of the past, reconciliation cannot take place. Section 8 (c) of the Act specifically requires the Commission to promote appropriate reconciliation mechanisms in affected areas. In general, reconciliation at each appropriate level of society is a prerequisite for peace and stability, as envisaged in the wording of the preamble.

Proceedings 2 – Promoting reconciliation and reintegration

Whereas additional proceedings establishing the genuineness of a reporter's purported repentance would ideally take place at the time amnesty is sought, and would aim to establish eligibility for the amnesty, the second broad category of proceedings would focus on the reporter's and the communities reconciliation and reintegration needs. These too would involve elements of accountability. In fact some overlap of themes and content is inevitable. What is important is to recognise that theoretically the amnesty process provides two opportunities for promoting accountability: at the initial stage of application and at the later stage of reintegration of the individual into the community.

For reconciliation based processes, the Commission may promote already existing processes, such as traditional justice in various communities (Acholi *mato oput* is often cited, but each community has its processes which can also accommodate the outsider offender). Religious and other processes also fall within this category, and

the Commission may devise its own procedures, especially those tailored to meet the reintegration and reconciliation requirements of a few of the more significant reporters. Parliament must surely have anticipated that the amnesty would entail involved legal processes and for that reason, ensured that the Chairman of the Amnesty Commission would, apart from having high moral integrity, be a Judge of the High Court, or meet the qualifications for holding that office (see section 7).

Are LRA leaders excluded from claiming the Amnesty?

On 24 May 2006, the following provision became part of the Amnesty Act.

***Section 2A.** Notwithstanding the provisions of section 2 of this Act 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.*

The Government had originally introduced an amendment to exclude unspecified leaders of ‘terrorist organisations’ from the amnesty. Those proposals met with resistance in the 7th Parliament, as a result of which the current form of words was agreed as a compromise position. Now, the Minister (of Internal Affairs) must place before Parliament the names of individuals he proposes to exclude from the amnesty. Parliament must then debate the names and if it approves (possibly by resolution) the Minister can then enact a declaration by Statutory Instrument rendering that person ineligible to the amnesty. Presumably, Parliament could in approving the list impose conditions including periodic review of the declaration. This section does not of itself render any person ineligible for the amnesty. It merely gives the Minister the power to propose and Parliament the right to approve, reject or indeed modify the proposal. At the time of writing, the Minister of Internal Affairs had not yet sought to exercise this power. There is **no need to amend the Amnesty Act in order to facilitate the grant of amnesty to leaders of the Lords Resistance Army.**

This however does not prevent the Government of Uganda, in line with the preamble of the Act, from involving Parliament in affirming its decision in effect not to exercise the power introduced by Section 2A. In fact such a move might be prudent. The decision to extend amnesty to the LRA leaders has attracted adverse reactions from the ICC and sections of the international community, placing the government under some international pressure. In those circumstances, the Executive might wish to involve Parliament in the approval of this approach. Although no legislative result is necessary, a debate and appropriate resolution of Parliament could be sought. A resolution could signal the legislatures approval. For example: “***This House supports the Government’s decision to hold talks with the Lords Resistance Army, and to extend the amnesty to the leaders of the Lords Resistance Army.***”

Affirming Accountability and Reconciliation

Deriving from the principles for ensuring genuine repentance and reconciliation are the building blocks for accountability procedures. It remains for the detail of the procedures and detailed guiding principles to be refined and adopted. In this endeavour, care should be taken not to discard the principle of procedural simplicity, which allows the majority of reporters to reintegrate without undue obstacles. Neither is it suggested here that the amnesty process should replace traditional justice and other community mechanisms of accountability. Instead, any proposals by the Commission should promote and complement these efforts, as Section 8 (c) requires. Additional processes would be required, and it is for the Amnesty Commission to spearhead and manage these. I would need to be selective and to adopt criteria for identifying those whose conduct, previous roles or knowledge qualifies them for additional scrutiny either to **test their good faith** in applying for amnesty or to **ensure their successful reintegration** into the community.

Outline elements of Procedures

Because there is the opportunity for promoting reconciliation and accountability even after the receipt of amnesty, a reporter whose reintegration is adjudged not to be complete could still be encouraged to cooperate with the Commission in this process. It is implicit in the grant of amnesty, and in the renunciation of rebellion, that the reporter would need to cooperate with all the processes of the amnesty, especially such mechanisms as would heal the rifts his or her actions might have caused. Just as reporters are entitled to return to the Commission for reintegration assistance ‘packages’ they are arguably under an obligation to make themselves available for appropriate reconciliation mechanisms. For present purposes, however, it is sufficient to recognize the potential for the amnesty process to address these questions and only to suggest in outline what more elaborate reconciliation and accountability mechanisms might look like.

Without any order of importance or exhaustiveness, the approach to accountability could include promoting: community-focused processes, as well as adopting nationally-based procedures; participatory proceedings; involvement of complainants and those who have suffered harm; reparations and compensation; recognition of various classes of crimes, especially gender related crimes; analysis of the pattern of offending and destruction; reliance on oral as well as written medium; formality and informality; geographical and ethnic balance (this should not just be an LRA or Acholi process – other rebel groups would be involved). If upon further reflection it is felt that the mandate of the Commission requires additional strengthening, this can be achieved with relative ease through the Minister enacting regulations under Section 17 of the Act. This would be necessary where some non-formal sanctions were contemplated.

Concluding cautiously

A cautionary note is appropriate in closing: although the international interest in these issues might be intense and pressing at the moment, a knee-jerk response should be avoided. The groundwork should be more carefully laid. Any outcome of any further reflection and analysis should represent community as well as national aspirations and values. This would send the affirming message that creative and principled African solutions for complex and protracted conflicts are possible. These issues, though

attracting considerable international interest are intensely local. While examples of other countries' experiences are salutary, each situation is unique and Ugandans must carefully consider how best to approach these issues. It will ultimately serve no useful purpose to be over ambitious and fail to achieve unrealistic objectives. Neither should such a process be a third party merely on account of its apparent complexity. Most importantly, at this time, the parties to the negotiations should not lose their focus on the task of reaching a workable settlement, which would be backed by a bona fide offer of amnesty. They can be draw on the provisions and principles of the Amnesty Act to reach a settlement which is respectful to all parties including others who have suffered most harm as a result of persisting rebellion in Northern Uganda.

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