

LETTERS TO THE EDITOR 2006
UNPUBLISHED

Dear Editor,

Following up on my previous contributions on this subject, I now wish to clarify the legal position on the direct question you posed under International Law.

The International Criminal Court was established by the Rome Statute (A/CONF.183/9 of 17 July 1998). The jurisdiction of the Court, under Article 5 of the Statute, extends to:(a)

- The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

The treaty came into force on 1st July 2002, following the 60th ratification. Uganda formally deposited instruments of ratification of the Treaty on 14 June 2002 – this was after the 60th ratification and accordingly for Uganda the Statute came into force on 1 August 2002.

The indictment of Joseph Kony was at the instance of the Uganda Government in December 2003 under Article 14 of the Statute. Since then the Prosecutor has secured warrants of arrest against Kony with a view to commencing prosecution. The question is whether such prosecution decision can be dropped. Under Uganda law, the DPP has the power to enter a Nolle Prosequi in any criminal trial but such power is limited. It cannot be exercised at the request of the Government in view of the DPP's independence. It can only be exercised on the basis of the determination of the DPP that the evidence available against the accused is insufficient to secure a conviction considering compromising subsequent events following indictment. Can the ICC Prosecutor consider the unwillingness of Uganda to prosecute Kony as such circumstances as justify withdrawal of charges? The answer would seem to be in the negative. Article 53(2) of the Statute states:

Article 53(2):

"2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
 - (b) The case is inadmissible under article 17; or
 - (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
- the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information."

Despite the language of Article 53, it has been argued that the decision to discontinue a prosecution by the Prosecutor for which a warrant has already been issued is limited to cases where he has made an independent determination that in all circumstances the prosecution cannot be successfully continued on the evidence or that the case is inadmissible by virtue of Article 17, because the State making the referral has assumed jurisdiction to prosecute the accused. In this latter case, the fact that the referral State has granted an amnesty resulting in impunity is not a justifiable ground for discontinuation of the prosecution because such a ground is a political and not legal justification even though it may be expedient as a means of achieving a peaceful settlement. On the basis of this reasoning the only body with the power to terminate proceedings on political ground is the Security Council under Article 16 which reads:

"Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

The above reasoning is supported by the decision of the Special Court of Sierral Leone which in *Prosecutor v. Kallon*, Case No. SCSL-2003-07-PT [Preliminary Motion based on

lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (June 16, 2003); *Prosecutor v. Kamara*, Case No. SCLS-2003-10-PT, Application by Brima Bazzy Kamara in respect to Jurisdiction and Defects in Indictment (June 16, 2003).] In that case the Appeals Chamber faced with a challenge of its jurisdiction to try the accused who claimed benefit from an amnesty granted by the Sierral Leone Government under the Lome Agreement, ruled that while a State in exercise of its Sovereignty has the power to grant an amnesty to rebels to promote a peaceful settlement of a civil strife, such amnesty cannot be extended " where, and in this case because, the conduct of the participants in the armed conflict is alleged to amount to international crime". The Appeals Chamber in effect declared that Sierra Leone could not legally declare an amnesty for "crimes under international law that are the subject of universal jurisdiction. The Court stated that "[I]t stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the

nature of obligation erga omnes.”

The position of the Court is in line with the position taken by the United Nations as outlined by the Secretary-General when presenting the Lomé Agreement to the Security Council, which also led his representative at the conference to register a dissent to the amnesty provision.

In contrast, however, the Truth and Reconciliation Commission of Sierra Leone has taken a more pragmatic position and has upheld the use of the amnesty as practical means of achieving a peaceful settlement in case of a civil conflict. In its Report, the Commission said:

"The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement. The explanations given by the Government negotiators, including in their testimonies before the Truth and Reconciliation Commission, are compelling in this respect. In all good faith, they believed that the RUF would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty. Accordingly, those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict." [REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION ch. 3, at 362 (2004) [hereinafter COMMISSION REPORT]]. This reference is to the version of the report presented to the President of Sierra Leone on 5 October 2004.]

In summary, while the amnesty is a useful toll of negotiating a peaceful end to the 20 year Northern Uganda insurgency, such amnesty cannot benefit Joseph Kony from prosecution under the ICC Statute or under Uganda Laws. It is for this reason that I proposed a Truth and Conciliation Commission to establish the facts which can either form the basis of Kony's trial or exoneration should be established that the facts as we know them are cannot justify prosecution under Article 5 of the ICC Statute.

Prof. Francis M. Ssekandi, Columbia University School of Law.
Posted on Web: March 21, 2008

Dear Editor,

Allow me to contribute to this most important debate.

My understanding is that the ICC acted at the request of the Uganda Government which at that time had indicated that it had failed to exercise its criminal jurisdiction against Kony. If this is so, I do not see why it is not possible for the Uganda Government to withdraw its request and state to the ICC clearly as Judge Goldstone has incidentally

advised that the Government is now in a position to exercise its criminal jurisdiction against Kony and his cohorts. Once the Warrants are withdrawn the Government of Uganda is free to indict or otherwise exercise its powers in whatever manner it chooses against Kony.

My personal view is that the top echelons of the LRA should be given an opportunity to clear their names as they are now asserting innocence. This could be either in a judicial forum where they would face charges arising from the alleged offences committed during the LRA campaign in Northern Uganda or through a Commission of Inquiry or a Truth and Reconciliation Commission. Ugandans are entitled to know the truth of what happened even if at the end of the process the perpetrators are granted a Presidential Pardon after conviction or a legislative amnesty, i.e an undertaking that those who come out and speak the truth of what happened will not be prosecuted. It is not enough for the President to offer a blanket amnesty without an investigation of the actions alleged to amount to genocide labeled against the LRA. It was shocking to every peace loving Ugandan for example to hear a former LRA testify against Besigye ,who is facing trial on a treason charge without any evidence that he committed or participated in the commission of the genocide labeled against Kony and Otti, that he the witness had killed children, disemboweled people and committed rape and other unimaginable crimes and yet was free having been given amnesty . How does such a despicable character roam the streets of Kampala and even come to be presented as a State Witness in the courts of law to testify against an accused facing crimes piling in comparison with what he himself committed and was exonerated? Yet, Besigye himself still faces trial? As I said in another contribution to this column before, Ugandans are prepared to accept the verdict of the Acholi and Lango people who have suffered at the hands of Kony, i.e if the Acholi and Langi people are prepared to extend the traditional hand of forgiveness and reconciliation in exchange for repentance after undergoing the traditional cleansing ceremonies, then we all , including foreigners who judge from the comfort of their peaceful existence, should accept this verdict by the very victims of these alleged crimes that so outrage our guardians of "justice"..

But the traditional ceremonies should also be accompanied by the generally accepted procedures which have been followed before in other countries extending peace and reconciliation in times of internal conflicts, such as establishment of a Truth and Reconciliation Commission to investigate the crimes committed as was done in South Africa and Sierra Leone and Rwanda. In this way we will put an end to impunity, otherwise every Ugandan can just wake up and begin an insurgency in which hundreds are killed and maimed and then seek an amnesty in exchange for ending the insurgency. The Constitution is very clear. Every one who attempts by force of arms to overturn the Constitution commits treason punishable by death. We have to put in place the proper mechanism that can deter power grabbers and dreamers from imagining and then executing acts which are intended to attain power by force of arms. We have started a democratic process whereby power is attained and handed over through a democratic process, by the will of the majority of the people expressed in a free and fair election. This has to be reinforced by our actions.

Thank you.

Francis M. Ssekandi

21 March 2008

Professor of African Law at Columbia University.

Negotiations should be given a chance in ending this conflict