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Uganda

by Samuel Egadu Okiror, Kampala

Supreme Court ruling fuels debate over double standards in war crimes prosecution

Five years after the trial was halted, the Ugandan Supreme Court delivered an eagerly awaited decision in the war crimes case against Thomas Kwoyelo [IJT-176]. But instead of providing clarity, the ruling to lift the former Lord's Resistance Army (LRA) commander's amnesty has been slammed by critics, calling it an example of double standards and selective prosecution.

In all, over 26,000 ex-combatants, half of them LRA, have been granted amnesty under the 2000 Amnesty Act. That means the individuals cannot be prosecuted for "any crimes committed in the cause of war or armed rebellion", as the legislation specifies.

In a unanimous decision on 8 April, a panel of seven Supreme Court judges, led by Chief Justice Bart Katureebe, overturned the September 2011 Constitutional Court ruling that Kwoyelo should be given amnesty. The court had ruled that although Kwoyelo did not voluntarily surrender, having been captured in the Central African Republic in 2009, he was still entitled to seek amnesty. At the time of the ruling, Kwoyelo was being prosecuted by Uganda's special International Crimes Division (ICD).

However, at the Supreme Court, the attorney general, through the Directorate of Public Prosecution (DPP), appealed the Constitutional Court's decision. And in their ruling earlier this month, judges noted that the Amnesty Act was set up for ex-combatants who voluntarily laid down arms and requested amnesty, and that Kwoyelo was no such "voluntary reporter". Judges also found that some of the crimes he is accused of – rape, murder and kidnapping of minors – are not covered by the Amnesty Act.

His trial is thus likely to be reopened.

Long-awaited decision

Kwoyelo was the first LRA commander to face trial at the ICD. Established in 2008 following agreements on accountability and reconciliation during the LRA peace talks in Juba, the division's task is to try international law violations including genocide, crimes against humanity, war crimes, terrorism, piracy and human trafficking.

"The decision is a positive step and right direction in our prosecutions of war crimes suspects and pursuit for justice," says DPP director Mike Chibita. But Chibita, who had earlier told IJT that the Amnesty Act was thwarting the ICD's work [IJT-164], could not yet say if his directorate would open new investigations into other ex-LRA commanders who were granted amnesty. "I have to first read the whole court judgment and see what follows," he explains.

Stephen Oola, the programme manager at the Makerere University Refugee Law Project, welcomes the long-awaited decision. "[Kwoyelo] has since been denied justice. As we know, for any justice delayed is justice denied. But better late than never," he tells IJT.

Kwoyelo has been in jail for six years, awaiting the outcome of his case.

Selective prosecution?

Kwoyelo's lawyers and local legal experts have slammed the Supreme Court's decision as selective and discriminatory. They question why Kwoyelo is singled out while other former high-ranking LRA commanders, such as Kenneth Banya, Sam Kolo Otto, Alfred Onen Kamdulu and Caesar Achellam Otto, still enjoy amnesty.

Kwoyelo's lawyer Nicholas Opiyo thinks the ruling could give the DPP "a blank cheque devoid of any restrictions [and] oversight" in prosecutions. "The selective application of the law on amnesty is cause for concern," he tells IJT.

"The Ugandan government has no consistent legislation regarding whether to prosecute rebel leaders or give them amnesty. This causes enormous confusion, not least for rebels still in the bush who might be considering giving themselves up," says Phil Clark, a political scientist and associate professor at the University of London. During his interviews with people in northern Uganda, Clark says he noticed how the inconsistency caused anxiety among former rank-and-file LRA combatants who had received amnesties but still feared being subject to prosecution. It also creates resentment among everyday citizens, he tells IJT.

The state of amnesty

It remains unclear whether the government will extend the Amnesty Act that is set to lapse in May. Key sections that allowed for a blanket amnesty were scrapped in May 2012, but then, a year later, reinstated for a two-year period following pressure from civil society and religious leaders wanting to encourage more LRA defections.

Oola believes the Supreme Court's decision reaffirmed the Constitutional Court by acknowledging that amnesty is still worthwhile for resolving past and future conflicts. "A useful tool", in particular, he says, is the 2006 amendment that provides for exclusion of "those who bear the greatest responsibility for crimes against humanity".

"Going forward," Oola says, "the task is for the DPP is to come out with a clear investigation and prosecution strategy for the LRA situation and for the minister of internal affairs to formulate regulations to the Amnesty Act with clear grounds for exclusion."

Local legal experts believe the Amnesty Act will be re-extended, possibly for a five-year term, but with new provisions that exclude the possibility of blanket amnesties. The government sees amnesty as an effective mechanism for dealing with rebel groups, they say.

According to Clark, the government found ex-LRA commander Acellam "an invaluable source of intelligence about [LRA leader] Joseph Kony and current LRA activities". He elaborates: "It was in the state's interest to give Achellam amnesty in exchange for this crucial information. In case similar scenarios unfold in the future, the government wants to keep amnesty on the table."

by Stephanie van den Berg, Belgrade

No court for old men?

The on-going controversy over the provisional release of Serbian ultra nationalist Vojislav Seselj [IJT-179] **from the International Criminal Tribunal for the former Yugoslavia (ICTY) has recast the spotlight on how courts deal with ailing accused. It also begets a fundamental question: what determines if someone is fit to stand trial?**

Seselj, awaiting judgement since his trial ended in 2012, was diagnosed with cancer when the court decided in November 2014 that, as a "humanitarian step", it would let him undergo treatment in Serbia [IJT-170, IJT-171]. Judges noted that Seselj was not receiving the best care possible in the UN detention unit "not because it is not available but because of a serious disagreement with the caregivers on the medical procedure".

Confident Seselj would return to The Hague to hear his verdict, the trial chamber, sought no guarantees. Instead, Seselj – appearing remarkably fit – went on a public speaking tour and repeated he would never voluntarily go back to the court.

Seselj's circumstances are unique, but they stand in a long line of dilemmas facing international justice advocates. Even at the Nuremberg trials, defendants sought to be declared unfit to stand trial, including close Hitler ally Rudolf Hess, who feigned memory loss.

Public perception

In international jurisdictions, suspects are often over 60 once they face justice, and their health reflects that. So far, international courts have been reluctant to grant interim release, often citing the severity of their charges: crimes against humanity, war crimes and genocide.

In trying such high-profile cases, public perception is a big consideration.

"When you're a human rights organization, you don't want to seem like you are hounding an old man," Reed Brody from Human Rights Watch, who was involved in the Augusto Pinochet case, told IJT.

Pinochet was apprehended in London in 1998 on a Spanish arrest warrant. After a legal battle, the British foreign minister ruled in 2000 that the ex-dictator's fragile health meant he could not be extradited to Spain for trial. Pinochet returned to Chile, where he eventually stood trial in a series of cases involving atrocities under his rule. Most were quickly suspended because of his alleged dementia. He died in 2006, aged 91, and never convicted for any crimes.

"The shining example [of bringing a perpetrator to justice] is somewhat tarnished when the defendant is so old that instead of invoking repudiation for what he did, he invokes sympathy for who he is now," said Brody of dealing with ailing and elderly accused.

"Meaningfully" participate

The standard still used for fitness to stand trial was set by the ICTY in a 2004 decision in the case against Pavle Strugar. The retired Yugoslav army general suffered from vascular dementia but was still found fit for trial.

The ICTY established that an accused had to be able to "meaningfully" participate in a case. That entails having the capacity to plead; to understand the charges; to understand the course of proceedings; to understand details of the evidence; to instruct counsel; to understand the consequences of the proceedings; and to testify. So far, the tribunal has only found one accused unfit for trial, and that was because of mental health issues. Vladimir Kovacevic reportedly suffers from paranoid psychosis and remains hospitalized in Belgrade.

The Strugar ruling and subsequent interpretations in other courts have cemented the fact that the mental element is more important than the physical in determining fitness to stand trial.

"The overall test is really if [an accused's] condition would impair the fairness of the proceedings and specifically would impair his ability to understand the nature and content of charges, to instruct counsel and to comprehend what is happening," Lorraine Smith van Lin, an independent legal expert and the former representative of the International Bar Association at the International Criminal Court (ICC), told IJT.

Still, defendants who suffer from physical problems are usually accommodated with adjusted trial schedules, longer breaks or the possibility to follow the case from their cells. This was the famous arrangement for Serbian strongman Slobodan Milosevic, whose trial, which started in 2001 at the ICTY, was repeatedly halted. He was given an adjusted sitting schedule due to high blood pressure and heart problems. Milosevic, who never sought to be declared unfit for trial, died in 2006 in detention, before his case trial was finished.

At death's door

The Extraordinary Chambers of the Court in Cambodia (ECCC) has also had to deal with many geriatric defendants. Despite all the defendants' advanced age, only former Khmer Rouge leader Ieng Thirith did not have to stand trial because she suffered from dementia.

But the first trial against former Khmer Rouge leader Nuon Chea was severely disrupted due to his bad health, said ECCC watcher and international justice author Thierry Cruvellier. In the second case against him [IJT-168, IJT-179], Nuon Chea's health continues to plague, with his lawyer saying the former Khmer Rouge ideologist has severe back pains and often follows the case from his cell.

Under current practice, physically ill defendants must be at death's door before international courts will consider releasing them.

The ICTY last week decided to release Croatian Serb leader Goran Hadzic [IJT-166] to Serbia for a month, quoting his terminal brain tumour. Doctors last November estimated he had, at most, 24 months to live. Hadzic promised to return voluntarily, with his whereabouts to be checked on daily by Serbian police.

Health as a bargaining chip

The Hadzic case, with a cooperating defendant agreeing to return in May following post-chemotherapy recuperation, comes in sharp contrast to the Seselj case. The latter reveals the trouble international courts experience when ailing defendants are willing to use their health as a bargaining chip.

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No court for old men?

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The ICTY appeals chamber has since ordered the trial chamber to revoke Seselj's provisional release immediately. However, instead of doing so, the lower trial chamber announced last week it would first seek a medical report. Seselj's Serbian medical team told journalists that he banned them from releasing details of his condition to the ICTY, while insisting that sending him back to The Hague would be a "fatal move" as he would refuse chemotherapy and other intensive cancer treatments.

"There is really not much you can do [with a sick and defiant accused], but the way [the ICTY] has dealt with it in the Seselj case is backfiring in a big way," Cruvellier told IJT.

The ICTY and other ad hoc courts have had to contend with elderly accused as they were all set up after the conflicts they were mandated to prosecute and took some time to get going. Experts foresee fewer geriatric defendants at the ICC because its investigations and arrest warrants are contemporaneous.

But the debate over what to do with ailing accused is sure to continue there, especially since former Ivory Coast president Laurent Gbagbo has already sought to be declared unfit for trial. Although judges found in 2012 that he was fit enough, they noted that Gbagbo's health would require "heightened attention" throughout the proceedings.

Smith van Lin believes the ICC can learn a lot from the Seselj case.

"It is critical that judges take a proactive approach to monitoring an accused's health," she said. "I think a very good step is that the ICC Rules of Procedure calls for court-appointed [medical] experts and a specific review period [of 120 days]. This is a key safeguard to prevent an accused from using alleged physical or medical incapacity as a basis for stymieing court proceedings."

DRC militia leader holds out for Dutch asylum

Over two years since his initial acquittal by the International Criminal Court (ICC), former Congolese militia leader Mathieu Ngudjolo Chui is still in the Netherlands fighting another legal battle: to get asylum in the ICC's host country.

His initial asylum request from 2012 was denied [IJT-156], but Ngudjolo was allowed to stay in the Netherlands awaiting outcome of his ICC appeals procedure. In February 2015, the appeals chamber confirmed acquittal, putting a final end to a trial that started in 2009 and saw him charged with crimes against humanity and war crimes during an attack in Bogoro village in DR Congo's eastern Ituri district.

After the ruling, the Netherlands put him on a plane ready to take off for DR Congo, but his lawyer managed to file a new asylum claim, and the ex-militia leader was escorted off the aircraft. The new claim was rejected a few days later. Last week a Dutch district court heard Ngudjolo's appeal.

"The moment I return to the Democratic Republic of Congo, I run the risk of persecution. I will disappear without a trace or be arrested," he told judges.

The hearing revealed that the ICC has changed its views on the risks Ngudjolo faces if repatriated. Initially, the court's Victims and Witnesses Unit (VWU) said he would be unsafe in his home country. But last week, Dutch state advocate Elisabeth Pietermaat cited a confidential VWU report, saying: "Ngudjolo could also settle in Kinshasa if he fears revenge in Ituri."

In response, Ngudjolo's lawyer, Filip Schüller, said he had received letters, including from Amnesty International, warning his client would face serious security risks in DR Congo.

This week the district court rules if the asylum claim has any chance of success and, if so, whether Ngudjolo may await its outcome in the Netherlands.

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ICTR starts its final case

Due to close its door permanently this year [IJT-172], the International Criminal Tribunal for Rwanda (ICTR), started its final trial last week in the appeals case involving six ex-officials of the former province of Butare.

Among the six defendants in the case is former minister for family affairs and women's development Pauline Nyiramasuhuko, the first female ever to be tried and convicted by an international war crimes court. The ICTR's sister court for the former Yugoslavia, the ICTY, convicted former Bosnian Serb president Biljana Plavsic for war crimes but this was following a plea bargain she struck with prosecutors.

Nyiramasuhuko was sentenced to life in prison in 2011 for conspiracy to commit genocide, genocide itself, extermination, rape, persecution, violence to life, other inhumane acts and outrages to human dignity. According to the judgement, the minister had command responsibility over Hutu Interahamwe militia who committed rapes in the offices of the Butare prefect.

The trial, which started in 2001, is one of the lengthiest in international justice. A verdict is not expected before this August, which means the trial would have lasted 14 years. Nyiramasuhuko will have spent 16 years in detention waiting for the case to go through the courts.

Established by the UN Security Council on 8 November 1994, the tribunal was mandated to prosecute those responsible for genocide and other atrocities in Rwanda when, in that year, Hutu extremists tried to wipe out the Tutsi minority and moderate Hutus.

Since opening in 1995, the ICTR has indicted 91 individuals believed to have committed serious violations of international humanitarian law during the genocide. Indictees include high-ranking military and government officials, politicians, businessmen, as well as religious, militia and media leaders. Sixty accused have been convicted and 14 others acquitted [IJT-166]. Two indictments were withdrawn. Two suspects died before judgment was delivered, another four were transferred to national jurisdictions and nine remain at large. If ever caught, their cases will be handled by the Mechanism for International Criminal Courts (MICT), tasked with handling residual functions of the ICTR and the International Criminal Court for the former Yugoslavia (ICTY) and already in operation.

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by Frances Harrison, London

Can the new Sri Lanka deal with its past?

After he swept to power in a surprise election result in January, Sri Lanka's new president promised a break with the past. So far, that has meant moves like easing press restrictions and tackling corruption, rather than dealing with the worst crimes associated with the 2009 civil war. President Maithripala Sirisena promised "a strong internal mechanism to look into human rights", but it is unclear when it will be established or what its remit will be. Critics say that for genuine accountability, it will have to tackle more than human rights abuses.

A 2011 UN Panel of Experts said Sri Lanka's conduct during the civil war's final phase was "a grave assault on the entire regime of international law". Its report concluded that 40,000 civilians might have been killed in a matter of five months, stating: "Most civilian casualties in the final phases of the war were caused by Government shelling." The panel found that the Sri Lankan Armed Forces systematically shelled hospitals, no-fire zones and food queues as they advanced against the Liberation Tigers of Tamil Eelam, a group designated worldwide as terrorists for using child soldiers and suicide bombers. A later UN Internal Inquiry estimated 70,000 civilian deaths. After the guns went silent in 2009, systematic, widespread abductions, torture and rape by the security forces of suspected former rebels continued with impunity, according to a UN Security Council report published last week.

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The change of government in Sri Lanka prompted the UN to defer publication of its latest investigation into the war. UN experts will now report to the Human Rights Council in September. In the meantime, Sri Lanka has been engaging with the West in a more collaborative fashion, saying there could be some sort of international advisory role for the UN in a future domestic accountability process. In parallel, Sri Lanka has also revived discussions with South Africa for advice in setting up a truth and reconciliation commission.

Scepticism

However, there are plenty of reasons why the new government may not want to tackle its grim past any more than the Rajapaksa family that ruled before. Many in the governing coalition have denied the state's role in war crimes, including the new president, who was acting defence minister in the conflict's final, bloodiest weeks. The 2009 army commander is part of the new governing coalition, having just been promoted to field marshal for "outstanding gallantry" and "meritorious performance" during "the defeat of terrorism". A credible process of justice would likely see on trial figures from current and previous governments.

Recent remarks by Sri Lankan leaders, furthermore, appear to prejudice any domestic inquiry. Foreign Minister Mangala Samaraweera said in parliament that the objective of an inquiry was to clear the name of the armed forces. President Sirisena rejected all allegations in the films on Sri Lanka, shown on the British TV station Channel 4, which depict the slaughter of civilians and summary executions of those who surrendered. Prime Minister Ranil Wickremesinghe said 5,000 Tamils died in the war's final phase, as opposed to the UN estimates of many tens of thousands.

There are also political reasons why probing allegations of mass atrocities may not be expedient now. A disparate coalition wields power and is about to change Sri Lanka from a presidential to a parliamentary political system and hold fresh elections. The coalition needs the backing of the majority Sinhalese to win elections, but the defeated Rajapaksa brothers still command considerable support. Many Sinhalese still regard any international involvement in a war crimes probe as an assault on national sovereignty. The new head of the presidential reconciliation task force, a part of the coalition, agrees. She said it is insulting to think foreigners have to be involved in any war inquiry.

Another domestic inquiry?

The UN Special Rapporteur on Transitional Justice, Pablo de Greiff, recently visited Sri Lanka, which is itself a sign of progress. He pointed to Sri Lanka's history of domestic inquiries that has "increased mistrust in the government's determination to genuinely redress those violations". Importantly, he stressed the need for a more consultative process, saying "citizens cannot be simply presented with 'solutions'" but "given no role".

There have already been three domestic inquiries since the end of the war. The Lessons Learnt and Reconciliation Commission in 2011 came up with positive recommendations for improving human rights, but exonerated the security forces of war crimes. Amnesty International said it was not a credible commission and complained of serious bias and flaws. A military-run inquiry into the final phase of the war also exonerated the armed forces, but never published its report to show how it reached such a conclusion. Sessions of a Disappearances Commission, whose mandate was expanded to investigate war crimes, were boycotted recently by some families of the disappeared.

At the heart of the debate is victims' trust in any domestic process. War survivors have held a number of protests in recent months, calling for nothing less than an international process. They stress they have no faith in yet another domestic inquiry. But the fact that these protests can happen at all is evidence of some small change in atmosphere, even if activists in the former conflict areas cite continued intimidation, harassment and surveillance by the military and police. Tamil war and torture survivors in exile also report the continued harassment of their family members in Sri Lanka by the security forces after the change of government.