

# **Thomas Kwoyelo's trial before Uganda's International Crimes Division Questions and Answers**

**July 2011**

## **1. Who is Thomas Kwoyelo?**

Thomas Kwoyelo is a former combatant in the Lord's Resistance Army (LRA), who is from Pabbo in the Amuru district of northern Uganda. The LRA is a Ugandan armed group that has engaged in a two-decade-long conflict with Ugandan government forces, mostly in northern Uganda beginning in the late 1980s. In late 2005, LRA fighters crossed into the Democratic Republic of Congo (DRC) and since the end of 2008, LRA fighters have been moving, splintered into small groups, between DRC, Central African Republic and Sudan. During the conflict, both parties have been implicated in committing extensive abuses against civilians.

In March 2009, Kwoyelo was injured and taken into custody following fighting between the Ugandan army and LRA combatants in Ukwa, DRC. He was subsequently taken to Uganda for medical treatment of his bullet wounds. The Ugandan government has stated that at the time he was taken into custody, Kwoyelo held the rank of colonel in the LRA. In Uganda, Kwoyelo was held in the custody of military intelligence for approximately three months in an undisclosed location.

## **2. What are the charges Kwoyelo faces?**

Kwoyelo was initially charged in June 2009 with crimes under Uganda's penal code before being transferred to the regular prison system.

In August 2010, Kwoyelo was charged with violations of Uganda's 1964 Geneva Conventions Act, including the grave breaches of willful killing, taking hostages, and extensive destruction of property in the Amuru and Gulu districts of northern Uganda. Since then, he was held for a time in Gulu Prison and was later transferred to Luzira prison, a maximum security facility near Kampala, where he has been for the majority of his detention.

The maximum penalty under Uganda's Geneva Conventions Act for the grave breaches of willful

killing is life imprisonment. The maximum penalty for the other crimes is 14 years in prison. The trial will be the first for war crimes under the Geneva Conventions Act since it was passed in 1964.

### **3. What is the International Crimes Division?**

Kwoyelo is the first person to be tried by Uganda's new International Crimes Division (ICD), a division of Uganda's High Court. Initially known as the War Crimes Division, it was set up in 2009 by the Ugandan government as part of its efforts to implement the 2008 Juba peace agreements between the Ugandan government and the LRA.

The division has the authority to try genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime defined in Uganda's Penal Code Act, the 1964 Geneva Conventions Act, the 2010 International Criminal Court Act (ICC), or any other criminal law. The ICCA—which defines crimes against humanity, war crimes, and genocide as domestic offenses in Uganda—does not contain any explicit provision stating that it can be applied to crimes committed before the law's enactment in June 2010, and so according to Uganda's Directorate of Public Prosecutions (DPP), it should not be. This would severely restrict its use to prosecute crimes committed during most of the conflict in northern Uganda.

The division may sit as a bench of three judges.

### **4. What other cases are currently before the International Crimes Division?**

No other cases have currently reached trial stage before the International Crimes Division. One case involving charges of human trafficking has reached preliminary hearings, but further hearings have been adjourned until October 2011. The government has said that the trial of at least 18 people charged with responsibility for the July 11, 2010 Kampala bombings will take place before the ICD, but the date for that trial to begin is not known.

It is not clear if Uganda's Directorate of Public Prosecutions plans to bring charges against other members of the LRA. At least one alleged LRA member, Okello Mission, has been in the custody of Ugandan military intelligence since March 31, 2010 although the legal basis for his ongoing detention has not been stated. Plans for his release or prosecution are not known, although international law requires that anyone arrested on suspicion of having committed a criminal offense be either promptly charged and brought to trial or released.

### **5. Where and when will Kwoyelo's trial take place?**

Kwoyelo's trial is scheduled to open on July 11 in Gulu, northern Uganda. Holding the trial in Gulu can have important benefits by increasing its visibility and resonance with the communities that were

most affected by the crimes committed during the conflict. At the same time, locating the trial in this area may increase security risks for judges, division staff, and the accused, along with heightening challenges to protect witnesses.

## **6. How long will the trial last and what are the preliminary issues for the court to address?**

It is unclear how long the trial will last. Cases involving war crimes and crimes against humanity tend to be complex, because of the range of incidents and extended time period involved in the charges. The prosecution has suggested that it will call approximately 80 to 90 witnesses to testify, and we understand the trial's court facility has initially been designated for one month for the trial.

As this is the first time that a trial will take place before the International Crimes Division, and the first time that a prosecution is taking place under the Geneva Conventions Act of 1964, the defense may raise a number of potential preliminary legal challenges, which could extend the duration of the trial.

For example, the defense may consider a constitutional challenge to the establishment of the division or whether any of Kwoyelo's constitutional or other rights are violated by trying him before it. There is also the question of whether Uganda's Geneva Conventions Act, which provides that it applies when the conflict is between two states, can be properly applied to Kwoyelo's alleged conduct.

Such challenges could result in a recess soon after the trial starts, until the judges decide on them. If any of these challenges are sent to the Constitutional Court, then the timing of the trial will depend on hearings and rulings by that court.

## **7. Why has Kwoyelo not benefited from Uganda's amnesty law, as have other LRA combatants?**

Uganda's Amnesty Act provides that people who meet the amnesty requirements (which include renouncing and abandoning involvement in the war or armed rebellion), cannot be prosecuted or punished for crimes covered by the act in Uganda. Since 2000, 12,906 people affiliated with the LRA have been granted amnesty. This represents almost half the beneficiaries of the amnesty law. The other amnesty beneficiaries are from other armed opposition groups.

According to the Amnesty Commission, Kwoyelo applied for amnesty under the Amnesty Act in 2010. The commission referred the case to the Directorate of Public Prosecutions as required under the act when individuals are in custody, for determination of eligibility. The DPP has not responded to the Amnesty Commission's request for such a determination, raising some questions about the arbitrariness of the process. Kwoyelo is the first member of the LRA to be in this situation, to our knowledge.

Some critics of the International Crimes Division have claimed that the fact that Kwoyelo has not been granted amnesty and is to be prosecuted is politically motivated, given that so many other LRA commanders have benefited from the domestic amnesty. For example, the former LRA high-ranking commanders Brigadier Kenneth Banya and Brigadier Sam Kolo Otto, as well as Lt Col. Opio Makasi, who served as the LRA director of operations, have all received amnesty under the act over the last several years. Several other LRA members who applied for amnesty were not prosecuted and instead joined the Ugandan army to fight the LRA.

Amnesties for crimes such as war crimes and crimes against humanity run counter to international law and practice, which rejects impunity for the gravest crimes. International and hybrid international-national war crimes courts outside Uganda have rejected amnesties for serious crimes.

**8. How does Kwoyelo's trial interface with investigation and prosecution by the International Criminal Court of crimes committed in northern Uganda?**

The prosecutor of the International Criminal Court (ICC) opened an investigation into the situation in northern Uganda in July 2004 after the government of Uganda referred the situation to the court in December 2003. The ICC has issued arrest warrants for war crimes and crimes against humanity for five LRA leaders: Joseph Kony, Vincent Otti, Okoth Odhiambo, Raska Lukwiya, and Dominic Ongwen, for conduct that allegedly occurred in 2004 and 2005. Lukwiya and Otti have since died. The other suspects are fugitives from the court.

There is no formal legal relationship between the ICC's cases against Kony, Odhiambo, and Ongwen and the Ugandan International Crimes Division's prosecution of Kwoyelo. Kwoyelo has never been subject to an arrest warrant by the ICC and was never a fugitive from ICC prosecution. However, the ICC prosecutors and the Ugandan prosecutors have cooperated and exchanged information regarding their investigations.

The Ugandan government and the LRA agreed to domestic trials of serious crimes during the 2006-2008 Juba peace talks as a possible alternative to ICC prosecutions of the LRA ICC suspects. While the final peace agreement was not concluded, the Ugandan government has moved forward to begin domestic trials of serious crimes via the establishment of the International Crimes Division.

When national courts are able and willing to investigate and prosecute serious crimes, the ICC allows and actually favors national trials of these crimes. In addition, the ICC prosecutor has to date only brought forward a limited number of cases as situations under ICC investigation.

**9. Is Kwoyelo represented by defense counsel?**

Kwoyelo spent over 18 months in custody without any legal representation. Since November 2010, Kwoyelo has been represented by private lawyer Caleb Alaka. The defense has not had access to any state funds to carry out investigations.

## **10. What fair trial standards apply to Kwoyelo's prosecution?**

All criminal trials should include: credible, impartial and independent investigation and prosecution; adherence to international fair trial guarantees; penalties that reflect the gravity of the crimes; and adequate witness protection. Domestic war crimes prosecutions should also consider outreach to communities most affected by the crimes; and due regard for victims to involve themselves in proceedings. International standards do not provide for the death penalty as a sanction. The work of the International Crimes Division to date creates a number of concerns, including:

- Kwoyelo's counsel has not had clear information regarding available resources to conduct his defense, and as of June 21, 2011 had no access to prosecution witness statements—for which timely disclosure can be essential to defense preparation.
- Whether adequate interpretation will be available at the trial is unclear. Although a number of languages are likely to be used at the trial, including at least English and Luo, Uganda has no professional interpretation and translation system. Currently, Ugandan courts call on anyone who can speak the relevant language (such as guards and court clerks) to interpret, which can create wide variation in the adequacy of interpretation and translation.
- Whether adequate witness protection and support will be provided is unclear. Uganda has no formal witness protection program, and as of March, there had been no assessment of risks for individual prosecution and defense witnesses, or of what support and protection would be required. Potential witnesses may be traumatized and face security threats due to their testimony.
- Outreach and public information about Kwoyelo's trial in the lead-up to its opening has been minimal, although some outreach activities were previously conducted about the division's work. Even Kwoyelo's defense attorneys were not aware of the trial's opening date until the third week of June.

In September 2007, [Human Rights Watch issued a memorandum](#) on particular challenges for Uganda in conducting national war crimes trials, which highlighted additional areas of concern, including insufficient definitions and forms of liability under Ugandan law for serious crimes in violation of international law, weak investigative and prosecutorial capacity of Uganda's justice system, and past incidents of attempted interference by the executive with the judiciary.

A detailed assessment of many areas for improvement by the International Crimes Division was commissioned in March by Uganda's Justice, Law and Order Sector. A copy of the assessment is on file with Human Rights Watch.

**11. Will the International Crimes Division be able to prosecute the LRA commanders Kony, Ongwen and Odhiambo, who are wanted by the ICC?**

It is not clear if the division could or will ever prosecute those wanted on ICC arrest warrants. One issue is whether the Directorate of Public Prosecutions might expand the application of the International Criminal Court Act to events prior to the law's enactment in June 2010. ICC judges have previously rejected claims that domestic proceedings replace the ICC's cases if the charges were not precisely those before the ICC. Ugandan officials have suggested that applying the Ugandan International Criminal Court Act to events prior to 2010 would violate the principle that people should not be prosecuted for actions that were not crimes at the time they were committed. However, under international law that principle does not prevent the prosecution of genocide, war crimes, and crimes against humanity because those crimes were prohibited conduct under international treaty and customary law that was binding on Uganda prior to 2010 even if they were not explicitly defined in domestic Ugandan law.

If Ugandan prosecutors brought charges against Kony, Ongwen and Odhiambo and sought to have the ICC's cases replaced by these domestic cases, ICC judges would determine whether the domestic prosecutions meet the ICC's requirements to replace ICC cases.

In October 2008, the ICC judges on their own initiative assessed whether domestic proceedings should oust the ICC's jurisdiction to prosecute the LRA-related cases before it. The judges found that national proceedings were not sufficiently established at that time to warrant the exclusion of the ICC.

Ugandan government officials have suggested that the International Crimes Division will try crimes committed by the LRA, but Uganda's military courts will try cases involving crimes committed by Ugandan forces. Ugandan armed forces are implicated in extra-judicial executions, torture and other serious crimes committed during the northern Ugandan conflict. Human Rights Watch has repeatedly raised concerns that there has been insufficient accountability before military courts for crimes committed in northern Uganda, and has suggested that the division is best placed for domestic trials of serious crimes committed by both LRA and Ugandan forces.

**12. Are traditional justice methods being applied alongside the ICD?**

Traditional justice processes have been a major issue in discussions over accountability for serious crimes in Uganda. While traditional justice processes may provide an important complement to

prosecutions, they are not a substitute for them. It is unclear whether traditional justice processes may be pursued for Kwoyelo in addition to prosecution.