Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: review of the recent jurisprudence of the African Commission on Human and Peoples' Rights

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ABSTRACT: During the course of the past three decades, various legal developments under international law have triggered academic debate and jurisprudential analysis on the legality of amnesties. While there is general recognition that states are not completely free to grant amnesty, the debate continues whether international law, with the exception of specific treaty obligations, generally bans the use of amnesty in all its forms, including in relation to serious violations, particularly in the context of transitions from war to peace. This case commentary reviews the analysis by the African Commission on Human and Peoples' Rights of the legal validity of amnesty provisions under the African Charter on Human and Peoples' Rights. It in particular examines how the *obiter dictum* in *the African* Commission's finding in the communication *Thomas Kwoyelo v Uganda* advances the Commission's jurisprudence on amnesty, and discusses the parameters that the Commission set for evaluating amnesty provisions including those that are additional, if not novel, to existing guidelines. Before this finding, the Commission's position on amnesty was inadequately articulated, generally formulated and confined to specific cases. This case note observes that while the African Commission, following a methodical line of analysis, establishes the legality of amnesty under the African Charter including in respect of serious violations, its *obiter dictum* in *Kwoyelo* also enhanced the frontiers of the law on the question of legal validity of amnesty. It did so by clarifying not only the scope of legality of amnesty provisions but also the substantive and procedural conditions amnesty provisions should meet.

TITRE ET RÉSUMÉ EN FRANCAIS:

Questionnement sur la conformité à la Charte de Banjul des règles d'amnistie en période de transition: évaluation de la récente jurisprudence de la Commission africaine des droits de l'homme et des peuples

RÉSUMÉ: Au cours des trois dernières décennies, divers développements juridiques en droit international ont déclenché un débat théorique et une analyse jurisprudentielle sur la légalité des amnisties. Bien que l'on soit généralement d'accord sur le fait que les États ne sont pas entièrement libres d'accorder l'amnistie, le débat porte le plus souvent sur la question de savoir si le droit international, à l'exception d'obligations conventionnelles précises, interdit l'utilisation de l'amnistie sous toutes ses formes, y compris en cas de violations graves, surtout lors de la transition de la guerre à la paix.

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Le présent commentaire examine l'analyse par la Commission africaine des droits de l'homme et des peuples de la validité juridique des dispositions d'amnistie à la lumière de la Charte africaine des droits de l'homme et des peuples. Il examine en particulier comment l'*obiter dictum* de la conclusion de la Commission africaine dans la communication *Thomas Kwoyelo c. Ouganda* avance la jurisprudence de la Commission en matière d'amnistie, et examine les critères définis par elle en vue d'évaluer les dispositions relatives à l'amnistie dont certains s'avèrent être novateurs par rapport aux directives existantes. Il y a peu, la position de la Commission sur l'amnistie était formulée en des termes généraux et limitée à des cas spécifiques. Ce commentaire conclut que, si la Commission africaine, suivant une ligne d'analyse méthodique, établit la conformité de l'amnistie à la Charte africaine, y compris en ce qui concerne les violations graves, son *obiter dictum* a également renforcé les limites du droit sur la question de la validité juridique de l'amnistie en précisant non seulement l'étendue de la légalité de ses dispositions, mais également les conditions de fond et de forme que doivent remplir les dispositions d'amnistie.

KEY WORDS: African Commission on Human and Peoples' Rights, amnesty, legality, transition, *obiter dictum*, *Kwoyelo v Uganda*

CONTENT:

1 INTRODUCTION

During its 62nd Ordinary Session held in Nouakchott, in the Islamic Republic of Mauritania, from 25 April to 9 July 2018, the African Commission on Human and Peoples' Rights (African Commission or Commission) handed down a landmark decision on Communication 431/12, *Thomas Kwoyelo v Uganda*.[1] As part of its consideration of the communication, the Commission adopted an *obiter dictum* on the status of amnesties within the framework of the African Charter on Human and Peoples' Rights (African Charter). As the Commission puts it, the *obiter dictum* was adopted in order to enable it to pronounce itself on the question of the compatibility of amnesty provisions, adopted in times of transition, with the rights guaranteed in the African Charter.[2]

While the Commission has previously encountered issues of amnesty, it has not given a fully-fledged authoritative opinion on the status of amnesty under the African Charter, particularly in the context of transition from conflict to peace. As the Commission itself admitted

1 African Commission on Human and Peoples' Rights, Communication 431/12, *Thomas Kwoyelo v Uganda* (*Kwoyelo*); https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/129 (accessed 1 November 2019).

2 *Kwoyelo,* just before para 283, the Commission uses the heading '*Obiter dictum*' (see paras 284-293 for the text of the '*Obiter dictum*'). The plural form *obiter dicta* may perhaps better capture the Commission's observations, but this note uses the Commission's own terminology ('*Obiter dictum*').

in its *Kwoyelo* finding, there was a 'lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace'.[3]

This case discussion presents a review of the Commission's analysis on the legal validity of amnesty provisions under the African Charter. It in particular examines how the *obiter dictum* advances the Commission's jurisprudence on amnesty and the parameters that the Commission set for evaluating amnesty provisions, hence offering important elements that are additional, if not novel, to existing guidelines and understanding on the legality of amnesty provisions in transitional legal instruments.

After this introduction, the next part presents a brief analysis on the legal authority of *obiter dicta,* generally, before proceeding to consider how and why the Commission's *obiter dictum* in *Kwayelo* is of significant legal value. The discussion then proceeds to present as background an overview of the communication, outlining the facts of the case and the Commission's findings (drawing attention to the fact that while amnesty features as a major part of the case, its legal validity under the Charter was not an issue on which the Commission was called upon to pronounce itself). In the next section, the case discussion deals with amnesties and international human rights law in an attempt to situate the Commission's position in the broader international law context. Part 4 proceeds to analyse the *obiter dictum,* including the novel dimensions of the approach the Commission adopted and how this approach interfaces with the debate in international law on amnesty provisions. Finally, I provide a conclusion with suggestions on how best the guidance in the *obiter dictum* can be put in practice.

2 THE LEGAL AUTHORITY OF *OBITER DICTA*

Particularly in Common Law systems, a distinction is made between the *ratio decidendi* and *obiter dicta* contained in judicial decisions.[4]

The *ratio decidendi* refers to 'those statements of law which are based on the facts as found and upon which the decision is based.'[5] These are the binding statements of law in a court decision. *Obiter dicta* are statements of law that are made in court decisions in passing, in the sense that they do not have direct impact on the outcome or finding of the court.

3 *Kwoyelo*, para 284.

4 See M Raz 'Inside precedents: *ratio decidendi* and *obiter dicta*' http://www.commonlawreview.cz/wp-content/uploads/2017/10/08_3CommonLRev212002.pdf (accessed 1 November 2019); R Hollier 'The ultimate guide to the ratio decidendi and obiter dictum' https://www.thelawproject.com.au/ratio-decidendi-and-obiter-dictum (accessed 1 November 2019).

5 Raz (n 4).

Obiter dicta may take different forms. It may be used to provide context or to provide a hypothetical case. It is also not uncommon to use *obiter dicta* to fully explore a relevant area of law even if it is not crucial for the determination of the outcome of the case concerned. While it is usually stated that *obiter dicta* are persuasive only and lack the force of precedent, the extent to which *dicta* are followed varies depending on how the *dicta* are used. McAllister states that there are 'five factors that influence the path of a particular dictum: (1) the number of judges that endorsed the dictum; (2) the depth of the issuing court's discussion of the dictum; (3) whether the dictum clarifies a line of demarcation in existing case law; (4) the relationship between the facts of the case and the statements made in dictum; and (5) the extent to which the issuing court stands by the pronouncements made in dictum.'[6]

'Obiter dicta can guide, inform, or enlighten future case reasoning'.[7] There are also instances in which it is used to clarify a legal issue in a case, although such legal issue does not affect the disposition of the case. *Obiter dicta* thus 'have different degrees of weight.'[8] It emerges that *obiter dicta* carry the most weight, to the point of establishing authoritative legal opinion, where they are used for clarifying a legal issue, intended to have such a force and involved sufficiently deep discussion of the matter.

In the case at hand, the African Commission used the *obiter dictum* to clarify the legal issue on the compatibility of amnesty under the African Charter. It is also clear from the African Commission's decision that it sought to provide legally authoritative view on the question of the validity of amnesty under the African Charter. The Commission also engaged the issue at some length. It not only clarified whether and how amnesty can be compatible with the African Charter but also went as far as stipulating the procedural and substantive test that should be met to adopt amnesty provisions in conformity with the African Charter.

As is discussed further below, the issue addressed in the *obiter dictum* in the *Kwoyelo* finding has a close relationship with the facts of the case. While the *ratio decidendi* concerned with the question of whether the refusal of the government of Uganda to grant amnesty to Kwoyele under the Amnesty Act of 2000 was discriminatory, the *dictum* addressed the question of the legal validity of amnesty as provided for in the Uganda Amnesty Act of 2000 under the African Charter.

The foregoing shows that the African Commission's *obiter dictum* in *Kwoyelo v Uganda* presents an authoritative statement of its legal opinion on the question of the legal validity of amnesty provisions under the African Charter.

6 M McAllister 'Dicta redefined' (2011) 47 *Willamette Law Review* 162 at 165.

7 Legal Information Institute 'Obiter dictum' https://www.law.cornell.edu/wex/obiter_dictum (accessed 1 November 2019).

8 Hollier (n 4).

3 BACKGROUND TO THE COMMUNICATION

The communication concerns a complaint lodged against Uganda on behalf of Thomas Kwoyelo, a former child soldier, who, after being abducted as a child in 1987, became a member of the Lord's Resistance Army (LRA).[9] The case arose from the treatment by Ugandan authorities of Thomas Kwoyelo following his capture by the Ugandan troops in 2009. The allegations presented in the complaint include abduction, torture and inhumane treatment, breach of fair trial rights and deprivation of medical treatment. The dimension of the communication that is of direct interest for the subject of this case discussion is the request to the African Commission to find the refusal by Ugandan authorities to grant amnesty to Kwoyelo as constituting a violation of his right to equal protection under the law.

As presented in the complaint, Kwoyelo was captured after a battle between the Ugandan army and LRA combatants in the Democratic Republic of Congo (DRC). After being taken to Uganda where he received medical care at a military hospital, he was arrested. Similar to other LRA fighters, Kwoyelo declared his renunciation of rebellion and applied to the Uganda Amnesty Commission to be granted amnesty under the 2000 Amnesty Act. In March 2010, the Amnesty Commission forwarded Kwoyelo's application to the Director of Public Prosecutions (DPP) for consideration with a recommendation that Kwoyelo should be allowed to benefit from the amnesty process. Instead of acting in line with the recommendation of the Amnesty Commission, the DPP charged Kwoyelo with various crimes including willful killing, taking hostages, extensive destruction of property, and violations of Uganda's 1964 Geneva Conventions Act.

While the case was pending before the International Crimes Division of the High Court of Uganda, Kwoyelo filed an application with the Constitutional Court of Uganda. He contended that his prosecution for acts falling within the Amnesty Act, but under which he has been declared to be eligible for amnesty, was a violation of his right to equality before the law. Despite the argument of the DPP that it was barred from granting amnesty to Kwoyelo due to the 'international' nature of the crimes for which Kwoyelo was charged, the Constitutional Court not only affirmed the constitutionality of the Amnesty Act but also held that the refusal of the DPP to grant amnesty to Kwoyelo in line with the recommendation of the Amnesty Commission constituted a denial of his right to equality before the law. The Constitutional Court further ordered the termination of Kwoyelo's trial.[10] The Court of Appeal, which the DPP approached for a stay of execution of the Constitutional Court decision, upheld the findings of the Constitutional Court.

9 See RR Atkinson 'From Uganda to the Congo and beyond: pursuing the Lord's Resistance Army' https://www.ipinst.org/wp-content/uploads/publications/e_pub_uganda_to_congo.pdf (accessed 1 November 2019).

10 *Thomas Kwoyelo alias Latoni v Uganda* [2011] UGCC.

Having been unable to get satisfaction under the Ugandan legal system with the government refusing to implement the Constitutional Court decision, Kwoyelo filed a communication with the African Commission arguing on his amnesty application that the refusal of Uganda to grant him amnesty as it did to over 24,000 other individuals amounts to a violation of his right to equal protection under the law' contrary to article 3 of the African Charter.

4 THE FINDING OF THE COMMISSION: *RATIO DECIDENDI*

In order to assess the allegation of violation of the right to equal protection under the law, the African Commission examined the question of whether the Amnesty Act was applied differently in respect of Kwoyelo and, if there was differentiation, whether the differentiation was justified. While the applicants for Kwoyelo, Onyango & Company Advocates, argued that 'the granting of over 24,000 amnesty applications before and 274 more after the victim's application was rejected including to persons who were holding higher command positions shows that he was selectively treated without any objective or reasonable explanation',[11] the government of Uganda in its response argued that 'the case of the victim was different from all other applicants who were granted amnesty because he was charged with serious violations of human rights and the others were not'.[12] Accordingly, on the question of whether the Amnesty Act was applied differently in respect of Kwoyelo, the Commission held that the facts that Kwoyelo was the only person whose application for amnesty was denied, that at the time of the filing of the communication 24000 amnesty applicants had been granted, and that 274 applicants were granted amnesty after Kwoyelo's application established a case of 'difference in treatment'.

With respect to the second question, namely, whether the difference in treatment was justified, the Commission considered the arguments of the respondent state based on a two-stage analysis. To the argument that the difference in treatment was justified on account of the requirement of prosecution of those suspected of committing most serious crimes or human rights violations under the Juba Agreement on Accountability and Reconciliation and the Annexure thereto of June 2007 and February 2008, the Commission held that the signing of the Juba Agreement did not stop the eligibility of the applicant under the Amnesty Act. The Commission further held that, without effecting corresponding and corollary amendments to the Amnesty Act, the Juba Agreement 'is not sufficient and convincing legal ground to warrant differential treatment.'[13] It thus held that being charged with serious

11 *Kwoyelo,* para 50.
12 *Kwoyelo,* para 168.
13 *Kwoyelo*, para 187.

crimes was not a stated ground for the denial of amnesty under the Act.[14]

To the argument that the enactment in 2010 of the International Criminal Court Act necessitated the prosecution of international crimes barring the application of the Amnesty Act, the Commission held that the refusal to grant amnesty by virtue of the ICC Act, which came into effect months after Kwoyelo was declared eligible for amnesty, 'would be a retroactive application of the law, which is a flagrant breach of the principle of legality.'[15] It accordingly found that the justification that the state proffered for defending the legality of the difference in treatment was not reasonable. The Commission accordingly concluded that 'by interpreting and applying the provisions of the Amnesty Act differently without any reasonable justification or explanation, the Respondent state violated the right to equal protection of the law afforded to the Victim as provided under article 3 of the Charter.'[16]

The Commission was right in pursuing the two-level analysis that it adopted for determining the existence of violation of the right to equal protection of the law. As it is clear from the Commission's examination of the parties' submission on article 3 of the Charter, the two-level analysis principally involves technical review (the existence of difference and justifiability of difference).

The Commission did not engage in a review of whether the entitlement (in this case the amnesty) with respect to which a claim of unequal application of the law was invoked was deserved and legitimate under the African Charter. Questions may arise on whether the Commission should have engaged in an examination of that question.[17] Yet, engaging in such an exercise would have been very problematic for the Commission. The question before the Commission, as framed in the submission of the parties, was whether the difference in the treatment of Kwoyelo was justifiable within the framework of the Amnesty Act. Understandably, the question of amnesty in the situation at hand is not confined to the case of Kwoyelo but implicates the entirety of Uganda's Amnesty Act. Since this issue was not directly framed in the submission of the respondent state, the Commission could be rightly excused for not engaging in the kind of exercise such a review would have required.

Yet, despite the appropriateness of confining the Commission's review to the Amnesty Act based on the two-level analysis, the Commission did not deem it proper to end its examination with making a determination on the existence or otherwise of violation of article 3 of the African Charter. Accordingly, the Commission found it important that it addressed the question of the compatibility of the use of amnesty provisions with the obligation of states under the African Charter to

14 *Kwoyelo,* para 180.

15 *Kwoyelo,* para 190.

16 *Kwoyelo,* para 195.

17 See P Bradfield 'Amnesty or no amnesty? The African Commission weighs in on the Kwoyelo case' (11 October 2018) https://beyondthehague.com/2018/10/11/amnesty-or-no-amnesty-african-commission-weighs-in-on-the-kwoyelo-case/ (accessed 1 November 2019).

ensure the protection of the Charter rights by bringing those engaged in the perpetration of violations to justice. The Commission sought to accomplish this by adopting an *obiter dictum*.

Before considering a closer examination of what, in the view of the Commission, comes to be its most authoritative view on amnesty provisions, I will first proceed in the following section with a discussion on amnesty provisions and human rights. This helps us to put the Commission's analysis in the broader international law and comparative context.

5 AMNESTY AND HUMAN RIGHTS LAW

There is no established definition of amnesty under international law. The word 'amnesty' comes from the ancient Greek word *amnestia*, meaning 'forgetfulness.' As the origin of the word suggests, when used in the context of peace processes or transitions amnesty involves an act of letting certain wrongs be forgotten. The Commission observed in *Zimbabwe Human Rights NGOs Forum v Zimbabwe* that an 'amnesty is granted to a group of people who commit political offences, e.g. during a civil war, during armed conflicts or during a domestic insurrection.'[18] The granting of amnesty thus leads to the limitation or exclusion of the application of criminal prosecution.

Despite the lack of established definition, amnesty is not without pedigree in international law. A case in point is article 6(5) of Additional Protocol II (of 1977) to the Geneva Conventions: 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' It is on this provision of the Geneva Conventions that the South African Constitutional Court relied in affirming the legality of the amnesty clause under the Act establishing the South African Truth and Reconciliation Commission.[19]

Various legal developments over the course of the past few decades have increasingly challenged the legality of amnesty under international law. It is now widely recognised that as a matter of principle states are expected to investigate and prosecute those responsible for serious international crimes and gross violations of human rights. Important sources of authority for such assertion are the specific obligations that a select number of human rights treaties impose on parties for investigation and prosecution. The 1949 Geneva Conventions enumerate acts described as 'grave breaches,' and impose a duty on its parties to prosecute perpetrators of such breaches, but these provisions apply only to international armed conflicts. The

18 2005 AHRLR 128 (ACHPR 2005), para 196 (*Zimbabwe Human Rights Forum* case).

19 *Azanian Peoples Organization v President of South Africa* 1996 (4) SALR 671 (CC)).

Convention on the Prevention and Punishment of the Crime of Genocide imposes an affirmative duty on state parties to criminalise genocide and to prosecute or extradite parties who are suspected of engaging in the perpetration of genocide. The Convention Against Torture also imposes obligations similar to the Genocide Convention, although its definition of torture is confined to those committed by or with the consent of a public official.

As far as customary international law is concerned, the position on whether there is complete ban on amnesties remains unsettled. There are international actors including the pronouncement of some international tribunals, some states and human rights advocates who hold that there is a customary norm of international law that bans amnesties. While there is thus general recognition that states are not completely free in terms of the granting of amnesty, it remains far from clear that international law, with the exception of specific treaty obligations, generally bans the use of amnesty in all its forms, including in relation to serious violations. This is particularly the case in the context of transitions from war to peace. The Special Court for Sierra Leone noted that there is 'no general obligation for States to refrain from amnesty laws on these *[jus cogens]* crimes.'[20] States therefore do not 'breach a customary international rule' in granting such amnesties.[21]

It emerges from review of state practice that the process of formation of a customary norm of international law banning the use of amnesties remains incomplete. The Belfast Guidelines on Amnesty and Accountability prepared by a group of international law scholars and practitioners pronounce that '*opinio juris* from domestic and hybrid courts together with state practice on amnesties does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes.'[22] This is also supported by the jurisprudence of some international bodies. The Trial Chamber found that 'state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them.' This finding was supported by the Trial Chamber's review of the adoption, scope and application of amnesties in conflict or post-conflict countries in the last three decades. The Trial Chamber found that state practice of 28 states in the past three decades encompassed the implementation of amnesty laws, of which 18 cover the crimes of genocide, crimes against humanity and grave breaches of the Geneva Conventions.[23]

20 *Prosecutor v Kallon & Kambara*, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72 para 7

21 As above.

22 The Belfast Guidelines on Amnesty and Accountability 12.

23 Case of *NUON Chea et al*, 002/19-09-2007-ECCC/TC, Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), 3 November 2011, D51/15, para 54, as cited in MG Karnavas 'Amnesties and pardons in international criminal law' http://michaelgkarnavas.net/blog/2016/07/22/amnesties-and-pardons-part-ii/ (accessed 1 November 2019).

Various international law scholars point out that no conclusive evidence of the formation of international custom altogether prohibiting amnesty has emerged.[24] After reviewing the work of regional human rights bodies and international courts on the subject, Trumbull concluded as follows:[25]

> These international court decisions may suggest an emerging international norm that demands accountability. They do not, however, establish that all amnesties for serious human rights abuses are illegal under international law, or that states have an international obligation to prosecute violations of international law. Indeed, international courts have shown a willingness to allow states to decide how to hold perpetrators accountable, and how to provide appropriate redress for the victims.

As observed in the *Zimbabwe Human Rights Forum* case,[26] states have obligations under international human rights law to ensure that victims of violations of human rights are afforded a remedy. This obligation of states to ensure that the right of victims to get a remedy for violations suffered demands that they do not take actions that make it impossible for victims to have their violations remedied. It is interesting to note that what the African Commission found objectionable in that case was not amnesty per se but the fact that the particular law in question 'foreclosed any available avenue for the alleged abuses to be *investigated,* and *prevented* victims of crimes and alleged human rights violations *from seeking effective remedy and compensatio*n'.[27] The Commission further stated that the 'granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy'.[28] It is worth noting that in this particular case the African Commission did not engage the question of the room available for limitations on these obligations in the context of a transition from war to peace.

There are three points that emerge from these legal opinions of the Commission. The first is that the obligation of states principally consists of holding perpetrators accountable, which may take forms other than criminal prosecution and punishment. This obligation bars states from relieving perpetrators of all forms of accountability. Second, the obligation of states also precludes them from blocking victims from getting *any form of remedy* for the violations they suffered. Third, the implication of these legal positions under the African Charter is that there is no as such a general and absolute ban on amnesties as long as such amnesties do not absolve perpetrators from accountability altogether and inhibit victims from having access to remedy.

The lack of customary international law banning the use of amnesties however does not imply that all forms of amnesties are acceptable and legal under international law. Most importantly, while

24 J Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001 at 1002-04; CP Trumbull IV 'Giving amnesties a second chance' (2007) 25 *Berkeley Journal of International Law* 283 (accessed 1 November 2019).

25 Trumbull (n 24) 301.

26 n 18.

27 *Zimbabwe Human Rights Forum*, para 211 (my emphasis).

28 *Zimbabwe Human Rights Forum*, para 215.

there are differences over the complete ban of amnesties in its entirety under international law, there is little, if any, dispute that international custom bans blanket or unconditional amnesties. In South Africa, for example, amnesty from prosecution was provided for 'acts, omissions, and offenses associated with political objectives and committed in the course of the conflicts of the past',[29] but only after the accused had made a full disclosure to the Truth and Reconciliation Commission. This is what is called conditional amnesty. Such amnesty is conditional to the extent that the amnesty depends on full disclosure and hence some measure of accountability and acceptance of responsibility. But it is not conditional in as far as the nature of the act is concerned.

The Uganda's Amnesty Act of 2000, which is the subject of the present case, stipulates in relevant sections as follows:

> 3.1. 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.
>
> 3.2. A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the course of the war or armed rebellion.

These provisions give general amnesty to rebels whereby no offences are excluded and all forms of insurgency are covered. There are no requirements in the Act that perpetrators have to meet other than renouncing armed rebellion. This is an example of unconditional amnesty.

It is clear from the foregoing that there has been a distinct narrowing in the overall permissibility of amnesties under international human rights law. However, state practice indicates a continued willingness to utilise amnesty provisions albeit in somewhat narrower ways. Even the jurisprudence of regional and international courts tends to limit the application of amnesties but have not rejected entirely the acceptability of amnesties.

6 ANALYSIS OF THE COMMISSION'S *OBITER DICTUM*

As noted earlier, the African Commission did not wish to end its consideration of the communication with a determination of whether Kwoyelo was discriminated against in terms of the application of the Amnesty Act. Underscoring the necessity for clarifying the question of amnesty, the Commission expressed the view that it 'deems it fitting that it pronounces itself on this issue given the lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace.'[30] It went on to explain that addressing the issue of amnesty via an *obiter dictum* was 'necessitated

29 Promotion of National Unity and Reconciliation Act 34 of 1995.

30 *Kwoyelo*, para 284

by the position that the Commission took herein above in finding violation of article 3 of the Charter in the application of amnesty, which, unless it is read carefully, may be wrongly interpreted as sanctioning blanket amnesty.'[31]

In the *obiter dictum*, the Commission presented its position methodically. Unlike previous cases, which the Commission addressed, in this case there is clear consideration of the context of transition from conflicts to peace. The Commission started off by noting the emergence of international norms laying down rules regulating the use of amnesties. The Commission in particular noted 'rules of international law aiming at giving force to human rights and IHL principles prescribe the conditions that should be met when societies have to have recourse to amnesties as a necessary means of ending the continuation of armed violence and the violations that inevitably accompany such violence.'[32] In so doing, the Commission signaled that what justifies amnesties is the necessity of ending continuation of armed conflict and hence fulfilling the right to peace under article 23 of the African Charter. Importantly, the Commission notes that the use of amnesties also advances further human rights needs in helping to end the violations that result from the continuation of conflicts.

The next point that the Commission addressed was what amnesties constitute and what their legal implications are. It observed that amnesties can be considered as 'legal measures that are used in transitional processes, often as part of peace settlements, to limit or preclude the application of criminal processes and, in some cases, civil actions against certain individuals or categories of individuals for violent actions committed in contravention of applicable human rights and IHL rules.'[33] It also noted that amnesties could be adopted as unilateral acts of the state or as part of a peace settlement that is given the force of law.

One issue that clearly weighed on the Commission's elaboration of its position on the compatibility of amnesties with the African Charter is its focus on the context of transition from peace to conflict. This specific attention to contexts of transition is indeed one of the factors that set the Commission's treatment of amnesties in the *obiter dictum* apart from its earlier pronouncements. This is not surprising given the fact that many countries on the continent have been affected by violent conflicts and the accompanying atrocious violations. The Commission thus noted that '[t]ypically, these are not normal or ordinary circumstances. Rather, they are characterised (by) lack of political and socio-economic stability, weak or dysfunctional institutions and diminished security.'[34] The upshot of this recognition of the extraordinary nature of contexts of transition from conflicts is that it demands the Commission to apply a standard different from what it applies in normal situations in its assessment of compatibility with the

31 As above.
32 *Kwoyelo*, para 285.
33 *Kwoyelo*, para 286.
34 *Kwoyelo*, para 287.

African Charter of measures adopted in contexts of transitions from conflict to peace.

The Commission elaborates the important distinction that needs to be made between blanket amnesties and conditional amnesties. After noting that blanket or unconditional amnesties relieve perpetrators of all responsibilities without the need for meeting any conditions, the Commission held that on account of their effect of excluding any form of accountability and hence enabling impunity, 'blanket amnesties are incompatible with human rights and IHL rules.'[35] What is interesting is not simply the Commission's clear rejection of blanket amnesties but also its rather restricted conceptualisation of conditional amnesties. Accordingly, the Commission held that '[co]nditional amnesties are those that usually offer relief from criminal conviction or criminal prosecution altogether for defined category of actors and on meeting certain preconditions including full disclosure of what they know about the conducts covered by the amnesty and acknowledgement of responsibility.'[36]

It is clear from the Commission's conception of conditional amnesties and interesting to note that the focus of the Commission's view on conditional amnesties relate to criminal prosecution or conviction, hence suggesting that conditional amnesties do not preclude accountability altogether. Indeed, other forms of accountability measures such as investigation and being identified for responsibility, truth telling and hence accepting responsibility, facing certain limitations by doing community service or by being responsible for paying compensation or by being excluded from serving in public offices are not excluded.

To back up its position on conditional amnesties, which the Commission considers not to be necessarily incompatible with the African Charter, the Commission made reference to the position of international human rights treaties, the jurisprudence of regional bodies and its own jurisprudence under paragraphs 289-292. Although this is done in rather broad-brush fashion, this reference to the broader international jurisprudential discussion on the subject largely represents an accurate depiction of where international law stands. It is thus consistent with the discussion in the preceding section on amnesties and international human rights law.

After building with such methodological sequence the foundation for its view, the Commission presented its conclusions on the question of when amnesties could or could not be compatible with the African Charter. It thus held that it is its considered view 'that blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to most serious crimes referred to in article 4(h) of the AU Constitutive Act) are not consistent with the provisions of the African Charter.'[37] It goes on to state that 'African states in transition from conflict to peace should at all times and under any circumstances

35 *Kwoyelo*, para 288.
36 As above.
37 *Kwoyelo*, para 293.

desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law.'

With respect to conditional amnesties in a novel formulation, the Commission identified the procedural and substantive requirements that should be met when societies in transition 'resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice'.[38] Procedurally, the Commission took the view that 'amnesties should be formulated with the participation of affected communities including victim groups.'[39] It has to be recalled that it is with the request and active participation of northern Ugandan communities affected by the LRA violence that the Ugandan Amnesty Act was formulated and adopted. Substantively speaking, the requirement is that 'amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation, with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.'[40] It emerges from this that while the Commission considers that the use of conditional amnesties may not be incompatible with the African Charter, its endorsement of conditional amnesties is highly conditional and restrictive.

7 CONCLUSION

The great contribution of the *obiter dictum* of the African Commission in this case is in its recognition of the unavoidability and even necessity of the use of amnesties in conditions of transition from conflict to peace. In so doing the Commission avoided a dogmatic wholesale rejection of the use of amnesties. The African Commission does not encourage amnesties. Instead, it frowns upon them. Yet, it does not totally ban them. It considers that an amnesty could be a necessary evil, the lesser of two evils that can be used as a last resort and as a necessary measure – but only under clearly defined conditions.

It thus emerges from the analysis of the *obiter dictum* of the African Commission that there are three considerations for determining the compatibility of amnesties with human rights obligations. These are:

- Are the amnesty measures necessary and proportionate to the objectives being pursued?
- Have victims and others affected by the conflict been given the opportunity to have a say in the formulation of the amnesty measures?
- Do the amnesty measures preclude any measure of redress or remedy for victims and accountability for perpetrators?

38 As above.
39 As above.
40 As above.

The African Commission's recognition of the possible use of amnesties in such contexts is dictated not only by practical considerations but also importantly by human rights considerations of the right to peace and preventing further violations. Most significantly, conditional amnesties as conceptualised by the Commission are endorsed without violating the requirements of accountability and the right of victims to a remedy. The Commission seems to suggest that the limitations that may arise from the use of conditional amnesties on the requirement of ensuring accountability and the right of victims to remedy are necessary and legitimate within the framework of the African Charter and the particular conditions prevailing in transitions from conflict to peace. Its introduction of the procedural and substantive requirements that should be met for conditional amnesties to be compatible with the African Charter represents a novel approach in international human rights law. This is an instance where an *obiter dictum* is used for not only clarifying an important legal issue but also establishing an authoritative legal opinion that expands the frontier of conventional view on such legal issue.