

UNIVERSITY OF THE WESTERN CAPE



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FACULTY OF LAW

LLM-PROGRAMME

**TITLE: THE INTERNATIONAL CRIMES DIVISION OF UGANDA: COMPLEMENTARITY IN
PRACTICE**

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**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF THE
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MASTERS OF LAW**

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SUBMISSION DATE: 7TH NOVEMBER 2017

DECLARATION

I declare that **THE INTERNATIONAL CRIMES DIVISION OF UGANDA: COMPLEMENTARITY IN PRACTICE** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

For you mummy and daddy (RIP),

For you my dearest sisters, aunt and grandmother.

For you my dearest Isaac.



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KEY WORDS

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International Criminal Court

International Criminal Court Act

Prosecution

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State party

Uganda



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LIST OF ABBREVIATIONS

AOAR	Agreement on Accountability and Reconciliation
A&R Accords	Agreement on Accountability and Reconciliation and its annexures
Division	International Crimes Division
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
FPA	Final Peace Agreement
GoSS	Government of South Sudan
GoU	Government of Uganda
ICD	International Crimes Division
ICCPR	International Covenant on Civil and Political Rights
LRA	Lord's Resistance Army
NGOs	Non-governmental Organisations
NRM	National Resistance Movement
OTP	Office of the Prosecutor
SCSL	Special Court of Sierra Leon

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CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1. INTRODUCTION TO THE STUDY

In previous centuries, millions of women, men and children were victims of inconceivable atrocities that deeply shocked the scruples of mankind.¹ Regrettably, such crimes often went unpunished in the past. Several people lost lives in the two world wars and in conflicts in Rwanda,² Sierra Leone³ and the former Yugoslavia.⁴ Although the International Military Tribunal and ad hoc courts prosecuted some of the major perpetrators in these conflicts, before then, many criminals such as German Kaiser, Wilhelm II, remained unpunished⁵.

The International Criminal Court (ICC) is the first permanent court with jurisdiction over the most malignant crimes threatening the peace, security and well-being of the world.⁶

In 1998, during the Rome diplomatic conference on the establishment of the International Criminal Court, 165 countries negotiated a treaty, to design the world's first permanent international criminal court.⁷ On 17 July 1998, 120 nations voted in favour of ICC and in July

¹ Finch GA 'Nuremberg and the International Law' (1947) 41 *The American Journal of International Law* 20–37.

² Statute of the International Criminal Tribunal for Rwanda UN Doc. S/RES/955 (1994).

³ Schabas WA *The Sierra Leon Truth and Reconciliation Commission* (2004).

⁴ Werle G & Jessberger F *Principles of International Criminal Law* 3 ed (2014) marg nos 48-50. See also Statute of the International Criminal Tribunal for the Former Yugoslavia. UN Doc. S/25704.

⁵ Werle G & Jessberger F (2014) Marg No 9.

⁶ Werle G & Jessberger F (2014) Marg No 56.

⁷ Bassiouni MC *The legislative History of the International Criminal Court*. Vol. 1 (2005) 143.

2002, the Rome Statute entered into force, after the ratification by 60 countries, Uganda being one of them.⁸

The ICC is empowered to try individuals over the age of 18 for the most malignant crimes,⁹ which include genocide, war crimes and crimes against humanity,¹⁰ committed after 1 July 2002. In principle, the ICC has jurisdiction over these crimes if they were committed on the territory of a state party or by one of its nationals,¹¹ unless the United Nations Security Council refers a situation to the prosecutor or unless the non-member state temporarily accepts the jurisdiction of the Court.

In its operations, the ICC complements, does not replace, national justice systems.¹² The Court, therefore, can prosecute cases only if a state party fails to carry out prosecution of the most serious crimes,¹³ or if the state is unwilling or unable to carry out the prosecutions.¹⁴ This is known as the principle of complementarity. To enforce this principle, office of the prosecutor pledged to encourage domestic prosecutions through the respect of the varied legal systems, culture and traditions.¹⁵

The ICC gave high hopes to victims that accountability would be done whenever the gravest crimes were committed.¹⁶ Indeed, this is true since the Court is independent, but cannot

⁸ Scharf MP 'Results of the Rome Conference for an International Criminal Court' (2008) 3 *The American Society of International Law* 10.

⁹ Article 26 of the Rome Statute of the International Criminal Court UN Doc. A/CONF.183/9.

¹⁰ Article 5 of the Rome Statute.

¹¹ Article 4 of the Rome Statute.

¹² Article 1 of the Rome Statute.

¹³ Article 17(a) of the Rome Statute.

¹⁴ Article 17(b) of the Rome Statute.

¹⁵ International Criminal Court-Office of the Prosecutor, Paper on some Policy Issues before the Office of the Prosecutor, September 2003. Also available at https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (Accessed 7 April 2017).

¹⁶ Moffet L 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague (2015) 13 *Journal of International Criminal Justice* 281.

accomplish its mandate alone, hence states parties have gone ahead to establish national courts to try the most serious crimes in implementation of the principle of complementarity.

Uganda pledged allegiance to the ICC when she ratified the Rome Statute in June 2002.¹⁷ This depicted Uganda's dedication in the struggle to fight impunity. Not only did Uganda ratify the Rome Statute but also it went ahead to domesticate the Statute, this was done through making reference to the Rome Statute in the provisions of the International Criminal Court Act of 2010. By this Act, Uganda devoted all effort to upholding and safeguarding international standards conferred by the Rome Statute, thereby domesticating all crimes as provided by the Rome Statute.¹⁸

The idea of ratification of the Rome Statute was a sigh of relief and hope to Uganda because since her independence in 1962, there had been unrest as a civil conflict ensued in Northern Uganda, where many lost lives at the hands of the Lord's Resistance Army (LRA).¹⁹ The LRA strife in northern Uganda marked a period of gross human rights abuse from approximately 1986 to 2005.²⁰

In 2008, with an aim to halt the struggle, the government of Uganda engaged the Uganda People's Defence Force (UPDF), to counter fight the LRA rebels in hopes that they would surrender to the country's UPDF.²¹ Unfortunately, this effort did not pay off, as the LRA

¹⁷ The International Criminal Court Act, 2010 Act No.11 of 2010.

¹⁸ Human Rights Watch, *Thomas Kwoyelo's trial before Uganda's International Crimes: Division Questions and Answers* (21 March 2012) also available at https://www.hrw.org/sites/default/files/related_material/Q%26A%20Kwoyelo%20Trial.pdf (Accessed 7 April 2017).

¹⁹ Human rights watch, *Q&A on Joseph Kony and the Lord's Resistance Army* (2017).

²⁰ Fabius Okumu-Alya, *The regional dimensions of the war in northern Uganda* also available at <https://www.africaportal.org/dspace/articles/regional-dimensions-war-northern-uganda> (Accessed 7 April 2017).

²¹ Maina G & Ahere J *The never-ending pursuit of the Lord's Resistance Army; An analysis of the Regional Cooperative Initiative for the Elimination of the LRA* (2013) also available at <http://www.accord.org.za/publication/the-never-ending-pursuit-of-the-lord-s-resistance-army/> (Accessed 7 April 2017).

soldiers did not surrender. In yet another attempt, the government of Uganda offered amnesty to LRA rebels²² inclusive of their leader Joseph Kony, if they had totally surrendered their arms and ceased the rebellion.²³ This too did not bear any fruits as the LRA rebels dismissed the offer.²⁴

In January 2004, the government of Uganda referred the LRA situation to the International Criminal Court, optimistic that the LRA warlords would be brought to account for their alleged insurgences.²⁵ The Office of the Prosecutor instituted investigations and consequently, the Pre-Trial Chamber issued arrest warrants to the top leadership of the LRA, namely Joseph Kony, Vincent Otti and Dominic Ongwen.²⁶ Owing to the fact that the LRA leaders were at large for more than 10 years, their trial did not commence until Dominic Ongwen surrendered himself to the ICC in January 2015.²⁷ Trial against Dominic Ongwen for charges of war crimes and crimes against humanity commenced on 16 December 2016.²⁸ For Joseph Kony and Vincent Otti, trial shall not commence unless they are arrested or surrender to the ICC because the Court does not try people *in absentia*.²⁹

Formation of the International Crimes Division (ICD) of Uganda resulted from peace talks between the government of Uganda and the LRA that commenced in 2006.³⁰ These peace

²² Amnesty Act of Uganda, Cap 294 of the Laws of Uganda.

²³ Afako B Reconciliation and justice: 'Mato oput' and the Amnesty Act (2002) also available at <http://www.c-r.org/accord-article/reconciliation-and-justice-%E2%80%98mato-oput%E2%80%99-and-amnesty-act-2002> (Accessed 7 April 2017).

²⁴ Maina & Ahere (2013:3).

²⁵ Situation Referred to the ICC by the Government of Uganda, January 2004 available at <https://www.icc-cpi.int/uganda> (Accessed 7 April 2017). (Herein after referred to as, 'Situation referred to the ICC by the Government of Uganda, January 2004 (2017)').

²⁶ Situation Referred to the ICC by the Government of Uganda, January 2004 (2017).

²⁷ Situation Referred to the ICC by the Government of Uganda, January 2004 (2017).

²⁸ Situation Referred to the ICC by the Government of Uganda, January 2004 (2017).

²⁹ Situation Referred to the ICC by the Government of Uganda, January 2004 (2017).

³⁰ Ogoola J *Presentation on the Special Division of the High Court' Final Report on the Workshop on Accountability and Reconciliation: Juba Peace Talks* of 6-7 May (2008).

talks resulted from the need to bring an end to the decades of rage that engulfed areas of northern Uganda from the LRA brutality.³¹ In 2007, the government of Uganda and the Lord's Resistance Army agreed upon issues of accountability and reconciliation. By clause 2 of the agreement, the parties agreed to fasten means of accountability and reconciliation.³² The government of Uganda undertook to form a special court where perpetrators of international crimes in the conflict in northern Uganda would be brought to justice. Even though the leadership of the LRA never signed the final agreement, in 2008, the government of Uganda unilaterally established the International Crimes Division (formally known as war crimes division).³³ Today, the ICD is a division of the High Court that tries both international and domestic crimes.³⁴ This research paper refers to the ICD as a 'the court' or 'division' interchangeably.

The ICD derives mandate from the International Criminal Court Act of 2010, which empowers it to try and punish crimes against humanity, genocide, war crimes and crimes against peace.³⁵

Before any case is brought up for trial, thorough investigations must be carried out by the police and designated prosecutor from the office of the Director of Public Prosecutions (DPP).³⁶ After such investigations are carried out, a pre-trial conference is held, where a pre-trial judge determines according to the evidence brought before the court, whether trial of the case must proceed.³⁷ The division is composed of five judges with a quorum of one or

³¹ Kristof Titeca, *An LRA for everyone: How different actors frame the Lord's Resistance Army*.

³² Clause 2 of the Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army (2007).

³³ Asiiimwe T *Effecting Complementarity: Challenges and Opportunities: A Case Study of the International Crimes Division* (2012) 4.

³⁴ Asiiimwe T (2012) 4.

³⁵ Asiiimwe T (2012) 6.

³⁶ Article 120 of the Constitution of the Republic of Uganda, 1995.

³⁷ Regulation 6 of the Judicature (High Court) (International Crimes Division) Rules, 2016.

three judges per trial, as the head of division may deem fit.³⁸ Finally, appeals from the decisions of the ICD go to the Court of Appeal.³⁹

1.1 STATEMENT OF THE PROBLEM

Ideally, accurately executed domestic trial of international crimes is the most effective accountability mechanism because national courts would presumably have easier access to; witnesses, crime scenes victims and evidence generally⁴⁰. Besides, domestic prosecution of international crimes is a key factor in ensuring accountability.

Establishment of the ICD by the Government of Uganda marked a step towards fulfilment of the principle of complementarity.⁴¹ The Court has since taken on trial of the low ranking former LRA combatant, Thomas Kwoyelo⁴² and many other domestic criminal proceedings.

In March 2009, Thomas Kwoyelo, a colonel in the LRA was apprehended from the Democratic Republic of Congo, where he had suffered injuries from the shootings of the UPDF soldiers, that were fighting the LRA rebels. He then was flown to Uganda and was given treatment under detention.⁴³ The trial of Thomas Kwoyelo officially kicked off on 11 July 2011, in Gulu, a district which was most affected by the LRA insurgencies. Kwoyelo was charged under Uganda's 1964 Geneva Conventions Act (GCA) for crimes of taking hostage of civilians, wilful killing and extensive destruction of property in Amuru and Gulu districts.⁴⁴

³⁸ Rule 23 of the Judicature (High Court) (International Crimes Division) Rules, 2016.

³⁹ Rule 53 of the Judicature (High Court) (International Crimes Division) Rules, 2016.

⁴⁰ Burke-White WW 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 68.

⁴¹ Asiimwe T (2012) 4.

⁴² Human Rights Watch *Thomas Kwoyelo's trial before Uganda's International Crimes: Division Questions and Answers* (2012).

⁴³ Human Rights Watch *Thomas Kwoyelo's trial before Uganda's International Crimes: Division Questions and Answers* (2012).

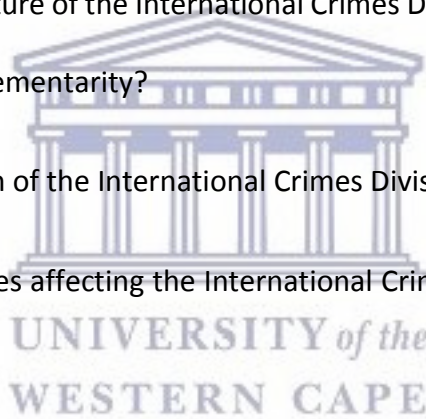
⁴⁴ Human Rights Watch *Thomas Kwoyelo's trial before Uganda's International Crimes: Division Questions and Answers* (2012).

Despite the presence of the International Criminal Court Act of 2010 that spells out the legal structure of the ICD, the division still faces several challenges that need to be addressed. Generally, challenges involve, lack of necessary funds, poor courtroom infrastructure, lack of qualified personnel, legislative inadequacies and partiality in selection of who to prosecute.⁴⁵ These challenges are responsible for the fact that today, the Kwoyelo trial is still pending. This research is intended to examine these challenges and address necessary recommendations.

1.2 RESEARCH QUESTIONS

This research paper answers the following questions;

1. What is the legal structure of the International Crimes Division and how does it favour the principle of complementarity?
2. What is the jurisdiction of the International Crimes Division?
3. What are the challenges affecting the International Crimes Division in prosecution of international crimes?



1.3 OBJECTIVES OF THE STUDY

This research aims at three objectives. First, to explore Uganda's commitment in implementation of the principle of complementarity. Second, to examine the legal structure of the International Crimes Division and thirdly, to explore the challenges the International Crimes Division encounters in fulfilment of its mandate.

⁴⁵ Human rights watch *Thomas Kwoyelo's trial before Uganda's International Crimes Division Questions and Answers* (2011).

1.4 LITERATURE REVIEW

Different scholars such as Werle⁴⁶ and Bassiouni⁴⁷ have comprehensively written about the principle of complementarity as expounded by the Rome Statute. Werle and Jessberger have vehemently underscored that it is the primary duty of the states parties to carry out domestic prosecution of international crimes, before the ICC can try such crimes.⁴⁸ However, the writers have acknowledged that although there has been an increase in domestic prosecution activities, domestic prosecution of international crimes is still practically secondary to prosecution by the ICC.⁴⁹

According to the writers, domestic prosecutions bestow jurisdiction to both the state where the crimes were committed and to third states through universal jurisdiction.⁵⁰ The writers also pointed out that although countries previously tried international crimes through ordinary crimes such as murder or rape among others, today, they appreciate the specifications of international crimes and have enacted laws to enable them try international crimes as provided for by international statutes.⁵¹ The notion of universal jurisdiction has since been witnessed in South Africa and Argentina. South Africa engaged in investigations over alleged crimes of torture that occurred in Zimbabwe during the elections 2008 while the Argentinian court issued arrest warrants to Spanish police officials for allegedly having committed crimes against humanity.⁵²

⁴⁶ Werle G & Jessberger F (2014) Marg Nos 344-345.

⁴⁷ Bassiouni MC (2013) 636.

⁴⁸ Werle G & Jessberger F (2014) Marg Nos 344-345.

⁴⁹ Werle G & Jessberger F (2014) Marg Nos 345.

⁵⁰ Werle G & Jessberger F (2014) Marg Nos 346.

⁵¹ Werle G & Jessberger F (2014) Marg Nos 346.

⁵² Werle G & Jessberger F (2014) Marg Nos 347.

Bassiouni is also of the same view that national prosecution of international crimes takes precedence over the ICC.⁵³ The author asserts that national legal systems are required to implement international laws into their domestic legislations so as to strengthen national judicial systems. In my opinion, Uganda has to some extent implemented the necessary international laws to enable it try international crimes domestically.

However, there are still challenges that hover over the judicial space curtailing fulfilment of international obligations. Even though there is enough literature on complementarity in general, there is meagre body of literature on the Ugandan attempt to put complementarity in practice. The existing literature specifically addressing the practice of complementarity in the International Crimes Division of Uganda and the challenges the division faces is still not extensive and unsolidified.

Africa Centre for Open Governance has written about some of the different domestic and hybrid courts that have participated in prosecution of international crimes including International Crimes Division, the Bosnia and Herzegovina's War Crimes Chamber, the Extra-Ordinary Chambers in the Courts of Cambodia and the Special Court of Sierra Leon.⁵⁴ In a paper giving lessons to Kenya, which intended to establish its own domestic mechanism to try 2007/2008 post-election violence perpetrators, the author indicated that a totally domestic court may face independence problems which may not be faced by hybrid courts.⁵⁵ The writer opined that due to legislative deficiencies, the judicial officers of the ICD are prone to political interference.⁵⁶

⁵³ Bassiouni MC (2013) 636.

⁵⁴ Kenyans for peace with Justice & Truth and Africa Centre for Open Governance *Domestic Prosecution of International Crimes: Lessons for Kenya* (2015) 7-23. (Herein after referred to as Domestic Prosecution of International Crimes: Lessons for Kenya).

⁵⁵ Domestic Prosecution of International Crimes: Lessons for Kenya (2015) 5.

⁵⁶ Domestic Prosecution of International Crimes: Lessons for Kenya (2015) 5.

On the other hand, Tadeo Asiimwe, the former registrar of the ICD, has written briefly about the legal structure and jurisdiction of the ICD.⁵⁷ Tadeo also indicated that the best way to meet international obligations would be through positive complementarity. This is where domestic mechanisms such as the ICD would receive assistance from the ICC and other able states parties.⁵⁸

Sharon Nakandha has analysed some of the realities of the practice of complementarity by the ICD.⁵⁹ The writer argued although establishment of the ICD was a step towards complementarity, the trial of Thomas Kwoyelo will grade its efficiency in trying international crimes.⁶⁰ The scholar asserts that the delays in the Kwoyelo trial owe to the lack of funding, poor infrastructure and lack of trained personnel. The researcher can therefore ascertain that the literature on the complementarity in practice at the ICD is still not comprehensive

1.5 RESEARCH METHODOLOGY AND SCOPE

The researcher adopted a desktop research methodology. This involved both primary and secondary sources. Primary sources include; statutes, international conventions, judicial precedents and laws of Uganda. Secondary sources will include; books, chapters in books, journal articles and internet sources.

This study is geographically limited to Uganda as a contracting party to the ICC. The study examines the background to the formation of the ICD, legal structure, role and challenges of the ICD in prosecuting international crimes.

⁵⁷ Asiimwe T (2012) 3.

⁵⁸ Asiimwe T (2012) 3.

⁵⁹ Nakandha S *The Kwoyelo Case at the ICD: The Realities of Complementarity in Practice* (2015) 1.

⁶⁰ Nakandha S (2015) 1.

1.6 SIGNIFICANCE OF THE STUDY

The intention of this study is to attempt to explore the legal framework of the International Crimes Division and its role in the practice of complementarity. Although the establishment of the division was a step towards fulfilling international obligations of primacy in prosecuting international crimes, the court today is faced with several challenges that hinder performance of its mandate. Challenges such as legislative deficiencies to mention but a few are so glaring, yet the research in the area is still fluid. This research is, therefore, intended to contribute to the study of domestic prosecution of international crimes and to address the challenges of the International Crimes Division.

1.7 CHAPTER OUTLINE

The research paper is laid out in five chapters. Chapter one gives a general introduction, research question, objectives of the study, scope of the study and research methodology.

Chapter two delves into the relationship between Uganda and the ICC. This is by examining the steps Uganda has taken to implement the Rome Statute. In this chapter, the study also focuses on the application of international law in Uganda and sources of international criminal law in Uganda.

Chapter three looks into the Legal Structure of the ICD. This entails an introductory part that shows the background of the ICD. The study thoroughly examines the law establishing and applicable to the Division, the territorial jurisdiction of the Division, the procedure of trial of serious crimes before the division, the rights of victims and witnesses, issues of reparations and finally, the adjudication of international crimes before the court.

Chapter four looks into the challenges faced by the ICD in domestic prosecution of international crimes. These challenges range from reparation issues, witness and victim protection, the physical structure of the court room, protection of the judges and prosecutors, retroactive application of the laws, financial constraints of the court, capacity and legislative deficiencies.

Finally, Chapter five gives the summary of the research finding, conclusion and recommendations.



CHAPTER TWO

IMPLEMENTATION OF INTERNATIONAL CRIMINAL LAW IN UGANDA

2. INTRODUCTORY REMARKS

The establishment and building of the International Criminal Court (ICC) has always been an important element of the growth of the international criminal justice system. More important going forward, is the way in which national systems are building international criminal justice into their domestic laws. Today, states in the international community have incorporated international crimes into their penal codes and initiated domestic trials for international crimes.

This chapter deals with the implementation of international criminal law by Uganda as well as sources of international criminal law in Uganda. This will help lay a legal foundation for the arguments in the following chapter.

2.1 DOMESTICATION OR IMPLEMENTATION OF TREATIES

Implementation of treaties entail a practice of bringing laws into force.¹ Werle, in introducing the concept of implementation indicates that, as states ratified the Rome Statute, many of them reviewed their domestic laws to evaluate the need for adaptation.² Resultantly, many of the countries either enacted new laws or amended the existing laws to accommodate the crimes incorporated by the Rome Statute and the international obligations therein.³ Shihata and Ibrahim extend the definition of implementation stating that implementation is a process

¹ Black's Law Dictionary (2003) 442.

² Werle G (2005) Mag No 216.

³ Werle G (2005) Mag No 216.

of practically applying international obligations.⁴ This is through enactment of laws, regulations and creation of domestic institutions to enforce those laws.⁵

Fundamentally, implementation occurs after ratification of a treaty. Implementation is a broad word, which not only extends to enactment of international law provisions into national laws, but also covers establishment of institutions such as courts and investigatory authorities to ensure that international commitments are enforced. This research focuses on how Uganda has incorporated provisions of the Rome Statute in particular, and the practice of complementarity by the International Crimes Division.

2.1.1 Purpose of Implementation of Treaties

Uganda's efforts to implement international criminal law into domestic criminal law are based on the fact that domestic prosecution of international crimes is a backbone to furtherance of the international criminal justice system. Being party to the Rome Statute, the Ugandan judicial system is primarily obliged to try and punish international crimes set out in the Rome Statute. This could only be done through implementation of international treaties.

The exercise of jurisdiction by the ICC is primarily dependent upon the principle of complementarity. The first mention of the principle of complementarity is made in the Preamble to the Rome Statute, which states as follows:

*'The State Parties to this Statute, (...) Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions...'*⁶

Further, Article 1 of the Rome statute provides:

⁴ Shihata, Ibrahim F. I *Implementation, Enforcement, and Compliance with International Agreements- Practical Suggestions in Light of the World Bank's Experience* (1997) 392.

⁵ Shihata & Ibrahim (1997:392).

⁶ The Preamble to the Rome Statute.

‘An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.’⁷

By virtue of the above provisions, it is apparent that the ICC was not established to replace national courts, but rather to complement them. In effect, national courts take precedence as a rule, unless the state party is not unable or willing to genuinely prosecute and investigate international crimes.⁸

On the other hand, Werle has pointed out that although ICC jurisdiction is dependent upon the principle of complementarity, the Rome Statute does not prescribe any obligation upon its member states to implement the Statute’s substantive laws into their domestic laws.⁹ This differs from other international treaties such as the Geneva Conventions, which specifically provide that parties must undertake to enact legislations to enforce provisions of the treaties.¹⁰ Be it as it may, Schabas opined that even though the ICC does not oblige member states to implement provisions of the Rome Statute into their domestic laws, it encourages them to do so.¹¹ This is implied from the provision of Article 17, which provides for the threshold for ICC’s involvement in the prosecution of international crimes that are committed within the jurisdiction of a state party. The provision provides that a case will fall under ICC jurisdiction where it is determined that a state is unwilling or unable to prosecute.¹² For a

⁷ Article 1 of the Rome Statute.

⁸ Article 17 of the Rome Statute.

⁹ Werle G (2005) Marg No 218.

¹⁰ Article 146 of Geneva Convention IV.

¹¹ Schabas WA *Human Rights Law Journal* (1999) 160.

¹² Article 17 Rome Statute.

country to be able to prosecute, they definitely must have enabling legislation in place and independent infrastructure. However, the ICC obliges states parties to enact laws that enable cooperation and mutual legal assistance with the ICC.¹³ Cooperation and assistance may be through, 'arresting and surrendering suspects,' 'enforcing the orders and judgments of the ICC,' including seizing and forfeiting proceeds of crime, protecting victims and witnesses and 'allowing the Prosecutor of the ICC to conduct investigations on the territory of the state.'¹⁴

2.1.2 Options for Implementation of International Criminal Law Treaties

States parties to international criminal law treaties have a vast set of options that can be adopted in implementation of the substantive international criminal laws. Werle has extensively identified the available options as follows:¹⁵

A country may choose to completely incorporate the provisions of the Rome Statute into its national laws. This could be by direct application, where customary international law directly applies within the jurisdiction of the state without necessarily enacting a legislation.¹⁶ This can best be explained by Section 232 of the South African Constitution that provides for the application of international customary law.¹⁷

Complete incorporation may also be done by reference to its relevant provisions. Here, domestic laws are enacted in a way that they refer to provisions of the Rome Statute. The best example is the International Crimes and International Criminal Court Act of New Zealand

¹³ Article 86 Rome Statute.

¹⁴ Human Rights Watch *Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute* (2001) 9.

¹⁵ Werle G (2005) Marg No 220.

¹⁶ Milton BJ *Principles of criminal Law* 2nd ed (1999) 28

¹⁷ Section 232 of the South African Constitution.

that refers to Article 6 of the Rome Statute in reference to the crime of genocide.¹⁸ Referencing may however not be applicable in countries where written laws are required to determine individual culpability.

Complete incorporation of international criminal laws may finally be achieved by copying. This would be through stating all the crimes verbatim as they appear in the Rome Statute. Werle opines that copying is only available to states whose constitutions do not expressly bar incorporation of unaltered provisions of international laws.¹⁹

The second option available for incorporation of international criminal law is by non-incorporation. Here, countries choose not to incorporate international law provisions at all, but rather modify their national laws and apply ordinary criminal law even to international crimes. With this option, countries were able to ratify the Rome Statute but did not go ahead to change their domestic laws.²⁰

The third option is by modified incorporation. With this option, international norms are adopted with modification. This could involve adoption of the law in principle. The fourth option is combinations. With combinations, a state may choose to combine any of the options mentioned above in its domestic incorporation.²¹

¹⁸ Section 9 International Crimes and International Criminal Court Act 2000 of New Zealand.

¹⁹ Werle G ((2005) Marg No 224.

²⁰ Werle G (2009) Marg No 319-321.

²¹ Werle G (2005) Marg No 229.

2.2 IMPLEMENTATION OF THE ROME STATUTE BY UGANDA:-MODE OF DOMESTICATION

Uganda is a dualist state.²² This means that, after ratification international law treaties, they must be incorporated into domestic laws by enacting Acts of parliament, in order for them to have legal effect and force in Uganda. ²³Further, for laws to domestically apply in Uganda, they must be written. For this reason, applicability of customary international law has faced challenges in Uganda as some times it is not written.²⁴

Considering the Uganda's Geneva Conventions Act and the International Criminal Court Act, it is clear that Uganda copied the provisions on the grave breaches as per the Geneva Conventions²⁵ and the international crimes as provided for by the Rome Statute into their domestic laws.²⁶ It is therefore safe to state that in codification of specific legislations, Uganda implemented international criminal law treaties by complete incorporation.

2.3 SOURCES OF INTERNATIONAL CRIMINAL LAW AND PROCEDURE IN UGANDA

International criminal law and procedure can be found in both written and unwritten laws in Uganda. Sources of written laws include; the Constitution of the Republic of Uganda, the International Criminal Court Act of 2010, the Geneva Conventions Act and the Penal Code Act. For the unwritten laws, we can consider common law and doctrines of equity and customary international law as they are applicable in the courts of Uganda.

²² Dualist states are those that require provisions of a treaty to be domesticated by enacting an Act. Monist states on the other had do not need to enact domestic laws to give effect to international treaties. The treaties become laws upon ratification. See Cryer R *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 117.

²³ Asiimwe T (2012) 6 and Article 79 of the 1995 Constitution of Uganda.

²⁴ Asiimwe T (2012) 6.

²⁵ Geneva Conventions Act 1964, Cap. 363, Laws of Uganda (2000).

²⁶ The International Criminal Court Act, 2010 Act No.11 of 2010.

2.3.1 The Constitution of Uganda 1995

Administratively, Uganda is a constitutional supremacy. The Constitution of Uganda is the grand norm and the supreme law of the land.²⁷ Any law or custom that is inconsistent with the constitution is declared null and void to the extent of the inconsistency.²⁸

The constitution is important in this study because first, it empowers the president of Uganda or any person he assigns to negotiate international treaties on behalf of Ugandans.²⁹ Such treaties have often involved international criminal law treaties such as the Rome Statute and the Geneva Conventions. Further, the Constitution empowers the parliament of Uganda to enact laws which include criminal laws from time to time.³⁰ As noted above, mere ratification of international treaties does not make them applicable in Uganda. The ratification must be followed with enactment of an Act of parliament for an international law or treaty to be in force, for example, the International Criminal Court Act No.11 of 2010 gave efficacy to the Rome Statute.

The constitution of Uganda also provides for substantive laws pertaining to the rights of an accused person and these are the guiding principles upon which the ICD operates.³¹ Such rights include the right to a fair trial, and right to legal representation, as will be discussed in chapter three.

²⁷ Article 2 of the Constitution of the Republic of Uganda 1995.

²⁸ Article 2(2) of the Constitution of the Republic of Uganda 1995.

²⁹ Article 123 of the Constitution of the republic of Uganda 1995.

³⁰ Article 79 of the Constitution of the Republic of Uganda 1995.

³¹ Article 28 of the Constitution of the Republic of Uganda 1995.

2.3.2 The International Criminal Court Act of Uganda

In June 2002, Uganda ratified the Rome statute. On 25 June 2010, the International Criminal Court Act No 11 of 2010 (ICC Act), was enacted. This Act gave efficacy to the Rome Statute and made a complete incorporation of the Rome Statute. This Act is important to international criminal law in Uganda and to this research because it bestowed the High Court of the Republic of Uganda with the power to try war crimes, crimes against humanity and genocide.³² However, even though most of the conflicts that led to the establishment of the ICC were committed before 2002, the ICC Act only covers crimes that were committed after 2002.³³

2.3.3 The Geneva Conventions Act of Uganda

Uganda incorporated the Geneva Conventions into domestic law in 1964. Just as the ICC Act, the Geneva Conventions Act also gave Ugandan Courts Jurisdiction to try war crimes and grave breaches in international armed conflicts.³⁴ Uganda also domesticated the Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).³⁵ Currently, Kwoyelo is being charged for crimes he allegedly committed between 1992 and 2005. Since the ICC Act, domesticating the Rome Statute was enacted in 2010, Kwoyelo was charged under the Geneva conventions Act of 1964 for grave breaches among other crimes.³⁶

³² Open Society Justice Foundations *Putting Complementarity into Practice, Domestic Justice for International Crimes in DRC, Uganda and Kenya by the Open Society Justice Initiative* (2011) 65.

³³ Asiimwe T (2012) 6.

³⁴ Geneva Conventions Act of 1964.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

³⁶ Namwase S *The Principle of Legality and the Prosecution of International Crimes in Domestic Courts: Lessons from Uganda* (2011) 25.

2.3.4 Penal Code Act

The Penal Code Act of Uganda (hereafter 'Penal Code') is the domestic law regulating criminal law in Uganda. The Act was enacted in 1956 and prescribes acts and omissions that amount to crimes in Uganda. The act lays down general principles of criminal law, which include; the different modes of participation in crimes, defences available to an accused person and penalties where one is found guilty. The ICD is empowered to try and hear cases of both international crimes and domestic crimes. Where crimes committed by an accused do not meet the threshold of an international crime, then domestic criminal law from the penal code will apply.³⁷ More so, given the backlog of cases within the judiciary of Uganda, the ICD also takes the role of hearing ordinary crimes proscribed by the Penal code Act.

2.4 CHAPTER SUMMARY

In conclusion, Uganda has taken steps to implement international criminal law treaties into its domestic laws. It is the strength of the above mentioned laws that determines the quality of domestic prosecution of international crimes. The sources of international criminal law in Uganda discussed above are not exclusive but are some of the most important and specific laws on the subject.

³⁷ Namwase S (2011) 23.

CHAPTER THREE

THE LEGAL STRUCTURE OF THE INTERNATIONAL CRIMES DIVISION OF UGANDA

3. INTRODUCTORY REMARKS

The complementarity regime of the ICC assigns national jurisdictions with the primary responsibility of investigating and prosecuting war crimes, crimes against humanity, and genocide.¹ This is drawn from the Preamble of the Rome Statute which provides that states have a duty to exercise primary criminal jurisdiction over those responsible for international crimes.² The system of complementarity also arrays admissibility tests before a case can fall within ICC jurisdiction. As seen in chapter 2, the ICC will only have jurisdiction where a state party is unable or unwilling to genuinely investigate and prosecute war crimes, crimes against humanity, and genocide.³ To fulfil the government's commitment under the agreement on accountability and reconciliation (AOAR) and to satisfy the international obligation of complementarity, in 2008, the government of Uganda (GoU) established the International Crimes Division (ICD), herein after referred to as court or division.⁴

The purpose of this chapter is to present a background to the process of creation of the ICD, the legal structure of the Division, the progress in prosecution of international crimes, issues of victim protection and reparations.

¹ Nouwen SMH *Complementarity in the Line of Fire: the Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013) 40.

² The Preamble to the Rome Statute.

³ Article 17 of the Rome Statute.

⁴ Namwase S (2011) 23.

BACKGROUND TO THE CREATION OF THE ICD:-RELATIONSHIP BETWEEN UGANDA AND THE ICC

3.1 Referral of the conflict in Northern Uganda to the ICC

Following decades of conflict in Northern Uganda at the hand of the LRA, in December 2003, a GoU official flew to The Hague with a 27 page document in his briefcase containing the very first self-referral to the ICC.⁵ The Office of the Prosecutor (OTP) welcomed this self-referral with grace and in a press release, the then Chief Prosecutor, Luis Moreno-Ocampo stated as follows:

'The Republic of Uganda has indicated that the ICC is the most appropriate and effective forum for the investigation and prosecution for those bearing the greatest responsibility for the crimes within the referred situation.... . Accordingly the Ugandan authorities have not and do not intend to conduct national proceedings, preferring instead that the cases be dealt with by the ICC. With this in mind, I have determined that this involves cases that would be administered under Article 17 of the Statute.'

This self-referral for all intents and purposes concreted the relationship between Uganda and the ICC. Further, it led to different theories from authors and scholars. Given Uganda's political environment at the time, Nouwen referred to the self-referral as 'a wedding ring' and the relationship between Uganda and the ICC as 'an arranged marriage.'⁶ First, the author stated that three months prior to filing the referral with the ICC, the OTP had announced its intentions to investigate the conflicts in Northern Uganda and the Democratic Republic of Congo (DRC).⁷ Having speculated that the Uganda People's Defence Force (UPDF), that was

⁵ Nouwen SMH (2013) 111.

⁶ Nouwen SMH (2013) 113.

⁷ Nouwen SMH (2013:111) and ICC-OTP 2003.

and still is in the command of the President of Uganda, Yoweri Kaguta Museveni, would be investigated for its responsibility in the atrocities committed in the Northern Uganda conflict, the GoU took advantage of the situation by filing the referral titled 'situation concerning the Lord's Resistance Army' 'so as to obstruct ICC's *proprio motu* jurisdiction.⁸ Nouwen substantiated her argument by stating that the self-referral letter by GoU was silent on the possible crimes committed by the UPDF. This in turn agitated Non-governmental bodies (NGOs), which quickly advocated that the OTP should also investigate the crimes that the UPDF may have committed as they counter fought UPDF.⁹ Indeed, the OTP responded to the NGOs' demand by changing the name of the situation from 'situation concerning the Lord's Resistance Army' to 'the situation in Northern Uganda.' This gave hope that the UPDF would still be investigated and like Nouwen states, it brought cracks in the Uganda- ICC 'arranged marriage.'¹⁰

To put this objectively, In other words, the GoU could not legally preclude the crimes committed by the Ugandan army (UPDF). This is because, referrals apply to the entire situation/conflict not just a few selected parties to the conflict. Thus, the OPT was legally obliged to make it a situation of Northern Uganda.

To some extent, the author of this paper concurs with Nouwen in as far as the relationship between the GoU and the ICC was what she referred to as a 'marriage of convenience.' This is premised on the notion that, after so many years of unrewarding struggle and aborted peace arrangements, the GoU proved its inability to vanquish or reach a peace pact with the LRA on its own.

⁸ Nouwen SMH (2013) 111-114.

⁹ Nouwen SMH (2013) 111-114.

¹⁰ Nouwen SMH (2013) 111-115.

As noted earlier in chapter one, the GoU tried to promise the members of rebel group blanket amnesty if they surrendered, unfortunately this yielded no results.¹¹ The GoU also sent the UPDF to counter fight, weaken and conquer the rebel group but this also failed.¹² In yet another attempt, the GoU engaged in peace talks with the LRA leaders but these were also fruitless. To accelerate this misfortune, corruption and dwindling UPDF operations together with their adverse effects to human rights caused disrepute to the GoU. In fact, besides riots on the streets of Kampala from the members of the opposition parties (opposing the National Resistance Movement (NRM) ruling party), international donors who funded almost half of Uganda's budget too rebuked the inhumane actions of the GoU and the unresolved conflict. Finally, the United Nations (UN) categorised the LRA conflict as 'the world's biggest neglected crisis.'¹³ The referral of the LRA conflict by the GoU to the ICC was therefore a way of cooling the mounting pressure both domestically and internationally.

The self-referral was also convenient to the ICC. Having been the first situation before the then newly established court. Authors like Cryer opined that there was need for ICC to show its usefulness, which would in turn appeal to states that were not party to the Rome Statute to join the fight against a culture of impunity.¹⁴ In the same vein, Akhavan states that the self-referral was enthusiastically received by the OTP because there was need to manifest confidence and to validate the newly established ICC.¹⁵ Nouwen also stated that the ICC stood to benefit from Uganda's referral because since it was a self-referral, sentiments that the ICC was interfering with a state party's sovereignty were avoided, which perhaps would not have

¹¹ Uganda's Amnesty Act, Cap 294 Laws of Uganda (2000).

¹² Open Society Justice Initiative Foundations *Putting Complementarity into Practice, Domestic Justice for International Crimes in DRC Uganda and Kenya* (2011) 65.

¹³ Northern Uganda 'world's biggest neglected crisis', available at <https://www.theguardian.com/world/2004/oct/22/2> (Accessed 16 July 2017).

¹⁴ Cryer R *The International Criminal Court and Its Relationship with Non-Party States* (2009) 121.

¹⁵ Akhavan P (2005) 403.

been the case, if the prosecutor of the ICC had instituted *proprio motu* investigations.¹⁶ It was also speculated that the ICC would stand to benefit from Uganda's full cooperation hence making investigation process smooth.

The referral was vital because at the time, Uganda was a deeply divided nation in need of impartial judicial intervention. The perceived independence and impartiality of the ICC by the victims and the people of Uganda would help avoid sentiments that the post conflict prosecution of the LRA leaders was a marred with politics and/or demonstration of a victor's justice.¹⁷ The resort to the ICC as an independent third party was the right thing to do.

Further, at the time, security for domestic trials of the LRA leadership was not guaranteed. Referral of the situation to the ICC prevented further violence. Payam illustrates that in Liberia, the transfer of Charles Taylor's trial to The Hague from the Special Court for Sierra Leon (SCSL) that was located in Freetown was to prevent reactivation of armed conflict, which was eminent.¹⁸ In fact, the Security Council resolution authorising the transfer noted that the reason for the transfer was insecurity.¹⁹ Because of unforeseen circumstances such as security, the SCSL had to incur even more expenses on renting ICC facilities for the Charles Taylor's trial.²⁰ Therefore, the ICC was a good alternative to domestic prosecution of the LRA leaders in Uganda.

¹⁶ Nouwen SMH (2013) 111-118.

¹⁷ Lomo Z & Hovi L *Behind the Violence: The War in Northern Uganda* (2004) find at <http://www.qsdrc.org/document-library/behind-the-violence-the-war-in-northern-uganda/> (Accessed 10 July 2017).

¹⁸ Carsten S & Mohamed ME *International Criminal Court and Complementarity: From Theory to Practice* Vol 1 (2011) 300.

¹⁹ Carsten S & Mohamed ME (2011) 300.

²⁰ *Prosecutor v Charles Taylor, Case No SCSL-03-1-PT, Decision on Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague* 23 June 2006.

More so, at the time of the referral, Uganda's budget heavily depended on donor funds. The author for this paper opines that the state was unable to afford such costly and complex trials yet the victims of the LRA-UPDF brutality needed to see justice done. As we shall see in subsequent chapters, one of the challenges the ICD is facing today and which has led to the delay of the Kwoyelo trial is financial constraints and complexity of the trial to inexperienced staff. With such limited resources for exorbitant trial costs, a referral to the ICC was the best option for the government of Uganda.

3.1.1 Results of the OTP's Investigations

Whatever the reasons for the referral were, in July 2004, the OTP nonetheless instituted investigations into the situation referred by the government of Uganda. The Pre-Trial Chamber consequently issued arrest warrants to the top leadership of the LRA, namely Joseph Kony, Vincent Otti and Dominic Ongwen.²¹ Owing to the fact that the LRA leaders were at large for more than 10 years, their trial did not commence until Dominic Ongwen surrendered himself to the ICC in January 2015.²² Trial against Dominic Ongwen for charges of war crimes and crimes against humanity commenced on 16 December 2016.²³ Vincent Otti has since died, while for Joseph Kony, trial shall not commence unless they are arrested or surrender to the ICC because the Court does not try people *in absentia*.²⁴

²¹ Situation Referred to the ICC by the Government of Uganda, January 2004 also available at <https://www.icc-cpi.int/uganda> (Accessed 7 April 2017).

²² Situation Referred to the ICC by the Government of Uganda, January 2004 available at <https://www.icc-cpi.int/uganda> (Accessed 7 April 2017).

²³ Situation Referred to the ICC by the Government of Uganda, January 2004.

²⁴ Situation Referred to the ICC by the Government of Uganda, January 2004.

3.1.2 The Quest for Peace after the ICC Referral

The self-referral to the ICC did not stop the GoU from exploring further domestic solutions to the long standing LRA insurgencies. The pendency of the ICC investigations notwithstanding, the UPDF made yet another unsuccessful mission to defeat the LRA. In 2004, the GoU also called for fresh peace talks with the LRA.²⁵ At the time, the ICC had not yet issued arrest warrants but the leadership of the LRA was in fear for their lives and dreaded the ICC.²⁶ This to some extent led to their cooperation. In the same vein, President Museveni made yet another offer for amnesty to the LRA leadership.²⁷ By this, the President thought that he would withdraw the referral from the ICC with the same ease with which he referred the situation. Unfortunately, this was not the case.²⁸ Consequently the LRA leadership absconded the talks in dissatisfaction which led them to crumble.

Under the auspices of the Government of South Sudan (GoSS), the GoU did not give up the quest for peace. In 2006, new peace talks were instituted in Juba, South Sudan. Unlike the previous talks, this time the GoU involved an international mediator. The GoU and the LRA this time agreed upon a number of things.²⁹ These ranged from ending the violence to establishment of judicial institutions to enhance accountability. At the time, the OTP had concluded investigations into the conflict in the Northern Uganda and had issued and publicised arrest warrants for the top leadership of the LRA. Like Mwenda suggests, the arrest

²⁵ Nouwen SMH (2013) 129.

²⁶ Schomerus MA *Terrorist is not a Person Like me: An Interview with Joseph Kony*. (2010) 96, available at https://www.researchgate.net/publication/45500692_A_terrorist_is_not_a_person_like_me_an_interview_with_Joseph_Kony (Accessed 19 July 2017).

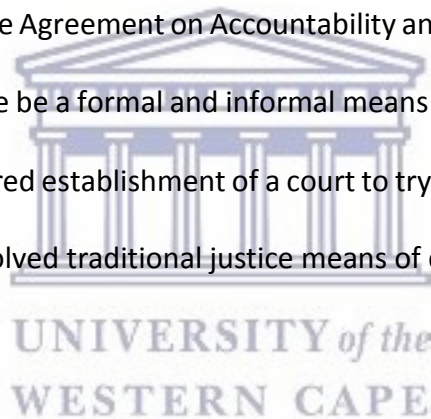
²⁷ Nouwen SMH (2013) 129.

²⁸ Nouwen SMH (2013) 129.

²⁹ Atkinson R Uganda peace talks - The Realists in Juba (2010). Available at <http://www.sudantribune.com/spip.php?article17685> (Accessed 19 July 2017).

warrants catalysed the LRA cooperation in the 2006 peace talks.³⁰ With the warrants hovering over the top leadership of the LRA, they had to agree to a cease fire and establishment of a domestic court where they hoped to be tried instead of taking them to the ICC. Nouwen also opines that at the time, the LRA had lost military support hence had cooperate with during peace talks.³¹

Significantly, the Juba peace talks yielded a number of agreements between the GoU and the LRA. Just after a month, the Cessation of Hostilities Agreement was signed.³² By this agreement peace and security was restored in Uganda and South Sudan. Eventually, after the GoU had now realised that the withdrawal of the referral from the ICC was a mission impossible, negotiations on the Agreement on Accountability and Reconciliation commenced, where it was agreed that there be a formal and informal means of accountability. The formal means of accountability required establishment of a court to try gross human rights offenders while the informal means involved traditional justice means of dispute resolution.



³⁰ Mwenda A 'Personalising Power in Uganda' (2007) 18 *Journal of Democracy* 23.

³¹ Nouwen SMH (2013) 130.

³² Agreement on the Cessation of Hostilities between the Government of Uganda and the Lord's Resistance Army 2006.

3.2 CREATION OF THE INTERNATIONAL CRIMES DIVISION

As seen earlier, the Juba peace talks resulted into a number of agreements including the Agreement on Accountability and Reconciliation and its annexures (A&R Accords). These provided for establishment of the ICD. The summation of all these agreements constituted the Final Peace Agreement (FPA).³³ For the implementation of the agreements to take place, both the GoU and the LRA had to append signatures to the FPA.³⁴ After all was said and done, the war lord, Joseph Kony of the LRA refused to sign the FPA.³⁵ This was by all intents and mind boggling because for once, the nationals and international community had envisaged that Uganda was so close to finding a lasting solution to the decades of human rights infringement occasioned by the LRA-UPDF war.

Nouwen indicates that Kony dreaded the effects of signing the FPA for his own security. He also had no faith that the GoU would put him off the ICC leash.³⁶ In his own speech, Kony indicated that even after Liberia's Charles Taylor turned himself in, he lost his grant for asylum in Nigeria, since he was nevertheless arraigned and tried before the SCSL.³⁷ On the other hand, Vincent Otti, Kony's deputy in command of the LRA also argued that Thomas Lubanga of DRC was also arrested and tried by the ICC, notwithstanding the fact that he had discussed a peace deal.³⁸ It should be remembered that at the time, both Kony and Vincent Otti (now

³³ Schomerus G (2012) 5.

³⁴ Schomerus G (2012) 6.

³⁵ Mukasa H & Baguma R *Kony Fails to Show Up for Peace Signing* (2008) available at http://www.newvision.co.ug/new_vision/news/1175982/kony-fails-peace-signing (Accessed 24 July 2017).

³⁶ Nouwen SMH (2013) 133.

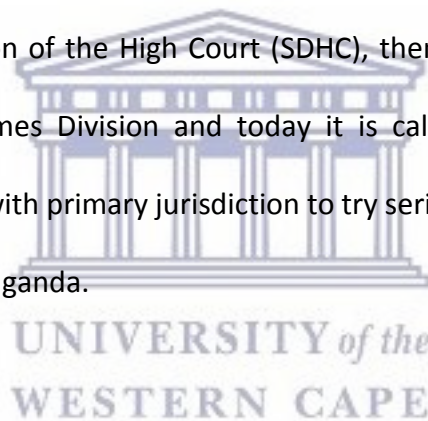
³⁷ Schomerus G (2012) 18.

³⁸ Mukasa H & Baguma R *Kony Fails to Show Up for Peace Signing* (2008) find at http://www.newvision.co.ug/new_vision/news/1175982/kony-fails-peace-signing (Accessed 24 July 2017).

deceased) had arrest warrants issued against them by the ICC. They therefore did not want to fall prey to the international community's *modus operandi*.

Like Ayugi and Eichstaedt state, it is likely that the peace process was to some extent adversely affected by the referral and ICC involvement.³⁹ On the other hand, the writer of this paper opines that if the ICC investigations and subsequent arrest warrants were not in place, the LRA leadership would not have even attempted to be present for the Juba Peace talks.

Nevertheless, in 2008, the GoU decided to establish the ICD regardless of whether the LRA had signed the FPA or not.⁴⁰ Perhaps, the most outstanding accomplishment of the Juba Peace talks was the creation of the ICD. Reference to the ICD was first made in the A&R Accords as the Special Division of the High Court (SDHC), then was referred to as the War Crimes Court, then War Crimes Division and today it is called the International Crimes Division.⁴¹ The ICD is a court with primary jurisdiction to try serious crimes in Uganda and is a division of the High Court of Uganda.



³⁹ Ayugi C & Eichstaedt P *International Criminal Court Calls for End to Lord's Resistance Army Aid; Institute for War & Peace Reporting* (2008).

⁴⁰ Asiiimwe T (2010) 5.

⁴¹ Annexure, clause 7 of the A&R Accords referred to the ICD as the Special Division of the High Court; Administrative Circular No.1 of 2008, Clause 2 referred to the ICD as the War Crimes Court; the international crimes bill of 2009 referred to it as the War crimes Division; today the High Court (International Crimes Division) Practice Directions of 2011 refer to the court as the International Crimes Division.

3.3 THE LEGAL STRUCTURE OF THE ICD

The then Principal Judge officially established the ICD through Legal Notice No 10 of 2011.⁴²

The ICD is a permanent court/ division of the High Court. It was also created in the spirit of the Constitution of the Republic of Uganda where it is provided that judicial power shall be exercised by courts of judicature such as the High Court, Court of Appeal, Constitutional Court, Supreme Court and any other subordinate courts established by parliament.⁴³

3.3.1 Jurisdiction of the ICD

The ICD is a division of the High Court of the Republic of Uganda specially established to try international crimes and to carry out domestic trials. Being a division of the High Court, the ICD has original and unlimited jurisdiction of all matters conferred to it by law.⁴⁴ The ICD has the jurisdiction to try and punish crimes including genocide, war crimes, crimes against humanity, human trafficking, piracy, terrorism and other international crimes under the Geneva Conventions Act. The division also has the mandate to try domestic crimes provided under the Penal Code Act.⁴⁵ Prior to the establishment of the division, the High Court did not have the jurisdiction to try the core crimes as they were not codified in Uganda's domestic laws.

⁴² The International Crimes Division was established by Hon. Justice James Ogoola, a Principal Judge of the High Court, as he then was, pursuant to Article 141 of the constitution of the Republic of Uganda 1995.

⁴³ Article 129 of the Constitution of the Republic of Uganda 1995.

⁴⁴ Article 139 of the Constitution of the Republic of Uganda 1995. Unlimited Jurisdiction of the High Court of Uganda means the court can try any crime, regardless of penalty.

⁴⁵ Section 6 of the High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011.

According to the Penal Code Act, the territorial jurisdiction of courts is limited within the boundaries of Uganda. ⁴⁶ However, this is not the case for the ICD, since the Geneva Conventions Act extends jurisdiction outside the boundaries of Uganda to also include non-citizens of Uganda that aid, abet or procure the commission of grave breaches.⁴⁷ It is also of much importance to recall that international crimes affect the entire international community. That being the case, countries, Uganda inclusive are empowered to prosecute and punish such heinous crimes, without regard to who and where the crimes were committed. ⁴⁸ With reference to the Princeton principles on universal jurisdiction, Werle rightfully asserts that nations within the international community have the power to try and punish perpetrators of international crimes regardless of their nationality because such jurisdiction is derived from the crime itself. ⁴⁹ In this case, the ICD can exercise universal jurisdiction.

3.3.2 Laws and Rules of Procedure in the ICD

The Division applies laws that are applicable to all criminal proceedings in the country.⁵⁰ Criminal proceedings in Uganda are generally bound by the laws, rules of procedure and evidence that are provided in the Constitution,⁵¹ Penal Code Act,⁵² Evidence Act,⁵³ Criminal Procedure Code Act,⁵⁴ Trial on Indictment Act,⁵⁵ and the Extradition Act.⁵⁶ In addition to these domestic laws, the ICD is bound by some special laws and rules of procedure given

⁴⁶ Section 4 of the Penal Code Act Cap 120.
⁴⁷ Section 2 of the Geneva Conventions Act.
⁴⁸ Werle G & Jessberger F (2014) Mag No. 213.
⁴⁹ Werle G & Jessberger F (2014) Mag No 214.
⁵⁰ Clause 8 Legal Notice 10 of 2011.
⁵¹ The Constitution of the Republic of Uganda, 1995.
⁵² The Penal Code Act, Cap 120.
⁵³ The Evidence Act, Cap 6.
⁵⁴ The Criminal Procedure Code Act, Cap 116.
⁵⁵ The Trial on Indictments Act, Cap 23.
⁵⁶ Extradition Act, Cap 117.

the complexity and sophistication of prosecuting international crimes. The ICD is bound by the provisions of the Geneva Conventions Act, the International Criminal Court Act⁵⁷ (ICC Act), which gives efficacy to the Rome Statute and The Judicature (of High Court) (International Crimes Division) Rules. These rules are special regulations laying down the procedure of trials before the ICD.⁵⁸

The ICD prosecutes both domestic and international crimes. This thesis is concerned with the ICD's trial of international crimes. Therefore, although the laws relevant in all criminal trials are applicable law available for the ICD, the same must be applied with caution and necessary modification to uphold international standards. Case in point are the rules of evidence. As a matter of practice, judicial officers tend to require corroboration of the victim's evidence in proof sexual offences such as rape.⁵⁹ This rule must be modified because when proving sexual violence in an armed conflict, there is no requirement to corroborate a victim's evidence.⁶⁰

3.3.3 Investigation and Prosecution of Crimes by the: The Role of the Director of Public Prosecutions

The office of the Director of Public Prosecutions (DPP) is autonomous and a creature of the Constitution of Uganda.⁶¹ The DPP is appointed by the president, on recommendation of the judicial service commission and approval of parliament.⁶² The main role of the DPP in prosecutions before the ICD is that after investigations are complete, he institutes criminal proceedings against any person suspected of having committed an international crime.⁶³

⁵⁷ The International Criminal Court Act No 11 of 2010.

⁵⁸ The Judicature (High Court) (International Crimes Division) Rules, 2016.

⁵⁹ *Uganda vs. Rurahukayo John*, High Court Criminal Case No. 260 of 1979. Also see; *Hassan Bassita vs. Uganda* SCCA No. 035 of 1995.

⁶⁰ Rules of Procedure and Evidence of the International Criminal Court rule 63(4).

⁶¹ Article 120 of the Constitution 1995.

⁶² Article 120 of the Constitution 1995.

⁶³ Article 120 (3) of the Constitution, 1995.

Investigation of serious crimes is conducted by the Uganda Police on their own volition, or upon orders of the DPP.⁶⁴ The police then forwards all the evidence to the DPP, who then decides on whether such evidence is substantial to institute proceedings. The decision to sanction charges or not, is within the powers of the DPP.⁶⁵ The DPP represents the state in proceedings before the ICD.⁶⁶ It is upon the DPP to ensure that all accusatory evidence against the defendant is well collected and presented to court. The DPP also has the role to inform the ICD whether witnesses or victims require any special needs, as the trial process ensues.⁶⁷

3.3.4 Composition of the ICD

The ICD consists of three judges and one of the three judges is the head of the division. Those judges have the duty to perform all functions in the ICC Act that require attendance of a high court judge.⁶⁸ The judges are appointed by the president of the Republic of Uganda, in consultation with the Judicial Service Commission and with the approval of the parliament.⁶⁹

3.3.5 Stages of the Proceedings before the ICD

After conclusion of investigations, proceedings before the ICD go through a number of stages. These include; the Pre-trial proceedings, which involve the pre-trial conference and pre-trial hearing. After the pre-trial proceedings, the case then goes in for trial. Trial ends in either a conviction, if the accused is found guilty or an acquittal, where the accused is found not guilty of the charges. After a conviction is made, the court then passes the adequate sentence. Where a convict is dissatisfied with court's findings, they have the right to lodge an appeal

⁶⁴ Acirokop P *Accountability for Mass Atrocities: the LRA Conflict in Uganda* (2012) 13.

⁶⁵ Article 120 of the Constitution 1995.

⁶⁶ Article 120 (3) of the Constitution, 1995.

⁶⁷ Rule 4 of the ICD Rules, 2016.

⁶⁸ Rule 5 of the ICD Rules, 2016.

⁶⁹ Article 142 of the Constitution, 1995.

with the Court of Appeal. Below is an elaborate discussion of each of the stages of prosecution of serious crimes before the ICD.

3.3.6 Pre-trial proceedings

Upon commitment of an accused to the ICD, the trial process commences with the pre-trial proceedings.⁷⁰ The head of the division (HOD) assigns one of the judges the duty to run the pre-trial proceedings.⁷¹ These proceedings consist of the pre-trial conference and the pre-trial hearing.

3.3.6.1 Pre-Trial Conference

The first stage of the pre-trial process is the pre-trial conference. At this stage, the indictment is already on the record of court, and the accused has received a copy from the DPP. So, the presiding judge seeks; to study the facts of the case, to have evidence disclosed and marked, to hear any objections from the parties regarding the evidence disclosed, to register settlements if any, regarding the issues and finally the judge considers the condition of the victims, witnesses and accused person.⁷² In sum, the essence of the conference is to ensure that everything necessary for a swift and fair trial is integral. It should be noted that the judicial officer that runs the pre-trial process at the ICD is excluded from constituting the trial bench of the same case.⁷³ Also, both the defence and prosecution are duty bound to attend the pre-trial process. If any is absent, the judicial officer has the power to punish them.⁷⁴

⁷⁰ Part II of the ICD Rules, 2016.

⁷¹ Rule 6 of the ICD Rule, 2016

⁷² Rule 6 (2) of the ICD Rules, 2016.

⁷³ Rule 6 (3) of the ICD Rules, 2016.

⁷⁴ Rule 8 of the ICD Rules, 2016.

3.3.6.2 Pre-Trial Hearing

The pre-trial hearing is the second stage of the pre-trial proceedings. This is where the presiding judge confirms charges from the evidence gathered from the pre-trial conference.⁷⁵

During the pre-trial hearing, the accused is given chance to plead to the charges as read to him/her by the registrar.⁷⁶ At this stage, both parties are at liberty to object to the conduct of the hearing.⁷⁷ The prosecution may also be permitted to make amendments to the charges.⁷⁸

However, such amendments must not seriously alter the merits of the case.

3.3.7 The Trial

Upon confirmation of charges, trial follows with panel of one or three judges as the HOD deems fit. The rules obligate the trial judges to adhere to rules of a fair trial and the constitutional rights of an accused person.⁷⁹ Article 28 of the constitution provides for the rights of an accused. Every accused person before ICD is presumed innocent until the prosecution establishes evidence beyond reasonable doubt to prove his guilt.⁸⁰ It is incumbent upon the trial judges to ensure that the trial is fair, prompt and held in an open court.⁸¹ The trial should also be held in a language the accused understands. Although English is the official language in Uganda, accused persons usually do not understand it.⁸² So it's the duty of trial judges to ensure that interpreters are employed to translate court proceedings to a language the accused understands. The accused person before the ICD has a right to legal representation and where an accused cannot afford legal counsel, the state provides one at

⁷⁵ Rule 12 of the ICD Rules, 2016.

⁷⁶ Rule 12 (1) of the ICD Rules, 2016.

⁷⁷ Rule 12 (4) of the ICD Rules, 2016.

⁷⁸ Rule 13 of the ICD Rules, 2016.

⁷⁹ Rule 25 of the ICD Rules, 2016.

⁸⁰ Article 28 (3) (a) of the Constitution, 1995.

⁸¹ Article 28 (1), Constitution 1995.

⁸² Article 28 (3) (b), Constitution 1995.

its expense.⁸³ Finally, as the trial is conducted, during trial, the parties are expected to tendering of evidence, disclose all exculpatory documents and the accused is expected to present his defence. The trial judge is required to ensure that if an accused is convicted, then they must get an appropriate sentence that is provided for by the law.⁸⁴

3.3.8 Sentencing before ICD

Upon conviction, the trial judge may proceed to the sentencing process on the same day or may make an adjournment and pass sentence on a future date, depending on the circumstances of the case. During sentencing, the prosecution is allowed to present aggravating factors that justify why the convict should receive a maximum penalty.⁸⁵ Some of the aggravating factors identified by the ICD Rules include; previous convictions by the same court or one with the same jurisdiction, where a convict abused power or office, where the victims of the convict's actions were in a vulnerable position and where a crime was so gruesome and affected several victims.⁸⁶ The defence is also allowed to mitigate the sentence. During mitigation, the defence is expected to give reasons why the convict should receive a minimum penalty. The judge may direct the defence to file a mitigation statement on oath. Where such a statement is filed, the trial judges may adjourn the matter, to give the prosecution time to prepare a response.⁸⁷ The rules oblige the judges to take into consideration both the mitigating and aggravating factors before the pass a sentence.

Article 80 of the Rome Statute permits national courts to determine their own sentencing systems. Although Ugandan judges still have the authority to pass the death sentence for

⁸³ Article 28 (3) (e), Constitution 1995.

⁸⁴ Article 28 (4) (8), Constitution 1995.

⁸⁵ Rule 47 of the ICD Rules, 2016.

⁸⁶ Rule 47 (b) of the ICD Rules, 2016.

⁸⁷ Rule 47 (b) of the ICD Rules, 2016.

domestic crimes, the ICC Act takes a divergent turn.⁸⁸ The maximum penalty for international crimes prosecuted at the ICD is imprisonment for life.⁸⁹ This is a notable similarity with the Rome Statute whose maximum penalty is life imprisonment.⁹⁰ GCA also provides for life imprisonment for anyone convicted for commission of grave breaches relating to wilful killing.⁹¹ The fact that the maximum penalty that can be meted out by the ICD is imprisonment for life has attracted criticism. Critics opine that the sentencing regime is discriminatory because the maximum penalty for domestic crimes such as murder is still death, while grave crimes before the ICD only get imprisonment for life.⁹²

Critics further state that the sentencing regime before the ICD was a strategic move by the GoU to attract funding from the international community who were unlikely to support a court that retained the death penalty. In fact, when the Iraqi High Tribunal (IHT) retained the death penalty, the UN avowed to withhold its support from any court that still had the discretion to pass the death sentence.⁹³

Besides sourcing for funding, the adverse effects for retaining the death penalty take other dimensions. Jurisdictions that have scrapped off the death penalty are reluctant to extradite fugitives to countries that retain the death sentence. The best example is when the ICTR refused to grant Rwanda's request to extradite its nationals that were suspected to have participated in the 1994 genocide in Rwanda.⁹⁴ The ICTR's refusal was partly based on the fact that Rwanda still retained the death penalty, and its courts were not in position to

⁸⁸ *Susan Kigula and 416 other v Attorney General* Supreme Court of Uganda, No 3 of 2006.

⁸⁹ Sections 7(3), 8(3) & 9(3) ICC Act.

⁹⁰ Article 77, Rome Statute.

⁹¹ Article 2, Geneva Conventions Act.

⁹² Mbazira C (2011) 218.

⁹³ Blum V 'Crafting Justice in Iraq' *International Centre for Transitional Justice* (2003), available at <http://www.ictj.org/en/news/coverage/articles/391.html> (accessed 30 September 2017).

⁹⁴ Twahirwa A, 'Death Penalty Rwanda: Abolition Spurs Quest for Justice', Inter Press Service Agency, (2007) available at <http://ipsnews.net/africa/nota.asp?idnews=38821> (accessed 30 September 2017).

conduct fair trials at the time. However, in 2007, the parliament of Rwanda abolished the death penalty and received enormous international support and also made extradition arrangements.⁹⁵ Therefore, being aware of Rwanda's experience, it is probable that Uganda chose to strategically avoid the death penalty for international crimes before the ICD. It should however be noted that Uganda has not acceded the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty. Therefore Uganda was not under any legal obligation to abolish the death penalty.

3.3.9 Rights of Victim and Witnesses before the ICD

According to the ICD rules, a victim is a person who individually or jointly writhed physical, emotional, or mental harm.⁹⁶ The definition is expanded to include anyone that suffered economic loss or whose rights were violated by perpetrators of international crimes within ICD's jurisdiction.⁹⁷ According to the rules, victims may include the immediate family, dependents or institutions that have suffered harm as a result of the international crimes in question. On the other hand, the ICD rules define a witness as 'a person who has made a statement or who has given or agreed to give evidence in relation to an offence or criminal proceedings before the Division.'⁹⁸ Generally, there are three categories of the rights of

⁹⁵ Arcton O 'Rwanda Lawmakers Vote to Scrap Death Penalty' NPR (2007) available at <http://www.npr.org/templates/story/story.php?storyid=10910112> (accessed 30 September 2017).

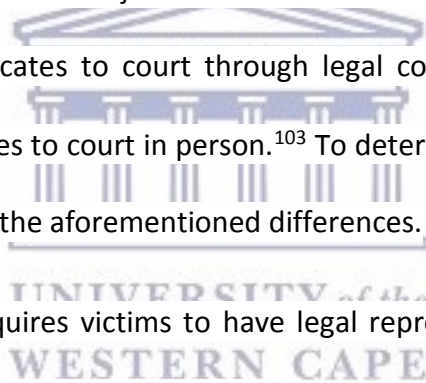
⁹⁶ Rule 3 of the ICD Rules, 2016.

⁹⁷ Rule 3 of the ICD Rules, 2016.

⁹⁸ Rule 3 of the ICD Rules, 2016.

victims in international criminal law. These rights include; ‘the right to participation, the right to protection and the right to reparations.’⁹⁹

The right to participation entails the victims’ ability to have their concerns and personal interests heard by the judges. The ICC booklet on participation of victims indicates that there is a difference between victim participation, and calling a victim as a witness.¹⁰⁰ According to the booklet, victim participation is voluntary while ‘a victim as a witness’ may be called by the defence, prosecution or the chambers. In the case of Uganda, criminal laws also recognise compellability of witnesses to testify.¹⁰¹ Victims as participants take care of their own interests while “a victim as a witness” serves the interests of the court, or the side that has called them as a witness.¹⁰² Another major difference is that in victim participation, the victim is represented and communicates to court through legal counsel while a witness is not represented and communicates to court in person.¹⁰³ To determine the rights of each party, it is important to take note of the aforementioned differences.



International criminal law requires victims to have legal representation and to be able to participate in the different stages of the proceedings.

Victim and witness participation is a requirement for just and effective prosecutions. Time and again, victims and potential witnesses are reluctant to participate in accountability

⁹⁹ González V ‘The Role of Victims in International Criminal Court proceedings: their Rights and the First Rulings of the Court (2006) 3 *Sur. Revista Internacional de Derechos Humanos* 3.

¹⁰⁰ ICC Booklet *Victims before the International Criminal Court; A Guide for The Participation of Victims In the Proceedings of the Court* available at <https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> (accessed 28 October 2017).

¹⁰¹ The Evidence Act Cap 6.

¹⁰² International Criminal Court Booklet: *Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court* (n.d) 10-12, available at <https://www.icc-cpi.int/> (accessed 30 September 2017).

¹⁰³ ICC Booklet on victim participation available at <https://www.icc-cpi.int/> (accessed 30 September 2017).

processes after atrocities. This could be out of actual or imaginary fear from different sources of insecurity.¹⁰⁴ Providing for protection and participation of witnesses and victims is essential for law enforcement, since victims face the direct or indirect wrath of the atrocities. The Rome Statute put victims at the centre of its proceedings.¹⁰⁵ Victims have the right to participate in the trial process. In practice, victims are represented by lawyers who ensure that the victim's views and concerns are heard by the judges.¹⁰⁶ The process of victim participation starts with direct contact with the victims. This is through outreach programmes, where potential victims are advised to apply to participate in the proceeding. Once victims apply to participate, there applications are sent from the field offices to the Hague, where court officials analyse the applications to determine if the victims are entitled to participate in the trial or not. The judges make the final determination of whether or not the victims are entitled to participate in the trial or not.¹⁰⁷

In the case of Uganda, although the ICD rules provide for victim participation, they do not comprehensively provide for the modalities of victim participation. The rules do not expressly provide for direct access of victims or the procedure through which one can be determined as the rightful victim.¹⁰⁸ The rules are silent on registration of victims and on the different rights that foster participation of the victims. However, Rule 51 provides that it is the duty of the registrar of the ICD to notify the victims of any court processes, to ensure that the victims

¹⁰⁴ International Network to Promote the Rule of Law (INPROL) 'Witness Protection in Countries Emerging from Conflict' (2007) available at <http://www.inprol.org/files/CR07008.pdf> (accessed 30 September 2017).

¹⁰⁵ Article 68(3) of the Rome Statute.

¹⁰⁶ ICC Booklet on victim participation available at <https://www.icc-cpi.int/> (accessed 30 September 2017).

¹⁰⁷ International Criminal Court *Booklet Victims before the International Criminal Court: A Guide For the Participation of Victims in the Proceedings of the Court*, available at <https://www.icc-cpi.int/.../282477/160910VPRSBookletEnglish.pdf> (accessed 6 November 2017).

¹⁰⁸ The International Center for Transitional Justice (ICTJ) and REDRESS *Victim Participation at the International Crimes Division in Uganda Stakeholder Roundtable Report* (2017) 13.

get legal representation and legal guidance, and to ensure their participation in the different phases of the trial.¹⁰⁹

Turning to the right of protection, the safety of victims and witnesses in international criminal trials must be guaranteed both by the ICC and domestic courts trying international crimes. Article 68 (1) of the Rome Statute, provides for measures aimed at protecting the ‘the safety, physical and psychological well-being, dignity and privacy of victims’¹¹⁰

The ICD rules provide for the protections and privacy of witnesses and victims throughout the rules. The prosecutors before the ICD must ensure that victims and witnesses are safe. At the pre-trial stage, they must make any necessary applications to ensure protections of the witnesses and victims. Trial judges are also under obligation to do the same. The prosecution is empowered to make applications for the review of the status of the witness and victim’s safety.

Depending on the circumstances of each case, the trial judge is obliged to direct the necessary government authority to ensure safety and protection of victims and witnesses. ¹¹¹Some of the key measures that should be taken to ensure witness and victim protection include provision of safe accommodation, provision of medical and psychological care and provision of necessary physical security.

The registrar is also tasked to arrange for training programmes for the prosecution and defence in handling victims of sexual violence. ¹¹²To ensure confidentiality and privacy of the victims of sexual violence, the trial judge has the duty to regulate the media and press coverage of proceedings where they are involved. Further, where necessary the trial judge

¹⁰⁹ Rule 51 of the ICD Rules 2016.

¹¹⁰ Article 68 of the Rome Statute.

¹¹¹ Rule 34 of the ICD Rules.

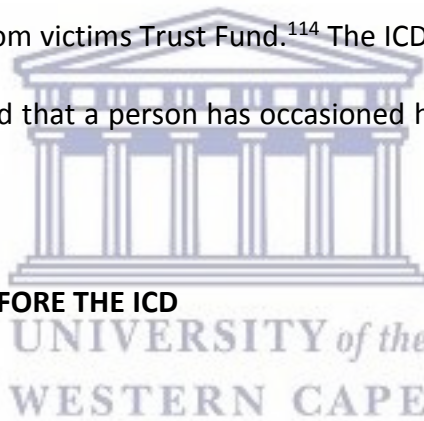
¹¹² Rule 34 of the ICD Rules.

may order that a witness testifies *in camera* or that their name and address be taken off the record of proceedings of the court. Similarly, the trial judge may order any party present during proceedings not to disclose the identity of the victim or witness to third parties.¹¹³

Therefore, the ICD rules give comprehensive guidelines regarding the issues of protection of witnesses and victims than they are for victim participation.

3.3.10 Reparations at the ICD

Finally, international criminal law recognises the victim's right to make a request for reparations. This right is recognised in Article 75 of the Rome statute, and reparations are intended to remedy the harm sustained by the victims of atrocious crimes. Article 79 provides for payment of reparations from victims Trust Fund.¹¹⁴ The ICD rules also make provision for reparations, where it is proved that a person has occasioned harm as a consequence of the crimes before the division.¹¹⁵



3.4 ADJUDICATION BEFORE THE ICD

The best determinant whether the ICD has succeeded in carrying out domestic prosecution of international crimes is by looking at the cases that have been handled by the Division so far. The Division has handled numerous domestic cases that involve ordinary crimes, which this research paper will not consider. The very first international crimes case before the ICD was *Uganda v Thomas Kwoyelo*. Below is a summary of the case.

¹¹³ Rule 36 of the ICD Rules.

¹¹⁴ Article 79 of the Rome Statute.

¹¹⁵ Rule 48 of the ICD Rules (2016).

3.4.1 *Uganda versus Thomas Kwoyelo*

Thomas Kwoyelo, a colonel in the LRA was apprehended from the Democratic Republic of Congo, where he had suffered injuries from the shootings of the UPDF soldiers, that were fighting the LRA rebels. He then was flown to Uganda and was given treatment under detention.¹¹⁶

The Kwoyelo trials began in June 2009 in the ICD, when he was charged with domestic crimes under the Penal Code Act. In 2010, the charges were amended and he was then charged under the Geneva Conventions Act of 1964 for grave breaches, involving wilful killing of civilians, taking of hostages, extensive destruction of property, causing serious injury to body or health and inhuman treatment.¹¹⁷

While in detention, Kwoyelo made an application for amnesty under the Amnesty Act of 2000 to the Amnesty Commission.¹¹⁸ At the time, amnesty had been offered to over 2000 ex-combatants on condition that they had surrendered their arms and ceased the fight.¹¹⁹ Upon receipt of the amnesty application, the Amnesty Commission forwarded it to the DPP for consideration but unfortunately, the DPP made no response to it, without citing any reason at the time.

In July 2011, pre-trial processes for the Kwoyelo trial began at the ICD. Kwoyelo's representatives (defence team) raised numerous objections regarding the constitutionality of the denial of Kwoyelo's application for amnesty.¹²⁰ The ICD being a division of the High Court

¹¹⁶ Human Rights Watch *Thomas Kwoyelo's Trial before Uganda's International Crimes: Division Questions and Answers* (2012).

¹¹⁷ Article 147 of the Geneva Conventions Act (1964).

¹¹⁸ Sibolini M *Is Uganda's Judicial System ready to Prosecute serious crimes?* (2015) 3.

¹¹⁹ Sibolini M (2015) 3.

¹²⁰ Nakandha S *Supreme Court of Uganda Rules on the Application of the Amnesty Act* (2015) 2.

did not have the Jurisdiction to decide on the application as it hinged on constitutional matters. In that regard, a constitutional reference was made to the Constitutional Court, which had to decide on two main issues. First, ‘whether or not the DPP and the Amnesty Commission’s failure to respond to Kwoyelo’s amnesty application, had violated his right to equal treatment and non-discrimination under Uganda’s Constitution.’¹²¹ Second ‘whether the serious charges of crimes could be considered to have taken place in the context of an international armed conflict.’¹²² The Attorney General raised a counter objection ‘whether certain sections of the Amnesty Act were inconsistent with the constitution.’¹²³

The defence team argued that by not considering Kwoyelo’s amnesty application, the DPP and Amnesty Commission were discriminating against Kwoyelo.¹²⁴ The defence based this notion on the fact that many ex-combatants had been granted amnesty by virtue of the Amnesty Act of 2010, on condition that they surrendered their arms and ceased the fight. Therefore, the defence did not find a plausible reason why Kwoyelo was being treated any different. Kwoyelo’s representatives also argued that the purpose of the Amnesty Act was to end the civil war and bring about peace, therefore was not merely offering a blanket amnesty.¹²⁵

In response, the prosecution argued that the DPP had the discretion to either grant or deny Kwoyelo’s application for amnesty.¹²⁶ This is because, first, according to the Constitution of Uganda the office of the DPP is autonomous in decision making.¹²⁷ Secondly, the prosecution

¹²¹ McNamara K *Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo* (2013) 12 *Washington University Global Studies Law Review* 664.

¹²² McNamara K (2013) 12.

¹²³ McNamara K (2013) 12.

¹²⁴ McNamara K (2013) 12.

¹²⁵ *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 12–18.

¹²⁶ *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 12–18.

¹²⁷ Article 120(3) (b) (c) of the Constitution (1995) and *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC at 12–18.

argued that offering a blanket amnesty to perpetrators of serious international crimes would be against Uganda's international obligations.¹²⁸

The Constitutional Court ruled in favour of Kwoyelo. The Court found that the Amnesty Act neither obstructed Uganda's international treaty obligations nor infringed on the autonomous powers bestowed to the office of the DPP by the Constitution. The Court further found that Kwoyelo's rights of equality before the law had been violated by the decision not to grant him amnesty.¹²⁹ The court noted that the DPP had not given any reasonable explanation for not granting Kwoyelo's application for amnesty, yet it had considered other 29 applications, whose applicants had committed war crimes.¹³⁰ Consequently, the Constitutional Court ordered that the DPP and Amnesty Commission consider Kwoyelo's application for amnesty, and free him immediately.¹³¹ Resultantly, the ICD trial for Kwoyelo had to stall.

Shortly after the Constitutional Court judgment, the Attorney General (AG) filed an Appeal to the Supreme Court hence Kwoyelo continued to stay in prison, on remand.¹³² The AG contended that Sections 2 and 3 of the Amnesty Act conflicted with Uganda's commitments under international law, to prosecute grave breaches and other serious crimes. Kwoyelo's representatives reiterated the same arguments as stated above. Owing to lack of quorum, the Supreme Court decision was delayed.

On 8 April 2015, the judgment of the Supreme Court nullified the Constitutional Court judgment. The judges stated that to offer amnesty to Kwoyelo would breed a culture of

¹²⁸ *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 12–18.

¹²⁹ *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 12–18.

¹³⁰ *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 24.

¹³¹ *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC 24.

¹³² Anderson R, *Little Kony: Thomas Kwoyelo*, Seattle Weekly News (July 11, 2012), available at <http://www.seattleweekly.com/home/873062-129/story.html>. (Accessed 2 October 2017).

impunity, since he allegedly committed crimes in violation of Article 147 of the Geneva Conventions Act of 1964.¹³³ The Court ruled that Kwoyelo was rightfully charged before the ICD and permitted his trial to continue.¹³⁴

In April 2016, pre-trial proceedings resumed with the pre-trial conference, and were postponed to August 2016. Even after the numerous adjournments, Kwoyelo's long-time lawyers were a no show to the August 2016 pre-trial conference. Having represented Kwoyelo from 2008 to April 2016, the lawyers unceremoniously quit because they allegedly lacked adequate resources to prepare for Kwoyelo's defence.¹³⁵ Kwoyelo then appointed new lawyers, and the court also appointed other lawyers to represent him on state brief. In September 2016, another pre-trial conference was conducted. Kwoyelo's new lawyers contested the manner in which the trial was being carried. They argued that whilst all the court documents and proceedings were in the English language, the accused (Kwoyelo) did not understand the language, as he could only understand *Acholi*.

The lawyers also contested the manner in which victims were determined. There was no record showing the victim's applications or procedure through which the said victims were determined to have been the rightful victims.¹³⁶ In sum, the lawyers contested the participation of the victims at the time.

¹³³ Uganda v Thomas Kwoyelo alias Latoni SCCA NO 1 [2012]

¹³⁴ Uganda v Thomas Kwoyelo alias Latoni SCCA NO 1 [2012].

¹³⁵ Ogora O L. *New Lawyers Appointed as Kwoyelo Pre-Trial Hearing is Adjourned to September*, available at <https://www.ijmonitor.org/2016/08/new-lawYERS-appointed-as-kwoyelo-pre-trial-hearing-is-adjourned-to-september/> (accessed 2 October 2017).

¹³⁶ [https://www.ijmonitor.org/2016/08/new-LAWYERS-appointed-as-kwoyelo-pre-trial-hearing-is-adjourned-to-september/](https://www.ijmonitor.org/2016/08/new-lawYERS-appointed-as-kwoyelo-pre-trial-hearing-is-adjourned-to-september/) (accessed 2 October 2017).

The most significant ruling that arose from the September 2016 pre-trial conference is that, the Division ordered the registrar of the ICD to register the victims, and allowed for their participation throughout all the stages the trial through their legal counsel.¹³⁷

In 2017, four dates from January to July, were slotted for the pre-trial hearing to take off.¹³⁸ The confirmation charges was expected to take place, to pave way for trial to commence. However, on all the dates the confirmation of charges did not happen. Some of the reasons for the inordinate delay are that, on 12 July 2017, the prosecution served the defence with court proceedings late, hence they did not have enough time to respond.¹³⁹ The Court made an adjournment to 18 July 2017, to allow the defence to file a response to the said proceedings.¹⁴⁰ However, on 18 July 2017, when the confirmation of charges was expected to happen, no court official turned up to Court. It is said that the proceedings could not ensue owing to financial constraints.¹⁴¹

Today, I conclude this summary on Kwoyelo's controversial trial without a clear date as to when confirmation charges and trial will commence. The inordinate delay of the trial is due to numerous challenges encountered by ICD, that will be adequately dealt with in chapter four of this research paper. The challenges notwithstanding, below is the significance of the Kwoyelo trial has had on Uganda.

3.4.2 Significance of the Kwoyelo Trial

As noted earlier, the Kwoyelo trial is the first domestic trial of its kind in the jurisprudence of Uganda. For the first time, a domestic court has taken on trial for international crimes.

¹³⁷ Ogora L *Landmark Ruling on Victim Participation in the Case of Thomas Kwoyelo*, available at <https://www.ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/> (accessed 2 October 2017).

¹³⁸ The dates include; 13 January 2017, 15 February 2017, 12 July 2017 and 18 July 2017.

¹³⁹ Ogora L (2017) 4.

¹⁴⁰ Ogora L (2017) 4.

¹⁴¹ Ogora L (2017) 4.

Although the trial is still at a preliminary stage, it has already served a great impact to international criminal law in Uganda in the following ways.

Despite several challenges, the Kwoyelo trial is a sign that accountability for gross human right violations is possible in Uganda. The fact that the Supreme Court recognised that offering a blanket immunity to an alleged perpetrator of serious crimes would breed a culture of impunity is laudable and significant to development of international criminal law in Uganda.

The LRA insurgencies left a number of victims impoverished and hopeless. The fact that the Kwoyelo trial as a form of accountability to some extent brings back hope to the victims.

Further, over 73 victims have been listed as having suffered as a result of Kwoyelo's alleged crimes. If at the end of the trial Kwoyelo is found guilty, the said victims will have a right to receive compensation. Even then, justice is not just about convictions, with or without a conviction, justice will be served.

The Kwoyelo trial has also increased civic participation in international criminal law in Uganda. Non-governmental organisations and civil society groups have time and again weighed in on the Kwoyelo proceedings while citizens have vehemently attended the court hearings. This has been facilitated by the fact that although, the ICD headquarters are in Uganda's capital, Kampala, the trial is being conducted in the High Court of Gulu, a town which was most affected by the LRA insurgencies and where most of the victims hail from.

3.5 CHAPTER SUMMARY

In conclusion, being the first of its kind, the Kwoyelo trial is a 'guinea pig' for the ICD. This trial will bring out the realities of complementarity before the ICD. Since other LRA ex-combatants are being tried by the ICC, the Kwoyelo trial is a chance for Uganda's judiciary to prove that it can conduct a successful and impartial trial, as a court of complementarity. The trial is also a

chance for the ICD to test its rules and procedures. It is noteworthy that this trial has highlighted the challenges that the court faces in trying international crimes, which will be dealt with in chapter four.



CHAPTER FOUR

THE CHALLENGES FACED BY THE INTERNATIONAL CRIMES DIVISION OF UGANDA

4.1 INTRODUCTORY REMARKS

Although the establishment of the ICD embodies growth of the international justice system in Uganda, it has not been as effective or as efficient as envisioned. The inordinate delay of the Kwoyelo trial portrays challenges faced by the Division. Analysis of the combination of the inherent institutional limitations and the objective difficulties within Uganda's judicial system is essential in assessing and improving the performance of the ICD as it plays a role in the suppression of international crimes.

This chapter discusses the different obstacles hampering the domestic prosecution of international crimes before the ICD and highlights those obstacles that can reasonably be expected in the future.



4.2 THE CHALLENGES

4.2.1 Legislative Inadequacies

Domestic prosecution of international crimes is generally limited by implementation discrepancies of the international laws on core crimes into domestic laws.¹ Absence or flaws in domesticating international treaties limit the jurisdiction of domestic courts, since they lack the necessary legal framework to prosecute perpetrators of core crimes. According to Kleffner, non-implementation of the international legal regime prohibiting core crimes is

¹ Kleffner J *National Suppression of Core Crimes. In Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) 38.

predominately seen in regards to implementation of customary core crimes.² According to the author, absence of specific laws defining core crimes results in states prosecuting core crimes by referring to the available ordinary domestic crimes, which is in itself problematic.³ One of the problems associated with referring to ordinary crimes when trying core crimes is that it may be challenging to find a 'matching' domestic or ordinary crime for certain crimes prescribed by the Rome Statute.⁴ For instance, finding a fitting ordinary crime for the conduct of 'the grave breach of the Geneva Conventions of compelling a prisoner of war or other protected person to serve in the forces of a hostile power' may be difficult.⁵

Uganda has had its own share of implementation flaws. These have to some extent led to delays in the Kwoyelo trial. As we may recall, chapter three indicates that ICD was established by a legal notice.⁶ The legal notice was not comprehensive which indicates that at the time of formation, there were inherent legislative inadequacies. Legislative inadequacies before the ICD manifested themselves in the lack of comprehensive substantive law to try the core crimes and in the clash of the laws.⁷

As regards the lack of a comprehensive substantive law to try core crimes, the ICC Act, that domesticates the Rome Statute in Uganda was enacted in 2010, long after the insurgencies in Northern Uganda, where Kwoyelo allegedly participated had ended.⁸ The ICC Act of Uganda is the law that proscribes core crimes by making reference to the Rome Statute but could not be applied retrospectively.⁹ In consequence, Kwoyelo was charged with offences proscribed

² Kleffner JK (2008) 38.

³ Kleffner JK (2008) 39.

⁴ Kleffner JK 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 96.

⁵ Kleffner JK (2003) 96.

⁶ The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011.

⁷ Domestic Prosecution of International Crimes: Lessons for Kenya (2013) 14.

⁸ See: Page 20, Chapter 2 of this thesis.

⁹ The International Criminal Court Act No 11 of 2010.

by Uganda's Geneva Convention's Act of 1964. The charges included counts of grave breaches and wilful killing among others.¹⁰ The dilemma in which the prosecutors found themselves was that, as of 2010 when Kwoyelo was indicted, his crimes were perceived to have been committed in an 'internal armed conflict.'¹¹ However, the Geneva Conventions Act of 1964, which domesticates the Geneva Conventions only addressed 'international armed conflicts.'¹² Crimes committed in internal armed conflicts are proscribed by the Protocol II of the Geneva conventions and the Rome Statute. Therefore, the lack of a comprehensive substantive law within which to charge Kwoyelo is one of the reasons for the delay of his trial. Where there is lack of a normative framework which criminalizes core crimes, there are two possible options: ordinary crimes approach, and customary international law. Having recognised that charging Kwoyelo under the Geneva Conventions Act of 1964 may be contentious, the DPP has from time to time amended Kwoyelo's indictment.¹³ As of 2011, the DPP amended Kwoyelo's indictment and included 53 charges from ordinary crimes proscribed by the Penal Code Act of Uganda.¹⁴ These included; 'murder, attempt to murder, kidnapping, kidnapping with the intent to murder, robbery, and robbery using a deadly weapon.'¹⁵ It is still too soon to tell whether charging Kwoyelo with ordinary crimes for conduct that *prima facie* amount to international crimes will have a negative impact on the trial. However, what is certain is the ordinary crimes approach is criticised for its lack of the moral condemnation that's associated with core crimes.

¹⁰ See: Chapter 2, Page 20, of this thesis.

¹¹ Namwase S, *The Principle Of Legality And The Prosecution Of International Crimes In Domestic Courts: Lessons From Uganda* (2011) 26.

¹² Namwase S (2011) 26.

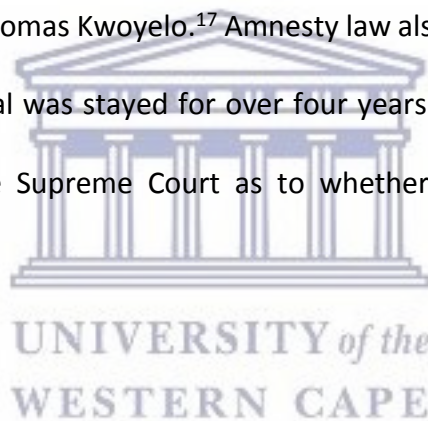
¹³ Uganda: 'Kwoyelo state prefers 53 Charges' *The Monitor* 12 July 2011. Available at <http://allafrica.com/stories/201107120020.html> (accessed 25 October 2017).

¹⁴ Uganda: 'Kwoyelo state prefers 53 Charges' *The Monitor* 12 July 2011. Available at <http://allafrica.com/stories/201107120020.html> (accessed 25 October 2017).

¹⁵ *Uganda V Thomas Kwoyelo*, Indictment (2010).

The conflict between domestic and international laws in Uganda is another challenge accruing from legislative inadequacies that has hampered the progress of the ICD. While Uganda's criminal penal laws still recognise the death penalty, the ICC Act provides imprisonment for life as the maximum penalty that the ICD can give.¹⁶ As noted in chapter 3, this inconsistency met a lot of backlash since the core crimes are presumed to be more heinous than the ordinary domestic crimes that attract a death penalty.

The passage of amnesty laws also caused discrepancies between domestic and international law. While international law obliges states not to grant blanket amnesties to perpetrators of heinous crimes, GoU gave amnesty to over 2000 ex-combatants, some of whom were in a higher rank in the LRA than Thomas Kwoyelo.¹⁷ Amnesty law also contributed to the delays in the Kwoyelo trial because trial was stayed for over four years pending the decisions of the Constitutional Court and the Supreme Court as to whether Kwoyelo would be granted amnesty.¹⁸



4.2.2 Partiality

The division has so far, not attempted to try UPDF soldiers for their contribution to the human rights violations in the northern Uganda, as they counter-fought the LRA rebels. Although it is the role of Uganda's DPP to investigate and institute cases before the ICD, the judges still have a duty to inquire into, or order for the investigation of the UPDF soldiers for justice to

¹⁶ *Susan Kigula and 416 other v Attorney General* (Supreme Court of Uganda) Constitutional Appeal before the Supreme Court of Uganda, No 3 of 2006 (21 January 2009), Sections 7(3), 8(3) & 9(3) ICC Act.

¹⁷ McNamara P (2013) 664.

¹⁸ McNamara P (2013) 664.

be served. As the Kwoyelo trial is still under way, the impartiality of the presiding judges continues to stand tested in this regard.¹⁹

4.2.3 Capacity to Prosecute Core Crimes

Presiding judges at the ICD have so far exhibited knowledge of international law principles and capability to try core crimes. The only challenge is that the judges and registrars are subject to administrative reshuffles since the ICD is a division of the High Court.²⁰ The predicament with such reshuffles is that not all judges within the High Court of Uganda are well conversant with international law principles and the procedure of trying core crimes.²¹ Furthermore, one of the reasons for the stay of the Kwoyelo trial is that two of the presiding judges in the case retired early this year, and are yet to be replaced.²² Besides judges, the ICD support staff such as legal assistants and clerks do not possess enough knowledge on international law principles, which in turn affects the quality of research at the division.²³ Another limitation to ICD's capacity to efficiently try international crimes is that the division also has the role of hearing both civil and criminal domestic cases. This in turn has diverted the already scarce resources to domestic cases hence leaving the prosecution of core crime pending.²⁴

¹⁹ Domestic Prosecution of International Crimes: Lessons for Kenya (2015) 14.

²¹ Domestic Prosecution of International Crimes: Lessons for Kenya (2015) 13.

²² Human Rights Watch, Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012:19). (Herein after referred to as, 'Justice for Serious Crimes before National Courts Uganda's International Crimes Division.').

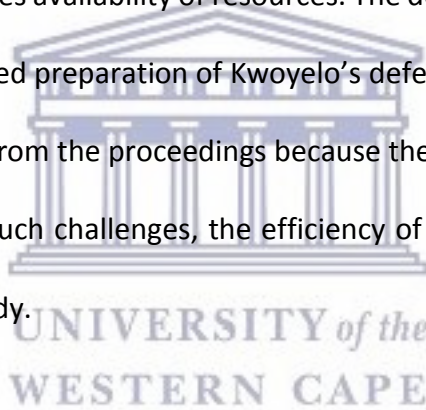
²³ Domestic Prosecution of International Crimes: Lessons for Kenya (2015) 14.

²⁴ Domestic Prosecution of International Crimes: Lessons for Kenya (2015) 13.

4.2.4 The Defense Team

Accused persons before the ICD have the right to legal representation.²⁵ They could either retain an advocate privately, or the presiding judge may appoint an advocate, on state brief, for the accused. State brief advocates are only appointed where the accused lacks financial means to instruct his own private advocate. A state brief advocate can also be appointed where an accused person charged with a capital offence punishable by death or life imprisonment does not have legal representation.²⁶

When advocates are appointed on state brief, they usually join the process later on in the proceedings.²⁷ This limits the level of preparedness of the defense. Also, preparation of a defense for core crimes requires availability of resources. The defense team's lack of financial resources has intensely affected preparation of Kwoyelo's defense. As seen in chapter three, Kwoyelo's lawyers withdrew from the proceedings because they lacked enough resources to prepare his defence.²⁸ With such challenges, the efficiency of the ICD in trying core crimes continues to remain in jeopardy.



4.2.5 Financial Constraints

ICD activities are financed by the GoU and International donors. Donor funds from the governments of Denmark and Ireland have supported the activities of the ICD, outside the GoU's budget.²⁹ GoU funds to support ICD activities are provided for by the budget of the Justice sector.³⁰ For an activity of the Justice sector to receive funding, it must be prioritised

²⁵ Uganda is a party to the International Covenant on Civil and Political Rights (ICCPR), which guarantees that everyone facing criminal charges is assigned legal representation.

²⁶ Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 19.

²⁷ Human Rights Watch, *Violence Instead of Vigilance: Torture and Illegal Detention by Uganda's Rapid Response Unit* (2011) 48-49. Available at, <http://www.hrw.org/reports/2011/03/23/violence-instead-vigilance> (accessed on 26 October 2017).

²⁸ <https://www.ijmonitor.org/2016/08/new-lawYERS-appointed-as-kwoyelo-pre-trial-hearing-is-adjourned-to-september/> (accessed on 2 October 2017).

²⁹ Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 9.

³⁰ Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 9.

by Uganda's 'Strategic Investment Plans.'³¹ For many years, activities of the ICD were not prioritised hence missed out on government funding.³² Even when ICD activities were prioritised, the funds set aside did not cover all activities of the division. Activities like financing the defense team, outreach activities and trial processes have been stalled due to lack of sufficient funds.³³

4.2.6 Witness Protection

Witnesses in core crime trials are prone to security risks. They may meet coercions and threats to themselves, families and business associates. They therefore need support both physically and psychologically.³⁴ The ICD rules have taken some significant measures to ensure that witness protection as discussed in chapter three. The challenge that remains is that the division has still not established a witness protection agency to ensure safety of the witnesses.³⁵ Theoretically, the ICD rules have provided for great measures to ensure that the witnesses get the necessary support and protection. For the Kwoyelo trial, ICD came up with risk assessment forms, which are to be filled by witnesses.³⁶ However, without a witness protection unit, the practicality of these rules on witness protection is yet to be tested.

4.2.7 Interpretation

The judiciary of Uganda has not had substantial formal interpretation programs, yet numerous languages are spoken in the country.³⁷ Although the language of the court is English, often the accused, witnesses and victims do not understand the language. This

³¹ Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 9.

³² Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 9.

³³ Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 9.

³⁴ Rule 34 of the ICD Rules.

³⁵ Nakandha S (2016) 1.

³⁶ Nakandha S (2016) 1.

³⁷ ICTJ, Facilitated Needs-Assessment Mission Final Report (2011) paras. 76-7).

challenge was vividly witnessed in Kwoyelo's pre-trial hearing where defence counsel notified the Court that the accused needed an interpreter to translate proceedings to his mother tongue.³⁸ Although interpretation is an important feature for a fair trial,³⁹ interpreters were not provided in the Constitutional Court hearing where Kwoyelo's application for Amnesty was challenged.⁴⁰ Therefore, the lack of interpretation still hinders ICD's mandate to try core crimes.

4.2.8 Sensitisation and Outreach Programmes

Sensitisation and outreach programmes especially to affected populations are very important. Sensitisation of communities on core crime trials is most effective when it is conducted in areas most affected by the atrocities and in the local languages of the people. Outreach programmes help to prevent confusion and misunderstanding of national trials, especially when domestic courts are trying international crimes. Outreach programmes also enable trials to resonate with victim communities.

In Uganda, those working with victim societies have reported considerable confusion from people regarding the activities of the ICD.⁴¹ Some people understand ICD to be a branch of the ICC.⁴² It has also been noted that most affected communities do not understand why Kwoyelo, a low ranking member of the LRA is being tried yet the warlords and other senior commanders of the LRA are free. Issues about the fact that UPDF soldiers have not been indicted for their human rights violations in the LRA insurgencies also remain a source of

³⁸ Ogora L *Landmark Ruling on Victim Participation in the Case of Thomas Kwoyelo* (2016). Available at <https://www.ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/> (accessed 27 October 2017).

³⁹ Article 14(3) ICCPR; Articles. 23(3), 28(3) Constitution of the Republic of Uganda 1995.

⁴⁰ Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 20.

⁴¹ Nakandha S (2016) 1.

⁴² Justice for Serious Crimes before National Courts Uganda's International Crimes Division (2012) 22.

confusion in the affected communities.⁴³ Today, outreach programs are hampered by the lack of sufficient financial resources to penetrate villages and poor leadership and organisation of the programme.

4.2.9 Violation of Due Process

Violation of due process constitutes a further set of obstacles to the ICD. Core crimes trials are at times unfair.⁴⁴ Instances where interpreters are not availed by the division, where there are undue delays and where the right to be tried by an impartial and independent court is violated constitute a breach to the right to a fair trial.⁴⁵ The ICD still faces such challenges, which undermine the legality and legitimacy of the prosecutions as a whole to the international community.

Violation of due process is worsened by infrastructural problems. As noted earlier, the ICD chose to have the Kwoyelo trial in Gulu High Court since Gulu was the most affected area by the LRA insurgencies. However, the courtrooms at Gulu High Court are quite small, yet a large number of people turn up for the hearing. They also lack screens that would enable a wider broadcast of proceedings and the court record is not well documented and publicised for people to know the stage of the proceeding.⁴⁶

⁴³ Human Rights Watch interviews with individual who works with the ICD, Kampala, September 19, 2011, ICC staff, Kampala, September 21, 2011, and two NGO observers, Kampala, September 19 and 20, 2011. Available at http://uscfn.creamermedia.co.za/assets/articles/attachments/37088_uganda0112forupload_0.pdf (accessed 27 October 2017).

⁴⁴ Weissbrodt D *The Right to a Fair Trial* (1997) 11.

⁴⁵ Kleffner JK (2008) 53.

⁴⁶ Nakandha S (2016) 1.

4.2.10 CHAPTER SUMMARY

This chapter underscored some of the main challenges hindering ICD's ability to prosecute international crimes. It should however be noted that the division is still considerably new and still has a long way to go. Since obstacles have been identified early enough, especially those exposed by its first case, the Kwoyelo trial, the administration at the ICD and all stakeholders should consider taking necessary measures to counter the aforementioned obstacles. Chapter five gives some of the possible recommendations that can be considered by the judiciary of Uganda to counter obstacles hindering ICD activities.



CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

In conclusion, this study finds that it was imperative for Uganda to implement the provisions of the Rome Statute because there was need for accountability for the human rights violations that occurred in Northern Uganda, during the LRA insurgencies. Being a dualist state, the parliament of Uganda has enacted laws domesticating international criminal law treaties, such as the Geneva Conventions Act and the International Criminal Court Act, which are sources of international criminal law in Uganda. Other sources of international criminal law in Uganda include all laws that are applicable to criminal proceedings in courts of Uganda. These include the Constitution of the Republic of Uganda, Penal Code Act and Evidence Act.

In order fulfil Uganda's commitment under the Agreement on Accountability and Reconciliation and to satisfy the obligation of complementarity under the Rome Statute, the GoU established the ICD, to try core crimes domestically. This study finds that ICD's legal regime provides for different aspects that make up the legal structure of the division. These include; the jurisdiction, the different stages of the trial process, reparations to victims and issues of witness protection.

The ICD has the jurisdiction to try genocide, crimes against humanity, war crimes, human trafficking and all crimes proscribed by Uganda's laws. Although the division has handled numerous trials of ordinary crimes, its first domestic trial of international crimes began in 2011, with the Thomas Kwoyelo case. Thomas Kwoyelo stands charged with grave breaches proscribed by the Geneva Conventions Act, crimes against humanity and other ordinary

crimes contrary to the Penal code Act of Uganda, such as murder, kidnap and rape. Today, the Kwoyelo case is still at the pre-trial stage.

Presence of a working legal system notwithstanding, this paper finds that the division is faced with different challenges hindering its performance. These include; legislative inadequacies, partiality, financial constraints, limited capacity and inadequate witness support and protection. It is the persistence of some of these challenges that has led to the inordinate delays in the Kwoyelo trial. It is therefore important that the stakeholders devise means to overcome these challenges to boost the performance of the division.

5.2 OBSERVATIONS AND RECOMMENDATIONS

Below are some of the proposed recommendations that may be considered to improve the performance of the ICD.

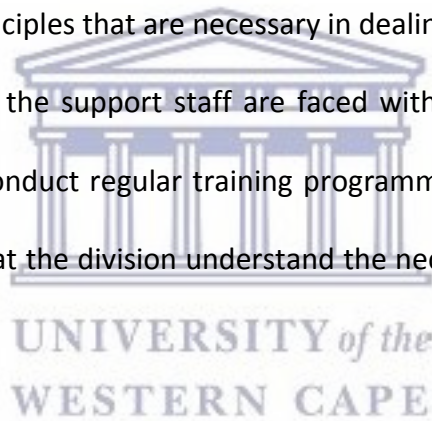
The judiciary of Uganda should consider intensifying support to the defense team, so as to ensure that the accused's defense is prepared on time. This may be by availing defense counsel with all the necessary financial and logistical support. Presiding judges at the ICD should also consider ensuring that full disclosure of evidence is done by the prosecution to enable the defense to prepare adequately and promptly.

The administrative department of the judiciary of Uganda should also consider minimising reshuffles of ICD staff. This will allow the division to keep the staff who are knowledgeable about international law and practices. The administration should also consider expediting efforts to establish witness protection units, to cater for the security of the witnesses before the ICD.

The judiciary of Uganda should consider prioritising ICD activities, by ensuring that funds are set aside for activities such as outreach programmes and prosecutions. Through adequate and prompt outreach and sensitisation programmes, the confusion as to the role of the ICD in communities will be prevented.

The office of the DPP should consider carrying on investigations with a view of prosecuting crimes committed by both the LRA and UPDF soldiers. This would resonate better with the victims of both the LRA and UPDF violence. It would also silence the sentiments claiming that the ICD is partial.

Lastly, regular training programmes should be implemented, to educate ICD staff on the international criminal law principles that are necessary in dealing with prosecution of serious crimes. Since the judges and the support staff are faced with administrative reshuffles, it would be advantageous to conduct regular training programmes at the division, to ensure that even the new members at the division understand the necessary international criminal law principles.



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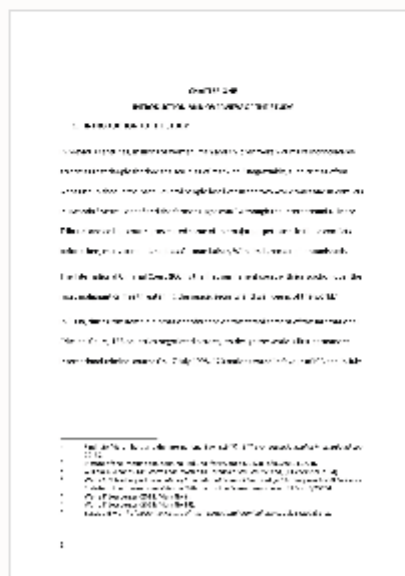


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