

Justice Delayed but not Denied: The Prosecution of Thomas Kwoyelo for International Crimes in Uganda

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Abstract

This article investigates the challenges of the application of international law in a domestic setting as depicted in the ongoing trial of Thomas Kwoyelo. Kwoyelo, a former child soldier and commander in the Lord's Resistance Army, is being prosecuted for the commission *inter alia* of murder, kidnapping with intent to murder, and pillaging, all as war crimes and crimes against humanity under International Humanitarian Law, Customary International Law and the *Penal Code Act* of Uganda. He is currently standing trial at the International Crimes Division of the High Court of Uganda. This trial is a unique test for the Ugandan judiciary, as it is faced with its first prosecution of an individual charged with crimes under international law. In a bid to apply international law domestically the Court has faced several challenges which have disabled the progress of the trial on many levels, arguably at the expense of the accused and the victims at large. The article primarily seeks to analyse the capability of the court to prosecute Kwoyelo for the commission of international crimes as well as to examine the challenges faced by the Court. The history of the conflict will be examined. This will be followed by an overview of the judicial hurdles faced by the Ugandan State in eventually charging Kwoyelo. The article will then analyse the present challenges faced by the Court. Finally, several recommendations are offered.

Keywords

Domestic law; International Criminal Law; Thomas Kwoyelo; International Crimes Division; crimes against humanity; victim participation; Lord's Resistance Army; Uganda.

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1 Introduction

The International Criminal Court (ICC) is charged with the responsibility of ensuring accountability under international criminal law.¹ However, the ICC shares this role with State Parties under the principle of complementarity. Complementarity is provided for under paragraph 1 of the Preamble² and Article 17³ of the *Rome Statute of the ICC (ICC Statute)*. Complementarity gives States Parties an opportunity to try the cases over which they have jurisdiction.⁴ The ICC steps in only where the State with jurisdiction is unwilling or unable to prosecute.⁵ This in itself enforces the notion that the State in question will have to apply international criminal law in its domestic setting. Indeed, the ICC is well aware that it is a court of last resort and has stated in *Prosecutor v Katanga and Ngudjolo* that domestic courts enjoy primacy over the ICC.⁶ Moreover, Werle and Jessberger provide that "the state parties should incorporate substantive international criminal law into their domestic legal system, so as to enable their courts to prosecute and punish international crimes in the same way as the International Criminal Court."⁷

Uganda is one of many ICC States Parties which have domesticated the ICC Statute, which it did when it enacted the *International Criminal Court*

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¹ Marshall 2010 *Human Rights Brief* 21.

² For a comprehensive discussion of the preamble of the *Rome Statute of the International Criminal Court* (1998) (hereafter the *ICC Statute*), see Triffterer, Bergsmo and Ambos "Preamble" 1-13.

³ For a detailed discussion of Art 17 of the ICC Statute, see Schabas and El Zheidy "Article 17" 781-831.

⁴ See Safferling *Towards an International Criminal Procedure* 40-41.

⁵ Article 17 of the *ICC Statute*. Also see Werle and Jessberger *Principles of International Criminal Law* 29.

⁶ *The Prosecutor v Katanga and Ngudjolo* Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, 25 September 2009 para 85. The sixth paragraph of the Preamble of the *ICC Statute* also states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Also see O'Keefe *International Criminal Law* 554.

⁷ Werle and Jessberger *Principles of International Criminal Law* 29.

Act, 2010.⁸ Uganda went a step further and established the International Crimes Division (ICD) of the High Court of Uganda in 2008. This ICD hears cases related to crimes under international law only. Between 1987 and 2008 Uganda experienced a protracted conflict⁹ led by the infamous Joseph Kony of the Lord's Resistance Army (LRA) against the government forces – the Uganda People's Defence Forces (UPDF) in its northern region. Although the LRA claimed to be fighting for the Acholi people, they ended up brutalising the very people that they claimed to be liberating.¹⁰ The conflict raged on for almost two decades, leaving in its wake devastation including pillaging, murder, body mutilation and abductions.¹¹ About 1.7 million people were forced into the Internally Displaced Person's (IDP) camps in order to flee the assaults, but these later turned into soft targets for LRA attacks.¹² These offensives later spread across the entire northern and some parts of the eastern regions of the country and later to South Sudan, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR).¹³

During the conflict, young Acholi boys and girls were abducted and conscripted into the rebel ranks, actively participating in the atrocities against their communities.¹⁴ Among these was Thomas Kwoyelo alias Latoni. Kwoyelo was forcefully abducted by the LRA at the early age of 13 while on his way to school in 1987.¹⁵ Following his abduction, Kwoyelo subsequently grew in the rebel ranks and rose to the level of a commander – a colonel, and the officer in charge of several departments.¹⁶ He served as one of Kony's right-hand men.¹⁷ The atrocities committed during the conflict fell within the ambit of International Criminal Law and for that reason

⁸ Also see South Africa, for example, which domesticated the *ICC Statute* in the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

⁹ Human Rights Watch 2012 https://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_0.pdf.

¹⁰ See generally *Uganda v Thomas Kwoyelo alias Latoni*, Confirmation of Charges, Uganda International Crimes Division HCT-OO-WCD-Criminal Case No. 002 of 2010 (31 August 2018).

¹¹ Apuuli 2005 *AJCR* 34; Also see Aijazi, Amony and Baines "'We Were Controlled'" 95-109, for a detailed discussion about sexual violence experienced by boys in the LRA.

¹² Apuuli 2005 *AJCR* 40. Also see Otunnu 2002 *Accord* 13.

¹³ See McKnight 2015 *JAL* 194.

¹⁴ Amnesty International 1997 <https://www.amnesty.org/en/documents/afr59/001/1997/en/>.

¹⁵ See generally *Thomas Kwoyelo alias Latoni v Uganda* (Constitutional Petition 36 of 2011) [2011] UGCC 10 (22 September 2011).

¹⁶ See generally *Uganda v Thomas Kwoyelo alias Latoni* (Constitutional Appeal No 1 of 2012 Arising out of the Constitutional Petition No 36 of 2011) [2015] UGSC 5 (08 April 2015) (hereafter *Uganda v Kwoyelo* Appeal No 1 of 2012) paras 6-7; Seelinger 2017 *CLR Online* 20-21.

¹⁷ See *Uganda v Kwoyelo* Appeal No 1 of 2012 para 8.

were worthy to be prosecuted by the ICC. The international community took an interest in the conflict in Uganda in 2003, when the Ugandan president asked for the intervention of the ICC in the form of a self-referral. The then Prosecutor of the ICC, Moreno Ocampo, travelled to Uganda in response to the invitation and opened a preliminary investigation into the crimes committed by the LRA in Northern Uganda, conducting an analysis of the case in order to be able to make a decision whether or not to open an investigation.¹⁸ In 2005 charges were preferred against the top five commanders of the LRA¹⁹ and arrest warrants were issued by the ICC.²⁰ However, in addition to the top five there were other LRA officials who were also responsible for the commission of crimes under international law, who were not subjected to immediate prosecution, including Kwoyelo. Their participation in the conflict did not match the threshold of gravity under Article 17(1)(d) of the *ICC Statute* for them to be prosecuted at the ICC. Uganda's interest in the domestic application of international law then took its course in pursuant to Article 1 of the *Annexure to the Agreement on Accountability and Reconciliation*, 2008. Also, the government of Uganda had made several attempts to negotiate a peace deal to end the conflict, but in vain.²¹ Negotiations were undertaken, which ultimately led to the end of the conflict in 2008.

Among the matters dealt with in the peace accord was the issue of accountability, which was foregrounded with the creation of a Specialised Division placed within the High Court of Uganda.²² The creation of this court fit perfectly the idea of positive complementarity, where the ICC would partner with states to ensure that prosecutions were conducted domestically.²³ The War Crimes Division was created under the High Court in 2008. It was later turned into the International Crimes Division (ICD), still under the High Court of Uganda.²⁴

Because Kwoyelo allegedly committed the atrocities before the establishment of the ICC in 2002, the ICC does not have jurisdiction over his conduct. Thus, since Kwoyelo was never the subject of an ICC arrest warrant,²⁵ his case is being heard by the ICD.²⁶ McKnight argues that "the

¹⁸ Marshall 2010 *Human Rights Brief* 25.

¹⁹ The top five were Joseph Kony, Vincent Otti (deceased), Okot Odhiambo (deceased), Raska Lukwiya (deceased) and Dominic Ongwen.

²⁰ See ICC 2022 <https://www.icc-cpi.int/uganda/kony>.

²¹ *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement* (29 June 2007, Juba, Sudan) (the AAR).

²² Bradfield 2017 *JICJ* 831.

²³ Marshall 2010 *Human Rights Brief* 22.

²⁴ Kemp "Implementation of the Rome Statute" 74.

²⁵ See Human Rights Watch 2011 https://www.hrw.org/sites/default/files/related_material/Q%26A%20Kwoyelo%20Trial.pdf.

²⁶ McNamara 2013 *Wash U Global Stud L Rev* 657.

conflict in northern Uganda presents a unique study of international criminal law and different responses to prolonged conflict, as seemingly every tactical and ideological method that has been implemented to instil peace and secure justice has failed."²⁷ These "tactical and ideological methods" include Uganda's *Amnesty Act* of 2000, the arrest warrants of the ICC for LRA commanders, the Juba peace talks, the establishment of the ICD, and Acholi ritual ceremonies.²⁸ The entire survivor population is still grappling with the aftermath of the conflict and the prosecution of those responsible. The creation of the ICD was timely and vital.

Despite its creation, the court has not been spared the toils of a domestic court handling crimes of an international nature. This court, one of a kind in the arena of the domestic application of international law, has tested the pitfalls that there are in the field. It is worth mentioning that the court did not foresee the complexities of prosecuting international crimes in a domestic setting, which has been responsible for the delays in the Kwoyelo matter. First, the legal landscape was not fit for the magnitude of the responsibility. The Uganda legislation lacked provisions for the criminalisation and punishment of crimes of international law, war crimes and crimes against humanity, which were the most likely ones the intended defendants would be charged with. During the Kwoyelo trial, the issue of the applicable law was outstanding and the prosecution and defence went back and forth in the pre-trial sessions as to whether customary international law was applicable. The ICD is a new court and also had to appoint judges who were not well versed in the application of International Criminal Law, which has added to the delays. Also, the legal system did not cater for incidental issues like the conduct of the trial in the interest of victims, and witness protection, mainly due to the applicability of the concept of victim participation, which is foreign to common law jurisdictions. This remains a challenge today.²⁹

The prosecution of crimes against humanity in particular presents its own challenges, such as the complexity of the material elements of the crime. It is very important for the ICD to ensure that justice is served in the Kwoyelo case in support of the principle of complementarity under the *ICC Statute*. The purpose of this article is to illustrate how Uganda is prosecuting crimes under international law, and in particular in the Kwoyelo case, one of the first cases at the ICD, as well as the challenges that may possibly prevent a fair trial of Kwoyelo in Uganda. It also proposes certain changes to the current legal regime responsible for the prosecution of crimes under international law in Uganda. This is important because currently there is a gap in the literature regarding the prosecution of crimes under international

²⁷ McKnight 2015 *JAL* 193-194; Also see Oola "In the Shadow of Kwoyelo's Trial" 153.

²⁸ McKnight 2015 *JAL* 194.

²⁹ International Justice Monitor 2018 <https://www.ijmonitor.org/2018/10/thomas-kwoyelo-in-uganda-victims-participation-brings-hope-and-challenges/>.

law by Uganda and more particularly, the case of Thomas Kwoyelo. These cases are complex in nature and require experienced judges knowledgeable in the theory and practical application of international criminal law. This article fills this gap in the literature and makes a valuable contribution to the field of International Criminal Law.

The article begins by exploring the creation of the ICD. It then examines why Kwoyelo is facing charges at the ICD as opposed to at the ICC, since one of Kwoyelo's fellow commanders, Dominic Ongwen, was convicted by the ICC in February 2021.³⁰ The rest of this article discusses the various delays faced by the ICD and how these challenges may be remedied by the Court.

2 The ICD and the trial of Thomas Kwoyelo

As per Article 17 of the *ICC Statute*, the ICC operates on the principle of complementarity.³¹ This principle encourages states where atrocities were committed to have the first recourse in trying the culprits of such violations.³² The ICC steps in only where the state is unable or unwilling to try the supposed offenders. This same scenario played out in the Ugandan case. The creation of the ICD arose from the agreements that were arrived at during the Peace Talks between the government of Uganda and the rebels in Juba, the capital of South Sudan.³³ The talks, which were not planned well mainly due to a lack of consensus between the parties, started in 2006 and were dominated by the peace versus justice discourse at a time when the ICC was investigating the Ugandan situation, which move seemed to be at odds with the reconciliation process.³⁴ By 2005 the ICC had issued warrants of arrest against the top five lieutenants of the LRA for war crimes and crimes against humanity.³⁵ This was premised on a self-referral to the ICC by the Ugandan government in 2003.³⁶ It is believed that with the warrants on the table the LRA were motivated to negotiate, hoping for

³⁰ See *The Prosecutor v Dominic Ongwen* Trial Judgment, ICC-02/04-01/15-1762-RED, Trial Chamber IX, 4 February 2021.

³¹ See generally Werle and Jessberger *Principles of International Criminal Law* 94. Art 17(1)(a) of the *ICC Statute* provides that "the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

³² Schabas and El Zheidy "Article 17" 784; Werle and Jessberger *Principles of International Criminal Law* 94.

³³ Moffett 2016 *Int CLR* 520.

³⁴ Quinn 2009 *Human Rights Rev* 61-63. See generally Sriram "International Criminal Court Africa Experiment".

³⁵ See ICC 2022 <https://www.icc-cpi.int/uganda/kony>.

³⁶ Human Rights Watch 2012 https://www.hrw.org/sites/default/files/reports/uganda_0112ForUpload_0.pdf. The *ICC Statute* provides for self-referrals of situations where a State Party to the *ICC Statute* can refer a situation to the Prosecutor of the ICC under Art 13(a).

amnesty, which they wanted in its blanket form, whilst the government pressed for accountability, as reflected in the *Agreement on Accountability and Reconciliation (AAR)* and its Annexure between the Government of the Republic of Uganda and the Lord's Resistance Army.³⁷ This frustrated many pro-peace advocates, who were worrying that the LRA would abandon the talks in fear of prosecution, which would in turn disturb the peace process.³⁸ Fortunately this was not the case as the final agreement was reached in 2008. The conflict in Uganda ended as the rebels fled to the neighbouring DRC, South Sudan and later to CAR.³⁹ Although the rebels on their part never signed the final Agreement but only the Annexure, the government remained true to its promise in the Annexure and pursued accountability, which was emphasised in the agreements during the Peace Talks which led to the establishment of the ICD.⁴⁰ Finally, there was an agreement in place between the parties.

The ICD was an actualisation of Uganda's complementary role to the ICC, giving Uganda its first recourse to trying the cases from the conflict.⁴¹ The ICD is a domestic court established in the High Court of Uganda, a special division whose jurisdiction consists of international crimes like war crimes, crimes against humanity and genocide, and other transnational crimes like trafficking in persons, terrorism and piracy.⁴² Thus, any individual who commits crimes under international law can be prosecuted at the ICD, thereby fulfilling the preamble of the *ICC Statute*, which advocated for the primacy of domestic prosecutions of international crime.⁴³

Despite its international law application, the ICD is premised on a common law foundation in the High Court of Uganda. A lot of this deviates from the appearance of international law and how it is applied at the ICC or other International Criminal Tribunals and courts such as the International Criminal Tribunal for the former Yugoslavia (ICTY) or the Special Court for Sierra Leone (SCSL), that have in the past been used to apply international law.⁴⁴ Yet the ICD was not to remain static in its model, but had to adjust to fit its purpose. This it did by introducing aspects including two chambers - a pre-trial and a trial chamber - a panel of three judges at trial, victim

³⁷ See *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement* (29 June 2007, Juba, Sudan). See generally Atkinson "'Realists in Juba?'".

³⁸ Bassiouni 2006 *JICJ* 424.

³⁹ *Uganda v Thomas Kwoyelo alias Latoni*, Confirmation of Charges, Uganda International Crimes Division HCT-OO-WCD-Criminal Case No. 002 of 2010 (31 August 2018) para 5.

⁴⁰ Moffett 2016 *Int CLR* 520-521.

⁴¹ Moffett 2016 *Int CLR* 504.

⁴² Section 6 of the *High Court (International Crimes Division) Practice Directions*, 2011.

⁴³ See generally Werle and Jessberger *Principles of international Criminal Law* 128-130.

⁴⁴ See generally McKnight 2015 *JAL* 205.

participation in the trial with legal representation, and witness protection, aspects that have proved quite difficult to realise for a strictly common law judiciary.⁴⁵ The applicable law includes the *Penal Code Act* of Uganda, 1950, the *Geneva Conventions* and Common Article Three forming part of customary law. In addition, the *International Criminal Court Act* gives force to the applicability of the *ICC Statute* in Uganda but cannot be used as it came in force after the period in which Kwoyelo allegedly committed the crimes of which he stands accused.⁴⁶ The stage was set for the domestic prosecution of crimes under international law in Uganda, and Kwoyelo would be one of the Court's first defendants.

3 The case of Thomas Kwoyelo

Kwoyelo, a former child soldier and victim of the LRA, rose through the ranks of the rebel group that abducted him and became a colonel himself.⁴⁷ Despite the offers of amnesty, he remained loyal to the rebel group.⁴⁸ He was captured in a fire exchange between the rebels and the UPDF in the operation "Lighting Thunder" that occurred in the Garamba National Park of the DRC in 2009 and was held in custody in several places, including Luzira prison in Kampala.⁴⁹ Kwoyelo was an active member of the LRA and was in combat between 1992 and 2005.⁵⁰ He allegedly participated in several atrocities including rapes, murders and kidnaps, either directly or through his command.⁵¹ It is also alleged that while active, Kwoyelo occasioned assaults against civilian populations in IDP camps in Kilak, Pabbo sub-county and the present-day Amuru district, while at the same time serving as the commander of operations and the director of military intelligence, and that he was in charge of the sick bay in the rebel ranks.⁵² He was arraigned before the ICD in 2010 and is now facing 93 counts of crimes against humanity in violation of Article 3 common to the *Geneva Convention* under customary international law, as well as other serious offences.⁵³

⁴⁵ Ugandan Judiciary 2022 <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html>.

⁴⁶ McNamara 2013 *Wash U Global Stud L Rev* 658-659. See also Kemp "Implementation of the Rome Statute" 74-75.

⁴⁷ *Uganda v Thomas Kwoyelo alias Latoni*, Confirmation of Charges, Uganda International Crimes Division HCT-OO-WCD-Criminal Case No. 002 of 2010 (31 August 2018) para 4.

⁴⁸ Human Rights Watch 2012 https://www.hrw.org/sites/default/files/reports/uganda_0112ForUpload_0.pdf.

⁴⁹ Human Rights Watch 2012 https://www.hrw.org/sites/default/files/reports/uganda_0112ForUpload_0.pdf.

⁵⁰ *Uganda v Kwoyelo* Appeal No 1 of 2012 para 15.

⁵¹ See *Uganda v Kwoyelo* Appeal No 1 of 2012 paras 9-11.

⁵² *Uganda v Kwoyelo* Appeal No 1 of 2012 para 12.

⁵³ See *Uganda v Kwoyelo* Appeal No 1 of 2012.

3.1 Application for amnesty

Uganda's obligation to international law was scrutinised in Kwoyelo's amnesty application, which application postponed the start of the trial. The eventual decision by the Ugandan Supreme Court in terms of granting amnesty to individuals implicated in the commission of mass atrocities is important for the development of international criminal law in Uganda.⁵⁴ When the Ugandan government was exploring amnesty there was a level of mistrust of the Government among the rebels.⁵⁵ The mistrust was grounded "in the fact that whereas the government of Uganda was pursuing peaceful means to achieve peace and end armed rebellion in the country, it was still showing support to its international obligations under the *ICC Statute* to surrender senior rebel commanders to face justice at the ICC."⁵⁶ Nevertheless, prior to Kwoyelo's application, about 26,000 former soldiers,⁵⁷ mostly belonging to the LRA, had benefitted from the *Amnesty Act* of 2000 (as amended in 2010).⁵⁸ Some of these were of a rank higher than Kwoyelo himself and others were in the same position as he was – captured in the rebel camps.⁵⁹ It was in Luzira prison that Kwoyelo denounced the rebellion and applied for amnesty.⁶⁰ His declaration was forwarded to the Office of the Director of Public Prosecution (ODPP), who did not have the jurisdiction to decide on the amnesty application, but left it to the courts. The ODPP therefore arraigned him before the Magistrates' Court and he was later committed for trial at the ICD in 2010.⁶¹ It was at the trial that he requested a consideration of his request for amnesty, arguing that the crimes which he was indicted for qualified for amnesty under the Act and that the rejection of this right would be discriminatory and in violation of his constitutional rights.⁶² This request was a matter of constitutional interpretation to determine the question of the denial of amnesty and its constitutionality. Lacking jurisdiction in the matter, the ICD referred the case to the Constitutional Court. The Constitutional Court ruled in favour of Kwoyelo's application that he qualified for amnesty.⁶³ Instead of facilitating his release,

⁵⁴ For a comprehensive discussion of amnesty in Uganda, see generally Miiró *Amnesty and Peace Building*; Bradfield 2017 *JICJ* 853-854.

⁵⁵ Muramuzi, Mawa and Ngabirano 2019 *IJSRP* 881.

⁵⁶ Muramuzi, Mawa and Ngabirano 2019 *IJSRP* 881.

⁵⁷ Bradfield 2017 *JICJ* 830.

⁵⁸ Article 2 of the *Amnesty Act* (Cap 294), 2000 defines amnesty as "a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State". Also see Hanlon 2007 *Tulsa J Comp & Int'l L* 304.

⁵⁹ *Uganda v Kwoyelo* Appeal No 1 of 2012 para 5.

⁶⁰ *Uganda v Kwoyelo* Appeal No 1 of 2012 para 10.

⁶¹ *Uganda v Kwoyelo* Appeal No 1 of 2012 para 15.

⁶² *Uganda v Kwoyelo* Appeal No 1 of 2012 para 3.

⁶³ See generally *Thomas Kwoyelo alias Latoni v Uganda* (Constitutional Petition 36 of 2011) [2011] UGCC 10 (22 September 2011).

the ODPP appealed the decision to the Supreme Court, with Kwoyelo still in detention.

An issue for consideration, among others, was the consistency of the *Amnesty Act* with the *Constitution* and Uganda's international law obligation to combat impunity for the commission of atrocities and to hold to account individuals responsible for such offences. The Supreme Court considered Kwoyelo's amnesty by determining whether his acts contributed to the prolongation of war.⁶⁴ It overturned the decision of the Constitutional Court and upheld Uganda's obligation to international law by ruling that the trial against Kwoyelo should proceed.⁶⁵ It was important for Uganda to be decisive and pursue the prosecution against Kwoyelo, even though there are no international legal constraints to the granting of amnesty for crimes under international law.⁶⁶

It was approximately six years from the time of Kwoyelo's application until the time when the Supreme Court ruled on the issue of his amnesty. The Supreme Court found the Act applicable to political crimes, those in furtherance of war or rebellion, but not to grave breaches against individual civilians, under which Kwoyelo's crimes were categorised.⁶⁷ In its view, Kwoyelo had engaged in acts that were not justified by military necessity – attacks on innocent civilians in their homes, which had nothing to do with the furtherance of war and hence were unlawful.⁶⁸ The Supreme Court upheld Uganda's international obligation to peace and security by taming the reach of the Act while adding that the ODPP had not scrutinised the amnesty applications as necessary. Many undeserving applicants benefitted from the law, which became understood as blanket amnesty, but this form of amnesty was subsequently dismissed by the Supreme Court.⁶⁹

3.2 Subject matter jurisdiction

In 2018 the ICD confirmed numerous charges against Kwoyelo. The charges include *inter alia* murder, rape, the recruitment of child soldiers and crimes against humanity, some committed directly while others were committed through his command.⁷⁰ One of the elements of crimes against

⁶⁴ Bradfield 2017 JICJ 842.

⁶⁵ *Uganda v Kwoyelo* Appeal No 1 of 2012 para 41.

⁶⁶ See Scharf 1999 *Cornell Int'l LJ* 521.

⁶⁷ Bradfield 2017 JICJ 843; *Uganda v Kwoyelo* Appeal No 1 of 2012 para 41.

⁶⁸ Bradfield 2017 JICJ 843, 851.

⁶⁹ Bradfield 2017 JICJ 842-844; *Uganda v Kwoyelo* Appeal No 1 of 2012 paras 41, 43.

⁷⁰ See generally *Uganda v Thomas Kwoyelo alias Latoni*, Confirmation of Charges, Uganda International Crimes Division HCT-OO-WCD-Criminal Case No. 002 of 2010 (31 August 2018).

humanity is that the attack must be widespread and systematic.⁷¹ Crimes against humanity is one of the core crimes of the ICC Statute and is a crime under customary international law.⁷² This in particular lends an international dimension to the offences allegedly committed by Kwoyelo. An in-depth understanding of the subject matter jurisdiction therefore plays a crucial part in the trial. For the matter of Kwoyelo, there was a need for careful consideration of the applicability of the law, the selection of which was complex.

An important subject matter jurisdiction question arises in view of the application of the *ICC Statute*. Given the fact that Kwoyelo is alleged to have committed some of the offences during the 1990s the *ICC Statute*, which was ratified in 2002, as well as the Ugandan *ICC Act* cannot be applicable mainly due to the legality principle, which is well enshrined in international law⁷³ and the Ugandan *Constitution*,⁷⁴ and purports that there can be no crime without law. The Ugandan penal laws would have been solely applicable at the time, especially for the crimes of murder and rape. Thus, the Prosecutor at the ICD will have to prove subject matter jurisdiction especially for the crimes against humanity and certain violations of international humanitarian law pursuant to customary international law.

3.2.1 Customary international law

The ICD confirmed that Kwoyelo allegedly committed certain crimes in violation of customary international law. Customary international law is "that body of law which derives from the practice of States accompanied by *opinio juris*."⁷⁵ "Legislative measures must be considered, along with decisions of courts and official acts and declarations by state representatives."⁷⁶ In certain cases customary law might be the only solution to a legal problem simply because of its familiarity among the legal community.⁷⁷ However, the application of customary international law in international criminal law is not without criticism, particularly due to its vagueness and uncodified nature, which makes the establishment of criminal liability on the basis of customary international law troublesome.⁷⁸ These challenges have been overcome in the past, as the Nuremberg Tribunals show, as well as the ICTY, which has applied customary international law in international criminal law cases

⁷¹ Ambos *Treatise on International Criminal Law* 280. Also see Hall and Ambos "Article 7" 167-172.

⁷² See generally Cryer *et al Introduction to International Criminal Law* 229.

⁷³ See Art 22 of the *ICC Statute*.

⁷⁴ Article 28(7) of the *Constitution of the Republic of Uganda*, 1995.

⁷⁵ Cryer *et al Introduction to International Criminal Law* 10.

⁷⁶ Werle and Jessberger *Principles of International Criminal Law* 58.

⁷⁷ Kadens and Young 2013 *Wm & Mary L Rev* 897.

⁷⁸ Djuro-Degan 2005 *Chinese JIL* 45-48; Cryer *et al Introduction to International Criminal Law* 11.

similar to that of Kwoyelo.⁷⁹ Each armed conflict and each case presents its own unique challenges to the interpretation of customary international law and should be treated on a case-by-case basis. Seelinger notes that

the direct application of customary international law into domestic legal orders is very much a nuanced and evolving question. There is simply no universal way states have approached the question. As experts in a largely dualist country following the English common law tradition, Ugandan judges can chart their own course with respect to the domestic application of customary international law in civil and criminal cases.⁸⁰

One of the questions that the judges will eventually have to determine during the trial is whether the alleged crimes against humanity were part of customary international law at the time of the commission of the offences by Kwoyelo.

3.2.2 *Crimes against humanity*

The definition of crimes against humanity was first observed in the *St Petersburg Declaration* of 1868 and has evolved significantly ever since.⁸¹ Simply put, "crimes against humanity are mass crimes committed against a civilian population".⁸² The term was particularly coined in Article 6(c) of the *Nuremberg Charter* in 1945 as well as in Article 5(c) of the *Tokyo Charter* in 1946. Several high-ranking Nazi officials were prosecuted for crimes against humanity at the Nuremberg Tribunal. Furthermore, the Statutes of the ICTY as well as the International Criminal Tribunal for Rwanda (ICTR) included crimes against humanity as a crime. These were included in these Tribunals because the perpetrators implicated in the respective conflicts targeted the fundamental human rights of the victims as part of a widespread and systematic attack on a civilian population. The crime addresses "the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind."⁸³ The crimes allegedly committed by Kwoyelo were therefore not committed only against the victims of the conflict in Uganda but also against the international community as a whole.⁸⁴ Crimes against humanity also require an individual to commit the crimes against a civilian population, whether in peace time or war time, and excludes isolated attacks such as killing only one person in a village.⁸⁵ Kwoyelo was allegedly responsible for numerous attacks that targeted

⁷⁹ Cryer *et al* *Introduction to International Criminal Law* 11.

⁸⁰ Seelinger 2017 *CLR Online* 30.

⁸¹ For a comprehensive discussion of Art 7 of the *ICC Statute*, see generally Hall and Ambos "Article 7" 144-294.

⁸² Werle and Jessberger *Principles of International Criminal Law* 328.

⁸³ *Prosecutor v Erdemovic* Case No. IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, 7 October 1997 para 21.

⁸⁴ See Cryer *et al* *Introduction to International Criminal Law* 229.

⁸⁵ Hall and Ambos "Article 7" 168-169.

civilians. These attacks were not isolated and were systematic.⁸⁶ It is submitted that these alleged crimes fall under the ambit of crimes against humanity pursuant to customary international law since crimes against humanity have been prosecuted by numerous tribunals in the past and the prosecution of such as allegedly committed by Kwoyelo has been accepted by States to be in accordance with the law.

3.2.3 *International humanitarian law*

The Confirmation of Charges includes several charges relating to the violation of certain sections of Common Article 3 of the *Geneva Conventions*, including murder, hostage taking, pillaging, cruel treatment, outrages perpetrated upon personal dignity, and torture. The *Geneva Conventions* or the Geneva Law(s) are among the most important sources of international humanitarian law. They essentially deal with the protection of civilians and former combatants unwilling to take part in the fighting.⁸⁷ In particular, Common Article 3 of the third *Geneva Convention* of 1949 protects the rights of civilians and prisoners of war in non-international armed conflicts.⁸⁸ Kwoyelo's alleged conduct was in direct violation of Common Article 3(1). Not only did he allegedly murder hundreds of civilians in a non-international armed conflict, but also committed various other offences listed under Common Article 3(1), including torture, rape, the destruction of villages and cruel treatment.

The application of crimes against humanity as a crime pursuant to international humanitarian law is well documented.⁸⁹ A report of the UN Secretary-General related to the establishment of the ICTY held that the statute should apply international humanitarian law as it is part of customary international law.⁹⁰ The report further added that doing so would be necessary for an international tribunal while prosecuting those persons that are responsible for serious violations of international humanitarian law.⁹¹ As in the case of Kwoyelo, who allegedly committed serious violations of international humanitarian law, it was important for the ICD to include violations of Common Article 3 as part of their subject matter jurisdiction.

⁸⁶ See *Uganda v Thomas Kwoyelo alias Latoni*, Confirmation of Charges, Uganda International Crimes Division HCT-OO-WCD-Criminal Case No. 002 of 2010 (31 August 2018) para 26.

⁸⁷ See Werle and Jessberger *Principles of International Criminal Law* 395.

⁸⁸ Article 3(1) of the *Geneva Convention (III) Relative to the Treatment of Prisoners of War* (1949).

⁸⁹ See Hall and Ambos "Article 7" 152-155.

⁹⁰ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* UN Doc S/25704 (1993).

⁹¹ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* UN Doc S/25704 (1993) para 34; Djuro-Degan 2005 *Chinese JIL* 46.

Significantly, at pre-trial the ICD rejected the Defence's submission not to apply customary international law and held that

the Constitution of Uganda does not prohibit the application of customary international law in Uganda's legal order and that to the contrary, it is open to the application of non-written law. Moreover, the offences charged in the Amended Indictment (crimes against humanity and serious violations of Common Article 3) do not contravene the legality principle, because at the time of their alleged commission, the said crimes were well-established bases for individual criminal liability both under treaty law and customary international law, thus giving the accused reasonable foreseeability.⁹²

The charges against Kwoyelo are comprehensive and legitimate. The charges in relation to customary international law are very serious and the burden is now on the State to prove that Kwoyelo is guilty beyond a reasonable doubt. The stage is set for the prosecution of Kwoyelo, but serious concerns have arisen regarding the capacity of the ICD to hear the case.

4 Challenges confronting the ICD

Despite a rich background in the content, the violent nature of the conflict and the willingness to prosecute, those most responsible for the LRA atrocities were not being prosecuted. That being said, the government of Uganda was firm in its decision to pursue accountability for the atrocities that had been committed in the north by the LRA rebels.⁹³ The establishment of the ICD was vital to address impunity. However, just like any other new institution, the ICD has faced its share of challenges. Judicial challenges such as the interpretation and application of rules of procedure, unreasonable delays, and victim participation are among a few of the challenges.⁹⁴ If these problems are left unresolved the successful completion of the Kwoyelo case might be jeopardised.

4.1 Judicial challenges

The crimes in the context of the Kwoyelo trial require the application of law by skilled legal professionals experienced in the delicate nuances of international criminal law and customary international law, none more so than the judges who must interpret the law, convict or acquit the offender and pass a sentence. In addition, all the previous international courts such

⁹² *Uganda v Thomas Kwoyelo alias Latoni*, Confirmation of Charges, Uganda International Crimes Division HCT-OO-WCD-Criminal Case No. 002 of 2010 (31 August 2018) para 43.

⁹³ Greenawalt 2009 *Va J Int'l L* 108.

⁹⁴ The payment of reparations to victims at the ICD is also a complex and challenging matter and will not be dealt with in detail in this article as this article is mainly dealing with the current challenges faced in the early stages of the Kwoyelo trial. For a detailed analysis of reparations at the ICD, see Musila 2016 <https://ssrn.com/abstract=2906172>.

as the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR, the SCSL and the Special Panels for Serious Crimes in East Timor consisted of judges from various countries. For example, in Sierra Leone the three judges in the Trail Chamber consisted of a Sierra Leonean judge and two international judges.⁹⁵ The involvement of international judges in post-conflict prosecutions provides a different perspective to a case and prevents judges from becoming too sentimental and emotional. That being said, it is also an advantage to have solely Ugandan judges on the panel, owing to their acute awareness of the history of the conflict as well as their understanding the local language. We support the fact that all judges at the ICD are currently from Uganda. Ugandan judges understand the impact that the conflict has had on Uganda as a whole.

The general question arises whether the judges at the ICD have enough experience to hear cases involving the prosecution of crimes under international law. All the judges at the ICD and in particular at the Kwoyelo trial are local Ugandan judges. Some of the former and current judges at the ICD have had exposure in hearing cases of crimes under international law by having served either at the ICTR or the SCSL and have experience in domestic criminal law cases concerning the conflict in Northern Uganda.⁹⁶ Moreover, there have been various training exercises and capacity building seminars for ICD judicial staff, both locally and abroad.⁹⁷ In 2011 the ICC publicly expressed a commitment to assist the ICD. The expert assistance from the ICC provides the ICD judges with additional experience in hearing its cases, which in turn ensures that Kwoyelo's case will be heard by judges well versed in the interpretation and application of international criminal law.

However, it seems that Uganda is struggling to keep hold of her experienced judges. A rotation policy in the Ugandan judiciary provides that judges rotate every three to four years.⁹⁸ Some, like Justice Elizabeth Ibanda-Nahamya, reached retirement age and the pleas to have her tenure extended for the course of the trial were granted only in part, her tenure being extended by only a year, which is not adequate.⁹⁹ With vast expertise in international criminal law, Justice Nahamya served as a judge at the International

⁹⁵ Article 12 of the *Statute of the Special Court for Sierra Leone* UN Doc S/2002/246 (2002).

⁹⁶ Human Rights Watch 2011 https://www.hrw.org/sites/default/files/related_material/Q%26A%20Kwoyelo%20Trial.pdf.

⁹⁷ Human Rights Watch 2011 https://www.hrw.org/sites/default/files/related_material/Q%26A%20Kwoyelo%20Trial.pdf.

⁹⁸ Human Rights Watch 2011 https://www.hrw.org/sites/default/files/related_material/Q%26A%20Kwoyelo%20Trial.pdf.

⁹⁹ Wesaka 2017 <https://www.monitor.co.ug/News/National/Retiring-judges-in-sheikhs-trial-to-get-one-year-extension/688334-3857396-a5t92jz/index.html#:~:text=The%20judges%20to%20be%20considered,Muhanguzi%20and%20Justice%20Elizabeth%20Nahamya.&text=According%20to%20information%20from%20the,age%20for%20High%20Court%20judges> 5.

Residual Mechanism for Criminal Tribunals. Moreover, the ICD remains under financial strain, which adds to the plight of slow justice.¹⁰⁰ It is recommended that judges at the ICD should be excluded from the Ugandan judiciary's rotation policy and serve out a longer term. The ICC should also be encouraged to assist the ICD financially. The continuous rotation of judges in the Kwoyelo trial could lead to several delays in the trial due to the appointment of new judges and should be avoided.

Also, the judges in the Kwoyelo case could appoint an *amicus curiae* or an expert witness experienced in the field of crimes under international law to assist the judges and provide a neutral view of the substantial law aspects of the trial, bearing in mind the complex nature of these crimes. A retired judge of the ICTY or a former judge of the ICC could be approached in this regard, a matter in which the ICC should consider assisting the ICD.

4.2 Unreasonable delays in the trial

Kwoyelo's experience while at the ICD has been anything but expeditious. He has already been in detention since his arrest in 2008. The right to a speedy and fair trial is a universal human right, also enshrined under Article 28(1) of the Ugandan *Constitution*, and should be enforced as such by the ICD.¹⁰¹ Instead, the delays register the violation not only of the accused's rights to justice but also those of his alleged victims, who depend on this trial to have their rights represented and to acquire reparation. In fact, Kwoyelo's legal team approached the African Commission on Human and Peoples' Rights (ACHPR) in 2012. This was after the ICD commenced with Kwoyelo's trial in 2011.

The Ugandan Government refused to release Kwoyelo upon his amnesty application, which led to a complaint to the ACHPR as a measure of last resort. Several issues were raised by the complainants on behalf of Kwoyelo, *inter alia* allegations that he was tortured after his capture and a plethora of procedural irregularities between 2011 and 2012.¹⁰² In 2018 the ACHPR dismissed most of the complainant's arguments, including the matter related to torture.¹⁰³ However, it decided that Uganda had violated several of Kwoyelo's rights in terms of the *ACHPR Charter* and even ordered Uganda to pay compensation to Kwoyelo as a result of the violations.¹⁰⁴ The violations included the right to be treated equally before

¹⁰⁰ Nakandha 2020 <https://www.ijmonitor.org/2020/06/complementarity-reality-check-the-case-of-ugandas-international-crimes-division/>.

¹⁰¹ See generally Farrell 2003 *SAJHR*.

¹⁰² Generally see *Thomas Kwoyelo v Uganda* Communication 431/12, ACHPR, 17 October 2018.

¹⁰³ *Thomas Kwoyelo v Uganda* Communication 431/12, ACHPR, 17 October 2018 para 198.

¹⁰⁴ *Thomas Kwoyelo v Uganda* Communication 431/12, ACHPR, 17 October 2018 para 295.

the law in terms of Article 3 of the Charter and to have a right to appeal in terms of Article 7(1)(a).¹⁰⁵ Finally, his right to a speedy trial in accordance with Article 7(1)(d) of the Charter had been only partially violated by Uganda.¹⁰⁶

The right to a speedy trial is also regulated under international criminal law.¹⁰⁷ Moreover, the United Nations (UN) Human Rights Committee states that the right to a speedy trial

relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal.¹⁰⁸

There were many delays in the initial proceedings which led the complainants to argue that Kwoyelo's right to a speedy trial had been violated. The ACHPR held that the Supreme Court should have ensured a speedy trial in 2012.¹⁰⁹ Apart from the ACHPR judgement and the various acts that protect the right to a speedy trial, Rule 55 of the *ICD Rules* also speaks of limiting delays in trials. Mention is also made of the Court's duty to guarantee expeditious trials.¹¹⁰ Kwoyelo has been in detention for over 13 years without being convicted by a Ugandan court and the trial is still just under way. This protracted and unreasonable delay is in clear violation of the fundamental human rights of Kwoyelo but also impedes the progress of access to justice and the rights of the victims of the alleged crimes.

4.3 Victim participation

Another major challenge faced by the ICD is victim participation. The commission of large-scale atrocities often results in a large number of victims. The Holocaust and the Rwandan genocide are two glaring examples. Donat-Cattin notes that "victims are alone because their rights are not fully recognised by the law that is applicable to them, and their life, security and privacy are not always protected before, during and after the

¹⁰⁵ *Thomas Kwoyelo v Uganda* Communication 431/12, ACHPR, 17 October 2018 para 294.

¹⁰⁶ *Thomas Kwoyelo v Uganda* Communication 431/12, ACHPR, 17 October 2018 para 265.

¹⁰⁷ Article 64(2) of the *ICC Statute* provides that "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Also, Art 67(1)(c) of the *ICC Statute* protects the right of the accused to be tried without undue delay. See also Schabas and McDermott "Article 67" 1663.

¹⁰⁸ *UN Human Rights Committee, General Comment No 13: Article 14 (Administration of Justice) - Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (1984) para 10.

¹⁰⁹ *Thomas Kwoyelo v Uganda* Communication 431/12, ACHPR, 17 October 2018 para 265.

¹¹⁰ Rule 55 of the *International Crimes Division Rules*, 2016 (the *ICD Rules*).

trial.¹¹¹ Importantly, the *ICC Statute* regulates the involvement of victims in trials.¹¹² The ICC created a unique avenue for the involvement of victims in trials.¹¹³ This is commonly known as victim participation. It is born of a concept that victims, like the rest of the international community, should take part in determining the guilt or innocence of the accused.¹¹⁴ This participation is embedded in the initial rights of the victim to participation and protection throughout the trial and then in reparations after trial.¹¹⁵ It is believed that their participation either by testifying or by witnessing the prosecution of their persecutors will yield closure.¹¹⁶ Victim participation in international criminal tribunals was discussed intensively at the UN *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985, when Member States were encouraged to better the victims' place in their national justice systems.¹¹⁷ These same principles were negotiated during the drafting of the *ICC Statute* and included in the practice of the ICC.¹¹⁸

Uganda having an adversarial system, the notion of victim participation is entirely novel. The idea in the case of Uganda was developed during the Juba Peace Talks, as documented in the AAR,¹¹⁹ tapping into the influence of the *ICC Statute*. The jurisprudence pertaining to this concept is being developed in the Kwoyelo trial. However, it is well developed in the international community and especially at the ICC, most recently in the *Ongwen* case.¹²⁰ This was not an easy addition to the *ICC Statute*.

The participation of victims during a trial is viewed as a means in ending impunity.¹²¹ Moffett posits that it is the victim's motivation to seek accountability that makes it essential in forwarding the agenda to end impunity, and thus their involvement is vital.¹²²

¹¹¹ Donat-Cattin "Article 68" 1682.

¹¹² See s 3 of the *ICC Rules of Procedure and Evidence*; s 68 of the *ICC Statute*. Generally, see also Office of Public Counsel for Victims, *ICC Representing Victims* 293.

¹¹³ *ICC Rules of Procedure and Evidence* s 3; s 68 of the *ICC Statute*. Generally, see also Office of Public Counsel for Victims, *ICC Representing Victims*.

¹¹⁴ War Crimes Research Office, *ICC Victim Participation* 33.

¹¹⁵ Gonzalez 2006 *International Journal on Human Rights* 21-22.

¹¹⁶ Cryer *et al* *Introduction to International Criminal Law* 37.

¹¹⁷ *Declaration of Basic Principles for Victims of Crimes and Abuse of Power* GA Res 40/34, UN Doc A/RES/40/34 (1985).

¹¹⁸ Cryer *et al* *Introduction to International Criminal Law* 483.

¹¹⁹ Clause 6.4 of the AAR.

¹²⁰ See generally *The Prosecutor v Dominic Ongwen* Trial Judgment, ICC-02/04-01/15-1762-RED, Trial Chamber IX, 4 February 2021.

¹²¹ Moffett 2016 *Int CLR* 504.

¹²² Moffett 2016 *Int CLR* 507-508.

Victim participation was developed to address issues that might affect the victim's personal interests, whenever they arise during trial.¹²³ It was tested in the *Lubanga* trial at the pre-trial and trial stages, and many issues were left unresolved. There were dissenting decisions and appeals on the issue of the "causal link" which was deemed unnecessary to be proved by the victim in the lower chambers.¹²⁴ However, the Appeals Chamber reversed this and established that a causal link between the harm suffered and a specific crime for one to qualify as a victim was necessary.¹²⁵ The term victim is wide enough to cover both natural and legal persons to link the harm that occasioned from the crime which falls within the jurisdiction of the ICC and although narrowly construed, a relationship should be drawn between the harm suffered and the specific crime that is being charged against the accused.¹²⁶ In *Bemba*,¹²⁷ 5 200 victims were given the opportunity to participate in the proceedings.¹²⁸

The inclusion of victims affords them an opportunity to obtain justice for the wrongs that they suffered in the past.¹²⁹ However, victim participation remains complex in the case of Uganda. It is the duty of the state to enable the realisation of victim participation, their protection, and reparation. Of all these, reparations come at the end of trial, as they are among a litany of penalties to be handed down to the party found guilty of such crimes as charged. For the purpose of this article, despite the existence of different types of reparation, compensation which serves the victim with a satisfaction of acceptance by the culprit and a sense of justice being served is preferred.¹³⁰ So far, 38 victims have been registered to participate in the trial against Kwoyelo.¹³¹ It should be clarified that the indictment covers the crimes of Kwoyelo between 1992 and 2005¹³² and only those victims that fall in that period are entitled to make claims.¹³³ In addition, it is critical to

¹²³ Baumgartner 2008 *IRRC* 411.

¹²⁴ Baumgartner 2008 *IRRC* 422-423.

¹²⁵ See generally *The Prosecutor v Thomas Lubanga Dyilo* Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ICC-01/04-01/06-1432, Appeals Chamber, 11 July 2008.

¹²⁶ Baumgartner 2008 *IRRC* 423.

¹²⁷ See *The Prosecutor v Jean-Pierre Bemba Gombo* Final Decision on the Reparations Proceedings, ICC-01/05-01/08-3653, Trial Chamber III, 3 August 2018. Bemba was acquitted by the ICC.

¹²⁸ See Cryer *et al* *Introduction to International Criminal Law* 488.

¹²⁹ War Crimes Research Office, ICC *Victim Participation* 4.

¹³⁰ Redress and Institute for Security Studies 2015 <https://redress.org/wp-content/uploads/2017/11/Englishvictim-rights-report.pdf> 7.

¹³¹ Neiman 2019 <https://www.worldpoliticsreview.com/articles/27873/can-a-court-in-uganda-deliver-justice-to-victims-of-the-lord-s-resistance-army>.

¹³² *Uganda v Thomas Kwoyelo alias Latoni*, Amended Indictment, Uganda International Crimes Division, WCD-CO-001-2015 (24 January 2017) para 13.

¹³³ Neiman 2019 <https://www.worldpoliticsreview.com/articles/27873/can-a-court-in-uganda-deliver-justice-to-victims-of-the-lord-s-resistance-army>.

stress that Kwoyelo's victims are different from the LRA victims. Kwoyelo himself is a victim of the latter and all those falling in that category are not entitled to claim for reparations at the end of the Kwoyelo trial. The victims must apply for reparations at the ICC, although in rare cases the Court can act on its own motion.¹³⁴ In the Ugandan case, the process to attain reparations is not well stipulated except that they are to be paid by the guilty party to the victims, or the money may be derived from any identified source.¹³⁵ The hope for the victims then lies in the hands of their legal representatives to push for reparations.

Although the victims are well represented by two committed attorneys, victim participation has been lagging in the Kwoyelo trial.¹³⁶ All parties involved are in the dark as to when the victims themselves will be participating.¹³⁷ As is the practice before the ICC, for victims to participate they should establish causality, but the judges on trial should also ascertain sufficient personal interest of the victim, the appropriateness in the participation at the proceedings, and the fact that the victims' participation will be consistent with the rights of the accused.¹³⁸ On the whole, it is this participation that allows the victims to have a voice in the trial whenever their interests are affected, as was evidenced in the Lubanga case at the ICC.¹³⁹ The nature of this participation and the mode of procedure are yet to be clarified in the Ugandan case. All this is dependent on the availability of their protection to enable them to participate. Victim protection is a cause for concern. Their direct participation is impeded by the lack of adequate witness and victim protection. Laws that regulate victim participation needs to be passed. They cannot for instance participate in an open court to give an account of how they are affected by the trial or how to claim for reparations.

The protection measures were reviewed at the trial conference by the parties in the matter. They range from their accommodation, transportation, and psychosocial support to the security of individual victims and their families, among other measures.¹⁴⁰ The measures required are very like those under the ICC, except that the law in Uganda to operate these measures is not in place. The welfare of the victims is a reserve of the

¹³⁴ Rule 95 of the ICC *Rules of Procedure and Evidence*.

¹³⁵ Clauses 6.4, 9.2 and 9.3 of the AAR; cls 16-17 of the *Annexure to the Agreement on Accountability and Reconciliation* (19 February 2008).

¹³⁶ Nakandha 2020 <https://www.ijmonitor.org/2020/06/complementarity-reality-check-the-case-of-ugandas-international-crimes-division/>.

¹³⁷ Nakandha 2020 <https://www.ijmonitor.org/2020/06/complementarity-reality-check-the-case-of-ugandas-international-crimes-division/>.

¹³⁸ Rule 85 of the ICC *Rules of Procedure and Evidence*; Art 68(3) of the *ICC Statute*.

¹³⁹ Baumgartner 2008 *IRRC* 423.

¹⁴⁰ *ICD Rules* 34-36.

Registry.¹⁴¹ There is neither law nor the funds to enforce this kind of protection and therefore rudimentary approaches have been applied. There have been scenarios where the court has been closed off to the public to enable a victim to give testimony.¹⁴² Although this is a protective strategy, it is not enough. With the trial being held in Gulu, the complexities of small-town relations come into play – thus, common nosiness may result in the identity of the victims being disclosed. In addition to that, closing off a court room surely blocks the flow of information to the public, and it is unknown for how long this will persist. The law needs to be availed speedily to address such concerns. At the ICC the law on victim protection takes a preventative approach and a standard procedure is followed in all cases.¹⁴³ The ICC employs various measures like the use of pseudonyms, video conferencing, voice distortion and the reduction of important information from documents.¹⁴⁴ These measures are absent at the ICD, making it hard for the victims to have their voices heard, or to have justice. It is hoped that the ICD will incorporate some of the victim participation measures applied by the ICC.

5 Conclusions and recommendations

This article has looked at the trajectory of the domestic application of international law in Uganda, right from the inception of the ICD, and the case of Thomas Kwoyelo, which has served as its test trial. Although international law offers dimensions that do not fit within Uganda's legal system – like having different stages of trial – the pre-trial and trial phases, having a panel of judges at the trial phase, and the inclusion of victims in the trial among others - Uganda has laboured to accommodate all this in its processes and it should be commended for the efforts. Uganda should be praised for its willingness to prosecute these crimes pursuant to its obligations under the *ICC Statute*. However, this has not been a small adjustment and there is yet much to be desired. The delays in the Kwoyelo trial serve as testimony to such difficulties. The case has stalled for over a decade from Kwoyelo's arraignment before the Magistrate's Court to its current stage.

Although this trial is an attempt on the part of Uganda to afford accountability to the victims of the conflict in northern Uganda and the perpetrators alike, the time has come for Uganda to close the chapter on decades of violence and take a stand against impunity. The trial of Kwoyelo at the ICD addresses this impunity and signals a new dawn for the realisation of international

¹⁴¹ *ICD Rule 51*.

¹⁴² Neiman 2019 <https://www.worldpoliticsreview.com/articles/27873/can-a-court-in-uganda-deliver-justice-to-victims-of-the-lord-s-resistance-army>.

¹⁴³ Gonzalez 2006 *International Journal on Human Rights* 22.

¹⁴⁴ Neiman 2019 <https://www.worldpoliticsreview.com/articles/27873/can-a-court-in-uganda-deliver-justice-to-victims-of-the-lord-s-resistance-army>.

criminal justice in Uganda. The intention to prosecute is clear as this was accentuated by the Supreme Court decision that turned down the award of amnesty and thus upheld Uganda's obligation towards international law. But this is not enough. The Kwoyelo trial has also manifested the complexities of having to prosecute international crimes in a domestic setting. It is anticipated that the trial will take a long time. The participation of victims, a novelty for Uganda, will add to this lengthy period. The interpretation of the law by skilled ICD judges is therefore non-negotiable. Judges of the War Crimes Chamber in Bosnia and Herzegovina established a Judicial Education Committee dedicated to foster and train their judges.¹⁴⁵ A similar approach could be helpful for the ICD. Uganda will clearly need all the assistance that can be given for her to realise the full potential of the mandate given and accepted. In the spirit of complementarity under which the ICC pledged to assist Uganda's efforts, it is recommended that the ICC assist Uganda in training judicial officers and giving support towards realising aspects like witness protection and victim participation. The prosecution of Kwoyelo is a remarkable feat but the ICD has to ensure that his fair trial rights are respected, otherwise this will not bode well for the advancement of international criminal justice in Uganda and Africa as a whole.

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List of Abbreviations

AAR	Agreement on Accountability and Reconciliation
ACHPR	African Commission on Human and Peoples' Rights
AJCR	African Journal on Conflict Resolution
CAR	Central African Republic
Cornell Int'l LJ	Cornell International Law Journal
Chinese JIL	Chinese Journal of International Law
CLR Online	California Law Review Online
DRC	Democratic Republic of Congo
Human Rights Rev	Human Rights Review
ICC	International Criminal Court
ICD	International Crimes Division
Int CLR	International Criminal Law Review
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
IJSRP	International Journal of Scientific and Research Publications
IRRC	International Review of the Red Cross
JAL	Journal of African Law
JICJ	Journal of International Criminal Justice
LRA	Lord's Resistance Army
ODPP	Office of the Director of Public Prosecution
SCSL	Special Court for Sierra Leone
SAJHR	South African Journal on Human Rights
Tulsa J Comp & Int'l L	Tulsa Journal of Comparative and International Law
UN	United Nations
UPDF	Uganda People's Defence Forces
Va J Int'l L	Virginia Journal of International Law
Wm & Mary L Rev	William and Mary Law Review

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