

The International Criminal Court and the transformation of post-war justice in Northern Uganda

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Abstract

This article looks at the interface between the International Criminal Court and transitional justice processes in Northern Uganda. It takes a doctrinal approach, drawing on qualitative work in the fields of international criminal law, human rights, and political science. The Ugandan situation demonstrates that top-down transitional justice has both positive and negative dimensions. This article argues that, while the International Criminal Court has helped transform judicial aspects, it has also contributed towards the decline of traditional justice mechanisms. Overall, the article concludes that there is still a compelling case to be made for the involvement of international criminal tribunals in post-war contexts, but that it needs to be done in such a way that promotes good domestic processes and incorporates bottom-up perspectives.

Transitional justice as a language of social transformation in Uganda

Northern Uganda was engulfed in a two decade civil war from 1987, between the Lord's Resistance Army (LRA) and the government, leading to a series of gross violations of human rights such as massacres, mutilations, widespread abductions, and child soldiering (Branch, 2010). A range of transitional justice (TJ) mechanisms were adopted: peace talks in 2008, amnesty, traditional justice and reconciliation, and criminal prosecution (Macdonald, 2017). They also included compensation for harm done through the *mato oput* or "bitter root" ceremony among the Acholi communities. The TJ process is both incomplete and contested, with concerns about the impact of the International Criminal Court (ICC) in Uganda (Macdonald, 2017; Oola, 2015). These scholarly concerns beg an important question: how has the ICC transformed the domestic justice process in Uganda?

This article is doctrinal in nature, divided into four parts. The first part presents an overview of TJ and criticisms associated with it, contextualizing this within the Uganda situation. In the second part, the article makes a substantive contribution to the discussions about the ICC's intervention in Uganda. It pays attention to the legal and social transformations and

concludes with a discussion on the complementarity framework. Next, the article places this ICC complementarity approach within the domestic legal framework, to help situate our understanding and critique of the existing mechanism for the prosecution of international crimes. Finally, it concludes by emphasizing the relevance of bottom-up approaches in ensuring effective and lasting TJ.

In this article, we use the term “transitional justice” to refer to redress for gross violations of human rights following periods of authoritarian rule or armed conflict (see Teitel, 2014). TJ mechanisms include criminal accountability, truth commissions, reforms, and reconciliation. Emerging scholarship within TJ emphasizes their ‘transformative’ element, suggesting their potential for long term social transformation beyond more orthodox criminal justice processes (Hoddy & Gready, 2020).

Addressing past violations needs to take place alongside a key awareness of the need to enhance positive changes for the future (Robins, 2015). This is because the past plays a role in the future, and change is always future-focussed (Mieth, 2018). As such, for TJ mechanisms to have long term social transformation, the role the past plays in the future must be considered in their composition and mandate. In order to achieve transformation, we need to understand how national TJ institutions work in relation to international justice mechanisms, as much of this transformation takes place at a national level, rather than at an international one. This article therefore aims to examine the presumed impact of TJ within a national context; in this case, post-war justice in Uganda.

TJ has had considerable success in Northern Uganda; for example, amnesty to ex-combatants and rehabilitation of survivors (Akello, 2019). However, it has been subjected to a range of critiques; most notably, the frequent use of a top-down ‘one-size-fits-all’ approach with inadequate local participation in its design and implementation (Lundy & McGovern, 2008). Mutua (2015) goes so far as to question whether or not there are any clear-cut cases where transformation can directly be attributed to TJ mechanisms or processes. There are also scholarly concerns about the ‘normalization’ of TJ through the proliferation of internationalised tribunals (Brett & Gissel, 2020; Gissel, 2017), the engagement of which may be undermined when not carefully implemented alongside other national processes. Therefore, due to the potential for both positive and negative consequences, there are calls for the reconceptualization of the ICC’s role as a TJ mechanism in Africa (Okafor & Ngwaba, 2015).

In recent years, the ICC has made some reforms as a way of achieving its goal of fighting impunity, with more efficient strategies. One area of reform relates to its case completion strategy that increases the speed of its proceedings, in line with the demands of the victims (Jones, 2019). The other area relates to the pursuit of a positive complementarity approach, whereby it would serve to complement and support states to undertake domestic prosecutions (Burke-White, 2008). This is also interpreted to mean the capacity-building of the states in order to realise this strategy (Evenson & Smith, 2015). Amidst these developments, this article uses Uganda as a case study to examine how the ICC transforms domestic justice processes.

ICC intervention in Uganda: A role model for justice?

Uganda was the first country to refer a situation to the ICC, leading to formal investigations of the crimes committed in Northern Uganda by the Office of the Prosecutor (OTP) in July 2004. The following year, the court issued warrants of arrest for five senior LRA commanders, including leader Joseph Kony (International Criminal Court, 2005). Kony is believed to be hiding in the Central African Republic; three of the remaining commanders have since died (Musisi, 2017). Dominic Ongwen, the last of the five indictees, was arrested in 2015 and subsequently tried and convicted at the ICC for war crimes and crimes against humanity in February 2021 (Ongwen Trial Judgment, 2021). From a TJ perspective, Ongwen's trial illustrated a disjuncture between a global criminal justice system and the domestic realities. In particular, the peace-justice and victim-perpetrator narratives within the affected communities led to criticism against the ICC intervention (Branch, 2017). Following Ongwen's conviction by the ICC, we can pose pertinent questions regarding the transformational impact of his case and the ICC intervention in general. (It should be noted that, following this trial and criticisms against the ICC, significant contributions to TJ efforts have taken place.)

First, the ICC intervention triggered transformations within the affected communities. One example of this is seen in the ICC Trust Fund for Victims (TFV), which has implemented its assistance mandate within the affected communities since 2008, using local partners to provide both physical and psychological rehabilitation to victims (Dutton & Ni Aolain, 2019). This assistance mandate presents a unique mode of transformation with long term effects as victims and affected communities are able to transform their livelihoods despite the outcome of the court trials.

Second, new categories of actors were formed across the country, ranging from grassroots organizations to victim organizations and national non-governmental organizations (NGOs). These include local implementing partners of the TFV and international NGOs like REDRESS (see REDRESS, 2020). Due to the nature of their work, some NGOs can be classified as intermediaries of the ICC, with a critical influence in international criminal justice (Ullrich, 2016). In the same vein, these grassroots organizations gained knowledge and some level of capacity was built through these programs.

Third, and most important for this article, there has been a structural transformation through the principle of complementarity. As highlighted in the introduction, the ICC implements a positive complementarity approach, which complements and supports domestic prosecutions instead of serving as the primary option for justice (Burke-White, 2008). According to the ICC's OTP, positive complementarity involves co-operation, encouragement, and facilitation of capacity-building and technical assistance aimed at promoting national proceedings (OTP, 2019). Hence, it is viewed as an avenue for the ICC to exercise a 'role-modelling' function for normative and structural capacity building in situation countries (Shany, 2013). The positive complementarity discourse by the ICC has triggered scholarly debates regarding the role of the ICC in developing domestic capacity for trying international crimes (De Vos et al., 2015). In the next section, we use the ICC complementarity framework to examine how it has transformed the domestic capacity to try international crimes in Uganda.

The International Criminal Division: Domestic transformation of international justice norms

The International Crimes Division (ICD) was created in 2008 and formalized in 2011, following unsuccessful peace talks between the Ugandan government and the LRA in 2008. More importantly, it was also envisioned as Uganda's way of effecting the ICC complementarity through the domestic prosecution of international crimes (Tadeo, 2012). In terms of transformation, it can be argued that this new domestic court preserved and enhanced the state's sovereignty in the polarized spaces of global justice.

The creation of a new court led to the enactment of a new law – the International Criminal Court Act 2010 – which incorporated precepts of the ICC's Rome Statute into Ugandan law (Tadeo, 2012). This can be considered as a normative transformation that created a foundation for the prosecution of a range of crimes – including genocide – that were not originally embedded within the domestic legal framework. It can also be seen as a positive step toward recognizing a wider range of victims' harms beyond what the narrow construct of 'domestic crimes' could cover. Similarly, the creation of an International Crimes Department within the Directorate of Public Prosecution (DPP) has built domestic capacity for the prosecution of complex crimes, like terrorism and trafficking, as staff members were trained on different aspects of international crime investigation and prosecution (Human Rights Watch, 2012).

Thomas Kwoyelo, a mid-ranking LRA commander, was the first person to be tried for war crimes by the ICD in 2011. His case was thus viewed as a way of implementing the complementarity approach (Oola, 2015) and his trial presented critical elements in the transformation of the domestic TJ framework. One key question resulting from his case regards the application of the law of amnesty. Kwoyelo sought to benefit from the amnesty laws in Uganda, but the Supreme Court upheld his trial at the ICD, emphasizing the prosecutorial aspect of TJ (Nakandha, 2015). Despite some criticisms (see Macdonald & Porter, 2016), the trial can be viewed as a notable transformation in Uganda's criminal justice and legal order, as it provided clarity on the application of amnesty as a TJ mechanism.

In terms of legal procedures, the Kwoyelo trial triggered the adoption of Special Rules of Procedure for the ICD in 2016, which have the effect of protecting victims and empowering them to participate in court proceedings (Avocats Sans Frontières, 2019). In practice, these legal developments have not yet created comprehensive transformations, as highlighted by victim-oriented scholars, suggesting a need for more context-specific approaches to complementarity (Moffett, 2016).

One notable concern with regards to the ICC's intervention in Uganda relates to the alienation of traditional justice mechanisms, as attention shifted towards formal criminal justice. This is notwithstanding the vocalized preference of traditional mechanisms by religious leaders who saw the ICC's intervention as a stumbling block to lasting peace (Hovil & Quinn, 2005; Moffett, 2016). According to Hovil, "local mechanisms of justice in Uganda were demoted and written off as not meeting the demands of justice" (Hovil, n.d.). Nonetheless, Kwoyelo's trial is regarded as "a step forward towards the fulfillment of victims' rights to justice" (International Center for Transitional Justice, 2015). Similarly, the legal empowerment of victims can enhance the transformative potential of TJ (Sandoval, 2017).

More generally, the establishment of the ICD presents some notable structural transformations. Asiimwe Tadeo, former Registrar of the ICD, considers it as a long-term investment for domestic accountability mechanisms in Uganda (Tadeo, 2012). Additionally, the ICD is also viewed as a potential model for other TJ contexts beyond Uganda (Nyeko, 2018). It is important to note, though, that the lack of adequate finances and resources limits the potential for meaningful implementation of the ICC complementarity approach (Shany, 2013).

Conclusion

This article has evaluated how the ICC transformed the domestic justice process in Uganda. Overall, three concrete forms of transformation have been highlighted. First, the social transformation within the affected communities and victims' livelihoods. From a victim-oriented perspective, this article has shown how the legal empowerment of victims can play a critical role as formerly marginalised people are now empowered to participate actively in the criminal justice mechanisms. Second, the formation of new categories of NGO actors that have remained pivotal in Uganda's TJ process. Third, this article has highlighted a structural transformation through the principle of complementarity and the domestic prosecution of international crimes. It is recommended that the Ugandan government and development partners should fast-track the implementation of TJ policies and adopt relevant laws for the efficient functioning of the domestic court. These recommendations include the formal adoption of laws on TJ and witness protection.

Beyond the aforementioned points, this article has also shown that, while the ICC has helped transform judicial aspects of law, it has simultaneously contributed towards the decline of traditional justice mechanisms. Crucially, the Ugandan case study highlighted in this paper illuminates the need for bottom-up approaches for effective and lasting TJ.

In an era where international criminal justice mechanisms such as the ICC have been widely promoted as 'the means' of ensuring accountability for human rights violations and justice for victims, there remains a need to ensure that they do not undermine genuine local transitional justice efforts. Rather international mechanisms can co-exist with national efforts in such a way as to create lasting transformations.

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