International Criminal Law, Complementarity and Amnesty within the context of Transitional Justice: Lessons from Uganda

Abstract

The article explores the domestic implementation of international criminal law and complementarity, when operating alongside parallel transitional justice approaches-Amnesty. International Criminal Justice in Uganda is best understood as part of the broader lens of transitional justice, in response to a two-decade war in the Northern part of the country. Besides a doctrinal analysis of the relevant legal regime and cases, the article benefits from the author's personal insights working in Uganda and The Hague- the 2 sites of International Justice that inform this article. Specifically, the International Crimes Division (ICD) which is the specialised court dealing with war crimes and crimes against humanity and the International Criminal Court (ICC). The article highlights critical paradoxes of the ICD and trial of former rebel Thomas Kwoyelo, putting this domesticated International Criminal Justice regime in a dilemma, also suggesting pathways for reforms.

Key words: International Criminal Justice, Transitional Justice, Uganda, International Criminal Court, International Crimes Division

1 Introduction: The Transitional Justice Landscape

There is a plethora of scholarly work about International criminal law in Uganda, particularly on the ICC intervention. The principle of complementarity is regarded as a crucial framework for the ICC to achieve its mandate, maintaining domestic states' mandate to address international crimes.[1] However, the framework of complementarity is also viewed with mixed perspectives in this regard, as it has not directly influenced the envisaged positive domestic changes besides legislation and capacity-building.[2] The crucial question that this article deals with relates to the impact of international criminal law and complementarity on the pluralised domestic transitional justice approaches. This article offers a more robust analysis of the country's engagement with the framework of complementarity and amnesty, whilst placing the debates within the ambit of transitional justice. The analysis is largely on the issues of amnesty and complementarity, as will be examined in the ongoing domestic prosecution. In terms of methodology, the article is based on doctrinal research, but also primary data from semi structured interviews with key actors in Uganda. The article also benefits from insights based on the author's work and observations in Uganda.

[1] Miracle Chinwenmeri Uche, Bringing Justice Closer to Victims and Creating a Community of Practice? Some Thoughts on Ways to Implement the ICC OTP's Policy on Complementarity and Cooperation, *EJIL: Talk!* 25 April 2024, *available at* https://www.ejiltalk.org/bringing-justice-closer-to-victims-and-creating-a-community-of-practice-some-thoughts-on-ways-to-implement-the-icc-otps-policy-on-complementarity-and-cooperation/ (accessed 13 June 2024)

[2] *See for instance* Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013); Christian M. De Vos, *Complementarity, Catalysts, Compliance The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo* (Cambridge University Press, 2020).

Uganda gained its independence from the British in 1962, ushering in a new political and governance structure in a multicultural country. Like many countries in sub–Saharan Africa, the presence of multiple ethnicities within the post independent Uganda also triggered political rifts and tensions. The country experienced military rule characterized by a legacy of atrocities and gross violations of human rights. When President Yoweri Museveni's National Resistance Army took over power in 1986, the country gained political stability and new rebel groups were subdued. However, one rebel movement that persisted was the Lord's Resistance Army (LRA) in the Northern part of the country, led by Joseph Kony. The LRA were originally militarily supported by neighbouring Sudan, which had fractious relations with Uganda, in the context of counter allegations of the latter's support for rebels in Sudan.

The LRA insurgency was largely a guerrilla war where rebels targeted mostly civilian communities, leading to massive displacement in Northern Ugandan cities, mostly Gulu. About 20,000 children were abducted and conscripted into the fighting forces by the LRA between 1987 and 2002. The LRA were implicated in war crimes and crimes against humanity, mostly murder and sexual violence. Equally, the Uganda military were alleged to have committed war crimes during the course of their operations in the Northern part of the country.[3]

International Criminal Justice in Uganda is best understood as part of the broader lens of transitional justice, ie. redress for gross violations of human rights following periods of authoritarian rule or armed conflict. These include criminal accountability, truth commissions, reforms, and reconciliation. What were the different transitional justice approaches in Northern Uganda? In 2006, there were peace talks between the Ugandan government and the LRA mediated by the Government of Southern Sudan (Juba Peace talks), but these collapsed in 2008,

[3] Adam Branch, 'Exploring the Root of LRA Violence: Political Crisis and Ethnic Politics in Acholiland' in Tim Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (1st edn, Zed Books 2010) 58.

prompting renewed military operations. There were also local peace mediations, with the most prominent being the Acholi Religious Leaders' Peace Initiative (ARLPI). Besides the peace talks, another measure to end the insurgency was through amnesty, with a law enacted in 2000, leading to the surrender and integration of over 10,000 LRA combatants into the communities. The Amnesty law was however amended and can't be construed as a blanket amnesty for all perpetrators of crimes in armed conflicts.[4]

Another important dimension in relation to the LRA insurgency was the use of traditional reconciliation approaches, also envisaged under the Juba Peace Agreement. The most notable traditional ritual is the *Mato Oput* or 'bitter root' ceremony among the Acholi people, where returning LRA combatants were cleansed through clans and family-centred units, with apologies and offers for compensation to the victims.[5] The other element of traditional justice is criminal accountability, in the form of prosecution before formal courts. These will be discussed in detail in the next sections. In a nutshell, the simultaneous implementation of amnesty, successive rounds of peace talks and use of local traditions of apology, compensation and (re)integration are all crucial dimensions within the country's transitional justice landscape.

[4] *See* Supreme Court decision and reasoning in *Uganda v Kwoyelo* (Constitutional Appeal No. 1 of 2012) [2015] UGSC 5 (8 April 2015).

[5] James Ojera Latigo, 'Northern Uganda: Tradition-Based Practices in the Acholi Region' in Luc Huyse and Mark Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (International Institute for Democracy and Electoral Assistance 2008).

2 The Import of International Criminal Law

In terms of the domestic legal framing Uganda has in place laws criminalising international crimes. International Treaties and Conventions ratified by Uganda are recognized as valid law under Uganda's Constitution, in addition to respect for international law and Treaty Obligations under the National Objectives and Directive Principles of State Policy.[6]

The Geneva Conventions Act 1964 domesticates the four principal Geneva Conventions, [7] whilst the International Criminal Court Act 2010 domesticated the Rome Statute of the ICC. The Act introduced provisions for the punishment of the war crimes and crimes against humanity, including genocide.[8] The ICC Act provides for universal jurisdiction, where:

a) the person is a citizen or permanent resident of Uganda;

(b) the person is employed by Uganda in a civilian or military capacity;

(c) the person has committed the offence against a citizen or permanent resident of Uganda; or

(d) the person is, after the commission of the offence, present in Uganda.[9]

Uganda has not yet ratified the Amendments on the crime of aggression to the Rome Statute, adopted at the Review Conference of the Statute in 2010. Nonetheless, Uganda hosted the Review Conference in Kampala from 31 May to 11 June 2010.

There are specific laws relating to perpetrators of international crimes. Both the Geneva Conventions Act and ICC Act introduced provisions relating to perpetrators of international

[6] *See Constitution of the Republic of Uganda* 1995, as amended, Article 287 and Principle XXVIII.

[7] *The Geneva Conventions Act*, 1964 (Cap. 363)

[8] *International Criminal Court Act,* No. 11 of 2010, Section 2.

[9] *Ibid*, Section 18.

crime. It is important to note that the ICC Act introduced the principle of command responsibility in relation to commanders and other superiors, a novel mode of liability under Ugandan criminal law. Another important law that has had profound impact on perpetrators of international crimes is the Amnesty Act of 2000, and its Amendments.[10] The law, renewed periodically until 2015, provided for 'an amnesty for Ugandans involved in acts of a warlike nature in various parts of the country and for other connected purposes'. [11] Consequently, perpetrators of international crimes were eligible for amnesty.

There are equally specific laws relating to victims of international crimes. Similarly, the Geneva Conventions Act and ICC Act contain provisions relating to victims of international crime. Like many common-law countries, Uganda does not have a definite legal regime on victims in criminal proceedings. Nonetheless, the International Crimes Division (ICD) Rules of 2016 provide for victim participation at the Court. [12] Another notable legal framework in which victims of international crimes can be protected is through the Prevention of Trafficking in Persons Act, 2009.[13] This law is founded on Uganda's obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), which supplements the United Nations Convention against Transnational Organized Crime.[14] Whilst human trafficking is not a crime under the Rome Statute, the protection, assistance and support for victims of trafficking in persons provisions under Part III

[10] *Amnesty Act*, Chapter 294 as Amended.

[11] *Ibid.*

[12] *International Crimes Division (ICD) Rules*, 2016.

[13] *Prevention of Trafficking in Persons Act,* 2009.

[14] *See the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (including the Palermo Protocol) adopted on 15 November 2000 and came into force on the 29 December 2003.

can be instructive in dealing with victims of enslavement and forced marriage, common within armed conflicts.[15]

As already mentioned, Uganda is a signatory to the Rome Statute of the ICC, signed on 17 March 1999 and ratified on 14 June 2002. The Statute was domesticated into national law by the ICC Act 2010. The International Crimes Division (ICD) Rules 2016 allow for victim participation in trials in this specialised division of the High Court. The ICC's Trust Fund for Victims is also very active in the post war regions of Northern Uganda through its assistance mandate, offering rehabilitation for victims of the LRA conflict. The most significant policy is the National Transitional Justice Policy (NTJP) 2019, which provides for a victim-centred in the design and implementation of justice approaches, in addition to participation in the processes and reparations.[16]

There is a special domestic court dealing with international crimes. The International Crimes Division (ICD), formerly known as the War Crimes Division was established in 2008, as a specialised court. In terms of scope, the court has jurisdiction over serious crimes which are; War Crimes, Crimes against Humanity, Genocide, Terrorism, Human trafficking, Piracy and other international crimes. [17]

Between 2000 and 2010, the issue of Amnesty for perpetrators of war crimes was among the key debates in Parliament, mostly for the LRA rebels. As already mentioned, an Amnesty Law was passed by Parliament in December 1999, and came into force in 2000. The Act was amended in 2002, 2003, and 2006, and 2008 before its lapse in 2012. It was reignited and extended until 2015. Part of the debates related to the exclusion of amnesty for 5 LRA

[15] *Prevention of Trafficking in Persons Act*, 2009.

[16] *National Transitional Justice Policy* 2019, page 16.

[17] *The High Court (International Crimes Division) Practice Directions,* Legal Notice No. 10 of 2011, Section 6.

rebels indicted by the ICC- Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya.

Uganda is both a participant in and supporter of international criminal law institutions. It was the first country to refer a situation to the ICC, where the country also has an active national office. Uganda also nominated key staff like judges and Registrars to the ICC and hybrid tribunals. Elizabeth Ibanda-Nahamya served as Principal Defender for the Special Court for Sierra Leone (SCSL), and later as Judge of the United Nations International Residual Mechanism for Criminal Tribunals (IRMCT). Solomy Balungi Bossa is a judge in the Appeals Chamber of the ICC, and also served at the IRMCT. Judge Daniel David Ntanda Nsereko served in Appeals Chamber of the ICC, and Appeals Chamber at the Special Tribunal for Lebanon (STL). The most recent appointment is that of Judge Lydia Mugambe Ssali at the IRMCT, following the passing of Judge Elizabeth Ibanda-Nahamya.

Since 2002, multiple local and international NGOs have been involved in work relating to international crimes in general. One notable one was the Ugandan Coalition for the International Criminal Court (UCICC) co-hosted by local NGOs. There are several NGOs working with victims within the context of the post war justice in Northern Uganda. These include, but are not limited to Uganda Victims Foundation, the ICC Trust Fund for Victims, Avocats Sans Frontières, International Center for Transitional Justice, REDRESS, Foundation for Justice and Development Initiatives, Refugee Law Project and the Justice and Reconciliation Project. In relation to perpetrators, In the last decade, Gulu Support the Children Organisation (GUSCO), a local NGO, operated in the war affected communities of Northern Uganda. Whilst its mandate was not on issues related to perpetrators of international crimes, it was a reception centre for several former child soldiers who escaped from the LRA. The organisation is not active, due to the end of the conflict around 2008.

Memorialisation is a key aspect of transitional justice in Northern Uganda. Examples of memorials for international crimes include the Lukodi Memorial Centre in Gulu, Northern Uganda, constructed in 2018 by the Foundation for Justice and Development Initiatives (FJDI)- a local NGO. It memorialises one of the massive attacks on an Internally Displaced Peoples Camp (IDP) in May 2004 by the LRA) rebels. There is also a Memorial Site for Victims of the Barlonyo Attack in the Northern district of Lira, in February 2004 by LRA rebels. On 19 May, there are Annual Memorial Prayers for victims of the 2004 Lukodi IDP attack by the LRA.[18] There have also been Barlonyo Memorial Services in Lira, where victims from different regions meet, sharing memories and experiences with those in Barlonyo.[19] There is plenty of fine arts, performing arts and local literature on the LRA war in Northern Uganda, including war crimes and crimes against humanity by the rebels. A notable movie is *Kony: Order From Above*, directed and produced by local filmmaker Steven T. Ayeny. [20]

Against this background, an important question for reflection remains, in relation to the impact of international criminal law and complementarity on the pluralised domestic transitional justice approaches.

[18] *See* Lino Owor Ogora, Over 2000 Community Members in Lukodi Attend Annual Memorial Prayers, *International Justice Monitor*, 30 May 2018, *available at* https://www.ijmonitor.org/2018/05/over-2000-community-members-in-lukodi-attend-annual-memorial-prayers/ (accessed 08 January 2024).

[19] Isaac Okwir Odiya, Standing together for the commemoration of the 13th anniversary of the Barlonyo massacre, *Justice & Reconciliation Project (JRP),* 21 February 2017, https://www.justiceandreconciliation.com/blog/2017/standing-together-for-the-commemoration-of-the-13th-anniversary-of-the-barlonyo-massacre/ (accessed 08 January 2024).

[20] *See* Kony: Order from Above at https://www.imdb.com/title/tt7377394/ (accessed 08 January 2024).

3 The Dilemma of Achieving Complementarity within the context of Transitional Justice

Whilst Uganda ratified the Rome Statute in 2002, the ICC's involvement in the country started in 2003, when the President formally referred the LRA situation to the court. Subsequently, in July 2004, the Office of the Prosecutor (OTP) opened an investigation into the situation. Whereas there were calls for a comprehensive investigation in respect to both government soldiers and rebel atrocities, the ICC investigations targeted crimes committed by members of the LRA.[21] As already noted in the first section, international criminal justice in Uganda operated alongside other transitional justice approaches. Traditional reconciliation and memorial activities were carried out by local NGO Justice & Reconciliation Project (JRP), whilst the ARLPI advocated for Amnesty. As such, when the ICC intervened in Uganda, there were mixed reactions within the conflict affected communities.

It is worth noting that the first Review Conference of the Rome Statute of the ICC which was held in Uganda in 2010. The peace *vs* justice debates[22] were also evident during the conference, as local NGOs were sceptical about the actual role of the ICC, in an environment where local reconciliation and amnesty had been negotiated to some degree. Nonetheless, the Review Conference also had another effect of further legitimising the ICC, as donors and

[21] Zachary Lomo and Lucy Hovil, 'Behind the Violence: Causes, Consequences and the Search for Solutions in Northern Uganda' (2004) Working Paper No.11 Refugee Law Project.

[22] Whilst there was significant work on peacebuilding through mediation and peace talks, there was pressure from mostly international development partners and NGOs to keep the issue of criminal accountability on the agenda. *See for example*, Saghar Birjandian, Uganda's Transitional Justice Policy Development Process and the International Criminal Court, E-International Relations, 21 April 2020, *available at* https://www.e-ir.info/2020/04/21/ugandas-transitional-justice-policy-development-process-and-the-international-criminal-court/ (accessed 22 July 2024).

international NGOs prioritised support towards the court and victims. In terms of ICC complementarity, there were renewed efforts to operationalise the ICD-specialised high court to adjudicate war international crimes.

The establishment of ICD was not just a reflection of the principle of complementarity of the Rome Statute, but was also a fulfilment of the State's commitment to implement the 2008 Juba Agreement on Accountability and Reconciliation, where criminal accountability was envisioned among other transitional justice approaches.[23]

Suffice it to say that war crimes under the Geneva Conventions Act are only envisaged under international armed conflicts. However, whilst it may not necessarily be of an international character, jurisdiction under the Geneva Act may be triggered when the conflict spreads to another country. This was exactly the position affirmed by the Supreme Court in the *Kwoyelo case*, considering that the LRA atrocities had spread beyond Uganda, to Sudan and Democratic Republic of Congo.[24] There is broader jurisdiction under the ICC Act, where war crimes are envisaged under both non-international and international armed conflicts.

As highlighted in the previous section, the Amnesty Act extended to perpetrators of war crimes in the course of rebellion against the government. Amnesty was largely used as a tool to encourage LRA rebels to surrender to the government, with the promise to waive criminal liability and reintegrate them into the local communities. An Amnesty commission was established to facilitate the implementation of the Amnesty Act and issued certificates to former combatants. In a nutshell, over 27,000 rebels were granted amnesty under the Amnesty Act.

[23] *See* Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the LRA/M ; Date: 29/06/2007 *available* at https://peacemaker.un.org/uganda-accountability-reconciliation2007 (accessed 08 January 2024).

[24] *Uganda* v *Kwoyelo*, Constitutional Appeal No. 1 of 2012.

From a criminal accountability perspective, the Act was initially viewed as an impediment to the prosecution of war crimes and international crimes.[25]

There has been one major exception to the application of the Amnesty laws, i.e., the *Kwoyelo* case at the ICD. He was a mid-level LRA commander who applied for amnesty, but his application rejected, in preference of prosecution. Kwoyelo challenged his prosecution and denial of amnesty, but the Supreme Court made a novel decision that further enhanced Uganda's obligations under International Criminal Law and the principle of complementarity.[26]

Two important issues in this decision are worth mentioning. Firstly, the Supreme Court held that the Amnesty Act was not inconsistent with Uganda's international Treaty obligations, particularly the Geneva Conventions, domesticated under the Geneva Conventions Act, Cap.363. Therefore, Amnesty was a valid law, regardless of the intersection with international law. Secondly, the Supreme Court clarified that the law did not envisage blanket amnesty. According to Katureebe, CJ:

> … the amnesty as defined both in the Act and by the learned authors cited above is targeted at political crimes and those incidental to such acts or crimes. I do not think the definitions, and indeed the purpose of the Act, or in its implementation, would include granting amnesty to grave crimes committed by an individual or group for purposes other than in furtherance or in the cause of the war or rebellion.[27]

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[25] *See for example* Amnesty law hindering crimes trial – government, *Daily monitor,* 19 March 2024 https://www.monitor.co.ug/uganda/news/national/amnesty-law-hindering-crimes-trial-government-1568164 (accessed 08 January 2024).

[26] *Uganda* v *Kwoyelo*, Constitutional Appeal No. 1 of 2012.

[27] *Ibid.*

In sum, the law on Amnesty did not impinge on the prosecutorial power of the DPPs to bring criminal charges against perpetrators of international crimes.

At the regional level, Uganda's changing attitude towards the ICC can be placed within the fractious African Union-ICC relationship in the past decades. The indictment of sitting heads of state in Kenya and Sudan by the ICC Prosecutor created a political backlash against The Hague based institution, viewed as tool for Western hegemony.[28] Against this background, there was a proposal for an African criminal court, whose jurisdiction overlaps that of the ICC. In 2014, the African Union adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR), commonly referred to as the Malabo Protocol, extending the jurisdiction of court to include war crimes and crimes against humanity.[29] Among the most notable provisions in the Amended ACJHR Statute is Article 46A *bis* on immunities to heads of state and other senior officials, a direct contrast to the Rome Statute. The Malabo Protocol is meant to become operational upon the ratification of at least 15 countries.[30]However, at the time of this writing, the African Court on Human and Peoples' Rights is still a stand-alone court adjudicating only human rights cases. In essence, the proposed ACJHR is still on paper. Be that as it may, Uganda signed the Malabo Protocol on 3 July 2017, but has not ratified it.

[28] Tonny R Kirabira, 'Book Review: Africa and the Backlash Against International Courts by Peter Brett and Line Engbo Gissel' (2021) 31 Social & Legal Studies 340.

[29] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. *See also* Daniel D. Nsereko and Manuel J. Ventura, 'Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol (2014' in Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press 2019).

[30] Of the 54-member states, only 15 have signed the Malabo Protocol, with no single ratifications.

There have been active debates on issues of international criminal justice and the impact of the law on Amnesty, among Ugandan Parliamentarians in the past decades. Most notably the Members of Parliament (MPs) from the war affected regions of Northern Uganda, and Members of the Ugandan National Group of Parliamentarians for Global Action (PGA). In 2015, the PGA hosted the then ICC Prosecutor Fatou Bensouda, during her working visit to the country. Notable among the issues of discussing were the domestic prosecution of international crimes under the framework of Complementarity, and the limitations of the Amnesty law. Hon. Stephen Tashobya, the Chair of the Legal and Parliamentary Affairs Committee of the Parliament of Uganda and Board Member of PGA affirmed that:

> Uganda and the African Great Lakes region needs to move on with effective application of the law implementing the Rome Statute. It is our obligation to provide access to justice, and reparations and redress to the direct and indirect victims of international crimes, especially those from Northern Uganda, since this is their right in the legislation that we have adopted and not a favor afforded to them. The Transitional Justice policy is the main tool that the Government of Uganda has put together to address this imperative of effective application of our ICC Act of 2010 and other commitments to the victims: Now the time has come for effective application and full implementation of the policy and its principles.[31]

NGOs have been a key influence in the implementation of International Criminal Justice in Uganda. Both local and international NGOs were pivotal in advocating for Uganda to host the ICC Review Conference in June 2010. These included the Human Rights Network Uganda

[31]*See PGA statement,* ICC Prosecutor Bensouda met with PGA National Group in Parliament of Uganda, *Parliamentarians for Global Action (PGA),* 27 February 2015, *available* at https://www.pgaction.org/news/icc-prosecutor-visit-pga-national-group-uganda.html (accessed 08 January 2024).

(HURINET–U) and No Peace Without Justice (NPWJ) that were also involved in the Eighth Session of the Assembly of States Parties (ASP) in 2008.[32] Like mentioned earlier, there was the UCICC which was a conflation of multiple NGOs that supported the ICC work in Uganda. However, the coalition has become largely inactive as it was hosted by local NGOs on a short-term basis. Another explanation to this inactivity is that once the ICC intervention was solidified through the Dominic Ongwen case, the donor priorities shifted towards the domestic prosecution. In other words, the coalition had achieved its primary objective of cementing the ICC in Uganda. The Uganda Victims' Foundation (UVF) and the Redress Trust were also very active in support of the ICC case- Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen. They filed *amicus curiae* in support of the admissibility of the case, and offered unique insights on victims needs and representation.

The *Dominic Ongwen* case at the ICC created pathways for testing the impact of International Criminal Justice in Uganda.[33] In terms of state cooperation, the government not only handed over Ongwen to the ICC, but also offered crucial evidence that enabled the successful prosecution at The Hague. The ICC office in Uganda was also active within the LRA affected areas, carrying out outreach missions with local NGOs, and also live screening of the Ongwen trial. NGOs and donors supported victims' representatives and leaders to travel to The Hague, helping to bridge the distant sites of justice. Overall, the *Ongwen* case represented a significant step forward in international criminal law-for the first time; the ICC considered the offence of forced pregnancy as a crime against humanity and war crime, forced marriage, and also dealt with a former victim turned perpetrator.

[32] *See* NPWJ website < http://www.npwj.org/content/Home.html > (accessed 08 January 2024).

[33] ICC, *Prosecutor* v *Dominic Ongwen*, ICC-02/04-01/15-1762-Red, Trial Chamber ix, Judgment, 4 February 2021.

The creation of the ICD and its operations have been largely supported and funded by foreign donors and NGOs. Avocats Sans Frontières and the Public International Law and Policy Group (PILPG) offered technical support in drafting the legislative framework for the ICD, including the rules allowing for Victims Participation.[34] An International Crimes Department was created under the Office of the DPP, with a small group of prosecutors dealing with work at the ICD. This is certainly a positive development, in terms of developing the relevant capability, considering the fact that international crimes are usually complex and require a great deal of both financial and human resources. Besides international crimes, the prosecutors can develop their capacity in relation to transnational crimes like human trafficking and terrorism.

It is important to note that the domestic implementation of criminal justice in Uganda has not been a smooth road. Kwoyelo's trial was significantly delayed due to funding limitations and other technical challenges like limited witness protection. A social worker interviewed noted a contrast in terms of the two sites of justice, further showing the challenges of achieving complementarity within a pluralised transitional justice system:

> The ICD need[s] to learn a lot from the ICC because the capacity of the ICD is wanted. The judges are not there when they are wanted and they are in other courts which makes it hard and the court hearing is always pushed. The logistics they need to facilitate the court like transport I also not reliable. The court room does not also provide good security for the people who would be witnesses and therefore people fear to be part of the witness even if they have something. There is also a lot of politisation of the process at the ICD because the court was started long

[34] Tonny R Kirabira, 'NGOs and Legitimacy of International Criminal Justice in Uganda' in Florian Jeßberger, Kalika Mehta, and Leonie Steinl (eds), *International Criminal Law – a Counter Hegemonic Project?* (TMC Asser Press 2022).

> before the one of the ICC but until now there is not much change in the case and yet for the ICC, judgment [Ongwen case] is already passed.[35]

Kwoleyo's lead lawyer Caleb Alaka also revealed similar frustrations in regards to the delayed trial and limited logistics.[36] Nonetheless, the trial is considered as a potential gateway for domestic prosecution of international crimes not only in Uganda, but in Africa more broadly.

One could assume that the creation of the ICD was largely meant to please 'The Hague' and proponents of international criminal justice, to achieve complementarity. Looking at the challenges at the ICD and delayed Kwoyelo trial, it could further be argued that the whole debate on (positive) complementarity in international criminal justice may be nothing but a pipe dream because of, among other things, lack of resources, as but also perhaps political will (amnesty).

4 Conclusion

The data set reflects a vivid picture of the application of complementarity and the simultaneous implementation of amnesty in Uganda, which were adopted as part of the broader lens of transitional justice. In essence, the ICC and domestic court operate alongside parallel transitional justice approaches-Amnesty and reconciliation. International Criminal Justice in Uganda has also been contested on this account, just like it was in Sierra Leone where the SCSL and Truth and Reconciliation Commission operated concurrently. Just like in Colombia, victims' organisations and NGOs have offered great expertise and assistance to international crimes investigations, prosecutions and memorialisation. Little wonder there are scholary

[35] Interview with social worker, 2 March 2021.

[36] Interview, 1 March 2021.

suggestions for legal pluralism in International Criminal Justice, based on the fragmented transitional justice approaches in contexts like Uganda.[37]

Uganda represents a case of complementarity in a way that reflects certain aspects found in other cases like Colombia and Sierra Leone. Firstly, there is a 'mixed economy' of justice which fits pluralistic models; secondly, this cannot be divorced from politics and the ICC faces significant challenges when its targets are state agents and not insurgency movements (like was the case in Kenya and Sudan); and third, complementarity implies the proper resourcing of domestic criminal justice institutions which are already hard pressed to deal with 'ordinary' crime. In Africa, states are more focused on domestic criminal law issues, using the meagre resources they have, leaving a gap in accountability for international crimes at the national level.[38] In this regard, NGOs fill the gap, but they are equally constrained to implement approaches that resonate with donors demands. As such, international criminal justice is not a one size fit all, and it could easily be asymmetrical to its intended beneficiaries- the victims of international crimes.

[37] Tonny R. Kirabira and Miracle C. Uche, 'The International Criminal Court and the Transformation of Post-War Justice in Northern Uganda' [2021] Sentio Journal 45; Emma Charlene Lubaale, 'Legal Pluralism as a Lens through Which to Appreciate the Role and Place of Traditional Justice in International Criminal Justice' (2020) 52 Journal of Legal Pluralism and Unofficial Law 180.

[38] Emma Charlene Lubaale and Ntombizozuko Dyani-Mhango (eds), *National Accountability for International Crimes in Africa* (1st edn, Palgrave Macmillan 2022).