

CHAPTER SIX

INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA: CHALLENGES AND OPPORTUNITIES

6.1 Introduction

Domestic investigations and prosecutions, where they are properly undertaken, are said to be the most effective process in ensuring accountability for international crimes. This is because states usually have the best access to evidence and witnesses and have their own enforcement mechanisms.¹ Domestic prosecutions are also said to foster a greater sense of local ownership, which may in turn enhance local impact of trials and any potential deterrent effect. This best explains why under the ICC complementarity regime, domestic jurisdiction retain the primary responsibility to prosecute cases if they are ‘able’ and ‘willing’ to carry out investigations and prosecutions.² To satisfy the ICC complementarity regime and to fulfil government’s commitment under the Agreement on Accountability and Reconciliation, the government of Uganda through a Legal Notice created a new Division of the High Court – the ICD to adjudicate international crimes.³

The creation of the ICD was in accordance to the Constitution of Uganda⁴ that provides that courts of judicature consisting of the Supreme Court, Court of Appeal, High Court and subordinate courts shall exercise judicial powers in Uganda as Parliament may establish by law.⁵ The High Court of Uganda has original and unlimited jurisdiction in all matters and the law may confer on it, appellate and other jurisdiction,⁶ thus, a division to specifically handle

¹ Office of the Prosecutor ‘Paper on some Policy Issues before the Office of the Prosecutor’ *ICC-OTP 2003* part 1 para 4 http://amicc.org/docs/OcampoPolicyPaper9_03.pdf (accessed 9 January 2012).

² Rome Statute preamble paras 4, 6 & 10; these paragraphs confirm the absolute necessity to prosecute persons for international crimes, emphasizes the duty of states to exercise its criminal jurisdiction in such cases and puts emphasise on the fact that the ICC shall be complementary to national criminal jurisdiction.

³ Agreement on Accountability and Reconciliation clause 2.1; stipulates that national legal arrangement composed of both formal and non formal measures to ensure justice and reconciliation should be created; the International Crimes Division was thus created through a Legal Notice in 2008 and in 2011 re-designated, the International Crimes Division; Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions 2011 clause 3.

⁴ The Republic of Uganda: Constitution of the Republic of Uganda (1995) Amended by the Constitution (Amendment) Act, Act 11/2005 and the Constitution (Amendment) (No. 2) Act, 21/2005.

⁵ Constitution of Uganda art 129(1).

⁶ Constitution of Uganda art 139.

international crimes could only be legally established as part of the High Court.⁷ Three judges selected based on their standing and experiences have been appointed to the ICD.⁸

The ICD will consist of five Judges sitting in panels of three; the judges are appointed by the President, with the approval of Parliament, on the advice of the Judicial Service Commission as provided for in article 142 of the Constitution of Uganda. The Registrar is also appointed by the President on advice of the judicial service commission⁹ and is responsible for non-judicial aspects of administration such as legal aid, court management, procurement and personnel among others.¹⁰ The Prosecutory function is handled by the office of the DPP that has appointed at least five State Attorneys to work at the ICD, these attorneys, are also assigned other ordinary criminal cases, depending on need. The Criminal Investigations Division (CID) of the Uganda Police Force conducts investigations. Several senior police officers around the country with the CID act as focal points for the ICD.¹¹ In line with the Constitution, defendants before the ICD may instruct counsel privately or in cases where the defendant is indigent, counsel may be appointed on 'state brief' to give free legal services.¹²

The ICD is fully constituted and operational. The first trial for war crimes and other violations of Uganda's penal laws is against Thomas Kwoyelo, a former LRA commander captured in the DRC in 2008.¹³ Kwoyelo's was arraigned in Court in September 2010 and trial

⁷ The government needed to set up the Division before the ICC Review Meeting that took place in Kampala in July 2010 to show to the international community that it is committed to the fight against impunity. According to Joan Kagezi, the Senior Principal State Attorney in the office of the Director of Public Prosecutions (DPP) in charge of war crimes prosecutions, the other Divisions of the High Court such as the Anti-corruption and Commercial Divisions created in 1999 proved effective and there is expectation and enthusiasm in the judicial sector in Uganda that this will be the case with the ICD. The ICD will also deal with the crime of terrorism, several suspects of the July 2010 bombing in Kampala are already in custody pending trial; Interview with Joan Kagezi conducted on 18 Jan 2011.

⁸ The appointed judges include Justice Dan Akiki-Kizza, who heads the division, has vast experience as a Judge in Uganda, and served in the anti corruption Commission of Sierra Leone. He is deputised by Justice Elizabeth Ibanda Nahamya, who served in various capacities at the ICTR and SCSL; and Justice Owiny Dollo, who is from Northern Uganda and is trained in international law.

⁹ Constitution of Uganda art 145.

¹⁰ The Registrar is appointed to serve in any Division of the High Court, so from time to time changed. General functions of the Registrar is provided for in the Judicature Act, Cap 13 1996 sec 41 & 43 and the Trial on Indictment Act cap 23 1971 sec 3, 27(2), 58(2) & 60.

¹¹ Interview with Joan Kagezi conducted on 18 Jan 2011.

¹² Constitution of Uganda art 28(3)(e).

¹³ Thomas Kwoyelo was detained in the maximum prison of Uganda at Luzira and was in detention for at least two years before his trial commenced.

commenced on 11 July 2011 after several delays.¹⁴ In a November 2011 Constitutional Petition, Kwoyelo challenged his prosecution as amounting to unequal treatment before the law (Amnesty Act); the Constitutional Court declared the Amnesty Act constitutional, that Kwoyelo had been treated unfairly under it and ordered the ICD to cease his trial.¹⁵

In contrast to Uganda, in the DRC, the military courts have been granted exclusive jurisdiction over international crimes, even where the suspects are civilians. Several individuals have been indicted and a few, for instance, Songo Mboyo successfully prosecuted on charges of mass rape and sexual violence as war crimes.¹⁶ Several legal practitioners in Uganda questioned the necessity of a new division exclusively dealing with international crimes, which they view as a waste of resources. They in particular question the need for judges specifically handling international crimes that could be catered for by ordinary courts and the court martial, as there is already a shortage of judges in the country. This has created a tremendous backlog that is choking up the judiciary. These concerns were raised in a meeting between judges and legal practitioners in Kampala facilitated by the Uganda Law Society on 2 February 2011.

Judge Elizabeth Nahamya, one of the judges appointed to the ICD, justified the necessity of the ICD citing the complex nature of trials for international crimes and a need for a complementary mechanism to facilitate ICC prosecutions.¹⁷ There is a definite need for this division and a problem the author foresees, is appeal in both interlocutory and substantive matters before the ICD that must go through Appeal and Supreme Courts that have to handle civil, criminal and election appeals as well as constitutional petitions. No additional

¹⁴ According to Joan Kagezi, investigations took place in 2008 and the investigators have not been in touch with the witnesses since. At the time of the initial investigations, the witnesses were in IDP camps but they have now returned to their villages, therefore DPP needs time to trace the witnesses, identify those in need of protection and prepare them for trial.

¹⁵ *Thomas Kwoyelo Alias Latoni v Uganda* (Constitutional Court of Uganda) Constitutional Petition No.036/11(Reference) [Arising Out of HCT-00-ICD-Case No. 2/10] Ruling of the Court of 22 Sept 2011) at para 625 ordering the ICD to cease trial of Kwoyelo; further discussion of this case is contained in chapter four of this thesis.

¹⁶ C Aptel 'Justice Systems and the Impact on the Rome Statute' a discussion in session 7 of the *Consultative Conference on International Criminal Justice System: Transitional Justice and Domestic Justice System* (9 – 11 2009) held at the UN headquarters.

¹⁷ The judge also clarified that all the judges assigned to the Division are high court judges, therefore assigned ordinary cases, including cases outside Kampala to ensure reduction in backlog. This will remain the case until such a time that the ICD may be overwhelmed with trials of international crimes. This discussion took place in Kampala in a periodic meeting organised by the Uganda Law Society in Kampala.

judges have been appointed to the courts that have repeatedly adjourned cases due to lack of quorum.¹⁸

It is important to point out that as much as many sections of the Ugandan society, especially victim groups expressed reservations about the ICC prosecutions, there seems to be more enthusiasm towards domestic prosecutions for international crimes perpetrated in the LRA conflict. This could be because the ICD was created because of an agreement between the government of Uganda and the LRA, therefore, no apparent contention or because at the time it was created, Northern Uganda had been relatively calm for at least two years. In addition, the LRA tucked away in the tri-border area of Central African Republic, the DRC and South Sudan and not an immediate threat, makes prosecutions a much more appealing option now than at the time that the ICC took up investigations.¹⁹

This chapter examines pertinent issues that affect the work of the ICD, in particular the applicable laws, which leads to the discussion on retroactive application of legislation specifically looking at the International Criminal Court Act 11 of 2010 that will not apply to international offences committed prior to March 2010. The chapter then discusses the Rules of Procedure and Evidence to be applied by the ICD placing emphasis on rules relating to sexual crimes that was rampant during the conflict. The next section discusses persons to be prosecuted by the ICD. Although the ICD jurisdiction makes no restrictions, no investigations have been launched in the actions of the UPDF during the conflict. There appears to be a preference of subjecting state actors for crimes committed during the conflict to other

¹⁸ Constitution of Uganda arts 137 & 140 spells out the role of Court of Appeal and Supreme Court of Uganda ; Judge Nahamya who I interviewed on 23 Feb 2011, agrees that the appellate courts may be overwhelmed considering the volume of appeals that may be lodged when the ICD commences trials. On average, an appeal takes 3 years before the Court of Appeal and even more before the Supreme Court. Though the Attorney General has put in a notice of appeal of the Constitutional Court amnesty decision, this will not be heard until a new judge is appointed to the Supreme Court that as of March 2012, lacks quorum. Interlocutory applications take an average of 3 months, or less depending on the urgency of the matter. Previously interlocutory applications automatically stayed proceedings in the High Court but to ensure expediency, this rule has been changed and stay is granted on a case-by-case basis. A further problem is the overcrowding in prisons, which are holding twice the number of persons, originally intended; these could have a negative impact negatively prosecutions of international crimes but can easily be sorted out by more recruitments and the government can give priority and acquire more facilities for the purpose of trials. For more details see, Government of Uganda *National Planning Authority: National Development Plan 2010* (2010) 292 – 296.

¹⁹ Discussion with the ICC Outreach Officer, Maria Kamara conducted on 15 May 2011 in Kampala; local government officers in Gulu and Pader districts also expressed this view in October 2011 during a field visit I undertook in Northern Uganda.

domestic courts, this leads to a discussion on prosecutions of international crimes as ordinary crimes in ordinary courts in Uganda. The chapter then discusses the territorial jurisdiction of the ICD, penalties to be imposed and age of liability before turning to practical issues such as protection and participation of victims and witnesses, reparations and conduct of outreach, which are especially important in the work of the ICD.

6.2 Applicable laws at the ICD

The crimes and law within the jurisdiction of the Division include:

... Any offences relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act, Cap 120, the Geneva Conventions Act, Cap 363, and the International Criminal Court Act II of 2010 or under any other penal enactment.²⁰

The DPP initially charged Thomas Kwoyelo²¹ with kidnapping under the Penal Code Act and remanded him in Gulu prison. Later, the DPP ordered his transfer to Luzira maximum prison in Kampala and the charges amended to war crimes in accordance to the Geneva Conventions Act Cap 363, laws of Uganda. The DPP further amended his indictment in 2011 to include 12 counts and 53 charges for offences he allegedly committed between 1996 and 2008 in the context of an international armed conflict in Uganda in accordance to the Geneva Conventions Act with alternative charges under the Penal Code of Uganda.²² The

²⁰ Legal Notice 10 of 2011 clause 6; this provision does not prejudice article 139 of the Constitution that provides that the High Court has unlimited and original jurisdiction in all matters. The jurisdiction of the ICD is much broader than what the government had negotiated for in Juba. The Agreement on Accountability and Reconciliation envisaged a special mechanism to prosecute crimes committed only by the LRA in the course of the conflict.

²¹ Kwoyelo was allegedly the focal point of the LRA in Uganda who gave the green light to the LRA on where, who and when to attack and constantly moved around the LRA operation areas including Northern Uganda, Eastern DRC and South Sudan. According to Joan Kagezi, several other culpable people including Major Makasi were captured in Garamba forests but most of them received an amnesty certificate, therefore, the DPP will not initiate proceedings against them. Other than Kwoyelo, the DPP's office is carrying out investigations and other five suspects have been identified.

²² *Prosecutor v Thomas Kwoyelo alias Latoni* (International Crimes Division of the High Court of Uganda) HCT-00-ICD-Case No. 02/10 'Final Amended Indictment' para 1 spells out that the LRA conflict is an international armed conflict as the rebels acted with support of or under the control of the government of Sudan. The particular charges against Kwoyelo are for Grave breaches of the Geneva Conventions and Geneva Conventions Act with alternative crimes under the Penal Code Act of Uganda. The crimes he is charged with on several counts include wilful killing, destruction of property, causing serious injury to body, inhumane

indictment alleges that Kwoyelo is a senior commander with the LRA who ordered the perpetration of several attacks; or that the LRA carried out attacks with Kwoyelo's knowledge or authority in Kilak County in Amuru district between 1987 and 2005.²³ The Senior Principal State Attorney in charge of war crime trials is confident that the DPP has overwhelming evidence to show that the conflict was internationalised and that the evidence the ICC has shared with them, shows the same. Chapter two of this thesis discusses the nature of the LRA conflict and concludes that between 1994 and 2005, it was an internationalised conflict, alongside an internal conflict.²⁴ It remains to be seen whether Courts in Uganda will reach the same conclusion when the issue is subject to judicial reasoning.²⁵

Other countries in the region also have legislations in place to prosecute international crimes, for instance, the DRC ratified the Rome Statute in March 2002 and as a monist state, the Statute has been applicable since ratification.²⁶ In November 2002, the DRC further adopted military and criminal procedure codes that gave it power to prosecute war crimes, crimes against humanity, and genocide. It then started prosecutions in military courts on that basis in 2006. The military courts began applying the Rome Statute directly though civilian courts have refrained from applying it.²⁷ To ensure prosecution of international crimes through civilian courts, the DRC created a draft implementing legislation on the Rome Statute in 2008 that amends the criminal code by adding international crimes as defined in the Rome Statute. The bill will also amend the criminal procedure code and will shift jurisdiction for international crimes from the military to the civilian justice system and give it the same post July 2002 temporal jurisdiction as the ICC.²⁸

treatment, extensive destruction of property, taking of hostages; with the alternative crimes of murder, attempted murder, kidnap with the intent to murder, destruction of property and robbery with aggravations under the Penal Code Act.

²³ *Prosecutor v Thomas Kwoyelo* 'Final Amended Indictment' para 2.

²⁴ See discussion on the nature of the LRA conflict in chapter two.

²⁵ Also undergoing trial at the ICC are several suspects of the July 2010 twin bomb blasts in Kampala that was carried out by the Somalia based Al-Shabab group. At least 86 people died in that attack.

²⁶ Constitution of the Democratic Republic of Congo (2006) arts 153 & 215; civilian and military courts are given powers to directly apply ratified treaties as long as they are consistent with law and custom of the DRC.

²⁷ *Avocats sans Frontières (ASF) 'Case Study: The Application of the Rome Statute of the International Criminal Courts by the Courts of the Democratic Republic of Congo'* (March 2009) 9 – 20 http://www.asf.be/publication/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf (accessed 10 Jan 2012).

²⁸ Open Society Foundation *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya* (2011) 21.

In Kenya, International Crimes Act domesticated the Rome Statute. Parliament approved the bill on 12 December 2008 and the Act took effect on 1 January 2009.²⁹ The Act gives the High Court jurisdiction over international crimes and incorporates definitions of international crimes as provided for in the Rome Statute.³⁰ Although, the High Court has jurisdiction over international crimes, a Special Tribunal for Kenya was proposed as an alternative for prosecution of alleged crimes against humanity during the post election violence in 2007 to 2008 in Kenya.³¹ It is unclear whether the International Crimes Act will be applied retroactively to cover the period of post election violence³² or if a new legislation will be drafted to specifically apply to crimes committed in the post election violence by the proposed Special Tribunal of Kenya.

In Uganda, the ICC Act commenced in March 2010, and no other domestic legislation criminalises crimes against humanity therefore, the DPP will not prosecute those committed in the LRA conflict prior to the passing of the Act. This, although it is evident to the DPP and the public that crimes against humanity were committed in the LRA conflict. There were therefore many calls in Uganda for this Act to apply retroactively.

6.3 Retroactive application of legislation

As previously mentioned, the government of Uganda created the ICD as a complementarity mechanism as envisaged by the Rome Statute. Its operations were therefore hindered in wait for the passing of the ICC Act. This Act gives basis for the prosecution of the crimes of genocide, war crimes and crimes against humanity by Ugandan Courts and establishes procedures to facilitate cooperation with the ICC. The cabinet first tabled the bill ushering in this Act in Parliament in December 2004 but the parliamentarians did not debate the bill

²⁹ International Crimes Act of Kenya sec 1.

³⁰ International Crimes Act of Kenya secs 8 & 9 – 17.

³¹ Commission of Inquiry into the Post-Election Violence, 'Final Report' (16 Oct 2008) 472 – 475 http://www.reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf (accessed 10 January 2012).

³² Open Society Foundation (n 28 above) 85.

due to apparent lack of interest and knowledge in the ICC.³³ The Bill was re-tabled in December 2006 but again put aside to give chance to the peace negotiations in Juba.³⁴ It was finally passed in March 2010 and no doubt pushed through as part of Uganda's bid to host the first Review Conference of the ICC that took place in Kampala in June 2010.³⁵

All stakeholders had hoped that the ICC Act would be passed retroactively to apply to crimes committed in LRA conflict and beyond the temporal jurisdiction of the ICC of July 2002. Contrary to the general expectations and recommendations of the Formal Criminal Jurisdiction sub-committee³⁶ of JLOS TJWG,³⁷ the law commenced on 10 March 2010, the day the Parliament passed it. In the consultations carried out by JLOS in July and August 2009, the civil society reached a general agreement that the temporal jurisdiction of the ICC Act should predate the effective jurisdiction of the ICC, which is limited to crimes committed

³³ Interview with Rachel Odoi-Musoke conducted on 12 March 2011 in Kampala; understandably, in 2004 when the ICC had commenced investigations in Uganda, there was a general lack of knowledge and interest in the ICC and its work. Parliamentarians also viewed the ICC as an institution that contradicts the aims of the Amnesty Act and would stand in the way of a peaceful negotiation of the conflict in Northern Uganda, therefore, they were not ready to discuss a bill to domesticate a law they barely understood and viewed with hostility.

³⁴ At this time, there was still general hostility towards the ICC that was viewed a 'spoiler' of the peace talks. Joseph Kony had made it clear that the LRA would not reach a peace deal with the government unless the ICC withdraws the arrest warrants against him and some of his commanders. At the time, it was not clear what the intention of the executives was and to give it chance to follow protocol to seek withdrawal of the arrest warrants, the Bill was once again put aside.

³⁵ All persons interviewed between July 2010 and March 2011 including judges and registrar at the ICD; representatives of the DPP and officials at the Law Reform Commission indicated that the government needed to pass the Bill before the Review Conference to show its commitment to prosecutions of international crimes to the international community. Interestingly, the Bill was passed hardly one month after some youth with links to opposition parties in Uganda in an unprecedented move petitioned the ICC seeking an indictment of the President Museveni, the Chief of Defence Forces - General Aronda Nyakairima and the Inspector General of Police - Major General Kale Kayihura over the death of at least 30 people during the September 2009 riots that rocked parts of Kampala after the visit of the Kabaka of Buganda - Ronald Mwendu Mutebi to Kayunga was blocked by the police and the military on the apparent orders of the President; see 'Uganda: ICC Bill - Why Did MPs Trap Museveni and Save Kony?' All African.com (10 March 2010) <http://allafrica.com/stories/201003310540.html> (accessed 23 Oct 2010).

³⁶ The overall goal of this sub-committee is to propose an effective legal and institutional framework to combat impunity for international crimes. The sub-committee is required to review existing laws in so far as they relate to the formal criminal justice sphere; review the Uganda International Criminal Court Act of 2010; conduct field work in other post conflict areas; conduct regional consultations and consensus building workshops. The proposals of the sub-committee are intended to address interaction between the ICC and Uganda as well as to suggest procedural and substantive rules governing the creation of the ICD.

³⁷ The government created JLOS TJWG as a commitment to the Juba Peace Talks and the Agreement on Justice and Accountability. The group is tasked to come up with policy and legislative proposals for the implementation of the Agreement on Accountability and Reconciliation and its Annexure. The working Group includes representatives of the sector Institutions including, the Ministry of Justice and Constitutional Affairs, the Judiciary, the Uganda Law Reform Commission, Uganda Police Force, the directorate of Public Prosecutions, Judicial Services Commission, Ministry of internal Affairs, the Uganda Law Society, the Uganda Human Rights Commission and the Amnesty Commission.

after 1 July 2002. There were further suggestions that the jurisdiction of the Act should go as far back as 1962, to ensure that all international crimes perpetrated in Uganda since independence are accounted for.³⁸ Other proposals included, 1995, the date the Constitution of Uganda was promulgated and the year Uganda ratified and domesticated the ICCPR. Another proposal was 1986, to take into consideration atrocities committed from the start of the conflict in Northern Uganda. Others included, 1980, to cover crimes committed in the Luwero Triangle conflict that ushered President Museveni and the NRM into power; and 1971 was a further suggestion to take into consideration the crimes committed during the reign of Idi Amin Dada.³⁹

TJWG noted all these suggestions but conscious of evidentiary complications and limitations that arise from the investigations of crimes that occurred several years before, recommended 1995 as a commencement date.⁴⁰ Unfortunately, Parliament ignored the strong will of Ugandans to fight impunity; in fact, the issue of commencement date that was prominent in civil society discussion did not feature at all as a contentious issue in the parliamentary debate on the ICC bill.⁴¹ Perhaps, the members of Parliament were conscious of Uganda's legality principle as provided for in the Constitution:

No person shall be charged with or convicted of a criminal offence, which is founded on an act, or omission that did not at the time it took place constitute a criminal offence... No penalty shall be imposed for a criminal offence that is severer in degree or description than

³⁸ Uganda's post colonial history has been very turbulent, marked by coups and insurgencies where gross human rights violations and abuse have been committed with impunity; for instance perpetrators of crimes in Obote I, II, and Amin's despotic regime were never prosecuted, even crimes, most notable the rampant use of child soldiers perpetrated during the 1980 to 1986 insurgency and eventual coup by President Museveni's NRA guerrilla's fighters have been overlooked but Ugandans have not forgotten and still want perpetrators of those crimes prosecuted. For more see introductory remarks in chapter one of the thesis; see also T Allen 'War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention' (2005) *Crisis States Research Centre* 7 – 9.

³⁹ Interview with Rachel Odoi-Musoke, conducted on 12 March 2011 in Kampala.

⁴⁰ As above.

⁴¹ Generally see Government of Uganda, Parliamentary Debates (Hansard) Official Report, 4th Session, 3rd Meeting, Wednesday 10 March, 2010; other states have passed laws retrospectively for instance the United Kingdom, passed the Pakistan Act of 1990 and sec 2(3) and deemed it to have come in force on 1st October 1989, nine months before it was enacted. The War Crimes Act of 1991 of the United Kingdom gives British Courts jurisdiction over war crimes committed in World War II. Even the United States Constitution that clearly prohibits the passing of retrospective laws in article 9 and 10 deemed constitutional the passing of the Adam Walsh Child Protection and Safety Act of 2006 that imposes a new registration requirement on sex offenders and applies retrospectively.

the maximum penalty that could have been imposed for that offence at the time when it was committed.⁴²

UDHR, the ICCPR, and the ACHPR all contain similar provisions, which are rightly described as a universal legal principle aimed at protecting individuals from arbitrary abuse of justice through retroactive legislation. Though the ICCPR contains a clear proviso that:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission, which at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.⁴³

In this particular case, the author contends that the acts in question at the time they were committed were criminal according to the general principles of law recognised by the community of nations, so no injustice would have occurred, had the ICC Act been passed retroactively. In fact, international norms require that all international crimes perpetrated in Uganda, whenever and by whoever committed, be prosecuted. It is the author's view that the effective prosecution of those responsible for international crimes in Uganda is much more important than upholding principles on non-retroactivity, if the aims of accountability are to be achieved.

The Court of Justice of the Economic Community of Western African States (ECOWAS court) reached a judgment on a similar issue dealing with Hissène Habré who allegedly committed crimes against humanity, war crimes, and torture, after seizing power in Chad in 1982 and imposing himself as President. In July 2006, the African Union mandated Senegal to ensure that Hissène Habré is prosecuted on behalf of Africa, by a competent Senegalese court and to ensure that he is guaranteed a fair trial.⁴⁴ In 2008, Senegal amended constitutional provisions and penal laws providing its courts with jurisdiction to prosecute any individual for international crimes. In October 2008, Habré filed a case before the ECOWAS court

⁴² Constitution of Uganda arts 28(7) & (8); this provision is derived from the Universal Declaration on Human Rights which in article 11(2) provides that no person shall be prosecuted for an offence which did not exist at the time of the offence nor a heavier penalty be imposed.

⁴³ ICCPR art 15(2).

⁴⁴ African Union Conference, 7th Session, Decision on the Hissène Habré Case and the African Union S 5 (ii), Doc. Assembly/AU/3 (VII) (2006).

asking for protection from prosecution based on retroactive legislation and basing his argument on article 15 of the ICCPR. In its judgment of 18 November 2010, the Court partly upheld Habré's claim ruling that a trial in a Senegalese court under the existing national framework would violate the prohibition of retroactive legislation. The Court however, also held that Senegal could prosecute Habré but strictly within the scope of an *ad hoc* special tribunal of an international character since the laws of nations recognised the alleged crimes as international crimes.⁴⁵

Perhaps even more importantly, without a pre-existing legislation to punish crimes against humanity⁴⁶ most if not all offences described as such, are provided for in Uganda's penal laws. The ICC Act incorporates the specification of the crime in article 7 of the Rome Statute, which means:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in Paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Indeed, most, if not all crimes described as crimes against humanity are crimes under the Penal Code Act of Uganda. Rape for instance is provided for in sections 123 and 124 of the Penal Code Act. Abduction, indecent assault, defilement, detention with sexual intent are

⁴⁵ *Hissène Habré v Senegal* Decision No. ECW/CCJ/JUD/06/10 (Decision of 18 November 2010) Court of Justice of the Economic Union of West African States Unofficial translation of the French original available at <http://www.hrw.org/en/habre-case> (accessed 13 Sept 2011)

⁴⁶ War crimes are codified in the Geneva Conventions Act, Cap 636 Laws of Uganda of 1964 (Geneva Conventions Act).

provided for under Penal Code Act.⁴⁷ Chapter XVIII and XX provides for the crime of murder and related offences (murder and manslaughter) and offences connected with murder and suicide, respectively. Chapter XXIV provides for the crime of enslavement including kidnapping, abduction, wrongful confinement and slavery as offences against Liberty. The only difference with Uganda's penal provisions is that, there is no requirement that the offences are committed as part of widespread or systematic attack directed against any civilian population with knowledge of the attack as provided for in the Rome Statute and the ICC Act.

Can a reasonable person then argue that he/she was not put on notice that the acts perpetrated in the LRA conflict were crimes in Uganda? Can one argue that the acts committed did not constitute criminal offences in Uganda? The author sees no basis for such arguments. The widespread and systematic nature of the crimes perpetrated against civilians in the LRA conflict must be acknowledged, recognised and prosecuted as such. On the other hand, the fact that they were widespread, systematic and directed against a civilian population should not be the basis for failure to prosecute. The Constitution of Uganda, provides that substantive justice shall be administered without undue regard to technicalities – to fail to prosecute in this instant case amounts to giving regard to technicalities.⁴⁸ The offenders knew or at least ought to have known that their acts and/or omissions were not only morally objectionable but also criminal. Prosecution therefore, does not occasion an injustice but failure to prosecute, surely does.⁴⁹

The DPP must therefore charge indictees before the ICD with crimes under the Penal Code Act and lead evidence during trial to show that the crimes were widespread and/or systematic and that they were directed against a civilian population with knowledge of the attack. The evidence led must correspond to the gravity of the crime to meet the threshold

⁴⁷ Penal Code Act secs 126, 128, 129 134 respectively.

⁴⁸ Constitution of Uganda art 126(2)(e).

⁴⁹ *Attorney General of Israel v Adolf Eichmann* Case No.336/61, District Court of Jerusalem; the Court found that no injustice was worked in prosecuting Eichmann, although there was no pre-existing legislation criminalising the acts, Eichmann was aware that the acts committed were morally and legally objectionable, therefore, there was no violation of the retroactive application of law principle.

laid down by the ICC Act. These relevant circumstances adduced in evidence during the trial will add to aggravating factors to ensure effective penal sanctions at sentencing.⁵⁰

6.4 Rules of procedure and evidence

The ICD will apply rules of procedure and evidence applicable to criminal trials in Uganda and may from time to time adopt practice directions for better management, orderly and timely disposal of cases.⁵¹ Article 28 of the Constitution sets out fair trial guarantees of the accused, these are generally respected in criminal proceedings and meet international standards. It will, however, be necessary for certain rules of evidence to be modified to meet the circumstances of violation; that is, an armed conflict. For instance, the rule requiring medical corroboration to prove physical force in cases of sexual violence, in particular rape should be revised. In addition, prior conduct of the victim as a defence should be done away with, as this will create a burden on victims who may already be traumatised and do not want to relive such experiences. In addition, such requirements are not practical in situations of armed conflict.

The ruling of both the ICTY and ICTR will be instructive for the ICD when prosecuting cases of sexual violence. For instance in *Prosecutor v Akayesu*,⁵² the ICTR broadly defined rape as physical invasion of sexual nature committed on a person under circumstances that were coercive, the ICTR further noted that the coercive nature need not be evidenced by show of physical force but may be inherent in certain circumstances such as armed conflict.⁵³ In addition, the ICC employs special rules set out in its Rules of Procedure and Evidence that apply to all sexual crimes. For instance, the legal requirement of corroboration is not mandatory for, 'in particular crimes of sexual violence.'⁵⁴ In addition, evidence of prior sexual conduct is inadmissible⁵⁵ and coercion (to show lack of consent) may be inherent in

⁵⁰ In an informal discussion held with Joan Kagezi the senior principal State Attorney in charge of international crimes prosecution on 6 July 2012, the author advanced this suggestion. Ms. Kagezi indicated that there is nothing that legally precludes the DPP from doing this and that it will be considered for further indictments and during trial.

⁵¹ Legal Notice 10 of 2011 clause 8; the applicable rules will therefore will include the Magistrate Court Act; Trials on Indictment Act Cap 23; and the Evidence Act.

⁵² *Prosecutor v Akayezu* Case No. ICTR 69-4-T (Judgement of 2 Sept 1998) ICTR Trial Chamber (*Akayesu case*).

⁵³ *Akayesu case* para 688.

⁵⁴ Rules of Procedure and Evidence of the International Criminal Court rule 63(4).

⁵⁵ Rules of Procedure and Evidence of the International Criminal court rule 71.

certain circumstances, such as armed conflict or military presence.⁵⁶ Special rules of this nature will be necessary for prosecution of offences of sexual violence at the ICD.

6.5 Persons to be tried by the ICD

The ICC Act is explicit in respect to its personal jurisdiction. Courts in Uganda can exercise jurisdiction over, a person who is a citizen or permanent resident of Uganda; a person who is employed by the Uganda government in a civilian or military capacity; a person who has committed the offence against a citizen or permanent resident of Uganda; and a person who after the commission of the offence is present in Uganda.⁵⁷ The DPP however, has no intention to assert jurisdiction over persons already indicted by the ICC and is ready to work with the ICC to ensure that those most responsible for crimes in the LRA conflict are prosecuted.⁵⁸ For the crimes perpetrated in the LRA conflict, the ICD will limit its jurisdiction to those who played leadership role within the LRA structures minus those indicted by the ICC.⁵⁹ Other lower ranking perpetrators will potentially appear before other accountability mechanisms like a Truth and Reconciliation Commission when/if created and traditional justice structures.⁶⁰

The problem however, is that amnesty was not only granted to lower ranking LRA perpetrators but high ranking and culpable members as well.⁶¹ The DPP has indicated that a grant of amnesty is not a bar to prosecutions of international crimes committed by Ugandans and/or in Uganda.⁶² If this were the case, it does not make sense that the DPP has not investigated or proffered charges against culpable high-ranking LRA commanders such

⁵⁶ *Prosecutor v Jean-Pierre Bemba Gombo* (situation in Central African Republic: ICC-01/05-01/08) Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) ICC Pre-Trial Chamber (*Bemba Case*) para 162.

⁵⁷ ICC Act art 18.

⁵⁸ Interview with Joan Kagezi conducted on 18 January 2011 in Kampala.

⁵⁹ Interview with Joan Kagezi conducted on 18 January 2011 in Kampala; see also Agreement on Accountability and Reconciliation clause 4.1 excluding state actors from accountability measures envisaged under the Agreement.

⁶⁰ Agreement on Accountability and Reconciliation clause 6.1.

⁶¹ Some of the high-ranking LRA commanders granted amnesty includes; Brigadier Banyana, Sam Kolo, Onekomon and Matsanga-Nyekorach who acted as the LRA representative in the later stage of the Juba talks.

⁶² Interview with Joan Kagezi conducted on 18 January 2011 in Kampala; the ICD ceased the trial of Kwoyelo but the DPP refused to release him from prison, insisting that the crimes for which, Kwoyelo is charged cannot be subject to amnesty. See further discussion in chapter four of this thesis.

as Brigadier Banya, Sam Kolo and Onekomon Kikoko among others, implicated in many atrocities committed in the LRA conflict. In addition, recent beneficiaries of amnesty include Major Makasi and Charles Arop. Charles Arop was the LRA Director of Operations; he surrendered to Ugandan troops in November 2009 and received amnesty in the same period.⁶³ In addition, David Matsanga Nyekorach, the LRA spokesperson and leader of the LRA peace delegation who is accused of frustrating the peace talks, also received amnesty.⁶⁴

Perhaps this is an attempt to avoid tension between the DPP's office and the Amnesty Commission, since these persons have already received amnesty certificates.⁶⁵ Should culpable individuals therefore escape prosecution so that accountability and reconciliation institutions are not at loggerhead? Perhaps this was a necessity to stay in line with the letter and spirit of the Amnesty Act, but what is more puzzling is that although Kwoyelo is not the only culpable LRA commander captured and in Uganda, he is the only one against whom charges have been proffered. One cannot help but question the reasons behind such differential treatment by the concerned institutions.⁶⁶

On 22 September 2011, the Constitutional Court declared Kwoyelo's trial unequal treatment before the Amnesty Act. The Court further declared the Amnesty Act, constitutional and ordered the ICD to cease trial of Kwoyelo.⁶⁷ The Court justified its findings citing Uganda's history that has been characterised by political and constitutional instability and stated that the aim of the Act to end an armed rebellion, was in line with national objectives and state

⁶³ Human Rights Watch *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division* (Jan 2012) 14; Arop is accused of leading the 'Christmas massacres,' part of a series of attacks in 2008 and 2009 resulting in the deaths of at least 620 civilians and the abductions of more than 160 children in the DRC.

⁶⁴ S Oola, 'Uganda: Mutsanga should not have been Given Amnesty' AllAfrica.com 10 June 2010 <http://allafrica.com/stories/201006110203.html> (accessed 22 Oct 2010).

⁶⁵ The DPP has made it clear that his office will not pursue rebel commanders already granted amnesty.

⁶⁶ Major Makasi is one such other commander, captured in Garamba, together with Kwoyelo but granted amnesty by the Amnesty Commission.

⁶⁷ *Prosecutor v Thomas Kwoyelo* (n 15 above) para 620; the state has indicated intentions of appealing this decision and applied to the High Court to stay of execution of the Constitutional Court order but this application was denied by Justice Zehurikirize. On 25 Jan 2012, the Justice made an order of mandamus to the Chairman of the Amnesty Commission and the DPP to grant Kwoyelo an amnesty certificate and release him immediately. This order was appealed by the attorney General and on 5 April 2012, the High Court reached a decision staying the execution of the order of mandamus granted by the Court pending the determination of the intended appeal by the applicant before the Supreme Court. See *Attorney General v Thomas Kwoyelo alias Latoni* (High Court of Uganda at Kampala) Miscellaneous Application No. 179 of 2012 (Arising from Miscellaneous Cause No. 162 of 2011) Order of 5 April 2012.

policy; and that made the Act constitutional.⁶⁸ Although the court stated that in determining the constitutionality of legislation, ‘its purpose and effect must be put into consideration as both purpose and effect are relevant to determine the constitutionality or unconstitutionality of that legislation’; it failed to do so in its ruling. The Court should have considered whether the inclusion of international crimes within the ambit of amnesty contravenes Uganda’s domestic and international obligations that require Uganda to investigate, prosecute and where it establishes guilt, punish perpetrators of international crimes and accord appropriate remedies to victims.

The state is set to appeal this decision and there is hope that the Supreme Court that made an interim order staying execution of any consequential orders seeking to enforce the judgement in the Constitutional Reference pending hearing and determination of the main application for stay of execution will overturn the ruling of the Constitutional Court.⁶⁹ In the event that the Supreme Court rules that the Amnesty Act, as it was then was unconstitutional, will the DPP then proceed against LRA leaders culpable of International Crimes? The DPP has ruled out the possibility of that happening, stating that his office will not prosecute those who hold amnesty certificates.⁷⁰ It is not clear yet when the Supreme Court that does not constitute a bench will hear the appeal. New judges are yet to be appointed to the Court.⁷¹

In addition, the Constitution of Uganda protects the President from prosecutions. Article 98(4) provides that while holding office, the President shall not be liable to proceedings in any court. Article 98(5) adds that, civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office. It further provides that any period of limitation in respect of any such proceedings shall not be taken to run during the

⁶⁸ *Prosecutor v Thomas Kwoyelo* (n 15 above) 19 - 20.

⁶⁹ *Attorney General v Kwoyelo alias Latoni* (Supreme Court of Uganda at Kampala) Constitutional Application No. 01 of 2012 (Arising from Constitutional Reference No. 36 of 2011) order of the Court 30 March 2012.

⁷⁰ Interview with Joan Kagezi the Senior Principal State Attorney in charge of international crimes prosecution.

⁷¹ Most of the judges of the Supreme Court have reached the retirement age but the state has been slow in the appointment of new judges. Since March 2012, the Judicial Service Commission has nominated several individuals for appointment to the Supreme Court.

period while that person was president. The Rome Statute however, does not recognise such immunity and in Article 27(1) clearly states that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Article 27(2) of the Rome Statute further provides that Immunities or special procedural rules, which may attach to the official capacity of a person, whether under national or international law, shall not bar the ICC from exercising its jurisdiction over such a person. Section 25 of the ICC Act provides that any immunity or special procedure rule attaching to the official capacity of any person shall not be a bar to a request by the ICC for surrender or other assistance.⁷² A recent constitutional petition⁷³ challenged this section, arguing that it is inconsistent with articles 98(4) and (5) and 128 of the Uganda Constitution that protects the President and other state officials from proceedings in courts.⁷⁴ The Court is yet to make pronouncement on that provision but it is likely that the constitutional provisions protecting the president will be upheld, as the Constitution is the supreme law in Uganda.⁷⁵

In addition, although the Agreement on Accountability and Reconciliation sought to exclude state actors from the jurisdiction of the envisaged special division,⁷⁶ the Legal Notice creating the ICD does not limit the jurisdiction of the ICD to particular individuals or categories of individuals.⁷⁷ The practice, however, seems to be that for crimes perpetrated

⁷² See also Nuremberg Charter art 7; reaffirmed in principle 221 of the Nuremberg Principles, Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, GA Resolution 95(1) UN GAOR, 1st Session, Point 2 at 1144, UN Doc A/236 (1946). This rule has been affirmed in art 7(2) ICTY Statute art 6(2) of the ICTR Statute and art 6(2) of the Statute of the Special Court for Sierra Leone.

⁷³ *Jowad Kezaala v Attorney General of Uganda* (Constitutional Court of Uganda) Constitutional Petition 24 (2010).

⁷⁴ Uganda Constitution art 98(4) provides that while holding office, the President shall not be subjected to proceedings in any court and article 128(4) protects persons exercising judicial powers from liability from any action or suit subject to the exercise of judicial powers.

⁷⁵ Although there is nothing that bars the ICC from proceeding against state officials in Uganda, there seems a general reluctance on the part of the Prosecutor to do so as illustrated in chapter six of this thesis.

⁷⁶ Agreement on Accountability and Reconciliation clause 4.1.

⁷⁷ Legal Notice No 10 para 6.

in the LRA conflict, state actors will be subject to the military or other ordinary courts in Uganda.⁷⁸ The State Attorney in charge of international crimes prosecution stated that the DPP does not have any leads to evidence of international crimes committed by state actors in the LRA conflict but that if any lead is brought to attention of the DPP, it will be followed. The State Attorney further indicated that in a March 2012 consultation meeting she undertook in Nwoya district, the local population gave a clear lead on crime of rape against both males and females perpetrated by members of the UPDF Fourth Battalion against civilians. She indicated that the DPP is following that lead and if it finds sufficient evidence to support this allegation, the DPP will charge the responsible officers.⁷⁹ Justice James Ogoola, the former Principal Judge of Uganda has further stated that, state actors will be held accountable through prosecutions in the ordinary courts in Uganda and for soldiers, through the court martial.⁸⁰

6.6 Prosecution as ordinary crimes in domestic courts

As discussed in chapter three of this thesis, international law, including the Geneva Conventions considers the prosecution of international crimes as ordinary offences in domestic courts as fulfilling the obligation to investigate, prosecute and punish.⁸¹ In addition, the complementarity regime of the Rome Statute appears to regard prosecutions of international crimes based on domestic criminal law sufficient response to preclude

⁷⁸ For instance in its reply to the case concerning War Affected Children in Northern Uganda before the African Committee of Experts on the Rights and Welfare of the Child; the government stated that the commander who was in charge of Barlonyo camp that was attacked by the LRA in 2004 was prosecuted in a court martial. The government further indicated that the court martial severely punished the commander for the negligence of his troops (see detailed discussion of the attack in chapter two). The government however, does not provide any details of the crimes, procedure and the punishment levied and if this is true, it is one isolated incidence, there is no information on other UPDF commanders being punished for negligence for the numerous attacks on IDP camps by the LRA (see detailed discussion in chapter two) or charged on individual criminal responsibility for crimes perpetrated during the conflict (a detailed discussion on international crimes perpetrated by the UPDF is contained in chapter two).

⁷⁹ Interview with Joan Kagezi conducted on 06 July 2012 in Kampala. Although the ICD is meant to take over all prosecutions of international crimes, there is reluctance on part of state actors for their actions to be subject to this court; therefore, prosecution as ordinary crimes will have to be pursued if state actors are to be held accountable for their action.

⁸⁰ J Ogoola 'Presentation on the Special Division of the High Court' *Final Report on the Workshop on Accountability and Reconciliation: Juba Peace Talks* (6 – 7 May 2008) Kampala.

⁸¹ Generally see the discussion on the 'obligation to investigate, prosecute and punish' in chapter three of this thesis.

action by the ICC.⁸² As previously elucidated in this chapter, several acts constituting international crimes, such as murder, rape and pillage are criminalised as ordinary offences in Uganda's penal regime. Therefore, Uganda has the option to prosecute crimes perpetrated in the LRA conflict based on its domestic penal laws in ordinary courts.

For the prosecution to be meaningful, however, the charges must correspond to the gravity of the crime and must entail 'effective penal sanctions' to meet the threshold laid down by the Geneva Conventions Act and the ICC Act.⁸³ The High Court of Uganda can carry out the prosecutions and for cases involving the military, the Court Martial can carry out prosecutions.⁸⁴ Court martial proceedings and prosecutions as ordinary crimes in domestic courts will not require time and resources to prove the nexus between the crime and the armed conflict in cases of war crimes or the classification of the conflict. As long as such prosecutions reflect the gravity of the crimes committed and encourages the participation of witnesses and victims, they will yield accountability for international crimes perpetrated in the LRA conflict.

Several states have prosecuted international crimes as ordinary crimes. For instance, the US, Lieutenant Calley was convicted by the general court martial for three counts of murder and assault with intent to commit murder in violation of article 118 and 134 of the Uniform Code of Military Justice of the US for his involvement in a massacre in the Vietnam War. The government could have charged him with grave breaches of the Geneva Conventions.⁸⁵ German courts have also charged several defendants from the former Yugoslavia with not

⁸² Rome Statute art 1.

⁸³ See art 49 of Geneva Convention I; art 50 of the Geneva Convention II; art 129 of Geneva Conventions III and art 146 of Geneva Convention IV.

⁸⁴ According to Joan Kagezi, the senior principal State Attorney in charge of international crime prosecution, several UPDF officials have been prosecuted by the High Court on charges of capital offences like murder and rape and that several others have been prosecuted by the court martial and given harsh sentences including death. Interview conducted on 6 July 2012 in Kampala.

⁸⁵ See *US v Calley*, 46 C.M.R. (1973) 1131, 1138. There have been several other court martial proceedings of members of the US Armed Forces for what amounted to grave breaches committed during military operations in Panama, Somalia and Iraq; W Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7(4) *Journal of International Criminal Justice* 723 – 741 at 730 making reference to Statement of J H McNeil before the committee on the judiciary of the US House of Representatives 12 June 1996; SD Murphy, 'Contemporary Practice of the United States relating to International Law' (2004) 98 *American Journal of International Law* 595.

only international crimes but also ordinary crimes such as murder.⁸⁶ However, although prosecution as ordinary crimes in domestic courts remain an option in Uganda, there has been little or no effort to investigate actions of state actors in the conflict.⁸⁷ On a positive note however, the lapse of Part II of the Amnesty Act in May 2012 means that there is no legal barrier to the prosecution of LRA commanders responsible for international crimes.

6.7 Territorial jurisdiction of the ICD

Jurisdiction of Ugandan courts is limited to crimes committed only or partly within Ugandan territories under the Penal Code Act,⁸⁸ although the Geneva Conventions Act broadly extends jurisdiction of courts in Uganda to offences committed outside Ugandan territories. Ugandan courts have powers to indict, try and punish such a person for that offence in any place in Uganda 'as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment of that person, be deemed to have been committed in that place.'⁸⁹

As previously discussed in this thesis, the LRA have committed international crimes, not only in Uganda but also in the DRC, Central African Republic and South Sudan. The mentioned countries have not brought charges against any LRA personnel and there is no indication that they will do so. In addition, the ICC has not charged the LRA indictees with crimes committed in any other territory, except Uganda.⁹⁰ Ugandan courts therefore must assert

⁸⁶ Ferdinandusse (n 79 above) 731.

⁸⁷ According to the DPP, several UPDF officials responsible for crimes such as rape, murder and pillage have over the years been successfully prosecuted by the High Court sitting in Gulu. The office also indicated that the court martial has also prosecuted several UPDF officials for serious crimes such as murder and indiscriminate attacks against civilians in the conflict affected areas. Interview with Joan Kagezi, the senior principal State Attorney in charge of international crimes prosecutions conducted on 6 July 2012 in Kampala.

⁸⁸ Penal Code Act sec 4(1); the exception to the territorial rule regards the offence of treason as provided in sections 23, 24, 25, 27 and 28 of the Penal Code Act, if committed by a Ugandan or a person ordinarily resident in Uganda outside Ugandan territory. That said, however, sect 3(b) of the Penal Code (saving some laws) provides that nothing in the Code shall affect the liability of any person to be tried or punished for an offence under the provisions of any law in force in Uganda relating to the jurisdiction of Uganda Courts in respect of acts done beyond the ordinary jurisdiction of such courts; ICC Act sec 7 to 9; extends jurisdiction to Ugandan Courts to try persons for international crimes committed outside the territory of Uganda, Joan Kagezi therefore indicated that the DPP will only bring charges against persons for international crimes committed outside the territory of Uganda from March 2010 under the ICC Act.

⁸⁹ Geneva Conventions Act sec 2(2).

⁹⁰ Although nothing in the Rome Statute appears to bar the ICC Prosecutor from amending charges against the indictees to include crimes perpetrated in the other territories in the region.

universal jurisdiction and comprehensively deal with all the crimes committed in the conflict, in whichever territory.⁹¹ Several states have prosecuted and convicted or at least sought to prosecute persons for crimes committed abroad, by non-nationals on the principle of universal jurisdiction; examples that Ugandan Courts could follow.⁹²

The DPP however, limited charges against Kwoyelo to acts he allegedly committed within Ugandan territories. In essence, for purposes of trial of offences in the LRA conflict, the DPP intends to prosecute only Ugandans or persons ordinarily resident in Uganda for offences committed within the territory of Uganda or partly committed within the territory of Uganda. The DPP has however indicated that for offences committed after the commencement of the ICC Act (March 2010), his office will try persons for offences committed outside Ugandan territories as provided for in the Act.⁹³

6.8 Penalties to be imposed by the ICD

The death penalty is the maximum sentence under Uganda's penal laws and the Supreme Court confirmed this, in 2009.⁹⁴ In that case, the Attorney General appealed against the 2005 Constitutional Court ruling that declared mandatory death sentence and delay on the death row for more than 3 years unconstitutional. The petitioners in a cross appeal challenged the constitutional court's decision that retained the death penalty to be applied

⁹¹ This is one way that ICC prosecutions can complement domestic prosecutions as the ICC has jurisdiction to try perpetrators for international crimes committed outside Ugandan borders.

⁹² For example in *Aguilar Diaz et al. v Pinochet*, Belgium sought the extradition of General Pinochet from the United Kingdom to answer charges of crimes against humanity committed in Chile against Chilean nationals; *in Javor et al. v X*, the French sought the prosecution of the defendant for genocide and crimes against humanity committed in a Serbian detention camp in the former Yugoslavia; In Switzerland, a Rwandan citizen, Niyonteze was charged with genocide and crimes against humanity committed in Rwanda in 1994, he was sentenced to life imprisonment on 11 charges of genocide among others; A Serbian, N. Djajic, was convicted for aiding and abetting war crimes by a German Court and another Serbian, D Kuslic was convicted for Genocide and murder in German. Several Germans were tried in England for war crimes under the 1991 War Crimes Act of England among several others.

⁹³ With the exception to the Geneva Conventions Act and the ICC Act, Ugandan Penal laws do not extend jurisdiction of Ugandan Courts to crimes committed by Ugandans abroad except for offences related to treason. Sec 4(2) of the Penal Code Act extends jurisdiction to offences under sections 23, 24, 25, 27 and 28 committed outside Uganda - treason and other offences. Understandably, the DPP's aim is to secure convictions and with as little fuss as possible and would want to avoid unnecessary interlocutory applications like challenges to jurisdiction. Interview with Joan Kagezi conducted on 18 January 2011. Note that the ICC also limited indictments of the LRA leaders to crimes allegedly committed within the territories of Uganda.

⁹⁴ *Susan Kigula and 416 other v Attorney General* (Supreme Court of Uganda) Constitutional Appeal before the Supreme Court of Uganda, No 3 of 2006 (21 January 2009).

on a case by case basis and hanging as an appropriate and constitutional mode of carrying out executions.⁹⁵ The Supreme Court upheld the decision of the Constitutional Court declaring mandatory death penalty unconstitutional but retaining the death penalty to be applied on a case-by-case basis.⁹⁶

Though the maximum penalty in the Rome Statute is life imprisonment,⁹⁷ article 80 gives leeway to a national jurisdiction to have a sentencing regime of its own. Despite this leeway, the Parliament of Uganda decided to follow the shifting international trend and removed the clause authorising the death penalty, replacing it with life imprisonment as the maximum sentence in the ICC Act.⁹⁸ The maximum sentence under the Geneva Conventions Act is life imprisonment for a grave breach involving wilful killing.⁹⁹ The 2010 Constitutional petition¹⁰⁰ challenged this provisions; arguing that sections 7(3), 8(3), 9(3), 15 and 16 of the ICC Act are discriminatory and unconstitutional for prescribing penalties that are less than those for the same crime punishable under sections 188 and 189 of the Penal Code Act.¹⁰¹ The petitioner argued that these provisions are inconsistent with article 21(1), (2) and (3) of the Constitution.¹⁰²

In effect, the argument is that while a person charged with murder under the Penal Code Act faces the possibility of death, a person charged with murder or wilful killing under the ICC Act may only be imprisoned for life, which is discriminatory, therefore unconstitutional.¹⁰³ It is unfortunate that Uganda retains the death penalty for ordinary offences in her statute books but for extraordinary offences like war crimes, genocide and crimes against humanity - the death penalty is done away with. It is most likely that Uganda made this shift conscious of the fact that the international donor community, including the UN and European governments are unlikely to support proceedings that may culminate in

⁹⁵ The petitioners were 417 Individuals on the death row, including 2 women.

⁹⁶ *Susan Kigula and 416 others* (n 88 above).

⁹⁷ Rome Statute art 77.

⁹⁸ ICC Act secs 7(3), 8(3) & 9(3).

⁹⁹ Geneva Conventions Act art 2.

¹⁰⁰ *Jowad Kezaala v Attorney General* (n 68 above).

¹⁰¹ These sections define death as maximum penalty.

¹⁰² This article provides for equality and freedom from discrimination.

¹⁰³ C Mbazira 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda' in C Murungu & Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 218.

the passing of a death sentence. For instance, after the Iraqi High Tribunal (IHT) included the death penalty in its sentencing regime, the UN declared that it could not sponsor or actively participate in a trial that could hand down such punishment.¹⁰⁴

In addition, countries that have abolished the death penalty may not extradite to a country, which retains the death penalty.¹⁰⁵ In the case of Rwanda, the ICTR dismissed the request to have remaining genocide suspects transferred to Rwanda for trial until the judiciary was reformed, fair trial rights guaranteed, prison conditions improved and the death penalty in particular abolished.¹⁰⁶ Thereafter, despite a referendum, where the public overwhelmingly voted for the retention of the death penalty, in 2007, Rwanda lawmakers voted to scrap the death penalty to encourage the transfer of genocide suspects to face trial at home.¹⁰⁷

Rwanda got a lot of international approval since this move¹⁰⁸ and swiftly signalled that it would actively seek the extradition of suspects known to be hiding out abroad and evading justice. The Justice Minister reportedly stated that Rwanda had signed several extradition agreements with many countries in Africa, Europe and in North America and was hopeful that the countries would cooperate in transferring genocide suspects to Rwanda.¹⁰⁹

¹⁰⁴ V Blum, 'Crafting Justice in Iraq' *International Centre for Transitional Justice* (22 December 2003) <http://www.ictj.org/en/news/coverage/articles/391.html> (accessed 23 Oct 2010).

¹⁰⁵ *Roger Judge v Canada* Communication No. 829/1998 U.N.Doc CCPR/C/78/D/829/1998 (2003) (Decision of 8 Aug 2003) Human Rights Committee para 10.6; in this case, the Human Rights Committee decided that by extraditing the applicant to a country that applies the death penalty (US in this case) Canada had violated the right to life of the applicant.

¹⁰⁶ A Twahirwa, 'Death Penalty Rwanda: Abolition Spurs Quest for Justice', Inter Press Service Agency, (7 Aug 2007) <http://ipsnews.net/africa/nota.asp?idnews=38821> (accessed 15 Feb 2011); K Musoke, allAfrica.com, 'Rwanda: Kagame Wants Genocide Trials Moved to Kigali' All Africa.com (25 June 2009); Reporting that Rwanda made this application under 11 *bis* of the ICTR statute.

¹⁰⁷ O quist-Arcton, 'Rwanda Lawmakers Vote to Scrap Death Penalty' NPR 9 June 2007 <http://www.npr.org/templates/story/story.php?storyid=10910112> (accessed 21 Oct 2010).

¹⁰⁸ A Twahirwa 'Death Penalty Rwanda: Abolition Spurs Quest for Justice' Inter Press Service Agency 7 August 2007 <http://ipsnews.net/africa/nota.asp?idnews=38821> (accessed 15 Feb 2011); reports that the President of Interpol, Jackie Selebi indicated that with the abolition, Interpol would cooperate in tracking down genocide suspects during the 19th African Regional Conference in Tanzania in July 2007; the United Nations High Commissioner for Human Rights, Louise Arbour, issued a tribute for Rwanda's decision to abolish the death penalty stating that the thirst for justice remained unquenched but with the ban on the death penalty, Rwanda had taken the necessary step to ensure respect for life, at the same time making progress to bring to justice to those responsible for the heinous crime of genocide.

¹⁰⁹ As above; see also H Holland 'Kagame Says Rwanda Should Host Genocide Trials' Reuters 24 June 2009 <http://af.reuters.com/article/topNews/idAFJOE55N0KT20090624> (accessed 15 Feb 2011); K Musoke 'Rwanda: Kagame Wants Genocide Trials Moved to Kigali' Reuters 25 June 2009.

Perhaps Uganda is conscience of such limitations.¹¹⁰ The death penalty is still available for crimes committed under the Penal Code Act that can be relied on by the ICD but the Senior Principal State Attorney in charge of international crime prosecutions indicated that the DPP's office would not request the ICD to issue the death penalty to be in line with international practice.¹¹¹ It is imperative now that Uganda amends its penal laws to remove the death penalty and have a uniform sentencing regime in its jurisdiction.

6.9 Age of liability

Section 19(1)(a)(v) of the ICC Act, excludes jurisdiction of the ICD over persons under 18 years of age at the time, the alleged offence was committed.¹¹² Yet, other laws in Uganda authorise the prosecution of children of 12 years and above.¹¹³ The practice in Uganda has been that children get mitigated sentences for the same crime committed by adults. In the *Jowad Kezaala constitutional petition*, the petitioner challenges this provision arguing that it is inconsistent with articles 2 and 34(6) of the Constitution of Uganda that recognises criminal responsibility of children.¹¹⁴ The Senior Principal State Attorney in charge at the ICD indicated that the DPP would not charge persons who were under the age of 18 at the time of commission of crimes.¹¹⁵ The State Attorney further stated that no individual abducted as a child would be indicted for international crimes.¹¹⁶

¹¹⁰ I Mufumba, 'Uganda: ICC Bill- Why Did MPs Trap Museveni and Save Kony?' All Africa.com (10 March 2010) <http://allafrica.com/stories/2010003310540.html> (accessed 23 Oct 2010); reports that President Museveni was at odds with the removal of the death sentence, a reason advanced for the delay in signing of the ICC Act.

¹¹¹ Joan Kagezi, interview conducted on 18 January 2011 in Kampala.

¹¹² This is done by incorporating article 26 of the Rome Statute.

¹¹³ The Children Act Cap 59 laws of Uganda, sec 88 provides that all persons of 12 years and above are criminally liable.

¹¹⁴ Constitution of Uganda art 2 provides that the Constitution is the supreme law and art 34(6) provides that children shall be kept separately from adult offenders.

¹¹⁵ Interview conducted on 18 Jan 2011 in Kampala.

¹¹⁶ In an affidavit to support his constitutional petition, Kwoyelo evoked his status as a formerly abducted child claiming that he was abducted by the LRA when he was 13 years old on his way to school; 'Affidavit in Support of the Constitutional Petition' *Uganda v Thomas Kwoyelo* Constitutional Reference No 36 of 2011 paras 3, 4 & 5; the state refrained from responding to this assertion though Joan Kagezi had indicated to me during an interview conducted on 18 January 2011 in Kampala that there is evidence to suggest that Kwoyelo was an adult by the time he joined the LRA and that he was not abducted; in effect, indicating that one's status as a 'formerly abducted child' will be an important determining factor in determining persons to be prosecuted by the ICD for crimes allegedly committed in the LRA conflict. The Constitutional Court however, did not deal with this issue.

This could be because the DPP is conscious of the rampant abduction of children that sustained the LRA conflict. On the other hand, the DPP may simply be avoiding the outcry that the ICC received on the indictment of Dominic Ongwen and may simply want to avoid side discussions that will complicate cases and may lead to acquittals. Like discussed in the previous chapter, children and persons abducted as children should benefit from accountability processes that ensures accountability for ones action; respects procedural guarantees appropriate in the administration of juvenile justice; and reflects the desirability of promoting the capacity of the individual to assume constructive role in society. The author maintains that the ICD like the ICC is not the right forum for this.

6.10 Protection and participation of victims and witnesses

Victim and witness participation is a necessity for fair and successful prosecutions, yet very often, in the aftermath or in situations of mass atrocities, such individuals do not want to participate in accountability processes out of fear, real or imagined. Providing protection to witnesses and victims is therefore important for law enforcement as well as a fundamental legal obligation, which poses a significant challenge in countries emerging from conflict where impunity of perpetrators has not been effectively confronted.¹¹⁷ The LRA conflict created a large number of victims, both direct and indirect, in Uganda and beyond. These victims will be required to testify in court about their experiences and experiences of others around them. This exposes them to risks, that may be aggravated considering that the ICD's location in Uganda where perpetrators and their supporters may have access to; have influence and resources; human and material, to intimidate and in the worst case scenario, further harm the victims. The question of protective measures cannot therefore, be overlooked by the ICD as it conducts investigations and trials.

The DPP and investigators recognise and appreciate the risks potential witnesses may face. At the start of investigations, the DPP did not take witness protection with utmost seriousness. Apparently, witnesses approached, did not express any fears and investigators

¹¹⁷ International Network to Promote the Rule of Law (INPROL) 'Witness Protection in Countries Emerging from Conflict' (5 Dec 2007) INPROL Consolidated Response (07-008) <http://www.inprol.org/files/CR07008.pdf> (accessed 29 June 2010).

saw no need to put any protective measures in place. When Kwoyelo, the first person indicted for war crimes by the ICD privately instructed defence counsel, the police, realised that although the LRA have not been active in Uganda since 2006, they may well still have resources and influence not only in Uganda but also in the region.¹¹⁸ This was the wakeup call for the DPP and his team of investigators that are now keen on possible risks that witnesses and victims may face. JLOS and its international partners carried out a risk assessment and have in place a Witness Protection bill.¹¹⁹ In addition, JLOS is pursuing a risk assessment for ICD witnesses to evaluate concrete risks and recommend those best placed to administer witness protection and the necessary training required.¹²⁰

The timing of these efforts raises concern given that at least 60 witnesses are already selected to testify on behalf of the prosecution in the Kwoyelo case, should it proceed to trial.¹²¹ Field reports indicate that these witnesses had since December 2011 not received any updates from the DPP and investigators on the constitutional ruling that ordered the cessation of Kwoyelo's trial case. Several witnesses reportedly stated that the ICD officials had promised that Kwoyelo would be imprisoned for life and that he would not return to the community.¹²² The State Attorney in charge of international crimes prosecution stated that the DPP's office has not made contact or discussed the constitutional case with the witnesses because the matter is still pending appeal and it would be premature to tell the witnesses that Kwoyelo will be returning to the community.¹²³

¹¹⁸ The privately instructed lawyers are Caleb Alaka & Francis Onyango who are said to receive payment for their involvement in the case from Sudan. The state offered Kwoyelo a lawyer on state brief as required by law for persons facing capital offences but Kwoyelo made no indication that he was interested in the addition. Interview with Joan Kagezi conducted on 18 January 2011 in Kampala. In an informal discussion with Francis Onyango, one of Kwoyelo's defence attorneys conducted on 20 April 2011, Onyango confirmed that their pay did not come from the state but did not indicate from who and where the payment was received.

¹¹⁹ At the end of 2011, the Law Reform Commission planned to start consultation on the bill but this has not yet commenced. Interview with Ismene Zarifis, transitional justice advisor of JLOS conducted on 17 Feb 2012 in Kampala.

¹²⁰ Interview with Ismene Zarifis conducted on 17 Feb 2012 in Kampala.

¹²¹ There is every possibility of Kwoyelo's case proceeding to trial as there is likelihood to the Supreme Court will overturn the Constitutional Court ruling that failed to investigate the purpose and relevance of the Amnesty Act, give a critical appreciation of Uganda's international obligations and the rights of victims under domestic laws of Uganda. Further discussion is contained in chapter four of this thesis.

¹²² Justice and Reconciliation Project 'Moving Forward: Kwoyelo and the Quest for Justice: A Rapid Situational Analysis and Opinions on the Way Forward' (15 Nov 2011) 2.

¹²³ Telephone discussion with Joan Kagezi conducted on 12 Feb 2012. Although the High Court denied a stay of execution pending appeal, the DPP has refused to release Kwoyelo from prison and there is no likely that he will return to his village until the Supreme Court disposes off the matter. Further discussion is contained in chapter four.

While the DPP and investigators continue with investigations of both the LRA and UPDF perpetrators, they must carefully consider the level of risk that each potential witness faces before, during and after trial to manage risks, effectively. Factors that should be taken into account will include the relationship between the witness and alleged perpetrator. Also the status of the alleged perpetrator; nature of the alleged crime; the nature of the threat; importance of the testimony to be given by the witness; the psychological state of the witness; and the period of time in which the witness is likely to be at risk.¹²⁴ Measures adopted could include protecting the identity of witnesses and other confidentiality guarantees. The ICTY, ICTR, the SCSL and the ICC all have at their disposal a number of confidentiality measures ranging from expunging names and identifying information from Court records; testimony under a pseudonym; electronic facial distortion, voice distortion and closed session from which the ICD could borrow.¹²⁵

In addition, victims of sexual violence are usually shy to take part in court processes due to trauma, stigma and blame that society usually attaches to the victims of such crimes. The ICD needs to pay particular attention to the lessons learned from the experiences *ad hoc* criminal tribunals such as the ICTY and ICTR that have documented the long lasting consequences on women who suffer sexual assault. Women who testify in the tribunals have received special psychological counselling and special protection that includes testifying from remote locations, where they are reluctant to face their tormentors in court. The Tribunals have also made special protective measures available to children and other vulnerable groups of victims and witnesses.¹²⁶

The protection accorded to victims and witnesses will largely determine their participation in the court processes but will only ensure the participation of victims and witnesses who are before the ICD. The Court should however, enable all victims to participate in its

¹²⁴ INPROL (n 111 above).

¹²⁵ Justice Nahamya indicated that, nothing that will bar the ICD from making appropriate rulings on protective measures, when it commences trials. Interview conducted on 11 March 2011 in Kampala.

¹²⁶ United Nations Department of Peacekeeping Operations *Review of the Sexual Violence Elements In the Judgment of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in Light of the Security Council Resolution 1820* (2009).

processes as provided in clause 8 of the Agreement on Accountability and Reconciliation, in the following terms:

The government of Uganda shall promote the effective and meaningful participation of victims in accountability proceedings...Victims shall be informed of the processes and any decision affecting their interests....In the implementation of accountability and reconciliation mechanisms, the dignity, privacy and security of victims shall be respected and protected.¹²⁷

In addition, article 68 of the Rome Statute provides for the participation of victims where their personal interests are affected and permits the presentation of their views and concerns in Court:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.¹²⁸

This provision however, is not incorporated in the ICC Act, so the victims do not have access to the ICD, as they would, the ICC. The ICD should therefore, give opportunity to victims and witnesses to participate in its proceedings through outreach and consultations. In addition, the seat of the Court will also determine how many victims can participate in Court proceedings. According to a number of ICD officials interviewed, there has been constant request from victim groups that trials to be held somewhere in Northern Uganda, in close proximity to the communities most affected by the conflict. The Registrar of the ICD has

¹²⁷ Agreement on Accountability and Reconciliation clause 8.

¹²⁸ Rome Statute art 68(3).

considered this request but funds are not yet available to make such a move.¹²⁹ The Court however, held its first hearing on the Kwoyelo's case on 12 July 2011 in Gulu.¹³⁰

6.11 Reparations

A further measure to ensure effective remedies to victims is the provision of compensation for the crimes suffered. The Agreement on Accountability and Reconciliation stipulates that alternative penalties shall require perpetrators to make compensation to victims.¹³¹ In addition, the Rome Statute, in article 75, makes detailed provisions for reparations and article 79 provides for reparations through the Trust Fund for Victims.¹³² However, the only provision related to reparations in the ICC Act is in clause 64 that is restricted to implementation of reparation awards made by the ICC under article 75 of the Rome Statute.

The Constitution of Uganda gives authority to Courts to order adequate compensation to victims¹³³ but this is limited to compensation by an accused.¹³⁴ It is necessary for Uganda to design a policy on reparations within her accountability processes to ensure a range of measures such as rehabilitation, restitution, compensation, guarantees of non-reoccurrence and other symbolic measures such as apologies, memorials and commemorations for victims of crimes in the LRA conflict. This would serve to restore victim's confidence in the state and to uphold Uganda's legal and moral obligations under the Rome Statute and the Agreement on Accountability and Reconciliation.¹³⁵

¹²⁹ Moving trials to Gulu for instance would mean, funds to hire a Courthouse, to upgrade prison facilities, pay per diem to Judges, prosecutors and all other staff of the ICD, funds that the ICD does not have at present. Interview with Alex Ajiji, Registrar of the ICD, conducted on 26 Jan 2011.

¹³⁰ M Kersten 'Uganda's Controversial First War Crimes Trial: Thomas Kwoyelo' Justice in Conflict 7 July 2011 <http://justiceinconflict.org/2011/07/12/ugandas-controversial-first-war-crimes-trial-thomas-kwoyelo/> (accessed 11 January 2012).

¹³¹ Agreement on Accountability and Reconciliation clause 9(1).

¹³² Rome Statute arts 75 and 79.

¹³³ Constitution of Uganda art 26(2)(b).

¹³⁴ Constitution of Uganda art 26(2)(b); art 53(2) further empowers the Uganda Human Rights Commission to order compensation and other legal remedy where an infringement of human rights or freedoms is established; and sec 126 of the Trial on Indictment Act, Cap 23 empowers the High Court to order compensation against a convict.

¹³⁵ According to ICD officials interviewed, though the Court will not award reparations (except for compensation ordered on a case-by-case basis against accused persons), the need for reparations is noted and this will be handled through truth and reconciliation commission that will be created. Interviews with Justice Nahamya, Joan Kagezi and Alex Ajiji of the ICD. Further and detailed discussion on reparations is contained in chapter eight of this thesis.

6.12 Role of outreach

The immediate challenge of the ICD will be to overcome the distrust among Ugandans of law enforcement, judicial and other state institutions that are riddled with corruption, nepotism, and favouritism.¹³⁶ If the ICD is to be successful, the public must feel that it has ownership of the process and is actively engaged in the outcome of all its justice initiatives. To have this credibility, the ICD will need the support of all Ugandans, civil society groups, traditional, religious and community leaders as well as the different political parties as early as possible in its operations. Only this kind of support will make the ICD processes meaningful in a concrete way. This support can only be achieved through a robust outreach programme.¹³⁷

In its outreach activities, it is necessary that the ICD reach the most vulnerable groups of population, particularly children and women, through information that is specifically targeted to consider their needs.¹³⁸ That said, the outreach should not only focus on victims' rights and needs, but also on fair trial rights of the accused so that the trials are understood to be fair and balanced, thus facilitating the acceptance of the eventual outcome of the proceedings.¹³⁹ There will also be a need to manage the expectations of victims as unrealistic expectations, when not met, could negatively affect the victims' perception of the ICD and the judicial processes in the country generally.

¹³⁶ Unpublished: MT Kirya 'The Independence and Accountability of the Judiciary in Uganda: Opportunities and Challenges' (2010) 10; the law enforcement institutions and the judiciary in Uganda are ranked among the most corrupt institutions in the country.

¹³⁷ Public International Law and Public Group (PILPG) & Vanderbilt University Law School International Legal Studies Program *Outreach Strategy for War Crimes Division of the High Court of Uganda* (2010) 19.

¹³⁸ In survey that the author undertook in Gulu town on 10 Sept 2011, the author found that all the formerly abducted children in GUSCO reception centre had not heard of the ICD; the children stated that they heard rumours that some people will be prosecuted in Uganda but were unaware that the Division had been set up and were unsure as to whether the division would target them as perpetrators of crimes in the Northern Uganda conflict; group discussion with a group of 22 children in GUSCO reception centre.

¹³⁹ For instance the JRP situational analysis (n 116 above) reports that witnesses indicated that they were promised that Kwoyelo would be imprisoned for ever; it is therefore clear that fair trial rights of the accused including the possibility of acquittal were not discussed with the witnesses who agreed to testify on the grounds that the accused will be imprisoned forever.

The ICD does not underestimate the need for an outreach programme to make the ICD better known, understood and accessible to the affected populations. The judges, prosecutors, registrar and investigators have carried out at least two consultation meetings with the affected population in Uganda since 2009.¹⁴⁰ The consultative meetings that have so far been done were carried out without representatives from the defence, which creates a misconception that the entire division, with the exception of defence, work as one, compromising fair trial rights of the accused persons and confidentiality guarantees of victims and witnesses. It is however, commendable that these meetings actually took place though there remains a big need for a more robust, responsive, consistent and sensitive outreach programme before, during and after trials of the ICD.

Closely related to the above, all main officials initially appointed to work with the ICD; the Judges, Prosecutor, Investigator and Registrar hailed from Western or other parts of Uganda, excluding the north and east that were most affected by the conflict, creating an impression of bias among the affected communities.¹⁴¹ The complaints of the affected populations were noted and Justice Owiny Dollo who is from Northern Uganda was appointed to the ICD. A number of staff working at the ICD also hail from Northern, Eastern and West Nile regions of Uganda that were most affected by the conflict.¹⁴² It is commendable that Ugandan leadership acknowledges the deep-rooted ethnic tensions that count for the many armed conflicts Uganda has witnessed. The appointment of public officials therefore should reflect ways to counter such divisions and disparities. Outreach remains the most powerful tool to educate the public and thereby remove the misunderstandings, ignorance and hostility that remain among the victim community and the entire population of Uganda towards the ICD and its officials.

¹⁴⁰ Interviews with Justice Nahamya; Registrar Alex Ajiji; Rachel Odoi-Musoke of JLOS; and Joan Kagezi of the DPP's office conducted between January and April 2011 in Kampala. These consultative meetings were done in 2009 and there is plan to have one more activity before the start of proceedings.

¹⁴¹ Most of the people that the author had discussions with in Gulu and Kampala who were aware of the ICD and its processes, expressed reservation about the appointees of the ICD and insisted that competent people from Northern and Eastern Uganda exist and should be considered for appointment if the Division is to have credibility.

¹⁴² Interview with Alex Ajiji, Registrar of the ICD conducted on 26 Jan 2011 in Kampala.

6.13 Conclusion

The ICD is a manifestation of Uganda's judicial attempt to move towards accountability after decades of armed struggle and mass atrocities. This move will ensure justice for victims of mass atrocities by punishing perpetrators and requiring them to compensate victims. In addition, through eye witness accounts, production of documents, videos and other evidences that may create an authoritative version of the truth, the process will narrate a story that later becomes history,¹⁴³ accomplishing the accountability goals of justice and to some extent, truth and reparations. Undertaking domestic prosecutions is a challenge that requires ample technical, material and financial investments. Uganda will also require a lot of support from the international community to achieve this goal. It is particularly critical to ensure and assure the independence of ICD, like every judicial organ, domestic or international, both in the manner of appointment of the judges and key officers and non-interference of the executive. As the most crucial appointments have already been made, it is, retrospectively, hoped that all the judges and other staff so far appointed are individuals of high moral character, impartiality, and integrity, possessing experience in criminal and international law, especially international humanitarian and human rights law, to effectively accomplish this work. The credibility of the ICD and all its processes depends on such assurances, and the ICD should not become an organ for political witch-hunt. The Public must see it as a bastion against impunity, which does not favour anybody despite political or social standing.¹⁴⁴ The executive should not interfere with the powers of the ICD and the other courts in the prosecution of international crimes committed in Uganda.¹⁴⁵

¹⁴³ MA Drumbl *Atrocity, Punishment and International Law* (2007) 175.

¹⁴⁴ During the parliamentary debate on the ICC Bill (2006), a member of Parliament, Elyas Lugwago is said to have expressed fear that the Bill will be used by government to intimidate people from the opposition see, All Africa.com, 10 March 2010 Isaac Mufumba, 'Uganda: ICC Bill- Why Did MPs Trap Museveni and Save Kony?' available at <http://allafrica.com/stories/2010003310540.html> (accessed 23 Oct 2010).

¹⁴⁵ A possible challenge the ICD will face is assaults on its independence by the executive as has been the case against the High Court in the past. Most notable example is the 2004 assault of legal practitioners in the High Court premises by government security operatives and the re-arrest of treason suspects that had been granted bail by the Court. The suspects were arraigned before the court martial in complete defiance to the High Court ruling. For more see J Oloka-Onyango 'Judicial Power and Constitutionalism in Africa: A Historical Perspective' in M Mamdani & J Oloka-Onyango (eds) *Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism* (1994) 470

In addition, there is a need to amend the constitutional provision on immunity of head of state to ensure scrutiny and censure of all Ugandans without any privilege of leadership. The Amnesty Act has interfered with the operations of the ICD and the fight against impunity. There is likelihood that the Supreme Court will overturn the Constitutional Court ruling on amnesty. However, as much as the Supreme Court may overturn this ruling, it is unlikely that the DPP will proceed against LRA culpable leaders who may have committed international crimes and already been granted amnesty.¹⁴⁶

It is further important that Uganda amend her penal laws and allow for a uniform sentencing regime, for international and ordinary crimes that will require a repeal of the death penalty from Uganda's penal laws. It is also crucial that the DPP evokes the principle of universal jurisdiction for international crimes to comprehensively investigate and prosecute all crimes committed in the LRA conflict if the aims of accountability are to be realised. To achieve all these, it is crucially important that Uganda provide sufficient and adequate budgetary allowance for the ICD in order to accomplish its work. The ICD will have critical undertakings, such as witness and victim protection, provision of legal services for accused persons, maintenance of regular staff and a robust outreach programme, involve considerable financial investment and will require financial commitment from the government.¹⁴⁷ The ICD is not the only means towards achieving accountability and reconciliation in Uganda; it must not be seen to contradict other accountability mechanisms created to ensure a viable post conflict society. Other proposed mechanisms such as traditional justice and a truth telling process will fundamentally complement the work of the ICD and the ICC. These mechanisms are discussed in the chapters that follow.

¹⁴⁶ According to the Joan Kagezi, the DPP has no intention to proceed against persons already granted amnesty (see further discussion in chapter four).

¹⁴⁷ National Planning Authority *National Development Plan of Uganda* (2010) 295 indicates that the judiciary over the years has faced many logistical related problems and continues to be understaffed which is one of the biggest constraints in the judicial sector. The sector is clogged with backlog in cases as a result, with a case disposal rate at 41 per cent.