



# **THE INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA: TOWARDS GREATER EFFECTIVENESS**

2018



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## Acronyms

<b>ADF:</b>	Allied Defence Forces
<b>DPP:</b>	Director of Public Prosecutions
<b>FPA:</b>	Final Peace Agreement
<b>HOD:</b>	Head of the Division
<b>ICD:</b>	International Crimes Division
<b>ICC:</b>	International Criminal Court
<b>LRA:</b>	Lord's Resistance Army
<b>UPDF:</b>	Uganda Peoples Defense Forces
<b>ULS:</b>	Uganda Law Society.



## Foreword



Over the past decade, international criminal law has become institutionalized in Uganda; with the Government setting up the International Crimes Division in the High Court of Uganda (the Court) in 2008 to try cases involving war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and other international crimes. Proceedings in this Division are still novel for most Ugandan lawyers. Needless to say, the Court has shaped access to justice dynamics in Uganda.

However, some actors within Uganda's criminal law sphere opine that the effectiveness of this Court in delivering justice is still questionable.

The Court is currently holding a pre-trial session for Jamil Mukulu, the leader of a rebel group, the Allied Democratic Forces. Further, for over seven years it is still struggling to complete the trial of Thomas Kwoyelo, a former leader of another rebel group the Lord's Resistance Army.

Against this backdrop the Uganda Law Society has sought to establish whether the victims and the general public can be

empowered with information on the functioning of the International Crimes Division through use of different tools that facilitate access to information to ensure that justice is done.

In this report, we present findings on victims' access to information on the International Crimes Division and to also provide recommendations on how the Division can improve its general visibility, meet its mandate towards victims, expedite its trials and ultimately deter the commission of crimes that shake the fabric of society.

**Simon Peter Kinobe**

President–Uganda Law Society

## A Note from the Chief Executive Officer



Warm greetings from the Uganda Law Society (ULS).

The ULS is the national Bar Association of Uganda, established by the Uganda Law Society Act (Cap 276). It is enjoined with a statutory mandate to protect and assist the public in Uganda in all matters touching, ancillary/ incidental to the law and; to assist the Government and the Courts in all matters affecting legislation; and the administration and practice of law in Uganda. In furtherance of these objectives, the ULS through its various legal aid clinics around the country and in collaboration with the Justice, Law and Order Sector (JLOS) works to promote respect for human rights and freedoms, access to justice and ultimately the Rule of Law.

As a key stakeholder in the justice sector and in keeping with Strategic Objective 3 of the ULS Strategic Plan (2017–2021), the ULS has adopted a proactive approach to addressing rule of law issues; to ensure access to justice, effective administration and delivery of justice, as well as good governance, transparency and accountability. This approach entails working with key institutions (both public and private) to support their proper functioning and efficiency in delivering their mandates.

The International Crimes Division (ICD) of the High Court of Uganda is a special court that was established with the primary jurisdiction to try serious crimes against humanity in Uganda. Since its inception in 2008, the Court has delivered some landmark judgements which have greatly informed jurisprudence in our country.

That said, the court has also faced major constraints (inadequate financing, manpower and technical support) which have hindered its effectiveness in delivery of justice. As such, the Court is not properly structured and equipped to effectively handle most of its core functions. Although set up to ratify and replicate the International Criminal Court model, the court is not adequately equipped to deliver on its mandate. For instance, the ICD does not have an established victims unit; a critical component to ensuring access to justice in this special court. Moreover, there is little known about the court among members of the general public. Sadly, a great percentage of members of the legal profession—who should be the vanguards in advancing the rule of law—are equally unaware.

It is against this backdrop that the ULS found it pertinent to begin a conversation about the ICD and to undertake an active drive to support the court to effectively carry out its duties. A number of activities were conducted under a short term pilot project implemented by the ULS with funding from the Platform.

This Report documents the activities and strategies taken, findings and observations from this initiative; and provides proposals for long term implementation by key stakeholders to strengthen the court in its operations and to foster its accountability by increasing knowledge among the public about it.

The ULS is privileged to work with the ICD and other key stakeholders on this undertaking. We anticipate an improvement in the workings of this court; especially with respect to victim participation and access to information on the court. It is also our hope that this report will serve as a tool that buttresses sustainable efforts to ensure improved access to and delivery of justice; as well as public confidence in this court.

**Joyce Nalunga Birimumaaso**

Chief Executive Officer–Uganda Law Society

## Report Summary

This report presents an account of activities, findings and observations of a short survey conducted under a short term pilot project by the ULS titled *“The International Crimes Division of the High Court of Uganda: Towards Greater Effectiveness”*. This Project was funded by the Knowledge Platform Security & Rule of Law (the Platform) and the main project objectives were to: foster effective victim participation at the International Crimes Division ICD; create knowledge around this Court as a tool to promote accountability for grave crimes; build collaboration between citizens and the Court as a way to foster lasting peace and security; and to create ownership and trust between the citizens and the Court.

This intervention was essentially focused on strengthening the demand side by: informing the public through civil society and media about the significance and operations of the ICD; working with legal practitioners to identify challenges and alternatives to improve the Court’s responsiveness to its mandate; and finally, working with the Court’s Registry to

*“With continued support, the ULS intends to establish a database of a pool of advocates specifically attached to the International Crimes Division in the near future”.*

determine the best way to ensure access to information on the court. With continued support, the ULS intends to establish a database of a pool of advocates specifically attached to the ICD in the near future.

The survey was conducted through interviews with victims in post conflict areas, community leaders, legal practitioners who closely interact with victims and the ICD, Court officials at the ICD and from the International Criminal Court (ICC). The interviews were aimed at enhancing victim participation at the ICD and ensuring access to information on the ICD's operations.

The study proposals are an outcome of our interactions and consultations with the above stakeholders and it is envisaged that these proposals will contribute to addressing the gaps identified at the ICD in relation to victim inclusion and access to information. It is also envisaged that the outcomes will contribute to Uganda's observance of international human rights commitments by promoting and ensuring access to justice.

## Introduction and Background to the Study:

The recognition of victims' participatory rights in criminal proceedings is a novelty in international criminal justice. The incorporation of victims as civil parties in international criminal proceedings marks a significant advance for victims' rights.<sup>1</sup> Ideally, victims should be included in the preliminary stages of investigations, at the pretrial stage and in the trial to enable them share their views and concerns through a lawyer so that the court to arrives at an informed decision.

However, victim participation under the International Crimes Division (ICD) of the High Court of Uganda is not direct and automatic. Victims can only be included in the proceedings of this court after the trial judge determines their eligibility to participate. The ICD is a special court and therefore does not entirely operate under the same rules of procedure of Uganda's criminal justice system.

Although the ICD was established to espouse the principles of the Rome Statute of the International Criminal Court, it is still lacking in the necessary structural requirements for proper execution of its mandate. The Court has not set up a victims processing unit to cater to victims' special needs, to process victims to ensure their effective participation in the Court proceedings, to ensure that their views and concerns are heard on matters where their personal interests are affected, and to conduct outreach to conflict affected communities.

Following a pre-trial hearing at the High Court of Uganda in the case of Thomas Kwoyelo in 2016, the presiding judge, the Honourable Lady Justice Susan Okalany delivered a landmark ruling on victim participation

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1 Dr. Rudina Jasini, *Victim Participation in International Criminal Justice: Real Power or Empty Rhetoric?* Retrieved from [https://www.law.ox.ac.uk/sites/files/oxlaw/criminal\\_justice\\_hub\\_proposals\\_-\\_dr\\_ina\\_jasini.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/criminal_justice_hub_proposals_-_dr_ina_jasini.pdf)

The ICD introduced the concept of victim counsel who would later be called friends of court. They have since offered legal support (gratis) to victims/witnesses in terms of preparing them to effectively participate in proceedings. The ICD has also amended its Rules of Procedure to include victim participation in court proceedings. The adoption of provisions on victim participation in the ICD Rules of Procedure reflects the evolution of our national law to embrace involvement of those who have most affected by the crimes triable by the Court. However, this initiative does not adequately foster victim participation and access to information due to the absence of a Victims Participation and Reparations unit.

Against this backdrop, this report therefore presents an analysis of victim participation at the ICD in Uganda and documents the level of victim involvement. It also presents arguments for and against the ICD. More importantly, in consideration of the victims' right to information on perpetrators and status of investigation and trial proceedings; this report studies the extent to which this right has been implemented by the ICD in Uganda.

The departing point of this study report is the recognition of the benefits that participation in the proceedings can bring to victims and their communities and the legitimacy and mandate of the Court.

This study was geographically limited to Uganda.





## Methodology

In implementation of this Project and study, the Project team had the following undertakings:

### 2.1 Project Set Up

At project inception, the ULS set up a mini project team to brainstorm on proposed project activities, to map out key stakeholders to interact with, and generate a project work plan.



**Figure 1:** *The Project Team following a meeting with the Hon. Lady Justice Elizabeth I. Nahamya (left)–Former Deputy Head of the ICD at the ULS Secretariat.*

Meetings were also held to strategize on the detailed project activities and the strategy for implementation. Additionally, the project team had inception meetings with key actors in the transitional justice arena to brief them about the project objectives including among others; soliciting their support in shaping the project activities and availing simplified information on the ICD; and giving advisory counsel on proposed strategies for community engagement.

The team met with the Hon. Lady Justice Elizabeth I. Nahamya—the former Deputy Head of the International Crimes Division of High Court of Uganda (now Judge of the United Nations Mechanism for International Criminal Tribunals) on January 11, 2018 and Ms. Kasande Sarah Kihika – the Head of Office – Uganda Programme at the International Center for Transitional Justice on January 12, 2018.



**Figure 2:** *The Project Team during a meeting with Ms. Kasande Sarah Kihika—the Head of Office of the International Centre for Transitional Justice in Kampala.*

## 2.2 Stakeholder Engagements

The Project team undertook a number of activities to engage different categories of stakeholders across the country through training workshops and multi-stakeholder dialogues, public engagements including physical outreach sessions with communities (community town hall barazas) as well as radio and TV talk shows. Engagement with stakeholders was necessary for dissemination of simplified information on the ICD, its processes and various avenues for public involvement and participation.



**Figure 3:** Focused group discussion with victims in Pagak, Northern Uganda.



**Figure 4:** One of the meetings involving victim participants in Lamogi, Northern Uganda



**Figure 5:** One of the meetings involving victim participants in Pabbo, Northern Uganda

## Research

Over a period of three months (January–March 2018), the Project Manager reviewed relevant documentation on victim participation in international criminal justice and interviewed actors involved in the processing and legal representation of victims before national tribunals in Uganda and the ICC in the Hague. The purpose of this research was to appreciate the shortfalls in victim representation at the ICD and to obtain proposals on effective victim participation. Those interviewed included victims, victims' lawyers, representatives of; NGOs, ICC, ICD court officials, and researchers in transitional justice.

The Project team also travelled to Gulu and Amoru districts in the northern part of Uganda at the beginning of February 2018 to interview victims of the LRA conflict, relevant CSOs, the local communities, duty bearers and opinion leaders. The interviews were particularly aimed at obtaining respondents views on how victims can effectively participate in trial proceedings; as well as to ascertain their appreciation of the mandate and operations of the ICD.

Victims' lawyers were interviewed to identify the challenges faced and proposals to: improve the Court's responsiveness to its mandate; guarantee sustainable solutions for peace; and ensure access to justice.

Additionally interviews were conducted in Kampala both through face to face meetings and via telephone.



**Figure 6:** The Project Team after a meeting with Ms. Jane Adong Anywar at the ICC Office in Kampala



**Figure 7:** The Project Team with the Court Registrar–Mrs. Harriet Ssali Abrahams at the International Crimes Division premises

The Project team also held community radio talk shows to sensitize the public on the work of the ICD, find out the public's thoughts on the ICD.



**Figure 8:** Project team conducting community radio talk shows on the ICD



## Findings, Observations and Recommendations

### 4.1 Access to Information for Victims

The right to information guarantees a defined and identifiable subject (the victim) the right to seek and obtain information relating to the reasons and circumstances for victimization of individual(s) concerned. It also entitles victims to a complete understanding of the procedures undertaken to dispense justice for wrongs suffered. The right places the obligation to investigate and keep victims informed on the State. This right is also enforceable through an effective domestic or international process court and human rights processes.

In recognition of the need for victims' and their families' to know the fate of their loved ones, victims of gross human rights violations can increasingly rely on the right to truth to know what happened to them and their relatives. The right to truth originates in the Geneva Conventions<sup>2</sup> and has found its fullest expression in the context of human rights law where it has a clear structure as a legal right. The provision has also found expression in an authoritative statutory text.<sup>3</sup>

During the research, it was apparent that victims have a strong desire to know the intricate proceedings at the ICD.<sup>4</sup> Like in any court proceedings in regards to witness protection, this may not be entirely possible.

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<sup>2</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977, entered into force 7 December 1979, 1125 UNTS 17512, art. 32.

<sup>3</sup> *For example, the Geneva Convention or the Convention for the Protection of All Persons from Enforced Disappearance (International Convention for the Protection of All Persons from Enforced Disappearance, adopted 12 January 2007, entered into force 23 December 2010, UN Doc A/RES/61/177, art. 24(2))*

<sup>4</sup> *Focused group discussion with victims of the ICD.*

The first step to access information from the ICD is the application process for one to become a victim. This entails that victims have to submit identity and profile documents to the Court by filling out an application form. Rather than describing the application process in its entirety, this report highlights recent developments pertaining to the application process and specifically the Court's efforts to improve processing of victims' applications. While the application process accounts only for a limited part of victims' experience of participation, the way in which this process is handled can have a significant impact on the manner in which participation is organized in subsequent stages of the proceedings.

From the interactions with the respondents, it was observed that handling of applications at the ICD has been slow and therefore inconveniencing to the victims. It is unfortunate that the Court did not foresee the limitations of the application process.

Nevertheless, it was evident that victims have become more aware of their rights especially due to increased number of applications. Increase in applications can be partly viewed as a registered success for the Court.

## **4.2 Informing Victims and their Understanding of their Rights and the Judicial Process**

The research established that a large number of victims of the crimes that are currently before the ICD have little or no understanding of the justice system. Most of them have never seen a judge or even a lawyer and lack of awareness about their rights and the rule of law. Some believe that corruption is the norm and cannot imagine impartial justice. Most victims, if not all attach justice to a value. As discussed below, in order to enable victims to make informed decisions on their participation, it is imperative to provide adequate and timely information regarding their rights and the likely impacts.

The first step to enabling access to justice is informing victims of their rights and assisting them to exercise these rights. The need for information is even more crucial when it comes to exercising their rights before the ICD; for two main reasons. Firstly, there are fewer opportunities for them to learn about their rights especially in light of the physical distance between the Court and affected communities. Furthermore, it is more challenging for victims to understand their rights and how to exercise them because they are different from what they may have heard, seen or been used to in Uganda's national legal system.

### **4.3 Practical Aspects of Informing Victims**

The ICD has made use of CSO's, for the purpose of informing victims of their right to participate in proceedings. CSO's have established links with members of the victim communities, and have helped the ICD to access and make contacts with victims and communicate with them in their language. Most importantly, local actors such as grassroots CSOs and local leaders enjoy the trust of victims and their communities. The use of CSO's therefore becomes unavoidable. While the question whether CSO's should be used is not controversial, the extent to which their involvement should be allowed remains uncertain. The matter of adequate support to CSO's is also an unsettled area.

While the most well-known purpose for which CSOs have been used in respect of facilitation of victim participation before the ICD is the application process, intermediaries not only play a role in that initial phase but also make substantial contributions throughout the trial.

### **4.4 Legal Aid Support to Victims Information**

Access to information by victims of international crimes is simply not possible without legal aid. Given the variety of needs that they face and the situation of extreme poverty and marginalization, most, if not all, victims do not have the means to seek information on their involvement in legal proceedings. The ICD is yet to develop a victims' legal aid scheme.



In addition to financial assistance, victims' lawyers often need other types of support in order to be in a position to represent their clients in an effective manner. Support needs change depending on the particular setting and Counsel's background and previous experience. However, during this study, it was possible to trace common needs and concerns of those involved in victim representation before the ICD.

#### **4.5 Security and Rule of Law**

There is almost no consensus on whether the ICD creates a sense of lasting security. Many victims consulted were not confident that the ICD has created a deterrent to future attacks, while some victims were of the view that the existence of the ICD creates a sense that in event of commission of international crimes in the country, justice will ultimately be served.

Some members of the public portrayed the ICD as a government tool to prosecute dissented political elements especially those with links with rebel groups. Judicial officers agreed that more needs to be done to earn public trust, but they were confident that a sense of rule of law has been established simply by the fact the numerous ICD cases are taking place.

#### **4.6 The Need for A Wide Consultation Process**

A wide consultation on the functioning of the ICD needs to be undertaken by stakeholders. Amongst the target participants should be the victims of crime and their representatives. Wide consultation is crucial in order to ensure that in case of any amendments to the existing justice systems, the existing challenges are addressed and all justice needs are tailored to the needs of those most affected.

#### **4.7 Background to the creation of the ICD**

During the 2008 Juba peace talks between the Government of Uganda (GoU) and the Lord's Resistance Army, the ICD was arrantly established through the Final Peace Agreement (FPA). For the implementation of the agreement to take place, both the GoU and the LRA had to append

signatures to the FPA. As it were, Joseph Kony refused to append his signature to the FPA, an issue the GoU disregarded established the ICD.

Within the FPA, the ICD was referred to as a Special Division of the High Court (SDHC). It was later referred to as the War Crimes Court, then War Crimes Division and today it is called the International Crimes Division.<sup>5</sup> The ICD is a court with primary jurisdiction to try international crimes.

The establishment of the ICD underscored Uganda's repugnance to impunity; and her determination to hold all persons responsible for the gravest crimes that shock the conscience of mankind accountable.

The court is guided by both domestic and international legislation including the; Constitution of the Republic of Uganda, 1995, International Criminal Court Act of 2010, Extradition Act, Cap. 117, Magistrates Courts Act, Cap. 16, Prisons Act, Cap. 304, Trial on Indictments Act, Cap. 23, Uganda Citizenship and Immigration Control Act, Cap. 66, Geneva Conventions Act of 1964 and the Penal Code Act Cap 120.

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<sup>5</sup> *Annexure, clause 7 of the A&R Accords referred to the ICD as the Special Division of the High Court; Administrative Circular No.1 of 2008, Clause 2 referred to the ICD as the War Crimes Court; the international crimes bill of 2009 referred to it as the War crimes Division; today the High Court (International Crimes Division) Practice Directions of 2011 refer to the court as the International Crimes Division.*

## Cases before the ICD

Subsequent to the formation of the ICD the court has heard a number of cases. At the time of conducting this research some of cases had been completed by the court while others are still ongoing.



**Figure 9:** 2010 Kampala Bombing Suspects Appear in Court (Source: Daily Monitor Newspaper)

### Concluded Cases

#### 5.1 Gabula v Attorney General

In this case the ICD heard a petition for amnesty from Africanus Gabula, who was convicted of treason in 1993 and was sentenced to death. Gabula reportedly belonged to a rebel outfit called the Kirimuttu, and sought amnesty from the Amnesty Commission after renouncing rebellion in 2000. However he was denied amnesty by the Amnesty Commission on the ground that he was not under detention but was

already a convict on death row and therefore was no longer eligible under the Amnesty Act. The ICD upheld the Commission's decision.<sup>6</sup>

## 5.2 Uganda v Umutoni

Annet Umutoni was sentenced by the ICD for the crime of aggravated human trafficking. She was convicted of abducting children from Rwanda into Uganda for the purpose of sexual exploitation and slave labour.<sup>7</sup>

## 5.3 Uganda v Hussein Hassan Agade & 12 Ors

The case referred to as the Kampala 'Bombing Case' is one of the most high profile cases to have been concluded by the ICD. This case involved seven Kenyans, five Ugandans and one Tanzanian who had masterminded a suicide bombing on a restaurant and rugby club that killed 76 people. The blasts were claimed by Somalia's Al-Shabaab and targeted football fans watching the World Cup final between the Netherlands and Spain at a restaurant and a rugby club in the Ugandan capital. One of the most complex ICD cases<sup>8</sup> that involved the assassination of the chief prosecutor resulted in the conviction of life imprisonment for Isa Ahmed Luyima (Ugandan), Hassan Hussein Agade (Kenyan), Edris Christopher Magundu (Kenyan), Habib Suleiman Njoroge (Kenyan) and Muhammad Ali Mohammed (Kenyan). Two other convicts; Hassan Haruna Luyima (Ugandan) and Sulaiman Hajar Nyamadondo (Tanzanian), were each handed a 50-year jail sentences for their roles in the attacks.<sup>9</sup>

6 *Gabula v Attorney General* (HCT-00-CV-CS-0054) [2012] UGHCI CD 1 (6 March 2012), available at <https://ulii.org/ug/judgment/high-court-international-crimes-division/2012/1>

7 *Uganda v Umutoni* (HCT-00-ICD-CR-SC-NO. 003 OF 2014) [2014] UGHCI CD 1 (16 October 2014), available at <https://ulii.org/ug/judgment/high-court-international-crimes-division/2014/1>

8 *Anthony Wesaka & Juliet Kigongo, After 6-year wait and Shs300m trial, Uganda holds breath for decision on worst terror case*, *Daily Monitor*, May 26, 2016, available at <http://www.monitor.co.ug/News/National/After-6year-wait-and-Shs300m-trial-Uganda-/688334-3218866-16jsegz/index.html>

9 *Uganda v Hussein Hassan Agade & 12 Ors* (CRIMINAL SESSION CASE No. 0001 OF 2010) [2016] UGHCI CD 1 (26 May 2016), available at <https://ulii.org/ug/judgment/hc-international-crimes-division/2016/4>

#### 5.4 Uganda v Kamoga Siraje & 13 Ors (2017)

In 2017, the court sentenced high profile muslim cleric the leaders of Tabliq Sect in Uganda Sheikh Mohammad Yunus Kamoga Kawooya, Sheikh Murta Mudde Bukenya, and Sheikh Fahad Kalungi to life in prison for terrorism. His followers Kakande Yusufu and Sekayaja Abdulsalam were served with 30 year sentences for simply participating and in the terrorist related acts.<sup>10</sup>

Following the death of high profile rival Muslim clerics, the ICD concluded that they committed terrorism related crimes by printing fliers with the names of the individuals that targeted to them to be killed. These flyers were distributed in mosques and they preached against the deceased. They also held meetings in their homes in which they planned the killings and sent WhatsApp messages with pictures of graves, coffins, bullets to their rival groups.



**Figure 10:** Figure 10 Sheikh Kamoga and co accused in Court (Source: Observer newspaper)

<sup>10</sup> *Uganda v Kamoga Siraje & 13 Ors (CRIMINAL SESSION CASE No. HCT-00-ICD-CR-SC –No. 004 OF 2015) [2017] UGHCI CD 1 (21 August 2017)*, available at <https://ulii.org/ug/judgment/hc-international-crimes-division-uganda/2017/1>

## Ongoing at the time of writing the report:

### 5.5 Uganda v Thomas Kwoyelo

On the 2 May 2016, the trial of former Lord's Resistance Army (LRA) rebel commander Thomas Kwoyelo started in the ICD in Gulu, Uganda. The trial marks an important phase in the quest for justice for war crimes and crimes against humanity committed by the LRA. It was also the first case before the ICD. The trial was a global milestone because it underscored the important role that domestic justice mechanisms have in ensuring accountability for these crimes.

### 5.6 Uganda v Jamil Mukulu

The ICD is hearing a case of terrorism and murder against rebel leader of the Allied Democratic Forces (ADF) Jamil Mukulu. Mukulu is accused of launching a rebellion against the government and terrorising people in Rwenzori region in western Uganda before establishing his base in eastern DR Congo.

### 5.7 Victim participation at the International Crimes Division

Since its formation Uganda's ICD now a decade plus is hoped to develop a clear cut process on victim participation. During a pre-trial hearing on September 21, 2016, the court ruled that victims would be allowed to participate in a manner similar to provisions of the ICC Rules of Procedure and Evidence. In addition, court directed that victims apply formally for participation to the ICD Registrar and that the Registrar should compile a list of all victims for purposes of formal recognition.

Although the concept of victim participation in criminal proceedings is not easily defined, it has been described as victims being in control, having a say, being listened to, or being treated with dignity and respect.<sup>11</sup>

11 J Doak 16 *Victims' Rights in Criminal Trials: Prospects for Participation* (2005) 32 *Journal of Law and Society* 295; I Edwards 16 *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making* (2004) 44 *British Journal of Criminology* 973; M Heikkilä 16 *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims Before International Criminal Tribunals and of Factors Affecting This Status* (2004) *Institute for Human Rights, Abo Akademi University, Turku* 141.

Initial drafters of the Uganda's ICC Act, supported the concept because they believed, that participation in criminal proceedings had restorative benefits, including the promotion of victims' healing and rehabilitation.<sup>12</sup> The ICC's victims' field representative to Uganda Ms Jane Adong who participated in the drafting of Uganda's ICC Act, said that she was convinced that, victim participation would bring the ICD closer to the persons who have suffered atrocities and thus increase the likelihood that victims would be satisfied that justice would be done.<sup>13</sup>

Finally, and significantly for the purpose of this study, judicial officers thought that victim participation might help address the under representation or misrepresentation of the experiences of victims.<sup>14</sup>

However, as indicated below, multiplicity of the victim participation scheme including the application process, legal representation, and participation modalities has added growing disdain for the ICD system. The ICD, in developing a role for victims faces enormous difficulties in getting them to accept the Court role in the justice process. These difficulties arise through the attempt to reconcile numerous provisions that give full effect to the rights of the victim without consulting the victims themselves.

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12 Interview with ICC Uganda Field Representative Ms. Jane Adong on the 24th of April 2018.

13 Interview with ICC Uganda Field Representative Ms. Jane Adong on the 24th of April 2018.

14 Interview with Mrs Harriet Abrahams Registrar of the ICD in Uganda 25th April 2018.





**Figure 11:** Some of the victims of the 2010 Kampala Bombings (Source: Getty images)

## Accessing Information from the International Crimes Division

From the study, it was apparent that victims have a strong desire to know the intricate proceedings at the ICD.<sup>15</sup> Like in any court proceedings, especially in regards to the nature of matters related to criminal prosecution, this may not be exhaustively possible.<sup>16</sup>

However, in recognition of the victims' and their families' need to know the fate of their loved one, victims of gross human rights violations can increasingly rely on the right to truth to know what happened to them and their relatives. This right to truth originates in the Geneva Conventions<sup>17</sup> and has found its fullest expression in the context of human rights law

<sup>15</sup> Focused group discussion with victims of the ICD.

<sup>16</sup> Interview with Mrs Harriet Abrahams Registrar of the ICD in Uganda 25th April 2018.

<sup>17</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted 8 June 1977, entered into force 7 December 1979, 1125 UNTS 17512, art. 32.



where it has a clear structure as a legal right: The provision has found expression in an authoritative statutory text <sup>18</sup>.

Clearly there is the need for regular transparency. This does not mean that victims should have access to all evidence, but they have a right to be kept informed of what the office of DPP does with the information in respect to the cases that affect them. It may be possible, for instance, that the information gathered during an investigation by police –including information provided by victims is insufficient to substantiate the charges, or that the information a victim provides is not used by the DPP. In that case, even if that information was provided through intermediaries, the DPP should inform and explain to victims, their families and/or affected communities of the reasons behind its decisions and how the decision affects their right to justice, truth and reparation.



**Figure 12:** *The Project Manager – Mr. Peter Katonene Mwesigwa interviewing a victim in Pabbo, Uganda.*

<sup>18</sup> For example, the Geneva Convention or the Convention for the Protection of All Persons from Enforced Disappearance (International Convention for the Protection of All Persons from Enforced Disappearance, adopted 12 January 2007, entered into force 23 December 2010, UN Doc A/RES/61/177, art. 24(2))

## ICD Victim's Gap on Information

### 6.1 DPP's decisions

Victims lack information on the interpretation of charges by the DPP's office. For instance, the current ICD victims do not feel represented in charges laid by the DPP in the Kwoyelo case. Failure to make a connection with the DPP's office widens the distance between the victims and the Court, which can lead to disengagement. This is a real problem that impacts on the legitimacy of the Court among affected communities.<sup>19</sup>

Victims have not always been satisfied with the DPP's decisions, and usually resent the lack of consistency and clarity in the choices taken by the DPP. The charges are perceived as too narrow and not always reflective of the range of criminality in a given case. Local voices complain about the DPP's decisions that target only one party to the conflict, thereby tainting its image and independence. For instance most victims feel that numerous officers in the Uganda Peoples Defence Forces should have also been charged for crimes against humanity.

The above problems are still current. As one of the participants said, "victims do not understand that victims of similar crimes will not all become part of proceedings because of the specific places or dates (jurisdiction) that were chosen in a case. That has a very significant unpleasant psychological effect."<sup>20</sup>

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19 Focused Group Discussion with Victims of the Thomas Kwoyelo Case in Pabbo Northern Uganda.

20 Focused Group Discussion with Victims of the Thomas Kwoyelo Case in Pabbo Northern Uganda.

## 6.2 Judicial Proceedings

There are serious concerns from victims in relation to information on judicial proceedings at the ICD.<sup>21</sup> Victims lack information on the length of the proceedings, the criteria used in the selection of cases and charges, and information on whether their victims' views are not taken into account during proceedings.<sup>22</sup>

The victims' patience is exhausted after a failure to receive information.<sup>23</sup> They want timely justice. It is difficult for them to understand why ICD proceedings have so many stages and take so long. As years pass by, both victims counsel and the victims' trust in the Court keeps decreasing and faith in the proceedings is lost.<sup>24</sup>

## 6.3 Compensation

Consultations and information on compensation possibilities for victims has not extensively taken place. For reparations to be meaningful for victims, consultations must be held with them and the affected communities. This is essential for identifying the most meaningful and useful form of reparations for victims especially in regards to financial constraints in Government.

In tune with the registries consultation Sarah Kihika, from the International Center for Transitional Justice insisted on the need to consult community leaders and experts on local culture when working out reparation measures, so as to avoid an overly western vision of what reparation really means and to take into account local social and cultural specificities.

The ICD has four main avenues for victims of crime to access compensation and other forms of reparation: (i) compensation orders made against the offender in the course of criminal proceedings;

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21 *Focused Group Discussion with Victims of the Thomas Kwoyelo Case in Pabbo Northern Uganda.*

22 *Pre-project discussion with Sarah Kihika Kasande, Head of Office: International Transitional Justice Project.*

23 *Interview with Kilama Henry Komackech Victims Counsel on the 11th of April 2018 .*

24 *Interview with Kilama Henry Komackech Victims Counsel on the 11th of April 2018.*

(ii) separate civil proceedings; (iii) fundamental rights actions; and (iv) administrative reparations schemes, including national criminal compensation schemes and reparation programmes for mass violations. Similarly, victims can pursue separate civil or fundamental rights proceedings. However, victims are usually discouraged since proceedings are often complex and expensive and require the victim to prove the whole case against the defendant.

#### 6.4 Information on benefits of victim participation

Victims expressed concern on the lack information on the benefits promised by the ICD.<sup>25</sup> They encompass a panoply of rights, including participation, representation, protection, general assistance, and reparations. Having set the bar so high, the stakes vested in victim participation are enormous for the ICD system as a whole. Whilst the institutional credibility of the ICD is at stake, what is important is meeting the benefits of victims participation.

#### 6.5 Information on Representation

Representation is one of the most ingrained practices in criminal court systems. Defense counsel engage in probably the best known practice of representation by directly representing the interests of the accused.

Information on representation for victims of the ICD has its own challenges.<sup>26</sup> Victims lack information on who their counsels are and how to contact them. Notably, victim lawyers insinuate that they are frustrated because they are not provided with the resources to contact the victims.

Victims also do not choose their lawyers. The ICD through its registry appoints the victims' lawyers. Freedom to choose a counsel is a necessary pre-condition for credibility and confidence in the client-lawyer relationship. This is stressed as a key element for victims.<sup>27</sup>

25 Interview with Kilama Henry Komackech Victims Counsel on the 11th of April 2018.

26 Interview with Kilama Henry Komackech Victims Counsel on the 11th of April 2018.

27 Interview David Keri Obok, LC1 Lamogi, Amuru District and ICD victim 15th March 2018.

When the victims have a lawyer that is trusted and perceived as their real representative, victims would develop literal sense of ‘ownership’ of ICD proceedings.

In this sense, there is a general concern about the appropriateness for the ICD to directly appoint lawyers to represent victims.<sup>28</sup> The main concern in this regard is the possibility of conflict of interest among groups of victims. This does not mean that they oppose the existence of the ICD’s registry. On the contrary, its work in providing assistance to the external counsel was considered important. However, it should not take the leading role in representing victims. More importantly, it is necessary to consult victims about the criteria for their own lawyer in a particular situation.

### Impact of the ICD on Security and Rule of Law

The ICD is currently trying Jamil Mukulu and Thomas Kwoyelo, both former leaders in rebel groups the ADF and LRA respectively. As famously stated by the International Military Tribunal in 1947, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>29</sup>

The experience of both Nuremberg and Tokyo Military Tribunals is quite informative, but when taking it into consideration, one has to be aware of its limited value for the present examination of the ICD. Both Tribunals indeed delivered “victor’s justice” in the aftermath of the World War II. Their paradigm, which precluded any need to balance the demands of peace and justice, may thus only partly be applicable within this study.

From a slightly different perspective, punishing the individual perpetrators and rehabilitating the individual victims helps in avoiding collective guilt and collective myths of victimhood and eliminates the strife for

28 Interview with Harriet Ssali Abrahams, Registrar of the ICD on the 25th April 2018.

29 International Military Tribunal (Nuremberg), 1947, p. 221.

vengeance thereby contributing to peace as they facilitate strengthening of the culture of peaceful settlement of conflicts

The ICD aims at promoting not only justice, but also peace. It has been widely criticized for doing neither of the two,<sup>30</sup> yet it has to contend with some severe structural and political difficulties including limited resources, institutional restrictions and politics all of which jointly affect dispensation of justice.

Despite the above, the ICD has the capacity to significantly contribute to the promotion of international justice and peace. It may also majorly impact on the prevention of crime, since its prosecutions represent a clear threat to highly placed individuals who commit serious crimes.<sup>31</sup> Victims and the ICD practitioners both agree that the contribution of the ICD to justice and peace depends on its institutional power and the support it receives from the Government and the way it is perceived by potential criminals and victims alike.

Throughout the study, it was found that victim opinions mostly focused on the working methods of the ICD.

During a radio talk show the public emphasized the continued need for cooperation and with the ICD if justice and peace are to be achieved. Talk show participants also echoed the need for mechanisms to ensure timely and coordinated support between CSOs and the ICD. They underscored the importance of proactive publicity on the ICD cases by the media, as well as the need to think ingeniously about how the public, the CSOs and the ICD can work in concert within their respective mandates, to advance the crucially important goals of ending impunity for mass crimes and promoting the rule of law.

<sup>30</sup> *Focused Group Discussion in Padoor Uganda.*

<sup>31</sup> *Interview with the ICC field representative, Ms Jane Adong on the 24th of April 2018.*

## Additional ICD Concerns

### 76.1 Victims direct involvement in the case

Victims would like to be directly involved, during the investigation of a case, but jurisprudence has determined that victims do not have a general right to participate in investigation phases, but are entitled to participate in judicial proceedings conducted at any stage of the proceedings.

### 7.2 Impartiality of the ICD

The political realities of prosecutions at the international crimes in Uganda add to the challenge of ensuring that trials are carried out unimpeded. The public has questioned the impartiality of the ICD through the DPP as it is yet to try senior UPDF soldiers. The ICD has not attempted to try UPDF soldiers for their contribution to the human rights violations in the northern Uganda, as they counter-fought the LRA rebels. Although it is the role of Uganda's DPP to investigate and institute cases before the ICD, the judges still have a duty to inquire into, or order for the investigation of the UPDF soldiers for justice to be served. As the Kwoyelo trial is still under way, the impartiality of the presiding judges continues to stand tested in this regard.<sup>32</sup>

### 7.3 Legal Aid to Legal Representatives and Defence team

The ICD was the first national court to allow for legal representation of victims through legal aid. As such, it could not resort to any previous experience in the set-up of a legal representation regime. The development of the ICD legal representation system has been tied to the evolution of the ICC legal aid scheme, given that all victims who have so far come before the Court are indigent. The victim's counsels

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32 Community Radio Discussion, 9 July 2018 on Mega Fm Gulu at 8pm.

lack of financial resources has intensely affected preparation of victim cases. With such challenges, the efficiency of the ICD in trying core crimes continues to remain in jeopardy.<sup>33</sup>

#### 7.4 ICD lacks resources

Limited resources are a challenge for the court. Attention has been drawn to the concern that hundreds of victims may be prevented from participating in hearings because of lack of resources. The early years of the court have seen much time and resources being consumed by issues relating to the participation of a very limited number of victims. Victim advocates in Uganda considers that the high numbers of victims wanting to engage with the Court should be seen as a measure of the Court's success.<sup>34</sup>

Reviews of the way victims apply to and participate in proceedings are on-going and that some have called for changes to the legal framework of the Court in that regard.<sup>35</sup> According to which collective application approaches should be explored as a possible solution to ongoing challenges faced by the ICD regarding the large numbers of victims.<sup>36</sup>

#### 7.5 Inclusion of Victims in Proceedings

The importance of reaching out to victims cannot be overstated, as it is an essential element of the ICD's legitimacy. Victims' views, expressed in the courtroom provide a necessary link between affected communities and the Court; they provide the judges with key information about the local context and the damages caused of such crimes within the communities affected.

In comparison to the ICC, the ICD does not have an outreach section which to conducts consistent dialogue sessions every a year with affected communities. This is essential to managing expectations

<sup>33</sup> Interview with Kilama Henry Komackech Victims Counsel on the 11th of April 2018.

<sup>34</sup> Interview with Kilama Henry Komackech Victims Counsel on the 11th of April 2018.

<sup>35</sup> Interview with ICD Registra Mrs Harriet Abrahams on the 25th April 2018.

<sup>36</sup> Interview with ICD Registra Mrs Harriet Abrahams on the 25th April 2018.



and ensuring that these communities can experience justice from ICD proceedings despite geographical and cultural distance. Without outreach, there would be little deterrent effect from the activities of the Court.<sup>37</sup>

## 7.6 Victims are against the ICD

Almost mindboggling is the indication, that the victims participants at the ICD themselves carry political support for the perpetrators themselves. This presents challenges for the Court; viewed by the victims not as the saviour who brings justice but the oppressor against their political leadership. The local narratives of victimhood from two Uganda victims seem to be competing with the ICD's idea of victimhood. During a Focused Group Discussion in Pabor, Uganda, the victims conducted a special prayer for their 27 son, Thomas Kwoyelo who they see as a victim of the LRA. They also openly criticized the way the government was handling the prosecution of Thomas Kwoyelo.

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<sup>37</sup> Interview with the ICC field representative, Ms Jane Adong on the 24th of April 2018.

## Recommendations

### Increased consultation with victims

Coordinated consultative communication between the various units interacting with victims and legal representatives should also be developed to ensure that participating victims are regularly informed of proceedings.

In practice, participation takes place mostly through the victims' legal counsel. To ensure that the views expressed by counsel reflect victims' views and concerns and that legal counsel play more than a neutral amicus role in the proceedings, regular in person consultations between legal representatives and their clients are essential, particularly in the build-up to key stages of the proceedings, both pre-trial and trial.

Given the distance between victims and the ICD, victims it is recommended the ICD ensures that victims are able to communicate with their legal representative on a regular basis, even in periods of low activity noted above. It is recommended that the frequency of meetings and updates be discussed and arranged from the outset between the legal representative and victims. From experience, that at a minimum, legal representatives should meet or provide updates to their clients every two months to keep them informed of the status of the proceedings, prevent misinformation spreading, maintain engagement in the process and obtain an update on their needs, views and concerns. This would ensure regular contact and opportunity for questions and exchanges. In the event of sudden activity, it would ensure that victims are aware of the proceedings and able to feed in promptly. It also allows legal representatives to regularly test and maintain their communication systems with their clients.

## Innovative platforms (Social Media)

In order for victims to present their views and concerns, they need to be provided with information to understand the process generally in a format that is accessible. Victims must be informed in order to be engaged. While most victims will not have a legal background and may not want to be involved in all aspects of a situation or case, efforts should be taken to explain the legal process and issues that arise in an easy to understand manner so that victims have an opportunity to provide their views and concerns. Assumptions as to which issues victims will want to present their views and concerns should be avoided.

Using online tools such as social media can play an important role in keeping victims informed about its work and the reasons for any decisions it takes. It is recommended that the ICD makes a more systematic and comprehensive effort at reaching out to victims using social media to expand its reach with victims and affected communities to listen to them before it issues arrest charges, explain the choices it has taken and to facilitate victims' understanding of its decisions.

It is important for victims to see the Court in action and innovate ways should be found to achieve this. It is recommended that ICD consider alternative and creative forms of media for such victim updates. For example it is noted that, bulk text messages and other materials have positively been used in other contexts to keep victims informed and may be appropriate media to convey certain information.

## Training CSOs and media

CSOs and media (Radio, TV and print) play a role in keeping victims informed. Adequate training should be provided to CSOs and the media about the ICD and its proceedings, including discussing with them the key messages to disseminate and how these will be translated into the victims' own language. It is crucial that victims' legal representative have a strong link with CSOs who are interacting with their clients.

Where the security situation allows, in situ proceedings should be considered so that victims can directly witness the justice process, including their representative in the courtroom. Specific strategies should be developed to reach women and to ensure that they are able to follow the proceedings. It should not be assumed that information communicated to community leaders will be passed on to all members of the community. In some contexts, women may be excluded from this channel of communication and decision-making.

### Creation of an outreach Section of the ICD

In comparison to the ICC, the ICD does not have an outreach section which conducts a two-way dialogue a year with affected communities. This is essential to managing expectations and ensuring that these communities can experience justice from ICD proceedings despite geographical and cultural distance. Without outreach, there would be little deterrent effect from the activities of the Court.

The main idea of consultation with victims is to equip them to present their views and concerns in the courtroom. However, the judges themselves do not consult with victims on essential issues pertaining to the exercise of their own rights in the courtroom.

The judiciary of Uganda has not had substantial formal interpretation programs, yet numerous languages are spoken in the country.<sup>38</sup> Although the language of the court is English, often the accused, witnesses and victims do not understand the language. This challenge was vividly witnessed in Kwoyelo's pre-trial hearing where defence counsel notified the Court that the accused needed an interpreter to translate proceedings to his mother tongue.<sup>39</sup> Although interpretation is an important feature for a fair trial,<sup>40</sup> interpreters were not provided in the

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

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

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

Constitutional Court hearing where Kwoyelo's application for Amnesty was challenged.<sup>41</sup> Therefore, the lack of interpretation still hinders ICD's mandate to try core crimes.

In Uganda, those working with victim societies have reported considerable confusion from people regarding the activities of the ICD. Some people think the ICD is a branch of the ICC.<sup>42</sup> It is noted that ICD outreach programs are hampered by the lack of sufficient financial resources to penetrate villages and poor leadership and organisation of the programmes.

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

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

## Conclusion

The first step to enable access to justice is to inform victims of their rights. Informing victims of their rights and assisting them in exercising them can lead to their empowerment. The need for information is all the more important when it comes to their rights before the ICD, for two main reasons. Firstly, there are fewer opportunities for them to learn about those rights in other ways given the physical distance between the Court and the communities concerned. Secondly, it is more challenging for victims to understand such rights and how to exercise them because they are different from what they may have heard, seen or been used to in Uganda's national legal system.

One of the questions that arise in relation to victims' understanding of their rights and the judicial process is how to ascertain the victims' informed consent regarding their decision to participate in judicial proceedings. The reason why this is relevant is because when discussing the success of victim participation, there may be a tendency to look at the numbers of victims who have applied to participate. The reason why ascertaining victims' informed consent is important is because it goes to the core of victims' experience of justice and their expectations about what the process can deliver.

Gaining access to the public record of the case, including public evidence filed by the DPP and the defence, never posed substantial problems. The most contentious discussion has concerned the access to confidential pieces of the prosecution's record.

As a general rule, victims have access to the public record of the case, including public evidence filed by the DPP and the defence. This is because confidential files normally have sensitive information on protection of witnesses and victims, or sensitive information pertaining

to national security. However, in order for participation to be truly meaningful, it is often necessary that the victims' legal representatives have access to confidential material.

The ICD has not yet acknowledged that parties to the case can decide to provide access to confidential documents to the victims' legal representatives should they feel that they contain information which affects the relevant victims' personal interests. In addition, the relevant Court can decide to allow legal representatives to gain access to other confidential materials which affect the victims' personal interests. Finally, the legal representatives do not have access to the entire index of the case and can thereby identify confidential materials, which could potentially affect the victims' personal interest, and request the Court to authorize them to have access to them.

Whenever a prosecutor opens a case, almost notoriously will the courts state their core intention is to bring justice to the victims. Victims and local communities are not indifferent to the Court's mandate and outcomes. On the contrary, they place their hopes in the activities of the Court. They want justice, to tell their stories and, eventually, to obtain reparation. But for many of them their main objective is achieving justice.

As a former legal representative said I never met a victim who only wanted reparation<sup>43</sup>. Victims, according to local voices, see justice as a means to ensure recognition of the gravity of their suffering as a crime. The Court proceedings are capable of sending a powerful message for victims. A teacher in Northern Uganda stated that, for victims it is important to see the perpetrator becoming small<sup>44</sup> in front of the judges. They want justice that is independent and impartial, justice that they were not able find on their own.<sup>45</sup>

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43 Interview with Kilama Henry Komackech Victims Counsel on the 11th of April 2018).

44 Interview with Peter OKumu, Head Teacher and Community Mobilizer: Pagak Northern Uganda on the 13th of March 2018.

45 Interview with Charles Abeka, Community Mobilizer: Pablo Northern Uganda on the 14th of March 2018.

However, there are serious concerns among local NGOs, community leaders and victim advocates about the disappointment of victims and affected communities in relation to ICD activities. The reasons are many including: high expectations, the length of the proceedings; lack of understanding on the criteria used in the selection of cases and charges; and lack of information and a perception that victims' views are not taken into account during investigations and proceedings.

The victims' patience is exhausted after reaching no justice at the national level. They want justice, and soon. It is difficult for them to understand why ICD proceedings have so many stages and take so long. As years pass by, victims' trust in the Court decreases and they lose faith in the proceedings.





## Observations





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