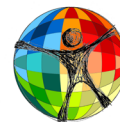


Criminal Prosecutions as a Transitional Justice Mechanism in Post-Conflict Uganda: Responding to the Needs of Formerly Abducted Individuals

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ABSTRACT

This paper examines the recent developments at the International Crimes Division of the High Court of Uganda while asking whether criminal prosecutions in Uganda have managed to fulfill the promises of transitional justice made at the Juba Peace Talks in 2008. Although the final Juba peace agreement was never signed, the Government of Uganda has continued to make efforts to uphold their end of the bargain. Long delays and lack of community engagement, however, have brought the work of the International Crimes Division into question. Set against the history of the conflict in Northern Uganda and the involvement of the international community in the transitional justice process, this paper questions the continued focus on formal criminal justice processes with a focus on the particular experiences and needs of the women who were abducted and forced to act as wives for the Lord's Resistance Army. This paper argues that criminal trials thus far have been a disappointing process through examining the trial of LRA commander Thomas Kwoyelo, the charge list against him, the avenues for victim participation, and the limited scope of prosecutions to date. At each turn, this paper discusses alternative transitional justice mechanisms that may fill in where criminal trials have been found to be lacking. Inspired by experience gained during an internship at the Refugee Law Project in Kampala, this paper is not arguing against the importance of justice in post-conflict reconciliation processes, but invites the reader to reconsider what justice looks like, the impacts of delayed justice, and where the limited resources available should be spent to have the greatest effects.

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Introduction

Transitional justice is plagued by the generally mutually reinforcing, but occasionally antagonistic, relationship between peace and justice.¹ While transitional justice is generally meant to be holistic, proponents of formal justice argue that there can be no lasting peace without criminal accountability.² In contrast, proponents for peace fear that formal trials may undermine negotiations and encourage a partisan approach to peacebuilding.³

The ongoing transitional justice process in Uganda provides a dynamic case study on how the relationships between society, peace, and justice must adapt overtime. The Government of Uganda (GOU) has recently passed a National Transitional Justice Policy (NTJP), more than ten years after it set out to create a national plan for peace in the wake of the Juba Peace Talks.⁴ The NTJP is promoted by the GOU as a demonstration of its ongoing commitment to building a more stable and lasting peace.⁵ To put forward an overarching framework for transitional justice across Uganda, the NTJP describes five priority policy areas, namely formal justice, traditional justice, nation building and reconciliation, amnesty (or the definitive lack thereof), and reparations.⁶ Of course, this policy is not the end, but is it truly the beginning of a transparent and effective transitional justice process?

This paper seeks to evaluate the priorities set out in the NTJP in the context of the last decade of transitional justice in Uganda. In particular, it seeks to question the continued prioritization of criminal prosecutions in the supposedly comprehensive approach to transitional justice.⁷ While this paper does not seek to reopen the peace vs justice debate, it does ask if the formal justice achieved through criminal prosecutions is the

¹ See generally Mark Kersten, "Peace and/or/with/versus Justice" in *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, (Oxford: Oxford University Press, 2016) (for an overview on recent scholarship surrounding the peace vs justice debate).

² *Ibid.*

³ *Ibid.*

⁴ See *National Transitional Justice Policy*, June 2019 at iv.

⁵ *Ibid* at 18.

⁶ *Ibid* at 15.

⁷ *Ibid* at 12, 18.

conception of justice that should be prioritized in a context of competing needs. This paper will argue that criminal prosecutions thus far have only provided for thin reconciliation and that the GOU and the international donor community should shift funding to other policies until state institutions are strong enough to pursue criminal prosecutions that will live up to their promises of ending impunity and providing justice for the victims.

All Ugandans have a stake in the success of transitional justice processes in preventing a relapse into armed conflict. It is impossible, however, to avoid generalizing and essentializing the voices of 'victims' if they are all to be addressed in a single paper. Therefore, this paper will focus on the particular experiences of women who were abducted by the Lord's Resistance Army (LRA) and forced to act as wives and bear the children of LRA soldiers. Before I begin, I will introduce myself and the experience that led me to write this paper. Then, I will give a brief history of the conflict in Northern Uganda, the peace negotiation process, and the resulting state policies and institutions, including the involvement of the International Criminal Court (ICC). I will focus in particular on the ongoing domestic trial of LRA Commander Thomas Kwoyelo.

I will then discuss three factors that contribute to the ability of criminal prosecutions to achieve justice for women abducted by the LRA. First, I will consider the value of prosecutions for internationally defined crimes and their ability to accurately reflect the experiences of women in conflict. Second, I will examine the efforts made to include victim participation in trials and the ongoing problem of distant justice. Finally, I will scrutinize the limited scope of criminal prosecutions as they have been pursued thus far and the resulting distrust of government institutions. For each of these three aspects of criminal prosecutions, I will consider their current effect on reconciliation in Uganda and then will suggest other transitional justice mechanisms that may better facilitate the same goals.

I spent the summer of 2019 working in the Conflict, Transitional Justice and Governance Programme at the Refugee Law Project (RLP) in Kampala, Uganda.⁸ This Programme was established to work towards improving the lives of internally

⁸ See Refugee Law Project, "Conflict, Transitional Justice, and Governance", (2019), online: *Refugee Law Project* <<https://www.refugeelawproject.org/our-work/conflict,-transitional-justice-governance>>.

displaced persons and individuals affected by the multitude of conflicts across Uganda. In recognition of the limited scope of my experience and position as an outsider to the peacebuilding process, I have tried to narrow the topic of my research for this paper and to include the voices of individuals who have been directly impacted by the conflict as much as possible. I will draw on discussions I witnessed at high-level transitional justice meetings hosted by RLP among stakeholders representing the government, victims, and civil society actors.

While I believe the narrow focus of this paper is necessary, it artificially cuts one piece out of the complex web of Uganda's history. I try to give a sense of the vastness of this web in my overview of the conflict in northern Uganda, but I do not discuss the state of Uganda's democracy today. The weakness of governance institutions and the rule of law are alluded to throughout the paper, but not explicitly discussed. Criminal prosecutions, like other transitional justice mechanisms, are going to be less effective in an environment where high-level corruption persists.⁹ To discuss those background issues would detract from the critique of international and domestic support for criminal prosecutions and the support for grassroots transitional justice mechanisms this paper puts forward. This paper is not taking on the challenge of creating a framework through which to promote more effective governance—instead it is taking national governance as it is and looking for a way to move forward in the meantime.

Why Former Lord's Resistance Army (LRA) Wives?

Women who were abducted by the LRA as children were usually forced to take on the role of wife immediately after puberty.¹⁰ I will refer to them as Formerly Abducted Individuals

⁹ See Paul Seils, "The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions" (June 2017) at 2, online (pdf): *International Centre for Transitional Justice* <<https://www.ictj.org/publication/reconciliation-transitional-justice>>.

¹⁰ See generally Grace Acan et al, "How Formerly Abducted Women in Post-Conflict Situations Are Reasserting Their Humanity in a Hostile Environment: Photovoice Evidence from Northern Uganda" (2019) 27:2 *Gender & Development* 273; Human Rights Watch, "The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda" (September 1997), online (pdf): *Human Rights Watch* <<https://www.hrw.org/sites/default/files/reports/uganda979.pdf>> [Human Rights Watch, "The Scars of Death"]; Erin Baines, "'Today I want to Speak the

(FAIs) because this is the terminology preferred by the Women's Advocacy Network, a grassroots advocacy group of women who share this experience of abduction and forced conjugal association.¹¹ As part of this forced role, they could not refuse any of the domestic labour or sexual acts that were ordered of them without suffering physical and psychological abuse at the hands of their 'husbands' and older co-wives.¹²

Women who survived their time in captivity returned home with children born of war (CBOW) to face relentless social stigma as wives of the LRA.¹³ Many were even forced to obtain amnesty, as though they were equally as culpable as any other rebel soldier.¹⁴ They continue to be blamed for the atrocities committed by the LRA and refused support from the villages they once called home.¹⁵

I have chosen to focus on this group of victims because of their importance to development and peacebuilding. In recent decades, the international community has come to recognize the particularly detrimental effects of conflict on women and the ability of women to be agents of change.¹⁶ The focus on responding to the needs of FAIs is not only imperative for justice,

Truth": Victim Agency, Responsibility, and Transitional Justice" (2015) 9:4 Intl Political Sociology 316; Evelyn Amony, *I am Evelyn Amony: Reclaiming My Life from the Lord's Resistance Army* (Madison: University of Wisconsin Press, 2015).

¹¹ See Grace Acan et al, *supra* note 10 at 276.

¹² See e.g. Acan et al, *supra* note 10; Baines, *supra* note 10; Amony, *supra* note 10; Human Rights Watch, "The Scars of Death", *supra* note 10.

¹³ See Acan et al, *supra* note 10 at 281, 287.

¹⁴ See e.g. Amony, *supra* note 10; CBC Radio, "Why Two Women Abducted as Children by the LRA in Uganda Are Telling Their Stories Through Clothes" (25 October 2019), online: CBC Radio <<https://www.cbc.ca/radio/day6/engineers-take-on-climate-change-u-s-nukes-in-turkey-raptors-uprising-spider-web-art-irl-witches-and-more-1.5333393/why-two-women-abducted-as-children-by-the-lra-in-uganda-are-telling-their-stories-through-clothes-1.5333397>>.

¹⁵ See Acan et al, *supra* note 10 at 281.

¹⁶ See e.g. UN Security Council, *Security Council resolution 1325 (2000)* [on women and peace and security], 31 October 2000, S/RES/1325 (2000); UN Security Council, *Security Council resolution 1820 (2008)* [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820 (2008); Elisabeth Rehn & Ellen Johnson Sirleaf, "Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building" (2002, online (pdf): *United Nations Development Fund For Women* <<https://www.unfpa.org/sites/default/files/pub-pdf/3F71081FF391653DC1256C69003170E9-unicef-WomenWarPeace.pdf>>.

but also imperative for preventing intergenerational trauma, ending the historical cycle of violence, and healing society as a whole.

Brief History of Conflict in Northern Uganda

It is difficult to know where to start in describing Uganda's complex and long history with conflict. Narrowing the scope to only the conflict in the North between the LRA and the Ugandan People's Defence Force (UPDF) does not help—the conditions of structural violence that would eventually lead to physical violence were created long before the conflict 'officially' began in 1986.¹⁷

The British governed with a divide-and-rule strategy.¹⁸ Individuals from southern Uganda were favoured and given administrative positions of relative power over individuals from northern Uganda who were mainly conscripted to serve in the police, army, and prison systems.¹⁹ At the same time, the Catholic and Anglican churches' influence throughout Uganda resulted in combinations of ethnic and religious affiliations underpinning all political parties and independence movements.²⁰

Independence in 1962 did not bring an end to tensions established during colonial rule. Indeed, participants in RLP's National Reconciliation and Transitional Justice Audit widely identified the division between North and South as one of the most destructive and pervasive of the colonial legacies.²¹ Still, animosity increased in the decades following independence along ethnic, religious, and sub-regional lines.²² In 1986, after Yoweri Museveni's National Resistance Army (NRA)—to be renamed the UPDF in 1995²³—overthrew Acholi General Tito Okello's

¹⁷ See Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006* (New York: Berghahn Books, 2009) at 39.

¹⁸ *Ibid.*

¹⁹ See Artur Bogner & Dieter Neubert, "Negotiated Peace, Denied Justice? The Case of West Nile (Northern Uganda)" (2013) 48:3 *Africa Spectrum* 55 at 61; Refugee Law Project, *Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit*, (Makerere University, 2014) at 17 [Refugee Law Project, "Compendium of Conflicts"].

²⁰ See Dolan, *supra* note 17 at 42.

²¹ See Refugee Law Project, "Compendium of Conflicts", *supra* note 19 at 17.

²² See Dolan, *supra* note 17 at 42.

²³ See generally Human Rights Watch, "Stolen Children: Abduction and Recruitment in Northern Uganda" (28 March 2003), online: *Human Rights Watch* <<https://www.hrw.org/report/2003/03/28/stolen-children/abduction-and-recruitment-northern-uganda>>.

government, the NRA marched north to prevent an uprising led by the remaining members of Okello's Ugandan National Liberation Army (UNLA).²⁴ As the NRA moved north they began attacking the local Acholi population as though they intended to rip apart the fabric of these communities.²⁵ In response, two major insurgencies emerged.²⁶ The UNLA reformed into a conventional rebel group, known as the Uganda People's Democratic Army. At the same time, a spiritual militant group known as the Holy Spirit Movement was founded by the self-proclaimed prophet, Alice Lakwena.²⁷ As these two rebel groups fell apart in the late 1980s, the LRA was formed under the charismatic leadership of Joseph Kony.²⁸ Like Lakwena, Kony declared he was driven by spirits that possessed him and that he had been sent by God to destroy all evil forces.²⁹

Although at first the civilian Acholi population in northern Uganda was supportive of the LRA insurgency—largely due to the continued occupation of the north by the abusive NRA—support for the LRA waned after a number of years.³⁰ When Sudan began funding the LRA as retaliation for Musveni's funding of a southern Sudanese rebel movement, the LRA became totally detached from the Acholi community.³¹ With the support of the Sudanese government, the LRA was able to use southern Sudan as its base, away from the reach of the NRA.³² By 1991, the LRA began committing the atrocious acts of violence against civilians it has since become famous for—killing civilians in mass, cutting off lips or noses of individuals who spoke against them, and abducting

²⁴ See Dolan, *supra* note 17 at 43.

²⁵ See Richard J Reid, *A History of Modern Uganda*, (Cambridge: Cambridge University Press, 2017) at 89.

²⁶ *Ibid.*

²⁷ See Dolan, *supra* note 17 at 43.

²⁸ See David Lanz, "The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs Justice" (2007) *The Fletcher School of Law and Diplomacy* at 4.

²⁹ See Refugee Law Project, *Compendium of Conflicts*, *supra* note 19 at 150.

³⁰ See Human Rights Watch, "Q&A on Joseph Kony and the Lord's Resistance Army" (21 March 2012), online: *Human Rights Watch* <<https://www.hrw.org/news/2012/03/21/qa-joseph-kony-and-lords-resistance-army>>.

³¹ See Lanz, *supra* note 28 at 4.

³² See Refugee Law Project, *Compendium of Conflicts*, *supra* note 19 at 152.

children to force them to act as wives or soldiers, to name only a few types of brutalities.³³

The people of northern Uganda were not safe under the watch of the NRA either. The NRA's counterinsurgency movement forced over 1.8 million individuals to move to 'protected villages' or internally displaced persons camps with squalid conditions.³⁴ NRA soldiers committed hundreds of extra-judicial executions as they moved people to the forced protection camps and burned down the vacant homes left behind.³⁵ NRA soldiers were also known to use rape as a strategic and widespread demoralization tactic, to defecate in food and drinking water, and to massacre civilians.³⁶ These crimes went unaddressed throughout the conflict, contributing to the widespread perception that President Museveni saw the prolongation of the war as a politically useful tool to hold power.³⁷

The Peace Process and the Influence of the International Community

In December 1999, Museveni's government signed a peace agreement with the Sudanese government.³⁸ Two weeks later, the LRA moved back into Uganda from Sudan, bringing with them a renewed wave of atrocities.³⁹ Searching for a solution to the decades long cycle of violence, the GOU passed an Amnesty Act in 2000.⁴⁰

The Amnesty Act was originally proposed and advocated for by religious and cultural leaders in the north.⁴¹ The final

³³ See e.g. Refugee Law Project, *Compendium of Conflicts*, *supra* note 19 at 152; Lanz, *supra* note 28 at 5; Dolan, *supra* note 17 at 57–59; Reid, *supra* note 25 at 89; Human Rights Watch, "The Scars of Death", *supra* note 10.

³⁴ See Stephen Oola, "In the Shadow of Kwoyelo's Trial" in Christian de Vos, Sara Kendell & Carsten Stahn, eds, *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015) 147 at 152 [Oola, "Shadow of Kwoyelo's Trial"].

³⁵ See Dolan, *supra* note 17 at 45.

³⁶ See Refugee Law Project, "Compendium of Conflicts", *supra* note 19 at 138–39.

³⁷ See Oola, "Shadow of Kwoyelo's Trial", *supra* note 34 at 153.

³⁸ See Dolan, *supra* note 17 at 51.

³⁹ *Ibid.*

⁴⁰ See generally *Amnesty Act*, 2000.

⁴¹ See Lucy Hovil & Zachary Lomo, "Whose Justice?: Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation" (February 2005) at 6, online: Refugee Law Project <<https://www.refugeelawproject.org/resources/working-papers/80-whose>

version that made it past Parliament, however, was not limited to any one region of Uganda or to any particular rebellion. Instead, it applied to anyone who had taken part in an armed rebellion since January 26th, 1986 as the manifestation of the “expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities”.⁴² Individuals seeking amnesty simply had to report themselves to a local authority, renounce their involvement in the war, and surrender any weapons in their possession.⁴³ The Act even provided for amnesty and release to be granted to individuals charged with a criminal offence.⁴⁴ Indeed, the sheer coverage of the Amnesty Act was its most controversial characteristic—over 27 000 individuals benefited from receiving amnesty under the act.⁴⁵

From the outset, both President Museveni and the international community were perceived to be hostile to the amnesty process. In 2002, President Museveni renewed military action against the LRA and had them declared a terrorist organization—making it unclear if LRA combatants would be eligible for amnesty at all under the Act.⁴⁶ One year later, Museveni referred the LRA conflict to the ICC, making it the first country to come before the newly established court.⁴⁷

The GOU and the LRA entered into peace negotiations in 2006. The Juba Peace Talks continued for two more years and resulted in five agreements signed by government actors and LRA leaders.⁴⁸ The final Comprehensive Peace Agreement, however, was never signed as the peace talks reached an impasse over ICC arrest warrants for Kony and other top LRA leaders.⁴⁹ Still, the LRA has continued to respect the ceasefire since the Juba Peace

justice-perceptions-of-uganda-s-amnesty-act-2000-the-potential-for-conflict-resolution-and-long-term-reconciliation>

⁴² See Amnesty Act, 2000 preamble, quoted in Hovil & Lomo preamble.

⁴³ See Amnesty Act, 2000 s 4 (1).

⁴⁴ *Ibid* s 4 (2).

⁴⁵ Hovil & Lomo, *supra* note 41 at 6; Justice Law and Order Sector, *Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial; National Transitional Justice Policy*, *supra* note 4 at 13; *National Transitional Justice Policy*, *supra* note 4 at 13.

⁴⁶ See Hovil & Lomo, *supra* note 41 at 20; Anti-Terrorism Act, 2002

⁴⁷ See Oola, “Shadow of Kwoyelo’s Trial”, *supra* note 34 at 149.

⁴⁸ See *National Transitional Justice Policy*, *supra* note 4 at 3.

⁴⁹ See Sidonia Angom, *Women in Peacebuilding in Northern Uganda* (Cham, Switzerland: Springer, 2018) at 5.

Talks ended in 2008 and the GOU has pledged to fulfill the obligations it undertook at Juba.

Creation of the International Crimes Division of the High Court

Among the outcome documents of the Juba Peace Talks was the Agreement on Accountability and Reconciliation.⁵⁰ This Agreement ordered that “formal courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially amounting to international crimes”.⁵¹ In an effort to actualize this commitment to formal justice processes, the GOU established what is now known as the International Crimes Division (ICD) of the High Court of Uganda.⁵² The Practice Directions of the ICD describe the jurisdiction of the Court as “any offence 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”.⁵³

The ICD was intended to provide for a domestically owned process that would prevent impunity and provide justice for the victims of the LRA conflict. To do so, the GOU domesticated several international instruments such as the Rome Statute and the Geneva Conventions.⁵⁴ It was hoped that this would relegate the ICC to the background of the post-conflict justice process, according to the principle of complementarity—the ICC’s pledge only to intervene when domestic authorities are unable or unwilling to prosecute.⁵⁵ Despite these efforts, however, it is clear that the ICC has continued to find the Juba Agreement on

⁵⁰ See *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement*, 29 June 2007.

⁵¹ *Ibid* at s 6.1.

⁵² See The Judiciary of the Republic of Uganda, “International Crimes Division” (2019), online: *The Judiciary of the Republic of Uganda* <<https://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html>>.

⁵³ *Ibid*.

⁵⁴ See *International Criminal Court Act*, 2010 Act No.11 of 2010; *Geneva Conventions Act*, 1964 Cap.36.

⁵⁵ See generally International Criminal Court Office of the Prosecution, *Informal Expert Paper: The Principle of Complementarity in Practice* (April 2003), online (pdf): *International Criminal Court* <https://www.icc-cpi.int/RelatedRecords/CR2009_02250.PDF>.

Accountability and the establishment of the ICD insufficient to justify removing its own involvement.

During this same period, the Justice Law and Order Sector (JLOS) Transitional Justice Working Group (TJWG) was created to give effect to the sections in the Agreement on Accountability and Reconciliation concerning alternative forms of justice and establish a national framework for transitional justice.⁵⁶ The JLOS TJWG became the body through which international donor support, money, and influence were extended to the ICD and other transitional justice processes.⁵⁷ While local civil society advocates were originally invited to take part in discussions at the JLOS TJWG forum, they were gradually overlooked in favour of international experts in pursuit of complementarity.⁵⁸

The Trial of Thomas Kwoyelo

Thomas Kwoyelo was abducted by the LRA in 1987, on his way to primary school.⁵⁹ Almost twenty years later, he was captured by government forces.⁶⁰ Over this time, it is alleged that Kwoyelo rose through the ranks of the LRA and led a series of attacks in Amuru District, Northern Uganda.⁶¹

While in detention in Uganda's highest security prison, Kwoyelo made a declaration that he was renouncing the rebellion and seeking amnesty.⁶² Although the Amnesty Commission was of the view that Kwoyelo was qualified to receive amnesty, he was ultimately denied.⁶³ It is speculated that Kwoyelo was denied amnesty because his arrest came as the ICD was being established and the promise of his prosecution was held out by JLOS to secure international donor support for the ICD.⁶⁴ For Kwoyelo, the injustice of the refusal to grant him amnesty was reinforced as other, more senior LRA officers, continued to be granted amnesty

⁵⁶ See *National Transitional Justice Policy*, *supra* note 4 at iv.

⁵⁷ See Oola, "Shadow of Kwoyelo's Trial", *supra* note 34 at 165.

⁵⁸ *Ibid.*

⁵⁹ See Trial International, "Thomas Kwoyelo" (7 June 2016), online: *Trial International* <<https://trialinternational.org/latest-post/thomas-kwoyelo/>>

⁶⁰ See *Uganda v Thomas Kwoyelo*, [2015] (Constitutional Appeal No. 01 of 2012) UGSC 5 (Supreme Court, Uganda) at 1–2.

⁶¹ *Ibid.*

⁶² *Ibid* at 2.

⁶³ *Ibid.*

⁶⁴ See e.g. Alexis Okeowo, "Thomas Kwoyelo's Troubling Trial" *The New York Times* (20 July 2012), online: <<https://www.newyorker.com/news/news-desk/thomas-kwoyelos-troubling-trial>>

up until the Amnesty Act was allowed to lapse in 2012.⁶⁵ The most recent statement on amnesty came in the NTJP as Policy Priority #4, which simply clarified that there would be no more blanket amnesty.⁶⁶

After losing a constitutional challenge alleging unequal application of the Amnesty Act⁶⁷, Thomas Kwoyelo's trial has been before the ICD since 2016.⁶⁸ At the time of writing, there have been over ten adjournments for varying lengths of time.⁶⁹ The trial so far has only heard from a handful of the prosecution's witnesses.⁷⁰ It is currently adjourned until an unknown date.⁷¹

Thomas Kwoyelo's trial is significant for reconciliation in Uganda because it is the *only* trial taking place at the ICD. It has been the main focus of the JLOS TJWG and is the expression of two major transitional justice mechanisms in action—criminal prosecutions and institutional reform. As such, the process and media coverage of the trial bears disproportionately on the perception of Uganda's institutional ability to provide justice and facilitate reconciliation within the country.

Given this significance, Kwoyelo's drawn out trial may have long-term negative effects on the future peace of Uganda.⁷² When Kwoyelo's trial first began at the ICD, individuals from the north had both negative and positive reactions.⁷³ Now, however, there is reason to believe the support for the trial is waning. Not only is the length of time the trial is taking potentially a breach of

⁶⁵ See Mark Kersten, "The Path Towards Prosecution: An End to Amnesty in Northern Uganda" (22 June 2012), online: *Justice in Conflict* <<https://justiceinconflict.org/2012/06/11/the-path-towards-prosecution-an-end-to-amnesty-in-northern-uganda/>>; *Amnesty Act, 2000* s 17 (only provided for 6 months, with the possibility for the Minister to extend).

⁶⁶ See *National Transitional Justice Policy*, *supra* note 4 at 19.

⁶⁷ See *Uganda v Thomas Kwoyelo*, *supra* note 60.

⁶⁸ See *Avocats Sans Frontières*, "Kwoyelo, Thomas (ICD-002/2010)" (10 December 2019), online: *Avocats Sans Frontières* <<https://www.asf.be/fr/blog/trialobservation/kwoyelo-thomas-icd-002-2010/>> [*Avocats Sans Frontières*, "Kwoyelo, Thomas"].

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² See David Rieff, "Chapter 5: Forgiveness and Forgetting" in *In Praise of Forgetting: Historical Memory and its Ironies*, (New Haven: Yale University Press, 2017) 76-93.

⁷³ See Anna Macdonald & Holly Porter, "The Trial of Thomas Kwoyelo: Opportunity or Specter? Reflections from the Ground on the First LRA Prosecution" (2016) 86:4 *International Africa Institute* 698.

Kwoyelo's constitutional right to a fair and speedy hearing, it also sends the message that the government may not be willing or able to respect citizens' constitutional rights when they come into contact with law enforcement.⁷⁴ Despite listing "Formal Justice" as Policy Priority Area #1, the NTJP does not address any of the concerns surrounding the slow evolution of Kwoyelo's trial.⁷⁵ The protracted trial is seen as increasingly illegitimate and thus, likely to reinforce the pre-existing distrust between the people of northern Uganda and the government.

Who, then, is this trial for? This is a question I will ask repeatedly throughout the rest of the paper as I consider if the continued pursuit of criminal prosecutions in the post-conflict transitional justice process can respond to the needs of FAls.

International Law and Gender-Based and Sexual Violence

The naming and definition of any crime is significant—it is imperative for justice that the crime actually represents the morally culpable conduct that the prohibition is aiming to sanction. Moreover, if criminal law is to be truly victim-centered, the charges should actually reflect the experiences of the victims. If not, victims' voices will be co-opted and forced to fit a legal script to support the prosecution's case.⁷⁶ For FAls, the danger of having their voices co-opted is amplified. International discourse, even with the best intentions, often rewrites the experiences of women in conflict as caricatures of victimhood.⁷⁷ Since sexual violence was included within the ambit of international criminal law, scholars have attempted to document the lived experiences of women, but the women themselves have continued to feel silenced.⁷⁸ Through speaking for the victims, international law has succumbed to the danger of reproducing the civilizational superiority where women are 'saved' and 'emancipated' from their savage male counterparts.⁷⁹ This two-dimensional narrative

⁷⁴ See *Constitution of the Republic of Uganda*, 22 September 1995 Art 22.

⁷⁵ See *National Transitional Justice Policy*, *supra* note 4 at 18.

⁷⁶ See Baines, *supra* note 10.

⁷⁷ See Chiseche Salome Mibenge *Sex and International Tribunals: the Erasure of Gender from the War Narrative* (Philadelphia: University of Pennsylvania Press, 2013) at 162.

⁷⁸ See Baines, *supra* note 10 at 381.

⁷⁹ See Kiran Kaur Grewal, "'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies'" (2015) 23:2

undermines the agency and dignity of the individuals international criminal law is trying to support.

In this section, I will consider the efforts made by the international community to define a crime that accurately represents the experiences of women abducted and forced to act as wives of LRA commanders and the conduct that is meant to be sanctioned. I will then consider the value of Thomas Kwoyelo's charges in promising justice for these women. I will argue that holding individual leaders to account is a necessary step in ending impunity, but that this is not enough to build a lasting peace in Uganda. The focus on individual responsibility distracts from the systemic nature of gender-based violence that characterizes the experiences of FAs in times of peace as well as conflict.

Developing an Accurate Legal Definition

The subjugation of women in the LRA conflict is far from unique in history. Indeed, the use of sexual violence on enemy civilians as a tactic of war or the increased perpetration of individual acts of sexual violence during armed conflict can be traced as far back as records allow.⁸⁰ The magnitude of sexual violence during the Second World War, including the mass rape of German women by the Russian army and the systematic use of 'comfort women' by the Japanese army, coincided with the development of international criminal law.⁸¹ This culminated in the recognition of "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" as forms of war crimes and crimes against humanity in the Rome Statute establishing the ICC.⁸² Today, there is increased recognition that the binary of women as victims and

Feminist Leg Stud 149 at 155. See also Makau Mutua, "Savages, Victims and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harvard Intl LJ 201; Mibenge, *supra* note 77.

⁸⁰ See generally Elisabeth Heineman, *Sexual Violence in Conflict Zones: from the Ancient World to the Era of Human Rights* (Philadelphia: University of Pennsylvania Press, 2011).

⁸¹ See Kim Thuy Seelinger, "Domestic accountability for sexual violence: The potential of specialized units in Kenya, Liberia, Sierra Leone and Uganda" (2015) 96:894 Intl Rev Red Cross 539 at 544.

⁸² See *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc A/CONF 183/9; International Criminal Court, *Elements of Crimes*, 11 July 2011.

men as perpetrators is a myth and efforts are being made to dispel the silence surrounding male victims of sexual violence.⁸³

Nonetheless, the gender-based violence experienced by the ‘bush wives’ of African conflicts (as they are not unique to the LRA) is distinguishable by two characteristics.⁸⁴ First, during conflict, their role was more than just the provision of sexual acts—they were literally treated as wives, forced to bear children, and take care of small family units in the constantly moving bush camps.⁸⁵ Second, in the post-conflict period, with the combination of the recognition of customary marriages and amnesty, it was not unique for women whose supposed ‘husbands’ had not died in the bush to return home alongside them.⁸⁶ Recognition of these unique characteristics led to the introduction of the terms ‘conjugal slavery’ and ‘forced marriage’ under the umbrella of “crimes against humanity of other inhumane acts” at the Special Court for Sierra Leone and subsequently into the charge list of a former LRA commander at the ICC.⁸⁷

Kwoyelo’s Charge List

Thomas Kwoyelo is charged under the domesticated Geneva Conventions, and the Penal Code of 1950, but I—with all of the resources I have at my disposal—could not find a consensus on the number of charges or a list of the specific charges. In different news articles and government publications, I read that Kwoyelo was charged with any count of crimes between ten and ninety-three.⁸⁸ The charges were listed generally and briefly—mostly only

⁸³ See Baines, *supra* note 10 at 319.

⁸⁴ See Annie Bunting & Izevbuwa Kehinde Ikhimiukor, “The Expressive Nature of Law: What We Learn from Conjugal Slavery to Forced Marriage in International Criminal Law” (2018) 18:2 *Intl Crim L Rev* 331. See also Mibenge, *supra* note 77 at 162.

⁸⁵ *Ibid.*

⁸⁶ See e.g. Grewal *supra* note 79 at 153–155; Baines, *supra* note 10 at 327; Acan et al, *supra* note 10 at 327; Ben Kiromba Twinomugisha, “African Customary Law and Women’s Human Rights in Uganda” in Jeanmarie Fenrich, Paolo Galizzi & Tracy E Higgins, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2012) 446 at 452.

⁸⁷ See Bunting & Ikhimiukor, *supra* note 84 at 344.

⁸⁸ See e.g. International Centre for Transitional Justice, “Victims in Kwoyelo Case Forced to Wait Longer for Justice” (25 July 2018), online: *International Centre for Transitional Justice* <<https://www.ictj.org/news/victims-thomas-kwoyelo-case-forced-wait-longer-justice>> [ICTJ, “Victims in Kwoyelo Case Forced to Wait”]; Avocats Sans Frontières, “Kwoyelo, Thomas”, *supra* note 67; Ephrem Rugiririza, “Uganda Faces First Test With Kwoyelo LRA Trial” (10 November 2018), online: *Justice Info*

naming war crimes and crimes against humanity, as well as murder, rape, forced slavery, and torture.⁸⁹

The ambiguity in the specific charges, combined with the ambiguity in the definitions of forced marriage and sexual slavery as war crimes and crimes against humanity, means that only individuals who have access to information and are exposed to the ongoing international discourse will see that Thomas Kwoyelo is being held to account for his personal treatment and contribution to the systematic treatment of FALs within the LRA. At the same time, for individuals living in rural areas without access to the internet, radio, or much contact with travelers from the city, Kwoyelo's trial and the accountability it is meant to bring are likely to be very unclear. For FALs, any expressive value to be had in the international condemnation of a crime is lost in Kwoyelo's trial.

The focus on individual responsibility in criminal prosecutions detracts from societal forms of gender-based violence that exist in times of peace as well as conflict in the institution of marriage.⁹⁰ The use of gender as an internal control mechanism in the LRA mirrored that which existed in northern Uganda generally, both before and after the conflict.⁹¹ Where the woman and man continue to be seen as a married couple after being granted amnesty and returning home, the stigma of being a rape victim is reduced because the sexual violence is deemed a part of the marital relationship.⁹² In other circumstances, when the men refuse to recognize the relationship or support their children, the women are ostracized and forced to find some way of supporting themselves in a heavily patriarchal society.⁹³ Through this dichotomy of bad options, women are trapped by the value placed on marriage as a crucial social institution and its perversion in this context.⁹⁴ Rather than recognizing diffused responsibility for conflict, criminal prosecutions reinforce a false binary between victims and perpetrators—a binary in which only archetypal victims may participate.⁹⁵ The inability of common

<<https://www.justiceinfo.net/en/tribunals/national-tribunals/39463-uganda-faces-first-test-with-kwoyelo-lra-trial.html>>.

⁸⁹ See Rugiririza, *supra* note 88.

⁹⁰ See Baines, *supra* note 10 at 319.

⁹¹ See Dolan, *supra* note 17 at 93.

⁹² See Grewal, *supra* note 79 at 152.

⁹³ See e.g. Acan et al, *supra* note 10.

⁹⁴ See Grewal, *supra* note 79 at 152–155.

⁹⁵ See Baines, *supra* note 10 at 327.

international discourse to recognize these nuances prevents victims from being able to honestly describe the complicated and intersecting factors of victimhood created by gender-based and sexual violence that cross over periods of peace and conflict.⁹⁶

Alternative Policy Mechanism: Support for Grassroots Truth Telling

Transitional justice processes are often grouped according to their main goal—criminal prosecutions are defined by the goal of accountability and ending impunity.⁹⁷ Although they may, in the process, give an opportunity for truth telling or developing a common history, these goals are usually associated with truth and reconciliation commissions and other transitional justice mechanisms where truth-seeking is the primary focus.⁹⁸ This categorization of transitional justice into “pillars” can be helpful for clarity, but it is, in practice, far less definitive.⁹⁹ Still, formal justice processes necessarily exclude the truths of countless individuals—no matter how supportive the prosecution is of victim participation. Criminal prosecutions *require* specific charges. The individuals on trial cannot, after all, be held to account for everything those affected by the conflict need to grieve. No matter how the charges are labelled and defined, they will necessarily exclude parts of all victims’ experiences.

In response to this difficulty, FAls and civil society organizations have developed grassroots initiatives to facilitate the truth-seeking goals of transitional justice and to provide victims a forum where they do not have to be anyone but themselves. These are similar to the informal truth-seeking and memory-sharing processes that have been conducted in other post-conflict contexts to provide war-affected individuals with the goods that criminal prosecutions promised but failed to deliver.¹⁰⁰ For example, the Women’s Advocacy Network (WAN) was founded by Joseph

⁹⁶ See Baines, *supra* note 10 at 328.

⁹⁷ See Ellen Lutz, “Transitional Justice: Lessons learned and the road ahead” in Naomi Roht-Arriaza & Javier Mariezcurrena, eds, *Transitional Justice in the Twenty-First Century: Beyond Truth vs Justice* (Cambridge: Cambridge University Press, 2006) 325 at 327.

⁹⁸ *Ibid.*

⁹⁹ See generally Seils, *supra* note 9.

¹⁰⁰ See e.g. Longman, Timothy, “Justice at the Grassroots? Gacaca Trials in Rwanda” in Naomi Roht-Arriaza & Javier Mariezcurrena, eds, *Transitional Justice in the Twenty-First Century: Beyond Truth vs Justice* (Cambridge: Cambridge University Press, 2006) 206.

Kony's eleventh wife, Evelyn Amony, along with other FAIs who met each other after having escaped from the LRA and having found their former homes to be hostile to their presence.¹⁰¹ WAN now consists of sixteen grassroots groups across northern Uganda, where over 900 war-affected individuals come together to share with and support one another as well as to advocate for the reintegration of FAIs and the needs of CBOW.¹⁰² WAN is not alone in these kinds of initiatives. RLP facilitates a number of similar truth-seeking community events, including memory dialogues and massacre scoping, where all individuals are encouraged to meet and share their memories of largely undocumented conflicts.¹⁰³ The therapeutic and expressive value of criminal prosecutions are magnified in these projects where all individuals are free to share without worrying about fitting into a particular legal script. Supporting such informal grassroots truth-seeking and memory-sharing processes would be more conducive to supporting human dignity as they provide more space for human individuality and agency.

The Trial and Meaningful Victim Participation

Thomas Kwoyelo's trial is the first opportunity for the GOU to demonstrate its desire and ability to use criminal prosecutions for the goal of reconciliation. While the recognition of forced marriage in conflict as an international crime is a success, women's stories are still re-told to fit a legal script. As such, the broader feminist approach has been to reduce the power of the law to define an individual's experience of sexual violence and thereby increase the space for the individual's own voice.¹⁰⁴ What is needed, however, is a balance between these two objectives—something that is only possible in formal criminal justice processes if victim participation is properly facilitated. In the process of the trial, victim participation should include giving victims a voice in the courtroom, providing protection for vulnerable witnesses, and ensuring that information about ongoing trials is disseminated to

¹⁰¹ See Acan et al, *surpa* note 10.

¹⁰² See Justice and Reconciliation Project, "Women's Advocacy Network" (2018), online: *Justice and Reconciliation Project* <<https://www.justiceandreconciliation.org/initiatives/womens-advocacy-network/>>.

¹⁰³ See Refugee Law Project, "Conflict, Transitional Justice, and Governance", *surpa* note 8.

¹⁰⁴ See Grewal, *surpa* note 79 at 155.

relevant stakeholders.¹⁰⁵ The NTJP recognizes this failing in the current criminal prosecution, but does not describe any specific steps to improve.¹⁰⁶

In the previous section, I described how ambiguously defined crimes reduce the expressive value of criminal trials for FAls. In this section, I will consider the ability of the ICD to facilitate meaningful participation during the trial itself. I will discuss two versions of victim participation, that which occurs in the courtroom and that which occurs through facilitating public dialogue outside the court. I will argue that the ICD's physical location makes little difference; there is too much distance between the court and the war-affected individuals it is meant to be serving.

Distant Justice: From the Capital to the Village

International courts and tribunals present a model of transitional justice that is distanced from the societies in transition.¹⁰⁷ The normative argument in favour of these processes is that the physical distance allows for political distance, embodied in the goods of independence and impartiality.¹⁰⁸ In contrast, the normative argument *against* distant international justice processes, and in favour of justice processes embedded in the community, is what led to the creation of the ICD—local decision-making promotes state-building and institutional reconciliation as well as contextually sensitive justice.¹⁰⁹ Despite being a domestically owned court, however, the ICD still suffers from many of the symptoms of distant justice that undermine its claim to the normative value of embedded justice.

First, the ICD was originally, despite its claim to render victim-centered justice, physically removed from the victims for whom it is meant to be prosecuting. The physical barrier of the distance between the war-affected communities in the north and the court's location in Kampala was overcome by moving

¹⁰⁵ See ICTJ, "Victims in Kwoyelo Case Forced to Wait", *supra* note 88; Oryem Nyeko, "A Test Case for Justice in Uganda: Government Should Signal More Commitment to Uganda's International Crimes Division" (15 November 2018), online: *Human Rights Watch* <<https://www.hrw.org/news/2018/11/15/test-case-justice-uganda>>.

¹⁰⁶ See *National Transitional Justice Policy*, *supra* note 4 at 20.

¹⁰⁷ See Phil Clark *Distant Justice: The Impact of the International Criminal Court in African Politics* (Cambridge: Cambridge University Press, 2018) at 34.

¹⁰⁸ *Ibid* at 22.

¹⁰⁹ *Ibid* at 34–35.

Kwoyelo's trial from Kampala to Gulu, a city in northwestern Uganda close to the centre of the LRA conflict.¹¹⁰ Still, Gulu is several hours drive from the homes of individuals affected by Kwoyelo's alleged crimes who live mainly in rural areas, separated from the city by poorly maintained roads and only accessible by public transportation.¹¹¹ Moreover, the cycle of hearings and adjournments with no clear schedule heavily disincentivizes individuals from traveling to witness the court proceedings as many have left disappointed before.¹¹² The ICD's Rules of Procedure and Evidence put forward the possibility that victims will be able to participate in trials at the ICD beyond the traditional role of providing evidence, but are silent on how this is meant to happen in practice.¹¹³ This has left the ICD to develop ad hoc procedures as Kwoyelo's trial has evolved.¹¹⁴ The failure of the GOU to facilitate victim participation calls into question the legitimacy of the justice process and casts doubt on the commitment of the GOU to deliver justice at all.¹¹⁵ Victim representatives describe feeling used by the justice process and coordinating NGOs—their photos are taken and their voices co-opted for a trial they hear nothing about.¹¹⁶

Second, the ICD is still a state-owned institution in a context where the state is not necessarily representative of the war-affected communities with which it is meant to be reconciling. This form of distance can be traced back to the colonial era. Under the divide-and-rule strategy, the Buganda Kingdom was favoured above all others and given the role of administering the British protectorate of Uganda.¹¹⁷ After independence, colonial institutions, notably the common law system, remained and

¹¹⁰ See Macdonald & Porter, *supra* note 73 at 710.

¹¹¹ Insights from work.

¹¹² Insights from work.

¹¹³ See Avocats Sans Frontières, "Reflections on Victim Participation before the International Crimes Division in Uganda" (September 2019) at 1, online: Avocats Sans Frontières < <https://www.asf.be/wp-content/uploads/2019/11/Policy-Brief-Victims-participation-in-Uganda-1.pdf> >.

¹¹⁴ *Ibid* at 2.

¹¹⁵ See ICTJ, "Victims in Kwoyelo Case Forced to Wait", *supra* note 87.

¹¹⁶ See Rachel Killeen & Luke Moffett, "Victim Representation before the ICC and ECCC" (2017) 15:4 J Intl Crim Justice 713 at 722; Acan, *supra* note 10 at 289.

¹¹⁷ See Bogner & Neubert, *supra* note 19 at 61; Refugee Law Project, "Compendium of Conflicts in Uganda", *supra* note 19 at 17.

continued to privilege the people of southern Uganda who had been educated at colonial institutions.¹¹⁸

Transported to the present, common law criminal prosecutions are as unfamiliar to some villages as they were in 1962.¹¹⁹ A sub-county chief explained that “in general terms, we support the trial but the community has developed a resilience and the court issue is a technical issue which the layman may not comprehend so people get on with their business.”¹²⁰ This exacerbates the difficulty of facilitating meaningful victim participation because it is not enough to broadcast the court proceedings or to have individuals physically present in the courtroom to impart the sense that justice is being served.

Without the dedication of funds to disseminating trial information, facilitating victims’ travel to the court and participation in trial through the use of translators—all costs that multiply with repeated delays and uncertainty of duration—criminal prosecutions fall glaringly short of their promises to give victims a platform for their stories to be told and for justice to be achieved. This leaves war-affected individuals with minimal interest or hope in the ongoing ICD trial.¹²¹ At most, war-affected communities express a desire for the trial to be concluded so that they may receive any small reparation that may be allocated to them as a result of a guilty verdict.¹²² Rule 48 of the ICD Rules of Evidence and Procedure allows for the trial chamber to award reparations against a convicted person when another person “whether or not she/her is a victim or witness in the case has suffered material loss or personal injury as a result of the offense”.¹²³ This possibility was once seen as promising, but

¹¹⁸ Insights from work.

¹¹⁹ See Twinomugisha, *supra* note 86; Daniel Komakech, “Reinventing and validating the cosmology and ontology of restorative justice: hermeneutics of the traditional Acholi justice system in Northern Uganda”, in TW Bennett, ed, *African Perspectives on Tradition and Justice* (Cambridge: Intersentia, 2012) at 141.

¹²⁰ See Macdonald & Porter, *supra* note 73 at 710.

¹²¹ See e.g. ICTJ, “Victims in Kwoyelo Case Forced to Wait”, *supra* note 87; Rugiririza, *supra* note 87; Macdonald & Porter, *supra* note 73.

¹²² See Macdonald & Porter, *supra* note 73 at 709.

¹²³ See REDRESS, “Ugandan International Crimes Division (ICD) Rules 2016: Analysis on Victim Participation Framework” (August 2016) at 11, online (pdf): <https://redress.org/wp-content/uploads/2017/12/1608REDRESS_ICD-Rules-Analysis.pdf>.

affected communities are beginning to believe reparations are a form of justice that is impossible in the current political context.¹²⁴

Alternative Policy Mechanism: Direct Reparations

Most FAls grew up in Acholi villages governed primarily by customary law. In Acholi culture, a wrong is not meant to be punished by another wrong like the death sentence or life imprisonment.¹²⁵ Instead, the wrongdoer and their clan are meant to make payment to the victim and their clan as a social punishment and reparation.¹²⁶ This is meant to restore balance in the community by contributing actively to rebuilding peace that was broken.¹²⁷

Traditionally, reparations would come from the wrongdoer and their clan, but victims would not have to wait for a long trial to be completed before receiving compensation.¹²⁸ As the GOU has removed the possibility of the community engaging in traditional criminal justice processes by denying Kwoyelo amnesty and insisting on a formal trial, war-affected communities see it as the GOU's responsibility to ensure that reparations are paid.¹²⁹ Indeed, the GOU recognizes this responsibility, as reparations are listed as the fifth and final Policy Priority Area in the NTJP and are promised in Article 50(1) of the Constitution.¹³⁰

As early as 2014, WAN lobbied Parliament to legislate on reparations to support the immediate needs of FAls and CBOW, but the recent NTJP goes no further than to say, again, that legislation on reparations will be adopted.¹³¹ The slow development towards issuing reparations reinforces the perception that the GOU is not interested in true reconciliation or enfranchisement of the north. Moreover, it is not just that reparations would be a significant symbol of recognition of the harms suffered as a result of the protracted conflict, but individuals

¹²⁴ See Macdonald & Porter, *supra* note 73 at 709.

¹²⁵ See Komakech, *supra* note 119 at 141.

¹²⁶ *Ibid.*

¹²⁷ *Ibid* at 136–137.

¹²⁸ *Ibid.*

¹²⁹ See Justice Law and Order Sector, *Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial*.

¹³⁰ See *Constitution of the Republic of Uganda*, *supra* note 73; *National Transitional Justice Policy*, *supra* note 4 at 20.

¹³¹ See Acan et al, *supra* note 10 at 278; *National Transitional Justice Policy* at 20.

have substantial and pressing *present* needs that require financial resources to remedy.

Health care in rural northern Uganda is sparsely provided, difficult to access, and insufficient to respond to the ongoing needs of FAls. Many women lost the use of limbs as a result of the fighting, suffered from poorly executed amputations or never received medical attention for injuries related to gunshots or landmines.¹³² Additionally, FAls suffer from lasting injuries related to the cycle of sexual abuse they suffered—a result of rape, sexually contracted infections, complicated pregnancies due to being forced to fight and travel, and giving birth in bad conditions.¹³³ Upon returning home from the bush, FAls are often treated as less than human despite often having the responsibility of being the sole caregiver for CBOW and needing care themselves.¹³⁴

Having had their dignity abused and undermined for so long at the hands of local authorities—whether directly or through neglect—FAls are unlikely to seek out help or know where to ask for it.¹³⁵ Charity, a woman interviewed by Human Rights Watch described her personal experience, “I would have to crawl a long distance to get tested for HIV and sleep on the road on the way there, so I just live without knowing.”¹³⁶ Explanations of hopelessness like this are common among FAls, demonstrating how the lack of resources and attention has been translated into a lack of respect for their humanity. In this context, the promise that reparations will only come *after* a guilty verdict is delivered at the ICD is emptied of hope. Reparations are likely to come too late for many FAls, or not at all.

¹³² See Acan et al, *supra* note 10 at 287; Human Rights Watch “As if We Weren’t Human”: Discrimination and Violence Against Women with Disabilities in Northern Uganda” (August 2010), online (pdf): *Human Rights Watch* <https://www.hrw.org/sites/default/files/reports/uganda0810_brochure_low.pdf> [Human Rights Watch, “As if We Weren’t Human”]; Ruth Ojiambo Ochieng, “The Scars on Women’s Minds and Bodies: Women’s Roles in Post-Conflict Reconstruction in Uganda” (2003) 22:2 *Canadian Woman Studies* 23; Helen Liebling-Kalifani et al, “Experiences of Women War-Torture Survivors in Uganda: Implications for Health and Human Rights” (2007) 8:4 *J Intl Women’s Studies* 1 at 2–4.

¹³³ *Ibid.*

¹³⁴ See Human Rights Watch, “As if We Weren’t Human”, *supra* note 132.

¹³⁵ *Ibid* at 14.

¹³⁶ *Ibid* at 16.

JLOS describes the ICD as a permanent fixture in Uganda's court system, encouraging the idea that funds may be put into improving the physical space of the courthouse, possibly going as far as constructing an entirely new building.¹³⁷ Although the physical constraints are real impediments to the delivery of justice at times, the trial cannot claim to be 'victim-centered' if it ignores the needs and express desires of actual victims. Continuing to co-opt victims' voices in pursuit of formal criminal justice perpetuates the two-dimensional narrative of victims without agency that strips FAs of individual dignity that I discussed in the previous section. Before sinking more resources into improving the ICD process, policymakers should trust that FAs understand their needs better than anyone and respond to the overdue calls for reparations.

Limited Scope of Prosecution

All accounts of the war recognize that both the government forces and the LRA inflicted undue suffering on the civilian population. In response to calls to investigate allegations of atrocities committed by government soldiers, the UPDF Political Commissar has asserted that all UPDF soldiers responsible have *already* been prosecuted in the military court system.¹³⁸ There is, however, no information available to the public about these prosecutions at all, contributing to the theory that they have not even occurred.¹³⁹

As I have previously considered the effect of the charge list itself and the ability of victims to participate meaningfully in the trial process, I will now consider the effect on national reconciliation of the choice of *who* to prosecute. I will illustrate the continued frustration in Uganda over the lack of accountability for atrocities committed by the UPDF during the conflict in the north and the failure of military courts as an alternative to the ICD. I will argue that only prosecuting wrongdoers from the LRA contributes to the impression that the current approach to criminal prosecutions in Uganda can only offer hollow justice.

¹³⁷ Insights from work.

¹³⁸ See Emma Charlene Lubaale, "Military Courts and Prosecution of Offences by National Defence Forces in the Dawn of the Complementarity Regime: The Case of Uganda" (2017) 28:4 Crim LF 709 at 711.

¹³⁹ Insights from work.

Impunity Among Government Actors

Although I have chosen to focus on a group of victims who, by definition, suffered primarily at the hands of the LRA, the failure of the government to admit that wrongs were committed by the UPDF affects FAs through preventing reconciliation in communities, promoting the narrative that there was a singularly evil side to the conflict, and by undermining formal criminal justice processes in general.¹⁴⁰

UPDF crimes during the conflict contributed significantly to the fracturing of the communities of FAs. The resentment felt towards the government continues to ripple through these communities and creates an inhospitable environment for community-level reconciliation.¹⁴¹ Healing a society through transitional justice is a necessarily holistic process that needs to recognize nuanced and diffused responsibility for the conflict.¹⁴² Painting the LRA rebels as the only evil actors reinforces the stigma attached to FAs as their supposed supporters.¹⁴³

Not only is the one-sided vilification of the LRA a harmful narrative, it is also simply untrue. The UPDF promoted or at least allowed a similar systematic approach to sexual and gender-based violence towards civilians during the conflict as did the LRA.¹⁴⁴ For example, the displacement of civilians in northern Uganda into camps, referred to by government critics as concentration camps, has since been universally condemned.¹⁴⁵ The camps were filled with human rights abuses at the hands of UPDF soldiers—an MP for Gulu described life in the forced

¹⁴⁰ See Macdonald & Porter, *supra* note 73 at 710.

¹⁴¹ See Acan et al, *supra* note 10.

¹⁴² See Dolan, *supra* note 17 at 102–103; Sophie Neiman, “Can a Long-Awaited Transitional Justice Policy Bring Accountability to Uganda” (17 July 2019, online: *World Politics Review* <<https://www.worldpoliticsreview.com/articles/28040/can-a-long-awaited-transitional-justice-policy-bring-accountability-to-uganda>>

¹⁴³ See Acan et al, *supra* note 10.

¹⁴⁴ See e.g. The Daily Monitor, “North Crisis Worsened by UPDF” republished on *Human Rights Watch* (23 September 2005), online: <<https://www.hrw.org/news/2005/09/23/north-crisis-worsened-updf>>; Human Rights Watch, “Abuses by the LRA and the UPDF against Civilians” (September 2005), online: *Human Rights Watch* <https://www.hrw.org/reports/2005/uganda0905/5.htm#_ftn86>.

¹⁴⁵ See Amnesty International, “Breaking the Circle: Protecting Human Rights in the Northern War Zone” (17 March 1999), online: *Amnesty International* <<https://www.amnesty.org/en/documents/AFR59/001/1999/en/>>.

protection camps as “just like living hell which is full of rape, torture, and other forms of mistreatment.”¹⁴⁶ The failure of the government to condemn sexual violence perpetrated by UPDF soldiers and the blame placed on their victims contributes to a wider public narrative that sees FAs as responsible for their own misfortune and accepts their social marginalization.

In addition to the effect on the lives of war-affected individuals, the failure to prosecute UPDF leaders publicly—deferring instead to the closed and opaque military court system—undermines institutional reconciliation. Through choosing not to investigate allegations against the UPDF, the supposedly independent Department of Public Prosecution (DPP) is failing to fulfill its duty to investigate, prosecute, and punish perpetrators of serious crimes under both the Constitution of Uganda and international law.¹⁴⁷ A senior staff member at JLOS is cited as explaining “the DPP would never investigate [UPDF crimes] because the ICD is a victor’s court.”¹⁴⁸

If any military prosecutions have occurred, all of their therapeutic and expressive value is lost in the silence. Closed military court proceedings fail to demonstrate condemnation of crimes that accurately represent the experiences of victims. It is unclear whether atrocities committed by UPDF soldiers were prosecuted as service crimes, crimes under the Penal Code, the Geneva Conventions, or the ICC Act.¹⁴⁹ If the military courts do not apply the same terms for prosecution as the prosecutions that occur at the ICD, it will reinforce the impression that the government does not take the atrocities committed by the UPDF as seriously as those committed by the LRA.¹⁵⁰ Service crimes, as they are set out in the UPDF Act, see the harm to civilian life as *incidental* to the actually reprehensible conduct of disobeying orders.¹⁵¹ Through this phrasing, the expressive value of criminal prosecutions is lost. Moreover, the uncertainty over whether these prosecutions have even occurred makes it seem unlikely that any victims were invited to participate in a meaningful way.

¹⁴⁶ See Dolan, *supra* note 17 at 109.

¹⁴⁷ See *Constitution Act*, Art 120 (3) (a);

¹⁴⁸ See Macdonald & Porter, *supra* note 73 at 703.

¹⁴⁹ See Lubaale, *supra* note 137.

¹⁵⁰ *Ibid* at 741–42.

¹⁵¹ *Ibid* at 721–22.

Only prosecuting Thomas Kwoyelo—in an inexplicably delayed trial—undermines the justice process in general, but that the DPP is not even promising to investigate UPDF crimes sends a clear signal that the ICD is indeed a ‘victor’s court’. Moreover, the one-sided prosecution has kept alive the impression that the GOU is not actually committed to building a lasting peace, as was pervasive during the conflict itself. The GOU’s demonstrably weak political commitment to the peace process has “merely aggravated a conviction that the government was against them.”¹⁵² President Museveni’s ongoing efforts to remain in office for life¹⁵³ further exacerbates the impression that national reconciliation is not a priority, that the GOU has no remorse for its contribution to the violence, and that there is no end in sight to the suffering and marginalization of communities in the north.

Alternative Policy Mechanism: Self-Imposed Accountability

The challenge of prosecuting government actors is not unique to Uganda’s post-conflict process. Indeed, throughout the history of transitional justice and international criminal law, all courts have struggled to overcome the power of victory in defining the terms of criminal accountability and prosecutorial discretion. Sovereignty and the need for stability in post-conflict environments often weigh heavily in favour of allowing government actors to get away with the past in order to move on into the future.¹⁵⁴ The simplest way the GOU could combat the detrimental effects of only pursuing criminal accountability for LRA leaders would be to publicize information about the criminal prosecutions that have occurred in military courts. If these prosecutions were less rigorous than the ideal of criminal prosecutions currently being pursued by the ICD, however, it would likely only further undermine the administration of justice to re-try UPDF perpetrators at the ICD. Instead, the GOU should actively engage in other transitional justice mechanisms to better support the goals of accountability, truth-seeking, and national reconciliation and to distract from the current failings of formal criminal prosecutions.

¹⁵² See Dolan, *supra* note 17 at 103.

¹⁵³ See e.g. Bukola Adebayo, “Uganda Court Upholds Law that Could Allow Yoweri Museveni to be President for Life” (27 July 2018), online: CNN <<https://www.cnn.com/2018/07/27/africa/uganda-presidential-age-limit/index.html>>

¹⁵⁴ See Bogner & Neubert, *supra* note 19 at 74.

It may be possible for the GOU to accept political accountability through issuing a formal apology, even if it cannot accept criminal or civil accountability. Apologies require a minimally conducive environment in which government actors are willing to self-impose accountability but calling for an apology is arguably less threatening than calling for criminal accountability. In this context, an apology may be seen as a kind of informal amnesty—where wrongs are recognized, but go unpunished—but the discourse that leads to an apology being issued and the process of writing the apology are often supportive of truth telling and the creation of a common cultural history.¹⁵⁵ The need for the apology to be seen as an unequivocal acknowledgement of the government's contribution to suffering—rather than an insincere expression of regret or sadness—may ensure that the apology does not pave the way for impunity.¹⁵⁶ The apology itself can help replace partisan recriminations with constructive dialogue and unite the public behind common goals for the path forward.¹⁵⁷ While accepting an apology is more forgiving of wrongdoing than would otherwise be palatable, there are necessarily going to be trade-offs in the transitional justice process.

In the interim, the alternative transitional justice practices I have discussed in previous sections would demonstrate the remorse of the GOU and its dedication to the peacebuilding process. Enthusiastic support for grassroots truth-seeking processes, community support networks, distributing reparations, creating formal memorials for undocumented massacres, and establishing a comprehensive history of the conflict, would demonstrate, in a less formal setting, that the GOU supports the peacebuilding process and can admit to some of its own culpability. Even if this acknowledgement of culpability comes without legal consequences, it will help unpack the current narrative of one-sided culpability and diffuse responsibility throughout society.

¹⁵⁵ See Ruben Carranza, Cristián Correa & Elena Naughton, "More than Words: Apologies as a Form of Reparation" (28 December 2015) at 1, online (pdf): *International Centre for Transitional Justice* <https://www.ictj.org/publication/more-than-words-apologies-form-reparation> [Carranza].

¹⁵⁶ *Ibid.*

¹⁵⁷ Carranza, *supra* note 155 at 1.

Conclusion

This paper could be interpreted as an argument for the continued involvement of the ICC in Uganda. I have demonstrated that the ICD, as it is acting now, is failing to live up to its original promise of ending impunity and contributing to national reconciliation. Is this the exact situation—where domestic actors are unwilling or unable to hold wrongdoers to account—for which the ICC was created? All of the concerns I have raised continue to operate whether it is the ICD or the ICC that performs the prosecutions. The ICC has proven to be incapable of prosecuting sitting government officials, as they rely on governments' cooperation to conduct investigations.¹⁵⁸ As such, the consequences I have outlined that follow from the failure to prosecute UPDF leaders would still follow from ICC prosecutions of LRA leaders alone. Moreover, no matter the inefficient process of the ICD, there is value in it being a nationally owned process, if nothing else. Nation-building is at times a process of trial and error, but the errors will only be learning opportunities if it is the nation itself that is making the errors and adapting to them. Public discourse alone indicates distrust of international actors and decries their continued involvement, demonstrating that foreign influence continues to be a barrier to self-determination and self-accountability.¹⁵⁹

As one of the primary pillars of transitional justice, criminal prosecutions have been an essential part of ending cycles of violence in many post-conflict contexts.¹⁶⁰ When so many strategies fail, it is easy to come to believe that a practice that worked in one context is necessary for the process to work in another context. At the time of the Juba Peace Talks, the international community was infatuated with the relative success of recent and ongoing war crimes tribunals and the creation of the ICC. This success, the laudable goal of ending impunity, and the realization that post-conflict societies do not have to choose between peace and justice, encouraged the dedication of significant resources to criminal prosecutions in Uganda. Ten years later, however, it has become clear that domestic policymakers and international donors need to step back and re-focus on the individuals for whom the transitional justice process

¹⁵⁸ See Clark, *supra* note 107.

¹⁵⁹ Insights from work.

¹⁶⁰ See generally Seils, *supra* note 9.

is designed. What process will best achieve peace, justice, and the realization of human dignity?

Although this paper is grounded in the Ugandan context and the experience of FAs over the last thirty years, the lesson that transitional justice must be dynamic and adaptable applies everywhere. Peace and justice take many forms and what combination of these two goals will be complementary and mutually reinforcing depends entirely on the context. The needs of the most vulnerable individuals, the people whose stories are held up as the *raison d'être* of justice, should be the standard against which the chosen transitional justice mechanism is measured for success. While transitional justice processes take time and commitment to succeed, there is also no reason to continue pursuing a particular conception of peace or justice when the circumstances required for them to flourish continue to be illusory.

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