Specialized teams in the investigation, prosecution and judgement of International Crimes

The Ugandan Experience

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“A person stands a better chance of being tried and judged for killing one human being than for killing 100,000”. - José Ayala Lasso, former United Nations High Commissioner for Human Rights
Background to the International Crimes Division of the High Court of Uganda-(ICD)

In July 2008, the Government of Uganda (GoU) established the International Crimes Division (ICD) of the High Court (previously War Crimes Division) by an Administrative Decree to try individuals who are alleged to have committed international crimes during the 20-year insurgency in northern Uganda.

The ICD has the authority to try genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime defined in Uganda’s Penal Code Act, Geneva Conventions Act 1962, International Criminal Court Act 2010, or under any other penal enactment in force in Uganda.
Background to the International Crimes Division of the High Court of Uganda-(ICD)

Thus, the ICD was intended to fulfill the Government of Uganda’s commitment to actualizing the Juba Peace Agreement provisions on accountability and reconciliation.

The civil wars and other international conflicts that Uganda experienced in the recent past justified the establishment of the ICD to try the perpetrators of war crimes and crimes against humanity including commanders of the Lord’s Resistance Army (hereinafter referred to as LRA) and other rebel groups.

The vision of the ICD is to fight impunity and promote human rights, peace and justice. The ICD has attained international acclaim.
Background to the International Crimes Division of the High Court of Uganda-(ICD)

- Following the enactment of the International Criminal Court (ICC) Act, which domesticated the Rome Statute, the ICD is now recognized internationally as a viable alternative to the International Criminal Court (ICC) in line with the principle of complementarity.

- It is the first international criminal court in Africa. The ICD is called an International Criminal Court because it tries crimes of an international nature or those having components of international law and crimes that can potentially be committed on/at the international scene and which crimes are also in a way grave breaches of international law.

Background to the International Crimes Division of the High Court of Uganda-(ICD)

- Rule 8 of The High Court (International Crimes Division) Practice Directions, 2011 (hereinafter ICD Practice Directions) provides that the ICD shall apply Rules of Procedure and Evidence applicable to criminal trials in Uganda.

- In addition, the Division has the power to adopt “such other procedure as it considers to be justifiable and appropriate in all the circumstances” taking into account the provisions of Section 141 of the Trial on Indictments Act and Section 39 of the Judicature Act and having regard to rights and views of the parties. Finally, the Division may from time to time adopt practice directions for the better management of cases and for the orderly and timely disposal of cases.
Law Applicable

The law applicable includes the following:

- The Constitution of the Republic of Uganda, 1995 (as amended)
- The Judicature Act
- The International Criminal Court Act of 2010, Act No. 11 of 2010
- The Geneva Conventions Act Cap. 363
- The Trial on Indictments Act Cap. 23
- The Evidence Act Cap. 6
- The Penal Code Act Cap. 120
- The Amnesty Act Cap.
- The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011
- The Judicature (High Court) (International Criminal Division) Rules, 2016 (hereinafter referred to as ICD Rules)
- Customary International Law
The ICD can adopt the Rules of Procedure and Evidence that best suit its unique jurisdiction. This is more so the case also based on the fact that the ICD’s main mandate is in relation to ‘crimes of an international nature’ and therefore, the Rules of Procedure and Evidence for the Division must as much as possible envision both the national and international standards on trial on such crimes. See Rule 8(1) of The High Court (ICD) Practice Directions, 2011.
The Complementarity Principle

- The principle protects sovereignty, by reaffirming the primary role of States in exercising criminal jurisdiction over international crimes.
- Promotes effective investigation and prosecution, by encouraging states to make genuine efforts to hold perpetrators accountable in line with their duty to investigate and prosecute crimes;
- Facilitates a certain division of labor between different layers of jurisdiction, i.e. by resolving conflicts of jurisdiction and limiting cases that come before the ICC;
- Stimulates cooperation and sharing of good practices between international and domestic justice actors.
Complementarity principle cont.

To effectively exploit the benefits of the complementarity principle discussed above. Special teams must be assembled, after all the international courts and tribunals set up to investigate, prosecute and try serious crime are very highly specialized and have demonstrated efficacy in dealing with their tasks.
WHY SPECIALISED UNITS?
Investigations
(ICD Special Police Unit)

- The crimes are complex nature and require a higher level of skills. There are set standards for investigating international crimes and handling of evidence that requires a special team equipped with knowledge and skills to obtain admissible evidence if the effective delivery of justice is to be realized.

- The elements of these crimes are different than in national offences. The practice of cumulative charging is most times unlawful in national jurisdictions and so is the interpretation of the legality principles of *Nulla poena sine lege* and *nullem crinem sine lege*.

- The nature of evidence to be gathered considering the magnitude of these crimes such as war crimes, genocide, terrorism etc. is humongous and incomparable with the quantity of evidence in domestic cases. In the Kampala 2010 Bombings case, over 300 witnesses were interviewed, Over 500 pieces of physical evidence recovered from the bombing scenes and analyzed and over 500 pieces of documents prepared.

- Investigations of this nature have a huge financial burden which requires a special budget.
Investigations
(ICD Special Police Unit)

- The Uganda Police has a special unit attached to the International Crimes Division of the High Court.
- The officers are especially trained to handle the intricacies of investigating serious crimes of an international nature.
The office of the Director of Public Prosecutions (ODPP)

- The Director of Public Prosecutions is mandated under the Construction.A.120 (3) of the 1995 Constitution of Uganda to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously.
- The DPP has a specialized desk responsible for overseeing prosecution led investigation of crimes triable at the ICD.
- The Prosecutors are trained to appreciate the specificities and complexities of rules of evidence and procedures relating to prosecuting international crimes.
Trial Process

According to the UNFPA research it takes up to 6 years for a criminal trial to go through an ordinary trial (can be found at https://uganda.unfpa.org/sites/default/files/pub-pdf/Issue%20Brief%20Special%20Courts.pdf).

This time does increase due to the special nature of trials of serious crimes, arising from of the bulk of the circumstantial evidence produced to prove certain facts and the fact that the procedures used in the trials are longer, all meant to protect the integrity of the process and the substantive as well as due process rights of the accused.

A specialized trial can fast track such processes and prevent certain challenges often caused by lengthy trials like the strain on the witnesses memory, the loss of interest by victims in the matter et al.
Judgement and Sentencing

- The volume and complexity of evidence for judges to consider in serious crimes is not ordinary given the several charges that are usually brought against one suspect.

- Even judgement writing in these crimes is complex and requires assistance of well trained researchers. In the Kwoyelo’s trial which has commenced, the trial panel will have to hear and consider evidence of over 100 eye witnesses, as well as several documents and reports *inter-alia*. Specialized adjudicators who are properly supported are needed to effectively preside over such trial.
Victim Reparations

- R.48 of the ICD rules provides for Reparation and compensation for victims.
- Victim participation is a major tenet of International crimes and cannot be achieved without a specialized court with specialized procedures and rules of evidence. In Uganda which is a common law country, victim participation is a new thing. The rules as they are currently, are not categorical about what stages victim participation is envisaged. In the Kwoyelo Pre-Trial, the court adopted the ICC Rules of Procedure and Evidence and ruled that victims must participate in all stages of the case, right from investigations, and not just in regard to reparations.
Victim Reparations

- Under the ICD rules, the Court has discretion to order the convicted person to pay compensation as the Court deems fair and reasonable order reparations in addition to any other lawful punishment.

- While ordinary criminal trials provide for compensation, in a few types of criminal cases the ICD rules are more explicit and the victim lawyers can pray for this compensation because of the fact that it is victim centered trial.
Challenges and Recommendations

- The implementation of the Rome Statute has been achieved to a large extent, the court has however faced some challenges in ensuring adherence to best practices and.
- For instance, additional legislation is required to address various legal loopholes which create impunity gaps.
- Currently, there is a legal gap in relation to prosecution of crimes that occurred before the entry into force of the ICC Act of 2010. The loophole arises because the crimes with which Mr. Kwoyelo is charged, and those allegedly committed by other members of the Lord’s Resistance Army occurred in the 1990s, in a non-international armed conflict. This creates a temporal gap and renders both the Geneva Conventions Act and the ICC Act inapplicable to these crimes. As a result, Mr. Kwoyelo was charged with war crimes and crimes against humanity, based on customary international law, a procedure which is unprecedented in Uganda.
Challenges and Recommendations

During the pre-trial proceedings, defence counsel raised objections to charges based on customary international law. I ruled that based on the Constitution of Uganda, that Customary International Law is applicable. Part XXVIII of the constitution spells out our Foreign policy objectives which are based on several principles, including respect for international law and treaty obligations. The 1995 saved all treaties agreements or conventions entered into by Uganda with any country or international organization since its independence on 9/10/1962, and which was still in force immediately before the coming into force of the Constitution; or
Challenges and Recommendations

- The other gaps are in regard to the lack of substantive legislation for victim participation in court proceedings, and to provide access to reparations for the victims of international crimes, especially those from Northern Uganda.

- Witnesses must feel secure in order to co-operate with law enforcement and to support and testify during court proceedings.

- The importance of witness protection is highlighted in various international treaties and conventions requiring states to take appropriate measures to ensure that witnesses are adequately protected from potential retaliation.

- Currently, Uganda does not have an official witness protection mechanism in place. The Witness Protection Bill of 2012, which envisages the creation of a witness protection authority, has not yet been passed into law yet.
Challenges and Recommendations

- In practice, Judges take *adhoc or informal* measures, on a case by case basis under the ICD Rules, the Trial Judge or Panel may request the relevant government authorities to take measures to ensure the protection and well being of witnesses and victims. The Registrar is mandated, to take several protective measures, in consultation with relevant government authorities including providing accommodation for victims, physical protection and assist in obtaining medical, psychosocial and other appropriate assistance for witnesses and victims; and formulating short term and long terms plans for the protection of witnesses and ensuring victim participation amongst others.
Challenges and Recommendations

The Amnesty Act of 2000

- The Amnesty Act of Uganda was enacted in January 2000 and was originally intended to operate for a period of six months with the purpose of ending hostilities in northern Uganda and other parts of the country. It has been subsequently amended and extended several times. After expiry in May 2017, the Act has been renewed for another period of two years, until this year.

- In May 2002, an amendment was introduced to exclude those that had been granted amnesty already but had returned to rebellion, except in cases of coercion. Another significant amendment was introduced by the government to allow the Minister to exclude from the grant of amnesty, with approval of the Parliament, certain persons who were considered ineligible. Attempts to declare persons ineligible have not been successful.
In practice no person has been declared ineligible for amnesty; and it has been argued that the Act effectively granted a blanket amnesty to members of the LRA and other such groups that had committed heinous crimes. In 2015, in the Thomas Kwoyelo Reference Appeal, the Supreme Court cleared the air and stated that the Act was not intended to grant a ‘blanket amnesty’ but rather allowed for prosecution of those who did not qualify, that is, perpetrators of international crimes.
The Supreme Court interpreted section 2 of the Amnesty Act and said it could only cover political offences but not serious international crimes. Consequently, the Amnesty certificates did not exonerate perpetrators of international crimes. The challenge is for the victims, police and prosecutors to initiate prosecution of former LRA fighters for international crimes despite being granted certificates of amnesty.

**Structural and Operational challenges**

- Inadequate training opportunities for judges and support staff
- Frequent Transfer of trained Judges and Registrars
- Inadequate funding and facilities for outreach activities
Way Forward

- State parties to the Rome Statute should endeavor to have special Investigation, Prosecution and Adjudication teams to handle international crimes committed in their member states since success in fighting impunity requires such.

- A proper understanding of international Criminal Law is required for all stakeholders.
Way Forward

- Capacity building in the areas of International Criminal Law, particularly areas of Witness Protection, Victim Participation and reparations and particular components of the trial process e.g. the laws of procedure and evidence that are pertinent to prosecution of International Crimes.

- Incorporating International Crimes and procedure in syllabi of Universities, police academies and Judicial Training Institutions and the syllabi.

- Provide adequate resources for your judiciaries.
Conclusion

A person who kills 100,000 should stand areal chance in our courts of being tried and judged for killing 100,000”.

THANK YOU