

# Technology as a key tool for the prosecution of international crimes: Lessons from Uganda

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## **Abstract**

This article uses the context of Uganda to examine the role of technology in the prosecution of international crimes. It uses the International Criminal Court (ICC) complementarity framework to analyse two cases- *Dominic Ongwen* and *Thomas Kwoyelo*, exploring a question - whether the use of technology enhances the ICC's positive complementarity approach? The article draws substantially from the review of empirical literature, qualitative interviews and the author's work experiences at the two sites of justice - Uganda and The Hague. The article reveals a practical overlap between the two sites of justice in the use of digital evidence and witness protection. It is argued that use of technology enhances the criminal trial procedures, victims' rights and the legitimacy of the courts. It is equally argued that the use of technology has the potential to enhance the ICC's complementarity approach. The article contributes to current debates about the role of technology in international criminal justice.

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## **Keywords**

International criminal Justice-technology-International Criminal Court (ICC)-International Crimes Division (ICD)-complementarity-Uganda-legitimacy

## **1 Introduction**

This article explores the role of technology during the prosecution of international crimes, using Uganda as a case study. This is an important case study, due to the intersection of two sites of international criminal justice-one at the International Criminal Court (ICC) and other at the domestic level, under the ICC complementarity regime. In turn, this provokes questions how the use of technology affects the way in which complementarity is implemented, with a particular focus on victims as key constituencies of both sites of justice.

As technology is becoming more and more prevalent in the prosecution of international crimes, there is also need to consider the implications within the affected communities. It is important to distinguish between different forms of technology, ranging from audio-enhancement software to improve the quality of sound recordings, recorded testimony, and audio-visual representations of situations or cases. A notable example of the use of audio-visual representations was the documentary film *Kony* (2012), produced by Non-Governmental Organisations (NGO) as documentation of the LRA atrocities and advocacy for the arrest and prosecution of Joseph Kony at the ICC. Such audio/video (A/V) productions can serve to enhance the legitimacy of the ICC before its constituents, including victims. Stolk and Werner observe a central place of the image of victimhood in the introduction of trials at the ICC, but

stress that ‘the form of a criminal trial affects the presentation of their stories’.<sup>2</sup> It can thus be argued that the use of technology may have a positive impact on the imagery of victims during the trials.

Technological tools like live video monitors are recommended for the prosecution of sexual violence, and it is argued that court is still able to assess the witness’ demeanor and credibility despite their physical absence in the courtroom.<sup>3</sup> Delagrangé proposes the use of modern technology during the collection of victim information, including electronic application processes as a way of improving the efficiency and effectiveness of the ICC.<sup>4</sup> Similarly, the use of cartographic visual representations during opening statements of the Prosecution is regarded as one way in which the ICC seeks to bring the trials closer to the affected communities.<sup>5</sup> Digital evidence is any data stored or transmitted using a computer that may be used in court proceedings.<sup>6</sup> As highlighted in the strategic plans of the Office of the Prosecutor (OTP), the use of electronic evidence has the ability to reduce the heavy reliance on witness testimonies, associated risks and financial costs.<sup>7</sup> It can thus be argued that the use of digital evidence has an impact on the effectiveness of international criminal courts. However, the increasing use of digital evidence offers both opportunities and challenges, during the prosecution of international crimes.<sup>8</sup> Crucially, this suggests the need to further explore the

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<sup>2</sup> Sofia Stolk and Wouter Werner, ‘Moving Images: Modes of Representation and Images of Victimhood in Audio-Visual Productions’ in Kevin Jon Heller and others (eds.), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).

<sup>3</sup> J. J. Arguin, *Prosecution of Sexual Violence: Reducing the Risk of Re-Traumatization of Survivor Witnesses*, <[unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i.-reducing-risk-of-retraumatization-survivors-witnesses-arguin.pdf](http://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i.-reducing-risk-of-retraumatization-survivors-witnesses-arguin.pdf)> , accessed 25 September 2020, p.17.

<sup>4</sup> M. Delagrangé, ‘The Path towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court’, 18 *International Criminal Law Review* (2018) 540–562, p. 540.

<sup>5</sup> Sofia Stolk, ‘Imagining Scenes of Mass Atrocity from Afar: Maps and Landscapes at the International Criminal Court’ (2017) 5 *London Review of International Law* 425.

<sup>6</sup> E. Casey, *Digital Evidence and Computer Crime* (Jordan Hill, Elsevier Science & Technology, 2004), p. 12.

<sup>7</sup> S. S. Shoamanesh, ‘Institution Building: Perspective from within the Office of the Prosecutor of the International Criminal Court’, 18 *International Criminal Law Review* (2018) 489–516, p. 489.

<sup>8</sup> A. Ashouri and C. Bowers and Cherrie Warden, ‘The 2013 Salzburg Workshop on Cyber Investigations: An Overview of the Use of Digital Evidence in International Criminal Courts’, 11 *Digital Evidence & Elec Signature Law Review* (2014) 115-127, p. 115

factors that impact on the effective prosecution of international crimes. In what she refers to as procedural innovations, ICC judge, Fernandez De Gurmendi discourages the presentation of live evidence during pre-trial proceedings, and recommends the use of modern technology.<sup>9</sup> This use of technology in the presentation of evidence is also recommended in the final report of the Independent Expert Review of the ICC (IER).<sup>10</sup> There are global attempts to establish legal and ethical norms in order to make open source evidence more relevant in the prosecution of international crimes.<sup>11</sup> These legal developments and discourses illustrate the growing importance attached to the use of technology in the prosecution of international crimes. However, it is equally crucial to determine how technological tools would be used within the context of complementarity and domestic prosecutions. The ICC has devoted greater attention to promoting complementarity, in regards to the domestic trials. Theoretically, the ICC operates under the ‘complementarity’ principle, in line with the respect for state sovereignty.<sup>12</sup> The Rome Statute places an onus on states to prosecute the perpetrators of international crimes.<sup>13</sup> In what is termed ‘negative complementarity’, the ICC only intervenes as a Court of last resort, if states are either unable or unwilling to fulfil their obligations.<sup>14</sup> Under the positive complementarity approach, the ICC complements and supports domestic prosecutions, instead

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<sup>9</sup> S. De Gurmendi, ‘Enhancing the Court’s Efficiency. From the Drafting of the Procedural Provisions by States to Their Revision by Judges’, 16 *Journal of International Criminal Justice* (2018) 341–361, p. 354.

<sup>10</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 18 May 2021, <[asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](http://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf)> accessed 30 September 2020, para 554.

<sup>11</sup> OHCHR and University of California Berkeley School of Law, *Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law* (United Nations Publications 2020) <[www.ohchr.org/Documents/Publications/OHCHR\\_BerkeleyProtocol.pdf](http://www.ohchr.org/Documents/Publications/OHCHR_BerkeleyProtocol.pdf)>, accessed 18 May 2021.

<sup>12</sup> ICC, Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), Article 1 reads: ‘.. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute’.

<sup>13</sup> See Preamble of the Rome Statute, para. 6,

<sup>14</sup> *Ibid.*, paras 4 and 10, Article 17; See also L. Moffett, ‘Complementarity’s Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo’, 16 *International Criminal Law Review* (2016) 503–524, p. 506.

of serving as the primary option for justice.<sup>15</sup> This complementarity discourse has triggered scholarly debates, regarding the role of the ICC in developing domestic capacity for trying international crimes.<sup>16</sup> This is well illustrated through the remarks made by the first Chief Prosecutor Luis Moreno Ocampo, that the ‘ICC would be a “major success” if the number of cases that reach the Court happens to be: Zero’.<sup>17</sup> More importantly, the ICC is also viewed as a key contributor to the understanding and use of digital evidence in domestic jurisdictions.<sup>18</sup> Against the background of these debates, this article argues for a technology driven approach to complementarity. It makes a key contribution to the existing literature by offering an analytical framework for assessing the effectiveness of the ICC’s complementarity framework, through the prism of technology. For example, questions can be raised on how the use of specific technological tools affects the way in which victims are represented. In this context, the article considers the victims participating in the trials and the ‘abstract victims’ living within the affected communities.<sup>19</sup> This article examines the audio-visual features of the trials and the impact on the victims, as central constituents of the international criminal law project. Besides the outreach tools, two key procedures are examined: the use of digital evidence and technology for witness protection. These features are relevant in order to examine the efficiency of the courts. The overall aim of the article is to explore whether the use of technology enhances the ICC’s positive complementarity approach. The article draws substantially from the review of empirical literature, complemented with primary data from qualitative interviews with court staff, NGO representatives and lawyers. The primary goal was

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<sup>15</sup> W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice’, 49 *Harvard International Law Journal* (2008) 53-107, p. 53.

<sup>16</sup> C. De Vos *et al.*, ‘Introduction’, in C. De Vos *et al.* (eds.), *Contested Justice The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, Cambridge, 2015), p.3.

<sup>17</sup> F. Jessberger and J. Geneuss, ‘The Many Faces of the International Criminal Court’, 10 *Journal of International Criminal Justice* (2012) 1081-1094, p. 1083.

<sup>18</sup> L. Freeman, ‘Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials’, 41 *Fordham International Law Journal* (2018) 283-336, p.333.

<sup>19</sup> S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood’, 76 *Law and Contemporary Problems* (2014) 235-262.

to understand how technology feeds into the work of the international criminal justice processes. The semi structured elite interviews were conducted through a mixture of telephone and online via video technology. Salmon's Qualitative e-Research framework was used as a tool for organising and designing the interviews.<sup>20</sup> The University of Portsmouth ethical guidelines and usual ethical principles guiding socio-legal research applied during the entire process. This was vital in order to have verifiable research participants, and provide informed consent before participating in the online interviews.<sup>21</sup> The article also incorporates emic perspectives from the author's work at the two sites of international criminal justice, as a Visiting Professional at the ICC and advocate of the high court of Uganda. The aforementioned work provided the impetus for thinking about the role of technology in prosecuting international crimes. Besides its findings, a key contribution of the article lies in the way it conceptualises the positive complimentary role of the ICC. The article does not set out to provide an exhaustive discussion of the two cases, but identifies the salient aspects regarding the use of technological tools. This article begins with a brief discussion on the northern Ugandan conflict. This history helps us to understand the background of the current international criminal trials in the Uganda situation. Section two examines the use of technology during the prosecution of Dominic Ongwen at the ICC. Three key procedures are examined: the use of digital evidence, technology for witness protection and outreach. Section three discusses the efforts to use technology during the International Crimes Division (ICD) trial, with a link to the principle of positive complementarity. The section will show how these technology related challenges impacted on the court's legitimacy. The last section makes some recommendations for effective use of technology during the prosecution of international crimes, in line with the complementarity regime.

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<sup>20</sup> J. Salmons, *Doing Qualitative Research Online* (SAGE Publications, London, 2016).

<sup>21</sup> J. Salmons, 'Designing and Conducting Research with Online Interviews' in Janet Salmons (ed.), *Cases in Online Interview Research* (SAGE Publications, California, 2012), 1-130, p. 8.

## 2 Historical context of Ugandan situation

Northern Uganda erupted into a civil conflict in 1987, one year after President Yoweri Museveni took charge of the country. The Lord's Resistance Army (LRA), a new rebel movement was formed by Joseph Kony. The LRA were implicated in acts of sexual violence, murder and recruitment of children as soldiers. It is estimated that about 20,000 children were abducted and recruited into the military by the LRA between 1987 and 2002.<sup>22</sup> Their atrocities caused massive internal displacement of more than 440 000 persons in Northern Uganda.<sup>23</sup> They received ammunition and supplies from the neighboring Sudanese government, due to existing political conflicts between Uganda and Sudan.<sup>24</sup> In 1994, there was a temporary ceasefire and a peace agreement was close to being reached between the Government of Uganda and the LRA.<sup>25</sup> However, the LRA returned to the bush and the violence escalated in the subsequent years. In July 2006, the Ugandan government and the LRA commenced peace talks, convened in Juba, South Sudan. However, they collapsed in December 2008.<sup>26</sup> Either side viewed the other with suspicion and the Ugandan government opted for a military operation to end the insurgency.<sup>27</sup> Due to the demand for peace, the Ugandan government

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<sup>22</sup> 'Child Soldiers International, *Child Soldiers Global Report 2004 - Uganda, 2004*' (Child Soldiers International, London, 2004).

<sup>23</sup> 'The Lord's Resistance Army and Children' (Office of the Special Representative of the Secretary-General for Children and Armed Conflict 2012) <childrenandarmedconflict.un.org/2012/06/the-lords-resistance-army-and-children/> accessed 19 March 2020.

<sup>24</sup> Z. Lomo and L. Hovil, 'Behind the Violence: Causes, Consequences and the Search for Solutions in Northern Uganda', *Working Paper No.11 Refugee Law Project*(2004)p.28.

<sup>25</sup> See Agreement between the Uganda Government and the Lord's Resistance Army (LRA) (Gulu Ceasefire) 2 February 1994, available at: [file:///C:/Users/Admin/Downloads/UG\\_940202\\_The%20Gulu%20Ceasefire.pdf](file:///C:/Users/Admin/Downloads/UG_940202_The%20Gulu%20Ceasefire.pdf), accessed 10 March 2021.

<sup>26</sup> D. Hendrickson and K. Tumutegyeize, *Dealing with Complexity in Peace Negotiations: Reflections on the Lord's Resistance Army and the Juba Talks* (Conciliation Resources, London, 2012), p. 5.

<sup>27</sup> 'Army Doubts Kony Peace Offer' *New Vision*, Kampala, 25 May 2006.

enacted an Amnesty Act in 2000, that offered immunity and resettlement packages to LRA fighters who surrendered. Consequently, over 26,000 people in the whole country responded positively and returned home.<sup>28</sup> However, the situation changed in 2004, when the government reduced the amnesty period from six to three months, and ended its application towards the LRA commanders.<sup>29</sup> The reduction of amnesty was criticised by some observers who noted that it delayed the peace process.<sup>30</sup> In 2002, the Ugandan government began an intensive military drive named 'Operation Iron Fist', exerting further pressure on the LRA.<sup>31</sup> Despite its initial success, the number of Internally Displaced People (IDPs) grew to over 800,000 at the end of 2003.<sup>32</sup> One year after the ICC commenced its work in 2002, the Ugandan government referred the situation to the ICC for investigation. The self-referral was also perceived as a political tool used by the government against the LRA, while overlooking the crimes committed by the Ugandan army. On 6 May 2005 the OTP filed an application to Pre-Trial Chamber II for warrants of arrest for five of the most senior commanders in the LRA, and they were subsequently issued on 8 July 2005.<sup>33</sup> Subsequently, arrest warrants relating to crimes against humanity and war crimes, were issued for the LRA's top 5 commanders in 2005. Dominic Ongwen, one of LRA's top commanders surrendered in 2015, and his trial before the ICC commenced in 2016.<sup>34</sup> In 2008, the ICC Trust Fund for Victims started its assistance mandate operations in Uganda, as a way or repairing the post-war affected

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<sup>28</sup>See, Conciliation Resources, *Undermining the LRA: Role of Uganda's Amnesty Act* (Conciliation Resources, London, 2012),.

<sup>29</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict 2012, *supra* note 21rome stat.

<sup>30</sup> Conciliation Resources, *supra* note 26.

<sup>31</sup> A. Macdonald, "In the Interests of Justice?" The International Criminal Court, Peace Talks and the Failed Quest for War Crimes Accountability in Northern Uganda', 11 *Journal of Eastern African Studies* (2017)628-648, p.631.

<sup>32</sup> K. C. Dunn, 'Uganda: The Lord's Resistance Army', 31 *Review of African Political Economy* (2004) 139-142, p.141.

<sup>33</sup> ICC, 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants', 14 October 2005, <[www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo\\_20051014\\_English1.pdf](http://www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf)> accessed 15 September 2020, p.3.

<sup>34</sup> ICC, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following the Surrender and Transfer of Top LRA Commander Dominic Ongwen' (21 January 2015).



communities.<sup>35</sup> Besides the ICC intervention and amnesty, another form of transitional justice related to reconciliation through traditional conflict resolution ceremonies within the war affected communities. On 4 February 2021, the Trial Chamber IX of the ICC convicted Ongwen of 61 out of 70 counts of war crimes and crimes against humanity, and on 6 May 2021, sentenced him to 25 years imprisonment.<sup>36</sup> Against the background of Ongwen's conviction, the next section will analyse the technological features of the case, to explore how they contributed to the efficiency of the trial and impacted on the court's relationship with the victims.

### **3 Technology as a key feature in the Ongwen trial at the ICC: A step in the right direction**

This section examines the use of technology during the prosecution of Ongwen at the ICC. Besides the outreach tools, two key procedures are examined: the use of digital evidence and technology for witness protection. It will also examine the audio-visual features of the trial and the impact on the victims, as central constituents of the ICC. The section will show how these features impacted on the court's legitimacy. The prosecution used audio-enhancement software to improve the quality of sound recordings. According to the Prosecutor, 'Digital enhancement gives translators and witnesses the best possible opportunity to understand the content of the sound recordings'.<sup>37</sup> On the other hand, the use of such technology could invite concerns about the accuracy of content and reliability of the evidence. It is important to note that a large portion of the prosecution evidence was based on intercepted radio communications between

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<sup>35</sup> K. J. Fisher, 'Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims', 20 *International Criminal Law Review* (2020) 318–345.

<sup>36</sup> *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Sentence, 6 May 2021; See also, T. R Kirabira, 'Ongwen at the International Criminal Court', 25 *ASIL Insights* (2021).

<sup>37</sup> *The Prosecutor v. Ongwen*, Prosecutor's Pre-Trial Brief, 6 September 2016, ICC-02/04-01/15-533, 6 September 2016, para 80-81.

Ongwen and other LRA commanders. The radio intercepts were obtained from the Uganda army, and greatly enhanced the prosecution's case. Crucially, it can be argued that digital audio and video-recordings constitute valuable evidence for the investigation and prosecution of international crimes. This evidential material does not replace, but rather reinforces eye witness testimony and documentary evidence. One notable technological feature under the Rome Statute involves the preservation of witness testimonies. Article 56 of the Rome Statute allows for the preservation of evidence through prior recorded testimony, that may not be available at trial.<sup>38</sup> In addition, Article 69(2) permits the court to admit 'recorded testimony of a witness by means of video or audio technology'.<sup>39</sup> In terms of the procedure, Rule 68(2) of the Rules provides that,<sup>40</sup>

[T]he Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.

During the *Ongwen* case, the court allowed prior recorded testimony of thirty-eight witnesses.<sup>41</sup> Besides the collection and preservation of evidence, such procedural tools allow for the testimony of vulnerable witnesses like victims of Sexual and Gender-Based Violence (SGBV).

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<sup>38</sup> Rome Statute, *supra* note 12.

<sup>39</sup> *Ibid.*

<sup>40</sup> Rule 68(1) ICC Rules of Procedure and Evidence (RPE)

<sup>41</sup> *The Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016; *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-711, Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 23 February 2017.

Elsewhere, I have stressed the importance of a victim-oriented approach to justice when interpreting the Rome statute and ICC jurisprudence.<sup>42</sup> It is important to note that the Rome Statute allows victims to appear before the Court as independent parties.<sup>43</sup> The term victims refers to actual human beings and legal persons that suffered harm as a result of the international crimes before the Court.<sup>44</sup> In practice, the participation of victims in the trials depends on their links with the accused persons and the Prosecutor's discretion.<sup>45</sup> A 'victim of the Case' is entitled to participate in the trial as they establish a causal link between the harm suffered and the accused, while a 'victim of the Situation' is not entitled to participate, due to the absence of the link.<sup>46</sup> Due to their first hand experiences, victims often appear as witnesses in the trials. However, there are some challenges that come with the dual victim-witness status. According to Baumgartner, 'even if victims can be heard as witnesses, their testimony could be somewhat flawed because of a certain appearance of partiality and the clear interests they have in the outcome of the procedure, that is, with regard to reparations'.<sup>47</sup> Nonetheless, the duality of victim-witness status underlines the crucial importance of both victim and witness testimony at the ICC. In the *Ongwen* case, the court allowed video-testimonies of particular victims of SGBV at the pre-trial state of the case.<sup>48</sup> The Chamber made an expansive interpretation of Article 56, noting that 'In fact, evidence may be preserved under that provision[Article 56] even before the surrender or voluntary appearance of the person

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<sup>42</sup> T. R. Kirabira, 'Elements of aggravation in ICC sentencing: victim centred perspectives', 13(2) Amsterdam Law Forum (2021) 25–42.

<sup>43</sup> See Rome Statute, Article 68(3) and Rule 85, RPE.

<sup>44</sup> *Ibid.*, see also L. Walley, 'Victims' Participation in ICC Proceedings: Challenges Ahead', 16 *International Criminal Law Review* (2016) 995-1017, p.997.

<sup>45</sup> A. Sehmi, 'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the Kenyatta Case', 16 *Journal of International Criminal Justice* (2018) 571–591, p.576.

<sup>46</sup> *Ibid.*

<sup>47</sup> E. Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court', 90 *International Review of the Red Cross* (2008) 409-440, p. 433.

<sup>48</sup> *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-277, Pre-Trial Chamber II, Decision on the 'Prosecution Application for the Pre-Trial Chamber to preserve evidence and take measures under Article 56 of the Rome Statute', 27 July 2015, para. 4.

concerned'.<sup>49</sup> This interpretation means that prior recorded evidence is not only relevant during procedural stages of the trial, but also in the crucial stages of investigations. More broadly, the interpretation of Article 56 of the Rome Statute in the *Ongwen* case is recognised as a milestone precedent for the safeguarding of vulnerable victims and preservation of evidence, where cases risk dormancy.<sup>50</sup> A different perspective could be that justice is based served when evidence is thoroughly tested through the oral examination of witnesses. Nonetheless, the interpretation of Article 56 of the Rome Statute in the *Ongwen* case suggests a step in the right direction, regarding the role of technology in the prosecution of international crimes. On 23 August 2019, the Trial Chamber VI of the ICC admitted prior recorded testimony of witnesses in the *Bosco Ntaganda* sentencing case, following Rule 68(2)(b) of the Rules.<sup>51</sup> The legal provision allows the Chamber to consider prior recorded testimony under certain circumstances like 'interests of justice', whilst maintaining the rights of the accused.<sup>52</sup>

Suffice to say, the use of prior recorded testimony does not replace *viva voce* testimony of witnesses. However, in contexts like Uganda where the accused person is charged with multiple crimes and counts, prior recorded evidence serves a key role in expediting the trials while adducing the most relevant evidence. Such evidence would also be easier for the prosecution to collect. Since quantity does not necessarily equate to quality,<sup>53</sup> it is important for the prosecution to gather the most relevant evidence, as outlined under the RPE.<sup>54</sup> Another technological tool in the *Ongwen* case relates to the use of video links for prosecution

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<sup>49</sup> *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Trial Judgment, 4 February 2021, para. 64 (Ongwen Trial Judgment)

<sup>50</sup> P. Bradfield, 'Preserving Vulnerable Evidence at the International Criminal Court – the Article 56 Milestone in Ongwen', 19 *International Criminal Law Review* (2019) 373–411 .

<sup>51</sup> *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-1029, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P0041 and P-0103, 20 November 2015, para. 25. See also, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Sentencing judgment, 7 November 2019, paras.5-6.

<sup>52</sup> See RPE; See also Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, *supra* note 41, para 16.

<sup>53</sup> R. Keydar, 'Mass Atrocity, Mass Testimony, and the Quantitative Turn in International Law', 53 *Law & Society Review* (2019) 554-587.

<sup>54</sup> See Rule 68(2)(b), RPE.

witnesses. All the witnesses who were raped and sexually enslaved by Ongwen while they were children, gave their evidence by video link from Uganda, without having to travel to The Hague.<sup>55</sup> Benjamin Gumpert, the lead prosecutor in the trial of Ongwen recommends this as a standard practice, noting that, ‘There should, I think, have to be a definable reason, approved by the judge/s, if a witness is going to be required to displace themselves and travel hundreds or thousands of miles from their home to testify in the courtroom’.<sup>56</sup> However, in what is termed ‘Judging by Observing’, normal face to face contact allows judges to test the quality of the testimony and competence of witnesses.<sup>57</sup> Ultimately, there would be need to balance the arguments for remote vis a vis face to face testimony. In the *Ongwen* case, the prosecution used a variety of technological tools, including ‘electronic visual representations of the four attack locations derived from the use of drone photography/video and three-dimensional laser scanning’.<sup>58</sup> These representations served as evidence, that was also relayed to the victims during the trial.<sup>59</sup> At the Pre-Trial stage, the Prosecution adduced evidence of video footage and photographs taken by the Ugandan security, purporting to illustrate the extent of Ongwen’s crimes on Lukodi Internally Displaced Persons’ (IDP) camps.<sup>60</sup> Crucially, these digital tools allow the recognition of various forms of evidence that links the perpetrators to the scenes of crime. Combs raises concerns about the use of non-testimonial technology like videos and electronic data, as these might undermine witness testimonies, where inconsistencies arise.<sup>61</sup>

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<sup>55</sup> Interview with Benjamin Gumpert, lead prosecutor in the *Ongwen* case, 12 March 2021.

<sup>56</sup> Interview, 6 May 2021.

<sup>57</sup> G. Chlevickaitė, B. Holá and C. Bijleveld, ‘Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There “Standard Practice” in International Criminal Justice?’ 18 *Journal of International Criminal Justice* (2020) 185-210, p. 195.

<sup>58</sup> *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/1, 5-438, Trial Chamber IX, Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016, 18 May 2016, § 93.

<sup>59</sup> *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-T-25-ENG ET WT 23-05-2016, Trial Chamber IX, Transcript, 23 May 2016, p. 9. “The images ‘will be shown to 25 witnesses so that they can describe to the Bench where the attackers came from, where a particular event occurred. And their comments on it, markings on it if it be, if that be done, will then become part of their evidence’”.

<sup>60</sup> Prosecutor’s Pre-Trial Brief, *supra* note 40, paras. 376, 381, 398

<sup>61</sup> Nancy Amoury Combs, ‘Grave Crimes and Weak Evidence: Fact-Finding Evolution in International Criminal Law’ (2017) 58 *Harvard International Law Journal* 47.

She recommends for more probative evidence for example surveillance videos, as a way of corroborating the testimonial evidence<sup>62</sup>. While recognising the growing role of technology in the prosecution of international crimes, David Crane, the founding Chief Prosecutor of the Special Court for Sierra Leone, raises some concerns that,

The rules of evidence still apply however requiring appropriate foundation such as reliability and relevance. The standard is such that most of the data and information that swirls around and atrocity zone render much of it useless...as much as 90%.<sup>63</sup>

In the *Ongwen* case, the Defence requested the Chamber to exclude a video by one of the Prosecution experts, Professor Mezey, claiming that it was obtained by means of a violation of Ongwen's human rights.<sup>64</sup> The Chamber rejected the Defences' request, since the requirements for the application of Article 69(7) of the Statute had not been established.<sup>65</sup> Nonetheless, the concerns raised by the Defence suggest a need to embrace more probative technology, to enhance the credibility and reliability of digital evidence in the courts. On the same basis, we are reminded that digital evidence still needs to meet the standard evidential threshold and judicial assessment during international criminal trials. Away from the use of digital evidence, it is important to link the members of the affected communities and victims to justice sites in The Hague, since proximity enhances the court's efficiency.<sup>66</sup> As mentioned in the previous discussions, there is a difference between victims and witnesses in terms of

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<sup>62</sup> *Ibid.*

<sup>63</sup> Interview, 1 March 2021.

<sup>64</sup> Ongwen Trial Judgment, *supra* note 49, para. 56.

<sup>65</sup> *Ibid.*; See also Article 69(7) of the Rome Statute precluding the admission of evidence obtained by means of a violation of the Statute or internationally recognised human rights, "where (a) the violation casts substantial doubt on the reliability of this evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings".

<sup>66</sup> S. Stolk and W. Werner, *supra* note 2; S. K. Ford, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?' 43 *John Marshall Law Review* (2010) 715-752, p. 715.

their participation and evidential roles during the trials.<sup>67</sup> Whilst many witnesses participate in the trials directly during oral testimony, victims participate through their legal representatives. Therefore, the use of video links allowed for victims' participation in the Ongwen trial. The need to make victims visible creates opportunities for both state and non-state actors to engage in the Court's work. International organisations were influential in linking the members of the affected communities to the ICC trial. As one clan leader in Northern Uganda attests:

The Danish refugee council, the Swedish government who helped in screening of the case in the community to watch so that they can feel that they were part of the case. It [live video screening] made the community feel that their voice also matters.<sup>68</sup>

A member of a victims' group affirms the critical role of NGOs during the Ongwen trial, but also shows the impact of technology on victims' perceptions, noting:

The benefit is that they[NGOs] helped us to know what is happening in the case and also helped us to watch on TV what was happening in the court even when we are here in Uganda. They also gave us a good knowledge about the case which we would not have got[ten] alone...<sup>69</sup>

Visual effects literature stresses the importance of such visual effects in international criminal justice, including audiovisual broadcasting of court proceedings, in what Tallgren calls 'the

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<sup>67</sup> Baumgartner, *supra* note 47, p.433.

<sup>68</sup> Interview, 8 April 2021.

<sup>69</sup> Interview, 8 March 2021.

power of visible justice'.<sup>70</sup> However, the audio-visual productions screened by the ICC outreach teams have the potential to impact on the way in which victims and affected communities perceive the court. Stolk and Werner argue that the majority of such videos are promotional materials that aim to legitimise the ICC among the affected communities using a victim centred strategy.<sup>71</sup> It can be argued that such audio-visual productions are not necessarily strategic outputs for legitimisation purposes. Nonetheless, they potentially contribute to the power of the court, as it serves as a legitimate justice mechanism for multiple constituencies, including the victims who are eager to follow the progress of the trials in The Hague. Crucially, the use of such technology serves to link the sites of international criminal justice, while enhancing the legitimacy of the courts before the affected communities. Finally, technology played a key role in the protection of witnesses in the *Ongwen* case. Protected witnesses had their faces distorted as a way of protecting their identities. According to a local NGO representative, such technology provides an opportunity for witnesses to discuss about the situation freely outside of courtroom during the course of the trials.<sup>72</sup> Despite the positive impacts of technology, there are critical concerns that need to be addressed in order to make witness testimonies more effective during trials. From a linguistic and cultural anthropology perspective, Swigart raises questions about witness testimonies in the *Ongwen* case, for example, the interpretation from Acholi into the working languages of the Court.<sup>73</sup> According to the lead prosecutor in the *Ongwen* trial, 'The technology of automated translation and interpretation is also going to have a huge impact on trials where the participants speak different languages'.<sup>74</sup> In sum, the *Ongwen* case highlights the critical role of technology in the

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<sup>70</sup> I. Tallgren, 'Come and See? The Power of Images and International Criminal Justice', *International Criminal Law Review* 2017,259-280, p. 259.

<sup>71</sup> S. Stolk and W. Werner, *supra* note 2.

<sup>72</sup> Interview,6 March 2021.

<sup>73</sup> L. Swigart, 'Unseen and Unsung: ICC Language Services and Their Impact on Institutional Legitimacy' in F. Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press, Cambridge, 2019) 272-296.

<sup>74</sup> Interview with Benjamin Gumpert,12 March 2021.



prosecution of international crimes. It is important to note that the presentation of prior recorded testimony and the use of video-conferencing technology are important aspects of the part of the OTP Strategy.<sup>75</sup> We can thus argue that such technology should equally be envisioned under the complementarity regime. In light of the complementarity approach, the next section will explore the second site of international criminal justice—the domestic prosecution of international criminal crimes in Uganda.

#### **4 (In)efficiency at the ICD: Technology as a relevant complement**

This section carries the technology debate forward, by exploring the salient features like witness protection and video conferencing. The overall aim is to explore whether the use of technology enhances the Rome Statute’s complementarity approach. In light of the theoretical framework of this article, the section views the International Criminal Division (ICD) in Uganda, as a complementarity site of international criminal justice and the ICC.

##### ***4.1 Limited protection for witnesses at the ICD***

Officially established in 2008, the Court was originally referred to as the War Crimes Division of the High Court, before rebranding to the ICD.<sup>76</sup> Although its establishments traces back to the Juba peace negotiations between the Ugandan government and the LRA in 2008, the ICD is also viewed as a product of the ICC’s intervention.<sup>77</sup> Within the complementarity framework, the ICD can be regarded as the primary site of justice, whilst the ICC is complementary.

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<sup>75</sup> See, OTP Strategic Plan, 2019 – 2021 (17 July 2019) p.21 <[www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf](http://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf)>, accessed 20 May 2021.

<sup>76</sup> M. Kersten, *Justice in Conflict: The Effects of the International Criminal Court’s Interventions on Ending Wars and Building Peace* (Oxford University Press, Oxford, 2016), p. 110.

<sup>77</sup> W. Rist, *Why Uganda’s New War Crimes Court Is a Victory for the ICC*, JURIST (29 May 2008), <[www.jurist.org/commentary/2008/05/why-ugandas-new-war-crimes-court-is/](http://www.jurist.org/commentary/2008/05/why-ugandas-new-war-crimes-court-is/)>, accessed 22 May 2021.

Therefore, this primary site of justice serves to close the ‘impunity gap’ left by the ICC, that only indicted the top commanders.<sup>78</sup> In 2010, Uganda adopted new legislation that incorporates provisions of the Rome Statute into Uganda law,<sup>79</sup> and gives the High Court jurisdiction over war crimes and crimes against humanity. The establishment of the ICD, drafting of applicable legislation and the training of judges, were mainly funded by external donors.<sup>80</sup> To some scholars, it was created as a legal institution to selectively prosecute LRA members by the Ugandan government.<sup>81</sup> Within the Ugandan context, the domestic judicial organs regarded positive complementarity as a form of international assistance to promote best practices, technical expertise in developing legislation and witness protection at the ICD.<sup>82</sup> In 2016, the government adopted the ICD Rules, that were viewed as an important step in the accountability process, specifically, the aspects of victim participation and victim protection.<sup>83</sup> Both judges and lawyers at the ICD acknowledge that the court requires special attention due to the nature of the crimes.<sup>84</sup> Kwoyelo was a former LRA director of operations, who was captured in 2009 and charged for war crimes and crimes against humanity.<sup>85</sup> Initially, his trial had stalled until 2015 when the Supreme Court ruled annulled his amnesty, paving a way for the resumption of his trial.<sup>86</sup> According to Ugandan lawyer Oola, the Kwoyelo trial was promoted by ICC

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<sup>78</sup> J. McKnight, ‘Accountability in Northern Uganda: Understanding the Conflict, the Parties and the False Dichotomies in International Criminal Law and Transitional Justice’, 59 *Journal of African Law* (2015)193–219, p 213.

<sup>79</sup> International Criminal Court Act 2010

<sup>80</sup> A. Macdonald, ‘“Somehow This Whole Process Became so Artificial”’: Exploring the Transitional Justice Implementation Gap in Uganda’, 13 *International Journal of Transitional Justice* (2019) 225–248, p.239.

<sup>81</sup> *ibid.*, p.112.

<sup>82</sup> See Paper presented by the Registrar of the ICD at a Regional Forum on International and Transitional Justice on 30th July, 2012, p.3 <asf.be/wp-content/uploads/2012/10/Case-Study-of-the-International-Crimes-Division-of-Uganda.pdf>, accessed 04 October 2020.

<sup>83</sup> Ugandan International Crimes Division (ICD) Rules 2016. Analysis on Victim Participation Framework. Final Version( REDRESS, London 2016) . <redress.org/wp-content/uploads/2017/12/1608REDRESS\_ICD-Rules-Analysis.pdf,accessed> 20 May 2021.

<sup>84</sup> J. P. Bako, *One Step Forward, One Step Back: The Fate of Victims Before the International Crimes Division of Uganda*, (IJ Monitor,27 July 2018 ) <www.ijmonitor.org/2018/07/one-step-forward-one-step-back-the-fate-of-victims-before-the-international-crimes-division-of-uganda/>, accessed 04 October 2020.

<sup>85</sup> *Uganda v. Thomas Kwoyelo*, HCT-00-ICD-Case No. 02/10 See also McKnight,*supra* note 78,at 205.

<sup>86</sup> McKnight,*supra* note 78,at 205

proponents as a practice of complementarity.<sup>87</sup> A similar perception is held by a local member of the ICC contact office in Uganda, who notes that ‘The ICD is the smaller version of the ICC which is done here in Uganda. They both try the same crimes but at different levels’.<sup>88</sup> These observations raise concerns about the way in which the Kwoyelo trial is conducted, from a complementarity framework. At the time of writing this article, the Kwoyelo trial was still underway, and 20 Prosecution witnesses have testified. One of the key challenges relates to the use of two different sites of justice within the domestic jurisdiction. It is important to note that the ICD is located in Uganda’s capital Kampala. However, as a way of bringing justice closer to the affected communities, the ICD conducts the Kwoyelo trial in the Northern Ugandan city of Gulu. On average, three sessions are conducted annually, where the judges, lawyers and support staff all travel from Kampala to Gulu. This mode of operation is problematic, as it makes the trial costly.<sup>89</sup> According to a prosecutor at the ICD, the use of audio visual means would greatly help reduce the resource intensity of the Kwoyelo trial.<sup>90</sup> The ICC is not directly involved in any support towards the prosecution of Kwoyelo. This lack of support can be attributed to the fact that Kwoyelo was not among the LRA commanders indicted by the ICC. However, on one occasion, Kwoyelo requested the ICD judges to transfer him to the ICC, due to lack of capacity at the ICD, noting:

I have been severely denied justice .... I have been in prison for 10 years now. Therefore, with due respect to this court, I request that my case be transferred to the ICC because I

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<sup>87</sup> S. Oola, ‘In the Shadow of Kwoyelo’s Trial The ICC and Complementarity in Uganda’, in C. De Vos *et al.*, (eds.), *Contested Justice The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, Cambridge, 2015), at 148.

<sup>88</sup> Interview ,2 March 2021.

<sup>89</sup> Interview with ICD staff ,3 March 2021.

<sup>90</sup> Interview ,2 March 2021.

want it to be completed because this court is handling my trial so slowly and yet other cases have progressed faster than mine.<sup>91</sup>

The aforementioned statement suggests a need to reconsider the way in which the complementarity framework is implemented. In relation to capacity building, the domestic courts need to be supported to develop the relevant tools, including technology. The second key challenge in the *Kwoyelo* case relates to the protection of victims and witnesses. The trial resumed in 2018 and 2019, but with multiple technical challenges. For example, in March 2019, one witness testified through video while the rest testified in a closed court session.<sup>92</sup> The judges justified these measures as a way of protecting the witnesses. The trial was delayed, partly because of legal uncertainty regarding the application of witness protection measures like closed court sessions.<sup>93</sup> This calls for a review of the technological tools that could be appropriate in such circumstances. Similar challenges were experienced in 2020, when the trial was held under closed doors and in the absence of victims, as one of the protective measures for the key prosecution witnesses.<sup>94</sup> This measure was done after the court objected to the defence lawyer's suggestion for the use of technology.<sup>95</sup> Nonetheless, some of the prosecution witnesses testified with protective measures, through a video link, that only projected audio voices in the courtroom.<sup>96</sup> According to Kwoyelo's lead lawyer, the available

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<sup>91</sup> L. O. Ogora, *Kwoyelo Requests Transfer to the ICC Due to Prolonged Trial; Accuses Prison Guard of Assault*, (International Justice Monitor, New York, NY, 12 March 2019), <[www.ijmonitor.org/2019/03/kwoyelo-requests-transfer-to-the-icc-due-to-prolonged-trial-accuses-prison-guard-of-assault/](http://www.ijmonitor.org/2019/03/kwoyelo-requests-transfer-to-the-icc-due-to-prolonged-trial-accuses-prison-guard-of-assault/)>, accessed 22 May 2021.

<sup>92</sup> Avocats Sans Frontières, *Resuming of witnesses' hearings after Kwoyelo's claim of assault in jail is settled* (Avocats Sans Frontières, Brussels, 5 July 2019), <[www.asf.be/blog/observation/01-05-07-2019-resuming-of-witnesses-hearings-after-kwoyelos-claim-of-assault-in-jail-is-settled/](http://www.asf.be/blog/observation/01-05-07-2019-resuming-of-witnesses-hearings-after-kwoyelos-claim-of-assault-in-jail-is-settled/)> accessed 20 May 2021.

<sup>93</sup> L. O. Ogora, *Uganda: Dispute Over Use of Closed Sessions Postpones Kwoyelo's Trial* (International Justice Monitor, New York, 16 October 2019), <[allafrica.com/stories/201911070501.html](http://allafrica.com/stories/201911070501.html)> accessed 20 May 2021.

<sup>94</sup> L. O. Ogora, *Four Witnesses Conclude Testimony as Kwoyelo's Trial is Adjourned to March 2020* (International Justice Monitor, New York, 17 January 2020), <[www.ijmonitor.org/2020/01/four-witnesses-conclude-testimony-as-kwoyelos-trial-is-adjourned-to-march-2020/](http://www.ijmonitor.org/2020/01/four-witnesses-conclude-testimony-as-kwoyelos-trial-is-adjourned-to-march-2020/)> accessed 20 May 2021.

<sup>95</sup> *Ibid.*

<sup>96</sup> L. O. Ogora, *Four Witnesses Testify in Thomas Kwoyelo Trial; Widow Gives Testimony About Husband's Death* (International Justice Monitor, New York, 15 March 2020), <[www.ijmonitor.org/2020/03/four-witnesses-testify-in-thomas-kwoyelo-trial-widow-gives-testimony-about-husbands-death/](http://www.ijmonitor.org/2020/03/four-witnesses-testify-in-thomas-kwoyelo-trial-widow-gives-testimony-about-husbands-death/)> accessed 21 May 2021.

technology at the court needs to be upgraded, in order for the trial to make sense to the parties.<sup>97</sup> In response to a closed court session at the ICD, one victim stated; ‘Can't they[court] find another way of protecting their witnesses rather than closing the room? Or even find a way of letting us know what is happening?’<sup>98</sup> This frustration affirms the view held by Kwoyelo’s lead lawyer that the closed courts limit the access to justice for the affected communities.<sup>99</sup>

#### ***4.2 Complementarity as a possible solution***

As the ICD lacks the necessary capacity, a question can be posted; should the ICC invoke the complementarity principle to mitigate the domestic challenges? Another key question would then be; whether the use of technology enhances the ICC’s positive complementarity approach. The observations in the *Kwoyelo* case at the ICD reveal a practical overlap between the ICC and ICD, regarding the use technology, specifically in relation to witness protection. One factor that creates a ‘technological bridge’ between the ICC and ICD, is the legal gap, regarding protective measures. While Rule 87 of the ICC Rules of Procedure and Evidence<sup>100</sup> explicitly provides for protective measures, the ICD does not have explicit regulations for the protection of witnesses. Similarly, there is no law providing for witness protection in Uganda. The Witness protection Bill has not yet been passed into law.<sup>101</sup> This legal overlap suggests that in addition to technical support, the government needs to enact the relevant laws within the complementarity framework, to allow the ICD protect witnesses through innovative measures. A local NGO representative illustrates a comparative approach to witness protection, noting ‘where need be, altered voice recording is preferable, as ...as was the case with the ICC’.<sup>102</sup>

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<sup>97</sup> Interview, 4 March 2021.

<sup>98</sup> L. O. Ogora, *Uganda: Dispute Over Use of Closed Sessions Postpones Kwoyelo's Trial* (International Justice Monitor, New York, 16 October 2019), <[allafrica.com/stories/201911070501.html](http://allafrica.com/stories/201911070501.html)>, accessed 20 May 2021.

<sup>99</sup> Interview, 4 March 2021.

<sup>100</sup> RPE, *supra* note 40.

<sup>101</sup> The Witness Protection Bill, 2011,

<sup>102</sup> Interview, 4 March 2021.

The author resonates with this option, considering the mixed perceptions about the use of prosecutorial mechanisms as a means of transitional justice in Northern Uganda. The witnesses need to be protected in case they face retaliation from members of the community that do not approve of the trial. In terms of procedure, the ICC practice relating to victim participation and witness testimony are instructive to the ICD.<sup>103</sup> To his end, Sharon Nakandha, a member of the external team of lawyers representing victims in the *Ongwen* case suggests a practical technological tool for the ICD in relation to the protection of witnesses:

Step one is to digitize everything about these[ICD] cases. [This] allows you to better track witnesses, highlight incidents of concern.. But on a serious note, without a specially assigned witness protection team, I am not sure technology would help.<sup>104</sup>

In addition to the legal framework and victims' protection unit, another member of the external team of lawyers in the *Ongwen* case suggests the use of anonymous codes as a way of identifying witnesses, instead of their names.<sup>105</sup> The technological gap raises questions about the scope of ICCs positive complementarity theory and the role of actors. An NGO staff who is involved in the Kwoyelo case notes:

The face of the ICC is Dominic Ongwen while the face of the ICD is Kwoyelo and the treatment at the ICC is much better because the human rights is respected, good security for the people on trial which is not the case in ICD.<sup>106</sup>

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<sup>103</sup> L. O. Ogora, *Landmark Ruling on Victim Participation in the Case of Thomas Kwoyelo*, (International Justice Monitor, New York, 4 October 2016), <[ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/](http://ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/)>, accessed 20 May 2021.

<sup>104</sup> Interview, 25 March 2021.

<sup>105</sup> Interview, 12 April 2021.

<sup>106</sup> Interview, 8 April 2021.

The aforementioned concern raises a need to address the security concerns of both witnesses and victims. Moffet relates the ICD's challenges to the failure of the ICC's positive complementarity as a sole solution to post-war transitions.<sup>107</sup> Besides the prosecutorial strategy, criminal policy and implementation,<sup>108</sup> the author posits that complementarity should also shape the technological dimensions of the ICC and domestic practice. In regards to funding, the ICD received Uganda shillings 400 million (US\$108,000) in 2010, for its operations in preparation for the Kwoyelo trial.<sup>109</sup> The funds were spent on outreach, and also, the purchase of video and court recording equipment.<sup>110</sup> For a normal criminal session in Uganda, the aforementioned budget can be considered as somewhat adequate. However, as the *Kwoyelo* case progressed in the later years, the budgetary constraints started to manifest. In June 2020, Kwoyelo's lead lawyer, Caleb Alaka raised the issue of limited finances among the causes for the delay of the trial.<sup>111</sup> Alaka reiterated the financial challenges, in another interview with the author.<sup>112</sup> The perceptions held by members of the affected communities in relation to the ICD and ICC suggest a need to reframe the complementarity approach, and develop the technical capacities at the domestic levels. According to a local leader involved in the Kwoyelo case:

The ICD need[s] to learn a lot from the ICC because the capacity of the ICD is want[ing]...The court room does not also provide good security for the people who

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<sup>107</sup> Moffet, *supra* note 14, at 520.

<sup>108</sup> C. Stahn, 'Introduction: Bridge over Troubled Waters?' in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, Cambridge, 2011), p. 1-18.

<sup>109</sup> The Justice Law and Order Sector, *Annual Performance Report 2010/2011*, (JLOS, Kampala), <[www.jlos.go.ug/index.php/document-centre/performance-reports/annual/229-annual-performance-report-2010-2011/file](http://www.jlos.go.ug/index.php/document-centre/performance-reports/annual/229-annual-performance-report-2010-2011/file)>, accessed 5 October 2020, p.72.

<sup>110</sup> *Ibid.*

<sup>111</sup> S. Nakandha, *Uganda: Complementarity Reality Check - the Case of Uganda's International Crimes Division* (IJ Monitor, New York, 21 June 2020) <[allafrica.com/stories/202006220559.html](http://allafrica.com/stories/202006220559.html)>, accessed 21 May 2021.

<sup>112</sup> Interview, 6 April 2021.

would be witnesses and therefore people fear to be part of the witness even if they have something.<sup>113</sup>

Comparing his experiences with the ICD and ICC, a local victims' representative notes that, 'I have not been much involved in the ICD case but the ICC cases where I was involved were doing their best to bring the court closer to the community...'<sup>114</sup> Another local victims' representative acknowledges the capacity related challenges at the ICD, but notes an intriguing perception about complementarity, 'I think they[ICC and ICD] are similar only that the ICC is a bigger court and therefore the way they do their things is different from the way the ICD does their things here in Uganda'.<sup>115</sup> A local journalist who has covered the Ongwen and Kwoyelo trials observes a need for more capacity building at the ICD, notes:

The resources that is put into the court, the attention and the level of organisation at the ICD has been very low as compared to the ICC, the rights of Kwoyelo who is now the face of the ICD has been violated a lot and he has several times requested the court to take him to the ICC but they have declined his request....<sup>116</sup>

It can be argued that in turn, the challenges in the *Kwoyelo* case impact on the court's power and legitimacy in the eyes of the affected communities. Nonetheless, local NGOs like Refugee Law Project provided technical support in terms of recording the trial on screens for some members within the affected communities. In the opinion of the author, NGOs have served as gap fillers where the state is not able to fulfil its duty under the complementarity framework. One technological tool that could be promoted, is the use of live video monitors, where the

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<sup>113</sup> Interview,30 April 2021.

<sup>114</sup> Interview,2 March 2021.

<sup>115</sup> Interview ,8 April 2021.

<sup>116</sup> Interview ,6 March 2021.



witnesses could testify in a separate room from the courtroom. This measure is recommended for the prosecution of sexual violence, and it is argued court is still able to assess the witness' demeanor and credibility despite their physical absence in the courtroom.<sup>117</sup> Besides the testimony by video conference, Kramer recommends other procedural protections like disguises or voice distortion.<sup>118</sup> Ultimately, these technological will serve to protect the witnesses, while improving the court's ability to adjudicate international crimes, as an independent organ of the state. The use of new technology will ultimately enhance the ICD as a model for other countries,<sup>119</sup> dealing with mass atrocities and international crimes. The Ugandan government could also give more attention to the ICD, due to the nature of the trials and crimes. A well-equipped ICD would be beneficial for the prosecution of gross atrocities like terrorism. However, the successful prosecution of such cases would require more funding towards purchase and maintenance of digital tools. However, there are financial resource implications regarding the use of evidence from digital sources.<sup>120</sup> Due to the financial challenges, NGOs become key gap fillers. As noted by an ICC judge, 'NGOs can push for countries to implement complementarity where countries have competent legal systems'.<sup>121</sup> Furthermore, an ideal complementarity regime would require the ICC to share best practices with the domestic investigators and prosecutors, including the use of technology. The prosecution of international crimes at the domestic level requires much more than laws, lawyers and courts. The actual success of the trials depends on how well the courts engage with the key stakeholders like victims and witnesses. Against this background, the use of technology is

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<sup>117</sup> J. J. Arguin, *Prosecution of Sexual Violence: Reducing the Risk of Re-Traumatization of Survivor Witnesses*, <[unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i.-reducing-risk-of-retraumatization-survivors-witnesses-arguin.pdf](http://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i.-reducing-risk-of-retraumatization-survivors-witnesses-arguin.pdf)>, accessed 25 September 2020, p.17.

<sup>118</sup> K. Kramer, *Witness protection as a key tool in addressing serious and organised crime*, <[www.unafei.or.jp/publications/pdf/GG4/Fourth\\_GGSeminar\\_P3-19.pdf](http://www.unafei.or.jp/publications/pdf/GG4/Fourth_GGSeminar_P3-19.pdf)>, accessed 04 October 2020, p.6.

<sup>119</sup> O. Nyeko, *A Test Case for Justice in Uganda*, 15 November 2018, (Human Rights Watch, New York), <[www.hrw.org/news/2018/11/15/test-case-justice-uganda](http://www.hrw.org/news/2018/11/15/test-case-justice-uganda)> accessed 09 October 2020.

<sup>120</sup> International Bar Association, 'Evidence Matters in ICC Trials' International Bar Association, August 2016, (IBA, London), <file:///C:/Users/Admin/Downloads/Evidence-Matters-in-ICC-Trials-August-2016-FULL.pdf>, p. 31.

<sup>121</sup> Interview, 4 March 2021.

essential in the delivery of justice and complementarity. Given the legal and public controversies surrounding the Kwoyelo trial, there needs to be closer attention towards the issues that affected the court's primary constituencies—the victims. The adoption of technology for the protection of witnesses and court's outreach will potentially contribute to the persuasive power of the ICD. As has been revealed in the *Ongwen* case at the ICC, technological tools enhance the court's work and impact within the victims and affected communities, where concerns of proximity would otherwise have rendered it illegitimate. In a nutshell, video technology is a useful tool to localise the trials. In sum, the Ugandan situation reveals the need to implement complementarity using a unified approach to the prosecution of international crimes. Moreover, it is argued that complementarity has reciprocal benefits for the two institutions.<sup>122</sup> The recent Independent Expert Review of the ICC envisages the increased use of digital devices in trial proceedings.<sup>123</sup> This is a step in the right direction, as the ICC is considered as the lead institution under the contemporary international criminal justice institutions.<sup>124</sup> Crucially, the ICC's support towards the ICD should include technological assistance for witness protection and the use of digital evidence.

## 5 Conclusion

The overall aim of the article has been to explore the role of technology in the prosecution of international crimes. More specifically, whether the use of technology enhances the ICC's positive complementarity approach. It has critically evaluated the use of technology during the

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<sup>122</sup> REDRESS, *Not with Us: Strengthening Victim Participation in Transitional Justice Processes in Uganda* (REDRESS, London, 2020) <[redress.org/wp-content/uploads/2020/07/Not-Without-Us-Report-for-Web.pdf](https://redress.org/wp-content/uploads/2020/07/Not-Without-Us-Report-for-Web.pdf)> accessed 27 August 2020>, p. 41.

<sup>123</sup> Independent Expert Review, *supra* note 10, para 555.

<sup>124</sup> M. Fairlie, 'The Abiding Problem of Witness Statements in International Criminal Trials', 50 *New York University Journal of International Law & Politics* (2017) pp.158, p. 158

prosecution of international crimes within the context of Northern Uganda. First, it has examined the audio-visual features of the trials and the impact on the victims, as central constituents of the international criminal law project. The article has used the *Dominic Ongwen* case to illustrate how the use of digital evidence and technology for witness protection improved the ICC's efficiency, while also enhancing its legitimacy within the affected communities. Next, the article has explored the historical and legal framework of the domestic court, in light of the complementarity framework. Using the Thomas Kwoyelo trial as a case study, the article has revealed a lack of adequate protection for witnesses. While acknowledging the need for proper legal framework, the article has shown how the lack of proper technology exacerbates the challenges of witness protection at the ICD. The article has also revealed how challenges of proximity and distance can be addressed through the use of video-conferencing technology. Video technology links the courts' constituencies to the sites of justice-in this case, The Hague in the Netherlands, Kampala and Gulu in Uganda. In light of these benefits, the article has revealed a crucial role of NGOs as 'gap fillers' within the complementarity regime, helping to bridge the gaps between the courts' constituencies and the sites of justice. In light of the glaring gaps in use of technology during at the two sites of international criminal justice in the Ugandan context, the question whether the use of technology enhances the ICC's positive complementarity approach, remains a double edged sword. The author posits that technology should not be divorced from the traditional procedural practice in domestic trials. As recommended by Cole, the development of new technology would enhance the court's outreach with the affected communities.<sup>125</sup> The challenges at the ICD are symptomatic of the anxieties of the ICC complementarity regime, calling into question the ways in which the court's primary constituents are engaged. By

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<sup>125</sup> A. Cole, 'States Must Support the ICC's Use of Technology for Outreach' in Richard H. Steinberg (ed), *The International Criminal Court: Contemporary Challenges and Reform Proposals* (Brill | Nijhoff, Lieden, 2020) 51-59.

acknowledging the challenges in the *Kwoyelo* case, the article does not suggest that complementarity should be abandoned. Rather, it contends that greater attention towards technical capacity would make the court more efficient. The article also underline the importance of visual aids as a way of closing the gaps between the courts and the affected communities, including victims. The article has shown that technology is not just helpful during the prosecution of the cases, but also enhances the court's much needed outreach programmes and image. In order to effectively implement the complementarity approach, the key stakeholders within the Rome regime need to be open to understanding the practical country-specific challenges. Crucially, we can argue for a technology driven approach to complementarity, through capacity building in the form of transfer of technology as a way of enhancing the domestic mechanisms. Consequently, stakeholders and development partners should allocate sufficient resources to the ICD, specifically, to allow the use of digital evidence and protection of witnesses. Ultimately, technological enhancement is one way of balancing the authority and power between the justice sites in The Hague and domestic contexts.