

## PROLOGUE: IN THE LINE OF FIRE

*In my eyes burns a fire that sees how much our lives have changed, a fire that sees and realizes how beauty can influence and transform even the most wretched of lives ...*

*I was convinced that I could paint the war only by contrasting it with love ... Hatred of war could exist only out of love for others.*

Vamba Sherif<sup>1</sup>

The dashboard indicates 47 °C. I hold my breath, as if that will protect me in the confrontation that is about to come, open the door of the land-cruiser and plunge into one of Khartoum's busiest streets. Racing against the heat, I focus on my destination. The entrance of the Ministry of Justice is flocked with people; some go in, some go out, but most stay, standing, lingering and staring. Together, they make for a busy scene. The gentleman behind the desk seems to be in charge of making visitors wait while he is engaged on the phone. I pass the desk as if I know where I am going, respond to my Sudanese nickname 'hey you' with a smile, but do not halt my course.

The young man in the ante-chamber of the Advocate General's office slowly lifts his head from an otherwise empty desk. I point to the room of my interlocutor. 'Ma fi', not there, he responds. 'Itfadali', welcome, he continues, pointing me to the one free chair in the room. And down goes his head again. I assess the risk that I will never muster the energy to rise from the deep armchair, but then surrender to the heat and sink next to snoring women.

Eyes go up when the Advocate General enters. He signs the documents that the colourfully dressed women present to him and turns to me. A young diplomat in Sudan, I have been assigned to report on the Government of National Unity's progress in implementing the

<sup>1</sup> Sherif 1999:317 and 314, respectively, translated from Dutch by Vamba Sherif.

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Comprehensive Peace Agreement (CPA) that the previous government concluded with the Sudan People's Liberation Movement (SPLM). A lawyer by training, I frequent the Ministry of Justice to check whether draft legislation has materialised to give effect to the hundreds of provisions in the CPA. But first things first, my interlocutor reminds me: coffee. 'No sugar? How will you ever get fat and find a husband?' The senior legal official then takes great care to explain to me the legislative process, the stages of the various bills and the obstacles. Impressed by his generosity in time and insights, I wonder whether Sudanese diplomats encounter such hospitality and patience in any European Ministry of Foreign Affairs.

After two hours, drops of liquid running down the back of my ears suggest that it is time to go. But after all mine, the Advocate General asks the final question. 'Can you help the Ministry with some training in international law, in particular international criminal law? Now the situation in Darfur has been referred to the International Criminal Court, my staff must learn more about this. Especially about the principle of complementarity.'

Heat notwithstanding, I almost jump out of my seat. In his inaugural speech two years earlier, the first prosecutor of the world's first permanent international criminal court defined a successful court as one without cases. He could explain this counter-intuitive statement by reference to the principle of complementarity, according to which national justice systems, rather than the International Criminal Court (ICC), have the primary right to investigate and prosecute crimes within the Court's jurisdiction. In defining the Court's success by reference to complementarity, the ICC Prosecutor seemed to subscribe to the idea that complementarity is not just a rule in the Rome Statute that governs the admissibility of cases, but a cornerstone principle that reflects an ideal; namely, that the ICC acts as a court of last resort and that the crimes defined in the Rome Statute are ideally investigated, prosecuted and tried at the domestic level.

Could the United Nations Security Council, by referring the situation in Darfur to the ICC, have spurred the Sudanese justice system into action, signalling that something must be done about the prevailing impunity? Does Sudan intend to render ICC cases inadmissible by invoking complementarity? Can it, legally? Can it, practically? Can it, politically?

Back at the embassy, I make a case for funding a training programme in international criminal law. While my own Ambassador is

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supportive, colleagues from headquarters and other European states express reservations. Their argument is that as ICC states parties we should not be seen as undermining the Court by helping Sudan launch an admissibility challenge. I disagree: an admissibility challenge does not threaten the Court. Indeed, in line with the Prosecutor's argument in his opening address, the Court would be successful if it catalysed genuine Sudanese proceedings. If the Sudanese efforts are not genuine, this need not undermine the Court: the Statute leaves the final decision on admissibility to the ICC judges.

The training gets organised but the episode continues to intrigue me: will complementarity have a catalysing effect and, if so, what kind of effects will it catalyse? How will these effects be brought about? Who will be the key actors? Will the ICC and states parties support it, or will they focus on establishing the ICC? Will answers be different in situations in which not the Security Council, but a state refers a situation to the Court? What has happened, for instance, in Uganda, a state that referred a situation in its own country to the Court? A research project is born.

I leave the embassy and return to the University of Cambridge to embark on a new odyssey: a PhD. I peruse libraries, trying to understand what lawyers, and – sometimes almost forgotten – I myself, think that complementarity is, work in the ICC as a Visiting Professional to get to know the system from within, and spend many months in Uganda and Sudan searching for any catalysing effect and explanations. After the PhD, I work for the African Union on Sudan, and then return to Darfur, Khartoum and Uganda once again looking for and trying to understand complementarity's catalysing effect. Seven years after that first discussion in the Ministry of Justice, I now close this book containing the treasures from the quest for complementarity's catalysing effect in Uganda and Sudan.

However, it is not just my wanderings that led to this book. Along the way, thousands of people wrote part of the story, by sharing phone numbers, accommodation or insights, by helping to obtain a book, an appointment or a travel permit, by feeding, challenging and improving my assumptions, my writing, and, ultimately, myself. The painful reality is that, as a matter of fact, I was 'yet another student earning a PhD on [others'] backs',<sup>2</sup> searching for information – some Sudanese

<sup>2</sup> Discussion with a person from northern Uganda, Kampala, August 2008.

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and Ugandan interviewees' last possession – against a backdrop of the rapacity of colonialism, of national elites and of armed groups. This inequality cannot be remedied by the gratuitous observation that I 'care'.<sup>3</sup> Access to education and knowledge production has become a personal cause that I will continue to pursue in the years to come. Here, I merely acknowledge that I am indebted to each and every person who made a contribution. I thank them, even if for reasons of confidentiality, security or, more pragmatically, space, I cannot mention everyone by name.

I particularly thank all the interviewees and informants, ranging from traditional leaders in Uganda and Sudan to activists in the international-criminal-justice movement in Western metropolises; from undercover Sudanese human rights activists to ambassadors in The Hague; from incumbent and former cabinet ministers in Kampala, Khartoum and Washington to parliamentary researchers and analysts in military intelligence services; from ICC officials in The Hague to spin doctors in peace negotiations in conflict zones; from Ugandan and Sudanese policemen, prosecutors and judges to UN and AU peacekeepers. They all contributed to this book by giving their time, insights and trust. Moreover, their wisdom, generosity and philosophies have taught me lessons far beyond the scope of this book. While they bear no responsibility for errors and may disagree with my evaluation, this work is partly theirs.

Roger O'Keefe could, if he wished, also claim this work to be partly his. Supervising the PhD thesis that led to this book, he scrutinised each and every word – indeed, character – with a legal and linguistic precision that will always remain an inspiration. So will his rigour in legal analysis, his depth of knowledge and his work ethic. If only PhD supervisors could remain supervisors for life.

Willing or not, Barney Afako was stalked until he became a *de facto* second supervisor. No one has shown me as many tints colouring law, politics and life as he has.

Several others will recognise their influence in this work. Wendy Hanson and Céline Korthals selflessly provided assistance in Uganda and proved indefatigable sparring partners in the development of arguments. Ali, Mohamed and Lyandro gave perspectives on Sudan and Uganda that cannot be captured in any book. Barney Afako,

<sup>3</sup> Wainaina 2005.

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James Crawford, Robert Cryer, Simon De Smet, Chris Dolan, Bibi Eng, Jeff Handmaker, Wendy Hanson, Andrew Hiram, Christina Jones-Pauly, Warner ten Kate, Claus Kress, Zachary Lomo, Kevin Malseed, Frédéric Mégret, Dominic McGoldrick, Joe McIntyre, Juliette McIntyre, Moses Chrispus Okello, Surabhi Ranganathan, Ajay Ratan, Shamim Razavi, Hannah Richardson, Edward Thomas, Jérôme Tubiana, Guglielmo Verdirame, Michael Waibel, Christopher Ward and Alexander Zahar read parts of previous versions of the book and gave feedback on argumentation and language. They are responsible for many improvements. Other inspiring scholars such as Tarak Barkawi, Kirsten Campbell, Anthony Cullen, Devon Curtis, Mark Drumbl, Sara Kendall, Gerben Kor, Martti Koskeniemi, Joanna Quinn, William Schabas, Immi Tallgren, Sari Wastell and Wouter Werner gave me confidence in this project when I lacked it. Katie O'Byrne helped me reach the finish with her meticulous copy editing.

Equally encouraging was Cambridge University Press. In the days when I could not even envisage a first draft of a PhD thesis, law editor Finola O'Sullivan already spoke of 'the book'. Combining professionalism with personal involvement, she and Nienke van Schaverbeke pushed for the book, but were also understanding and forgiving when the manuscript got delayed, again. At the same press, Richard Woodham made sure that a text became a book.

Financially, this research would not have been possible without contributions from various funds in Cambridge: the Bartle Frere Fund, the Isaac Newton Trust, Emmanuel College, Pembroke College, the Yorke Fund, the UAC of Nigeria Travel Fund and the Smuts Fund for Commonwealth Studies. The Arts and Humanities Research Council and the Gates Cambridge Trust made the most generous contributions to the research in Uganda and Sudan and financed the PhD studies. William Charnley at Mayer Brown, Pembroke College and the Lauterpacht Centre for International Law funded post-doctoral life.

Displacement was inherent in this research, and without those who gave me a sense of home I might not have survived the lines of fire – a few times all too literally. Shaza not only assisted in translations, forged contacts and advised on personal security ('the less you mention the word ICC, the better; as a Dutch person, you should not use the term at all'), but also cared for wounds after a fire incident and in other difficult moments. Neha, Abdul and Alex, the demands of high-level politics notwithstanding, paid daily visits to the hospital, where

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Sister Prya reassured me that everything would be all right. Maarten put me together after a disorienting run through a minefield. Hildebrand conciliated in a confrontation with armed – and drunk – soldiers. Aziz got us home post-curfew hours, turning the car into an oasis of peace by playing Chopin under Darfur's stars. Abdi enhanced my security by transforming me into a Nyala local – the outfit remains a favourite. Rusoke was *always* there. All over the world, people invested in deep and long-lasting friendships, the temporariness of my stay notwithstanding.

The Refugee Law Project in Kampala, an NGO in Sudan (the name of which is withheld for security reasons), Judge Fulford's team at the ICC and Le Cocq & Partners in Rotterdam allowed me to be part of inspiring professional communities. In terms of physical homes, I thank Esther, Faisal, Fahd, Rose and Annelieke in Kampala, Steven in Gulu, Rose in Kitgum, Corina, Claude, Abdul, Alex, David, Neha and Reena in Khartoum, Sander and Abdi in Nyala, Aziz and his team in El-Fasher, Hans, Margaret and Diet in London, Bert and Marianne in France, Francesca in Brussels, Riet and Vokke in Voorburg, Marianne, George and Colet in Amsterdam, Maria in Utrecht, Laurien and Henri in Nijmegen, Anna and Raymond in Belfast, Sara in New York, Sandra in Washington, St Andrew's and Manchester, unique fellow nomad B all over the world, and, ultimately, my beloved Mr Darcy in Cambridge who opened the gate to inner peace. All gave me so much more than a bed.

After all the moves and living out of suitcases, William Charnley at Mayer Brown, Pembroke College and the Lauterpacht Centre for International Law gave me the enormous luxury of a concrete home in Cambridge, when welcoming me as Mayer Brown Research Fellow in Public International Law. Anita Rutherford and Karen Fachechi at the Lauterpacht Centre and the fellowship of Pembroke College offered me also the *idea* of home by allowing me to keep my cherished work and living spaces in the year that I went back to Sudan and Uganda. The Law Faculty and Squire Law Library of the University of Cambridge provided a desk, books and 24/7 access, and – even more valuable – most supportive experts, among whom Lesley Dingle, the always helpful international law librarian, and computer-rescuers Sarah Kitching, Andrew Gerrard and Steve Burdett. At the Lauterpacht Centre, Michael Waibel, as modest and kind as brilliant and exemplary, and Tara Grant, as generous and considerate as original and creative, were most encouraging officemates.

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An inexhaustible source of inspiration also flowed from the office next door, from which James Crawford shared his passion for international law in the broadest sense and unconditionally supported this admittedly rather ‘different’ international legal research project. When I was running around in the wider world, seeking to give the research some practical relevance, James, working on heavyweight international law cases somewhere else in the wider world, would occasionally send an email with only one line – ‘When are you finishing the book?’ – getting me back to it by putting in the subject line ‘important before urgent’. Later, he kept up my momentum by asking for chapters and returning them within a few hours, eradicating infestations of Dutchisms and quelling the manuscript’s thirst for commas.

Cambridge provided not only a community of scholars but also of true friends. In addition to the already mentioned colleagues, I particularly thank Alfonso, Ana, Elselijn, Eva, Francesca, the Fuchs-Mtwebana family, Kate, Murray, Renaud and Virginie, Sandra, Sietse, Simon, Yseult, the housemates of ‘the Mediterranean Institute’, the Savino’s dynasty, and Fenners’ gym buddies. Other vital dimensions of the sense of belonging are rooted in the past. I remain indebted to friends, teachers and supervisors from de Kralingsche School, het Erasmiaans Gymnasium, Universities of Utrecht, Western Cape and Cape Town, Loyens & Loeff Paris, the Centre of International Studies in Cambridge, The Netherlands Ministry of Foreign Affairs in The Hague, New York and Khartoum, and close family friends and neighbours in and around the Avenue Concordia.

Last, yet essentially first, I thank my brother Raphaël and his dear Ilse for welcoming home their prodigal sister; my sister Laura for helping me to see things from a more relevant perspective; and my father Laurent, now accompanied by his beloved Noor, for exemplary perseverance and engagement with the world’s suffering. I dedicate any good parts in this work to the memory of my mother, Heiltjen Nouwen-Kronenberg, whose complementarity continues to catalyse.

## CHAPTER 1

COMPLEMENTARITY FROM THE  
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*As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.*

Luis Moreno-Ocampo, first Prosecutor of the  
International Criminal Court<sup>1</sup>

Great expectations have attended the creation of the world's first permanent International Criminal Court ('ICC' or 'the Court'). One of the greatest is that the ICC will contribute to ending impunity not only by investigating and prosecuting crimes within its jurisdiction, but also by inspiring, encouraging or even pressuring domestic justice systems to do the same. This expectation is tied to what has been called a, or the, 'defining feature', 'cornerstone'<sup>2</sup> or 'foundational principle'<sup>3</sup> of the Rome Statute that creates and governs the ICC: the principle of complementarity.<sup>4</sup>

As set forth in article 17 of the Statute, complementarity dictates that the Court may exercise its jurisdiction over a case only if the latter is not being, or has not been, genuinely investigated or prosecuted by a state.<sup>5</sup> In other words, in case of competing claims for jurisdiction, complementarity accords national criminal justice systems, rather than the international court, the primary right to investigate and prosecute war crimes, crimes against humanity and

<sup>1</sup> Moreno-Ocampo 2003a:2.

<sup>2</sup> See, *inter plurima alia*, *Decision on the Practices of Witness Familiarisation and Witness Proofing Lubanga*:[34], n. 38, *LRA Admissibility Decision (PTC)*:[34], *Prosecution Response to Libyan Admissibility Challenge*:[4], UN Doc. A/50/22 (1995):[29] and Holmes 1999:73.

<sup>3</sup> Coalition for the International Criminal Court 2011:29.

<sup>4</sup> Rome Statute of the International Criminal Court (RS), tenth preambular recital and arts. 1 and 17.

<sup>5</sup> RS, art. 17(1)(a), (b), (c). The text is reproduced in Chapter 2, 'The key provisions setting forth complementarity'.



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genocide.<sup>6</sup> It was with reference to this principle that the Court's first Prosecutor in his inaugural address defined the Court's success by reference to the *absence* of trials before the ICC. His above-cited statement encapsulates the hope that there might be no need for ICC trials, since the existence of the Court would encourage states to use their primary right to investigate and prosecute.

States, non-governmental organisations (NGOs) and scholars, too, have expressed expectations that the principle of complementarity will have a catalysing effect at the domestic level.<sup>7</sup> The anticipated effect consists not only of domestic investigations and prosecutions of crimes within the Court's jurisdiction, but also reform of domestic justice systems in order to make such proceedings possible.<sup>8</sup>

<sup>6</sup> RS, art. 5. The amendment incorporating into the Statute the definition of the crime of aggression and the jurisdictional modalities for its prosecution has not yet entered into force (see RC/Res.4 (2010)). This book uses the term 'conflict-related crimes' to refer to offences for which the conduct is the same as the conduct of the crimes within the ICC's jurisdiction, but which are not necessarily criminalised domestically as genocide, crimes against humanity or war crimes as in the Rome Statute.

<sup>7</sup> For the expectation of, or hope for, a catalysing effect, see, *inter alia*, Akhavan 2003:716–17, Alvarez 2003:438–9, Ambos 2010:41, Becker 2004:481, Bekou and Cryer 2004:xii–xiii and xviii, Benvenuti 1999:39, Benzing 2003:596 and 632, Benzing and Bergsmo 2004:413–14, Bergsmo, Bekou and Jones 2010:795, Blumenson 2006:805, Bourdon 2000:330–1, Broomhall 2003:86, Burke-White 2003–2004:201–3, Cassese 2003:353, Charney 2001:122–3, Chesterman 2009:350, Chung 2007–2008:228, Cryer 1998:281, Cryer 2005b:96, 116–17, 143, 149, 164–5, 185–6 and 329, Cryer 2011:1102, Drumbl 2007:141 and 145, Dunofe and Trachtman 1999:405, Dupuy 2008:17, El Zeidy 2008b:299–300, Ellis 2002:223, Gordon 2011, Hall 2003:8, 22 and 24, Hernández 2000:100, International Center for Transitional Justice 2010:1, Jurdi 2010:74, Keppler 2013, forthcoming, Kleffner 2009:44 and 51, McCormack 2006:142, McGoldrick 2004a:45–6, McGoldrick 2004b:468 and 473, Miskowiak 2000:77, Nassar 2003:595, Nerlich 2009:347, Olásolo-Alonso and Rojo 2011:405–6 and 413, Rastan 2007:8, Rastan 2008:440, Rastan 2011:433, 449–50 and 459, Robinson 2010:91, Sarooshi 2004:940–1, Seils and Wierda 2005:3, Stigen 2008:14, 18, 264, 391, 401, 469, 473 and 488, Struett 2005:187, Wippman 2004:176, Yang 2003:621 and Yang 2005a:122–4. Specifically on complementarity's catalysing effect on domestic legislation, see UN Doc. S/2004/616 (2004):16, Bassiouni 2005:100, Cryer 2005b:171–2, Delmas-Marty 2009:97, Doherty and McCormack 1999, Hernández 2000:95, Lattanzi 2001, Mégret 2004:186, Kleffner 2003, Razesberger 2006:27, Schabas 2001:205, Stahn 2008:92, Stahn 2011b:250, Terracino 2007, Weschler 2000:96 and Yang 2005b:290. The questions how and when complementarity could have a catalysing effect have been most developed in Burke-White 2005:568 *et seq.*, Burke-White 2008b, Burke-White 2008c:299–301, Kleffner 2006 and Kleffner 2008:309–39.

<sup>8</sup> Apart from where it indicates otherwise, this book uses the term 'proceedings' in the meaning of 'criminal process', including both investigations and prosecutions. This

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This book puts to a test this great expectation of a catalysing effect of complementarity. Has complementarity had a catalysing effect and, if so, what has it catalysed and why? What effects have been widely expected but have not been catalysed? Why not? Where did the assumptions underlying the expectation of a catalysing effect go wrong? Honing in on two states facing unresolved violent conflict and subject to ICC intervention, this book tells the story of complementarity's catalysing effect in Uganda and Sudan.

## THE STORY OF COMPLEMENTARITY'S CATALYSING EFFECT IN UGANDA AND SUDAN

In Uganda and Sudan, complementarity did catalyse some widely anticipated effects. Crimes within the ICC's jurisdiction were incorporated into domestic law, even in Sudan, a state not party to the Rome Statute. Domestic courts specialising in international crimes proliferated. Some less predicted effects appeared, too: adultery – where committed 'within the framework of a methodical direct and widespread attack'<sup>9</sup> – was included in the list of crimes against humanity; mini ICCs mimicked the Court not just in subject-matter jurisdiction, but also in terms of budget, discourse and audience; 'traditional' practices were rediscovered, reframed and rebranded; lawyers asserted their relevance to the resolution of armed conflict; rebel movements demanded accountability instead of amnesty; the transitional-justice economy boomed and 'international standards' became a fetish.

But the ICC also catalysed processes that *went against* the encouraging effect on domestic proceedings that complementarity was expected to have: states *outsourced* the responsibility for investigations and prosecutions to the ICC; mediators took the topic of accountability *off* the peace-talks agenda because the ICC was already dealing with the issue; human rights activists' operational space was *reduced*, rendering the domestic promotion of international norms, including those related to accountability, more difficult. Notably, the one and only effect that is directly relevant for an invocation of complementarity before the Court, namely, the initiation of genuine domestic

is in line with RS, art. 17, which defines unwillingness (art. 17(2)) and inability (art. 17(3)) with reference to 'proceedings', these definitions applying to the phases of both investigation and prosecution (art. 17(1)(a) and (b)).

<sup>9</sup> See Chapter 4, 'Motivating the adoption of laws on international crimes'.