COMPLEMENTARITY IN THE LINE OF FIRE

Of the many expectations attending the creation of the first permanent International Criminal Court, the greatest has been that the principle of complementarity would catalyse national investigations and prosecutions of conflict-related crimes and lead to the reform of domestic justice systems.

Sarah M. H. Nouwen explores whether complementarity has had such an effect in two states subject to ICC intervention: Uganda and Sudan. Drawing on extensive empirical research and combining law, legal anthropology and political economy, she unveils several effects and outlines the catalysts for them. However, she also reveals that one widely anticipated effect – an increase in domestic proceedings for conflict-related crimes – has barely occurred. This finding leads to the unravelling of paradoxes that go right to the heart of the functioning of an idealistic Court in a world of real constraints.

Sarah M. H. Nouwen is a university lecturer in law at the University of Cambridge. She is also a Fellow of the Lauterpacht Centre for International Law and of Pembroke College.
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Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan
Sarah M. H. Nouwen
COMPLEMENTARITY
IN THE LINE OF FIRE

The Catalysing Effect of the International Criminal Court in Uganda and Sudan

SARAH M. H. NOUWEN
In memory of
Heiltjen Nouwen-Kronenberg
7 February 1944 – 21 July 2007
... j’écris ton histoire. Et celle des tiens. Des miens de s’ormais. Parce que tu m’as dit sans rancœurs ni haines les terribles des petites vies de rien, et de leurs théâtres intimes, que les mots sont de la chair, qu’il suffit de les écouter battre, bien au ras des émotions simples, et qu’ainsi tu m’as fait comprendre le métier d’écrire. Parce que avec du vif, sincère, sans fard, sans frime, ta vie dans tes paumes ouvertes, tu m’as dit aussi l’humanité nue. Pas l’idéale, celle des religions et des philosophies, ni la créature politique, mais celle qui a mal aux dents, qui essaie d’aimer à grande douleur et immenses espoirs, malgré son gros nez, malgré la maladie, les préjugés, malgré les glories savoureuses et les bravos, la ballotée d’histoire, l’oubliée des guerres et des destinées jolies, minuscule, celle qui trahit et tue, et celle qui a peur, l’innocente et l’héroïque ordinaire, celle qui veut enfermer l’univers dans son poing fermé et ne peut y tenir un papillon.

Michel Quint

Et mon mal est délicieux (Folio, Gallimard, Paris, 2004)

... I am writing your story. And the story of those dear to you. Dear to me now. Because with neither resentment nor hatred you told me about the awfulness of small lives with nothing, and their intimate dramas, you told me that words are made of flesh, that we only need to listen to them pulsate, right down next to simple emotions, and in this way you made me understand the craft of writing. Because with spontaneity, sincerity, without masquerading, without showing off, your life in your open palms, you also told me about naked humanity. Not the ideal one, of religions and philosophies, nor the political creature, but the one whose teeth ache, the one that tries to love with great pain and immense hope, despite its big nose, despite illness, despite prejudice, despite delicious glories and cheers, the one that is tossed about by history, forgotten by wars and pretty destinies, minuscule, the one that betrays and kills, and the one that is afraid, innocent and mundanely heroic, the one that wishes to trap the universe within its hand and cannot keep hold of a butterfly.

Translation by D. Roshd
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FOREWORD

When in the summer of 1998 most of the world's states converged in Rome to negotiate a treaty to establish an international criminal court, they were divided between those who sought to defend the sovereign right of a state to deal with crimes within its jurisdiction, and others who wanted to see an international prosecutor with a free hand to pursue cases on the basis of the evidence alone.

Eventually a compromise emerged which was reflected in the concept of complementarity, now encapsulated in the Rome Statute's provisions governing the admissibility of cases before the ICC. Under those rules, states have the priority in the exercise of criminal jurisdiction over crimes, and the International Criminal Court (ICC) can intervene only in the face of inaction by states. Yet, as Sarah Nouwen demonstrates in this engaging book, this relatively simple idea has met with continuing resistance despite the apparent clarity of the language employed in the Rome Statute.

In this rigorously argued book, which should cure any sloppy thinking about complementarity, the reader will reap the benefit of a work which began life as a doctoral thesis. Readers will also gain insights from Dr Nouwen's intimate and respectful 'fly on the wall' account of how Ugandan and Sudanese officials and civilians alike have grappled with the diverse and often contradictory demands arising as a consequence of the intervention of the ICC in each of their countries.

Whilst the book has, to its credit, avoided an overtly political tone, its analysis and insights will nevertheless support critical reflection on the mechanics and politics of the application of the Rome Statute, especially in Africa, where the ICC has come under severe criticism for its exclusive focus on this continent, and for apparently disregarding the complexities and dilemmas of managing politically turbulent and fragile societies.

While African states and other commentators have maintained these criticisms of the Court, as Dr Nouwen observes, African states...
have also engaged in political calculations to avoid the costs and maximise benefits of cooperation with the ICC. These governments have sought—and often succeeded—in deflecting or co-opting the ICC as an instrument for dealing with local adversaries or for managing international critics, without themselves exercising criminal jurisdiction in relation to crimes committed by their nationals or on their territory. Thus emerges a central challenge, and irony, in relation to the ICC, that an institution that was intended to be a court of last resort has, with the encouragement of some states, become a court of first and, increasingly, only, instance.

In addition to its refreshing exposition of the concept of complementarity, this book thus poses a fundamental question about the identity of the ICC: will it establish itself, as envisaged by the Rome Statute, as a court that defers to the jurisdiction of states, or will it arrogate to itself the priority for dealing with international crimes? If the ICC assumes the latter posture, it may either induce in states the sense that defiance is preferable to compliance with the orders of the Court. Besides inducing confrontation, a misapplication of complementarity may also deprive states of any incentive to deal with crimes at the national level, with states increasingly leaving to the ICC the responsibility for dealing with all such crimes. Both outcomes would cement a departure from the letter and spirit of the Rome Statute.

One can be confident that this book will therefore be indispensable reading for those seeking a thorough grounding in the tenets of the contested concept of complementarity. There will also be rich pickings in here for readers looking for an informed and nuanced exposition of the politics of the International Criminal Court in action, especially on the African continent.

Barney Afako

Barney Afako has assisted conflict resolution initiatives in Africa, including talks between the Government of Uganda and the Lord's Resistance Army, as well as the African Union panels on Darfur, and on Sudan and South Sudan. He sits as a Tribunal judge in London.
The photograph on the cover was taken by Olivier Chassot on 8 March 2009. A crowd welcomes Sudan’s President Omar Al-Bashir to El-Fasher, the capital of North Darfur, four days after the International Criminal Court issued an arrest warrant against him on counts of crimes against humanity and war crimes committed during the conflict in Darfur. The poster with a cross on ICC Prosecutor Ocampo’s face reads: ‘Liar, liar, you agent’. The big white banner (not entirely visible) says: ‘Welcome Omar Al-Bashir and his supporters’. The text on the big yellow banner (again not entirely visible) can roughly be translated as: ‘We will sacrifice ourselves for you’. Other posters read: ‘No to destabilising the country’ and ‘One line behind our leader’. The map on page xxi below was designed by the Scientific Response Unit (SRU) of the ICC’s Office of the Prosecutor. All other photographs in the book were taken by the author.


In order to avoid already long footnotes getting even longer, references have been abbreviated. Full details of (a) literature and official documents, (b) cases and procedural documents and (c) legal instruments can be found in the bibliography. References to literature and official documents refer to the author (or alternatively the title) or document number and year. Orders, decisions, judgments and
procedural documents (in italics) relate to ICC proceedings, unless specifically attributed to a different court. In the bibliography, they are organised by court, and, for the ICC, by situation or case. The abbreviated name indicates the relevant situation or case. All links to websites were effective on 17 October 2012.

The book aims to be up to date to July 2012.
## Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<td>A&amp;R</td>
<td>A&amp;R Agreement and its Annexure</td>
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<td>Accords</td>
<td>Agreement on Accountability and Reconciliation</td>
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<td>AC</td>
<td>Appeals Chamber</td>
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<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>AU</td>
<td>African Union</td>
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<td>AUPD</td>
<td>African Union High-Level Panel on Darfur</td>
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<td>CAR</td>
<td>Central African Republic</td>
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<td>CICC</td>
<td>Coalition for the International Criminal Court</td>
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<td>CPA</td>
<td>Comprehensive Peace Agreement</td>
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<td>DDDC</td>
<td>Darfur–Darfur Dialogue and Consultation</td>
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<td>DDPD</td>
<td>Doha Document for Peace in Darfur</td>
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<td>DFA</td>
<td>Darfur Peace Agreement</td>
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<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<td>EU</td>
<td>European Union</td>
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<td>FPA</td>
<td>Final Peace Agreement</td>
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<td>GoS</td>
<td>Government of Sudan</td>
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<td>GoSS</td>
<td>Government of Southern Sudan</td>
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<td>GoU</td>
<td>Government of Uganda</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICID</td>
<td>International Crimes Division</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IDP</td>
<td>internally displaced person</td>
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<td>ILR</td>
<td>International Law Reports</td>
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<td>INC</td>
<td>Interim National Constitution</td>
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<td>JCCD</td>
<td>Jurisdiction, Complementarity and Cooperation Division</td>
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<td>JEM</td>
<td>Justice and Equality Movement</td>
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<tr>
<td>JIC</td>
<td>Judicial Investigation Commission</td>
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<td>JLOS</td>
<td>Justice Law and Order Sector</td>
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<td>LJM</td>
<td>Liberation and Justice Movement</td>
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<td>LRA</td>
<td>Lord's Resistance Army</td>
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LIST OF ABBREVIATIONS

NCP National Congress Party
NGO non-governmental organisation
NISS National Intelligence and Security Service
NRA National Resistance Army
NRM National Resistance Movement
OHCCHR Office of the High Commissioner for Human Rights
OPCV Office of Public Counsel for Victims
OTP Office of the Prosecutor
PCA Permanent Court of Arbitration
PCIJ Permanent Court of International Justice
PSC Peace and Security Council
PTC Pre-Trial Chamber
RPE Rules of Procedure and Evidence
RS Rome Statute of the International Criminal Court
SCCED Special Criminal Court on the Events in Darfur
SCSL Special Court for Sierra Leone
SDHC Special Division of the High Court (also referred to as War Crimes Court or War Crimes Division)
SLA Sudanese Liberation Army
SLA/AW Sudanese Liberation Army/Abdel Wahid section
SLM Sudanese Liberation Movement
SPLA Sudan People’s Liberation Army
SPLM Sudan People’s Liberation Movement
STL Special Tribunal for Lebanon
TC Trial Chamber
UCICC Ugandan Coalition for the International Criminal Court
UN United Nations
UNAMID AU/UN hybrid operation in Darfur
UNDP United Nations Development Programme
UNHCHR United Nations High Commissioner for Human Rights
UNSC United Nations Security Council
UNSCR United Nations Security Council Resolution
UNTS United Nations Treaty Series
UPDF Uganda People’s Defence Forces
USAID United States Agency for International Development
VCLT Vienna Convention on the Law of Treaties
WCC War Crimes Court (also referred to as Special Division of the High Court or War Crimes Division)