Introduction

CHRISTIAN M. DE VOS, SARA KENDALL AND CARSTEN STAHN

International criminal law and its institutions have expanded dramatically over the past two decades, a growth that has been reflected in the related fields of international human rights law and transitional justice. Much early writing on the field of international criminal law focused on its growing body of jurisprudence and its institutional developments, yet less attention has been paid to the effects that international judicial interventions have had upon the communities and state structures where grave crimes have occurred. Similarly, while claims have proliferated among proponents and observers that the field contributes to certain normative goods – the lessening or prevention of conflict, the re-establishment of the rule of law and the alleviation of suffering within conflict-affected communities – few of these ambitious claims have been subjected to grounded inquiry or critical analysis.

Over the past decade, however, an emerging body of literature has sought to situate the work of international criminal law in historical, political and cultural contexts, with critical interventions from scholars in related fields, including socio-legal scholars, political scientists and anthropologists. Much of this scholarship has focused on the work of the ad hoc tribunals for the former Yugoslavia (International Criminal Tribunal for Former Yugoslavia; ICTY) and Rwanda (International Criminal Tribunal for Rwanda; ICTR),[1]

[1] For studies on the impact of ICTY, see, e.g.,S. Ivković and J. Hagan, *Reclaiming Justice: The International Tribunal for the former Yugoslavia and Local Courts* (Oxford: Oxford University Press, 2011); B. Swart, A. Zahar, and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (New York: Oxford University Press 2011); D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Justice Initiative, 2010); L. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010). On the ICTR, see M. Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007); K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (New York: Palgrave MacMillan, 2005); E. Stover and H. Weinstein (eds.), *My Neighbor,*

both now nearing the end of twenty-year trajectories, as well as the Special Court for Sierra Leone,[2] which ceased active operations in 2013. Scholars have also begun to focus critically on the work of the International Criminal Court (ICC), the sole permanent body where genocide, war crimes and crimes against humanity are judged and punished.[3]

This volume builds upon this body of literature by offering a grounded critique that focuses exclusively on the institutional site of the ICC and its work in situation countries. Drawing upon field- and practice-based accounts that illustrate the effects of the Court's interventions, it brings together contributions from scholars and practitioners within and outside the field of international criminal law to offer a sustained focus on the work of the ICC, with a particular emphasis on its work in domestic contexts. With this emphasis, the collection seeks to unsettle the predominantly 'Hague-centric' view of the production of international criminal justice – where doctrine and jurisprudence have been at the normative centre – by critically reflecting on the ICC's multiple and competing constituencies, its translation and reception at national and local levels and the socio-political effects of its work in the states and communities where it has intervened.

The ICC's novelty

Established in 2002, the ICC is often read as a novel development in the field of international criminal law. As a treaty-based institution, it has the

My Enemy: Justice and Community in the Aftermath of Mass Atrocity (Cambridge: Cambridge University Press, 2004). For an account of state cooperation in relation to both tribunals, see V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2009).

[2] C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge: Cambridge University Press, 2014); T. Kelsall, *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009).

[3] S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013); C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (London: Routledge, 2014). Literature from outside the field of international criminal law that has taken up more critical perspectives on the ICC includes: D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014); A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011); K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006).

potential to exercise territorial jurisdiction in all states that accept its authority, in addition to the exceptional jurisdiction it enjoys through referrals from the UN Security Council. The Rome Statute, the Court's founding treaty, grants it subject-matter jurisdiction over 'the most serious crimes of international concern', a number of which are defined by the Statute in unparalleled detail. Furthermore, unlike its ad hoc predecessors for Rwanda and the former Yugoslavia, which enjoyed primacy over domestic jurisdictions, the ICC is designed to complement domestic investigations and prosecutions. Referred to as 'complementarity', this constraint on admitting situations before the ICC is a defining feature of the Court's architecture. It results from a number of factors, including the Court's institutional design, its limited resources and the acknowledged role of domestic legal orders in bringing more proximate forms of criminal accountability.

While complementarity is technically understood as an admissibility principle, 'positive' complementarity is a more expansive conception that calls upon the Court and other actors to encourage and assist national legal bodies in investigating and prosecuting crimes of an international character.[4] The vision is illustrated by the first prosecutor Luis Moreno-Ocampo, who notably argued that '[t]he effectiveness of the International Criminal Court should not be measured by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.'[5] This has aroused debate as to whether the ICC, rather than states, should be called upon to develop domestic capacity for trying international crimes.

The mandates of judicial institutions often encompass a variety of goals and objectives; however, the ICC's are particularly ambitious. The Court's intended relationship with conflict-affected communities is another aspect that distinguishes its work: as an ICC guidebook explains, 'victims at the ICC enjoy rights that have never before been incorporated

[4] On the evolution and various interpretations of complementarity, see C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (New York: Cambridge University Press, 2011).

[5] 'Paper on some policy issues before the Office of the Prosecutor', ICC Office of the Prosecutor, September 2003, 4. On 'positive complementarity', see W.B. White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', *Harvard International Law Journal*, 49 (2008), 53–108; C. Stahn, ' Complementarity: A Tale of Two Notions', *Criminal Law Forum*, 19 (2008), 87–113.

in the mandate of an international criminal court'.[6] Towards this end, the Statute attempts to provide greater recognition to communities through a complex regime of victim participation and the prospect of reparations. The Court's affiliated Trust Fund for Victims is also mandated with implementing Court-ordered reparations, as well as with supporting medical and livelihood assistance programs to conflict-affected communities. The Court's work extends beyond judgment and punishment, and it seeks to incorporate restorative dimensions that bring it more explicitly into a relationship with the field of transitional justice.

The ICC's institutional structure is designed with a degree of porousness that is unusual for a criminal court: civil society actors as well as conflict survivors are brought into its formal operations, and domestic judicial activity plays a role in determining whether or not cases are admissible.[7] Spaces of discretion are built into the Rome Statute as well. The Court's ability to assesses whether a state is 'able or willing' to prosecute those individuals brought before it, or the prosecutor's ability to take into account 'the interests of justice' in determining whether to investigate or prosecute, provides important openings to contextual and extra-legal considerations.

Finally, the network of actors drawn into the ICC's orbit is uniquely expansive. Its work engages international political entities such as the UN Security Council; the Assembly of States Parties, the Court's governing body of member states; and a vast array of civil society actors, ranging from international non-governmental organisations (INGOs) to domestic and local community-based organisations. The Court's decisions and policies also have implications that intersect with those of donor states, UN bodies, and NGOs working in post-conflict responses, development and domestic institutional reform. The multiple ways in which the Court's jurisdiction can be triggered – through state referral, UN Security Council resolution and the prosecutor's exercise of *proprio motu* powers – further engage a broad set of actors and institutions involved in practices of global governance.

The diverse actors who interact with and influence the work of the Court form broader assemblages of agency, affecting the terms and institutions through which conflicts are addressed and expanding the

[6] See ICC, 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court'.

[7] F. Jessberger and J. Geneuss, 'The Many Faces of the International Criminal Court', *Journal of International Criminal Justice*, 10 (2012), 1081–1094.

role of international criminal law in the global imagination.[8] But how do the various aspects of the Court's architecture operate in practice? Does the ICC actually supplement national jurisdictions, as is often described, or might it instead supplant them? Does it defer to domestic initiatives, or does it seek to influence the terms and institutional forms through which they are carried out? To what extent – and with what effects – does the Court rely upon in-country actors to sustain its work? How does the ICC operate as a site of normative production, disseminating views and values concerning what an appropriate response to conflict should entail? How does it influence the legal discourse of criminal justice, as well as national political priorities in the states where it intervenes?

ICC interventions and their effects

While political dimensions of the Court's work are frequently downplayed in ICC discourse and practice,[9] many of its actions and policies can be interpreted in light of how they allocate and diffuse different forms of power. In some situations the Court exercises what might be termed 'compulsory power'. The most classical example of this is the exercise of direct control by the ICC over individuals, including the detention of persons or efforts to protect witnesses and victims. In these areas, ICC authority appears as a surrogate of state power and is most vulnerable to criticisms that include the violation of human rights norms or the lack of democratic accountability. Yet in practice the Court is highly dependent upon states and other entities to assist it in executing arrest warrants and carrying out its in-country work.

The Court has developed alternate channels of authority and control, deploying multiple forms of institutional power. In many contexts, the ICC justifies or maintains its power through formalised responses, practices and policies of interaction.[10] Decisions or claims to authority are translated into technical legal documents or institutionalised in order to cultivate acceptance of ICC actions or to mitigate criticisms of the Court. The turn to institutional power is most visibly reflected in the expansion

[8] See S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2008).

[9] See generally S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21 (2010), 941–965.

[10] On the role of 'practice' in the ICC, see J. Meierhenrich, 'The Practice of International Law: A Theoretical Analysis', *Law & Contemporary Problems*, 76 (2014), 1–83.

of the Court's regulatory framework, the development of procedures of interaction with domestic authorities and victims and the adoption of policy and 'expert' papers on core issues of concern to the Court, including complementarity, the 'interests of justice', victims and sexual- and gender-based violence.[11] This practice has gradually extended the Court's normative space of operation as well as its claim to authority by re-casting political choices as formalised policies.

Many of the effects of ICC interventions are also influenced by relationships with other actors. The Court relies on these dynamics to justify its authority or to reinforce its impact. This structural power involves forms of subordination as well as cooperation, including the Court's relationship to collective security and the role of the Security Council;[12] its interaction with state authority;[13] and its relationship to individuals, which serves as the basis of some of the most important claims of the Court's authority. Indeed, as a number of the chapters in this volume suggests, ICC actions, policies and language have had a transformative effect in spaces where the Court intervenes. They may alter social realities through discursive practices and processes: through labelling certain acts as crimes, through stigmatising perpetrators, and through the bestowal or denial of victim status as a legal category. Some of the resulting effects of Court interventions are calculated and intended, as when the ICC's actions generate political pressure to comply with its decisions. But in many situations, ICC interventions have produced unintended effects, such as the alteration of conflict narratives and ICC-centric law reform practices, some of which may ultimately run counter to the Court's objectives.[14]

[11] See OTP, Informal Expert Paper, 'The principle of Complementarity in Practice' (2003); OTP, 'Policy Paper on Interests of Justice', September 2007; OTP, 'Policy Paper on Victims' Participation', April 2010; OTP, 'Policy Paper on Sexual and Gender-Based Crimes', June 2014.

[12] See L. Arbour, 'Doctrines Derailed? Internationalism's Uncertain Future', 28 October 2013, http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx.

[13] On acculturation, based on 'sanction' and 'reward' schemes in international law, see R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford/New York: Oxford University Press, 2013).

[14] A vivid illustration of the Court's contested transformation of social reality appears in Judge van den Wyngaert's critical note on the judicial construction of ethnicity in the *Katanga* case. See *Prosecutor* v. *Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07, Trial Chamber II, 7 March 2014, Minority Opinion of Judge Christine van den Wyngaert, ICC-01/04-01/07, para. 258.

This volume critically engages with the effects of ICC interventions. It begins from the normative premise that the Court should be more responsive to the contexts in which it works. The Court's Outreach Unit has claimed that it 'aims to give [conflict-affected] communities ownership over the Court, rendering it an institution that works for them and in their name'.[15] While the Court and its proponents have occasionally invoked the language of 'local ownership', responsiveness and contextual sensitivity may offer more realistic standards for its work in practice. In their pioneering contribution to the field of socio-legal scholarship, Philippe Nonet and Philip Selznick argued that 'a responsive institution retains a grasp on what is essential to its integrity while taking account of new forces within its environment. To do so, it builds upon the way integrity and openness sustain each other even as they conflict'. [16] In the context of the ICC, 'integrity' is provided by the Court's governing documents and continuing dialogue over the interpretation of the laws and rules that bind it, and the ICC's responsiveness is thus restricted by what is possible within the confines of the Rome Statute and its interpretation. By contrast, the normative call to 'openness' admits the social and political contexts in which international criminal law operates, and suggests a continuing dialogue between the Court's institutional form and the settings in which it carries out its work.

This collection places particular emphasis on the Court's work in context, such as its relationship with domestic constituencies and actors. It thus seeks to foreground critical considerations of how and for whom the ICC operates. While some scholars have addressed the turn to 'the local' in the field of transitional justice,[17] there has been relatively little analysis of how international criminal justice interventions are received domestically and locally – that is, what shape their domestic uptake has assumed and the degree to which these interventions have been developed by local actors. Echoing Nonet and Selznick's views on responsive law, transitional justice literature has traced a shift towards 'the local' in

[15] 'Outreach Report 2009', ICC Public Information and Documentation Section, 28.

[16] P. Nonet and P. Selznick, *Law & Society in Transition: Toward Responsive Law* (New York: Harper and Rowe, 1978), 77.

[17] See, e.g., P. Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (Cambridge: Cambridge University Press, 2010); R. Shaw, L. Waldorf, and P. Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010); A. Hinton, *Transitional Justice* (New Brunswick, NJ: Rutgers University Press, 2011); K. McEvoy and L. McGregor, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (London: Hart Publishing, 2008).

transitional justice mechanisms, arguing for 'more responsive forms of place-based engagement and broader understandings of justice'.[18] In a similar vein, this volume takes up the question of whether an analogous shift has happened in the field of international criminal law, and if so, with what effects at the ICC's sites of reception.

Contributions to the volume

This collection brings together scholars and practitioners to reflect upon the ways in which ICC interventions have been taken up, developed and contested by a range of actors, including states, civil society organisations, sections of the Court and conflict-affected communities. Contributions are divided among four sections, each with a distinct unifying theme: Law's Shape and Place, Reception and Contestation, Practices of Inclusion and Exclusion, and Politics and Legal Pluralism. Tracking the Court's selective geography, the volume predominantly focuses on the ICC's effects in African states, beginning from its early state-referred interventions in Uganda and the Democratic Republic of Congo (DRC) and continuing through its *proprio motu* investigations in Kenya and its UN Security Council-referred work in Libya. Yet it also considers the domestic uptake of preliminary examinations in states like Afghanistan and Colombia, where the Court's presence has shadowed state- and community-based accountability efforts. Throughout the contexts considered, the work of the ICC has been 'vernacularised' to varying degrees, circulating among alternate and often competing conceptions of what qualifies as an appropriate response to mass atrocity.[19]

Law's shape and place

The section begins by considering international criminal law as a legal form: how does it relate to the field of transitional justice, and to what extent is it seen to complement domestic justice initiatives? Read together, the chapters offer multiple perspectives on the degree to which the work of the Court can be tailored towards domestic and local concerns. The volume's first section thus brings the work of the ICC into dialogue with broader themes from the field of transitional justice and, in particular,

[18] Shaw, Waldorf, and Hazan (eds.), *Localizing Transitional Justice*, 5.
[19] On 'vernacularisation' and legal language, see S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

on the possibility and desirability of prioritising local considerations within international legal institutions. Some ICC proponents regard it as falling within the 'transitional justice' paradigm, operating as a post-conflict mechanism that would help to facilitate societal recovery. But for many states, a key constituency of the international legal order, these institutions have been and remain instruments of international politics.

The first chapter by Frédéric Mégret departs from the question of who the beneficiaries of international criminal justice are in practice, arguing that the issue of constituency has remained marginal in scholarship on international criminal justice to date. Rather than asserting a claim about the empirical reality of the ICC's constituency, the chapter instead focuses on the ways that claims to particular constituencies produce the field of international criminal law's 'symbolic economy'. In whose name is international criminal law carried out, and how do these various claims work to shore up the legitimacy or authority of institutions such as the ICC? By tracing various ways in which constituencies are invoked – such as 'justice' itself, a universalist notion of humanity, the victims of international crimes, future generations or the 'international community' – Mégret shows how constituency-building, a rhetorical feature of the international criminal justice project, reveals a broader politics of 'speaking for', or a politics of representation. Mégret concludes that the plurality of diverse – and at times contested – constituencies invoked by the Court suggests that its main constituency may in fact be 'nothing but itself'.

Carsten Stahn's chapter examines the divide between the international and the local in ICC policies and practice. It argues that ICC justice is different from historical 'civilizing' projects, yet it remains vulnerable to some of the dilemmas that other liberal and emancipatory projects face in their engagement with 'the local', such as paternalistic and missionary features, perpetuation of structural inequalities and the distorting effects of de-localisation. It discusses different faces of the 'local' in the ICC context: as 'the other', as object, as subject and, finally, as a pattern of justification. It claims that a certain degree of de-localisation is unavoidable in international justice, and that there is some virtue in the ability of the ICC to override domestic choice (e.g., to counter claims of superiority inherent in criminal conduct). But it pleads against artificial 'mainstreaming' of ICC justice and an instrumentalist vision of 'the local' that blends out the disempowering effects and contradictions of ICC justice.

David Koller's chapter revisits the well-travelled tension between law and politics, but with a view to understanding how the relation between the global and the local might bear upon it. This third chapter critically

reflects on international justice as a form of what Gerry Simpson has called 'juridified diplomacy',[20] questioning whether the mandates of international tribunals, particularly the ICC's, have been stretched too far in the quest to accommodate local priorities and demands. It argues that the support of donor states for international criminal institutions playing a transitional justice role remains limited. While the integration of transitional justice and international politics may be desirable in the long-term, the hesitation of states to fully embrace this paradigm suggests limitations to that vision in the short-term. Koller ultimately cautions against viewing international courts and tribunals as working in the interests of local communities given their inherent constraints as transitional justice mechanisms, arguing that they are more properly regarded as 'instruments of a legitimised international politics'.

Contrasted with Koller's emphasis on the role of states, Jaya Ramji-Nogales's chapter begins from a more community-based view regarding the possibilities of orienting the field of international criminal law towards the ends of transitional justice. Articulating a theory of what she terms 'bespoke transitional justice' at the ICC, Ramji-Nogales suggests principles to support the legitimacy of the source, procedure and substance of accountability mechanisms, as well as the desirability of using evidence-based and locally grounded methods to implement them. In offering a normative theory of 'bespoke' justice, the chapter concludes that the Court should be more responsive towards local demands, even if this entails refusing to intervene in situations where the objectives of transitional justice may not be met through criminal prosecutions. Ramji-Nogales contends that contextual considerations and local priorities should serve as the normative starting point of the Court's work, which would align its objectives more clearly with the field of transitional justice.

Michael Newton's final contribution to the section builds upon Ramji-Nogales's normative argument by asking what a more community-focused form of justice might look like in legal practice. He contends that Article 53 of the Rome Statute offers an under-explored avenue for incorporating domestic understandings of justice. The text of the article specifies that the prosecutor must consider the 'interests of justice' when initiating an investigation and requesting prosecution. Through a reading that seeks to incorporate local understandings of justice as a

[20] G. Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 1.