Introduction

Since its establishment at the early turn of the century, the International Criminal Court (ICC) has been both a symbol of and vehicle for the ascendance of a global accountability norm. Central to that ascendance has been a preoccupation with the nature of the ICC’s relationship to national jurisdictions. As a permanent body intended to investigate and adjudicate crimes conceivably without geographical restriction, the ICC is structurally designed to work at the intersection of the international and the domestic. Complementarity – the idea that the court is intended to supplement, not supplant, national jurisdictions – has been the dominant juridical logic through which this relationship has been expressed, but, as this book’s preface suggests, this principle occupies a charged space in the political imaginary, replete with tensions and ambiguity.

To a domestic judge in Uganda, it suggests that the ICC might serve as a kind of ‘big brother’ court to its domestic counterparts, while to a human rights advocate in Kenya, it represents little more than a ‘long game’ by a government determined to evade The Hague.

Meanwhile, for many of the court’s supporters, complementarity is now commonly invoked as the ‘cornerstone of the Rome Statute’: it represents the very future of an international criminal justice system. In the words of the International Center for Transitional Justice, ‘How the complementarity principle is put into practice will be the key to the fight against impunity and thus the future of international justice will largely turn on these efforts’. So understood, complementarity is no longer a legal concept confined to the courtroom – an organizing principle for the regulation of concurrent jurisdiction – but a policy tool for catalysing progressive change in post-conflict countries’ legal frameworks and institutions. There is by now a well-developed (and still rapidly proliferating)
literature that frames its inquiries around the ICC’s catalytic potential through the principle of complementarity.23

Whereas the dominant approach of many of these texts has taken the catalytic potential of the ICC as a given, this book examines how complementarity and, by extension the court came to be framed as ‘catalysts’ for domestic investigations and prosecutions in the first place. It then explores what effects this framing has had in three distinct country contexts where the ICC has intervened. In particular, it asks how both state and non-state actors in Uganda, Kenya and the Democratic Republic of Congo (DRC) have relied upon the principle of complementarity as the logic through which the court’s catalytic potential can be realized, as well as a transnational site and adaptive strategy for entrenching the norm of international criminal accountability domestically. In tracing these steps, the book addresses three principal questions. First, how has the understanding of complementarity evolved since the ICC’s inception, and what role have non-state actors, in particular, played in this evolution? Second, how have ICC judges understood and interpreted complementarity in the courtroom, and how has the Office of the Prosecutor

sought to implement it as a matter of policy? Finally, how have the ICC’s interventions in Uganda, Kenya and the DRC affected these countries’ normative legal and institutional frameworks for carrying out domestic criminal proceedings, and to what extent have such proceedings, indeed, been catalysed by the court itself?

1 Framing the ICC as a Catalyst

Framing international legal institutions as catalysts for progressive domestic reform dominates much of a growing literature on their effects and impact at the national level. While the ICC represents a more recent iteration of this scholarship, the presumption that other institutions – from regional human rights courts to United Nations (UN) human rights mechanisms – would have or have had a salutary effect on state behaviour has drawn the interest of legal scholars and political scientists alike.24 The political scientist Kathryn Sikkink writes that ‘[w]ell before the creation of the ICC, the Inter-American Commission on Human Rights and the Inter-American Court of Rights ... played a catalytic role in pushing for individual criminal accountability’.25 Sikkink contends that these courts were part of an array of actors and norm entrepreneurs, ‘including NGOs, regional human rights organizations, and members of transnational governments’, who collectively contributed to the rise and legitimation of individual criminal accountability as a new international norm.26

Describing this new norm as part of a ‘justice cascade’, Sikkink argues that ‘states and non-state actors worked to build a firm streambed of international human rights law and international humanitarian law that fortified the legal underpinnings of the cascade, culminating in the Rome Statute of the ICC in 1998’.27 The prosecutions of several

26 Ibid., 245. The concept of ‘norm entrepreneur’ has a long history explored in the next chapter. Cass Sunstein is first believed to have introduced the phrase in a 1996 article, wherein he defines entrepreneurs simply as ‘people interested in changing social norms’. See Cass R. Sunstein, ‘Social Norms and Social Roles’, Columbia Law Review 96(4) (May 1996), 903–968.
27 Ibid., 97.
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high-level political figures, which drew legal scholars to examine the domestic effects that such efforts might augur, illustrate the fortification of this cascade. These developments followed the establishment and evolution of the ad hoc tribunals for Rwanda and the former Yugoslavia. There, too, the trope of ‘catalyst’ has been summoned: William Burke-White argues that ‘the ICTY has encouraged the development of domestic courts in [Bosnia and Herzegovina] and catalysed the activation of domestic judicial institutions’. Similarly, in her authoritative study of the International Criminal Tribunal for the former Yugoslavia (ICTY), Diane Orentlicher concludes that the tribunal became a key catalyst for ramping up Bosnia’s (and, to a lesser extent, Serbia’s) domestic capacity to prosecute wartime atrocities. Yuval Shany likewise observes that the ‘practical importance of international criminal proceedings is mainly symbolic and catalytic’, insofar as they ‘may trigger or nurture domestic and international legal and political processes’.

Interest in the capacity of international courts and prosecutions to serve as ‘catalysts’ at the national level has strong affinities with an


expanding scholarship on the socializing power of international law and legal institutions and their role in shaping state behaviour.\textsuperscript{31} Seminal texts like the \textit{Power of Human Rights}\textsuperscript{32} and the early work of such scholars as Abram and Antonia Handler Chayes\textsuperscript{33} opened up a new literature amongst legal scholars and social scientists on compliance with international norms and institutions, one that has proliferated rapidly in the last two decades. To that end, focusing on the ICC as a catalyst for domestic criminal proceedings reflects a converging interest of two distinct, though interconnected, disciplines – international relations and international law – in how legal institutions can influence state behaviour and, more particularly, how they can encourage ‘rule-consistent’ behaviour.\textsuperscript{34} Interest in complementarity thus parallels a larger political project wherein supranational judicial bodies are increasingly scrutinized in


\textsuperscript{33} The Chayes’ scholarship forms part of – and was an early contribution to – an important strand in compliance literature focusing on ‘managerial’ compliance, suggesting that limitations on the capacity of states and the absence of domestic regulatory apparatuses, rather than the ability to sanction, better explains why states comply with international law. See Abram Chayes and Antonia Handler Chayes, ‘On Compliance’, \textit{International Organization} 47(2) (1993).

terms of their effects on state compliance with international norms, rules and judgments.\textsuperscript{35} As part of a larger but increasingly contested moment in global governance, these scholars ask not only whether international legal institutions can influence state behaviour but also why and how they do so.\textsuperscript{36}

Importantly, these developments in scholarship and the rise of the accountability norm described by Sikkink resonate with a larger understanding of international law and its institutions as progressive, catalytic forces on states. As a discursive structure, characterizing these institutions as ‘catalysts’ recalls what Thomas Skouteris has called the notion of progress in public international law discourse, one that looms particularly large in international criminal law. In the context of the ‘new tribunalism’, of which the ICC is perhaps the most emblematic, this ‘vocabulary of progress’ becomes a ‘legitimizing language’ – a narrative of evolution and disciplinary progress.\textsuperscript{37} In Skouteris’ words, ‘It is


\textsuperscript{36} Attendant with this turn has also been a growing interest in identifying ‘indicators’ for measuring compliance. See, e.g., Sally Engle Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance’, \textit{Current Anthropology} 52(3) (April 2011), 83–93; Sally Engle Merry, \textit{The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking} (Chicago: University of Chicago Press, 2016). A growing attention to the ‘effectiveness’ and ‘efficiency’ of international courts appears to mark a further shift in this direction, wherein judicial institutions are increasingly measured by the satisfaction of certain performance indicators and/or other quantifiable metrics. See, e.g., Yuval Shany, \textit{Assessing the Effectiveness of International Courts} (Oxford: Oxford University Press, 2014); Theresa Squatrito, Oran R. Young, Andreas Follesdal and Geir Ulfstein (eds.), \textit{The Performance of International Courts and Tribunals} (Cambridge: Cambridge University Press, 2018).

\textsuperscript{37} Thomas Skouteris, \textit{The Notion of Progress in International Law Discourse} (Leiden: Proefschrift, 2008), 187. On the discourse of progress as a dominant narrative of modern
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a compelling story about how international law may finally be able to travel the coveted distance from a power-oriented approach to a rule-oriented approach, from indeterminacy to determinacy, from impunity to accountability’. Thus figured, international tribunals are ‘not only the latest addition to the repertoire of international legal action: they are also the catalyst for coping with the realist challenges of the 21st century’. Established at the dawn of that new century, the ICC was a critical addition to this repertoire.

2 Complementarity as a Catalyst for Compliance

Most writing about the ICC’s power to catalyse domestic investigations and prosecutions has interpreted complementarity as a matter of compliance with legal rules. As stated in the ICC Prosecutor’s first policy paper: ‘[T]he system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States’. In this duty-based understanding, these ‘rules’ include a legal obligation on states to implement the Rome Statute within their domestic penal code; to ensure that their courts are capable of accommodating prosecutions for international crimes and, as the Statute’s preambular language affirms, to investigate and prosecute those responsible. A number of legal scholars, notably Jann Kleffner’s pioneering work on complementarity, have sought to locate these duties


38 Skouteris, The Notion of Progress in International Law Discourse, 137.
39 Ibid.
40 OTP, ‘Paper on some policy issues before the Office of the Prosecutor’ (September 2003), at www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.
41 Rome Statute, Preamble, para. 10; see also Kampala Declaration, RC/Dec1.1, para. 5 (‘Resolve to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity’).
within the text of the Rome Statute itself. For Kleffner, complementarity is understood as ‘aiming to induce and facilitate the compliance of States with their obligation “to exercise [their] criminal jurisdiction over those responsible for international crimes,” which underlies the Rome Statute’. Furthermore, he argues, ‘The detailed content of the obligation imposed by the [Rome] Statute, as derived from the complementarity requirements, demands that State Parties conduct effective, genuine, independent and impartial investigations into allegations of ICC crimes without unjustified delays’.

I argue that this duty-based approach has entailed two key strategies for complementarity. On the one hand, complementarity signals the Court’s potential to stimulate national prosecutorial activity through threatened intervention (a coercive relationship); on the other, it signals the ICC’s ability to serve a more supportive, managerial function, wherein it supports or, literally, ‘complements’ national jurisdictions (a cooperative relationship). While these divergent approaches have important implications for the strategies by which complementarity is realized and the domestic forms it has taken in the three countries studied here, both share a vision in which the ICC’s metaphorical ‘shadow’ can precipitate or spur

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43 Kleffner, ‘Complementarity as a Catalyst for Compliance’, 80.

progress in conducting investigations and prosecutions at the domestic level. This understanding of complementarity was actively developed under the tenure of the Court’s first prosecutor, who identified ‘positive’ complementarity – defined as the active encouragement of ‘genuine national proceedings’ – as a principal pillar of the Office’s strategy. It remains a significant pillar today.

Yet, as this book shows, complementarity’s evolution and framing as compliance inducement has predominantly cast the domestic forms and possibilities for post-conflict justice in Uganda, Kenya and the DRC within a retributive model, furthering ‘the criminal trial, courtroom, and jailhouse as the preferred modalities to promote justice for atrocity’. Domestic accountability is commonly understood as requiring, for instance, the establishment of exceptional courts that conform with, or mimic, the ICC’s structures rather than prosecutions enabled through the ‘regular’ criminal justice system. Prosecutions, too, are typically thought to necessitate adjudication as international crimes.

45 The ‘shadow of the ICC’ has become a commonplace description of the Court’s beneficial effects, popularized by former UN Secretary General Ban Ki-moon. See Ban Ki-moon, ‘With the International Criminal Court, a New Age of Accountability’, Washington Post (29 May 2010) (‘Those who thought the court would be little more than a paper tiger have been proved wrong. To the contrary, the ICC casts an increasingly long shadow. Those who would commit crimes against humanity have clearly come to fear it.’). Prosecutor Bensouda has summoned similar imagery, see, e.g., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at first arria-formula meeting on UNSC-ICC relations (6 July 2018), at www.icc-cpi.int/Pages/item.aspx?name=180706-otp-statement-arria-formula (‘[The ICC’s] work is having an impact on the ground, and cultivating norms. Reverberations of such work are also felt beyond the jurisdictional limits of the ICC, where the shadow of the Court, is ever-present. The demobilisation of countless children in Nepal on the heels of the Lubanga case is just one such example.’).


rather than ‘ordinary’ crimes, while justice itself is increasingly understood and prioritized as the exclusive domain of criminal accountability, rather than the plural approaches more commonly associated with transitional justice policy and practice. Indeed, the ICC itself is now often referred to as a ‘transitional justice mechanism’. Domestic accountability is thus increasingly understood and measured in retributive, outcome-oriented terms.

Judged by these terms, the ICC may appear to have done little in Uganda, Kenya or the DRC. In Kenya, no senior official or political leader has been held to account for crimes committed during the 2007–8 elections. While there have been a handful of scattered domestic prosecutions, they have been charged as ‘ordinary’ crimes, in the ordinary Kenyan criminal justice system (most of these already limited proceedings also stalled once the ICC’s investigation commenced). Efforts to establish a domestic special tribunal in Kenya have repeatedly failed, and despite the appointment of various working groups and a domestic ‘task force’ to review hundreds of PEV case files, the vast majority of them have been deemed unfit for prosecution due to an alleged lack of evidence. There have been more, but still limited, prosecutions in


50 See, e.g., Obiora Chinedu Okafor and Uchechukwu Ngwaba, ‘The International Criminal Court as a ‘Transitional Justice’ Mechanism in Africa: Some Critical Reflections’, *International Journal of Transitional Justice* 9(1) (2015), 90 (‘Much scholarly writing on the International Criminal Court (ICC) gives the impression that the Court can function effectively as one of the primary transitional justice mechanisms on the African continent, and that it should, indeed, be deployed more or less frequently, liberally and robustly as such.’).

51 Nouwen’s ‘most striking’ finding in her commanding study of the Court’s interventions in Uganda and Sudan was that the relevant compliance sought – an increase in domestic proceedings for crimes within the ICC’s jurisdiction – was ‘barely observable in either state’. She is careful to note, however, that an absence of domestic proceedings did not mean that complementarity was without catalytic effect. See Nouwen, *Complementarity in the Line of Fire*, 10, 33.


53 In June 2008, Kenya’s Attorney General constituted a ‘task force’ within the Director of Public Prosecutions (then subordinate to the Attorney General’s Office) to undertake a