

COMPLEMENTARITY, CATALYSTS, COMPLIANCE

Since its establishment at the turn of the century, a central preoccupation of the International Criminal Court (ICC) has been to catalyse the pursuit of criminal accountability at the domestic level. Drawing on ten years of research, this book theorizes the ICC's principle of complementarity as a transnational site and adaptive strategy for realizing an array of ambitious governance goals. Through a grounded, inter-disciplinary approach, it illustrates how complementarity came to be framed as a 'catalyst for compliance' and its unexpected effects on the legal frameworks and institutions of three different ICC 'situation countries' in Africa: Uganda, Kenya and the Democratic Republic of Congo. Linking complementarity's law and practice to contemporary debates in international law and relations, the book unsettles international law's dominant progressive narrative. It urges a critical rethinking of the ICC's politics and a reorientation towards international criminal justice as a project of global legal pluralism.

CHRISTIAN DE VOS is a senior advocacy officer with the Open Society Justice Initiative. He has worked for organizations including Amnesty International, the United States Institute of Peace, the War Crimes Research Office and Leiden University's Grotius Centre for International Legal Studies. He previously clerked for the United States Court of Appeals for the Second Circuit. He has published in a number of leading academic journals and was a coeditor of the volume *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (with Sara Kendall and Carsten Stahn, 2015). A graduate of American University Washington College of Law (JD) and Leiden University (PhD), De Vos is a member of the New York Bar and was a term member of the Council on Foreign Relations.

Cambridge University Press
978-1-108-47248-7 — Complementarity, Catalysts, Compliance
Christian M. De Vos
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‘De Vos’ careful, rich and well-informed study of the complementarity regime of the International Criminal Court shines by claiming neither too little nor too much. Illuminating how international justice interacts with national processes in three places, and how the first can catalyze the second, he concludes with a persuasive call to hopeful modesty about expectations.’

Samuel Moyn, Henry R. Luce Professor of Jurisprudence and
Professor of History, Yale Law School

‘Christian De Vos detoxes the ICC from its demons. He does so gently, respectfully, wisely and firmly. He delivers the most sophisticated, insightful and compelling assessment currently available about the ICC and its strained, awkward relationships with others. And De Vos builds, too, beautifully, by charting a path forward. His book stands tall. It has soul. It flows with roll, pitch and yaw: De Vos delivers a gleaming must-read.’

Mark A. Drumbl, Class of 1975 Professor of Law, Director, Transnational
Law Institute, Washington and Lee University School of Law

‘With an exquisite analysis of the ICC’s catalytic impact in Uganda, the Democratic Republic of the Congo and Kenya, *Complementarity, Catalysts, Compliance* offers a brilliant analysis of the changes in complementarity as we know it. Christian De Vos’ rethinking of complementarity’s role in practice contributes a deeply insightful understanding of the transformation of international justice in the contemporary period. With breadth, depth and analytic innovation, this is a tour de force – a must read in international justice scholarship!

Kamari Clarke, Professor of Anthropology, University of
California–Los Angeles

‘By following the strange trajectory of complementarity, Christian De Vos manages to capture the political dimensions of prosecution efforts for serious crimes as few have done before him. His study is a fascinating account of how complementarity has taken on multiple identities over the last decade. It plunges us into the meander of internal (mainly strategy changes in the Office of the Prosecutor) and external factors (resulting from the practice of state and non-state actors) that have successively influenced these multiple identities. The study reveals how each of these identities, in turn, influenced the behaviour of actors involved in the national prosecution efforts. The most original contribution of this study lies in the revelation of the versatility of complementarity. We have been conditioned to see complementarity as an intrinsically progressive doctrine – which explains why some find the term “positive complementarity” somewhat redundant. But, as the study reveals, local actors have used complementarity mechanisms and practices to frustrate national prosecutions. If complementarity allows the ICC to project its proverbial shadow, this book urges us to consider the source of its light.’

Pascal Kambale, Senior Advisor, Africa Regional
Office – Open Society Foundations

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‘De Vos has written an exceptional book. *Complementarity, Catalysts, Compliance* evinces a masterful use of interdisciplinary techniques to illuminate how the International Criminal Court – and the idea of the Court – have been constructed, thwarted, re-imagined and transformed, as well as the dynamic actors and political contexts that have shaped these processes. With unflinching honesty, the book tests the scholar’s insights against richly researched and analyzed case studies; these, in turn, provide a rich seedbed for prescription. More than a brilliant intellectual account – though it is surely that – *Complementarity, Catalysts, Compliance* offers valuable guidance for policy-makers and those who work on the front-lines of post-conflict justice.’

Diane Orentlicher, Professor of International Law,
American University Washington College of Law

‘This erudite and insightful book explores a fundamental question: can international criminal justice be truly global? Deftly exploring the International Criminal Court in light of its potential and parameters, its cases and constraints, De Vos illuminates the tensions a faraway court poses for the workings of rule of law on the ground. A must-read for scholars and policy analysts alike.’

Ruti Teitel, Ernst C. Stiefel Professor of Comparative Law,
New York Law School

‘Christian De Vos has done the seemingly impossible: write a book two decades into the ICC’s existence that says something new about the Court’s foundational principle, complementarity. In this meticulously researched and beautifully written book, De Vos demonstrates that the principle of complementarity has generally catalyzed domestic accountability mechanisms not by policing how states prosecute international crimes, but by encouraging non-state actors to promote – sometimes for good, sometimes for ill – a global norm of accountability. All future work on complementarity will have to grapple with this counterintuitive insight.’

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COMPLEMENTARITY, CATALYSTS, COMPLIANCE

The International Criminal Court in Uganda,
Kenya, and the Democratic Republic of Congo

CHRISTIAN M. DE VOS

*Leiden University
Grotius Centre for International Legal Studies*



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-47248-7 — Complementarity, Catalysts, Compliance
Christian M. De Vos
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108472487
DOI: 10.1017/9781108560436

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First published 2020

Printed in the United Kingdom by TJ International Ltd, Padstow Cornwall

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: De Vos, Christian M., author.

Title: Complementarity, catalysts, compliance / Christian M. De Vos.

Description: New York : Cambridge University Press, 2020. | Series: Cambridge studies in international and comparative law | Includes bibliographical references and index.

Identifiers: LCCN 2019043874 | ISBN 9781108472487 (hardback) | ISBN 9781108459723 (ebook)

Subjects: LCSH: Complementarity (International law) | International crimes. | International Criminal Court. | International criminal courts. | Criminal law--International unification. | Criminal justice, Administration of. | Compliance.

Classification: LCC KZ7379 .D48 2020 | DDC 345/.0122--dc23

LC record available at <https://lcn.loc.gov/2019043874>

ISBN 978-1-108-47248-7 Hardback

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For John, Rieve and Baird

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ACKNOWLEDGEMENTS

Like all books, this one has had a long journey with many debts acquired along the way. It began its life ten years ago when I took up a post as a PhD researcher at Leiden University's Grotius Centre for International Legal Studies and continued when I moved to the Open Society Justice Initiative. I count myself fortunate to have had the opportunity to work in both of these institutions, with colleagues whose intellect and passion have helped nourish and inspire my academic pursuits, as well as my commitment to advocacy and social change.

I want to first thank my many interlocutors – in Kenya, Uganda, the Democratic Republic of Congo and The Hague – without whose time and assistance this research would not have been possible. Their names do not all appear here or in the pages that follow, but the time they took to speak with me about their work, their achievements and their disappointments have helped shape this endeavour in ways both large and small.

I am also indebted to individuals whose insights and connections helped me to both develop my in-country networks and my thinking. My sincere thanks to Morten Bergsmo, Phil Clark, Judy Gitau, Kevin Jon Heller, Maria Kamara, George Kegoro, Patryk Labuda, Jacques Mbokani, Njonjo Mue, Sharon Nakhanda, Sarah Nouwen, Eva Nudd, Antonina Okuta, Stephen Oola, Rod Rastan, Carsten Stahn, Ruti Teitel, Larissa van den Herik, Muthoni Wanyeki and Marcel Wetsh'okonda Koso. Like many others who miss her, I am grateful for the wisdom of Chandra Lekha Sriram who offered helpful insights to me at a key moment in the project.

Members of my doctoral review committee also provided critical feedback, helping to guide the revisions that followed: I am grateful to Helen Duffy, Mark Drumbl, Robert Heinsch, William Schabas and Harmen van der Wilt. I owe particular thanks to Larissa for her steadfast encouragement over the years and to Mark, who summoned Matisse at the right moment. His support of this endeavour – and of me – has meant a great deal.

As a law student, I was fortunate to work with and learn from Susana SáCouto and Diane Orentlicher, whose scholarship drew me to the field

of international criminal justice in the first place. Their influence on my thinking has been deep and lasting. Montserrat Carreras gave me my first job in international human rights when I landed at Amnesty International's Belgium chapter after college. My time working with her – just as the ICC was taking shape – helped shape my future pursuits, and I thank her for opening those doors for me. Finally, I am grateful to the Netherlands Organization for Scientific Research, which provided generous financial support to make this project possible; to Tom and Barbara Devine, who kindly let me commandeer their dining room table for several intense writing sojourns on Cape Cod; to Alex Foster, who proved a nimble and cheerful indexer; and to Pete Muller, for the permission to use his photograph as the book's cover image.

Friends and colleagues have been pillars of support. In particular, this work has benefited immeasurably from a conversation and friendship that began with Sara Kendall. She has been a travelling comrade, intellectual sounding partner and the best personal gift to emerge from this experience. Jennifer Easterday, Iavor Rangelov and Marieke Wierda have also been valued interlocutors and friends who came into my life through the course of this project.

It is my great fortune to work with outstanding, supportive colleagues at the Open Society Justice Initiative and the larger Open Society Foundations, which I joined in 2013. I owe particular thanks to the indomitable Betsy Apple, who patiently supported this extended juggling act (first as dissertation, then as book), as well as to Tracey Gurd, whose good cheer and big heart helped in innumerable ways as I transitioned to the Justice Initiative. Alpha Sesay and Eric Witte shared documents, contacts and insights with me generously both before and during my time at OSF; it is a delight to work with them now as colleagues. Conversations and collaborations with Yassir Al-Khudayri, Erika Dailey, Liliana Gamboa, James Goldston, Nina Ippolito, Pascal Kambale, Steve Kostas, Fiona McKay, Roger Mvita, Sharon Nakhandu (again), Mariana Pena, Taegin Reisman, Beini Ye and Ina Zoon have likewise enriched and challenged my thinking. That said, all views expressed (and any errors) in the pages that follow are my own. They do not represent those of OSF or the Justice Initiative.

As a long incubating effort, some parts of this book have appeared elsewhere in previously published forms. Portions of 'Investigating from Afar: The ICC's Evidence Problem', *Leiden Journal of International Law* 26(4) (2013) and "Magical Legalism" and the International Criminal Court: A Case Study of the Kenyan Preliminary Examination', in Morten Bergsmo

and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1* (Torkel Opsahl Academic EPublisher, 2018) appear in a revised format in Chapter 4. Portions of the chapter ‘All Roads Lead to Rome Implementation and Domestic Politics in Kenya and Uganda’ from the edited volume *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) also appear in Chapter 5. This is my second opportunity to publish with Cambridge and, as before, I am grateful for their support and professionalism. My particular thanks go out to Finola O’Sullivan, Marianne Nield, Sarah Payne, Rebecca Jackaman, and Priyaa Menon.

This book would of course not be possible without the love and support of my parents, Christian De Vos and Marnie Whelan-De Vos. They raised me to believe that social justice is part of our work here on earth, but they also encouraged me to ask questions. I am forever grateful for their example. I am also fortunate to have been supported by a wonderful family of choice. Mary Baim and Michael Becker, in particular, have patiently encouraged this endeavour, while the memory of my late father-in-law, Robert Lance, is always with me. I miss him.

Above all, my greatest debt is to Abigail, who gave me the courage to take this leap and the gift of walking it together. She has endured living with this project – its scattered papers, endless Post-it Notes, late nights and too many foregone social outings – for longer than I had any right to ask. Every thought reflected in these pages is a tribute to her fine mind, her generous heart and her unwavering support. Marrying her is the best decision I ever made.

The completion of this project was marked by a number of life events, but three in particular loom large: the death of a dear friend and mentor, John Daniel, and the birth of my children, Rieve Francine Lance-De Vos and her brother, Baird Michael. John was a transformative educator and activist who committed his life to fighting the crime against humanity that was South African apartheid. For my children, this tragic, complicated, occasionally beautiful world is only beginning to take shape. As they steer their own paths in life, I hope that they will do so with the courage and integrity that helped guide John in his. This book is dedicated to them.

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Affaire Kibibi (MP et PC c. Daniel Kibibi et consorts), Cour militaire de Bukavu (21 February 2011)

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Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-06, PTC III (30 November 2006)

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Situation in the Republic of Côte d'Ivoire

Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11, PTC III (3 October 2011)

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Judgment on the Appeal of Côte d'Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo', ICC-02/11-01/12 OA, Appeals Chamber (27 May 2015)

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- Decision on the Admissibility of the ‘Appeal of the Government of Kenya against the “Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(1) of the Statute and Rule 194 of the Rules of Procedure and Evidence”’, ICC-01/09 OA (10 August 2011)
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The Case of the Prosecutor *v.* William Samoei Ruto et al.

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ABBREVIATIONS

A&R	Accountability and Reconciliation Agreement (Uganda)
AC	Appeals Chamber (ICC)
ASF	<i>Avocats sans Frontières</i>
ASP	Assembly of States Parties
AU	African Union
CICC	Coalition for the International Criminal Court
CIPEV	Commission of Inquiry on Post-Election Violence (Kenya)
CMJ	<i>Comité Mixte de Justice</i> (DRC)
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
FARC	Revolutionary Armed Forces of Colombia
FDLR	Democratic Forces for the Liberation of Rwanda
FPA	Final Peace Agreement (Uganda)
HRW	Human Rights Watch
ICA	International Crimes Act (Kenya 2008)
ICC/Court	International Criminal Court
ICC Act	International Criminal Court Act (Uganda 2010)
ICD/Division	International Crimes Division (Uganda and Kenya)
I-CD	Inter-Congolese Dialogue
ICL	International Criminal Law
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
JCCD	Jurisdiction, Complementarity and Cooperation Division
JLOS	Justice Law and Order Sector (Uganda)
JSC	Judicial Services Commission (Kenya)
KNHRC	Kenya National Human Rights Commission
KPTJ	Kenyans for Peace with Truth and Justice
LRA	Lord's Resistance Army
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (formerly MONUC)
MP	Member of Parliament
NGOs	Non-Governmental Organizations

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NILD	National Implementing Legislation Database
ODM	Orange Democratic Movement (Kenya)
OSF	Open Society Foundations
OTP	Office of the Prosecutor
PAJ	Political, Administrative and Judicial Committee (DRC)
PE	Preliminary Examination
PEV	Post-Election Violence
PGA	Parliamentarians for Global Action
PTC	Pre-Trial Chamber (ICC)
SCC	Special Criminal Court in the Central African Republic
STK	Special Tribunal for Kenya
TC	Trial Chamber (ICC)
UNDP	United Nations Development Programme
UPDF	Uganda People's Defence Force
UVF	Uganda Victims Foundation
VRWG	Victims' Rights Working Group
WCD	War Crimes Division (Uganda)

PREFACE

This book is about the International Criminal Court (ICC), the world's first permanent judicial body established to prosecute mass atrocity crimes, and the legal transformations its interventions have spawned in three 'situation countries' to date: Uganda, Kenya and the Democratic Republic of Congo (DRC). Its origins date back to the summer of 2010, a time that, in various ways, marked a turning point for the Court as well as the countries the book traverses.

In June, the first 'Review Conference of the Rome Statute' was held in Kampala, Uganda. Billed partly as a 'stock-taking' exercise of the ICC's founding treaty and of the Court's first eight years of operation, the conference was yet another illustration of international criminal justice's remarkable ascendance as a post-Cold War political project. The conference provided an opportunity for member states to finally establish an agreeable definition of aggression – the most contentious crime over which the ICC now has (partial) jurisdiction – and an occasion to issue a number of ambitious resolutions. One resolution extolled the impact of an emergent 'Rome Statute system' on victims and affected communities, while another noted the 'importance of States Parties taking effective domestic measures to implement the Statute' in their own legal systems (as the conference's host country, Uganda, had just done).¹ The final Kampala Declaration recalled the heady language of the Rome Statute's preamble – 'that all peoples are united by common bonds', whose 'delicate mosaic may be shattered at any time' – as it summoned 'the common bonds of our peoples, our cultures pieced together in a shared heritage'.²

¹ See RC/Res.2 The impact of the Rome Statute system on victims and affected communities and RC/Res.1 Complementarity, para. 4 (both adopted on 8 June 2010, by consensus), at https://asp.icc-cpi.int/en_menus/asp/reviewconference/resolutions%20and%20declarations/Pages/resolutions%20and%20declarations.aspx.

² See RC/Decl.1 Kampala Declaration (adopted on 1 June 2010, by consensus), at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf.

And yet, by 2010, these bonds were being sorely tested. After commencing its first investigations in both Uganda and the DRC (situations that were referred to the Court by those countries' own governments), the ICC had begun to navigate an increasingly rocky political terrain. Luis Moreno-Ocampo, the ICC's inaugural prosecutor, had initiated the Court's first, controversial *proprio motu* investigation in Kenya that spring, following the government's failure to establish a domestic tribunal for the post-election violence of late 2007. Shortly thereafter, ICC judges issued a second arrest warrant against former Sudanese President Omar Al Bashir, the first sitting head of state to then be charged by the Court. This time the charge was for genocide, the 'crime of crimes'.³

By late July, Kampala was again playing host, but this time to a different summit: the African Union's (AU) annual Assembly of Heads of State. At this convening, the focus was not on humanity's 'common bonds' but rather on charges of the ICC's racism and bias. Furious at what by then had increasingly come to be seen as a 'court for Africa' – neocolonial in design, imperial in ambition – the AU Assembly rejected the ICC's request to open a 'liaison office' in Addis Ababa (where the Union is headquartered) and accused Moreno-Ocampo personally of 'making egregiously unacceptable, rude and condescending statements' in relation to both the Al Bashir case and other situations on the continent. Already a source of animosity, the Court's relationship with the AU sank to a new low, one with which it continues to struggle.⁴

That same summer, I was packing up my apartment in New York City for a different, though related, destination: The Hague. Host city to an array of international courts and tribunals, including the ICC, my decision to move there was motivated by a desire to better understand an institution that both inspired and intrigued me. A young lawyer and aspiring academic at the time, I made the decision to join a new research project housed at Leiden University's Grotius Centre for International Legal Studies that sought to explore the Court's institutional evolution since first opening its doors on 1 July 2002, as well as the domestic legal effects that its interventions had 'catalysed', a concept I would come to interrogate closely over the coming years.

³ See Prosecutor v. Kambanda (ICTR 97-23-S), International Criminal Tribunal for Rwanda, Trial Chamber I, Judgment 4 September 1998, para. 16.

⁴ For a fuller accounting of the ICC's relationship with African politics, see Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2019); Charles Chernor Jalloh and Ilias Bantekas (eds.), *The International Criminal Court and Africa* (Oxford: Oxford University Press, 2017); Kamari M. Clarke, Abel S. Kottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press, 2016).

Living and working in The Hague allowed me to regularly engage with an array of academics, jurists and human rights advocates from around the world, many of whom have made the creation and sustenance of the field called ‘international justice’ their life’s work. Their often single-minded focus on the ICC was remarkable in its sophistication and ambition. Not only was it rooted in the vision of a global institution that could competently and fairly try those accused of international crimes (a formidable task in itself, as the Court’s experience to date has made clear) but one that could also spark the domestic pursuit of accountability in countries around the world.

This book explores the belief in that spark – its origins, capacities and permutations – and offers an assessment of the ICC’s ability to deliver upon it. It comes not only at a time when debates about the Court’s performance and its ‘catalytic effect’ on states increasingly captivate scholars from a variety of disciplines but also at a moment when the ICC, international courts and the human rights project itself face a growing and possibly existential tide of political resistance.

At the centre of much of this discussion lies the principle of complementarity: the idea that the ICC is designed to supplement, not supplant, national jurisdictions.

This appealing idea is at once both straightforward and deeply complex. Originating as a technical admissibility rule for determining when the ICC can ‘admit’ a case within its jurisdiction, complementarity has since become the cornerstone for what is now commonly referred to as the ‘Rome Statute System’, one in which ‘States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction’.⁵ A related, core aspiration is that the ICC, through the principle of complementarity, will spur domestic jurisdictions to action. As put by two commentators, ‘The [ICC] is intended to not only investigate and prosecute crimes under its jurisdiction but to act as a catalyst for genuine national justice by applying the principle of complementarity’.⁶

⁵ ‘Paper on some policy issues before the Office of the Prosecutor’, ICC-OTP 2003 (September 2003), 5, at www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

⁶ Jonathan O’Donohue and Sophie Rigney, ‘The ICC Must Consider Fair Trial Concerns in Determining Libya’s Application to Prosecute Saif al-Islam Gaddafi Nationally’, EJIL: Talk! (blog), *European Journal of International Law* (8 June 2012), at www.ejiltalk.org/the-icc-must-consider-fair-trial-concerns-in-determining-libyas-application-to-prosecute-saif-al-islam-gaddafi-nationally/.

Ultimately, my research led me to Uganda, Kenya and the DRC. Between 2011 and 2012, I travelled to each of these countries on multiple occasions to interrogate the idea of the ICC-as-catalyst further and to better understand what domestic legal transformations the Court's involvement in these early situations had augured. These 'field' trips – as well as my time living in The Hague – attempted to explore both the expectations that attended the Court's establishment and the effects of its interventions through interviews with international and domestic non-governmental organizations (NGOs), ICC staff, judges, human rights advocates and diplomatic representatives. In the course of those two years, I conducted over sixty interviews with actors based both in-country and The Hague. Three of these encounters are described in the following.

Uganda: 'We Have to Look Like We Are Doing Something'

The International Crimes Division (ICD) – a special division of the Ugandan High Court's eight divisions – sits midway up a tall hill in the already hilly city of Kampala, Uganda's capital. The Division is not easy to reach. The easiest way, if you are without a car and unwilling to walk, is to grab one of the ubiquitous *matatus* that populate the city. I made three trips to the ICD in the course of my visits to Uganda, but on this sunny day in December 2011, my co-researcher and I were to meet with one of the judges of the Division who was part of the bench then overseeing early proceedings in the trial of former Lord's Resistance Army (LRA) commander, Thomas Kwoyelo, which had already been underway for nearly two years.⁷ It was not the first time we were meeting this judge. Only several months prior, she and other colleagues from the Division had come to The Hague for a week-long training in international criminal law that Leiden supported, together with a leading transitional justice NGO.

As it happened, that morning we had also met with the legal counsel for Uganda's Amnesty Commission. The Commission had certified Kwoyelo's amnesty petition in January 2010 but was now engaged in a protracted battle with the Director of Public Prosecutions over its validity. Established by the Amnesty Act in 2000 as a way to incentivize defections from the LRA (as well as other rebel movements),

⁷ Interviews with legal counsel to the Amnesty Commission and ICD judge (Kampala, 13 December 2011). My co-researcher refers to Dr Sara Kendall, with whom I conducted most interviews jointly.

the Commission was the Division's institutional opposite: it granted ex-combatants protection from prosecution, while the ICD was meant to be the putative forum for prosecuting them.⁸ Curious, I asked the counsel what kind of impact he thought the ICC had in Uganda. 'A big one', he said soberly, 'The ICC has a lot of powers; it says some of these Africans need to behave'. I also asked the same of the ICD. 'It has increased international pressure', he replied, 'The donors have invested some money in that court, so we have to look like we are doing something'.

One long walk later, we sat before the judge who, over the course of an hour, answered a string of questions. How many judges sit on the Division? (Four, at that time.) When did it change from the War Crimes Division – its name when first established in 2008 – to the ICD? (In 2010.) What rules of procedure would they use? (The rules were not yet created at the time but would have to be originated by the Division, and they would have to 'reflect the best practices in the world'.) The judge indicated that ICD colleagues had received multiple trainings in subjects ranging from substantive international criminal law and procedure to organized crime and the laws of war. On the subject of the ICC, the judge expressed disappointment that the Division itself did not have any interactions with the Court and stressed the need for more 'positive complementarity' – for instance, a proper witness protection program, judicial trainings, even perhaps 'attaching' the Division to other 'courts of complementarity' in countries like Australia or Canada. 'I wish the ICC could help with that, but I think it prefers to keep safe', the judge said, with evident disappointment.

⁸ For a more detailed history of the Ugandan conflict, the following texts offer useful background context: Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006); Matthew Green, *The Wizard of the Nile: The Hunt for Africa's Most Wanted* (London: Portobello Books, 2009); Tim Allen and Koen Vlassenroot (eds.), *The Lord's Resistance Army: Myth and Reality* (London: Zed Books, 2010); Aili Mari Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime* (Boulder: Lynne Rienner Publishers, 2010); Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011). Sverker Finnström's *Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda* (Durham: Duke University Press, 2008) is an excellent anthropological account of the conflict in northern Uganda; see also Sverker Finnström, 'Reconciliation Grown Bitter? War, Retribution, and Ritual Action in Northern Uganda', in Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010), 135–156.

Democratic Republic of Congo:
la poursuite de la 'pérennité'

Kinshasa, the Democratic Republic of Congo's dense and sprawling capital city, is known as 'Kin la belle', although the description is at times difficult to appreciate. Even as it sits far from the violence that grips the east of the country (where the ICC has concentrated its work), the city's chaotic rhythms seemed to vibrate with its dense, complex history. Stretching back to the 'First Congo War', when Rwandan and Ugandan troops backed Congolese rebel forces in the overthrow of then President Mobutu Sésé Seko, the DRC has remained at the epicentre of one of the world's most enduring conflicts.⁹

Given this, it was not hard to appreciate the daunting challenge that a country like the DRC posed for a young institution like the ICC. Nor was the Congo's violent legacy of colonialism ever far from my mind. I thought frequently of my Belgian family's own particular story with the country (my grandfather worked for many years in the shipyards and rail stations of pre-independence Belgian Congo; my aunt and father were born there), as I engaged in earnest conversations with expats about how to 'end impunity' for the atrocities that civilians continued to endure. I wrestled with the idea that a court situated thousands of miles away could do this and about the complicated donor economies that encircled its intervention. Many of the same European countries that were now financing the ICC and other judicial reform projects in the country were the same ones that had been divvying up this continent not so long ago.

Our arrival in June 2011 preceded the DRC's second presidential elections by several months, although it was clear that their imminence was already consuming most of the diplomatic community's energies. These elections were the first to follow the arrest of one of the country's leading politicians, Jean-Pierre Bemba, whose trial before the ICC (for crimes committed in

⁹ See, for example, Kris Berwouts, *Congo's Violent Peace: Conflict and Struggle since the Great African War* (London: Zed Books, 2017). There is a vast literature on the conflict in the DRC. Useful texts consulted for this research are Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996–2006* (Cambridge: Cambridge University Press, 2009); Jason K. Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (New York: PublicAffairs, 2011); Michael Deibert, *The Democratic Republic of Congo: Between Hope and Despair* (London: Zed Books, 2013); and David van Reybrouck, *Congo: The Epic History of a People* (London: Fourth Estate, 2014). Notably, the ICC's presence in the DRC is barely mentioned (or mentioned only in passing) in most of these texts; of them, Deibert engages most with Court developments in the context of the continued fighting in eastern DRC.

the neighbouring Central African Republic) had begun in November 2010. On our first day, an interview that had been scheduled with the European Union (EU) delegation provided us, fortuitously, with an opportunity to meet two Congolese human rights advocates whose NGO had been engaged around the ICC's intervention for several years.¹⁰ Much of their work focused on facilitating the participation of victims in Court proceedings, as well as advocating for the passage of Rome Statute implementing legislation. As they explained, their mandate was to 'simplify' the Statute and make it understandable to people – in French, *la vulgarisation* ('popularizing work'). The advocates were there to brief the EU delegation's Working Group on Human Rights, a monthly gathering of donor states, but with elections then looming, the long table they were meant to address was almost empty. Except for one representative, no one had shown up.

The Working Group's loss was our gain: over coffee, we seized the opportunity for a conversation. It quickly became apparent that despite our interlocutors' support for the ICC's work in the DRC, they were deeply critical of its performance. They spoke of the poor quality of investigations and of the investigator one of them met who had never even been to the DRC before. How were they selected? How were they vetted? They recalled that the best years for contact with the Court were probably between 2002 and 2005 – the early years of its intervention – and expressed frustration with the many ICC staff changes since then. 'People leave, and you don't know where they go', one remarked. *Il faut que le peu qui est fait, soit bien fait* ('the little that is done must be done well') said the other, but, in her view, too much had not been done well. Although there was 'a lot of hope' amongst victims in the beginning, it was not as strong now, and people could not understand why the first trial in The Hague (that of Thomas Lubanga, for the recruitment of child soldiers) had gone on for so long.

Towards the end, the discussion turned to the prospects for domestic accountability in the DRC. What about the prospect of a mixed chamber for these serious crimes, of the sort that was then being proposed? They were sceptical. 'It is not just about the judges – it is about the prisons, the personnel, the system at large', one replied. It was the need for long-term sustainability within the criminal justice system that concerned them – in French, *la poursuite de la pérennité*. A special chamber would only deal with one category of crimes: it would be an 'itinerant' court unconnected to the domestic judiciary. What, they asked, about the rest of the country?

¹⁰ Interview with Congolese human rights advocates (Kinshasa, 20 June 2011).

Kenya: ‘One Long Game’

On my third trip to Nairobi, I met again with the director of the Kenyan Country Office for a prominent international NGO. Shortly after my last visit, the Office of the Prosecutor (OTP) had issued its summons for the defendants that came to be known as the ‘Ocampo Six’. On this visit, two of those accused, Uhuru Kenyatta and William Ruto, had just announced a new political ticket forged out of the ICC’s accusations: the Jubilee Alliance.¹¹ At the time, however, the Court was riding relatively high. From my very first visit to Nairobi, the sophistication of Kenyan civil society was quickly apparent, as was the jolt that the ICC’s intervention had brought to the human rights community there.¹² As the same director said at our first meeting, Kenya had a long history of impunity for political violence, such that, when the Court first arrived, many Kenyans embraced it. ‘They were so used to seeing people get away with things’, he said.¹³

Indeed, the ICC’s arrival brought with it, for a time, great hope. Members of Kenyan civil society set about supporting the Court’s work in a variety of ways: registering and interviewing victims, supporting an ‘underground’ witness protection system, conducting outreach in conflict-affected communities, gathering evidence and, later, pushing for the establishment of a special domestic tribunal.¹⁴ In Kenya, as elsewhere, national NGOs came to serve as a kind of shadow network for the Court. They were its eyes and ears on the ground.

By the time of our second meeting in late 2012, however, that hope had dimmed considerably.¹⁵ Two of the ‘Ocampo Six’ had not had their charges confirmed, and there was fear – well founded, as it would soon

¹¹ On shifts in the Kenyan political order, see Sara Kendall, “‘UhuRuto’ and Other Leviathans: The International Criminal Court and the Kenyan Political Order”, *African Journal of Legal Studies* 7(3) (2014); Gabrielle Lynch, ‘Electing the “Alliance of the Accused”: The Success of the Jubilee Alliance in Kenya’s Rift Valley’, *Journal of Eastern African Studies* 8(1) (2014).

¹² On the emergence and accomplishments of modern civil society in East Africa, see Makau Mutua (ed.), *Human Rights NGOs in East Africa: Political and Normative Tensions* (Kampala: Fountain Publishers, 2009).

¹³ Interview with Kenyan NGO director (Nairobi, 17 June 2011).

¹⁴ These examples were offered through interviews with Kenyan civil society advocates (Nairobi, June 2011 and January 2012). See also Njonjo Mue and Judy Gitau, ‘The Justice Vanguard: Kenyan Civil Society and the Pursuit of Accountability’, in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

¹⁵ Second interview with Kenyan NGO director (Nairobi, 3 December 2012).

turn out – that the other cases would also collapse.¹⁶ Kenyatta and Ruto were on the political rise, it seemed, with ominous implications for the trials that awaited them; indeed, Kenyatta would go on to win the presidency the following year. I asked my interlocutor what kind of impact he thought the ICC had had, despite its mistakes. What had it catalysed? The answer came in two parts. On the one hand, ‘the only time you hear about something being set up [in Kenya] is when the ICC moves’. That was what led Parliament to attempt to set up a domestic tribunal in 2009, to the creation of a special ‘task force’ within the Director of Public Prosecutions office to investigate the post-election violence cases and later to talk about the creation of a special judicial division to try international crimes. But none of that, apparently, mattered. ‘All that has supposedly been done for complementarity’, he said with a long sigh, ‘It has just been one long game’.

Much has changed in the years since these encounters took place. The ICC bench is now populated with new judges, while, in 2012, a new prosecutor, Fatou Bensouda, succeeded (and inherited) Moreno-Ocampo’s tumultuous tenure; a third prosecutor will follow her in 2021.¹⁷ The last of the ‘Ocampo Six’ cases was dismissed in early 2016, following a damaging series of missteps by the OTP and significant interference in the proceedings by the Kenyan government itself. In Uganda, one trial of the original five accused members of the LRA has moved forward (following the surprise arrest and transfer of former child soldier Dominic Ongwen in 2015), but the group’s leader, Joseph Kony, remains at large and no new warrants have been issued since. And while the DRC remains the greatest source of the ICC’s judicial activity to date, the OTP’s increasingly fragile record of successful prosecutions has done little to deter ongoing violence in the region, as many had hoped. Meanwhile, amidst the Court’s increasingly uneven performance, new situations crowd the Prosecutor’s docket, spanning countries as diverse as Georgia, Palestine, the Philippines and Myanmar. Repeated threats by African countries to initiate a mass

¹⁶ Following the confirmation of charges decisions, the ICC prosecutor announced in March 2013 that her office was withdrawing the charges against Francis Muthaura. The charges against Kenyan President Uhuru Kenyatta were subsequently withdrawn in March 2015.

¹⁷ See, for example, David Kaye, ‘Who’s Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight’, *Foreign Affairs* 90(3) (May/June 2011).

withdrawal from the Statute have largely not come to pass, but the situation remains tense and uncertain.¹⁸ After the promise of Rome, the threat of state withdrawal is perpetual.

Much has changed for me in these years as well. Though the dissertation on which this book is based was completed in early 2016, I made the decision to move towards practice-based work when I joined the Open Society Justice Initiative, part of the Open Society Foundations (OSF), in 2013. In that process, the methodology and investments I made in this project have necessarily shifted. For one, I became a member of the same transnational ‘community of practice’ described in the pages that follow, as both the Justice Initiative and OSF more broadly are significant actors in the international and transitional justice landscape. Furthermore, although my work for the Justice Initiative has not directly involved any of the three countries addressed herein, I myself now advocate in support of the ICC and its work. I also engage in other countries where the Court’s intervention is sought. In the course of doing so, several of my former interlocutors have since become valued colleagues and friends. In short, I sit in the privileged, if complicated, position of having become a participant in my own research.

Thus, while this book began its journey as a scholarly pursuit and its insights draw principally from my PhD research, it is also now, inevitably, a personal analytical account. It is not only multi-sited in the geographies it traverses but also multi-positioned in the professional identities I have inhabited.¹⁹ In his influential ethnography of development practice, the anthropologist David Mosse, himself a former consultant for the United Kingdom’s Department for International Development (DFID), aptly describes such research as ‘both social investigation and lived experience’.²⁰ While Mosse’s research first drew on his insights as a participant-insider with DFID, for me, the reverse is true: my role as a ‘participant-insider’ in the field of international criminal justice has

¹⁸ At the time of writing, only two states have withdrawn from the Rome Statute (Burundi, which announced its withdrawal in October 2017, and the Philippines, which deposited notification of its intention to withdraw in March 2018), but many others have threatened to do so, including the three countries examined here. For an analysis of threatened African withdrawals, see Christian De Vos, ‘The Politics of Departure: Africa and the International Criminal Court’ (3 November 2016), at <https://theglobalobservatory.org/2016/11/international-criminal-court-south-africa-burundi-gambia/>.

¹⁹ See, for example, George E. Marcus, ‘Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography’, *Annual Review of Anthropology* 24 (1995).

²⁰ David Mosse, *Cultivating Development: An Ethnography of Aid Policy and Practice* (London: Pluto Press, 2005), ix.

evolved over time. This experience has itself influenced the conclusions I draw from my research. As Mosse writes, 'Mine is an interested interpretation not a scientific judgment; it adds interpretations to those of actors whose experience I share'.²¹

Similarly, my experience as a human rights advocate and practitioner has expanded my own interpretations. I have come to see with new eyes and greater appreciation the campaign that was waged to not only successfully establish a permanent international criminal court – a political dream harboured by so many, for so many years – but to also then help transform the meaning and understanding of complementarity itself. These are advocacy victories to celebrate and learn from; they were hard fought and hardly imaginable today. But, as I hope this book illustrates, they have exacted a certain price as well. The expectations these victories ushered in, as well as the ambitions that animated them, appear almost impossibly large in retrospect. Implementation of a catalytic 'complementarity norm' has been a challenge for the ICC and its supporters to realize as they struggle, increasingly, to reconcile a political dream amidst a host of growing practical, political and fiscal constraints. This book is a partial exploration into what that dream has looked like in practice and an effort to suggest what should come next.

²¹ Ibid., 14.

Cambridge University Press
978-1-108-47248-7 — Complementarity, Catalysts, Compliance
Christian M. De Vos
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