A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

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In the two and a half years I spent preparing to write this dissertation, I found myself living in The Hague or as it proudly refers to itself, the "International City of Peace and Justice." Host city to an array of international courts and tribunals, including the International Criminal Court (ICC), working in The Hague allowed me to regularly engage with an array of academics, jurists, and human rights activists, many of whom have made the creation and sustenance of the field of international criminal law their life's work. Their focus on the ICC in particular 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) but one that could also spark the domestic pursuit of accountability in countries around the world.

This dissertation seeks to explore the belief in this spark—its origins, capacities, and permutations—as well as the ICC's ability to deliver upon it. As the Court enters its second decade, debates about its potential impact on domestic criminal jurisdictions, and the legal systems of states more broadly, loom ever larger. At the center of much of this discussion lies the principle of complementarity: the idea that the ICC is designed to supplement, not supplant, national courts. This appealing idea is at once both straightforward and deeply complex. Beginning as a technical admissibility rule for determining when the ICC can pursue 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."[1] A core aspiration is that 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."[2]

During my time in The Hague, I also traveled to three of the ICC's "situation countries" to interrogate this idea of the ICC-as-catalyst further: Uganda, the first country to come before the Court, and referred there by the government itself in 2004; the Democratic Republic of Congo, the second situation so referred; and Kenya, a country that became the source of the Prosecutor's first *proprio motu* investigation following the post-election violence of late 2007. These trips were field research, an attempt to explore the expectations that have attended the Court's establishment through interviews with international and domestic NGOs, ICC staff, judges, human rights advocates, and diplomatic representatives. In the course of those months, I conducted over 50 interviews with these individuals. Three are described below.

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[1] "Paper on some policy issues before the Office of the Prosecutor," September 2003, 5, at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

[2] 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! (8 June 2012).

1. Uganda: "We Have to Look Like We Are Doing Something"

The International Crimes Division—a special division of the Ugandan High Court's eight divisions—sits mid-way 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 day we 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 LRA commander, Thomas Kwoyelo.[3]

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 Lord's Resistance Army, 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. Curious, I asked the counsel what kind of impact he thought the ICC had had in Uganda. "A big one," he said. "The ICC has a lot of powers; it says some of these Africans need to behave." What about the ICD, I asked? "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, I 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 International Crimes Division? (In 2010.) What rules of procedure would they use? (The rules had to be originated by the Division, but 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 ICD itself did not have any interactions with the Court, and stressed the need for more "positive complementarity"—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 they [the ICC] could help with that, but I think they prefer to keep safe," the judge said.

2. Democratic Republic of Congo: *la poursuite de la pérennité*

Kinshasa, the DRC's dense and sprawling capital, is known as "Kin la belle," although the description is at times difficult to appreciate. We arrived in Kinshasa after two weeks in Kampala and Nairobi, and it was quickly apparent—even in this capital city, which sits far from the violence that grips the east of the country—what a daunting challenge the DRC, with its dense, complex histories of conflict, must be for a young institution like the ICC. Our arrival 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.

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[3] Interviews with legal counsel to the Amnesty Commission and ICD judge, Kampala, 13 December 2011. "We" refers to Sara Kendall, with whom I conducted most interviews jointly.

On the first day, an interview that had been scheduled with the European Union 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.[4] 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 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 skeptical. "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—*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?

3. 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, someone I had first interviewed 18 months prior, shortly after the OTP announced its summons for the defendants that would become known as the "Ocampo Six." From my first visit to Nairobi, the sophistication of Kenyan civil society was quickly apparent,[5] as was the jolt that the ICC's intervention had brought to the human rights community there. As the same director said at our first meeting, Kenya had a long history of impunity for political violence such that, when the ICC first arrived, many Kenyans embraced it. "They were so used to seeing people get away with things," he said.[6]

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[4] Interview with Congolese human rights advocates, Kinshasa, 20 June 2011.
[5] 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).
[6] Interview with Kenyan NGO director, Nairobi, 17 June 2011.

Indeed, the Court's arrival brought with it, for a time, great hope. Members of Kenyan civil society set about supporting the ICC'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 continuing to push for the establishment of a special domestic tribunal.[7] In Kenya, as elsewhere, national NGOs came to serve as a kind of shadow network for the Court.

By the time of our second meeting, however, that hope had dimmed considerably.[8] Two of the "Ocampo Six" had not had their charges confirmed and there was fear—well founded, as it would soon turn out—that other cases might collapse.[9] I asked my interlocutor what kind of impact he thought the Court had had, despite its missteps. What had it catalyzed? 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, and later to the creation of a special "task force" within the Director of Public Prosecutions to investigate the post-election violence cases. But none of that, apparently, mattered. "All that has supposedly been done for complementarity," he said with a sigh, "It has just been one long game."

[7] These examples were offered through interviews with Kenyan civil society advocates, Nairobi, June 2011 and January 2012.
[8] Second interview with Kenyan NGO director, Nairobi, 3 December 2012.
[9] 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.