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

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CHAPTER ONE
Introduction

Since its inception, a central preoccupation of and for the International Criminal Court has been the nature of its relationship to national jurisdictions. 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 the prologue's three narratives suggest, the principle occupies a charged space in the political imaginary, replete with tensions and ambiguity. To a Ugandan judge it suggests that the ICC might serve as a kind of "big brother" court to its domestic counterpart, while to a Kenyan human rights advocate 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 the "cornerstone of the Rome Statute": it represents the very future of international criminal justice. 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."[10] 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 catalyzing progressive change in post-conflict countries' legal frameworks and institutions.[11]

1. Research Aim, Problem Statement, and Research Questions

This dissertation aims to examine what effects framing the ICC as a "catalyst" for domestic investigations and prosecutions has had in three distinct situation-country contexts. Pursuant to this research aim, it examines how both state and non-state actors in Uganda, Kenya, and the Democratic Republic of Congo have relied upon the principle of complementarity as the logic through which the Court's catalytic potential can be best

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[10] International Center for Transitional Justice, "The Future of International Justice: National Courts Supported by International Expertise," at https://www.ictj.org/news/future-international-justice-national-courts-supported-international-expertise

[11] As detailed further in the dissertation, there has been a rapidly proliferating literature that frames its inquiries around the ICC's catalytic potential through the principle of complementarity. One of the earliest articles to employ the phrase was Jonathan Charney, "Editorial Comments: International Criminal Law and the Role of Domestic Courts," *American Journal of International Law* (2001), 120 (viewing the effective success of the ICC as "having first served as a catalyst, and then as a monitoring and supporting institution"). See further Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus Nijhoff Publishers, 2008); Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008); Géraldine Mattioli and Anneke van Woudenberg, "Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo," in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, March 2008); Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (UK: Ashgate, 2011). See also Janine Natalya Clark, "Peace, Justice and the International Criminal Court: Limitations and Possibilities," *Journal of International Criminal Justice* 9 (2011), 521-545; Clark argues that, "through the implementation and practice of complementarity, the Court can potentially have a significant catalytic effect," 538. The most recent, and best, work to date is Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

realized, as well as a transnational site and adaptive strategy for entrenching the norm of international criminal accountability domestically. In so doing, it asks three principal research 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's requirements in the courtroom, and how has the Office of the Prosecutor sought to implement it as a matter of policy? Finally, to what extent and how have the ICC's interventions in Uganda, Kenya and the DRC affected these countries' institutional and normative frameworks for carrying out domestic criminal proceedings?

2. Framing the ICC as a Catalyst

Framing international legal institutions as catalysts dominates much of a growing literature on their effects and impact at the national level. While the ICC may represent a more recent iteration, the presumption that other institutions—from regional human rights courts to UN human rights mechanisms—would have or have had a salutary effect on state behavior has drawn the interest of legal scholars and political scientists alike.[12] The political scientist Kathryn Sikkink writes that, "Well 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."[13] 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,"[14] who collectively contributed to the rise and legitimation of individual criminal accountability as a new international norm.

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."[15] The prosecutions of several high-level political figures, which drew legal scholars to examine the domestic effects that such efforts might augur, illustrate the fortification of this cascade.[16] These developments continued with the establishment and evolution of the *ad hoc* tribunals for Rwanda and the former Yugoslavia, both of which preceded the ICC. Here, too, the trope of the "catalyst" has been summoned: William Burke-White argues that, "the ICTY has encouraged the development of domestic courts in [Bosnia and Herzegovina] and catalyzed the activation of domestic judicial institutions," while Diane Orentlicher concludes that, "[T]he ICTY became a key catalyst for ramping up Bosnia's domestic

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[12] See, e.g., Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton & Company, 2011); Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Washington, D.C.: Brookings Institution Press, 2012). 269.
[13] Sikkink, *The Justice Cascade*, 105.
[14] Ibid., 245.
[15] Ibid., 97
[16] See, e.g., Ellen L. Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009). See also Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in The Age of Human Rights* (University of Pennsylvania Press, 2005). Roht-Arriaza, noting the "burgeoning field of transnational prosecutions" that followed the attempted extradition of former Chilean General Augusto Pinochet from the United Kingdom in 1998 (the same year as the Rome Statute's adoption), argues that the case "played a catalytic role in stimulating and accelerating judicial investigations" in countries like Chile and Argentina. See Naomi Roht-Arriaza, "Of catalysts and cases: transnational prosecutions and impunity in Latin America," in Madeleine Davis (ed.), *The Pinochet Case: Origins, Progress and Implications* (London: Institute of Latin American Studies, 2003), 210.

capacity to prosecute wartime atrocities."[17] Similarly, Yuval Shany 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."[18]

Interest in the capacity of international courts and prosecutions to serve as "catalysts" at the national level has strong affinities with a growing literature on the socializing power of international law and legal institutions, and their role in shaping state behavior.[19] Seminal texts like the *Power of Human Rights*[20] and the early work of such scholars as Abram and Antonia Handler Chayes[21] opened up a new literature amongst social scientists on compliance with international norms and institutions, one that has proliferated rapidly in the last two decades. Interest in the ICC as a catalyst for domestic criminal proceedings thus reflects a converging interest of two distinct, though interconnected, disciplines—international relations and international law—in how legal institutions can influence state behavior and, more particularly, how they can encourage "rule-consistent" behavior.[22] In this sense, interest in complementarity is part of a larger

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[17] William W. Burke-White, "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina," *Columbia Journal of Transnational Law* 46 (2008), 282; Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Initiative/International Center for Transitional Justice, 2010), 108. Orentlicher advances a similar argument in the context of the Serbian experience, arguing that "one of the ICTY's most acknowledged, if nonetheless limited, achievements in Serbia has been its role in spurring the creation of a local war crimes court and helping to empower that court to function professionally." See Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Open Society Justice Initiative, 2008), 45. More recent scholarship has focused on the Special Court for Sierra Leone's contributions to domestic justice advancements as well. See, e.g., Sigall Horovitz, "How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone," *Israel Law Review* 46(3) (2013), 339-367.

[18] Yuval Shany, "The Legitimacy Deficit of Exceptional International Criminal Jurisdiction," in Fionnuala Ni Aolain and Oren Gross (eds.), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge: Cambridge University Press, 2013), 370.

[19] See, e.g., Karen Alter, *The New Terrain of International Law: Courts, Politics, and Rights* (Princeton University Press, 2014); Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford: Oxford University Press, 2013); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009). Goodman and Jinks, in particular, have advanced a theory of "acculturation as a distinct mode of social influence," arguing that this model best accounts for changes in state behavior, in part, "because 'conforming' and 'belonging' themselves confer substantial affective returns," 30-31.

[20] Drawing on quantitative and qualitative case studies, *The Power of Human Rights* suggested that a five-phase "spiral model" explains the socialization process of states with human right norms; the model links interactions among governments, domestic opposition groups, and transnational human rights networks. See Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); see also Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).

[21] The Chayes' scholarship forms part of 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," *International Organization* 47(2) (1993).

[22] See, e.g., Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013); Michael Barnett and Martha Finnemore, *Rules for The World: International Organizations in Global Politics* (Cornell: Cornell University Press, 2004); Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92 (1998), 367-397. For an account of the rise of global governance through

contemporary moment in global governance, wherein supranational judicial bodies are increasingly scrutinized in terms of their effects on state compliance with international norms, rules, and judgments.[23]

These developments in scholarship and the rise of the accountability norm described by Sikkink resonate with a view of international criminal law and its institutions as progressive, catalytic forces on states. As a discursive structure, characterizing these institutions as "catalysts" also recalls what Thomas Skouteris has called the notion of progress in public international law discourse. In the context of the "new tribunalism" of which the ICC is a part, this "vocabulary of progress" becomes a "legitimizing language"—a narrative of evolution and disciplinary progress.[24] In Skouteris' words, "It is 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."[25] 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."[26]

3. Complementarity as a Catalyst for Compliance

Most writing about the ICC's power to catalyze domestic investigations and prosecutions has interpreted complementarity as a matter of compliance with 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."[27] 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.[28] A number of legal scholars, notably Jann Kleffner's pioneering work on complementarity, have sought to locate these duties

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international institutions, see Mark Mazower, *Governing The Word: The History of an Idea, 1815 to the Present* (New York: Penguin Books, 2013).

[23] On compliance, see Dinah Shelton (ed.), *Commitment and Compliance: The role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003); Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007); Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge: Cambridge University Press, 2014). Attendant with this turn has been a growing interest in identifying "indicators" for measuring compliance. See, e.g., Sally Merry, "Measuring the World: Indicators, Human Rights, and Global Governance," *Current Anthropology* 52(3) (April 2011), 83-93.

[24] Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Leiden: Proefschrift, 2008), 187. On the discourse of progress as the "dominant narrative of modern international law," see also David Koller, "… and New York and The Hague and Tokyo and Geneva and Nuremberg and…: The Geographies of International Law," *European Journal of International Law* 23(1) (February 2012); Gerry Simpson, "The sentimental life of international law," *London Review of International Law* 3(1) (2015), 4.

[25] Skouteris, *The Notion of Progress in International Law Discourse*, 137.

[26] Ibid.

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

[28] Rome Statute, Preamble, para. 10; see also Kampala Declaration, RC/Decl.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 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."[29] 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."[30]

This duty-based approach has involved two key strategies for complementarity. On the one hand, complementarity signals the Court's potential to act as a coercive stimulant on national jurisdictions (a threat-based relationship); on the other, it signals the ICC's ability to serve a more cooperative, managerial function, wherein it supports or, literally, "complements" national jurisdictions. While these divergent approaches have important implications for the realization of complementarity in practice, both share a vision in which the ICC can precipitate or spur progress in conducting investigations and prosecutions at the domestic level. This understanding of complementarity was actively developed under the tenure of former Prosecutor Luis Moreno-Ocampo, who identified "positive" complementarity—defined as the active encouragement of "genuine national proceedings"—as a principal pillar of his Office's strategy.[31]

This dissertation argues that complementarity's evolution as a tool for compliance has cast the domestic forms and possibilities for post-conflict justice in Uganda, Kenya, and the DRC within a predominantly retributive model, furthering "the criminal trial, courtroom, and jailhouse as the preferred modalities to promote justice for atrocity."[32] In this process, complementarity has largely been interpreted in a manner that privileges (even when it does not legally require) a mirroring of the ICC's normative and institutional frameworks. Domestic accountability is thus commonly understood as requiring, for instance, the establishment of exceptional courts that mimic the ICC's structures rather than prosecutions enabled through the "regular" criminal justice system. Prosecutions, too, are thought to necessitate adjudication as international crimes rather than "ordinary" crimes, while accountability itself is increasingly understood and prioritized as a project of criminal justice, rather than the plural approaches more commonly associated with transitional justice policy and practice.[33] Indeed, the ICC is

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[29] Jann K. Kleffner, "Complementarity as a Catalyst for Compliance," in Jann K. Kleffner and Gerben Kor (eds.), *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (The Hague: TMC Asser Press, 2006), 80. See also Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 473-478; Jann Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law," *Journal of International Criminal Justice* 1 (2003), 113 (noting that, "complementarity provides for a supervision of national criminal courts, supported by the threat that they relinquish the primary right to exercise jurisdiction if they fail to meet the relevant requirements"); Florian Jessberger and Julia Geneuss, "The Many Faces of the International Criminal Court," *Journal of International Criminal Justice* 10 (2012), 1088 ("The ICC's possible intervening looming over the affected states' reputation serves as a tool to trigger domestic prosecution and is a 'catalyst for compliance.'").

[30] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, 307.

[31] "The Office of the Prosecutor - Report on Prosecutorial Strategy" (14 September 2006), II.2.a.

[32] Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 5. Ruti Teitel similarly refers to the growing "enforcement of international human rights norms through judicial proceedings," in particular international criminal law enforcement. Ruti G. Teitel, "The Universal and the Particular in International Criminal Justice," in *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014).

[33] See, e.g., Lisa J. Laplante, "Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes," *Virginia Journal of International Law* 49(4) (2009), 915-984. On the persistence (and necessity) of

itself now commonly 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 accomplished little in Uganda, Kenya, or the DRC.[34] In Kenya, no senior official or political leader has been held to account for crimes committed during the 2007-08 elections and, while there have been a handful of scattered domestic prosecutions, they have been charged as "ordinary" crimes, in the ordinary criminal justice system.[35] Efforts to establish a domestic special tribunal 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.[36] There have been more, but still limited, domestic prosecutions in the DRC through mobile military courts; however, as I argue, these are primarily due to the efforts of human rights advocates who summon complementarity as a principle of burden-sharing and cooperation (rather than admissibility) to animate their work. The ICC itself is barely present.[37] Finally, in Uganda, there has been only one attempted prosecution to date of a former LRA member before its International Crimes Division, a proceeding which itself has been rife with fair trial violations.

Yet, from a process-oriented perspective, the "idea of the ICC" has been deeply alive in domestic politics and there has been considerable national-level activity pursued in complementarity's name.[38] Indeed, as this dissertation illustrates, the absence of domestic proceedings has not meant that states are inactive, but nor has it meant that compliance with rules necessarily produces greater accountability. Furthermore, an approach defined principally by outcome rather than process underscores the extent to which legalism animates the catalyst/compliance framework. More particularly, it underscores the dominance of what Bronwyn Leebaw has called "human rights legalism," which "not only insists upon the promotion of *law* and courts in general, but on the

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amnesties, see Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

[34] 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.

[35] See, e.g., Irene Wairimu, "Kenya: First Life Sentence in Local PEV Trial," *The Star* (12 June 2012); Human Rights Watch, "'Turning Pebbles': Evading Accountability for Post-Election Violence in Kenya" (December 2011).

[36] In June 2008, Kenya's Attorney General constituted a "task force" within the Director of Public Prosecutions (then subordinate to the AG's Office) to undertake a national wide review of the PEV cases; it later released two reports on domestic investigations and prosecutions, in 2009 and 2011. For a more detailed assessment of these figures, see Sosteness Francis Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (The Hague: T.M.C. Asser Press, 2015), 102-111. The Attorney General also established a "Working Committee on the International Criminal Court" in 2012, following the government's failed admissibility challenges. See "Report of Government's Working Committee on the International Criminal Court" (March 16, 2012) (on-file).

[37] For a similar conclusion, see Milli Lake, "Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo," *African Conflict & Peacebuilding Review* 4(1) (Spring 2014). Lake concludes that, "while the ICC may have inspired certain aspects of legal reform in DRC, the Court itself has remained largely disengaged from domestic developments," 3.

[38] My thanks to Rod Rastan for this felicitous phrase.

centrality of *criminal* law in the aftermath of atrocities and political violence."[39]

Scholars have noted for some time the dominance of legalism—defined by the political theorist Judith Shklar as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by legal rules"[40]—in transitional justice literature. Kieran McEvoy notes, for instance, that, "a strongly positivistic trend of scholarship and practice persists in the legal understanding of transitional justice."[41] This, he suggests, is the product of the "institutionalization of transitional justice in major legal edifices," including the ICC.[42] In McEvoy's view, legalism is seductive, for it "encourages a notion of a rational and ordered place based on universal understandings."[43] Similarly, Shklar notes the influence of legalism as a "matter of rule following," one that seeks to separate legal analysis from politics as well as other disciplines. She writes:

> The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definitions. This procedure has served to isolate law completely from the social context within which it exists. Law is endowed with its own "science," and its own values, which are all treated as a single "block" sealed off from general social history, from general social theory, from politics, and from morality.[44]

Legalism thus shares with compliance an emphasis on rule abidance, wherein political problems are often subordinated to legal categories. In Shklar's words, "Politics is regarded not only as something apart from law, but as inferior to law."[45]

By contrast, this dissertation underscores the primacy of political context in understanding the ways in which domestic actors have negotiated ICC interventions at national level. Building on Leebaw's insight, it argues that these interventions and the goals they seek to achieve have not transcended "the influence of local politics or the impact of global asymmetries" but are, in fact, constituted by them.[46] Nevertheless, in The Hague the ICC has articulated a complex set of rules that states must satisfy in order to successfully challenge the admissibility of cases before the Court, leaving little room (or the perception of little room) for agency or political discretion. As I argue, these rules

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[39] Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), 6 (emphasis in original).
[40] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 1. For a similar, contemporary critique from a conservative legal scholar, see Eric Posner, *The Perils of Global Legalism* (Chicago: The University of Chicago Press, 2009).
[41] Kieran McEvoy, "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice," in Kieran McEvoy and Lorna McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* 15-45 (Portland: Hart Publishing, 2008), 19.
[42] Ibid.
[43] Ibid., 20. For a qualified defense of legalism and international criminal tribunals, see Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).
[44] Shklar, *Legalism*, 2-3.
[45] Ibid., 111. For a similar argument in the context of humanitarianism, see David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).
[46] Leebaw, 179. Leebaw emphasizes instead the importance of political judgment in the examination of systematic atrocities, which "informs the ways in which clashing local and international standards will be treated," 178. Sarah Nouwen and Wouter Werner have also called for an evaluation of the ICC's activities that acknowledge and understand its political dimensions; however, their framework of analysis emanates from the friend/enemies framing advanced by Carl Schmitt. See Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21(4) (2010), 941-965.

perpetuate a mirroring effect between international and domestic institutions, often at the expense of more pluralistic approaches.

A catalyst/compliance framework also tends to privilege the ICC as the institutional locus for triggering domestic change, wherein rules and practices devised in The Hague radiate outwards. A central premise here, however, is that the effects of ICC engagement cannot be interpreted in institutional isolation. Indeed, the perpetuation of the ICC's mirroring effect is not only (or even mostly) the work of Court actors. It is also the result of private actors and norm entrepreneurs—international human rights NGOs, academics, influential donors—who have powerfully and deliberately sought to shape the public understanding of justice in the ICC's image. This constellation of global civil society actors, technical advisors, and international consultants that attend Court interventions are equally, if not more, important actors in spurring domestic reform agendas and influencing political priorities.[47] Indeed, while ICC case law and the Rome Statute are both sources of legal authority, it is often these entrepreneurs who play the most active role in mediating the normative content of complementarity and in framing the Court as a catalytic force.[48]

Notably, this vertical approach to change places a heavy burden on the Court itself. To catalyze, the ICC must be seen as a credible threat by states: its coercive power depends on safeguarding this perception. But the Court's lackluster record of confirmations and convictions to date indicates that it has largely failed to live up to these expectations, thus imperiling its catalytic potential. Furthermore, the Court and its political stakeholders (notably, the Assembly of States Parties) have often struggled to reconcile complementarity's more ambitious policy goals, particularly its cooperative dimensions, with the ICC's so-called "core function" as a court of law. In practice, then, a more narrow approach to the Court's relationship with domestic jurisdictions has been pursued, limited not only by geographical and institutional constraints but, increasingly, financial ones as well.

4. Structure

The following chapters address how the ICC, through the exercise of the principle of complementarity, has been framed as a catalyst for one particular set of

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[47] Recent work has drawn attention to the vital role played by these actors in the ICC's establishment and functioning. Nouwen, for instance, points out that, "In practice, most catalyzing effects are not the result of direct ICC-state interaction." *Complementarity in the Line of Fire*, 22. See also Lake, "Ending Impunity for Sexual and Gender-Based Crimes," 4 (concluding that "many of the developments within the Congolese justice sector have been propelled not by the ICC, but by the work of international and domestic NGOs"). On the significance of civil society's role in the ICC's creation and evolution, see Marlies Glasius, *The International Criminal Court: a global civil society achievement* (New York: Routledge, 2006); Fanny Benedetti, Karine Bonneau, and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Leiden: Martinus Nijhoff Publishers, 2014).

[48] For a similar assessment in the context of the work of other international tribunals and human rights institutions, see Xinyuan Dai, "The Conditional Effects of International Human Rights Institutions," *Human Rights Quarterly* 36 (2014), 589 (arguing that IHRIs "in and of themselves, do not directly impact states' policies or behaviors"; rather, "others—interested stakeholders and human rights activists—may (or may not) use them to gain additional leverage to push for improvement in human rights practices"); Patrice C. McMahon and David P. Forsythe, "The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics," *Human Rights Quarterly* 30 (2008), 433 (arguing that "the court's effects must be considered in the context of the networked order in Europe").

outcomes: domestic investigations and prosecutions.[49] As highlighted in the problem statement and research questions above, I seek to trace not only how the understanding of complementarity has evolved since the ICC's inception, but also how judges in The Hague have interpreted the principle and how it has been implemented in practice by key Court actors, notably the Office of the Prosecutor. The dissertation then examines the process by which such proceedings have sought to be realized in the contexts of Uganda, Kenya, and the DRC, focusing in particular on the institutional and normative frameworks that have emerged in these countries.[50]

Chapter two examines how complementarity has evolved from a legal rule of admissibility—an organizing principle for the regulation of concurrent jurisdiction—to an instrument of policy. This policy, often referred to as "positive" complementarity, is one that promotes the ICC and the "Rome Statute System" as proactive agents for domestic accountability. In seeking to understand the meaning and purpose of this evolution, the chapter traces this more ambitious articulation of the ICC's relationship to national jurisdictions and argues that its ascendance reflects the work of norm entrepreneurs who, through a duty-based reading of the Statute, have progressively sought to articulate a more catalytic vision for the Court and a broader array of policy goals. It concludes that complementarity's evolution in this regard is testament to the significant influence of non-state actors, and of a growing effort on their part to route human rights norms through the framework of international criminal law.

This discursive project runs alongside the Court's jurisprudence, which, thus far, has established a largely conservative, Hague-centric interpretive framework for determining admissibility. Chapter three thus focuses on complementarity in its juridified form: it undertakes a detailed review of Article 17 jurisprudence and argues that the ICC has developed a body of case law that requires states to effectively mirror the same conduct (and arguably the same incident) that the OTP investigates as a precondition for rendering a case inadmissible. Although the Court's more recent case law in the context of Libya's admissibility challenges has unsettled this mirroring regime somewhat, the chapter contends that such a strict approach to admissibility challenges may serve to stymie, rather than catalyze, domestic proceedings. Furthermore, while Court officials and some commentators have defended the ICC's approach, suggesting that it is not inconsistent with the policy goals of complementarity, I argue that this division is symptomatic of legalism: it relies on an artificial division between the Court as a legal and political actor.

Chapter four shifts from doctrine to practice, and examines the role of the Office of the Prosecutor. Responsible for undertaking the investigations and prosecutions that are brought before the Court, the OTP is arguably the most significant actor shaping the ICC's catalytic potential, perched as it is between The Hague and national jurisdictions. The chapter thus queries in what ways the Office has sought to influence state behavior towards domestic proceedings through two key areas of its work: preliminary examinations and investigations. As the only country of the three to have been placed in preliminary examination, the dissertation offers a case study of the Kenyan experience in order to closely explore the political dynamics at play in that period, and what

[49] While the focus here is predominantly on whether and how the ICC has catalyzed domestic proceedings, I do not suggest that Court interventions have not had other, multi-dimensional effects.
[50] While the research presented herein endeavors to take account of recent developments in each country, the analysis centers most closely on national developments that took place between 2010 and 2013, during which time field research was carried out.

presumptions guided the OTP as it sought to push the state to establish a national accountability mechanism that, thus far, remains elusive. The second half of the chapter addresses the Office's investigatory practices, focusing on Uganda and the DRC in particular. It argues that while investigations could be a material site where a positive, cooperative approach to complementarity could be more meaningfully enacted, for the most part it has not been. This has often been to the detriment of the OTP's relationship with state and non-state actors at the national level, but also to the Office's confirmation and conviction record, which itself imperils the Court's catalytic potential.

Chapters five and six move away from Hague-based actors to national-level actors in Kenya, Uganda, and the DRC. Together, they address two key areas of "rule following" associated with the catalytic frame: the transformation of domestic judiciaries for the prosecution of atrocity crimes and the reform of national legal frameworks. Chapter five examines the emergence and attempted establishment of specialized domestic courts or chambers for the prosecution of serious crimes as one of the most frequently cited outcomes of ICC interventions, even though, as I argue, the link between these efforts and the Court's work is sometimes tenuous. In Kenya and Uganda, these divisions have been created or proposed to satisfy perceived obligations under the ICC's complementarity regime, although there has been only one attempted domestic prosecution (in Uganda) by such a division to date. By contrast, in the DRC, domestic military courts have undertaken a far greater number of prosecutions, even though they were not created in response to, and indeed preceded, the ICC's involvement. In describing these various courts, the chapter highlights the shifting, multiple ways in which complementarity has been invoked as a basis for their establishment. The chapter's second half identifies several concerns that these institutions have produced, in particular the enduring tensions between the exceptionalism that underwrites the creation of special courts and their relationship to ordinary criminal justice systems. It also examines the ways in which the establishment of domestic institutions in complementarity's name have accommodated to state power, leading in certain instances to outcomes that are themselves at odds with human rights norms.

Chapter six explores the normative impact of the ICC on the legal frameworks of these three states. It first argues that implementation has become a sophisticated and technocratic exercise in applying the Rome Statute as a "global script"; this, in turn, has contributed to an increasingly disciplinary approach to implementation, one that privileges conformity with the Statute. Second, I argue that it was less the ICC's intervention or the threat of domestic proceedings that catalyzed the passage of national implementation legislation in any of these countries; rather, implementation of the Statute was accelerated in order to "perform" complementarity for predominantly international audiences. The union of these two factors—uniformity of application and the power of external constituencies—was largely responsible for driving the implementation process in both Kenya and Uganda, but it glossed over deeper political fissures about the desirability of international criminal law as a framework for domestic accountability. In the DRC, by contrast, domestic politics have continually thwarted efforts to press for comprehensive implementing legislation (though looming presidential elections may yet contribute to its passage). Despite these different outcomes, the chapter queries the outsized role of external actors and constituencies in the implementation processes, raising questions about the content and form of the domestic legislation that was enacted.

In the final chapter, I offer several tentative conclusions arising out of this work. First, complementarity contains multiple meanings: it is not merely a rule of admissibility, but the juridical logic through which the ICC's potential as a catalytic force has been expressed. Second, although complementarity was initially seen as a mechanism to influence the choices of state actors, its effects on non-state actors appears to have been far more profound. Third, while legalism is central to the pursuit of a rules-based global order, the effects of ICC interventions in Uganda, Kenya, and the DRC—all peri-transitional countries, with long histories of political autocracy—underscore how global asymmetries, and the patronage networks they produce, are deeply entwined with the catalytic project. The increasing focus on "compliance" with ICC standards and procedures is partially a function of these asymmetries: it belies the outsized influence that external constituencies can hold over what activities states undertake in the name of complementarity. Finally, and for these reasons, the ICC's "catalytic effect" on state behavior is better understood as part of a complex political process, rather than a singular desired outcome of the complementarity regime. In light of these observations, I conclude with several suggestions for future inquiry and practice.

5. Terms, Methodology, and Country Selection

This dissertation draws upon a wide variety of primary and secondary sources, ranging from books and articles in the emerging complementarity canon, to news articles and parliamentary debates in Kenya and Uganda, to international and domestic jurisprudence. The primary approach is thus textual. Through discourse analysis I seek, in particular to trace how complementarity has been understood and portrayed by different actors and stakeholders as a shifting, protean principle, one that does not admit of a singular understanding.[51] In so doing, a note on terminology is warranted. Formally, the ICC is an institution and complementarity a principle of limitation: it governs the priority of the Court's jurisdiction. Yet regardless of formal ICC intervention in a country, complementarity is also invoked as a duty of member states. For instance, it can be said to "catalyze" the passage of implementation legislation merely as a precaution against the threat of ICC intervention. In the context of Kenya, Uganda and the DRC, however, where the Court itself has formally intervened, the operation and invocation of complementarity is fundamentally intertwined with the work of the ICC itself. Thus, in Uganda, a dedicated unit for adjudicating international crimes was seen as a necessary step to (potentially) displace the ICC, but complementarity was the principle that justified its creation. Throughout the dissertation, I have sought to make this conceptual distinction clear but I occasionally use the terms "ICC" and "complementarity" interchangeably.

In addition, the ideas reflected herein are deeply informed by several field research trips carried out in Nairobi, Kenya; Kampala, Uganda; and Kinshasa, DRC, over the course of 2011 and 2012, as well as the two and a half years I spent living and working in The Hague.[52] While not a work of legal ethnography, the dissertation adopts

[51] See, e.g., Solomon T. Ebobrah, "Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations," *European Journal of International Law* 22(3) (2011), 669 (nothing that "although the term may appear universal, its application or functioning in practice differs according to each specific context").

[52] Research trips were conducted in the periods of June 2011 (four weeks), December 2011 (two weeks), January 2012 (one week), and November-December 2012 (ten days). All interviews were conducted in French or English.

a "multi-sited" focus,[53] one that shares an interest in using ethnographic methods as useful tools for "accessing the complex ways in which law, decision-making and legal regulations are embedded in wider social processes."[54] Though rooted in legal analysis, it seeks to contribute to a growing field of interpretive social science that uses interdisciplinary, qualitative methods to capture a wider, more situated perspective on the value and impact of global legal institutions.[55]

Understanding the theatre of the ICC's work outside of its institutional center in The Hague also afforded me the opportunity to better understand the complex circumstances in which its interventions unfold. Principally, the research trips allowed me to undertake interviews with a wide array of actors engaged in ICC-related work: Court officials working (either long-term or on mission) in Kampala, Kinshasa, and Nairobi; practitioners in the field of human rights and transitional justice, either in the national offices of international NGOs or for national organizations; domestic lawyers, judges, and bar associations; government officials; and an extensive community of international diplomats and donors. In addition, I was able to gather numerous documents—court judgments, parliamentary debates, draft laws, brochures—that were generally not available outside of the countries, and occasionally not publicly available within. On several occasions, I also attended and observed private meetings and public programs convened by NGOs working in country.

Informants were initially approached through personal contacts that my co-researcher and I had developed prior to the first research trip in June 2011, on the basis of their expertise in some aspect of the ICC's intervention at national level, as well as their engagement in domestic political or legal aspects of the Court's work.[56] Following a "snowball" approach, these initial meetings became important points of connection to other interlocutors: we relied on referrals from initial informants to identify additional interview subjects.[57] Despite the debt that this work owes to those individuals who gave of their time, I reference these interviews relatively sparingly in the chapters that follow.

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[53] See George E. Marcus, "Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography," *Annual Review of Anthropology* 24 (1995), 95-117.

[54] June Starr and Mark Goodale, "Introduction," in June Starr and Mark Goodale (eds.), *Practicing Ethnography in Law* (New York: Palgrave Macmillan, 2002), 2.

[55] Other literature from outside the field of international criminal law that has taken up more critical perspectives on the ICC and/or international criminal tribunals includes: Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011); Kamari Clarke, *Fictions of Justice: the International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell: Cornell University Press, 2009). See also Hugo van der Merwe, Victoria Baxter, Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, D.C.: USIP Press, 2009).

[56] Interviews were formal but followed a semi-structured format: questions were prepared in advance, although the discussions frequently evolved to accommodate unexpected insights or new lines of inquiry.

[57] Given that the risk of selection bias is always present (particularly so for the snowball approach; the technique has been criticized for reducing the likelihood that the sample of informants represent a representative cross-section of the population), I should note that we generally had greater success in speaking with and accessing representatives of international and national NGOs, although in all three countries we were at least able to meet with several senior representatives from the domestic judicial sector, in-country ICC staff (from the OTP as well as the Registrar), and individuals engaged in donor work on behalf of the diplomatic community. It should be noted, however, that this study did not use interviews as a means of sampling the country populations or determining the factual accuracy of their views; rather, as noted, the interviews provided important contextual information for the claims that I develop herein. On snowball interviewing, see Paula Pickering, *Peacebuilding in the Balkans: The View from the Ground Floor* (Ithaca: Cornell University Press, 2007)

Because of the sensitivity of the subject matter, many interlocutors only spoke with the express understanding that their views were not for attribution. While others imposed no such restrictions, the sensitive nature of their work and its attendant security risks compels caution in identifying them. For these reasons, references to interview subjects occur only where the assertions provide explicit, additional validation of claims central to my analysis.[58]

Defined as "a person or thing that causes a change,"[59] I employ catalyst here in a causal sense. As a methodological approach to understanding the relationship between the ICC's work and the "rule following" examined in chapters five and six, then, I rely on process tracing. As defined by Bennett:

> Process tracing involves looking at evidence within an individual case, or a temporally and spatially bound instance of a specified phenomenon, to derive and/or test alternative explanations of that case. In other words, process tracing seeks a historical explanation of an individual case, and this explanation may or may not provide a theoretical explanation relevant to the wider phenomenon of which the case is an instance.[60]

Such an approach is necessary in light of the ambitious, often overly eager claims to validate Court interventions as the cause of domestic change. The challenge of understanding whether the relationship between relevant national-level events—the passage of domestic Rome Statute legislation, the establishment of a domestic war crimes court—and the ICC's actions is indeed causal (rather than contributory) is therefore crucial: more than one factor contributes to change. My intent is thus two-fold: to clarify to what extent the Court's interventions, as opposed to the influence of mediating actors and events, have catalyzed domestic change, and to better understand the nature of this mediated relationship as a catalytic force in itself.

A final note on country selection: at the time that this project began in mid-2010, the ICC had five active situations, from which I selected three.[61] For the purposes of this dissertation, ICC "intervention" is defined as those countries where the Court's engagement has advanced to at least an investigatory stage.[62] This was a minimum criterion in selecting the DRC, Kenya, and Uganda (as opposed to other countries, like Colombia, where the Court's engagement has been substantial but has not advanced to this threshold.) On the spectrum of Court engagement, intervention has thus entailed, at

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[58] Needless to say, however, my interlocutors do not necessarily endorse the conclusions advanced herein.
[59] Oxford Dictionary. The etymology of "catalyst" is chemical: it was introduced in the mid-19th century by a Swedish chemist as "change caused by an agent which itself remains unchanged."
[60] Andrew Bennett, "Process Tracing: A Bayesian Perspective," in Janet M. Box-Steffensmeier, Henry E. Brady, and David Collier (eds.), *The Oxford Handbook of Political Methodology* (Oxford: Oxford University Press, 2008), 704. See also *Process Tracing: From Metaphor to Analytic Tool* (Andrew Bennett and Jeffrey T. Checkel, eds.) (Cambridge: Cambridge University Press, 2014).
[61] Security concerns, resource constraints, and the sheer complexity of each of these diverse situations required selectivity for the purposes of conducting meaningful field research. On this basis, the Sudan and the Central African Republic (CAR) were excluded: Sudan principally because of the political difficulty of conducting such research inside the country, and CAR because of the apparently limited scope of the ICC's investigations there (which, to date, have led to an arrest warrant for only the former DRC Vice President Jean-Pierre Bemba) and the substantial implications that those proceedings, while formally part of the CAR referral, have had in the DRC. While subsequent developments in other ICC situations inform parts of my analysis, they are not addressed in depth here.
[62] On the term "international judicial interventions," see David Scheffer, "International Judicial Intervention," *Foreign Policy* (1996), 34.

the least, active deployment of ICC personnel to the countries in question, as well as a substantial (if developing) body of case law ranging from questions of admissibility and victim participation, to individual criminal liability and reparations.

This focus on direct Court engagement should not obscure, however, more "indirect" forms of intervention, including the use of preliminary examinations (explored further in chapter four) or the evolving, normative impact of the Rome Statute on national legal frameworks. Indeed, as the first two chapters argue, the treatment of complementarity as both policy concept and legal doctrine has had a profound effect on the popular understanding of the principle, as well as what it purports to require of states, regardless of whether or not they are the subject of a formal Court intervention. Nevertheless, such forms of intervention demand considerably less of the ICC's financial and material resources, and the connection between its work and national-level change is even more difficult to delineate. For these reasons, while the conclusions advanced herein may be relevant to other ICC interventions, they are not necessarily representative of them.