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## CHAPTER FIVE

### Competing, Complementing, Copying: Domestic Courts and Complementarity

This chapter examines the emergence of specialized domestic courts or chambers for international crimes as one of the most frequently cited effects catalyzed by the principle of complementarity. Because a fundamental “rule” of the complementarity-as-catalyst framework is that national-level actors investigate and prosecute international crimes themselves, ensuring domestic venues for their prosecution is a key preoccupation for civil society state and non-state actors alike. The attendant focus of much complementarity discourse has thus been on the establishment of institutions at the national level that are capable of accommodating such prosecutions. As Human Rights Watch puts it, “The ICC’s authority to act only where national authorities are unable or unwilling ... encourages the development of credible and independent judicial systems within national jurisdictions.”<sup>507</sup>

Similarities and differences mark the domestic judicial arrangements of the three countries examined in this dissertation. In Uganda, the establishment of a special division within the High Court in which to adjudicate Rome Statute crimes, now called the International Crimes Division, has been the key domestic institution whose creation was catalyzed by the threat of ICC intervention. In Kenya, efforts to create a Special Tribunal for the post-election violence represented a high-water mark in the establishment of a domestic accountability process in lieu of ICC proceedings. As the previous chapter argued, the failure to establish the STK suggests the limits of the Court’s catalytic potential; however, more recently, discussions in Kenya have also turned towards the establishment of an ICD within Kenya’s High Court system.

In both cases, 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 to date before the Ugandan ICD related to the LRA conflict. By contrast, in the DRC, domestic military courts have undertaken a far greater (if still limited) number of prosecutions. Significantly, however, these courts were not created in response to the ICC’s involvement in the country; rather, they have had longstanding jurisdiction over international crimes. A more recent turn to domestic prosecutions through the use of so-called “mobile” courts in the eastern DRC region represents a novel invocation of the complementarity principle; however, most of these efforts have been undertaken by international donors and NGO actors, who have deliberately sought to characterize the courts as an extension of and “complementary” to the ICC’s work.

This chapter’s aim is two-fold. First, it offers a descriptive account of these various domestic judicial institutions, highlighting the shifting ways and competing purposes in which complementarity has been invoked as a basis for their establishment. Here again the central premise is that the ICC’s role as catalyst rests on different conceptions of the complementarity principle. In certain cases, the threat of the Court’s jurisdiction has been used to prompt the setting up (or attempted setting up) of domestic legal bodies. In this sense, the ICC’s catalytic potential has been largely coercive. By contrast, recent descriptions of these bodies depict them more literally as institutional extensions of the ICC: rather than displacing the Court, they are meant to complement,

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<sup>507</sup> Human Rights Watch, “Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court: Questions and Answers” (25 March 2009), 3.

and even “complete,” its work. A related depiction has been of complementarity as a cooperative venture, wherein a managerial, division-of-labor approach between The Hague and national institutions is meant to facilitate the pursuit of accountability at the domestic level.

But while the establishment of national courts specialized in the adjudication of serious crimes is typically presented as a normative good, their depiction as part of complementarity “in practice” has been largely directed towards an international audience of donors, norm entrepreneurs, and other states. In its second half, then, the chapter identifies several concerns that these institutions have produced at the domestic level. It focuses specifically on the manner in which these courts have evolved at the national level (located within the existing structures of state but often, given their exceptional status, standing apart from the broader judicial system), the donor economies that surround them, and the institutional tensions that are produced through this arrangement. A related concern is an apparent insistence on “international standards” as the means by which “compliance” with complementarity should be assessed. Finally, through a case study of the sole attempted trial before the Ugandan ICD, the chapter considers how the domestic invocation of complementarity also accommodates to state power, leading, in certain instances, to outcomes that are themselves at odds with fundamental principles of a fair criminal process.

## 1. Uganda

The first country in which the ICC intervened, Uganda was also the first situation country to set up a specialized judicial forum for the prosecution of Rome Statute crimes. Established in 2008 as the War Crimes Division (and later rebranded as the International Crimes Division), the forum is a specialized division of the Ugandan High Court with jurisdiction to try war crimes, genocide, and crimes against humanity, as well as other serious transnational crimes, including human trafficking, piracy, and terrorism. Although it has yet to convict any individuals related to the LRA conflict, the court to date has received a great deal of attention. As Nouwen notes, it is “[p]ossibly the most visible effect indirectly catalyzed by complementarity in Uganda,” one that “has become the focus of donors’ transitional-justice interest.”<sup>508</sup>

### 1.1 Complementarity as Coercion: The ICC and Juba

Although the establishment of the War Crimes Division (WCD) has often been depicted as a product of the ICC’s investigations,<sup>509</sup> the history of the WCD’s establishment is more appropriately traced to the Juba peace talks that sought to bring a negotiated settlement to the government’s long running conflict with the LRA.<sup>510</sup> The

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<sup>508</sup> Nouwen, *Complementarity in the Line of Fire*, 179.

<sup>509</sup> See, e.g., Wes Rist, “Why Uganda’s New War Crimes Court Is a Victory for the ICC,” *JURIST* (29 May 2008), at <http://jurist.org/forum/2008/05/why-ugandas-new-war-crimes-court-is.php>. Rist argues that, “the ICC has been the key player in using the threat of international criminal responsibility to create a judicial body that can address the same issues of war crimes and crimes against humanity at the domestic rather than international level.”

<sup>510</sup> A detailed history of the Ugandan conflict is not offered here, however, texts that were particularly useful in offering background context include 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 Arica’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:*

Ugandan government formally announced the referral of the “situation concerning the Lord’s Resistance Army” in January 2004.<sup>511</sup> At the time, as many commentators have noted, the ICC referral suited the interests of both the ICC and Uganda. For the Museveni government, it was an opportunity to “rally international assistance for the arrest of the government’s military opponents,” as well as a savvy “international relations campaign.”<sup>512</sup> Furthermore, it was a low-risk approach given the unlikelihood that the OTP, despite having re-characterized the referral as concerning the situation in northern Uganda (rather than the LRA alone), would pursue investigations against Ugandan military officials (UPDF). Meanwhile, for the ICC, the “voluntary referral of a compelling case by a state party represented both an early expression of confidence in the nascent institution’s mandate and a welcome opportunity to demonstrate its viability.”<sup>513</sup> This view was endorsed by Pre-Trial Chamber II, which accepted the government’s contention that the ICC was the “most appropriate and effective forum” for investigating those bearing the greatest responsibility in the conflict, and its assertion that it was “unable” to arrest the LRA leadership.<sup>514</sup>

For these reasons, cooperation between the ICC and Uganda was the dominant logic in the early phase of the Court’s intervention. This logic began to change, however, in mid-2006 when, for the first time, the Ugandan government and the LRA entered into an internationally mediated peace negotiation. Although previous attempts at a negotiated settlement had proven unsuccessful, the Juba peace talks benefited from a changed political calculus on both sides: the Ugandan government was under increasing pressure to ameliorate the humanitarian situation in the north (and appeared no closer to apprehending Kony following the ICC referral), while the LRA had lost the support of the government of Sudan, its primary benefactor.<sup>515</sup> The talks were thus seen as a credible attempt to find a peaceful solution to the conflict.<sup>516</sup> After signing a cessation of

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*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.

<sup>511</sup> OTP Press Release, “President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC,” 29 January 2004.

<sup>512</sup> Nouwen and Werner, “Doing Justice to the Political,” 949. The government’s previous attempts at defeating the LRA had chiefly been through unsuccessful military campaigns and a policy of forced displacement, resulting in a growing humanitarian crisis that was weakening the government’s (faltering) international standing. These campaigns included Operation North (Operation Simsim) in 1991, Operation Iron Fist in 2002, and Operation Iron Fist in 2004. While President Museveni had always favored a military approach, he had on occasion allowed peace initiatives, such as the one undertaken by Betty Bigombe, then Ugandan Minister for the Pacification of the North, in 1994. For a detailed history, see Branch, *Displacing Human Rights*.

<sup>513</sup> Payam Akhavan, “The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court,” *American Journal of International Law* 99(2) (2005), 404. See also Clark, “Chasing Cases,” 1198-1202.

<sup>514</sup> *Situation in Uganda*, Warrant of Arrest for Joseph Kony, ICC-02/04-01/05-53, PTC II, 8 July 2005 (as amended on 27 September 2005), para. 37 (citing government letter from Uganda’s Solicitor General)..

<sup>515</sup> See International Crisis Group, “Northern Uganda: seizing the Opportunity for Peace,” Report No. 124 (2007).

<sup>516</sup> Refugee Law Project, “Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda,” Working Paper No. 22 (October 2012), 7.

hostilities agreement in August 2006,<sup>517</sup> four additional agreements were concluded over the course of the next 18 months.<sup>518</sup>

In the shadow of these negotiations stood the ICC's arrest warrants for Kony and four other senior LRA members, which had been unsealed in October 2005.<sup>519</sup> Despite the progress being made in Juba, one of the key points of contention was the question of accountability, as the LRA had demanded from the outset that the ICC's warrants be withdrawn. It was in response to this point of contention—a desire to displace the ICC in order to secure Kony's support for a negotiated peace—that the Court, by reference to the principle of complementarity, catalyzed the creation of what would become the WCD. As Nouwen notes, "The closest thing the [government of Uganda] could offer the LRA was to conduct domestic proceedings so that it would be for it or the ICC suspects successfully to challenge admissibility on the basis of articles 17, 19, and 20 of the Rome Statute."<sup>520</sup>

The "Agreement on Accountability and Reconciliation (A&R) between the Government of Uganda and the Lord's Resistance Army," signed in June 2007, laid the legal framework for these arrangements.<sup>521</sup> This was followed by the signing of an Annexure in February 2008, which set out a framework for the A&R Agreement's implementation.<sup>522</sup> The Agreement states at the outset that its purpose is to "promote national legal arrangements ... for ensuring justice and reconciliation with respect to the conflict."<sup>523</sup> Point 6.1 further reads:

Formal courts provided for under the Constitution shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict.<sup>524</sup>

Notably, the language of the A&R Agreement did not restrict itself to formal criminal justice mechanisms alone: it also acknowledged "reconciliation proceedings," while the Annexure provided for a national truth-telling process, reparations, and a role for traditional justice mechanisms.<sup>525</sup>

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<sup>517</sup> Agreement on Cessation of Hostilities between the Government of the Republic of Uganda and Lord's Resistance Army Movement (Agenda Item No. 1), 26 August 2006.

<sup>518</sup> Other agreements focused on comprehensive solutions; the disarmament, demobilization and reintegration of LRA forces; and on a permanent cease-fire. See Comprehensive Solutions Agreement (Agenda Item No. 2), 2 May 2007; Permanent Ceasefire Agreement (Agenda Item No. 4), 23 February 2008; Agreement on Disarmament, Demobilization and Reintegration of the LRA Forces (Agenda Item No. 5), 29 February 2008. All documents available at [http://www.beyondjuba.org/BJP1/peace\\_agreements.php](http://www.beyondjuba.org/BJP1/peace_agreements.php).

<sup>519</sup> The other warrants of arrest were for Vincent Otti, Raska Lukwiya (deceased), Okot Odhiambo and Dominic Ongwen.

<sup>520</sup> Nouwen, *Complementarity in the Line of Fire*, 133.

<sup>521</sup> Accountability and Reconciliation Agreement (Agenda Item No. 3), 29 June 2007 ("A&R Agreement").

<sup>522</sup> Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008 ("Annexure"), at [http://www.iccnw.org/documents/Annexure\\_to\\_agreement\\_on\\_Accountability\\_signed\\_today.pdf](http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf)

<sup>523</sup> A&R Agreement., Clause. 2.1.

<sup>524</sup> Ibid., Clause 6.1.

<sup>525</sup> For instance, Clause 3.1 of the Agreement states: "Where a person has already been subjected to proceedings [...] or has been subjected to accountability or reconciliation proceedings for any conduct in the course of the conflict, that person shall not be subjected to any other proceedings with respect to that conduct" (emphasis added).

Although the A&R Agreement does not invoke the principle of complementarity by name, the Annexure does. In it, the parties recalled “their commitment to preventing impunity and promoting redress in accordance with the Constitution and international obligations and recalling, in this connection, *the requirements* of the Rome Statute of the [ICC] and in particular the principle of complementarity.”<sup>526</sup> The Annexure further provided for the establishment of a “special division of the High Court of Uganda ... to try individuals who are alleged to have committed serious crimes during the conflict,” as well as “a unit for carrying out investigations and prosecutions in support of trials and other formal proceedings.”<sup>527</sup> In the end, however, the Final Peace Agreement (FPA)—a collection of the agreements reached over the course of the negotiations—was never signed. Kony, unconvinced that the A&R Agreement would indeed keep the ICC at bay, ignored the government’s ultimatum that the FPA be signed by the end of November 2008. Shortly thereafter, the Ugandan military renewed its military offensive against the LRA, which continues to operate today outside of the country, largely in remote eastern regions of the DRC.<sup>528</sup>

## 1.2 International Crimes Division

Despite not being signed, the Ugandan government expressed its intention to unilaterally implement the FPA agreement to the extent that it could. Of these, implementation of the provision for the proposed special division has advanced the furthest. Indeed, while the ICD is already operational, the other transitional justice measures foreseen under the A&R Agreement have developed only haltingly.<sup>529</sup> (According to Stephen Oola, the formal policy “has dragged on for eight years and, despite being now on its sixth draft, has yet to be finalised, let alone operationalized.”<sup>530</sup>) The court, however, was formally established as the WCD in July 2008 pursuant to an administrative notice issued by then Chief Justice James Ogoola, who ordered it staffed with judges and a registrar. This notice—an act of administrative fiat—effectively served as the statutory basis for the court. In 2011, by a similar act of fiat, the WCD was rebranded the ICD, with an expanded jurisdiction that includes the transnational offenses of piracy, human trafficking and terrorism.<sup>531</sup> Its current docket has largely encompassed terrorism-related cases, notably the Kampala bombings of 2010. As discussed below, only one case related to the LRA conflict has actually come before the Division, although it has yet to advance beyond the pre-trial stage.

Structurally, the ICD sits as a panel minimally comprised of three judges, although the total Division consists of five judges. Uganda’s principal judge appoints them, in consultation with the High Court Chief Justice. One of the ICD judges serves as head of the Division, and is responsible for its administration, in cooperation with the registrar.<sup>532</sup> Judges periodically rotate out of the Division since it is “common for judges,

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<sup>526</sup> Annexure, Fifth Recital (emphasis added).

<sup>527</sup> Ibid., Clauses 7 and 10.

<sup>528</sup> See Branch on ongoing, joint military operations between the UPDF and AFRICOM, 216-239.

<sup>529</sup> Interview conducted with Uganda Law Reform Commission, Kampala, 13 December 2011. The government released a draft “Transitional Justice Policy” in mid-2013, but it has still not been finalized or adopted.

<sup>530</sup> Stephen Oola, “Will LRA Victims Get Justice?,” *Saturday Monitor* (11 August 2015).

<sup>531</sup> The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 (2011), Section 6.

<sup>532</sup> Interview with ICD judge, Kampala, 13 December 2011. Attached to the ICD are a series of relevant units. A unit of Uganda’s Directorate of Public Prosecutions (DPP) oversees the ICD’s prosecutorial function, although the prosecutors appointed to that unit may also be responsible for crimes not heard by

registrars, prosecutors, and investigators in Uganda to be frequently rotated on and off work relating to specific divisions.”<sup>533</sup> The ICD is headquartered in Kampala (where the courtroom sign still reads “War Crimes Courts”), although it is mobile in the sense that the judges can travel; indeed, the proceedings related to Thomas Kwoyelo have to date taken place at the Gulu High Court in northern Uganda. Decisions of the ICD can be appealed to Uganda’s Constitutional Court and, in the final instance, to the Supreme Court.<sup>534</sup>

The ICD receives technical assistance through the Justice Law and Order Sector (JLOS), which is a government mechanism operating a “sector-wide approach” (SWAp) to donor-driven judicial reform. A document prepared by JLOS describes SWAp as “bring[ing] together institutions with closely linked mandates of administering justice and maintaining law and order and human rights.”<sup>535</sup> In 2008, JLOS established a high level Transitional Justice Working Group to “give effect to the provisions of the Juba Peace Agreement.”<sup>536</sup> JLOS oversees the budgetary allocation of the ICD, a substantial portion of which, as discussed further below, relies on international donor support.

### 1.3 Shifts in Complementarity

The creation of Uganda’s ICD initially placed the ICC and the Ugandan government in an antagonistic relationship. As the ICD has developed, however, its origins as an outcome of the A&R Agreement have evolved away from a competition-based model of complementarity—a way to displace the ICC—towards a more harmonious, cooperative vision of the principle. The ICD’s website states that, “While originally meant to be part of a comprehensive peace agreement with the LRA, the International Crimes Division has come to be viewed as a court of ‘complementarity’ with respect to the International Criminal Court, thus fulfilling the principle of complementarity stipulated in the preamble and Article 1 of the Rome Statute.”<sup>537</sup> A 2010 publication of the Uganda Law Society likewise notes that, “the War Crimes Division of the High Court of Uganda has been set up as a complementary institution to the ICC,” while the Ugandan Victims Foundation’s legal advisor has suggested that a “running and well equipped WCD of Uganda has the potential of becoming a regional criminal tribunal which may complement well the work of the ICC.”<sup>538</sup> And in the words of one judicial spokesperson, “[T]his court now complements the [International Criminal Court]. We now have the equivalent of Geneva or The Hague in Africa.”<sup>539</sup>

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the ICD. A similar unit resides within the Criminal Investigations Department and is responsible for investigating crimes that may be tried before the Division.

<sup>533</sup> Human Rights Watch, “Justice for Serious Crimes Before National Courts: Uganda’s International Crimes Division” (2012), 19.

<sup>534</sup> JLOS, “Frequently Asked Questions on the International Crimes Divisions of the High Court of Uganda,” 5, at [http://www.judicature.go.ug/files/downloads/ICD\\_FAQs.pdf](http://www.judicature.go.ug/files/downloads/ICD_FAQs.pdf).

<sup>535</sup> See JLOS, “Annual Performance Report 2009/2010” (September 2010), 9.

<sup>536</sup> “‘The Dust Has Not Yet Settled’: Victims’ Views on the Right to Remedy and Reparation, - A Report from the Greater North of Uganda,” United National Human Rights Office of the High Commissioners (Kampala, 2011), 59. The Transitional Justice Working Group is comprised of five thematic sub-committees including: (1) war crimes prosecutions; (2) truth and reconciliation; (3) traditional justice; (4) Sustainable funding; and (5) integrated systems.

<sup>537</sup> International Crimes Division, available at [www.judicature.go.ug](http://www.judicature.go.ug).

<sup>538</sup> “Does the High Court of Uganda Have a Wider Jurisdiction than the ICC?,” *Lanyers’ Voice* (July-September 2010), 5; Joseph A. Manoba, “First Trial before the War Crimes Division of the High Court in Uganda,” *VRWG Bulletin* 17 (Winter 2010), 6.

<sup>539</sup> Nouwen, *Complementarity in the Line of Fire*, 181 (quoting Cyprian Musoke, “Uganda: nation ready to try Col. Gaddafi,” *New Vision*, 11 June 2011).



Burden-sharing thus appears to now define complementarity in Uganda, wherein the ICD and ICC are positioned as partners in a cooperative, joint enterprise. This shift is particularly striking when one considers the Ugandan government's response to a 2008 request by the ICC Pre-Trial Chamber for information on the implication of the Division's establishment, where it averred that "those individuals who were indicted by the [ICC] will have to be brought before the special division of the High Court for trial."<sup>540</sup> The ICC never opined on this admissibility question given its prematurity; however, now, the government indicates that—notwithstanding the substantial investment of resources into the now functioning ICD—it does not intend to challenge the admissibility of the ICC cases, should Kony or other LRA members be captured.<sup>541</sup> Speaking at a 2012 conference, Uganda's State Minister for Justice and Deputy Attorney General, Freddie Ruhindi, even indicated that while he was confident the Ugandan courts could try the LRA leader, Kony would nevertheless be sent to the ICC for trial.<sup>542</sup> The January 2015 arrest and transfer of LRA commander Dominic Ongwen to The Hague confirms Ruhindi's statement. Questions about Uganda's primary duty to investigate and prosecute Rome Statute crimes have thus become, as Nouwen notes, "increasingly detached from the possibility of actually using the right in order to challenge admissibility."<sup>543</sup>

## 2. Kenya

### 2.1 From Special Tribunal to Special Division

As chapter four explained, a key recommendation of the Commission of Inquiry on Post-Election Violence was that a special tribunal be established to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity."<sup>544</sup> Much like the A&R Agreements in Uganda, then, complementarity's coercive dimension was the dominant logic behind the CIPEV's recommendation. If a Special Tribunal was not established within a specified time frame, and if the government proved unwilling or unable to investigate and prosecute, the ICC might intervene. As noted, however, the rejection of the STK owed largely to the "unholy alliance" amongst those MPs who supported a domestic accountability process but had substantive objections to the bill put forward by then Minister for Justice Karua, and those who "considered the ICC card a bluff," one that would take "too long to

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<sup>540</sup> See Letter from Jane F.B. Kiggundu, Solicitor General, Reply to Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, ICC-02/04-01/05-285-Anx2, Government of Uganda, 27 March 2008; see also Uganda Admissibility Decision. The letter further clarified that the government referred the situation to the ICC "because the leadership of the Lord's Resistance Army was beyond the borders of Uganda and the international community was not being helpful," not because of "the competence of its courts to handle cases connected with the situation."

<sup>541</sup> See Florence Ogola, "Uganda Victims Question ICC's Balance," Institute for War & Peace reporting (14 June 2010). A similar assessment was made in the course of my interview with a senior DPP official, Kampala, December 2011.

<sup>542</sup> See Mark Kersten, "Outsourcing Justice to the ICC – What Should Be Done?" (31 October 2012), at <http://justiceinconflict.org/2012/10/31/outourcing-justice-to-the-icc-what-should-be-done/>.

<sup>543</sup> Nouwen, *Complementarity in the Line of Fire*, 237

<sup>544</sup> CIPEV Report, 472-473.

act.”<sup>545</sup> Thus, by publicly calling for the ICC, the government “could look good yet not push the accountability issue.”<sup>546</sup>

The defeat of the STK, in turn, laid the seeds for current discussions around the establishment of an ICD in Kenya. Muthoni Wanyeki notes that the possibility of establishing a special division of the High Court was floated “half-heartedly” by the subsequent Minister for Justice, Mutula Kilonzo, as an alternative to a private members’ bill for a special tribunal that had been put forward in the wake of the STK’s defeat.<sup>547</sup> This proposal was “vigorously opposed,” however, by the governance, human rights and legal sectors of civil society groups who argued that, the investigative and prosecutorial arms of the judiciary were too compromised to be credible.<sup>548</sup>

Discussions around an ICD did not seriously reemerge until the appointment in 2011 of Willy Mutunga as Chief Justice and President of the Supreme Court. A dedicated human rights advocate, Mutunga’s reformist credentials in Kenyan politics are well-known: his appointment was widely seen as a victory for the Kenyan left, and a promising step in the country’s new constitutional dispensation.<sup>549</sup> (By contrast, the appointment of Keriako Tobiko as Director of Public Prosecutions was considered a major defeat.<sup>550</sup>) In this capacity, Mutunga also chairs the Judicial Services Commission (JSC), whose mandate encompasses the appointment of judges and advising on “improving the efficiency of the administration of justice.”<sup>551</sup> In May 2012, at Mutunga’s request, the JSC appointed a Working Committee to “look into modalities of establishing an international crimes division in the High Court, to hear and make determination on the pending post-election violence cases and deal with other international and transnational crimes.”<sup>552</sup>

## 2.2 Proposed Structure

Chaired by the Reverend Samuel Kobia, the JSC’s Working Committee published an extensive report in October 2012 setting forth six recommendations, the first of which called upon “the Chief Justice to establish the International Crimes Division as a division of the High Court, to prosecute the pending post-election violence cases, international and transnational crimes.”<sup>553</sup> As with the Ugandan ICD, the legal framework for such a Division would be rooted in the unlimited original jurisdiction of the High Court, while appeals would lie with the Kenyan Court of Appeal, and in the

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<sup>545</sup> Maina Kiai, “Using International Justice to End Impunity and Prevent Further Atrocities in Kenya,” Consultative Conference on International Criminal Justice,” September 2009, 4, at [http://www.internationalcriminaljustice.net/experience/papers/Maina\\_Kiai\\_Speech\\_Sept10\\_09.pdf](http://www.internationalcriminaljustice.net/experience/papers/Maina_Kiai_Speech_Sept10_09.pdf).

<sup>546</sup> Ibid.

<sup>547</sup> Wanyeki, “The International Criminal Court’s cases in Kenya: origin and impact,” 9-10.

<sup>548</sup> Interview with Kenyan NGO director, Nairobi, 3 December 2012.

<sup>549</sup> Mutuma Ruteere, “Dr. Willy Mutunga: Why they fear him,” *The Nairobi Law Monthly* 2(6) (June 2011), 31-39.

<sup>550</sup> Interview with Muthoni Wanyeki, Nairobi, 16 June 2011.

<sup>551</sup> “Judicial Service Commission – The Judiciary,” at <http://www.judiciary.go.ke/portal/the-judicial-service-commission.html>

<sup>552</sup> The Judicial Service Commission, “Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in The High Court of Kenya” (30 October 2012), 32 (“JSC Report”) (on-file).

<sup>553</sup> Ibid., 146. Section 8(2) of the International Crimes Act No. 16 of 2008 grants Kenya’s High Court jurisdiction to conduct trials over persons responsible for international crimes committed locally or abroad by a Kenyan, or committed in any place against a Kenyan as of January 2009. See chapter six for further discussion.

final instance, the Supreme Court. The Division's proposed subject matter jurisdiction would include Rome Statute crimes (domesticated under the Kenyan International Crimes Act 2008), but could be expanded to include transnational crimes as well: money laundering, cyber-laundering, human trafficking, terrorism, and piracy. Other recommendations include the establishment of an independent prosecution unit with the DPP "to deal exclusively with international crimes," fully funding the country's existing (if underfunded) Witness Protection Agency, and setting up a "special fund to help victims."<sup>554</sup>

The Commission's recommendation that an ICD be formed for "international-scale crimes"—including but not limited to the post-election violence—was partially endorsed in a May 2013 report by Kenyans for Peace Truth and Justice (KPTJ), an influential coalition of NGOs that came together following the disputed presidential election. Although KPTJ expressed a firm preference for a Special Tribunal option, it acknowledged that, "[g]iven the lack of political will ..., the Special Division option is more feasible, if not the only viable option in the near future."<sup>555</sup> The report recommended that "the overall structure of the accountability model take the form of a Special Division of the High Court," although it went further than the JSC's report, advocating as well for the establishment of a Special Prosecutor for the post-election violence cases and for the participation of international staff.<sup>556</sup> To date, however, there is no indication that these proposals are under serious consideration.

Despite the focus of the JSC's report on the post-election violence and the prosecution of international crimes in particular, it was chiefly Mutunga's influence that led to the proposed expansion of the ICD's jurisdiction to include other transnational crimes.<sup>557</sup> This expansion has been of particular concern to civil society advocates who fear that the court may be more active as a forum for adjudicating transnational crimes, rather than post-election violence cases; in KPTJ's words, "the proposed ICD could end up being a white elephant, with no cases to prosecute."<sup>558</sup> Many human rights advocates have also been skeptical of the proposed division, seeing it as yet another attempt to obstruct ICC proceedings in The Hague through the "appearance" of complementarity.<sup>559</sup> As of 2014, support for the JSC's proposal had appeared to further dim. Many civil society actors boycotted a February consultation convened by the government on the grounds that the process was not genuine, while statements attributed to DPP Tobiko at the same meeting "suggest his office does not believe the ICD is appropriate or necessary to prosecute post-election crimes."<sup>560</sup>

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<sup>554</sup> Ibid., 149.

<sup>555</sup> KPTJ, "Securing Justice: Establishing a domestic mechanisms for the 2007/8 post-election violence in Kenya" (May 2013), 49.

<sup>556</sup> Ibid., 51-53.

<sup>557</sup> The JSC report notes that, "The Chief Justice ... prevailed on the Committee to, during its conceptualization and design of the architecture of this court, devise mechanisms of vesting on the court [an] expansive mandate to deal with other international crimes and transnational crimes other than having jurisdiction only limited to international crimes as proscribed in Kenya's International Crimes Act, 2008," 31.

<sup>558</sup> KPTJ, "A Real Option for Justice? The International Crimes Division of the High Court of Kenya," 9.

<sup>559</sup> See further the discussion in chapter four.

<sup>560</sup> Amnesty International, "Crying For Justice: Victims' Perspectives on Justice for the Post-Election Violence in Kenya" (July 2014), 26. According to the same report, "as of June 2014, no concrete steps had been taken towards establishing the ICD," 25-26. Additionally, in December 2013, President Kenyatta temporarily suspended six JSC members after the National Assembly requested an investigation into allegations of misconduct and misappropriation of funds. Although a subsequent High Court ruling reinstated the six members pending the outcome of their legal challenge against the investigation, the

### 2.3 From Coercing to Complementing

Whereas the threat of ICC intervention was clearly a catalyst for the attempted Special Tribunal in Kenya, the predominant driver behind the push for an ICD has been Chief Justice Mutunga. Following the STK's defeat, domestic leadership on the issue of accountability for electoral violence has migrated almost totally to Kenya's judicial branch, particularly in the wake of the 2013 election of Kenyatta and Ruto, former political rivals who aligned, under the banner of the Jubilee Alliance, in opposition to the ICC proceedings.<sup>561</sup> The establishment of an ICD is also more feasible than any attempt to revisit the failed special tribunal as that would require parliamentary assent, a political impossibility at this point.

While the ICD remains a distant prospect in Kenya, the discourse there, as in Uganda, has shifted away from a threat-based model of complementarity to one that instead sees the Division as an extension of the ICC's work, rather than an alternative to it. The JSC report appears to endorse, for example, a burden-sharing model of complementarity, wherein the ICD would "try middle and lower perpetrators of crimes against humanity as related to the post-election violence period," while the ICC deals with those "who bear the highest responsibility for crimes against humanity that were perpetrated against citizens."<sup>562</sup> Aimee Ongeso of the Nairobi-based NGO Kituo cha Sheria, similarly writes that, "The ICD should be seen as complementary to the International Criminal Court that only holds those who bear the greatest responsibility to account."<sup>563</sup> The ICC's outreach coordinator in Kenya has also said that the division would "serve the important role of complementing the ongoing ICC work." In her words, "It is not a question of comparing the ICD and the ICC. It is a question of the complementing role the two institutions can play to bring about justice to victims. It is our hope that the ICD will meet international standards."<sup>564</sup>

### 3. Democratic Republic of Congo

Like the A&R Agreement in Juba and the National Accords in Kenya, the Sun City Accords—the 2002 peace agreement that brought a nominal end to the DRC's long-running conflict—also foresaw the creation of accountability mechanisms for atrocity crimes.<sup>565</sup> In December 2002, participants in the Inter-Congolese Dialogue (I-CD),

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allegations have further stalled steps that the JSC might take towards establishing the Division. See Mathews Ndanyi, "Setbacks for Kenya's Special Court," *Institute for War & Peace Reporting* (23 December 2013), at <http://iwpr.net/report-news/setback-kenyas-special-court>.

<sup>561</sup> See JSC Report, 32, 40. The report notes that, "The JSC now finds itself in the position of having to play a gigantic and momentous historic role of putting in place mechanisms to deal with and eliminate the culture of impunity that has for years been deeply ingrained in the socio-political fabric of the Kenyan society."

<sup>562</sup> JSC Report, 98.

<sup>563</sup> Aimee Ongeso, "An International Crimes Division in Kenya's High Court: Meaningful justice or a white elephant?," *VRWG Bulletin* 22 (Spring 2013), 3.

<sup>564</sup> Nzau Musau, "ICC welcomes international crimes court in Kenya," *The Star*, 7 February 2014 (quoting Maria Mabinty Kamara).

<sup>565</sup> There is a vast literature on the conflict in the DRC, which is not recounted here. Useful texts consulted for this dissertation 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

meeting in Sun City, South Africa, reached a Global and Inclusive Accord (*Accord Global et Inclusif*) that included recommendations regarding the establishment of a truth and reconciliation commission and an international special tribunal for war crimes in the DRC.<sup>566</sup> Subsequently, in September 2003, the transitional government approved a decision to refer the situation in the DRC to the ICC, and to request the creation by the UN Security Council of an international special tribunal to deal with crimes that fell outside the Court's jurisdiction.<sup>567</sup> Little is known about the DRC's truth commission other than that its mandate ended in controversy in 2007, having opened no enquiries during its tenure and awarded no reparations.<sup>568</sup> One commentator has noted that, the "presence of belligerents" in the TRC and the "lack of public engagement" in its creation, "fundamentally undermined it from the start."<sup>569</sup>

### 3.1 Complementarity as Cooperation

In 2004, President Kabila formally referred the situation to the ICC, initiating an engagement that has produced the greatest amount of prosecutorial and judicial activity for the Court to date.<sup>570</sup> Yet whereas complementarity had an important coercive dimension in both Uganda and Kenya, this was not the case in the DRC. Indeed, from the outset, both the OTP and the Congolese government envisaged the ICC's intervention as a burden sharing arrangement between international and domestic jurisdictions. As Kambale has argued, the Court's intervention in the DRC was premised on a "clear division of labour whereby the ICC would prosecute a handful of individuals among those bearing the greatest responsibility, while the Congolese justice system, with the support of the international community, would take on other cases."<sup>571</sup>

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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.

<sup>566</sup> The Commission on Peace and Reconciliation—one of the five commissions established under the ICD—had been tasked with "recommending measures to ensuring lasting peace within the national borders and security in the region." The Commission's recommendations were adopted by all I-CD delegates. See P. Bouvier and F. Bomboko, *Le Dialogue intercongolais, anatomie d'une négociation à la lisière du chaos*, Cahiers africains No 63-64, (Paris: L'Harmattan, 2004), 177-78.

<sup>567</sup> Ibid.

<sup>568</sup> Very little has been written about the DRC's truth commission although its performance was deeply criticized in the UN's Mapping Report's in 2010. See "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003" (August 2010), paras. 1063-1072, ("UN Mapping Report") at

[http://www.ohchr.org/Documents/Countries/CD/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf).

<sup>569</sup> Laura Davis, "Power shared and justice shelved: the Democratic Republic of Congo," *The International Journal of Human Rights* 17(2) (2013), 302. Notably, the Kenyan truth commission was met with similar criticism over the initial appointment of Ambassador Bethuel Kiplagat as its chair. Many human rights groups argued that Kiplagat was himself linked to human rights violations that the truth commission was expected to investigate, damaging its credibility from the outset. See Kimberly Lanegran, "The Kenyan Truth, Justice and Reconciliation Commission: The Importance of Commissioners and Their Appointment Process," *Transitional Justice Review* 1(3) (2015), 42.

<sup>570</sup> Letter of Referral from President Joseph Kabila to Prosecutor of the ICC (Kinshasa, 3 March 2004), ICC-01/04-01 /06-32-US-Exp-AnxAl 12-03-2006 1/1UM (letter reproduced as Appendix I in Godfrey Musila, "Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC" (Institute for Security Studies Monograph 164, July 2009), 79-80).

<sup>571</sup> Pascal Kalume Kambale, "A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo," 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).

The elements of such an arrangement were outlined in the letter that the OTP sent to President Kabila to seek his referral of the situation in the DRC in September 2003:

Since the International Criminal Court will not be in a position to try all the individuals who may have committed crimes under its jurisdiction in Ituri, a consensual division of labor could be an effective approach. We could prosecute some of those individuals who bear the greatest responsibility for the crimes committed, while national authorities, with the assistance of the international community, implement appropriate mechanisms to deal with others. This would send a strong sign of the commitment of the Democratic Republic of the Congo to bring to justice those responsible for these crimes. In return, the international community may take a more resolved stance in the reconstruction of the national judiciary and in the re-establishment of the rule of law in the Democratic Republic of the Congo.<sup>572</sup>

The referral echoed Prosecutor Moreno-Ocampo's speech to the Assembly of States Parties earlier that month, where he noted that the Court and the DRC "may agree that a consensual division of labour could be an effective approach." He added:

The Office could cooperate with the national authorities by prosecuting the leaders who bear most responsibility for the crimes. National authorities with the assistance of the international community could implement appropriate mechanisms to deal with other individuals responsible.<sup>573</sup>

The OTP's announcement of the formal opening of investigations in June 2004—in which Moreno-Ocampo stated that his office would target only those "people that bore the highest responsibility"—reinforced the intention to pursue a joint approach.<sup>574</sup>

As a catalyst for accountability, then, complementarity in the DRC was envisioned less as a coercive arrangement than a cooperative one. Other benefits were also seen to accrue from this relationship, including the promise of state cooperation and a "positive" role for the Court in helping to build the state's own capacity and will to undertake prosecutions. Unfortunately, as has been noted, this vision of the OTP's role largely failed to materialize: little of the skills or knowledge transfer that was envisioned took place. One official in Kinshasa (responsible for overseeing requests between the DRC and the ICC) characterized the Court's approach as "a one-way street," with

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<sup>572</sup> "Letter from Prosecutor Luis Moreno-Ocampo to H.E. Joseph Kabila, President of the Democratic Republic of Congo," 25 September 2003 (quoted in Kambale, "The ICC and Lubanga: Missed Opportunities.") Kambale notes that former Minister of Justice Ngele Masudi articulated this vision as well. In opening remarks at a meeting on the ICC in October 2002, he "indicated that the government's strategy to address war crimes was based on the principle of complementarity, by which he meant that the DRC would leave to the ICC the task of prosecuting those in the top leadership of armed groups who bore the greatest responsibility for crimes under the ICC jurisdiction, whereas the Congolese justice system would deal with the lower ranking perpetrators and the less complex crimes." Ibid. Clark likewise argues that, "the Prosecutor and other OTP personnel engaged in lengthy discussions with the President's office in Kinshasa, outlining the domestic political benefits of ICC investigations into serious crimes." See Clark, "Chasing Cases," 1188.

<sup>573</sup> Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, 8 September 2003, at [http://www-icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO\\_20030908\\_En.pdf](http://www-icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO_20030908_En.pdf).

<sup>574</sup> OTP Press Release, "The Office of the Prosecutor of the International Criminal Court opens its first investigation," ICC-OTP-20040623-59, 23 June 2004.



information flowing to The Hague but not in reverse.<sup>575</sup> Similarly, as noted in chapter three, the OTP took a strong line against cooperation in the *Katanga* litigation, stating that, “the ICC was not created to be an international investigative bureau with resources to support national authorities.”<sup>576</sup> Finally, over time, it became clear that the individuals for whom the Court had issued warrants were far from those who bore the highest responsibility.<sup>577</sup> Amidst pressure to begin bringing cases, the promise of a division-of-labor between the Court and the DRC proved difficult to implement in practice.

### 3.2 Special Chambers/Court

The attempted creation of a special tribunal for the DRC for crimes committed dating back to 1993 reached a political turning point in late 2010, six years after the ICC began its investigations. The political momentum for what later came to be called the “Special Court” proposal owed largely to the publication in August 2010 of a long-awaited “mapping” report on crimes committed between 1993-2003 in the DRC by the UN Office of the High Commissioner for Human Rights, which explicitly endorsed the creation of a “mixed judicial mechanism – made up of national and international personnel – [as] the most appropriate way to provide justice for the victims of serious violations.”<sup>578</sup> More generally, the report lent renewed interest and impetus for the establishment of a domestic accountability mechanism, and prompted increasing pressure from international actors as well. The United States, in particular, put significant political weight behind the idea, building upon the momentum of a visit by former Secretary of State Hillary Clinton to the eastern Congo in 2009.<sup>579</sup> To that end, in November 2010, the Ministry of Justice circulated a government-sponsored bill (*projet de loi*) for the creation of so-called *chambres specialises* (“Special Chambers”).<sup>580</sup>

The chief architect of the *projet de loi* was the DRC’s then Minister of Justice, Luzolo Bambi Lessa, although it was heavily influenced by the input of a number of international organizations. Though “clearly unfinished” when it was first circulated, the Ministry signaled unusual openness to external actors, convening a multi-sector conference of international and national NGOs to discuss improvements shortly after the bill was circulated.<sup>581</sup> The initial draft prepared by the government made clear that the chambers were intended to function within the existing court systems, although it

<sup>575</sup> Interview with Colonel Muntanzini, Kinshasa, 27 June 2011. The Colonel noted in particular that one request for information had been made (in writing) to the OTP but, after an initial exchange, it was not followed up on.

<sup>576</sup> OTP Response to Katanga Admissibility Challenge, paras. 100-101.

<sup>577</sup> See, e.g., Clark, “Chasing Cases,” who argues that, “Lubanga is at best a middle-ranking perpetrator, with more senior regional actors responsible for the crimes committed,” 1191. Indeed, the Pre-Trial Chamber appeared to raise similar concerns when, following Lubanga’s confirmation hearing, it stated that the OTP’s charges failed to recognize the international nature of the conflict in eastern DRC, given the involvement of Rwanda and Uganda in arming opposition groups. See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision sur la Confirmation des Charges, ICC-01/04-01/06-806, PTC I, 5 February 2007.

<sup>578</sup> See UN Mapping Report, paras. 61-63.

<sup>579</sup> Interviews in the DRC confirmed that U.S. support for the mechanism was the most aggressive, in spite of persistent concerns about harmonization of the proposed *projet de loi* with Rome Statute implementing legislation.

<sup>580</sup> In the DRC, a *projet de loi* is a government supported draft law endorsed in most cases by the Ministry of Justice. A *proposition de loi* is, by contrast, brought before Parliament by one or more parliamentarians, usually without government support (and occasionally with its explicit disapproval.) The Special Chambers legislation was a *projet de loi*, while the Rome State implementation legislation (discussed in chapter six) was a *proposition de loi*.

<sup>581</sup> Interview with EUPOL official, Kinshasa, 23 June 2011.

contemplated the possibility of appointing foreign judges and other international staff; hence, the proposal for “mixed” chambers. Following extensive input from international and Congolese human rights NGOs, a three-member drafting committee that was appointed to collate the proposals of the stakeholders submitted a report that recommended the establishment of such a mechanism.<sup>582</sup> This proposal was later endorsed in the final version of the bill drafted by the Congolese Law Reform Commission, which submitted it to the National Assembly in April 2011.<sup>583</sup>

While non-state actors and donor states invoked complementarity in a literal sense in support of the Special Chambers proposal, government documents do not use the term at all. Instead, the Ministry of Justice’s rationale for the proposal (*exposé des motifs*) as presented to the National Assembly is a litany of the ICC’s failings and an indictment of the international community.<sup>584</sup> Of the latter, the Ministry’s note recalls the I-CD’s support for a UN Security Council-sponsored tribunal to deal with crimes that fell outside of the ICC’s jurisdiction. It states that President Kabila “pleaded” for the creation of such a tribunal but that his “request was ignored by the United Nations and the international community,” leaving the DRC government to “give up” on the proposal for reasons of “feasibility, resources and finances, notably in the absence of support for the international community.”<sup>585</sup> Having observed the international community’s “reticence” for the creation of international criminal tribunals, and in light of these tribunals’ “mitigated results,” the proposal further stated that the responsibility to prosecute grave crimes now “returns to Congolese jurisdictions, through the establishment of specialized chambers within [those] jurisdictions.”<sup>586</sup> It also referenced the publication of the UN’s mapping report as indicating a new, “positive international dynamic, which the DRC intends to support for the repression of international crimes.”<sup>587</sup>

The government’s characterization of the ICC is more scathing. The Ministry’s proposal states that the Court’s engagement in the DRC could not produce “the desired results,” and that the cases it has pursued “do not realize the magnitude of the [impunity] deficit.”<sup>588</sup> To that end, a separate document prepared for donor states in June 2011 presented the *projet de loi* as a necessary alternative to the ICC, which, despite “nine years of cooperation with the DRC, has only realized three or four prosecutions, while the violence continues.”<sup>589</sup> The document further criticized the ICC for entertaining the

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<sup>582</sup> Ibid.

<sup>583</sup> Patryk Labuda, “The Democratic Republic of Congo’s Failure to Address Impunity for International Crimes: A View from Inside the Legislative Process 2010-2011,” International Justice Monitor, 8 November 2011, at <http://www.ijmonitor.org/2011/11/the-democratic-republic-of-congos-failure-to-address-impunity-for-international-crimes-a-view-from-inside-the-legislative-process-2010-2011/>. The DRC Parliament is bicameral: the National Assembly is the lower house and was established by the 2006 Constitution; the Senate is the upper house.

<sup>584</sup> “Projet de Loi Relative Aux Chambres Spécialisées pour la Répression des Violations Graves du Droit International Humanitaire: Organisation, Fonctionnement, Droit Applicable, Compétence et Procédure” (11 April 2011) (“Projet de Loi”) (on-file).

<sup>585</sup> Ibid., 1 (author’s translation).

<sup>586</sup> Ibid.

<sup>587</sup> Ibid., 2

<sup>588</sup> Ibid., 1. The note concludes: “The ICC cannot, and is not intended, to judge all of these crimes; other mechanisms must be put in place.”

<sup>589</sup> Comité Mixte de Justice, “Compte Rendu de la Réunion Politique du Comité Mixte de Justice,” 28 June 2011, 3 (“CMJ Note”) (on-file). Like JLOS, the Comité Mixte de Justice was established in an effort to coordinate government and international donor priorities and management. Interview with CMJ official, Kinshasa, 28 June 2011.



asylum petitions of three Congolese nationals who were transferred to The Hague to serve as defense witnesses in the Lubanga and Katanga/Ngudjolo Chui trials.<sup>590</sup> In doing so, “the Court encroached on the jurisdiction of the DRC in its role as state party despite its exemplary cooperation with the ICC.” In its only (indirect) reference to complementarity, the government noted that, while it still maintains a “wise policy” towards the ICC despite “the treatment inflicted upon it,” in the coming days it would appear “before Parliament to present its views on the jurisdiction of the ICC in relation to Congolese national jurisdiction.”<sup>591</sup> The government also noted that the proposed hybrid court would “be a good accompaniment to the [forthcoming] electoral process,” in order to “prevent the disturbances” that could arise as a result of “certain political ambitions.”<sup>592</sup>

Notwithstanding the executive branch’s support for a national approach to accountability and its withering critique of the ICC, most parliamentarians were deeply wary of the *projet de loi*. In addition to the political implications, they were unsettled by the swiftness with which the proposed legislation was being pushed, as well as the outsized role of external actors in amending it.<sup>593</sup> Moreover, important questions about the structure of the chamber, its scope of jurisdiction, and the applicable law—including its proposed relationship to Rome State implementation legislation, which was being considered at the same time through a separate bill—had yet to be resolved. Indeed, although the *projet* was being increasingly presented as a rival to the implementation legislation that had been proposed, it was clear that both bills complemented each other.<sup>594</sup> Amidst these continued concerns, substantive debate was tabled until the last day of the Assembly’s spring session.<sup>595</sup>

In the face of these criticisms and in a desire to push the legislation through, Kabila’s government adopted a series of extraordinary measures. It first opted to have Minister Luzolo present a different authorization law (*loi de habilitation*) directly to the Senate, effectively bypassing the Assembly.<sup>596</sup> This law asked the Senate to grant the executive exceptional powers to legislate in a number of areas of “heightened importance,” of which the proposed court was part, in advance of the presidential elections later in the year. This effort failed, but the Ministry of Justice then made a renewed effort at passage by putting the legislation on the agenda of a special summer session of Parliament.<sup>597</sup> A moderately revised version of the bill—rather than Special

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<sup>590</sup> On the applications of these three witnesses and the ensuing proceedings, see Jennifer Easterday, “Asylum Applicants Must be Returned to the DRC, Trial Chamber Orders” (8 December 2011), at <http://www.ijmonitor.org/2011/12/asylum-applicant-must-be-returned-to-the-drc-trial-chamber-orders/>.

<sup>591</sup> CMJ Note, 4.

<sup>592</sup> The government also presents the non-execution of ICC arrest warrants in explicitly political terms, noting Uganda’s failure to arrest LRA members (the failure of which has “harmed the credibility of Congolese political governance”) and the non-arrest of Bosco Ntaganda (“not because of the Congolese government but because the international community decided in 2006 that he could not be pursued”) in the face of its own “exemplary” cooperation. Ibid.

<sup>593</sup> Interview with PGA consultant, Kinshasa, 27 June 2011.

<sup>594</sup> See, e.g., Human Rights Watch, “DR Congo: Commentary on Draft Legislation to Establish Specialized Chambers for Prosecution of International Crimes” (11 March 2011). HRW notes that, “the draft legislation creating the specialized chambers refers to the implementing legislation a number of times, as if it had already been passed, which is obviously not the case. These passages must be amended to avoid any possibility of legal gaps or inconsistency.” Chapter six discusses the proposed implementation legislation in further detail.

<sup>595</sup> Interview with EUPOL official, Kinshasa, 23 June 2011.

<sup>596</sup> See Labuda, “The DRC’s Failure to Address Impunity for International Crimes.”

<sup>597</sup> Ibid.

Chambers, the proposal now called for a stand-alone “Special Court”—was thus presented in August 2011.

The Senate rejected the proposed *Court Spécialisée* in strong terms, characterizing it as an intrusion by the international community in the DRC’s internal affairs.<sup>598</sup> Notwithstanding this opposition, the President of the Senate, Leone Kengo wa Dondo, forced the bill through to the Senate’s Political, Administrative and Judicial (PAJ) Committee.<sup>599</sup> The senators there rebelled as well, objecting to the attempted circumvention of established parliamentary procedure. In strong words, the Committee rejected the bill outright, recommending that any such legislation should be merged with the Rome Statute implementing legislation.<sup>600</sup> (That bill, whose deadline for parliamentary approval had since lapsed, was absent from this agenda.) Committee members also voiced serious concerns about the potentially unsettling impact that the bill would have on the Congolese judiciary, raising questions about the compensation of foreign judges, the treatment of international magistrates alongside Congolese magistrates, and the orientation of resources and attention around a select number of crimes to the detriment of the legal system as a whole.<sup>601</sup>

The exceptional powers invoked by the executive in its attempt to force legislative assent of the Special Court bill underscores the degree to which Kabila’s government saw its establishment as a necessary concession to demands for accountability, particularly with presidential elections looming. Concerns articulated by a number of national actors and NGOs that the legislation needed further refinement were largely ignored, however, and the legislation was generally seen as a rushed effort driven by outside actors. In Kambale’s words, “a number of senators felt that the campaign amounted to an international conspiracy against Congolese sovereignty.”<sup>602</sup> The failure to connect the Special Chambers bill with Rome Statute implementing legislation, explored further in the following chapter, was also a concern, making it appear “as if the government was acting precipitously and only because the international community was demanding action.”<sup>603</sup>

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<sup>598</sup> Press Release FIDH/ASADHO/GL/LE, “RDC: Les sénateurs torpillent le projet de loi dur la Court spécialisée mixte,” 23 August 2011 (on-file).

<sup>599</sup> Interview with EUPOL official, Kinshasa, 23 June 2011. Kengo wa Dondo reportedly stated that, “If you don’t approve it now, the UN will force you to do so anyway.”

<sup>600</sup> République Démocratique do Congo Senat, Commission Politique, Administrative et Juridique, Session extraordinaire d’aout 2011, “Rapport Relatif a l’Examen du Project de Loi Portant Création, Organisation et Fonctionnement de la Court Spécialisée Chargée de la Répression des Crimes de Génocide, Crimes de Guerre et des Crimes Contre l’Humanité” (August 2011) (“Rapport Relatif au Projet de Loi”) (on-file).

<sup>601</sup> Ibid. (author’s translation).

<sup>602</sup> Pascal Kambale, “Mix and Match: Is a hybrid court the best way for Congo to prosecute international crimes?,” *Openspace* (February 2012), 65. In May 2014, the National Assembly rejected another proposal that envisaged setting up special chambers within the DRC’s existing court system. Despite a less intrusive approach by many international NGOs to this proposal, concerns over sovereignty again loomed large, as “MPs [remained] increasingly wary of any suggestion of external influence in the management of Congolese internal affairs, including in [the] justice sector.” Lack of consultation between the government and MPs was also an issue, amidst concerns by MPs that they “not be taken for granted.” For helpful analysis of this period, see Nick Elebe ma Elebe, “Why DRC Lawmakers Again Rejected Special Chambers to Prosecute International Crimes” (23 May 2014), at <http://www.ijmonitor.org/2014/05/drc-a-bill-on-special-chambers-rejected-for-the-second-time/>.

<sup>603</sup> Ibid., 66.

### 3.3 Military/Mobile Courts

In the absence of a special tribunal or mixed court, military courts remain the sole arbiter of international crimes in the DRC. In 2002, the government ordered an overhaul of the legal framework for its military court system, granting its courts exclusive jurisdiction over international crimes. Military courts have a long history in the DRC, however, dating back to the founding of the Congolese colonial state.<sup>604</sup> The system has undergone numerous transformations since that time, including the introduction of a *code de justice militaire* (code of military justice) in 1972. This code, Marcel Wetsh'okonda Koso notes, “organized the military courts for the first time into a complete judicial system, distinct from that of ordinary courts.”<sup>605</sup>

Military justice thus became increasingly normalized in the post-1972 period. Efforts to reform the system—recognizing, for instance, its independence from the prosecutor’s office—were attempted in the early 1990s with the onset of a democratic opening in Congolese society, but were largely ignored following Mobutu’s fall from power.<sup>606</sup> Indeed, in 1997, the new regime of then President Laurent Kabila established a single court, the *Court d’Ordre Militaire* (COM), “which reduced the independence of magistrates and wrecked the organization, procedures and jurisdiction of the military justice system.”<sup>607</sup> During this time, the courts’ jurisdiction was progressively extended to encompass, in certain cases, civilians as well.

Growing criticism of the COM’s abuses helped augur further change in 2002, when the Inter-Congolese Dialogue adopted a resolution on reform of the system. This led, in turn, to the adoption of the new *code de justice militaire* and *code penal militaire* (military criminal code). The DRC ratified the Rome Statute that same year as well, providing the ICC with the possibility of prosecutions for grave crimes committed post-2002. Notably, the *code penal militaire* incorporates, in large part, the Rome Statute’s crimes (discussed in further detail in chapter six), but none of these crimes have yet been incorporated into the country’s civil criminal code.<sup>608</sup> Military courts therefore retain exclusive subject matter jurisdiction over international crimes, even as deep criticism about their lack of independence from the executive remains. It is particularly noteworthy that, since 2002, the system has “extended its material and personal jurisdiction to a degree unprecedented in its history,” including over civilians.<sup>609</sup>

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<sup>604</sup> “The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms,” A Review by AfriMAP and Open Society Initiative for Southern Africa (OSISA, 2010), 17.

<sup>605</sup> *Ibid.*, 18.

<sup>606</sup> The *Conférence nationale souveraine* (Sovereign National Conference) that took place from 1991-1992 focused on the military justice system in particular, and made several recommendations for reform, including abolishing the “double supervision of military courts by both the Defense and Justice ministries,” as well as ensuring the independence of military magistrates from the high command. *Ibid.*, 19; see also Deibert, 39-40.

<sup>607</sup> *Ibid.*

<sup>608</sup> Code Penal Militaire, Arts. 164-66, 173-75. In June 2015 (with presidential elections again looming), the National Assembly/Chamber of Deputies voted for the adoption of a “Law to Implement the Rome Statute” in the domestic legal order, following a re-tabling of the 2008 draft legislation in September 2012 by Prof. Balamage MP. At the time of writing, the bill has not yet passed the Senate. See Patryk Labuda, “Whither the Fight Against Impunity in the Democratic Republic of Congo?” (24 June 2015), at <https://justicehub.org/article/whither-fight-against-impunity-democratic-republic-congo>.

<sup>609</sup> “The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms,” 17. Jurisdiction over civilians was justified, for instance, by broad, vaguely defined clauses that include civilians accused of ordinary crimes committed merely with “weapons of war.” See Amnesty

It is difficult to ascertain how many military trials have been conducted in the DRC to date; no official record is kept. A study published by Avocats Sans Frontiers in 2009 identified 13 atrocity-related trials held by military courts between 2004 and early 2009, concerning a total of 188 defendants belonging either to the DRC's regular army or to non-state armed groups.<sup>610</sup> Wetsh'okonda Koso suggests a similar figure,<sup>611</sup> although a more recent article notes that, since 2011, "military courts have tried some 8,000 cases of sexual violence committed by soldiers."<sup>612</sup> Most of these proceedings have been by so-called "mobile courts" (*chambres foraines*), meaning that the courts themselves travel to remote jurisdictions to conduct trials.<sup>613</sup>

Mobile courts have received increasing attention as a rule-of-law intervention amongst international donors, leading some commentators to wrongly suggest that they are a recent innovation. In fact, Congolese law specifically provides for their operation and has long done so.<sup>614</sup> The Open Society Justice Initiative, which provided financial support for mobile courts operating in the DRC's Kivu region, describes the courts as "not new in Congo; they have long been used by the central government to administer justice in its remote interior."<sup>615</sup> Wetsh'okonda Koso further notes that because the jurisdiction of the basic military courts (*tribunaux militaires de garnison*) is set at district level, accessing them is often difficult: they are typically situated far from the places where offenses are committed. Thus, "practically all the trials for international crimes recorded up to this point have been arranged as a result of hearings in the mobile courts."<sup>616</sup>

To date, the courts largely operate in the eastern part of the DRC, where intense fighting has continued despite the 2002 power-sharing agreement. One of the largest programs to date has been run by the American Bar Association's Rule of Law Initiative (ABA-ROLI).<sup>617</sup> Operating principally in the North and South Kivu regions of the

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International, "The Time for Justice is Now: New Strategy Needed in the Democratic Republic of Congo: Summary," AFR 62/007/2011 (August 2011).

<sup>610</sup> See Avocats Sans Frontieres, "The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo" (2009), 100-112.

<sup>611</sup> Marcel Wetsh'okonda Koso, "La contribution de la justice militaire réformée à la lutte contre l'impunité en République démocratique du Congo dix ans après: essai de bilan et perspectives d'avenir" (on-file).

<sup>612</sup> Louise Jones, "The rape trial of Colonel 106: a test for Congo's military justice," *International Justice Tribune* No. 165, 10 September 2014; Stephanie van den Berg, "Praise for historic Congo rape conviction," *International Justice Tribune* No. 170, 11 December 2014.

<sup>613</sup> While mobile courts can also sit as civilian tribunals, they have largely been convened as military proceedings. Interview with Marcel Wetsh'okonda Koso, Kinshasa, 21 June 2011.

<sup>614</sup> Article 67 of the Code d'Organisation et de Compétence Judiciaire. An interlocutor active in one mobile court program noted that provisions for such courts exist in other African Francophone countries as well, and that the concept "gave rise" to the existence of circuit court in the United States. Interview with ABA-ROLI staff member, Washington, D.C., 12 February 2014.

<sup>615</sup> "Fact Sheet: DRC Mobile Gender Courts," at <http://www.opensocietyfoundations.org/sites/default/files/mobile-court-20110725.pdf>.

<sup>616</sup> "The Democratic Republic of Congo: Military Justice and Human Rights," 33.

<sup>617</sup> In a published paper, the ABA notes that the program initially began in January 2008 and was funded by the U.S. Department of State's Bureau of Human Rights, Democracy and Labor. Tessa Khan and Jim Wormington, "Mobile Courts in the DRC: Lessons from Development for International Criminal Justice," Oxford Transitional Justice Research Working Paper Series, 19. 18, n.93. US AID is no longer the primary grantmaker: ABA-ROLI now sub-partners (or has partnered) with a number of other organizations, including the Open Society Foundations (for a program begun in South Kivu in late 2009), as well as USAID, the Norwegian Ministry for Foreign Affairs, and The Netherlands. These programs focus on the provinces of Maniema and North and South Kivu. *Ibid.*, n.84. For an overview of various donors engaged in mobile courts, see also *Putting Complementarity in Practice: Domestic Justice for International Crimes in DRC*,

country, two ABA-ROLI attorneys write that the courts “are deployed to remote locations to enable access to justice for victims unable to travel to courts in town and cities.”<sup>618</sup> They add:

Everything about the courts is temporary: the court is housed in a community centre or town hall, with magistrates, a registrar, a bailiff, defence attorneys and lawyers brought in from the closest towns and cities. Mobile courts remain in a given location for a period of between one and two months, hearing as many cases as possible. While the mobile courts are primarily established to hear cases relating to sexual violence, they do deal with other matters affecting the community.<sup>619</sup>

Informational material by donor organizations further describes the need for a “specialized approach” to the endemic sexual violence in the DRC region. However, while the courts’ specialization in gender issues is what “distinguishes” them, they also have “discretion to hear other cases,” such as murder and torture.<sup>620</sup>

The mobile courts have achieved some notable convictions and they have also, in certain instances, applied provisions of the Rome Statute directly.<sup>621</sup> One of the most prominent cases to date was the trial in February 2011 of Colonel Kibibi Mtware, who was sentenced, along with ten of his commanding soldiers, to lengthy jail terms for their involvement in a mass rape (as a crime against humanity) in the town of Fizi, in South Kivu province, on New Year’s Day in 2011.<sup>622</sup> Kibibi was the first commanding officer in the DRC to be so convicted; in so doing, the court applied the Congolese military criminal code. Another trial to receive significant attention was the conviction of Lieutenant Eliwo Ngoy and his co-defendants for crimes against humanity, for mass rapes committed in the town of Songo Mboyo in 2003. Sitting in Mbandaka, the capital of Équateur province, the court chose, in a novel development, to apply the Rome Statute directly in convicting the defendants, rather than Congolese national law.<sup>623</sup> A 2014 judgment of a military court sitting in Goma, North Kivu similarly applied the Rome Statute in the convictions of 26 (out of 39) members of the Congolese armed forces for acts of looting and pillaging committed in the town of Minova in November

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*Uganda, and Kenya* (Open Society Foundations, 2011), 55-56; see also Passy Mubalama, “Roving Courts in Eastern Congo,” *Institute for War & Peace Reporting* (13 February 2013).

<sup>618</sup> Khan and Wormington, 19.

<sup>619</sup> Ibid.

<sup>620</sup> “Mobile Gender Justice Court,” Women’s UN Report Network. In informational material, OSF similarly writes that, “The court, which is staffed entirely by Congolese and functions within the Congolese judicial system, also has flexibility—it has the discretion to hear other serious crimes, including murder and theft.” See “Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo.”

<sup>621</sup> For an invaluable account of several such judgments, see Elena Baylis, “Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks,” *Boston College Law Review* 50(1) (2009), 72. Amongst international NGOs, Avocats sans Frontières has worked perhaps most closely with the DRC’s military justice system, conducting extensive trainings for judges and prosecutors of the military tribunals on the ICC and the Rome Statute. See, e.g., Avocats Sans Frontières, “Promoting Complementarity [sic] in the Democratic Republic of Congo (document prepared for the 2010 Rome Statute Review Conference); see also “Recueil de Décisions de Justice et de Notes de Plaidoiries en Matière de Crimes Internationaux” (on-file).

<sup>622</sup> Kelly Askin, “Fizi Mobile Court: rape verdicts,” *International Justice Tribune* No. 123, 2 March 2011.

<sup>623</sup> For the full Songo Mboyo judgment, see ASF, “The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo.”



2012, following their expulsion from Goma by M23 rebel groups.<sup>624</sup> Notably, while widespread rape and sexual assault were perpetrated upon local civilians as well, the court delivered only two rape convictions.

As with courts in Uganda and Kenya, the ICC and complementarity loom large in descriptions of the DRC's mobile courts program. The courts are typically depicted as completing and "complementing" the work of the ICC, even if, as elsewhere, there is little to any coordination or cooperation between them.<sup>625</sup> Mark Ellis writes (incorrectly) that the courts were created to "prosecute persons who committed crimes under the ICC's jurisdiction," while Khan and Wormington describe the mobile courts as unfolding "alongside" the ICC's efforts.<sup>626</sup> In a similar vein, the Open Society Justice Initiative explains that the mobile court was "designed ... to support the concept of 'complementarity'—the principle that domestic courts have the primary responsibility to investigate and prosecute serious crimes—and hence to complement the work of the International Criminal Court in The Hague, which is tasked with prosecuting high level suspects otherwise outside the capacity of the domestic court system."<sup>627</sup> Kelly Askin, senior legal officer at the Justice Initiative, also suggests a burden-sharing relationship between the ICC and the mobile courts, with the former "going after the highest level accused often out of reach of domestic jurisdictions - and the local courts, including mobile courts, going after lower level suspects."<sup>628</sup>

#### 4. Three Concerns

The attempted transformation of domestic judiciaries for the prosecution of atrocity crimes highlights the shifting, protean nature of complementarity. As the histories of Uganda and Kenya suggest, an initially threat-based relationship with the principle—spurred by the potential of ICC intervention—catalyzed efforts to establish credible bodies that could potentially displace the Court's jurisdiction. Over time, however, complementarity has become a harmonious principle—a way to narrate the ICC's influence on domestic jurisdictions even when the Court is itself absent. Many criminal justice and human rights advocates welcome the development of such specialized domestic fora, seeing their establishment as a step towards accountability, as well as an opportunity to invest in the successful functioning of the broader national

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<sup>624</sup> Milli Lake, "After Minova: Can War Crimes Trials Overcome Violence in the DRC?" (8 May 2014), at <http://africanarguments.org/2014/05/08/after-minova-can-war-crimes-trials-overcome-violence-in-the-drc-by-millie-lake/>.

<sup>625</sup> Interview with Congolese magistrate at High Military Court, Kinshasa, 28 June 2011; interview with ABA-ROLI staff member, Washington, D.C., 12 February 2014. As an example of this descriptive tendency, see Mubalama, "Roving Courts in Eastern Congo" ("The mobile courts complement the work of the International Criminal Court, ICC, in The Hague ... In parallel with its own investigation, the ICC has a policy of encouraging local judicial systems to develop their ability to try cases of this kind.")

<sup>626</sup> Ellis, *Sovereignty and Justice*, 247 ("In 2010, the [DRC] created mobile courts in the eastern part of the country to prosecute persons who committed crimes under the ICC's jurisdiction, particularly crimes involving sexual violence"); Khan and Wormington, 18. For a similar description, see Michael Maya, "Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?", in Juan Carlos Botero, Ronald Janse, Sam Muller, and Christine Pratt (eds.), *Innovations in Rule of Law: A Compilation of Concise Essays* (HiIL and The World Justice Project, 2012), 33-36.

<sup>627</sup> "Fact Sheet: DRC Mobile Gender Courts."

<sup>628</sup> Askin, "Fizi Mobile Court: rape verdicts." A recent publication by the Southern African Litigation Centre is also representative: the DRC mobile courts are highlighted as a case study of "Complementarity in Action: The Mobile Gender Courts," in *Positive Reinforcement: Advocating for International Criminal Justice in Africa* (May 2013), 79-83.

legal system.<sup>629</sup> Yet tensions also beset these arrangements. In particular, the attention paid to initiatives like the ICD or the mobile courts—both of which are typically presented as extensions of the ICC’s work, or even as legacies of its intervention—reflect a preference by some actors to focus more on the Court’s purported “demonstration effects,” rather than on the equal development of national judicial institutions overall.<sup>630</sup>

#### 4.1 Special Courts for Special Crimes?

Exceptionalism—treating or giving something the status of being unique or special—has both positive and negative connotations in the context of criminal justice. Understood as the former, seeking criminal accountability for mass violence has typically required exceptional responses by the international community. Notable examples include the establishment of international ad hoc and/or hybrid tribunals, as well as the creation of “high risk courts” or even the exercise of military jurisdiction.<sup>631</sup> Exceptionalism may also be justified as an antidote: the failures of the “ordinary” criminal justice system necessitate the establishment of independent structures or, indeed, supra-national jurisdiction. As articulated by Wilfred Nderitu, former chair of ICJ-Kenya, in his testimony before the Waki Commission:

We find that depending on who is heading a particular unit within the security agencies – then just by looking at him or by knowing what his name is in 90% of the cases you will be able to know what kind of decision he would make with regard to which particular community or you will be able to know whether he will turn a blind eye to something that is happening. So the issue of getting people who are not unduly affected by the politics behind the violence coming to help us, I think that ... is very important.<sup>632</sup>

Nderitu’s testimony illustrates the need for erecting mechanisms that function outside the normal structures of state. The creation of specialized institutions, personnel, and regulations can help inoculate transitional justice measures from the corrosive influence of a compromised justice sector but, more ambitiously, they also hold the potential to positively influence the development of the rule of law domestically.<sup>633</sup> Indeed, it was on this basis that the UN’s “mapping” report recommended that a special mechanism in the

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<sup>629</sup> See, e.g., Jane Stromseth, “Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies,” *Hague Journal on the Rule of Law* 1 (2009), 87-97; Victor Peskin and Eric Stover, “A hopeful future for Kenya,” *Los Angeles Times* (7 June 2010) (“A fair and effective [domestic] tribunal will open the way to an independent judiciary, which is a cornerstone of the proposed constitution.”).

<sup>630</sup> On “demonstration effect,” see Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006), 259-261. For a thorough exploration of tensions between/among “transitional justice” practitioners and rule-of-law/development actors, see Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A contentious relationship* (Routledge Press, 2013). Bringing development and rule-of-law actors together in support of “implementing the complementarity principle” has been a topic of increasing focus in recent years, see, e.g., “Greentree Principles” of 2010.

<sup>631</sup> The creation of special jurisdictions is nevertheless understood to require the satisfaction of certain conditions under international law, in order to ensure equal and impartial proceedings. See, e.g., UN Human Rights Committee, General Observation No. 32, “Article 14: right to equality before courts and tribunals and to a fair trial,” CCPR/C/GC/32, 23 August 2007.

<sup>632</sup> Record of Evidence Taken Before the Commission of Inquiry into Post-Election Violence (CIPEV), 24 July 2008 (verbatim recording) (on-file). The historian Daniel Branch makes a similar point about the ICC’s intervention: “The only way that Kenyans could expect to check the abuses of power of those in high office and find justice was through external intervention.” Branch, *Kenya: Between Hope and Despair*, 288.

<sup>633</sup> For a fuller discussion of this debate, see Stromseth, Wippman and Brooks, *Can Might Make Rights?*

DRC should also contribute to strengthening and rehabilitating the national justice system.<sup>634</sup>

Yet in each of the country contexts described, the institutional forms that have emerged (or been proposed) in the wake of the ICC's intervention raises concern about what several Congolese interlocutors called *la pérennisation*: the structure, resourcing, and functioning of these forms relative to the well-being of the broader domestic criminal justice system. As articulated by MP Danson Mugatana in his opposition to the proposed STK:

We are going to have another court for the ordinary *mwananchi* who was sent to go and actualize the ideas of these bigger crime suspects ... entrenching a system where we have a special procedure for those who are going to be eminent people or suspects and a different procedure for the ordinary.<sup>635</sup>

As institutions that are rooted, to varying degrees, within the domestic structures of the state, the ICDs of Kenya and Uganda, the proposed Special Chambers in the DRC, and the mobile military courts reflect broader tensions over the role of external actors in their design, as well as the priorities of donor benefactors vis-à-vis those of domestic actors.

#### 4.1.1 DRC

The failed creation of the Special Chambers/Court in the DRC illustrates perhaps most directly the tension between the need for specialized jurisdiction and the concern for *la pérennité* of the broader justice system. The reasons enumerated by the Senate in its August 2011 rejection of the Ministry's bill illustrate the divergent views held by international and domestic actors over the benefit of such a mechanism. As noted, Committee members voiced serious concerns about the potentially unsettling impact that a Special Court would have on the Congolese judiciary and the risk that it would "lead to a duplication of jurisdictions."<sup>636</sup> The incorporation of international staff also appears to have been one of the main reasons for the Senate's rejection of the bill. In the Committee's words:

The integration of foreign judges in this national jurisdiction, under the pretext of ensuring the effectiveness and independence of the judiciary, would appear to be an admission of powerlessness on the part of the Government, which itself has the duty to strengthen the capacities of Congolese judges and would be an insult to them.<sup>637</sup>

The Committee also noted that, "the adoption of a special status for the judges of this [Special] Court is likely to create discrimination between them on the one hand and the

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<sup>634</sup> UN Mapping Report, paras. 1038, 1044, 1055. Notably, the DRC's *projet de loi* also noted the ability of a "hybrid composition" to "reinforce the independence integrity and capacity of Congolese magistrates."

<sup>635</sup> STK Amendment Bill, MP Danson Mugatana.

<sup>636</sup> Rapport Relatif au Projet de Loi ("la creation d'une Cour specialisee avec les memes competences entrainerait un dedoublement de juridictions, avec risqué de litispendance") (author's translation).

<sup>637</sup> Rapport Relatif au Projet de Loi ("l'intégration des magistrats étrangers au sein de cette juridiction nationale, sous prétexte d'assurer l'efficacité et l'indépendance de la justice, apparaitrait comme un aveu d'impuissance de la part du Gouvernement charge de renforcer les capacités des magistrats congolais et serait une injure pour ces derniers") (author's translation).



other judges in other jurisdictions, on the other.”<sup>638</sup> Opponents of the proposed STK raised similar concerns during parliamentary debates.<sup>639</sup>

In some respects, concerns about the Special Court’s potentially distorting impact have been realized in the functioning of the DRC’s mobile courts, where international donor influence looms large. Here, exceptionalism extends in particular to the predominant focus on sexual violence crimes. Severine Autesserre, a political scientist who has conducted extensive fieldwork in the DRC, argues that the sexual abuse against women and girls is one of several dominant narratives that have “dominated the discourse on the Congo and oriented the interventions strategies ... of some of the most powerful states and organizations,” such that other forms of violence are increasingly overlooked.<sup>640</sup> She further notes that, “according to donors and aid workers, sexual violence is such a buzzword that many foreign and Congolese organizations insert references to it in all kinds of project proposals to increase their chances of obtaining funding.”<sup>641</sup> A 2012 study of the DRC mobile courts by two Dutch academics similarly warns of the deleterious effects that such a singular focus can have. They argue that, “Although mobile courts should see all kinds of cases, they are almost uniquely organized around sexual violence cases and, linked with the predominant perception that sexual violence is caused by armed perpetrators, they are mostly targeting military justice.”<sup>642</sup>

Furthermore, while observers of the courts (many of whom are also funders) have noted that the mobile court proceedings meet fair trial standards, significant concerns remain about the independence of the Congolese military justice system. As a report of the Open Society Initiative for Southern Africa notes:

[The] mobile court hearings are ... sometimes not held in conditions that allow military judges to issue rulings in a faithful and conscientious way, and with complete freedom. This is the case when these hearings draw a significant crowd, and there is public pressure for the accused to be sentenced. Judges are then very strongly tempted to make decisions that will satisfy public opinion.<sup>643</sup>

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<sup>638</sup> Ibid. (“l’adoption d’un statut special en faveur des magistrats de cette Cour est de nature a creer une discrimination entre eux, d’une part et entre ceux-ci et les magistrats de autres juridictions, d’autre part”) (author’s translation).

<sup>639</sup> MP Danson Mungatana, for instance, spoke out against the 2009 Bill in similar terms:

First and foremost, if you look at this tribunal, it is a huge monolith that is going to set up a parallel legal system in this country. If you look at the Bill that has been circulated, we are going to have several offices created. There is going to be the office of the public prosecutor, office of the defender, office of the registrar, a trial chamber, special prosecution court and an appeals chamber. This is a very big parallel structure to the legal system of Kenya that already exists (STK Amendment Bill, 40).

<sup>640</sup> Séverine Autesserre, “Dangerous Tales: Dominant Narratives on the Congo and their Unintended Consequences,” *African Affairs* (2012), 13. Autesserre argues further that these dominant narrative have “diverted attention from much more needed policy actions, such as the resolution of grassroots antagonisms, the fight against corruption, and the reform of the state administration,” 11. For a similar argument in the context of the need for “local peacebuilding,” see also Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge: Cambridge University Press, 2010).

<sup>641</sup> Ibid.

<sup>642</sup> Nynke Douma and Dorothea Hilhorst, “Fond de Commerce? Sexual violence assistance in the Democratic Republic of Congo,” Disaster Studies, Occasional Paper No. 2 (Wageningen University, 2012), 11, at [http://www.wmm.com/filmcatalog/study/justice\\_report.pdf](http://www.wmm.com/filmcatalog/study/justice_report.pdf).

<sup>643</sup> “The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms,” 34-35.

The effective “sponsoring” of mobile courts by non-state actors, presumably eager to see the impact of their own investments, also raises questions about the influence of donor money on due process. As the 2012 study notes, “NGOs pay for lawyers on the side of victims, while suspects are usually left with unpaid, and hence unmotivated, public defenders. This enhances the possibility for suspects to be convicted regardless of the evidence that is presented.”<sup>644</sup>

Finally, domestic advocates have expressed concern about the displacing effects of the mobile courts. One Congolese jurist noted that “ordinary” justice institutions are effectively stalled when the mobile courts are in session, as they draw personnel “from the closest towns and cities” away from those institutions for the duration of the time that the court is sitting.<sup>645</sup> Another publication refers explicitly to the courts as “palliative,” noting their high cost and the fact that they depend almost entirely on the logistical assistance provided by MONUC, the UN’s mission to the DRC.<sup>646</sup> Of their (relative) high cost, similar concerns have been expressed about the distortions such interventions can visit on the local economy, where the per diem offered for three days travel often well exceeds the compensation that a public court official would otherwise receive.<sup>647</sup> A 2009 needs assessment of the DRC’s justice system similarly noted that, “since more international actors get involved in mobile courts initiatives, magistrates have started to demand additional pay before agreeing to participate.”<sup>648</sup> While the *chambres foraines* are thus part of the Congolese system, the resources necessary to activate them may well come at the price of other rule of law building efforts.

#### 4.1.2 Uganda

The permanence of a structure like Uganda’s ICD is, in part, a response to concerns that the benefits of transitional justice mechanisms would not accrue to domestic justice systems. As Human Rights Watch describes it, “As a division of Uganda’s High Court, the ICD is a fully integrated part of Uganda’s domestic system, operating according to standard judicial procedure and practice.”<sup>649</sup> Yet even such specialized divisions can produce tensions between and amongst other justice sector actors. In Uganda, for instance, the perception that the ICD is a “prized” Division,

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<sup>644</sup> Douma and Hilhorst, “Fond de Commerce?,” 11. The authors further note that, “legal personnel receive compensation (*primes*) during mobile hearings from the NGOs.”

<sup>645</sup> Interview with Congolese jurist, Kinshasa, 21 June 2011.

<sup>646</sup> “The Democratic Republic of Congo: Military Justice and Human Rights – An urgent need to complete reforms,” 34-35.

<sup>647</sup> Interview with MONUSCO official, 23 June 2011. The Open Society Justice Initiative likewise notes, “Judges who are usually reluctant to accept remote postings have eagerly participated in mobile courts for the per diem payments.” *Putting Complementarity into Practice*, 56.

<sup>648</sup> “Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo,” An International Legal Assistance Consortium and International Bar Association Human Rights Institute Report (August 2009), 27. The report concludes that having mobile courts “run by the government, under specific and consistent guidelines, would contribute to solving the problem.” Similar tensions are described in a 2004 report of Human Rights Watch, concerning a joint effort, known as REJUSCO, spearheaded by the DRC government and the European Commission to restore the criminal justice system in Bunia, Ituri. The report notes that, judges and investigate judges’ monthly stipend was “‘worse than meaningless’” as it did “‘not even cover 30% of ... monthly needs.’” It recommends that all parties involved “should reaffirm the principle that the burden of paying the salaries of judicial personnel should be borne by the government.” Human Rights Watch Briefing Paper, “Making Justice Work: Restoration of the Legal System in Ituri, DRC” (1 September 2004), 10.

<sup>649</sup> Human Rights Watch, “Justice for Serious Crimes Before National Courts: Uganda’s International Crimes Division” (January 2012), 18.

attracting not only the interest of international NGOs, advocates, and academics, but also donor money, has contributed to a sense that it enjoys a special status within the High Court structure.

What this status confers ranges from the level of the seemingly mundane to the potentially constitutional.<sup>650</sup> Several Ugandan jurists, for instance, pointed to the fact that ICD judges were receiving a paid legal assistant (something Ugandan judges do not traditionally use) as a form of patronage. Donors were in fact asked to consider supplemental funding for legal assistants for ICD judges in 2011, although this request was not funded (at the time).<sup>651</sup> Judicial “training” has been another site of institutional tension, as ICD judges have received extensive training on a variety of topics in international law.<sup>652</sup> The Institute for Security Studies, a think tank based in South Africa notes that, since March 2011, it has “provided the ICD with intensive training workshops on international criminal justice, counter-terrorism and mechanisms for international cooperation. The judges and the registrar of the ICD have also benefited from exchange programmes or study tours to the ICC and the International Criminal Tribunal for Rwanda.”<sup>653</sup> Given the resources invested in such trainings, concern has been expressed that the possible rotation of judges off of the ICD—an otherwise common practice within the High Court system—will now cause “a loss of developed knowledge and expertise in a specialized legal area.”<sup>654</sup>

Funding is again intimately intertwined with these tensions. JLOS is ostensibly meant to serve as the Ugandan government’s coordinating body for justice issues, but the interest in its transitional justice mandate, for which a working group was established in 2008, has attracted particular attention. Stephen Oola notes that JLOS “received significant donor money” in support of expediting the ICD’s first trial (that of Thomas Kwoyelo, discussed further below) and, “with it, pressure to abandon its earlier roadmap towards a more comprehensive transitional justice process.”<sup>655</sup> Nouwen concludes that the establishment of a division specialized in ICC crimes is yet another iteration of Uganda’s expensive patronage system. In her words, “International donor money for such special bodies guarantees income outside the ordinary national budget,” while

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<sup>650</sup> For instance, the JSC proposal that would vest jurisdiction for piracy and other transnational crimes with the Kenya’s ICD would likely face a constitutional challenge at some point (or require a change in legislation), as currently such cases are handled at the magistrate’s court level. Second interview with Kenyan NGO director, Nairobi, 3 December 2012. Similar constitutional issues are raised with special tribunals as well, as was the case in both Kenya and the DRC.

<sup>651</sup> In its recommendations to donors, Human Rights Watch included that they “consider prioritizing funding of legal assistants to support ICD judges.” See “Justice for Serious Crimes Before National Courts,” 27.

<sup>652</sup> See, e.g., *Putting Complementarity into Practice*, which notes that ICD judges, “have requested extensive additional trainings, including in plea-bargaining, as well as on-going trainings that address other particular challenges,” 72.

<sup>653</sup> Max du Plessis, Antoinette Low, and Ottilia Maunganidze, “African efforts to close the impunity gap: Lessons for complementarity from national and regional actions,” ISS Paper No. 241 (November 2012), 17, at <https://www.issafrica.org/uploads/Paper241.pdf>. Other trainings—by the Public International Law and Policy Group, International Criminal Law Services, the Institute for International Criminal Investigations, and the International Center for Transitional Justice—have likewise been offered to investigators and prosecutors.

<sup>654</sup> Human Rights Watch, “Justice for Serious Crimes Before National Courts,” 20.

<sup>655</sup> Stephen Oola, “In the Shadow of Kwoyelo’s Trial: The ICC and Complementarity in Uganda,” 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).

The sector secured over UGX 400m (apx. \$115,000 USD) to initiate the Kwoyelo trial alone. See JLOS, “Annual Performance Report 2010/2011,” 72.

domestic patronage networks are rewarded by “secondment to a body that promises training with sitting allowances, access to international networks and travel abroad as fringe benefits.”<sup>656</sup> The repeated recommendation of international organizations that the ICD is “under-staffed and under-resourced”<sup>657</sup> arguably adds to the patronage potential of such bodies.

#### 4.2 Mimicry and “International Standards”

While the creation of specialized judicial divisions invests them with an exceptional status in the domestic legal sphere, they also demonstrate a striking uniformity with the institutional form of justice that the ICC represents, promoting in Mark Drumbl’s words, “the iconic status of the courtroom and the jailhouse as the best practice to promote justice in the aftermath of grave mass violence.”<sup>658</sup> As chapter three argues, the ICC has abetted this process through a line of admissibility jurisprudence that privileges the “mirroring effect” of its procedures at the national level. Academics and policy makers have also encouraged this development, seeing it as salutary, an elevation of domestic criminal justice through greater adherence to “international standards.” Ellis, for instance, posits that the “importance of stressing *international standards of justice* is paramount,” while George Fletcher argues that “the long range-value of the ICC is that it will teach countries of the world how to do justice as they seek to apply repressive measures in the name of social protection.”<sup>659</sup> Similarly, the European Commission, in assessing “whether impunity has been properly addressed,” asks: “Is the existing normative framework [constitution, penal code, procedural code...] in line with international standards on justice?”<sup>660</sup>

The suggestion that ICC practice is to be copied, coupled with the message of mediating organizations that “international standards” and “best practices” must be met, has been effectively transmitted to influential actors in both Uganda and Kenya (by contrast, this message was largely rejected by domestic political elites in the DRC). In 2010, Principal Judge Ogoola, the first presiding judge of the Ugandan ICD, wrote:

The Court’s standards and procedures—including a trial bench of three Judges, Prosecution, Investigation, and Defence Office, and in-house translation service—all mirror those of the modern international criminal courts such as the Hague, Arusha, Bosnia, Yugoslavia, Sierra Leone, etc. In the legislation, we have sought to go even further by, for instance, providing the opportunity for an International Criminal Court observer at the hearings of cases by the [Ugandan

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<sup>656</sup> Nouwen, *Complementarity in the Line of Fire*, 182.

<sup>657</sup> See, e.g., ISS at 18. Writing of the Kenyan ICD, one NGO also describes the costs of operationalizing the court as “enormous”; the Kenyan government is “expected to fund the ICD adequately in addition to international donor funding.” Ongesco, 3.

<sup>658</sup> Drumbl, *Atrocity, Punishment, and International Law*, 198.

<sup>659</sup> *Sovereignty and Justice*, 8-10 (emphasis in original); George Fletcher and Jens David Ohlin, “Reclaiming Fundamental Principles of Criminal Law in the Darfur Case,” *Journal of International Criminal Justice* 3 (2005), 540.

<sup>660</sup> European Commission, “Toolkit for Bridging the gap between international [and] national justice: Joint Staff working Document on Advancing the Principle of Complementarity,” SWD(2013), 1 January 2013, 11.

War Crimes Chamber]—let alone the use of international experts to assist the Court’s proceedings.<sup>661</sup>

Ugandan Justice Akiki Kiiza, who later presided over the Division, has likewise stated that, “war crimes trials held in the country will function in a similar fashion to those in The Hague, with three judges officiating each case.”<sup>662</sup> (Whereas single judges typically preside over judicial matters in Uganda, the ICD employs a three-judge bench in keeping with ICC practice.) These messages are furthered by key domestic NGOs. The Uganda Victims Foundation, for instance, has stated that, “Given the special international nature of the crimes coming before the WCD, a structure similar to the ICC should be upheld and adhered to.”<sup>663</sup>

The proposals for Kenya’s ICD mirrors the emerging practice in Uganda. Justices Ogoola and Kiiza’s remarks are nearly identical to those of Reverend Samuel Kobia, who, speaking at the annual Assembly of States Parties in November 2013, said that Kenya’s proposed ICD would be established “modeled on standards of the ICC – the same standards... with the same rules, with the same practice and with the same procedures.”<sup>664</sup> To that end, the sub-committee proposed that the ICD sit “in panels of three judges with one extra judge in case one of the judges cannot sit.”<sup>665</sup> The JSC’s report on the Kenyan division further concludes that:

Special rules of procedure and evidence should be formulated to provide the procedure on the prosecution of crimes in this division. This is so because, this division will be dealing with criminal matters with significant international character and needs to be modeled in accordance with international standards of the International Criminal Court and tribunals.”<sup>666</sup>

Kenya’s nascent Witness Protection Agency, which has become a critical focus of “positive” complementarity-related efforts, describes its mission—to be “the leading Witness Protection Agency in the World”—in similarly ambitious terms.<sup>667</sup>

Procedural provisions are also considered part of “proper” adjudication. The ICC’s victim participation regime, for instance, has been frequently summoned as a necessary corollary of criminal proceedings in Kenya and Uganda, even though such participation is otherwise foreign to their common-law systems.<sup>668</sup> Punishment, explored

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<sup>661</sup> Justice James Ogoola, “Lawfare: Where Justice Meets Peace,” *Case Western Reserve Journal of International Law* 43 (2010), 184. Justice Ogoola references the work here of the Public International Law & Policy Group.

<sup>662</sup> Florence Ogola, “Uganda Victims Question ICC’s Balance,” *Institute for War & Peace Reporting* (14 June 2010).

<sup>663</sup> Uganda Victims Foundation, “Statement on the International Crimes Bill of 2009” (4 November 2009).

<sup>664</sup> Simon Jennings and Thomas Bwire, “Kenyan Chief Justice Announces Special Court,” *Institute for War & Peace Reporting* (10 December 2012); Nzau Msua, “Kenya: Mutunga to Establish ICC Model Court,” *The Star* (26 February 2013).

<sup>665</sup> JSC Report, 144

<sup>666</sup> *Ibid.*, 96. Because of the nature of crimes to be tried, the report recommends that, “before the court commences its trials, all measures should be put in place to ensure that the court room has modern ICT facilities e.g. cameras, videos etc.,” 145.

<sup>667</sup> The Witness Protection Agency, Republic of Kenya Service Charter (brochure on-file).

<sup>668</sup> See, e.g., UVF, “Statement on the International Crimes Bill of 2009,” which states “Whilst it is recognized that the Ugandan legal system does not normally provide for victims to participate in criminal proceedings (other than as witnesses) or to be legally represented, the UVF is of the firm belief that the special nature of the crimes coming before the WCD merits significantly greater involvement of victims in

further in the following chapter, has been another area of ICC mirroring, where a false understanding that the Rome Statute requires domestic prohibition of the death penalty further demarcates international crime adjudication from the broader criminal justice system. For instance, the Kenyan JSC report calls upon the government to “give an undertaking through a memorandum of understanding to the International Community and the ICC that any person charged, prosecuted and convicted for committing an international crime shall not be sentenced to death,” even as Kenya retains the death penalty for other criminal offenses.<sup>669</sup> A similar disparity is evident in Uganda, which, despite a *de facto* ban on the death penalty, retains criminal punishment for certain ordinary crimes.<sup>670</sup>

Paradoxically, this insistence on conformity with standards can serve to stymie domestic proceedings, rather than catalyze them. As Elena Baylis notes, “the common approach has been to hold constant as an irreducible, unnegotiable value our commitment to trials that meet international due process standards and to do what it takes to achieve that commitment in the immediate term: that is, to hold trials on the international level insofar as possible and to discourage and criticize national trials that do not meet international standards.”<sup>671</sup> Uganda’s ICD illustrates this tendency. Whereas a 2011 needs assessment of the Division concluded that, “the JLOS institutions are closer to being ready for war-crimes proceedings than some within those institutions believe,”<sup>672</sup> a July 2012 speech by the ICD’s Registrar highlighted its ongoing deficiencies. In his words:

Positive Complementarity presupposes that national institution[s] like the ICD in Uganda should have the necessary and vital tools to effectively and efficiently handle investigations and prosecutions of International Crimes under the Statute. Many countries, Uganda inclusive, have problems in fulfilling these obligations. This therefore, calls for the ICC and other International Organisations, as well as governments of the other State Parties to facilitate the young national institution to cope with the expected standards.<sup>673</sup>

The pressures of accommodating a unique set of crimes within a permanent domestic judicial structure thus oscillate between a mutually reinforcing rhetoric of exceptionalism (special crimes require special treatment) and conformity (to ICC rules and procedures).

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the process”; see also *Prosecutor v. Joseph Kony et al.*, Observations on Behalf of Victims pursuant to Article 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes, ICC-02/04-01/05-349, Office of Public Counsel for Victims, 18 November 2008.

<sup>669</sup> JSC Report, 150.

<sup>670</sup> On the “growing paradox” of excluding the death penalty for international crimes before international jurisdictions while national jurisdictions maintain it, see Boctor, “The Abolition of the Death Penalty in Rwanda.”

<sup>671</sup> Baylis, “Reassessing the Role of International Criminal Law,” 8. For a similar conclusion in the context of Uganda, see Phil Clark, “All these Outsiders Shouted Louder Than Us’: Civil Society Engagement with Transitional Justice in Uganda,” Working Paper SiT/WP/03/15, 13.

<sup>672</sup> “Final Report and Recommendations of Needs-Assessment Mission Experts,” 4 March 2011 (on-file).

<sup>673</sup> Remarks by His Worship Asiimwe Tadeo, “Effecting Complementarity: Challenges and Opportunities: A Case Study of the International Crimes Division of Uganda,” paper presented at regional forum on international and transitional justice organized by ASF-Uganda Mission and the UCICC (20 July 2012).

#### 4.3 *Uganda v. Thomas Kwoyelo*: Complementarity and State Power

Commentators have already drawn attention to the fact that the “self-referrals” in situations such as Uganda and the DRC were themselves concessions to state power, resting on an implicit understanding that the referring government would not be a focus of the Court’s investigations.<sup>674</sup> While the OTP’s choice of cases in these situations (to date) would appear to vindicate this criticism, less remarked upon has been the way in which the exercise of complementarity has likewise served to shore up existing domestic power structures. Uganda’s case against Thomas Kwoyelo is perhaps the most dramatic illustration of this phenomenon.

##### 4.3.1 Procedural History

Kwoyelo, a former LRA fighter and child soldier who himself had been abducted by Kony’s forces when he was 13, became the first war crimes suspect to face trial before Uganda’s ICD.<sup>675</sup> Captured in March 2009, he was charged under the Geneva Conventions Act as well as Uganda’s Penal Code Act. The government alleged that he “committed his offences in the context of an international armed conflict that existed in Northern Uganda, Southern Sudan and North Eastern Democratic Republic of Congo between the LRA (with the support of and under the control of the government of Sudan), fighting against the government of the Republic of Uganda as by law established, between 1987 and 2008.”<sup>676</sup>

Kwoyelo was initially charged in June 2009 but applied for amnesty under Uganda’s Amnesty Act in January 2010.<sup>677</sup> As the Act prescribed, the Amnesty Commission sent Kwoyelo’s application to the DPP for certification that he was not charged with offenses unrelated to the LRA activity (a condition of receiving amnesty); however, in this instance, the DPP failed to respond to the Commission’s request.<sup>678</sup> Whereas thousands of other combatants like Kwoyelo had received amnesty, the DPP’s refusal on this occasion to certify his application suggests that the ICD’s establishment, coupled with the swift passage in 2010 of long delayed Rome Statute implementing legislation and the forthcoming ICC Review Conference (for which Uganda was the host

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<sup>674</sup> See, e.g., Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011); Schabas, “‘Complementarity in Practice’: Some Uncomplimentary Thoughts.”

<sup>675</sup> Kwoyelo was captured in March 2009 in Ukwa, a northeastern part of the DRC during a joint military operation and as part of “Operation Lightning Thunder,” which was launched in December 2008, following the failed Juba peace process. See *Uganda v. Thomas Kwoyelo alias Latoni*, Constitutional Court of Uganda, Petition No. 036/11, 22 September 2011 (“Kwoyelo Constitutional Court Decision”), 3-4.

<sup>676</sup> Director of Public Prosecutions, International Crimes Division of the High Court of Uganda at Kampala, HCT-00-ICD-Case No. 02/10, Amended Indictment, 5 July 2011, para. 1.

<sup>677</sup> Interview with Amnesty Commission official, 13 December 2011. In January 2000, Uganda adopted an Amnesty Act (subsequently amended in 2002 and 2006) that provided amnesty for anyone who had engaged in armed rebellion against the government since the “26th day of January 1986” and who agreed to renounce and abandon such rebellion. The conditions for amnesty were broadly conceived, with the declaration that “amnesty means a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State.” See Amnesty Commission, “The Amnesty Act: An Act of Forgiveness” (August 2009), 26 (on-file). To date, more than 26,000 former combatants have received amnesty under the Act (approximately half of whom were former LRA members.) Ibid.

<sup>678</sup> Interview with Amnesty Commission official, 13 December 2011. My interlocutor indicated that the DPP typically certified within one month of the Commission sending the file, which it had done in March 2010. The Department did not respond, however, instead filing its initial indictment against Kwoyelo in August of that year. See also, “The Amnesty Act: An Act of Forgiveness,” 12 (“The Role of the DPP”).

state), signaled a decision to make him an “example” of Uganda’s commitment to complementarity.<sup>679</sup>

Kwoyelo’s legal team raised several challenges in the first instance before the ICD (which sat in Gulu rather than Kampala for the proceedings), including whether the armed conflict between the LRA and the government was international in the sense of the Geneva Conventions, as well as his alleged torture during the time that he was held in pre-trial detention. The central question, however, was whether Kwoyelo was entitled to amnesty and whether the Commission under the Ugandan Constitution had accorded him equal treatment.<sup>680</sup> Faced with these constitutional questions, the ICD referred the matter to the Constitutional Court in July 2011. In a turnabout from its previous position, the government responded that Kwoyelo was not entitled to amnesty because the Amnesty Act, which had been in existence for the previous ten years, was unconstitutional as it compelled Uganda to violate its “international legal obligation to punish grave breaches of the Geneva Conventions on war crimes.”<sup>681</sup>

In November 2011, the Constitutional Court halted Kwoyelo’s trial. In a unanimous decision, it dismissed the Attorney General’s arguments and upheld the Act’s constitutionality; further, it found that Kwoyelo had been unequally treated. The Court also rejected the argument that Uganda’s Rome Statute obligations implied a duty not to grant amnesties, finding that it had “not come across any uniform international standards or practices which prohibit states from granting amnesties.”<sup>682</sup> Upon remanding the case to the ICD, the Amnesty Commission sought renewed certification from the DPP to issue Kwoyelo’s amnesty, which it again refused to issue.<sup>683</sup> Instead, the Attorney General appealed to the Ugandan Supreme Court (a higher appellate court), challenging the Constitutional Court’s decision. The Supreme Court had no quorum at the time, however, thus adding additional delay to the proceedings.

Subsequent successful attempts by Kwoyelo to apply for bail (as an interim remedy) and for a writ of mandamus (to compel his release) in light of the Constitutional Court’s decision were likewise ignored by the DPP.<sup>684</sup> Instead, the Attorney General sought to stay the orders of these lower courts by appealing to the Supreme Court, which convened, without quorum, a special one-hour sitting and then granted the government’s

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<sup>679</sup> See, e.g., Samuel Egadu Okiror, “Ugandan Supreme Court ruling fuels debate over double standards in war crimes prosecution,” *International Justice Tribune* No. 180, 21 April 2015.

<sup>680</sup> Uganda v. Thomas Kwoyelo alias Latoni, Constitutional Reference No. 36 of 2011, Reference to the Constitutional Court, 25 July 2011.

<sup>681</sup> Uganda v. Thomas Kwoyelo alias Latoni, Constitutional Reference No. 36 of 2011, Attorney General’s Legal Arguments, 16 August 2011.

<sup>682</sup> Kwoyelo Constitutional Court Decision, 24. The court did not address another argument put forward by the government: that the Amnesty Act violates Uganda’s international treaty obligations under the Rome Statute.

<sup>683</sup> Interview with Amnesty Commission official, 13 December 2011. My interlocutor shared a copy of the DPP’s reply to the Commission (dated 17 November 2011), which stated that, “The grave breaches of the Geneva Conventions for which the accused is charged with constitute international crimes for which amnesty cannot be granted.” (Notably, Kwoyelo was not charged under the Geneva Conventions but rather the Geneva Conventions Act, which, like the Penal Code Act, would appear to fall within the Amnesty Act’s ambit.)

<sup>684</sup> Thomas Kwoyelo alias Latoni v. Attorney General, High Court (Civil Division), HCT-00-CV-MC-0162-2011, 25 January 2012 (Hon. Zehurikize) (on-file). The DPP issued a press release explaining its contempt, stating, “This office maintains the position that under the principles of international law, no amnesty can be granted to persons accused of committing war crimes under the Geneva Convention. The war crimes he is charged with include killings and infliction of grave injuries.” See Edward Anyoli, “DPP rejects Kwoyelo amnesty,” *New Vision* (5 February 2012).



motion.<sup>685</sup> The appeal against the Constitutional Court’s decision was finally heard on the merits in April 2014. In April 2015, the Supreme Court overturned the decision on the grounds that any crimes committed against innocent civilians or communities (including crimes under Article 8(2)(e) of the Rome Statute) cannot be categorized as “crimes committed in furtherance of the war or rebellion”; thus, Kwoyelo was not entitled to amnesty.<sup>686</sup> More controversially, the Court also ruled that the DPP’s decisions as to whether or not to certify future amnesty requests were not entitled to judicial review, effectively granting the government unfettered discretion in such determinations.<sup>687</sup>

As he awaits yet another return to the ICD, Kwoyelo has been kept in pre-trial detention since his proceedings began five years ago. In October 2012, facing no other domestic avenues for relief, he petitioned the African Commission on Human and Peoples’ Rights, challenging his continuing detention as arbitrary and a violation of his rights under the African Charter on Human and Peoples’ Rights.<sup>688</sup> That petition remains pending.

#### 4.3.2 Hijacked Justice?

Kwoyelo’s proceedings point to a dark side to complementarity, particularly when domestic accountability is pursued by a state eager to be seen as making good on the investments of donor bodies and “compliant” with international norms. As a member of Kwoyelo’s legal defense team explained, “There is so much international pressure for [Uganda] to deal with the LRA.”<sup>689</sup> In response to such pressure, many of the same “international standards” to which domestic systems must ostensibly comply have been violated: Kwoyelo has now spent five years in pre-trial detention, in defiance of repeated orders by Uganda’s own courts that he be released.

Such defiance of the domestic judiciary is not new in Uganda,<sup>690</sup> but it is noteworthy that many of the same international NGOs that are otherwise champions of due process have said so little about the Kwoyelo trial or his treatment.<sup>691</sup> Complementarity’s disciplinary dimensions can also be seen in the reaction of JLOS to the Constitutional Court’s decision, when it (incorrectly) insisted that the “principle would require those responsible for serious human rights violations to be excluded from

<sup>685</sup> See Oola, “In the Shadow of Kwoyelo’s Trial.”

<sup>686</sup> The Republic of Uganda in the Supreme Court of Uganda at Kampala, Constitutional Appeal No. 1 of 2012, *Uganda v. Thomas Kwoyelo*, 8 April 2015, 41-42.

<sup>687</sup> Ibid. Notably, the judgment’s lead opinion also suggests a sequential approach to justice that would pursue accountability first before resorting to other “alternative” measures. See Sharon Nakandha, “Supreme Court of Uganda Rules on the Application of the Amnesty Act” (16 April 2015), at <http://www.ijmonitor.org/2015/04/supreme-court-of-uganda-rules-on-the-application-of-the-amnesty-act/>.

<sup>688</sup> Bill Oketch, “Rights body to assist Kwoyelo,” *Daily Monitor* (2 January 2013).

<sup>689</sup> Alexis Okeowo, “Thomas Kwoyelo’s Troubling Trial,” *The New Yorker* (21 July 2012).

<sup>690</sup> See, e.g., Mari Tripp, *Museveni’s Uganda*, 86-91; Kasaija Phillip Apuuli, “The ICC’s Possible Deferral of the LRA Case to Uganda,” *Journal of International Criminal Justice* 6 (2008), 808. Mari Tripp recounts a notorious scene from November 2005, when opposition leader Kizza Besigye was arrested (on charges of treason and rape) and brought to the High Court to be released on bail, only to be surrounded by members of the Black Mamba Squad, a paramilitary unit, in the courtroom and arrested extralegally; Apuuli notes similar acts were repeated in March 2007.

<sup>691</sup> Rather than drawing attention to the government’s failure to release Kwoyelo on bond, Amnesty International described the Constitutional Court’s decision as a “setback” for international justice. Amnesty International Public Statement, “Court’s decision a setback for accountability for crimes committed in northern Uganda conflict” (23 September 2011).

the amnesty process, and instead, be investigated by the national courts.”<sup>692</sup> In its words, “The Amnesty Act presents challenges to Uganda’s ability to *comply* with the principle of complementarity.”<sup>693</sup> In a “special report” issued following the decision, JLOS likewise stated that Uganda’s ratification of the Rome Statute represented an “international commitment to seek justice and accountability” and that its domestication “reinforces Uganda’s good reputation in ratification and domestication of international laws and its duty to apply the law.”<sup>694</sup>

Kwoyelo’s trial thus presents vexing questions about the ways in which complementarity may be used in the interests of state power. Jelena Subotic’s work on what she calls “hijacked justice” is instructive here, as she argues that the rise in popularity of transitional justice institutions (including courts) and their increasing ubiquity are such that “states use these mechanisms to achieve goals quite different from those envisaged by international justice institutions and activists.”<sup>695</sup> In Kwoyelo’s case, and as the Supreme Court’s decision suggests, the goal appears to be making him the public example of Uganda’s evolution from an earlier period wherein amnesty largely held sway as state policy to an increasingly retributive model, wherein criminal accountability is now the guiding norm. Yet this evolution has not been executed in a manner consistent with Kwoyelo’s own rights. Similar concerns animate the Kenyan ICD, talk of which, critics contend, amounts to little more than “sham compliance” on the part of the state. Writing in the *Daily Nation*, Betty Waithherero, a Kenyan commentator, argues that,

A lot of time, money and effort has ... been put into what looks like just smoke and mirrors; a political stillborn whose intention was to create the appearance of complementarity while utilizing dubious methods to create [it].”<sup>696</sup>

Such “domestic misuse of transitional justice norms,” Subotic concludes, can lead to “policy outcomes far removed from international transitional justice expectations.”<sup>697</sup> These outcomes may range from marginalizing domestic political opponents (as in the DRC), to obtaining material benefits (as in Uganda), or “gain[ing] membership in prestigious international clubs”<sup>698</sup> – including, perhaps, the “complementarity” club.

## 5. Conclusion

To varying degrees, complementarity animates and sustains the creation (or proposed creation) of specialized institutions, personnel, and regulations for the domestic prosecution of ICC crimes. Whether as admissibility rule or normative ordering principle, state and non-state actors alike have summoned the adaptive nature of complementarity as the basis for transforming and reforming domestic judicial systems,

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<sup>692</sup> “Community Dialogue on the Future of the Amnesty Act” (March 2012). JLOS convened the “dialogue” in conjunction with UN Women and the UN Office of the High Commissioner with “a view to understanding community views on the current operation and future of the [Amnesty] Act.” See also JLOS, “The Amnesty Law (2000) Issues Paper, Review by the Transitional Justice Working Group (April 2012).

<sup>693</sup> Ibid. (emphasis added).

<sup>694</sup> JLOS, “Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial,” 4.

<sup>695</sup> Jelena Subotic, *Hijacked Justice*, 6.

<sup>696</sup> Betty Waithherero, “Can the International Crimes Division prosecute Kenya’s PEV cases?,” *The Nation* (8 February 2014).

<sup>697</sup> Subotic, 6.

<sup>698</sup> Ibid.

as well as their relationship to the ICC. Whereas complementarity was once a principle that Uganda sought to invoke to keep the Court at bay, the ICD now appears as the ICC's institutional partner: Thomas Kwoyelo tried in Uganda, Dominic Ongwen tried in The Hague. Non-state actors in the DRC have invoked complementarity in a similar manner, even though the (limited) domestic proceedings there are not connected in any material way to, nor the direct result of, the ICC's undertakings. Indeed, the opposite has taken place: an initial promise of cooperation between the ICC and the government has given way to greater contestation between The Hague and Kinshasa.

At the same time, the creation of specialized regimes or units for the prosecution of international crimes has arguably contributed to an ongoing bifurcation within these systems, often rigidly dividing international and national justice in a way that disadvantages the "ordinary" criminal justice system in the competition for attention and resources.<sup>699</sup> The language of "international standards" and "best practices"—abundantly invoked by external technical "experts" as Rome Statute obligations—abets this phenomenon. Finally, the Kwoyelo proceeding highlights the vexed relationship between state power and complementarity, demonstrating how "compliance" with the latter can also facilitate abusive states practices. Although Kwoyelo cannot invoke complementarity as legal matter, the narrative of his trial has been built on the principle. Moreover, as a progress narrative, his prosecution marks an apparent shift in Ugandan policy from amnesty to accountability; it offers a picture to an international audience of complementarity "in practice." But Kwoyelo's is not a story that the ICC or its supporters should want to tell, built as it is on exceptionalism at the expense of due process. As these evolving histories suggest, the logic of complementarity shifts depending on the political priorities and goals of those who seek to invoke it.

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<sup>699</sup> One such example is the Kenyan ICD proposal, which would vest jurisdiction for crimes like piracy and other "transnational crimes" within the division, even though the ordinary criminal justice system has long prosecuted these crimes with some success.

