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

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CHAPTER SEVEN
Conclusions

The idea that all international problems will dissolve with the establishment of an international court with compulsory jurisdiction is an invitation to political indolence. It allows one to make no alterations in domestic political action and thought, to change no attitudes, to try no new approaches and yet appear to be working for peace.

Judith Shklar (1964)[839]

[I]n the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you, as lawyers and tribunes of justice to do your utmost in our struggle to ensure that no ruler, no state, no junta, and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights and that those who violate those rights will be punished.

Kofi Annan (1997)[840]

1. Reassessing Complementarity as a Catalyst

The ICC remains a pivotal institution in the growing juridification of international politics. At the same time it faces many challenges, ranging from the damaging breakdown of the Kenyan cases to increasing criticism that it is a neo-colonial project targeting African states.[841] This increasingly fragile political space in which the Court finds itself is, to some extent, captured in the dueling views of Annan and Shklar above. The certitude of Annan's remarks is rooted in the vision of a progressive, cosmopolitan legal order, of which the ICC is both agent and apex; by contrast, Shklar warns against seeking such certitude in the law or its institutions.[842] These competing conceptions inform a number of the themes that this dissertation has sought to trace in its examination of the ICC's "catalytic effect" in Uganda, Kenya, and the DRC.

First, because the ICC was understood from early on as needing to be more than the sum of its parts – a vehicle for retributive justice, but also an engine for accountability at the domestic level – complementarity has multiple meanings. Such a project is at once progressive and disciplinary: it is driven by Annan's vision that all

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[839] Shklar, *Legalism*, 134.

[840] Kofi Annan, "Advocating for an International Criminal Court," *Fordham International Law Journal* 21(2) (1997), 366.

[841] See, e.g., the March 2012 issue of the *New African*, with the title "ICC, Why Africa Will Always Lose." More critical scholarship has also increasingly questioned the triumphalism surrounding international criminal law, as well as its own exclusions. See, e.g., Christine Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014); Tor Krever, "Dispensing Global Justice," *New Left Review* 85 (January-February 2014).

[842] For a thoughtful reflection on Shklar and the ICC, see Samuel Moyn, "Judith Shklar versus the International Criminal Court," *Humanity* (Winter 2013), 473-500. These polarities also recall Martti Koskenniemi's insights into the dynamics of the international legal field: the ICC and its body of law oscillates between deference to the power of states, and openness to more cosmopolitan visions. See Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

might "sleep under the cover of justice," but insists that, in order to do so, states follow certain rules. Complementarity, in turn, has become more than a question of admissibility but the juridical logic through which these rules have been articulated. As chapter two illustrated, it has been effectively reshaped from shield—a principle protective of sovereignty—to sword. In Mégret's words, "Complementarity has become part of the way in which international criminal lawyers project a sense of the 'international criminal law *acquis*,' a sort of global package of norms that have to be developed by states that become part of the ICC club."[843] Two principal conceptions of complementarity animate this global package. One is as a tool for cooperation (a "gentle incentivizer"), the other as an instrument of coercion. Both interpretations, however, position the Court as a catalytic body: the threat of ICC intervention prompts states to undertake their own accountability efforts, while the promise of assistance and cooperation encourages them to do so.

A central feature of this new norm is the commonly held understanding that complementarity imposes explicit duties on states, thus linking the ICC-as-catalyst frame to the dominant discourse of compliance in international law. Indeed, although legally inaccurate, this duty-based conception of complementarity—with its attendant domestic obligations of implementation, investigation, and prosecution—has come to dominate the popular understanding of the principle. The reflection and advancement of this understanding in a vast array of literature demonstrates how, in Robinson's words, "collective belief can influence our understanding not only of history but also of text."[844]

In so doing, the domestic forms and possibilities for post-conflict justice have increasingly been cast within a compliance-oriented model as w, with attention predominantly paid to criminal prosecution and punishment rather than the plural approaches more commonly associated with transitional justice. Thus, while complementarity might once have been thought to spur pluralism—to enable greater "ownership" of national or local level judicial processes—ICC primacy has instead taken root. The Court's admissibility jurisprudence has contributed to this phenomenon. As chapter three demonstrated, it has largely followed a strict approach in its admissibility decisions, suggesting that a state's domestic proceedings must effectively mirror Court proceedings in order to successfully retain (or assert) control over them. (The application of this test has been even stricter when brought by an accused under Article 19(2)(a).) At the same time, the Court's jurisprudence on "positive" complementarity remains thin and underdeveloped.

Second, although complementarity was initially seen as a mechanism to catalyze state actors in the pursuit of criminal accountability, its effects on non-state actors appear to have been far more profound. While the evolution in complementarity's meaning was perhaps inevitable given the ICC's institutional limitations, its speed and spread owes largely to the critical role that private actors and organizations have played in the process. As part of a highly networked, transnational community of practice, these norm entrepreneurs have not only played the most active role in shaping and transforming the normative content of complementarity, but they have also increasingly reoriented their own advocacy agendas towards the ICC. In this sense, as Emily Haslam has elsewhere argued, civil society organizations are both object and subject of the Court's "catalytic

[843] Mégret, "Implementation and the Uses of Complementarity," 362.
[844] Robinson, "The Controversy over Territorial State Referrals and Reflections on ICL Discourse," 380.

effect": they seek to expand complementarity's normative influence, while having themselves been transformed by it.[845]

Third, it is clear that, in all aspects of the ICC's work, law and politics are deeply entwined. While legalism remains a seductive (and perhaps necessary) fiction in the pursuit of a rules-based global order, the effects of ICC interventions in Uganda, Kenya, and the DRC underscore how, returning to Leebaw, "international standards [do] not transcend the influence of local politics or the impact of global asymmetries." Rather, these asymmetries, as well as the patronage networks they produce and sustain, are intimately entwined with the catalytic project. This reality is particularly acute for the Office of the Prosecutor. Situated at the nexus of The Hague and situation countries, the OTP's decision of whether and when to open preliminary examinations and investigations is arguably the defining question of whether the ICC's engagement can trigger domestic criminal proceedings. The Office's use of preliminary examinations holds some promise for catalyzing domestic accountability processes but the conduct of these examinations is highly dependent on political context and timing, as the Court's early intervention in Kenya suggests. Investigations, which are similarly contingent on political context and cooperation, are also an important site where certain goals of "positive" complementarity—knowledge transfer, technical assistance to national jurisdictions, strengthening domestic prosecutorial capacity—could be meaningfully enacted but, to date, such an approach has been limited in practice.

Fourth, the developments traced here at national level make clear that the "catalytic effect" of complementarity should be understood as part of a complex political process, rather than a singular desired outcome. Judged by the latter, the outcomes that the ICC was meant to catalyze—domestic investigation and prosecution of international crimes—have only rarely and sporadically materialized. But while complementarity has not necessarily produced greater criminal accountability, the absence of criminal proceedings has not meant that these states are inactive.[846] Indeed, the Court has been deeply alive in the political discourse and decision-making of all three countries: from Uganda, where it loomed large in the government's peace negotiations with the LRA, to Kenya, where it helped forge a political alliance united in opposition to The Hague. Moreover, as chapter five illustrated, it has influenced the strategies and priorities of numerous NGOs and donor states. In the DRC, these actors have invoked complementarity—not as an admissibility principle, but the idea that the ICC symbolically complements domestic accountability efforts—to support important (if limited) prosecutions at the national level.

Finally, compliance with ICC standards and procedures belies the outsized influence of external constituencies as to what activities states undertake in the name of complementarity. Even in the absence of domestic proceedings, much attention has been focused on the creation (or proposed creation) of ICDs in both Uganda and Kenya. While Uganda's ICD initially emerged out of a coercive relationship with the ICC's investigations ("classical" complementarity), this has shifted in recent years to complementarity in a literal sense; it is less an alternative forum for domestic prosecution than the ICC's domestic twin. The proposed Kenyan ICD has been characterized in a

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[845] Emily Haslam, "Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society," *International Journal of Transitional Justice* 5(2) (2011).

[846] On dyadic tensions in the structuring of arguments, see Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win," *Leiden Journal of International Law* 28(2) (2015).

similar fashion, as have the mobile courts in the DRC. These juridical bodies have frequently been portrayed as helping to strengthen domestic justice systems in the wake of conflict; however, as I have argued, there is a tension between the exceptionalism associated with their origin and functioning—particularly the donor agendas and economies upon which they draw—and the desire to fortify "ordinary" domestic systems. Indeed, in demonstrating an excessive homology with The Hague, they can produce significant micro-tensions in the competition for attention and resources.

The perceived duty to implement the Rome Statute in its identical form at the domestic level is another telling illustration of the relationship between the power of external constituencies and compliance. As chapter six argued, it was less the threat or actuality of ICC intervention that catalyzed the passage of national implementation legislation (in Uganda, the ICC had already been engaged for many years; in Kenya; the threat of its intervention was then perceived to be remote); rather, identical implementation of the Statute was accelerated in order to "perform" complementarity for predominantly international audiences. In particular, the imminence of Uganda serving as host state for the Rome Statute Review Conference drove the passage of its 2010 legislation, while in Kenya the recommendation of the Waki Commission was the catalyst for Kenya's ICA. The appearance of "performance" for the international community was significant in the DRC as well, insofar as the release of the 2010 UN Mapping Report served, at the time, to catalyze renewed proposals for the establishment of a Special Chambers/Court and for passage of implementing legislation. A related concern is thus whether implementation of the Statute, when seen as something merely to be copied or transplanted, may in fact stymie the pursuit of other legal reform efforts that might be more meaningful to affected communities.

2. Ways Forward

In light of these complex histories, what paths might the ICC and criminal justice advocates chart in the years ahead? The trajectory traced here suggests that, while the Court is an important actor in the criminal justice landscape, the weight of too many expectations has been placed on its shoulders. Furthermore, while advocates and norm entrepreneurs have continually summoned the symbolic power of the ICC and the polysemy of complementarity to serve a variety of reformist agendas, this strategy has not been without cost to other normative values like legal pluralism, local "ownership," and democratic deliberation. Below I offer five broad areas for reflection.

2.1 Beyond Compliance

Although compliance with the Rome Statute's purported obligations has animated much of the interest in complementarity, ICC interventions have precipitated developments that are not limited to domestic criminal proceedings alone. In this sense, thinking of the ICC as a "catalyst for compliance" is too narrow a lens to capture the complex legal and political alchemy that Court interventions produce, or the diverse ways in which actors have oriented their own objectives around the principle of complementarity. As Robert Howse and Ruti Teitel argue, the lens of rule compliance can lead "to inadequate scrutiny and understanding of the diverse complex purposes and projects that multiple actors impose and transpose on international legality."[847]

[847] Robert Howse and Ruti Teitel, "Beyond Compliance: Rethinking Why International Law Really Matters," *Global Policy* 1(2) (May 2010), 127.

In order to better appreciate the ICC's catalytic power, then, legalism—compliance with a particular set of rules—cannot be the dominant framework. Indeed, the question that should be asked is not merely whether states comply with international norms or duties, but how and why they do so. Such an orientation can better capture not only what norms infiltrate a state in the process of an international judicial intervention, but if, how, and why those norms are implemented in practice. As Subotic notes, "Although international organizations may initiate international justice projects for all the noble reasons, their effects may be quite different when they are strategically adopted by local political actors in the context of domestic political contention and mobilization."[848] For these reasons, an understanding of domestic political context is essential.

The importance of political context also casts in doubt the coercive potential of complementarity. Although this approach might yield results in certain contexts, it would appear that the reputational cost of domestic inaction by states in the face of ICC activity may be lower than was first presumed, and that the Court, ultimately, does not possess "the type of primacy or finality akin to the ideal of sovereign coercive actors."[849] The wisdom of a predominantly disciplinary approach to complementarity, wherein domestic jurisdictions are encouraged to "mirror" the standards and practices of the ICC, is thus worth reflecting upon.[850] In particular, the OTP and the ASP should consider anew a more robust investment in the cooperative dimensions of the principle, focusing on how the Court itself can help strengthen domestic capacity and commitment.[851] While legitimate questions persist about the propriety of an international court carrying such an assistance mandate, the circumscribed interactions between The Hague and national jurisdictions to date, and the OTP's own limited capacities, suggest that this approach merits further examination.

2.2 Towards a Place-Based Court

Just as a shift away from the language of compliance might open up a space to better understand the range of effects of the ICC's "shadow" at national level, greater resources must also be invested in its presence. Numerous expectations by state and non-state actors alike have been attached to the Court, without an attendant

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[848] As Lucy Hovil argues, "Supported by the assumption that any intervention working to 'end impunity' is somehow above reproach, there is an unwillingness to critically evaluate these well meaning, but sometimes unwanted and even harmful, interventions." Lucy Hovil, "Challenging International Justice: The Initial Years of the International Criminal Court's Intervention in Uganda," *Stability* 2(1) (2013), 1.

[849] Antonio Franceschet, "The International Criminal Court's Provisional Authority to Coerce," *Ethics & International Affairs* 26(1) (Spring 2012), 100. See also David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014); Nouwen, *Complementarity in the Line of Fire*, 26 (concluding that, "even in countries where sovereignty and reputation costs are considered high, complementarity has not catalyzed domestic proceedings because there are other costs that are even higher").

[850] See, e.g., Heller, "A Sentence-Based Theory of Complementarity," 132 (describing the "hard mirror" and soft mirror" theses as "both … based on the assumption—almost never questioned—that the goals of the ICC will be best served if states are either required [the "hard mirror"] or pressured [the "soft mirror"] to prosecute international crimes as ordinary crimes").

[851] For a helpful, early assessment of the ICC's ability to serve as a "supporting institution for national courts," see Jenia Iontcheva Turner, "Nationalizing International Criminal Law," *Stanford Journal of International Law* 41(1) (2004), 30-37. For a more recent iteration, see Serge Brammertz, "International criminal court: now for Kony and Bashir," *The Guardian*, 13 June 2012; Brammertz contends that the fact that "national capacity building is not happening in parallel to the [ICC's] work" is "a missed opportunity and should be reconsidered."

commitment of material resources and political support. From two unfunded UN Security Council referrals (Sudan and Libya) to continued non-cooperation in the arrest and transfer of suspects, the rhetorical commitments to Annan's "promise of universal justice" appear to be increasingly overshadowed by the political costs those commitments would entail.[852] Such political assessments are, of course, stitched into the Court's constitutional fabric, but the ICC's troubled history suggests that its current trajectory is unsustainable in the long term.

Furthermore, within the Court itself the promise of "positive" complementarity has functioned far more in theory than practice. The OTP's Hague-centric approach to the conduct of preliminary examinations and investigations is but one clear illustration of an institutional reluctance to engage more deeply in the complicated terrain of "the field." A senior, Nairobi-based Court official, whose previous assignments have spanned both the ICC and ICTY, expressed this reluctance well:

> For the first time in many years, I see the benefit of a field office. I see that the Court is here, not in The Hague. We have to deal with the impact here. The victims are here, not in The Hague. But we spend such time having to defend what we do … [for those] who don't realize the context in which we operate.[853]

Such a field-based orientation—ranging from more place-based (or proximally-based) examinations and investigations, to more fulsome outreach programs, to greater use of *in situ* proceedings—would look quite different than the Court that currently exists.[854] But if the ICC is to be a catalyst for change, then it too must change.

2.3 Defining Deference

Much of the ICC's complementarity jurisprudence supports an excessive homology with the OTP's charging practices, suggesting that failure to pursue the "same conduct" as the Court's Prosecutor would per se render a case admissible. This strict approach to complementarity tacitly furthers the "mirror image" between The Hague and domestic jurisdictions; arguably, it can also deter states that may be willing to pursue criminal investigations and prosecutions but see little hope of successfully doing so. Put another way, through the Court's current admissibility regime, states are perpetually seeking to "catch up" with the ICC. In this vein, scholars like Drumbl have called for "qualified deference" in the allocation of institutional authority, one that "strikes a middle ground between subsidiarity and complementarity."[855]

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[852] See Philipp Ambach and Klaus U. Rackwitz, "A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court," *Law and Contemporary Problems* 76(3&4) (2013), 148-153. Ambach and Rackwitz clearly state, "As desirable as the referral of yet another situation by the UN Security Council would be for the legitimacy, perception, and universal reach of the Court, if such a referral does not include a cost solution it will be potentially do more harm than good for the Court," 160.

[853] Interview with ICC outreach official, conducted jointly with Sara Kendall, Nairobi, 27 November 2012. A similar disconnect is palpable in a 2009 piece on the early stages of the Lubanga proceedings. See Adam Hochschild, "The Trial of Thomas Lubanga," *The Atlantic*, 1 December 2009.

[854] On the value of *in situ* proceedings, see Clark, "Peace, Justice and the International Criminal Court," 532-535. Notably, the Court has sought on numerous occasions to host portions of trials or confirmation proceeding in country (in DRC and Kenya both, and most recently Uganda) but has not done so to date. See, e.g., Judge Sir Adrian Fulford, "The Reflections of a Trial Judge," *Criminal Law Forum* 22 (2011), 215-223; David Kaye, "What to Do With Qaddafi," *New York Times*, 31 August 2011.

[855] Drumbl, *Atrocity, Punishment, and International Law*, 188.

As an orienting principle, subsidiarity recalls other deference doctrines such as the margin of appreciation, which originated in human rights adjudication but could be fruitfully applied in the context of ICC admissibility determinations as well. As developed by the European Court of Human Rights, the doctrine is premised on the understanding that, while the European Convention binds all member states, they have substantial leeway as to the means by which those obligations are implemented. In this sense, the "machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights."[856] Subsidiarity then, like "classical" complementarity, is a protective principle: it is rooted in the sovereignty of states.

Such an approach to admissibility could better navigate the tensions between the legal test for complementarity, which is rooted in the degree of similarity between an ICC case and national jurisdictions, and its policy-based elements, wherein domestic proceedings are to be encouraged amidst a much larger "universe of criminality."[857] In Drumbl's words, deference "creates a rebuttable presumption in favor of local or national institutions that, unlike complementarity, does not search for procedural compatibility between their process and liberal criminal law and, unlike primacy, does not explicitly impose liberal criminal procedure."[858] Thus, rather than "bear[ing] the burden of proof" to show evidence of "concrete and progressive investigative steps," a rebuttable presumption would afford a lower threshold for indicia of investigative activity at the domestic level. Whether that activity was indeed genuine would be a subsequent matter for the Court to determine as a matter of unwillingness.

An approach that draws from subsidiarity would also avoid an outright jettisoning of the established "same conduct" test, while tempering the incentives towards mimicry. The Appeals Chamber's endorsement of a "substantially the same" approach to conduct appears to be a step in this direction but, as noted, it remains a relatively restrictive standard that has been inconsistently applied. A more clearly articulated and consistent application of a deference principle could thus permit the Court to maintain its current case-by-case approach to admissibility determinations without "radically depart[ing] from the framing of admissibility structures."[859] A margin of appreciation would, however, be incompatible with the excessively exacting "same incident" approach to domestic proceedings, which, unlike the "same conduct" test, finds no textual basis in the Statute. While the ICC Prosecutor has periodically referenced an incidents-based test to support the admissibility of certain cases, the Court has notably yet to opine on the issue.

There has also been significant attention paid to the question of whether the ICC might play a more formal monitoring role over domestic proceedings, suggesting a form of "qualified" or "conditional" admissibility not unlike the "reverse complementarity" approach that came to later define the ICTY and ICTR's relationships with national jurisdictions. There would appear to be little support in the Statute for such a procedure; however, as Stahn has noted, "If a Chamber is entitled to make a final finding on admissibility, based on the criteria of Article 17, it must have the power to rule on the

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[856] *Handyside v. United Kingdom*, European Court of Human Rights (1976), para. 48. For a thoughtful exploration of subsidiarity's relevance to international law and governance, see Paolo G. Carroza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 97 (2003), 38-79.
[857] Rod Rastan, "Situation and Case: Defining the Parameters," 442.
[858] Drumbl, *Atrocity, Punishment, and International Law*, 188.
[859] Stahn, 258.

steps leading to that result."[860] Deference would thus constitute, in effect, "an interim decision on inadmissibility."[861]

Yet it is far from clear that a conditional admissibility approach, particularly one that is judicially engineered, would not ultimately reinforce the primacy that qualified deference should guard against. More dramatically, it may also imperil the Court's fragile political standing with member states. To that end, a more fruitful area of practice would be to make greater use of the Rome Statute's cooperation and dialogue regimes. Articles 89 and 94, for instance, provide for consultation between a state and the Court in cases where an ICC request conflicts with domestic investigation of prosecution—that is to say, in relation to a different case—yet these provisions have received scant attention to date. According to Darryl Robinson, "The ICC has never rejected, nor has it ever received, a request for postponement from a state wishing to pursue a suspect for a different case."[862]

Article 18(2) offers a similar opportunity in the context of the same case: the OTP could suspend or conditionally defer its investigation(s) (subject to re-initiation if domestic proceedings prove inadequate), while perhaps also undertaking a monitoring and/or advisory role in the process.[863] In short, although Article 17 applications have been the crucible through which states have sought to accommodate their interaction with the ICC, they are a blunt instrument: the space they create for dialogue between states and organs of the Court is exceedingly limited. Greater attention to the Statute's cooperation and consultation regimes is thus needed.

Finally, although the Court's admissibility decisions in the Libyan cases were increasingly clear that an exacting standard of due process is not required for states undertaking domestic proceedings, this has mattered little in the broader meaning of the term, where conformity with "international standards" continues to permeate discussions about implementation at the domestic level. To that end, deference must also mean the necessary acceptance that the goal of accountability—whether sought alongside ICC proceedings, in the shadow of them, or without them at all—is necessarily contingent on the numerous political, material, and technical challenges that confront states. As Elena Baylis writes of military courts in the DRC:

> [T]he goal in the Congo cannot be justice absolute, ideal and untarnished, but rather must be partial justice—justice for at least some victims, through imperfect processes, with the meager but nonetheless ambitious aim of ending the certainty of impunity, rather than ending impunity itself.[864]

This reality need not mean that the language of legal obligation should be relinquished, nor must it limit more abundant aspirations for justice. It should, however, temper them.

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[860] Stahn, 257.
[861] Ibid.
[862] Robinson, "Three Theories of Complementarity," 182. On "sequencing" in the context of Articles 89(4) and 94, see Carsten Stahn, "Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility,'" *Journal of International Criminal Justice* 10(2) (2012).
[863] Article 97, by way of analogy, may offer a similar opportunity for consultation in the context of a same case (although it relates to the Court's cooperation regime rather than admissibility).
[864] Elena Baylis, "Reassessing the Role of International Criminal Law," 9.

2.4 Geographies of Justice

At the same that the ICC demands greater investment, another important approach would be to seek out other, potentially more creative avenues for encouraging accountability at the international, regional, sub-regional, national, and sub-national level.[865] Judicial "romanticism" for international criminal tribunals has too often invited and encouraged a mono-institutional approach to accountability.[866] Indeed, as the experiences recounted herein suggest, the ICC has been regarded more often than not as the sole institutional locus of power or influence, even as it exists within a transnational network of institutions participating in and/or supporting national proceedings (MONUSCO for instance, the UN mission that continues to operate in the DRC). This has resulted in a narrow approach towards the Court's relationship with domestic jurisdictions that puts it too often above, rather than nested within, a broader network of judicial actors. Moreover, as noted, such ICC-centrism harbors a risk: it places a heavy performance burden on the Court, one that the institution has largely failed to meet.

Disproportionate focus on the Court also overlooks other hybrid arrangements that, by their design, have a deeper relationship to national jurisdictions and may thus have a more lasting effect on strengthening domestic capacity. An instructive example is the work of the Guatemala International Commission against Impunity (CICIG), a novel institution that was created in late 2006, in the wake of Guatemala's long-running conflict, as a treaty-level agreement between the United Nations and the government. By mandate, CIGIG operates as an independent body to support the Public Prosecutor's Office and the National Police, as well as other relevant state institutions, in the investigation and prosecution of crimes committed by organized criminal enterprises, and engages alongside state institutions in the dismantling of these groups' strong ties to Guatemala's political and security sectors.

In its near ten-year existence, CICIG has played a key role in strengthening state investigative and prosecutorial institutions (resulting in a number of high-level convictions against former senior state and military officials for corruption), improving prosecutorial capacity, and establishing "high risk" courts for the prosecution of organized crime and other complex cases.[867] Indeed, it was one such court (and the extraordinary efforts of Guatemala's former Attorney General, Claudia Paz y Paz) that led to the remarkable 2013 trial and conviction for genocide and crimes against humanity of Efraín Ríos Montt, Guatemala's former President.[868] The Ríos Montt trial and, more recently, criminal proceedings against former President Perez Molina, are the most public in a series of important domestic investigations, but it was an outcome that owed to years of close, concerted work between CICIG and its national counterparts.

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[865] See, e.g., Alexandra Huneeus, "International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Bodies," *American Journal of International Law* 107 (January, 2013), 1-44.
[866] See McMahon and Forsythe, "The ICTY's Impact on Serbia: Judicial Romanticism Meets Network Politics."
[867] For more on the impact of CICIG's work, see Open Society Justice Initiative, "Unfinished Business: Guatemala's International Commission against Impunity"; Morris Panner and Adriana Beltrán, "Battling Organized Crime in Guatemala," *Americas Quarterly* (Fall 2010).
[868] See, e.g., Naomi Roht-Arriaza, "The Trial of Ríos Montt," *Aportes DPLf* 18(6) (December 2013). For additional history of the Montt trial relevant to this point, see Elizabeth Oglesby and Amy Ross, "Guatemala's Genocide Determination and the Spatial Politics of Justice," *Space and Polity* 13(1) (April 2009), 21-39.

As a form of cooperation and assistance not unlike that imagined for "positive" complementarity, CICIG speaks to the importance of international(ized), yet nationally/locally situated, mechanisms that can work with judicial and political actors to seek accountability in ways that might resonate more meaningfully with domestic communities.[869] Indeed, despite CICIG's significant later contributions to international criminal justice, its work (and legitimacy) owes largely to its achievements in joining accountability with other crucial efforts in post-conflict Guatemala, such as investigating and prosecuting cases of corruption and other economic crimes. Similar creative initiatives have taken root elsewhere in national courts, including the use of domestic litigation to enforce ICC arrest warrants (as in Kenya), or the novel use of universal jurisdiction principles, rooted in the domestic ICC legislation of states, to press for national investigations of Rome Statute violators (as in South Africa).[870] These promising initiatives suggest that the empowerment of independent domestic judicial actors and the strengthening of ordinary domestic courts likely deserve more attention than they have received to date. Such approaches take inspiration from the principle of complementarity but do so in ways that creatively expand the geographies of justice beyond The Hague.

2.5 Promoting Pluralism

An attendant phenomenon of ICC-centrism is mimicry. As interpreted by many norm entrepreneurs and advocates, the language of complementarity has increasingly been cast in the idiom of "best practices" and "international standards," while the ICC's jurisprudence suggests to national prosecutors that states should hew towards its procedures. This mirroring phenomenon is institutional as well as normative, ranging from what domestic courtrooms should look like to the content of national implementation legislation.[871] While such an interpretation of the Rome Statute is progressive in its reading of state obligations under complementarity it is potentially regressive as well, insofar as those obligations can have the effect of calcifying the form and substance of justice at the national/local level. Indeed, just as the creation of special criminal divisions (as in Uganda) or the passage of national implementing legislation (as in Kenya) were "fast tracked" for international audiences, so-called alternative justice measures—from enfeebled to truth commissions to indolent "transitional justice policies"—have been slow walked.

Here, too, the concept of margin of appreciation, as an orientation that seeks to "develop a geographically and culturally plural notion of implementation," could be

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[869] See, e.g., David A. Kaye, "Justice Beyond The Hague: Supporting the Prosecution of International Crimes in Domestic Courts," Council on Foreign Relations (Council Special Report No. 61, June 2011). Kaye further notes that, the "compartmentalization of 'accountability' and 'rule of law' programming means that support for one does not benefit the other." The two should be "integrated as a central aspect of building rule of law in the wake of conflict," 15. The Open Society Justice Initiative has supported a similar approach. See, e.g., *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (Open Society Foundations, 2011).

[870] See, e.g., *Southern African Litigation Centre and Zimbabwe Exiles Forum v. National Director of Public Prosecutions*, High Court of South Africa (North Gauteng), Case No. 77150/09, Judgment (8 May 2012). State efforts to improve mutual legal assistance for the national prosecution of international crimes are also a promising step forward in this respect. See, e.g., Ward Ferdinandusse, "Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty?" *ASIL Insight*, 21 July 2014.

[871] For another articulation of this view, see Sarah M.H. Nouwen and Wouter G. Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity," *Journal of International Criminal Justice* 13(1) (2015).

usefully applied.[872] As Mégret notes, complementarity may be better understood as a "device to accommodate diversity … not only because this diversity exists, but because it has normative value in itself."[873] Approaching complementarity in this way—as more than ceremonial fidelity to the Rome Statute—could free a space in which to think critically about its productive potential as part of a politically fraught and dynamic process. Echoing Drumbl, a "richly multivalent approach" to justice is needed.[874]

Such an approach would, for example, encourage expanding the scope of national legislation to include corporate liability and economic crimes,[875] as well as supporting the establishment of judicial arrangements that may fall outside of the ICC's framework.[876] It would also encompass a deeper, more nuanced grappling with the relationship between criminal accountability and other transitional justice approaches, as the experience of South Africa's Truth and Reconciliation Commission once exemplified.[877] The proposed peace agreement between the Colombian government and the FARC, which foresees a similar exchange of testimony in return for eligibility for a system of "alternative justice," suggests a return to the South Africa's admixture of accountability and truth. The ICC's preliminary examination in Colombia is notable in this regard, but it is unclear the extent to which the terms of the proposed arrangement were influenced by the OTP's involvement or rather emerged in spite of it.[878]

Finally, a "multivalent approach" would also require a loosening of the grip that the monarchical language of "international standards" and "best practices" currently commands over much of the accountability discourse. Doing so could open more spaces for experimentation and innovation, as well as contestation. Indeed, it is precisely the hybridity of systems and processes—their contingency as well as their possibility—that, in Baylis' words, "provide opportunities for multiple voices to be heard in multiple contexts, [and] in order to genuinely accommodate those multiple interests and communities."[879]

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872 Frédéric Mégret, "Nature of Obligations," in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), 132.

873 Mégret, "Implementation and the Uses of Complementarity," 390. For a compelling exploration of this theme, see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012).

874 Drumbl, *Atrocity, Punishment, and International Law*, 181. Drumbl likewise advances a philosophy of "cosmopolitan pluralism," 186.

875 It is worth noting that the recently adopted protocol on amendments to the statute of the African Court of Justice includes jurisdiction over ICC crimes, as well as, *inter alia*, the crimes of corruption, money laundering, and illicit exploitation of natural resources.See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Arts. 28A, 28E, 28I, 28I *Bis*, 28L *Bis* (on-file). More controversially, the Protocol also includes the proposed crime of "unconstitutional change of government."

876 Notably in this regard, the AU's Peace and Security Council, following its review of the AU Commission of Inquiry on South Sudan, has recently decided to create "an independent hybrid judicial court," the Hybrid Court of South Sudan (HCSS), in accordance with Chapter V (3) of the Agreement reached by the South Sudanese parties, as "an *African-led and Africa-owned* legal mechanism" (emphasis added).

877 For a compelling argument favoring this approach in the Ugandan context, see Erin Baines, "Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice," *African Affairs* 109(436) (2010), 409-430; on amnesties, see Louise Mallinder and Kieran McEvoy, "Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies," *Contemporary Social Science* 6(1) (2011), 1-7-128.

878 See Louisa Reynolds, "Colombia looks towards peace rather than punishment in FARC deal," *International Justice Tribune* No. 186, 30 September 2015.

879 Elena Baylis, Reassessing the Role of International Criminal Law," 72. See also Mégret, who suggests that the idea of "ownership" might better accommodate such multiplicity, in that it "lends itself well to the

2.6 From Management to Modesty

Although the ICC may be accused of having too quickly put itself at the center of contentious accountability debates, many private actors and organizations have helped put it there.[880] The desire to catalyze domestic judicial reform or threaten governments into action may have been the reason for doing so, but it is not always clear that the political consequences of these strategies have been sufficiently thought through. The ICC Prosecutor, for instance, may be perceived as an ally by civil society but, ultimately, the choices she makes have consequences for national-level advocates that may do more harm than good. The near ubiquitous refrain amongst Court officials and international NGOs of the need to "manage the expectations" of victims and affected communities suggests a similar phenomenon. At the same time, it is many of these same expectations that drive the belief in the ICC's "catalytic effect."

Rather than "management" of expectations, then, these uncertainties speak to the need for greater modesty about what the ICC is able to achieve. To that end, it also calls for more careful consideration and sober reflection about the wisdom of soliciting the Court's intervention in a country, before the scale of civil society's ambitions is publicly tested by its doctrinal and/or institutional limits. Finally, as the case studies here suggest, the ICC is but one factor among many that influence and shape the choices of domestic political actors. Consistent with a more process-based approach, then, Court interventions can be more productively seen as one *tactic* that might, over time, alter a domestic political environment in favor of greater accountability. As Karen Alter suggests, "The existence of an international legal remedy empowers those actors who have international law on their side, increasing their out of court political leverage."[881]

3. Epilogue: *Une belle époque?*

I close this dissertation with a more recent encounter. In late March 2015, I was in Brussels for a high-level conference convened by the Belgian government. Entitled "Implementation of the European Convention on Human Rights, our shared responsibility,"' the conference marked the culmination of Belgium's six month chairing of the Council of Europe, an alphabetically rotating honor that this small country would not hold for another twenty years. Amidst increasing fears of the United Kingdom withdrawing from the European Convention on Human Rights, and other, similar rumblings in countries throughout the Council, the conference was intended to reaffirm the "deep and abiding commitment" of member states to the European Convention and to the "full, effective and prompt execution" of the judgments of the European Court of Human Rights.[882] Negotiations on a text had been underway for the previous five

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possibility of dual or multiple ownership." Frédéric Mégret, "In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice," *Cornell International Law Journal* 38 (2005), 741.

[880] For a similar view, see Clark, "Peace, Justice and the International Criminal Court"; in the context of universal jurisdiction, see Naomi Roht-Arriaza, "Universal Jurisdiction: Steps Forward, Steps Back," *Leiden Journal of International Law* 17 (2004), 375-389; in the context of a negotiated peace, see Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28(3) (Winter 2003/04), 5-44.

[881] Alter, *The New Terrain of International Law*, 19. For a similar assessment in the context of the ICC's engagement in situations of armed conflict, see Philipp Kastner, "Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations," *Journal of International Criminal Justice* 12(3) (2014), 471-490.

[882] Brussels Declaration (27 March 2015), http://justice.belgium.be/fr/binaries/Declaration_EN_tcm421-265137.pdf.

months and it was at the conference that the final "Brussels Declaration" was to be adopted.

I attended the conference not as a researcher but as an advocate for an international NGO that I joined in early 2013. Now a norm entrepreneur myself, being there was a bit how I imagined the summer of 1998 might have felt in Rome. As the conference began, there was still uncertainty as to whether agreement on a final text had been reached; hushed conversations over coffee and croissants made clear that implementation was a verb that states were more comfortable with in theory than practice. And the parallels to the ICC were striking: another revered but overburdened court; another bold experiment in the taming of sovereignty through law; another appeal to states, reminding them that it was their primary responsibility to protect and defend human rights at the national level. Rather than complementarity, the diplomats here spoke of subsidiarity, but the logic was the same: like The Hague, Strasbourg, too, was a place of last resort.

When the Declaration was adopted at the end of the second day—after all 47 states had expressed their support, and their reservations—everyone stood and applauded, flush with political commitments renewed. As the delegates slowly drifted out for the final reception, I spoke casually with an old friend from Amnesty International's office in Brussels, whom I had once worked for (as an intern, on Belgium's domestic implementation of the Rome Statute) in 2001, but whom I had not seen since. Our meeting felt at once accidental and purposeful —as Adler says, "communities of practice have no fixed membership; people 'move in and out' of them"[883]—but it was a pleasure to reconnect. Eventually joined by other Belgian colleagues, I listened as the group's conversation turned to the future of not only the European Court but other human rights institutions as well. They were clearly worried. There was a feeling that the human rights movement's best moments were perhaps behind it: Belgium's once pioneering universal jurisdiction law, now neutered; the signing of the Rome Statute in 1998, the ICC in what now felt like disarray; the promise of the International Court of Justice's *Yerodia* decision, now at risk of obscurity. *Ça c'était une belle époque*, said one member of the group, to wistful nods.[884]

My colleagues' sense of a progress narrative interrupted, as well as the circumstances that brought us together, touch upon a number of themes that this dissertation has sought to surface. As their recollections attest, the role of international criminal law in global governance has grown ever larger but, as I have suggested herein, it has also increasingly narrowed into the face of one institution at the transnational top: the ICC. The Court's performance woes have unfortunately complicated this phenomenon while dovetailing with a resurgent discourse of sovereignty, leaving many advocates to wonder, as those gathered in Brussels did, whether the hard won achievements of the international human rights movement may be eroding.[885]

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[883] Emanuel Adler, "Communities of practice in International Relations," 15.

[884] "Belle epoque," in French, refers to "a period of high artistic or cultural development." My colleagues are not alone in this assessment. See, e.g., Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013); for responses to Hopgood, see Kenneth Roth, "The End of Human Rights?", *The New York Review of Books*, 23 October 2014 and Doutje Lettings & Lars van Troost, "Debating *The Endtimes of Human Rights:* Activism and Institutions in a Neo-Westphalian World" (The Strategic Studies Project, Amnesty International Netherlands, 2014).

[885] The title of a 2015 symposium in the *Journal of International Criminal Justice* 11(3) (July 2013) captures the sentiment well: "Down the Drain or Down to Earth? International Criminal Justice under Pressure." See

More than a decade later the soaring rhetoric that accompanied the ICC's establishment feels dimmed. But while the Court remains a key actor in the international legal and political landscape, it is hardly the only one. The mere fact that it exists cannot be, as Shklar warns, an invitation to indolence. Furthermore, the close examination offered here of Uganda, Kenya, and the DRC illustrates that the ICC's practices on the ground, as well as its institutional limitations, provide reason for sober reflection. Such inquiries from the proverbial "field" may temper our faith in how catalytic a force the Court or the principles summoned in its name can actually be, but that is a necessary reckoning. Our ambitions should be measured by more realistic expectations, while seeking new possibilities on the horizon.

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also the February 2015 debate issued by the ICTJ, "Is the International Community Abandoning the Fight Against Impunity?" at https://www.ictj.org/debate/impunity/opening-remarks.