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The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

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THE LOCAL IMPACT OF A GLOBAL COURT

Assessing the Impact of the International Criminal Court in Situation Countries

PROEFSCHRIFT

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de graad van Doctor aan de Universiteit Leiden,

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Marieke Irma Wierda

geboren te Saada, Jemen

in 1973

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We wept with joy because we had succeeded in ensuring that for us to be a human civilization worthy of some self respect, the strong would henceforth forfeit voluntarily their protections in respect of the weak, and most particularly, the victims, whenever allegations of criminal conduct crossed the boundary separating the ordinary from the outrageous. It was, and still is, the most enlightened step in human history ever taken.¹

¹ Statement by H.R.H. Prince Zeid Raad Zeid Al-Hussein, the Hashemite Kingdom of Jordan, speaking also on behalf of H.E. Christian Wenaweser, Ambassador of the Principality of Liechtenstein, to the twelfth session of the Assembly of States Parties, 20 Nov. 2013.

For my beloved parents, Huib and Truus Wierda, who in their 40 years of medical services provided in Saada, Yemen, taught me the significance of the “local”.

Legend for photos on cover (taken by Marieke Wierda):

1. Pictures depicting martyrs of the Revolution in the Misrata museum, Misrata, Libya 2012
2. Dural Aman Palace, Kabul, Afghanistan 2014
3. Mural of Qhadafi in dumpster, Gheryan, Libya 2014
4. City view Bogota, Colombia 2014
5. Victims gather at site of suspected mass grave at Pul e Charkhi prison, Kabul, Afghanistan 2010
6. Girl in Gulu, Northern Uganda 2014

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List of Abbreviations

ASF	Advocats Sans Frontier
ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
DPP	Department of Public Prosecutions Uganda
DRC	Democratic Republic of Congo
FIDH	International Federation for Human Rights
FARC	Fuerzas Armadas Revolucionarias de Colombia
EU	European Union
HRW	Human Rights Watch
ICC	International Criminal Court
ICD	International Crimes Division (Uganda and Kenya)
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal (in Nuremberg or the Far East)
ISAF	International Security Assistance Force (Afghanistan)
ISIL	Islamic State in Iraq and the Levant
JCCD	Jurisdiction, Complementarity and Cooperation Division
JLOS	Justice Law and Order Sector Uganda
JPL	Justice and Peace Law (Law 975) Colombia
LFP	Legal Framework for Peace Colombia
LRA	Lord's Resistance Army
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization of Security and Cooperation in Europe
OTP	Office of the Prosecutor
PEV	Post Election Violence, Kenya
SCSL	Special Court for Sierra Leone
SGBV	Sexual and Gender Based Violence
TFV	Trust Fund for Victims
UNAC	Context and Analysis Unit Colombia
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMID	United Nations Assistance Mission in Darfur
UNSC	United Nations Security Council
UNSMIL	United Nations Assistance Mission in Libya
UPDF	Uganda People's Defense Forces

PREFACE

I was in the room on 11 April 2002 at the UN Headquarters in New York, when the final ten States Parties of the sixty ratifications required for the coming into force of the Rome Statute were deposited with the treaty section of the United Nations. I remember well the sense of optimism, joy, and hope that filled the room when state delegates, civil society and the media rose to their feet and applauded at the conclusion of the ceremony, in the knowledge that the dream of a global court was now a reality. I had worked at the ICTY as an associate legal officer from 1997-2000. The ICTY had demonstrated that fair and functional criminal justice at the international level is indeed possible.² International criminal justice was on the rise, and its jewel in the crown was expected to be the International Criminal Court.³

My subsequent views on the ICC have been largely shaped by my field experiences as a transitional justice professional. The first such experience was my opportunity to observe the workings of the Special Court for Sierra Leone and the Truth and Reconciliation Commission, from 2002-2005. My experiences in Sierra Leone taught me the importance of a comprehensive approach to transitional justice, where prosecutions are complemented by other mechanisms, many of which may play a very important role for victims. I also observed that even this “hybrid” tribunal often suffered from being perceived as a “space ship phenomenon”, i.e. viewed as remote from, and to some extent irrelevant in the society where it operated.

My experiences in Uganda, over fifteen field visits between 2005-2011, also helped to shape my views. I first went to Uganda in 2005 to participate in a survey of victims’ views in the North on the ICC, with UC Berkeley. As will be described in this thesis, Court’s intervention in Northern Uganda met with strong local opposition. This raised fundamental questions about why a neutral and international institution such as the ICC could evoke such a negative response on the part of victimized communities. Eventually I was involved in the Juba Peace Talks in 2007, where I recommended that Uganda should seek to exercise complementarity in its domestic courts for LRA crimes. This option was pursued in the Juba Agreement on Accountability and Reconciliation, signed in 2008. In 2007-2010, I was involved in the establishment and training of the International Crimes Division in Kampala.

I was also fortunate to have a limited role advising the High Commissioner for Peace and the Ministry of Justice in the Colombian peace process, as well as advising local judges and lawyers during the years of the Justice and Peace Law (Law 975), in 10

² The trajectory of the ICTY’s growth is eloquently described in Klarin, Mirko, *The Tribunal’s Four Battles*, *Journal of International Criminal Justice* 2 (2004), 546-557.

³ I was a participant in the last few PrepComs, the first few ASPs, several expert groups that sought to define policy on complementarity, the Trust Fund for Victims, Peace versus Justice, and Article 53, and the Review Conference in Kampala in 2010.

field visits from 2007-2013. During my research for this thesis, I was able to meet with President Santos, who won the Nobel peace prize for his peacemaking efforts in 2016.⁴

From 2009-2010, I spent a year in Afghanistan, embedded in the Afghan Independent Human Rights Commission, to document war crimes and crimes against humanity from 1978-2001. Prior to that, I had conducted around 15 field visits to Afghanistan between 2003-2009. The ICC does not have much visibility in the Afghan context. In March 2014 I spoke to Abdel-Hakim Mujahid, former Taliban Ambassador to the UN prior to 9/11, and Vice President of the High Peace Council, an institution that has suffered multiple attacks by the Taliban over the years. I spoke to him about whether an intervention of the ICC may have any impact on the Taliban today. His answer to me was twofold, implying that on the one hand, the Taliban are more interested in suicide attacks and going to paradise than they fear arrest, but he also said that “the insurgency is made up of religious students, who are studying in seminaries with a curriculum that is 800 years old: ninety-nine percent do not know about international conventions and they do not care.”⁵

In my role as criminal justice director at ICTJ, I observed and gave advice on domestic criminal justice processes in a number of contexts, including DRC, Iraq, Bangladesh, Kenya, and Lebanon (in relation to the Special Tribunal for Lebanon).⁶

My closest encounter with flawed domestic proceedings was in my role as a transitional justice advisor to UN Support Mission in Libya (UNSMIL) between 2011-2015. During these years I held numerous meetings with the Minister of Justice, the General Prosecutor and local prosecutors and was exposed to their opinions and views on the ICC. As the Minister of Justice in Libya, Mr. Salah Marghani exclaimed during a conversation we had in 2013: “Why does the international community only care about 2 individuals when we have 7000 former Qadhafi loyalists in detention?” UNSMIL was the only organization to monitor the trial of Saif Al-Islam and Abdullah Al-Senussi in Libya. The trials of the former regime figures in Libya, concluded on 28 July 2015 before the Tripoli Court of Assize, fell far short of international standards, as will be discussed in this thesis.

Throughout these experiences, I came to understand that international criminal trials have introduced important fair trial standards that ought to be followed at the

⁴In 2013, President Santos had made an impassioned plea to the General Assembly of the United Nations: “What we are asking from the U.N. and the international community is to respect Colombia's right, and the right of every nation, to pursuing peace. We ask you to keep accompanying us in this effort, respecting our choices, the way in which we act, and trusting that our decisions have never been against the international community's needs.”

⁵ Interview with Abdel-Hakim Mujahid, Kabul, 18 March 2014.

⁶ Sissons, Miranda and Marieke Wierda. *Political Pedagogy Baghdad Style: The Dujail Trial of Saddam Hussein*, in *Prosecuting Heads of State* (Edited by Ellen Lutz and Caitlin Reiger) Cambridge University Press (2009).

national level. However, international criminal trials are not necessarily viewed as impartial in situation-countries. International actors must have humility, a good contextual understanding, and must seek to comprehend how their efforts impact on local justice struggles.