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# Complementarity in the Line of Fire

The Catalysing Effect of the International  
Criminal Court in Uganda and Sudan

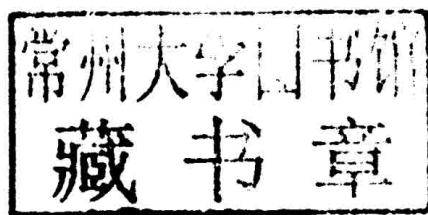
SARAH M. H. NOUWEN

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## COMPLEMENTARITY IN THE LINE OF FIRE

Of the many expectations attending the creation of the first permanent International Criminal Court, the greatest has been that the principle of complementarity would catalyse national investigations and prosecutions of conflict-related crimes and lead to the reform of domestic justice systems.

Sarah M. H. Nouwen explores whether complementarity has had such an effect in two states subject to ICC intervention: Uganda and Sudan. Drawing on extensive empirical research and combining law, legal anthropology and political economy, she unveils several effects and outlines the catalysts for them. However, she also reveals that one widely anticipated effect – an increase in domestic proceedings for conflict-related crimes – has barely occurred. This finding leads to the unravelling of paradoxes that go right to the heart of the functioning of an idealistic Court in a world of real constraints.

SARAH M. H. NOUWEN is a university lecturer in law at the University of Cambridge. She is also a Fellow of the Lauterpacht Centre for International Law and of Pembroke College.

## CAMBRIDGE STUDIES IN LAW AND SOCIETY

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*Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*

Sarah M. H. Nouwen



In memory of  
Heiltjen Nouwen-Kronenberg  
7 February 1944 – 21 July 2007

... j'écris ton histoire. Et celle des tiens. Des miens désormais. Parce que tu m'as dit sans rancœurs ni haines le terrible des petites vies de rien, et de leurs théâtres intimes, que les mots sont de la chair, qu'il suffit de les écouter battre, bien au ras des émotions simples, et qu'ainsi tu m'as fait comprendre le métier d'écrire. Parce que avec du vif, sincère, sans fard, sans frime, ta vie dans tes paumes ouvertes, tu m'as dit aussi l'humanité nue. Pas l'idéale, celle des religions et des philosophies, ni la créature politique, mais celle qui a mal aux dents, qui essaie d'aimer à grande douleur et immenses espoirs, malgré son gros nez, malgré la maladie, les préjugés, malgré les gloires savoureuses et les bravos, la ballottée d'histoire, l'oubliée des guerres et des destinées jolies, la minuscule, celle qui trahit et tue, et celle qui a peur, l'innocente et l'héroïque ordinaire, celle qui veut enfermer l'univers dans son poing fermé et ne peut y tenir un papillon.

Michel Quint

*Et mon mal est délicieux* (Folio, Gallimard, Paris, 2004)

... I am writing your story. And the story of those dear to you. Dear to me now. Because with neither resentment nor hatred you told me about the awfulness of small lives with nothing, and their intimate dramas, you told me that words are made of flesh, that we only need to listen to them pulsate, right down next to simple emotions, and in this way you made me understand the craft of writing. Because with spontaneity, sincerity, without masquerading, without showing off, your life in your open palms, you also told me about naked humanity. Not the ideal one, of religions and philosophies, nor the political creature, but the one whose teeth ache, the one that tries to love with great pain and immense hope, despite its big nose, despite illness, despite prejudice, despite delicious glories and cheers, the one that is tossed about by history, forgotten by wars and pretty destinies, minuscule, the one that betrays and kills, and the one that is afraid, innocent and mundanely heroic, the one that wishes to trap the universe within its hand and cannot keep hold of a butterfly.

Translation by D. Roshd

## FOREWORD

When in the summer of 1998 most of the world's states converged in Rome to negotiate a treaty to establish an international criminal court, they were divided between those who sought to defend the sovereign right of a state to deal with crimes within its jurisdiction, and others who wanted to see an international prosecutor with a free hand to pursue cases on the basis of the evidence alone.

Eventually a compromise emerged which was reflected in the concept of complementarity, now encapsulated in the Rome Statute's provisions governing the admissibility of cases before the ICC. Under those rules, states have the priority in the exercise of criminal jurisdiction over crimes, and the International Criminal Court (ICC) can intervene only in the face of inaction by states. Yet, as Sarah Nouwen demonstrates in this engaging book, this relatively simple idea has met with continuing resistance despite the apparent clarity of the language employed in the Rome Statute.

In this rigorously argued book, which should cure any sloppy thinking about complementarity, the reader will reap the benefit of a work which began life as a doctoral thesis. Readers will also gain insights from Dr Nouwen's intimate and respectful 'fly on the wall' account of how Ugandan and Sudanese officials and civilians alike have grappled with the diverse and often contradictory demands arising as a consequence of the intervention of the ICC in each of their countries.

Whilst the book has, to its credit, avoided an overtly political tone, its analysis and insights will nevertheless support critical reflection on the mechanics and politics of the application of the Rome Statute, especially in Africa, where the ICC has come under severe criticism for its exclusive focus on this continent, and for apparently disregarding the complexities and dilemmas of managing politically turbulent and fragile societies.

While African states and other commentators have maintained these criticisms of the Court, as Dr Nouwen observes, African states

have also engaged in political calculations to avoid the costs and maximise benefits of cooperation with the ICC. These governments have sought—and often succeeded—in deflecting or co-opting the ICC as an instrument for dealing with local adversaries or for managing international critics, without themselves exercising criminal jurisdiction in relation to crimes committed by their nationals or on their territory. Thus emerges a central challenge, and irony, in relation to the ICC, that an institution that was intended to be a court of last resort has, with the encouragement of some states, become a court of first and, increasingly, only, instance.

In addition to its refreshing exposition of the concept of complementarity, this book thus poses a fundamental question about the identity of the ICC: will it establish itself, as envisaged by the Rome Statute, as a court that defers to the jurisdiction of states, or will it arrogate to itself the priority for dealing with international crimes?

If the ICC assumes the latter posture, it may either induce in states the sense that defiance is preferable to compliance with the orders of the Court. Besides inducing confrontation, a misapplication of complementarity may also deprive states of any incentive to deal with crimes at the national level, with states increasingly leaving to the ICC the responsibility for dealing with all such crimes. Both outcomes would cement a departure from the letter and spirit of the Rome Statute.

One can be confident that this book will therefore be indispensable reading for those seeking a thorough grounding in the tenets of the contested concept of complementarity. There will also be rich pickings in here for readers looking for an informed and nuanced exposition of the politics of the International Criminal Court in action, especially on the African continent.

*Barney Afako*

Barney Afako has assisted conflict resolution initiatives in Africa, including talks between the Government of Uganda and the Lord's Resistance Army, as well as the African Union panels on Darfur, and on Sudan and South Sudan. He sits as a Tribunal judge in London.

## PREFACE

The photograph on the cover was taken by Olivier Chassot on 8 March 2009. A crowd welcomes Sudan's President Omar Al-Bashir to El-Fasher, the capital of North Darfur, four days after the International Criminal Court issued an arrest warrant against him on counts of crimes against humanity and war crimes committed during the conflict in Darfur. The poster with a cross on ICC Prosecutor Ocampo's face reads: 'Liar, liar, you agent'. The big white banner (not entirely visible) says: 'Welcome Omar Al-Bashir and his supporters'. The text on the big yellow banner (again not entirely visible) can roughly be translated as: 'We will sacrifice ourselves for you'. Other posters read: 'No to destabilising the country' and 'One line behind our leader'. The map on page xxi below was designed by the Scientific Response Unit (SRU) of the ICC's Office of the Prosecutor. All other photographs in the book were taken by the author.

Parts of Chapter 2 appear as a chapter titled 'Fine-Tuning Complementarity' in the *Research Handbook on International Criminal Law*, edited by Bartram S. Brown and published by Edward Elgar in 2011. Parts of Chapter 3 have been published in 'Complementarity in Uganda: Domestic Diversity or International Imposition?', in *The International Criminal Court and Complementarity: From Theory to Practice*, edited by Carsten Stahn and Mohamed M. El Zeidy, published by Cambridge University Press in 2011. Material from that chapter has also been used for a chapter titled 'The ICC and Complementarity Post Juba: Between International Imposition and Domestic Diversity', forthcoming in *The International Criminal Court and the Juba Peace Process or Global Governance and Local Friction*, edited by Pål Wrange.

In order to avoid already long footnotes getting even longer, references have been abbreviated. Full details of (a) literature and official documents, (b) cases and procedural documents and (c) legal instruments can be found in the bibliography. References to literature and official documents refer to the author (or alternatively the title) or document number and year. Orders, decisions, judgments and

procedural documents (in italics) relate to ICC proceedings, unless specifically attributed to a different court. In the bibliography, they are organised by court, and, for the ICC, by situation or case. The abbreviated name indicates the relevant situation or case. All links to websites were effective on 17 October 2012.

The book aims to be up to date to July 2012.

## ABBREVIATIONS

A&R	A&R Agreement and its Annexure
Accords	
A&R	Agreement on Accountability and Reconciliation
Agreement	
AC	Appeals Chamber
ASP	Assembly of States Parties
AU	African Union
AUPD	African Union High-Level Panel on Darfur
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CPA	Comprehensive Peace Agreement
DDDC	Darfur–Darfur Dialogue and Consultation
DDPD	Doha Document for Peace in Darfur
DPA	Darfur Peace Agreement
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
EU	European Union
FPA	Final Peace Agreement
GoS	Government of Sudan
GoSS	Government of Southern Sudan
GoU	Government of Uganda
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division
ICID	International Commission of Inquiry on Darfur
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	internally displaced person
ILR	International Law Reports
INC	Interim National Constitution
JCCD	Jurisdiction, Complementarity and Cooperation Division
JEM	Justice and Equality Movement
JIC	Judicial Investigation Commission
JLOS	Justice Law and Order Sector
LJM	Liberation and Justice Movement
LRA	Lord's Resistance Army

## LIST OF ABBREVIATIONS

NCP	National Congress Party
NGO	non-governmental organisation
NISS	National Intelligence and Security Service
NRA	National Resistance Army
NRM	National Resistance Movement
OHCHR	Office of the High Commissioner for Human Rights
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PSC	Peace and Security Council
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
RS	Rome Statute of the International Criminal Court
SCCED	Special Criminal Court on the Events in Darfur
SCSL	Special Court for Sierra Leone
SDHC	Special Division of the High Court (also referred to as War Crimes Court or War Crimes Division)
SLA	Sudanese Liberation Army
SLA/AW	Sudanese Liberation Army/Abdel Wahid section
SLM	Sudanese Liberation Movement
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UCICC	Ugandan Coalition for the International Criminal Court
UN	United Nations
UNAMID	AU/UN hybrid operation in Darfur
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNTS	United Nations Treaty Series
UPDF	Uganda People's Defence Forces
USAID	United States Agency for International Development
VCLT	Vienna Convention on the Law of Treaties
WCC	War Crimes Court (also referred to as Special Division of the High Court or War Crimes Division)



# MAP OF ICC SITUATION COUNTRIES IN JULY 2012

