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

by

Sarah M Nouwen

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... if anything, the story of complementarity's catalysing effect has shown that this is not a world of endless 'complementaries' in which efforts for criminal, restorative, political and legal justice seamlessly 'complement' each other. This is a world of horrific constraint, in which the promotion of one value often compromises another. More precisely, the absolute war on impunity succeeds in achieving some justice, but also produces, shapes and legitimates injustices. This is not a moment for concluding. It is the moment for more questioning.¹

Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan by Sarah Nouwen is an excellent exploration of the concept of complementarity under the Rome Statute of the International Criminal Court (the Rome Statute). In this book, Nouwen does not attempt a pure legal treatise. While she provides an excellent account of the legal dimensions of complementarity, she goes deeper, exploring sociological and political dimensions of complementarity and how it is used by various actors in the international criminal justice arena. Her findings, many of which are intuitive, are based on real empirical study and not just analysis of text. *Complementarity in the Line of Fire* is well written, well-researched and adopts an objectivity that is often lacking in the literature on international criminal law, and the International Criminal Court (the ICC) in particular. It should be said that Nouwen is no stranger to authorship which dissects the line between law and politics in the ICC discourse.²

The book tackles perhaps one of the key principles of international criminal justice, ie complementarity. But it is certainly not the first to do so.³ Nouwen, however, attempts to go beyond the rhetoric, in the

1 This is the "concluding" paragraph from Sarah M Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013) 414.

2 See, eg, Nouwen & Werner 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' 2010 *European Journal of International Law* 941.

process uncovering the myths around the concept, and laying bare not only what complementarity is meant to be under the Rome Statute, but also what it has become in practice. Complementarity is the idea or principle that the primary function for ensuring accountability for Rome Statute crimes, is not the ICC but rather domestic courts. The ICC only steps in when domestic courts are unable or unwilling to “genuinely” investigate and/or prosecute.

One of the critical contributions that *Complementarity in the Line Fire* makes is to distinguish between the legal nature of complementarity as provided for in the Rome Statute and what Sarah Nouwen refers to as “complementarity as big idea”, ie the rhetoric or sound bites associated with complementarity. As provided for in the Rome Statute, complementarity is a procedural bar to the jurisdiction of the ICC. But, contrary to popular belief, complementarity does not provide a legal basis for domestic courts to exercise jurisdiction over Rome Statute crimes.⁴ As Nouwen correctly asserts, however, “complementarity as big idea” includes the idea that there is a responsibility or even sometimes a legal obligation to prosecute. It is, to borrow from Nouwen, an idea that “lives in the assembly halls of international organisations, conference rooms, auditoria, and other places where diplomats and politicians ...” and others make rhetorical statements. In truth, however, this invented tradition of complementarity as establishing a legal obligation has, in fact, managed to find itself into judicial decisions, including in South Africa.⁵ While the Rome Statute may assume, rightly or wrongly, the pre-existence of such a duty under customary international law, it does not create it.

Complementarity in the Line of Fire also identifies other effects of the complementarity craze such as an expanded meaning of complementarity beyond what was envisaged in the Rome Statute. To the extent that this particular process is giving content to a rule already established in the Rome Statute, then it may be unremarkable, amounting to nothing more than a process which could lead to an interpretation of the complementarity as legal bar to jurisdiction through practice – assuming

3 See, eg, Bergsmo (ed) *Active Complementarity: Legal Information Transfer* (2011). See also Tladi ‘A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step for the Evolution of a Comprehensive International Criminal Justice System’ 2014 *SA Public Law* 368 describing key gaps in the application of complementarity as a central element of the Rome Statute system. Stone & du Plessis ‘The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries’ available at <http://www.issafrica.org> (accessed: 2014:07-21).

4 See Tladi *supra* n 3.

5 *South African Litigation Centre and Another v National Director of Public Prosecutions and Others*, 2012 (10) BCLR 109 (GNP) par 15 and *National Commissioner of the South African Police and Another v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA). *National Commissioner of the South African Police and Another v Southern African Human Rights Litigation Centre and Another* 2014 (12) BCLR 1428 (CC).

the requirements for subsequent practice under the Vienna Conventions on the Law of Treaties are met.⁶

Other findings in Nouwen's book, however, are not as unremarkable and are more controversial. For example, Nouwen suggests that the ICC, in particular, the Office of the Prosecutor, has created a new meaning for complementarity – one derived from the literal meaning of the word complementarity, but far removed from its legal connotation in the Rome Statute. She asserts that the Court has used complementarity to suggest a division of labour where it, the ICC, goes after the big fish (or Nile Perch) while domestic courts go after the small fry (Tilapia). This understanding is captured in the Prosecutorial Strategy adopted by the Office of the Prosecutor. However, as Nouwen points out, it does not find support in the Rome Statute. While complementarity is intended to encourage domestic prosecution, she argues that it has the effect of discouraging certain prosecutions, in particular those relating to the big fish.

The idea of the Court, on the one hand stressing the importance of complementarity and the responsibility of states to prosecute,⁷ while on the other pushing the idea that it has the responsibility for certain prosecutions, could suggest at best schizophrenia or at worst, a hypocrisy – assuming of course that the factual assertion that the Court both pushes a line of primacy of domestic jurisdictions while also, itself, asserting primacy of certain prosecutions. This conclusion appears buttressed by another one of Nouwen's conclusions, namely that the Office of the Prosecutor has a "policy" of inviting states to refer situations – it is doubtful whether this can be regarded as a policy, although, at least the first Prosecutor had earlier in his tenure mentioned an intention to invite states to refer. The "policy", of course, is critical to another ranging debate concerning the so-called Africa bias since the ICC's response to the charge of bias is, in part, to refer to the fact that most situations on its docket are the result of self-referrals by states. But from the perspective of complementarity, it raises issues concerning the validity of the assertion that justice must be done domestically first and at the ICC only as a last resort.

Nouwen explores these issues through an empirical study of ICC engagement in Uganda and Sudan. And it is at this point that certain cautionary notes should be made. First, Sudan and Uganda are two of the earlier situations and, particularly, with respect to the role of the ICC itself in bringing the matters within its jurisdiction, it should not be too hastily assumed that whatever conclusions can be drawn from the Court's involvement in those two situations are generally accurate. Second, it is also important in approaching this book – which by both intent and result is not purely a legal text, but includes sociological, anthropological

⁶ See generally Nolte (ed) *Treaties and Subsequent Practice* (2013).

⁷ For references to various statements in which the Court has stressed the primacy of national jurisdiction, see Tladi *supra* n 3.

perspectives – to take into account personalities involved. The Office of the Prosecutor, responsible for much of the posture of the Court in respect of prosecutorial policy, is essentially under new leadership coming after much of the empirical research conducted. From a legal perspective this is irrelevant: there is only one Office of the Prosecutor.

There will be many who will (and judging from the blurbs on the back cover, many already have) sing the praises of this book and yet others will not agree with the conclusions. But what cannot be disputed is that *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* is a well written, well researched book that will hopefully lead to a dynamic debate on the role and future (and future role) of the ICC vis-à-vis domestic jurisdiction. The value of the book lies in the ability of the author to put on the blinders and tell the story as she sees it (paradox intended). The story is complex and readers should not be quick to judge the ICC harshly because of the book. Rather, they should search for the nuance that I (think) Nouwen is trying to bring out. Nouwen avoids the lazy tendency that I have identified in another publication:

The [ICC debate] has been characterised by an ideological chasm that has pitted villains against protagonists – with both sides casting the other as villains intent on wanton destruction and themselves as protagonists fighting the good fight.⁸

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⁸ Tladi 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' 2014 *African Journal of Legal Studies* 378 378.