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Introduction

CHRISTIAN M. DE VOS, SARA KENDALL AND CARSTEN STAHN

International criminal law and its institutions have expanded dramatically over the past two decades, a growth that has been reflected in the related fields of international human rights law and transitional justice. Much early writing on the field of international criminal law focused on its growing body of jurisprudence and its institutional developments, yet less attention has been paid to the effects that international judicial interventions have had upon the communities and state structures where grave crimes have occurred. Similarly, while claims have proliferated among proponents and observers that the field contributes to certain normative goods – the lessening or prevention of conflict, the re-establishment of the rule of law and the alleviation of suffering within conflict-affected communities – few of these ambitious claims have been subjected to grounded inquiry or critical analysis.

Over the past decade, however, an emerging body of literature has sought to situate the work of international criminal law in historical, political and cultural contexts, with critical interventions from scholars in related fields, including socio-legal scholars, political scientists and anthropologists. Much of this scholarship has focused on the work of the ad hoc tribunals for the former Yugoslavia (International Criminal Tribunal for Former Yugoslavia; ICTY) and Rwanda (International Criminal Tribunal for Rwanda; ICTR),¹

¹ For studies on the impact of ICTY, see, e.g., S. Ivković and J. Hagan, *Reclaiming Justice: The International Tribunal for the former Yugoslavia and Local Courts* (Oxford: Oxford University Press, 2011); B. Swart, A. Zahar, and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (New York: Oxford University Press 2011); D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Justice Initiative, 2010); L. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010). On the ICTR, see M. Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007); K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (New York: Palgrave MacMillan, 2005); E. Stover and H. Weinstein (eds.), *My Neighbor*,

both now nearing the end of twenty-year trajectories, as well as the Special Court for Sierra Leone,² which ceased active operations in 2013. Scholars have also begun to focus critically on the work of the International Criminal Court (ICC), the sole permanent body where genocide, war crimes and crimes against humanity are judged and punished.³

This volume builds upon this body of literature by offering a grounded critique that focuses exclusively on the institutional site of the ICC and its work in situation countries. Drawing upon field- and practice-based accounts that illustrate the effects of the Court's interventions, it brings together contributions from scholars and practitioners within and outside the field of international criminal law to offer a sustained focus on the work of the ICC, with a particular emphasis on its work in domestic contexts. With this emphasis, the collection seeks to unsettle the predominantly 'Hague-centric' view of the production of international criminal justice – where doctrine and jurisprudence have been at the normative centre – by critically reflecting on the ICC's multiple and competing constituencies, its translation and reception at national and local levels and the socio-political effects of its work in the states and communities where it has intervened.

The ICC's novelty

Established in 2002, the ICC is often read as a novel development in the field of international criminal law. As a treaty-based institution, it has the

My Enemy: Justice and Community in the Aftermath of Mass Atrocity (Cambridge: Cambridge University Press, 2004). For an account of state cooperation in relation to both tribunals, see V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2009).

² C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge: Cambridge University Press, 2014); T. Kelsall, *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009).

³ S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013); C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (London: Routledge, 2014). Literature from outside the field of international criminal law that has taken up more critical perspectives on the ICC includes: D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014); A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011); K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006).

potential to exercise territorial jurisdiction in all states that accept its authority, in addition to the exceptional jurisdiction it enjoys through referrals from the UN Security Council. The Rome Statute, the Court's founding treaty, grants it subject-matter jurisdiction over 'the most serious crimes of international concern', a number of which are defined by the Statute in unparalleled detail. Furthermore, unlike its ad hoc predecessors for Rwanda and the former Yugoslavia, which enjoyed primacy over domestic jurisdictions, the ICC is designed to complement domestic investigations and prosecutions. Referred to as 'complementarity', this constraint on admitting situations before the ICC is a defining feature of the Court's architecture. It results from a number of factors, including the Court's institutional design, its limited resources and the acknowledged role of domestic legal orders in bringing more proximate forms of criminal accountability.

While complementarity is technically understood as an admissibility principle, 'positive' complementarity is a more expansive conception that calls upon the Court and other actors to encourage and assist national legal bodies in investigating and prosecuting crimes of an international character.⁴ The vision is illustrated by the first prosecutor Luis Moreno-Ocampo, who notably argued that '[t]he effectiveness of the International Criminal Court should not be measured by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.'⁵ This has aroused debate as to whether the ICC, rather than states, should be called upon to develop domestic capacity for trying international crimes.

The mandates of judicial institutions often encompass a variety of goals and objectives; however, the ICC's are particularly ambitious. The Court's intended relationship with conflict-affected communities is another aspect that distinguishes its work: as an ICC guidebook explains, 'victims at the ICC enjoy rights that have never before been incorporated

⁴ On the evolution and various interpretations of complementarity, see C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (New York: Cambridge University Press, 2011).

⁵ 'Paper on some policy issues before the Office of the Prosecutor', ICC Office of the Prosecutor, September 2003, 4. On 'positive complementarity', see W.B. White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', *Harvard International Law Journal*, 49 (2008), 53–108; C. Stahn, 'Complementarity: A Tale of Two Notions', *Criminal Law Forum*, 19 (2008), 87–113.

in the mandate of an international criminal court'.⁶ Towards this end, the Statute attempts to provide greater recognition to communities through a complex regime of victim participation and the prospect of reparations. The Court's affiliated Trust Fund for Victims is also mandated with implementing Court-ordered reparations, as well as with supporting medical and livelihood assistance programs to conflict-affected communities. The Court's work extends beyond judgment and punishment, and it seeks to incorporate restorative dimensions that bring it more explicitly into a relationship with the field of transitional justice.

The ICC's institutional structure is designed with a degree of porosity that is unusual for a criminal court: civil society actors as well as conflict survivors are brought into its formal operations, and domestic judicial activity plays a role in determining whether or not cases are admissible.⁷ Spaces of discretion are built into the Rome Statute as well. The Court's ability to assess whether a state is 'able or willing' to prosecute those individuals brought before it, or the prosecutor's ability to take into account 'the interests of justice' in determining whether to investigate or prosecute, provides important openings to contextual and extra-legal considerations.

Finally, the network of actors drawn into the ICC's orbit is uniquely expansive. Its work engages international political entities such as the UN Security Council; the Assembly of States Parties, the Court's governing body of member states; and a vast array of civil society actors, ranging from international non-governmental organisations (INGOs) to domestic and local community-based organisations. The Court's decisions and policies also have implications that intersect with those of donor states, UN bodies, and NGOs working in post-conflict responses, development and domestic institutional reform. The multiple ways in which the Court's jurisdiction can be triggered – through state referral, UN Security Council resolution and the prosecutor's exercise of *proprio motu* powers – further engage a broad set of actors and institutions involved in practices of global governance.

The diverse actors who interact with and influence the work of the Court form broader assemblages of agency, affecting the terms and institutions through which conflicts are addressed and expanding the

⁶ See ICC, 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court'.

⁷ F. Jessberger and J. Geneuss, 'The Many Faces of the International Criminal Court', *Journal of International Criminal Justice*, 10 (2012), 1081–1094.

role of international criminal law in the global imagination.⁸ But how do the various aspects of the Court's architecture operate in practice? Does the ICC actually supplement national jurisdictions, as is often described, or might it instead supplant them? Does it defer to domestic initiatives, or does it seek to influence the terms and institutional forms through which they are carried out? To what extent – and with what effects – does the Court rely upon in-country actors to sustain its work? How does the ICC operate as a site of normative production, disseminating views and values concerning what an appropriate response to conflict should entail? How does it influence the legal discourse of criminal justice, as well as national political priorities in the states where it intervenes?

ICC interventions and their effects

While political dimensions of the Court's work are frequently downplayed in ICC discourse and practice,⁹ many of its actions and policies can be interpreted in light of how they allocate and diffuse different forms of power. In some situations the Court exercises what might be termed 'compulsory power'. The most classical example of this is the exercise of direct control by the ICC over individuals, including the detention of persons or efforts to protect witnesses and victims. In these areas, ICC authority appears as a surrogate of state power and is most vulnerable to criticisms that include the violation of human rights norms or the lack of democratic accountability. Yet in practice the Court is highly dependent upon states and other entities to assist it in executing arrest warrants and carrying out its in-country work.

The Court has developed alternate channels of authority and control, deploying multiple forms of institutional power. In many contexts, the ICC justifies or maintains its power through formalised responses, practices and policies of interaction.¹⁰ Decisions or claims to authority are translated into technical legal documents or institutionalised in order to cultivate acceptance of ICC actions or to mitigate criticisms of the Court. The turn to institutional power is most visibly reflected in the expansion

⁸ See S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2008).

⁹ See generally S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21 (2010), 941–965.

¹⁰ On the role of 'practice' in the ICC, see J. Meierhenrich, 'The Practice of International Law: A Theoretical Analysis', *Law & Contemporary Problems*, 76 (2014), 1–83.

of the Court's regulatory framework, the development of procedures of interaction with domestic authorities and victims and the adoption of policy and 'expert' papers on core issues of concern to the Court, including complementarity, the 'interests of justice', victims and sexual- and gender-based violence.¹¹ This practice has gradually extended the Court's normative space of operation as well as its claim to authority by re-casting political choices as formalised policies.

Many of the effects of ICC interventions are also influenced by relationships with other actors. The Court relies on these dynamics to justify its authority or to reinforce its impact. This structural power involves forms of subordination as well as cooperation, including the Court's relationship to collective security and the role of the Security Council;¹² its interaction with state authority;¹³ and its relationship to individuals, which serves as the basis of some of the most important claims of the Court's authority. Indeed, as a number of the chapters in this volume suggests, ICC actions, policies and language have had a transformative effect in spaces where the Court intervenes. They may alter social realities through discursive practices and processes: through labelling certain acts as crimes, through stigmatising perpetrators, and through the bestowal or denial of victim status as a legal category. Some of the resulting effects of Court interventions are calculated and intended, as when the ICC's actions generate political pressure to comply with its decisions. But in many situations, ICC interventions have produced unintended effects, such as the alteration of conflict narratives and ICC-centric law reform practices, some of which may ultimately run counter to the Court's objectives.¹⁴

¹¹ See OTP, Informal Expert Paper, 'The principle of Complementarity in Practice' (2003); OTP, 'Policy Paper on Interests of Justice', September 2007; OTP, 'Policy Paper on Victims' Participation', April 2010; OTP, 'Policy Paper on Sexual and Gender-Based Crimes', June 2014.

¹² See L. Arbour, 'Doctrines Derailed? Internationalism's Uncertain Future', 28 October 2013, <http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx>.

¹³ On acculturation, based on 'sanction' and 'reward' schemes in international law, see R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford/New York: Oxford University Press, 2013).

¹⁴ A vivid illustration of the Court's contested transformation of social reality appears in Judge van den Wyngaert's critical note on the judicial construction of ethnicity in the *Katanga* case. See *Prosecutor v. Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07, Trial Chamber II, 7 March 2014, Minority Opinion of Judge Christine van den Wyngaert, ICC-01/04-01/07, para. 258.

This volume critically engages with the effects of ICC interventions. It begins from the normative premise that the Court should be more responsive to the contexts in which it works. The Court's Outreach Unit has claimed that it 'aims to give [conflict-affected] communities ownership over the Court, rendering it an institution that works for them and in their name'.¹⁵ While the Court and its proponents have occasionally invoked the language of 'local ownership', responsiveness and contextual sensitivity may offer more realistic standards for its work in practice. In their pioneering contribution to the field of socio-legal scholarship, Philippe Nonet and Philip Selznick argued that 'a responsive institution retains a grasp on what is essential to its integrity while taking account of new forces within its environment. To do so, it builds upon the way integrity and openness sustain each other even as they conflict'.¹⁶ In the context of the ICC, 'integrity' is provided by the Court's governing documents and continuing dialogue over the interpretation of the laws and rules that bind it, and the ICC's responsiveness is thus restricted by what is possible within the confines of the Rome Statute and its interpretation. By contrast, the normative call to 'openness' admits the social and political contexts in which international criminal law operates, and suggests a continuing dialogue between the Court's institutional form and the settings in which it carries out its work.

This collection places particular emphasis on the Court's work in context, such as its relationship with domestic constituencies and actors. It thus seeks to foreground critical considerations of how and for whom the ICC operates. While some scholars have addressed the turn to 'the local' in the field of transitional justice,¹⁷ there has been relatively little analysis of how international criminal justice interventions are received domestically and locally – that is, what shape their domestic uptake has assumed and the degree to which these interventions have been developed by local actors. Echoing Nonet and Selznick's views on responsive law, transitional justice literature has traced a shift towards 'the local' in

¹⁵ 'Outreach Report 2009', ICC Public Information and Documentation Section, 28.

¹⁶ P. Nonet and P. Selznick, *Law & Society in Transition: Toward Responsive Law* (New York: Harper and Rowe, 1978), 77.

¹⁷ See, e.g., P. Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (Cambridge: Cambridge University Press, 2010); R. Shaw, L. Waldorf, and P. Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010); A. Hinton, *Transitional Justice* (New Brunswick, NJ: Rutgers University Press, 2011); K. McEvoy and L. McGregor, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (London: Hart Publishing, 2008).

transitional justice mechanisms, arguing for ‘more responsive forms of place-based engagement and broader understandings of justice’.¹⁸ In a similar vein, this volume takes up the question of whether an analogous shift has happened in the field of international criminal law, and if so, with what effects at the ICC’s sites of reception.

Contributions to the volume

This collection brings together scholars and practitioners to reflect upon the ways in which ICC interventions have been taken up, developed and contested by a range of actors, including states, civil society organisations, sections of the Court and conflict-affected communities. Contributions are divided among four sections, each with a distinct unifying theme: Law’s Shape and Place, Reception and Contestation, Practices of Inclusion and Exclusion, and Politics and Legal Pluralism. Tracking the Court’s selective geography, the volume predominantly focuses on the ICC’s effects in African states, beginning from its early state-referred interventions in Uganda and the Democratic Republic of Congo (DRC) and continuing through its *proprio motu* investigations in Kenya and its UN Security Council-referred work in Libya. Yet it also considers the domestic uptake of preliminary examinations in states like Afghanistan and Colombia, where the Court’s presence has shadowed state- and community-based accountability efforts. Throughout the contexts considered, the work of the ICC has been ‘vernacularised’ to varying degrees, circulating among alternate and often competing conceptions of what qualifies as an appropriate response to mass atrocity.¹⁹

Law’s shape and place

The section begins by considering international criminal law as a legal form: how does it relate to the field of transitional justice, and to what extent is it seen to complement domestic justice initiatives? Read together, the chapters offer multiple perspectives on the degree to which the work of the Court can be tailored towards domestic and local concerns. The volume’s first section thus brings the work of the ICC into dialogue with broader themes from the field of transitional justice and, in particular,

¹⁸ Shaw, Waldorf, and Hazan (eds.), *Localizing Transitional Justice*, 5.

¹⁹ On ‘vernacularisation’ and legal language, see S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

on the possibility and desirability of prioritising local considerations within international legal institutions. Some ICC proponents regard it as falling within the 'transitional justice' paradigm, operating as a post-conflict mechanism that would help to facilitate societal recovery. But for many states, a key constituency of the international legal order, these institutions have been and remain instruments of international politics.

The first chapter by Frédéric Mégret departs from the question of who the beneficiaries of international criminal justice are in practice, arguing that the issue of constituency has remained marginal in scholarship on international criminal justice to date. Rather than asserting a claim about the empirical reality of the ICC's constituency, the chapter instead focuses on the ways that claims to particular constituencies produce the field of international criminal law's 'symbolic economy'. In whose name is international criminal law carried out, and how do these various claims work to shore up the legitimacy or authority of institutions such as the ICC? By tracing various ways in which constituencies are invoked – such as 'justice' itself, a universalist notion of humanity, the victims of international crimes, future generations or the 'international community' – Mégret shows how constituency-building, a rhetorical feature of the international criminal justice project, reveals a broader politics of 'speaking for', or a politics of representation. Mégret concludes that the plurality of diverse – and at times contested – constituencies invoked by the Court suggests that its main constituency may in fact be 'nothing but itself'.

Carsten Stahn's chapter examines the divide between the international and the local in ICC policies and practice. It argues that ICC justice is different from historical 'civilizing' projects, yet it remains vulnerable to some of the dilemmas that other liberal and emancipatory projects face in their engagement with 'the local', such as paternalistic and missionary features, perpetuation of structural inequalities and the distorting effects of de-localisation. It discusses different faces of the 'local' in the ICC context: as 'the other', as object, as subject and, finally, as a pattern of justification. It claims that a certain degree of de-localisation is unavoidable in international justice, and that there is some virtue in the ability of the ICC to override domestic choice (e.g., to counter claims of superiority inherent in criminal conduct). But it pleads against artificial 'mainstreaming' of ICC justice and an instrumentalist vision of 'the local' that blends out the disempowering effects and contradictions of ICC justice.

David Koller's chapter revisits the well-travelled tension between law and politics, but with a view to understanding how the relation between the global and the local might bear upon it. This third chapter critically

reflects on international justice as a form of what Gerry Simpson has called ‘juridified diplomacy’,²⁰ questioning whether the mandates of international tribunals, particularly the ICC’s, have been stretched too far in the quest to accommodate local priorities and demands. It argues that the support of donor states for international criminal institutions playing a transitional justice role remains limited. While the integration of transitional justice and international politics may be desirable in the long-term, the hesitation of states to fully embrace this paradigm suggests limitations to that vision in the short-term. Koller ultimately cautions against viewing international courts and tribunals as working in the interests of local communities given their inherent constraints as transitional justice mechanisms, arguing that they are more properly regarded as ‘instruments of a legitimised international politics’.

Contrasted with Koller’s emphasis on the role of states, Jaya Ramji-Nogales’s chapter begins from a more community-based view regarding the possibilities of orienting the field of international criminal law towards the ends of transitional justice. Articulating a theory of what she terms ‘bespoke transitional justice’ at the ICC, Ramji-Nogales suggests principles to support the legitimacy of the source, procedure and substance of accountability mechanisms, as well as the desirability of using evidence-based and locally grounded methods to implement them. In offering a normative theory of ‘bespoke’ justice, the chapter concludes that the Court should be more responsive towards local demands, even if this entails refusing to intervene in situations where the objectives of transitional justice may not be met through criminal prosecutions. Ramji-Nogales contends that contextual considerations and local priorities should serve as the normative starting point of the Court’s work, which would align its objectives more clearly with the field of transitional justice.

Michael Newton’s final contribution to the section builds upon Ramji-Nogales’s normative argument by asking what a more community-focused form of justice might look like in legal practice. He contends that Article 53 of the Rome Statute offers an under-explored avenue for incorporating domestic understandings of justice. The text of the article specifies that the prosecutor must consider the ‘interests of justice’ when initiating an investigation and requesting prosecution. Through a reading that seeks to incorporate local understandings of justice as a

²⁰ G. Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 1.

counterforce to international criminal law's terms, Newton draws upon his own experience advising domestic transitional processes in Afghanistan and Uganda to show how 'the interests of justice' can be broadly construed to incorporate alternate values beyond criminal accountability.

Reception and contestation

The second section takes up specific situations where the ICC has intervened to consider its political effects and its interaction with state officials, NGOs and 'intermediaries' – individuals or groups working on the Court's behalf. All contributors write from direct experience of working in the African Great Lakes region, and their chapters document the complex and often fraught circumstances in which Court interventions unfold.

Stephen Oola's chapter focuses on how the principle of complementarity has been marshalled by domestic political actors in Uganda. As he argues, the attempted prosecution of former LRA member Thomas Kwoyelo before the International Crimes Division (ICD) of Uganda's High Court has been hailed by many advocates and international donors as an example of complementarity 'in practice', yet the case raises disturbing questions about an executive branch that has skilfully used the Court's intervention to shore up its own dominance. The chapter focuses, in particular, on the emergence of the ICD as a post-Juba priority for international donors and asks to what degree Kwoyelo's prosecution of former LRA members signals an increasing attempt by the government to control and manage the country's incipient transitional justice process.

Oola's attention to the dark sides of complementarity – the way in which ICC interventions can reinforce state power – finds resonance in the DRC as well. There the government also 'invited' the Court to investigate the commission of international crimes post-2002: these investigations have focused only on rebel movements operating within the country, rather than the regime itself. Pascal Kambale examines the ICC's record in this regard and elucidates several critical areas – investigations, capacity building, information sharing – where cooperative arrangements between the ICC's Office of the Prosecutor (OTP) and Congolese officials were overlooked or ignored, despite the prosecutor's repeated calls to harness ICC interventions in the service of 'positive complementarity', that is, to actively encourage and strengthen domestic accountability efforts. While the concept of 'positive complementarity' has resonance among the representatives of international human rights

organisations, Kambale contends that its implementation in the DRC was frustrated by the strategy of the OTP prosecutor, which valorised state cooperation and cost-savings over the needs of conflict-affected communities and the duty to conduct thorough investigations.

The ICC's intervention in Kenya stands apart from Uganda and the DRC insofar as it was the prosecutor's first investigation *proprio motu*, following the failure of domestic authorities to establish a special tribunal after the post-election violence of 2007–2008. As Njonjo Mue and Judy Gitau's chapter details, Kenyan civil society has been at the vanguard of the Court's intervention, which resulted in the issuing of arrest warrants for Uhuru Kenyatta, who later became president, and William Ruto, who became deputy president. The prosecutor's initiation of an investigation fundamentally reoriented domestic politics in Kenya, uniting former political rivals and shaping a discourse that increasingly casts the ICC as a neo-colonial project, with civil society as its conduits.²¹ In the face of these growing attacks, Mue and Gitau detail the brave efforts of domestic NGOs to shore up the Court's work, ranging from developing an informal system of witness protection to litigating the enforcement of ICC warrants in Kenyan courts. Their descriptive account highlights the catalytic role the Court has played in orienting the work of domestic human rights advocates, notwithstanding the OTP's collapsing cases and the government's further retreat from accountability for grave crimes.

Such attacks on civil society in situation countries have raised questions about the work civil society does on the ground, and about the appropriate limits and regulation of respective mandates. Returning to similar themes raised by Kambale, Déirdre Clancy's chapter illustrates the risks that many country nationals assume on behalf of the Court – ranging from the OTP to defence counsel – often with little if any formal support. She examines the ICC's practice in this regard through the lens of so-called intermediaries, locally situated individuals and organisations who provide a variety of vital services in support of the Court's core functions. The chapter argues that while civil society has always had an active and visible advocacy role around the ICC and international justice, much of the work of NGOs in support of Court operations, in the field, has unfolded largely in the shadows. Furthermore, Clancy contends that, as with its investigations, the OTP in particular has taken a cavalier

²¹ For an account of the Court's effects upon domestic politics in Kenya, see S. Kendall, "UhuRuto" and Other Leviathans: The International Criminal Court and the Kenyan Political Order', *African Journal of Legal Studies*, 7 (2014), 399–427.

approach to its work with and reliance upon intermediaries. Reflecting on several experiences to date, the chapter highlights some of the challenges with which both civil society and the ICC must grapple.

Practices of inclusion and exclusion

In addition to an institutional response to grave crimes, the ICC can be viewed as a set of practices and discourses that produce certain forms of legal subjectivity, ways of speaking and inclusions and exclusions. Based largely on empirical study of different ICC practices – outreach, victim participation, the assistance mandate of the Court’s affiliated Trust Fund for Victims and reparations – the chapters gathered in the volume’s third section examine the production of these forms amongst conflict-affected communities. As noted, many commentators have praised the ICC for incorporating the interests of these communities more explicitly than previous tribunals. For example, it includes outreach activities in its general budget, and its founding statute formalises victims’ participatory rights. In attempting to reach out to conflict-affected individuals and communities as part of its broader constituency, however, the Court must make decisions about how to distribute its resources and personnel, invariably producing exclusions and marginalisations even as it seeks greater inclusion.

Matias Hellman’s chapter focuses on outreach practices at the ICC through drawing comparisons to past work he carried out as an outreach officer at the ICTY. Hellman’s cautiously optimistic contribution charts how the ICC sought to draw upon lessons from previous international criminal tribunals in establishing its Public Information and Documentation Section, a permanent section of the Court with a dedicated budget. By now there is a broad consensus on the importance of effective outreach in a court’s work and a growing recognition of the limits of the first and second waves of international tribunals in this regard. Outreach activities at the ICC reflect a more settled part of tribunal practice, with increased funding and institutional attention paid to the local population as an audience of tribunal proceedings.

Nevertheless, these developments are beset by new tensions: for example, Shaw, Waldorf and Hazan have argued that transitional justice ‘has undergone a shift towards the local’ while also claiming that its current phase ‘is frequently marked by disconnections between international legal norms and local priorities and practices’.²² Relatedly, Hellman’s

²² Shaw, Waldorf, and Hazan (eds.), *Localizing Transitional Justice*, 4 and 3.

chapter notes how outreach frequently becomes an exercise in ‘managing expectations’, where ICC personnel must explain that the desires of conflict-affected communities may not be reflected in the outcomes of the Court’s work. It argues that while a robust outreach program is a necessary component of international criminal proceedings, the active engagement of courts in socio-political processes should be avoided, since their legitimacy as judicial entities ultimately depends on their independence and impartiality. Viewed in this light, the Court’s integrity is valued as much if not more than its openness.

The ICC’s legal regime for victim participation offers another possibility for greater inclusion of conflict-affected communities, and it remains unique amongst international criminal tribunals. It has the potential to more profoundly engage the ICC’s relationship with post-conflict priorities *in situ* because it conceives of local actors as agents of the court’s work. As the OTP noted in its ‘Policy Paper on Victims’ Participation’, victims bring a ‘necessary perspective to the ICC[’s] activities’, one in which they are engaged as ‘actors of international justice rather than its passive subjects’.²³ Participation before the ICC extends beyond the role of witness-participant commonly reserved for victims in criminal proceedings. Victims may participate as witnesses before the Court, but, crucially, the purpose animating the Rome Statute conceives of them as more than instruments for evidence gathering.

While the participation of victims may offer a site for engagement with the local, there are numerous challenges. First, who qualifies as a victim? Rule 85 of the ICC’s Rules of Procedure and Evidence defines ‘victims’ as natural persons who have suffered harm, but – assuming that an individual can first overcome the formidable process of applying for recognition as a victim – this definition must necessarily be linked to one of the relevant charges brought by the OTP.²⁴ Thus there will be hundreds, if not thousands, of victims in situation countries who suffered harm as a result of crimes other than those charged by the OTP who will be excluded from participation before the Court.

The following four chapters provide more critical accounts of the Court’s potential for inclusivity. Legal anthropologist Kamari Maxine Clarke begins by historicising the turn to victims’ participatory rights in international criminal law, noting its imbrication with neoliberalism in

²³ See OTP, ‘Policy Paper on Victims’ Participation’.

²⁴ See *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06, The Appeals Chamber, ICC, 11 July 2008, para. 62.

the turn of the twenty-first century and its attendant discourses of the 'rule of law' and 'good governance'. Clarke's contribution highlights the narrowing of conceptions of justice by routing them through criminal law and notions of legal accountability, which she theorises as 'legal encapsulation': the erasure of political and economic realities of violence by subjecting them to judicial logics. The field of possible victims is substantially narrowed by purported institutions of redress such as the ICC, which fail to account for socio-economic crimes and structural violence while focusing instead on violations against the human body. Drawing upon an ethnographic account of the ICC's work in the Great Lakes region, Clarke contends that even the court's 'restorative mandate' fails to account for the structural needs of victims.

In a related vein, legal scholar Laurel Fletcher takes up a critique of victim-related discourse at the ICC, drawing upon critical theoretical accounts of identity and language to argue that the institution constructs and relies upon an 'imagined victim' to help legitimate its work. In line with Mégret's observations, Fletcher claims that victims are but one of many constituencies for the ICC, and the field of international criminal law itself prioritises retributive over restorative justice. Through a reading of the ICC's case against Thomas Lubanga, Fletcher shows that the Court responds to victims within its own juridical logics, obscuring the 'juridical switch from normative to distributive concerns' through the figure of the imagined victim. Whereas actual victims of crimes may seek more distributive forms of justice, the imagined victim is constructed as seeking retributive justice, thus serving a legitimating function for the Court itself and ICL more broadly. While eschewing concrete policy prescriptions, Fletcher calls for more modest claims from the ICC regarding victim redress.

Sociologist Peter Dixon addresses similar concerns of inclusivity at the Court, highlighting the relationship between reparations and categorisations of harm. He argues that for international criminal reparations, the targeted distribution of assistance to vulnerable groups is a particularly risky and complex process – as material manifestations of legitimate categories of crime, reparations can 'mark' and potentially stigmatise individuals. Drawing on lessons from development and humanitarian assistance projects, the chapter highlights both the challenges of targeting reparations to victims of crimes as well as the need to carefully balance individual and collective reparations within a community-based decision-making model. Dixon illustrates how his claims bear out in Court practice by

addressing two categories of crimes that have featured prominently in the ICC's first trials: the use of children in armed forces and acts of sexual and gender-based violence.

The section's final chapter by Sara Kendall contends that the restorative practices of the ICC – including victim participation, medical and livelihood assistance for conflict-affected communities and reparations – ought to be read in the broader context of humanitarianism rather than through the more limited frame of international criminal law. Arguing that such practices at the ICC can be understood as forms of 'legal humanitarianism', which seeks to address conflict-related suffering through law, Kendall reads international criminal law's restorative turn in relation to existing critiques of humanitarianism in other disciplines. Drawing upon observations from Uganda and Kenya, she considers how the ICC's constraints do not necessarily mark institutional failings of the Court itself, but instead highlights the inherent tension in re-crafting a retributive field towards restorative objectives. The chapter thus builds upon the critiques by Clarke and Fletcher to illustrate the erasures and exclusions performed by international criminal law when it engages in concrete projects of post-conflict redress.

Politics and legal pluralism

The fourth section considers the relationship between the ICC and domestic legal systems. Its contributions trace the uptake of international criminal law through domestic implementation of the Rome Statute, admissibility challenges and contestations around the meaning of 'complementarity', and the relationship between the ICC and other post-conflict responses. Considering the phenomenon of legal pluralism, or the relationship between 'multiple legal spheres, which may be equal but are in conflict with each other',²⁵ contributors reveal how the interaction between the law of the ICC and other legal forms may produce contestations as well as complementarity.

Christian De Vos examines the implementation of the Rome Statute in the domestic jurisdictions of Kenya and Uganda. He challenges the dominant narrative that the ICC itself catalysed these implementation efforts; rather, implementation of the Statute in both countries was accelerated in order to 'perform' complementarity for predominantly international audiences. In Uganda, the state's role as host of the 2010

²⁵ Clarke, *Fictions of Justice*, 24.

ICC Review Conference propelled the passage of legislation that had long stagnated, while in Kenya the desire to publicly demonstrate an immediate departure from the post-election violence ‘fast-tracked’ implementation there. De Vos argues that this acceleration was enabled by the rise of a growing ‘transnational expert community’ that sees implementation as an increasingly disciplinary exercise: it privileges conformity with the Statute over legal pluralism. In both countries, however, these truncated politics glossed over deeper fissures about the desirability of importing international criminal law as a framework for domestic accountability. Moreover, the outsized role of external actors in pushing domestic implementation legislation raises questions about the African continent’s equal and consensual participation in the creation of this body of law.

Offering a more positivist reading, Patryk Labuda’s chapter explores the impact and ‘misapplication’ of the Rome Statute in the Democratic Republic of Congo. In addition to examining political debates within the Congolese parliament over implementation of the Rome Statute in the country’s civilian judicial system, Labuda considers the fate of a proposed bill to establish a special hybrid tribunal in the wake of the UN’s 2010 Mapping Report. He also examines the direct application of the Rome Statute by Congolese military courts, highlighting instances in which military court judges have specifically used the Statute to adjudicate serious crimes. This account of attempted legislative changes and the development of international criminal jurisprudence at the domestic level reveals a political dimension of legal pluralism in the institutional and jurisprudential sites where international criminal law and Congolese law come into contact. Seemingly technical legal modifications transpire within a broader social and political context, which in turn influences their uptake and translation into the Congolese legal order.

Moving from the ICC’s focus on the African continent, Jennifer Easterday considers the domestic effects of the ICC’s preliminary examination in the Colombian context, where prosecutions and practices of memorialisation and reparations are carried out in the ‘shadow’ of the Rome Statute system. Easterday’s chapter examines whether and how these examinations can affect domestic justice process, even in the absence of the conduct of international trials or, indeed, of formal investigations as such. In particular, the chapter examines the creation and implementation of Colombia’s Justice and Peace Law, and the extent to which the ICC played a role in shaping the legal and practical application

of that law. As with other contributions from Oola, Kambale and De Vos, Easterday's chapter illustrates the role of the state in managing and contesting the work of the Court.

In his chapter on the ICC's engagement in Libya, Mark Kersten explores the political dimensions of ICC interventions in situations where the Court's jurisdiction has been triggered by virtue of a UN Security Council referral. He considers the unique set of cooperation and admissibility challenges that confront the Court where, as in Sudan, it acts under the umbrella of collective security.²⁶ Kersten further highlights the risks of mixing 'military' and 'justice' interventions, and the controversies over the locality and normative space of international justice in the immediate aftermath of civil war. Particular attention is paid to the UN Security Council referrals, which have generated substantial political controversy regarding the exercise of ICC jurisdiction, as well as the subsequent distancing from the Court by Security Council members following the fall of the Qaddafi regime.

The final chapter, by Juan Méndez and Jeremy Kelley, returns to some of the open questions and broad themes raised in the first section of the volume. It considers the ways in which the ICC, and international courts more broadly, may work towards establishing and maintaining peace, noting how faith in criminal law's deterrent capacities continues to animate the international criminal justice project. The chapter argues that justice can contribute to peace and prevention when it is not conceived instrumentally – that is, as a lever than can be turned on and turned off – but rather from the certainty of the law's application over a period of time. This view presents a (qualified) optimism about the ICC, affirming law's emerging, if not yet enduring, place within the broader order of peace making.

Contested justice

Building upon Martti Koskeniemi's insights into the dynamics of the international legal field, the contributions in this volume contend that the ICC and its body of law oscillate between deference to (state) power on the one hand, and openness to more inclusive and cosmopolitan visions of justice on the other.²⁷ These tensions are built into the very

²⁶ For an account of the Court's role in Sudan, see Nouwen, *Complementarity in the Line of Fire*.

²⁷ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

architecture of the Rome Statute system, which provides the prospect of deferring to domestic jurisdictions or delaying proceedings, while at the same time re-inscribing the authority of institutions like the UN Security Council, opening spaces for non-state parties to influence a Court to which they are not bound. The form of justice on offer at the ICC is thus deeply contested, raising questions as to what constituencies it serves, in whose name it acts, and what other avenues may be foreclosed as the reach of international criminal law extends.

The volume's diverse set of contributions illustrates these contestations, showing how the role of the ICC has extended far beyond the juridical practices of judgment and punishment. Like many international actors in other professional fields, the Court has taken on an increasing range of issues that venture beyond a classical focus on the adjudication of crime. Through the development of concepts and practices, such as complementarity, victim participation or the 'interest of justice', the Court actively shapes global justice policies. This may be one of its most visible traces. By mandating that state action should largely mirror ICC action in the context of admissibility challenges,²⁸ the ICC has also placed itself at the centre of the international justice system, with domestic systems at the periphery. This trend is reinforced through the promotion of specific agendas in judicial findings and in the formulation of Court policies.

The ICC's development is thus symptomatic of the transformation of international institutionalism since the end of the Cold War, and its critiques.²⁹ Like other global human rights or justice institutions, the practice of the Court suffers from its own contradictions. It has considerably widened its *telos* and reach for the sake of justice and accountability, but this expansion of authority has not always been accompanied by sufficient attention to the responsibilities, needs, and duties of care that such a transformation requires.

Further, as a particular form of justice-as-accountability, international criminal law's disciplinary reach risks eliding different understandings of

²⁸ See, e.g., *Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11, The Appeals Chamber, ICC, 21 May 2014, para. 73

²⁹ See, e.g., D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004); M. Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca: Cornell University Press, 2011); R. Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004).

justice. Scholars such as Kamari Clarke have noted the growing ‘tribunalization of violence’³⁰ – the turn to legal frameworks as a primary means of responding to intractable conflict. In a similar vein, Mark Freeman argues that the ‘permanent ICC . . . has come to define’ our current moment in the ‘global fight against impunity’, potentially crowding out other approaches, while Samuel Moyn asks, ‘How has international criminal justice ascended so quickly, and so high, even as social justice is increasingly marginalized, undermined from within at home and eroded through the victory of the free market on the world stage?’³¹ In relation to the ICC’s understanding of complementarity, Sarah Nouwen argues that ‘the promotion of one value often compromises another’:³² the view that mass atrocity requires legal accountability may foreclose other responses, such as negotiated political settlements or non-retributive transitional justice mechanisms. More critically, it may also displace attention from other structural causes of violence in a globalised world of increasing inequality.

The expansion of international criminal law is thus itself contested. As the contributions to this volume illustrate, the ICC’s work is refracted through domestic politics, competing conceptions of accountability, and local priorities that accompany its interventions on the ground. The particular vision of justice agreed to in Rome often looks quite different in practice, as it plays out in relation to other sets of priorities and interests that reshape its content as well as its form. The extent to which the ICC is capable of a responsive orientation towards the social, political and legal contexts where it intervenes remains one of the central challenges of the Court’s work, and more broadly, for international criminal law as an emerging field of global governance.

³⁰ Clarke, *Fictions of Justice*, 45.

³¹ M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009), 4; S. Moyn, ‘Of Deserts and Promised Lands: On International Courts’, *Human Rights and the Uses of History* (London: Verso, 2014), 54. See also S. Nouwen and W. Werner, ‘Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity’, *Journal of International Criminal Justice*, 13 (2015), 157–176.

³² Nouwen, *Complementarity in the Line of Fire*, 414.