BOOK REVIEW


Sarah Nouwen writes well. One of the most pleasant features of her book *Complementarity in the Line of Fire* is its readability. Unusual for a legal book on international criminal law, her book combines her personal observations during her time working as a young diplomat in the Sudan with rigorous legal analysis. In his Foreword, Barney Afako describes this as a ‘fly on the wall’ approach. The first few pages of the book create a sense of suspense and combines humour with profound insights. This stands in stark contrast with many books on international law which suffer from dryness, clichés and uncritical acceptance of received knowledge. The intriguingly ambiguous title of the book hints at what is to come. Nouwen is refreshingly critical of the many standard assumptions of the discipline. She is critical of the notion that enterprises such as the International Criminal Court (ICC) are inherently good, noble and praiseworthy.

In recent years the ICC has become the subject of increasing scrutiny and criticism. Many are of the view that the court is slow and inefficient. It seems as if a successful approach to complementarity is one way for the court to redeem its reputation and justify its expensive existence. Over the last decade the topics of complementarity and particularly positive complementarity have become the hottest topics in international criminal law. Complementarity, a cornerstone of the Rome Statute system, is often described as the principle which states that the ICC may not exercise jurisdiction ‘unless a State is genuinely unable or unwilling to carry out prosecutions’. Nouwen later discusses the inadequacy of this shorthand definition. Positive complementarity can be defined as a policy according to which, ‘rather than competing with national systems for jurisdiction, the OTP [Office of the Prosecutor] will encourage national proceedings wherever possible’. Positive complementarity, therefore, is a programme of action. The first ICC prosecutor, Moreno Ocampo, referred to this form of complementarity as the ‘second dimension of complementarity’. Nouwen writes that whereas many scholars see complementarity as admissibility rule and complementarity as a ‘big idea’ as linked, her book shows that these two conceptions of

complementarity are growing further apart. The ICC’s efforts at encouraging cooperation between states and itself in a joint project of ending impunity are, in her view, a strategy of cooperation rather than complementarity. Nouwen believes that, strictly interpreted, this test will leave the ICC with little or no role to play in investigating and prosecuting crimes within the jurisdiction of the ICC.

Nouwen poses a fundamental question: whether complementarity has had a catalysing effect on domestic systems? This catalysing effect consists not only of domestic investigations and prosecutions of crimes within the jurisdiction of the ICC but also reform of domestic justice systems. Throughout the book, she asks whether complementarity has had a catalysing effect, and if so, what this effect has been. She also asks what effects have been widely expected but not been catalysed.

The narrowest manifestation of complementarity is the interpretation that enables the ICC to find ‘inaction’ on the part of the state if the state did not investigate exactly the same case, narrowly defined in the sense of the same person, conduct and same crime, as the case prosecuted by the ICC.

Nouwen writes of the ‘double life’ of complementarity. The legal life of complementarity consists of the admissibility rule in the Rome Statute, which determines when the ICC may proceed with an investigation or prosecution. However, complementarity has also been conceptualised as a ‘big idea’ that transcends the technical meaning of the term and involves/entails responsibilities for states. The catalysing effect of complementarity has been activated, not just by the Rome Statute, but also by actors such as international non-governmental organisations (NGOs) who have promoted normative agendas beyond the framework of the ICC. Nouwen is particularly interested in these catalysing effects which live off the ICC but are not parasitical or dependent on the Rome Statute for its existence or power.

Nouwen quotes Jawaharlal Nehru who said: ‘[t]heoretical approaches have their place, and are, I suppose, essential but a theory must be tempered with reality.’ This summarises Nouwen’s philosophy and approach to international law research. In explaining her methodology, Nouwen clearly states that the purpose of her book is empirical. She discloses her normative commitment as fundamentally realist in nature. She describes it as ‘a realism that acknowledges the importance of big ideas and great ideals but believes that they should start from what as a matter of fact is for them not to become dangerous’. It is a ‘realism that is idealistic precisely because it works towards ideals from a difficult status quo’. This fits her belief in complementarity as ‘big idea’. This ‘big idea’ extends complementarity beyond a mere rule of admissibility. Complementarity in this sense can even be disentangled from its ‘original’ ICC context. The book demonstrates that complementarity can have a catalysing effect irrespective of or even in spite of ICC action. Her

5 Nouwen (note 2 above) 27.
6 Ibid.
7 Ibid 20.
complex methodology suits a complex topic. The empirical part of the book stems from sources such as process tracing, histories, archival documents and interview transcripts.

The first two chapters of the book primarily do two things. They set out the ICC’s law on complementarity very clearly and correct important misconceptions on complementarity. The three most popular misconceptions she highlights are worth mentioning. First is the assumption that the Rome Statute grants states the responsibility or obligation to investigate or prosecute crimes within the ICC’s jurisdiction. Nouwen points out that the principle of complementarity itself does not establish such a legal duty. She emphasises that the provisions in arts 17 and 20 of the Rome Statute set out admissibility rules for the court and not obligations for states. The Statute does not create obligations for states independently of the Statute’s operation. The second is the assumption that the Rome Statute requires states to adopt ‘implementing legislation’ that makes the crimes within the ICC’s jurisdiction crimes under international law. The Rome Statute requires only that national law facilitate cooperation with the ICC and criminalises offences against the ICC’s administration of justice. The third popular misconception highlighted by Nouwen is that the Rome Statute bans amnesties. The Statute does not contain any prohibition against amnesties. This part particularly adds to the intellectually illuminating effect of the book.

Nouwen focuses on the experiences in Uganda and the Sudan. She writes that complementarity has indeed had some widely anticipated catalysing effects. Such effects include the fact that crimes within the ICC’s jurisdiction were incorporated into domestic law. Significantly, this happened even in Sudan, which is not a State Party to the Rome Statute. Unfortunately, the ICC also had less desirable catalysing effects such as the fact that states outsourced their responsibility to investigate to the ICC. Nouwen draws interesting conclusions about the high cost of domestic action as a reason for the absence of a strong catalysing effect. Cost in this sense refers to the sacrifices that must be made to remove practical and political obstacles to domestic proceedings for conflict-related crimes.8

Nouwen never shies away from being critical and she is quick to point to instances where the ICC’s actions and policies do not match the rhetoric of the court. She identifies crucial paradoxes in the practice of the ICC. For example, the fact that the states which refuse to cooperate with the ICC, such as the Sudan, leave the court relatively unable to prosecute. The ICC can only function if it has guaranteed means by which to enforce obligations to cooperate. Without state cooperation the ICC cannot do its job.

It is difficult to fault this book. Nouwen’s characteristic passion for the topic she writes on shines through each page. The book reminds one of a beautiful tapestry, intricate in design, richly textured and vivid and fiery in colour. I admit that this may be greedy on my part, but I would have liked to see in the

8 Ibid 394.
book more of what Nouwen does best and what makes her book such a treat to read: personal observation and reflection and a less ‘legal’ writing style.

Since this book focuses on the African experience of complementarity, South Africans interested in international law, international politics and world affairs should read *Complementarity in the Line of Fire*. It is ironic that European legal scholars are currently more familiar with the ICC’s impact on Africa than African scholars.

I cannot wait for Nouwen’s next book.

**Mia Swart**

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