

The Grotius Centre for International Legal Studies

The ICC and Complementarity

International Research Conference
2009

Conference Summary

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Universiteit Leiden
CampusDenHaag.nl

The ICC and Complementarity: from Theory to Practice



An introduction to the research project

The principle of complementarity is one of the cornerstones of the architecture of the Rome Statute. It shapes various dimensions of ICC and domestic practice, ranging from prosecutorial strategy and criminal policy to statutory implementation and compliance.

The operation of complementarity is of paramount importance to the operation and impact of international criminal justice. International courts and tribunals are only able to accomplish their mandates and leave a 'lasting footprint' on society, if they manage to mobilise support and genuine justice efforts at the domestic level.

Traces of complementarity are replicated in the relationship between the ad hoc tribunals and domestic jurisdiction (Rule 11 bis), the exercise of universal jurisdiction ('horizontal complementarity') and the operationalisation of the concept of "Responsibility to Protect".

One of the dilemmas of complementarity is that many of its theoretical underpinnings and operational features are underdeveloped. The Rome Statute sets out the general contours of the concept in three paragraphs (Article 17). The existing text leaves a considerable degree of ambiguity and space for creative interpretation.

The concept has thus undergone dynamic transformation. The Office of the Prosecutor has developed guidelines and policy principles on complementarity. Other aspects have been clarified by the jurisprudence of the Court in the context of the first situations under investigation. Some of these conceptions deviate from classical understandings of complementarity. Core notions ("gravity", "inability", "case") and key concepts (self-referrals, primacy of domestic jurisdictions, 'positive complementarity') are at the heart of judicial and policy debate.

The broader implications of complementarity in international relations and domestic societies are not yet well understood and researched. Implementation remains a challenge, both in terms of law and policy.

Project goals

The purpose of the project is to revisit the conceptual foundations of complementarity, as well as its broader systemic and operational implications.

The project is designed to:

- build a bridge between historical understandings of complementarity and its contemporary application;
- offer fresh analysis on core aspects of the interpretation and

treatment of complementarity and its implication in international relations;

- provide insider perspectives and critical analysis of the application of complementarity in the first situations under investigation.

It seeks to bring in insights and theories that political and social scientists bring to the theorisation and application of complementarity. The project covers several research themes. The project is thematically linked to NWO funded research of the Grotius Centre on 'Post-conflict justice and local ownership'.

Research themes

The project is centred on a number of core themes.

1. Origin and genesis of the principle of complementarity

What are the origins of complementarity? To what extent is it a novel and unique feature of the Rome Statute? Is there one or are there several models of complementarity? What is its rationale and what are its goals? How do expectations from the Rome Conference relate to contemporary practice? What are the strengths and weaknesses of existing approaches? To what extent does complementarity extend to other jurisdictions than the ICC?

2. Analytical dimensions of complementarity

(i) Conceptions of complementarity

How does complementarity operate? How does complementarity affect the identity of the ICC and its role with respect to domestic jurisdictions? To what extent is it based on 'carrots and sticks'? How does it apply in relation to non-state actors? What is the purpose of the distinction between 'classical' and 'positive' complementarity? How can a more pro-active and managerial dimension of complementarity be operationalised?

(ii) Complementarity and the distinction between 'situations' and 'cases'

How does complementarity affect investigation and prosecution techniques? When does it become relevant? How does it apply in relation to 'situations' and 'cases'? What criteria should be used to assess complementarity at the 'situation' stage? What is the understanding and meaning of the concept of a 'case' under the Rome Statute, and how does it affect the scope of complementarity?

(iii) Complementarity and statutory interpretation

What are main problems with the interpretation of Article 17 and to what extent can they be solved by legal means or discourse? To what extent is the Court competent in cases of mere 'inaction' by States? Under what circumstances should the Court act as a matter of law or policy? What is the role of 'gravity'? What are the substantive and procedural implicati-



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ons of a 'self-referral'? To what extent are such referrals desirable? What lessons can be learned from human rights law or other courts and tribunals for the interpretation of the criteria of 'inability' or 'unwillingness'? Under what circumstances does ordinary criminal prosecution satisfy the complementarity test? What are the requirements and implications of admissibility challenges? How does the burden of proof operate in such circumstances? How does complementarity interrelate with cooperation?

(iv) Complementarity and crimes

What is the relationship between complementarity and implementing legislation? To what extent do approaches in domestic legislation facilitate or restrict the exercise of the complementarity? How does complementarity apply with respect to the crime of aggression? What is the potential benefit and impact of the Legal Tools Project?

3. *Complementarity in perspective*

What are the broader implications of complementarity on the global system of justice? To what extent does complementarity influence the debate on traditional and alternative forms of justice? What lessons can be learned from the engagement of the ad hoc tribunals with domestic and local actors, in terms of outreach, impact and legal empowerment? How does complementarity affect interstate-relations and the exercise of domestic jurisdiction? What is the relationship between complementarity and the 'Responsibility to Protect', and how can it be operationalised?

4. *Complementarity in practice*

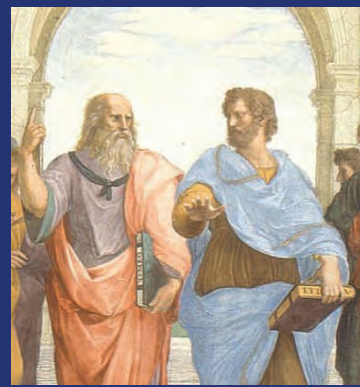
How has complementarity been applied in the context of the first ICC situations? What strategies and policies have been applied by the Court? How have they operated and been received by different constituencies? What are the benefits and risks of ICC engagement? How does complementarity affect victims and society? To what extent does Court action have a catalytic effect on domestic institutions? How long, and in what form should the Court stay engaged in situations? What can be realistically achieved through action of different organs or entities of the Court (Prosecutor, Registry, Trust Fund)? What lessons can be learned from existing engagements in relation to Uganda, the Democratic Republic of Congo, the Central African Republic and Colombia? What are the implications for Court practice, international cooperation and development strategies?

Conference Programme

Tuesday 15 September 2009

Peace Palace, Academy Hall, Carnegieplein 2, The Hague

Academy Hall of the Peace Palace



8:45 – 9:15 REGISTRATION

9:15 OPENING

Prof. Jouke de Vries, Director Campus The Hague
Dr. Carsten Stahn, Programme Director Grotius Centre

9:30 – 11.30 PANEL 1: Origins and Theorisation of Complementarity

Reflections on Complementarity at the Rome Conference and Beyond

Prof. Mauro Politi, University of Trento and former Judge Pre-Trial Chamber, ICC

The Genesis of Complementarity

Dr. Mohamed El Zeidy, Pre-Trial Chamber, ICC

Policy Through Complementarity:

The Atrocity Trial as Justice

Prof. Mark Drumbl, Washington and Lee University

International Idealism Meets Domestic Procedural

Realism: Complementarity, Gate-Keeping, and Case Selection

Prof. William Burke-White, University of Pennsylvania

The Law and Policy of Complementarity in relation to 'Criminal Proceedings' carried out by Non-State Organized Armed Groups

Dr. Jann Kleffner, University of Amsterdam and Swedish National Defence College

11:30 – 11:45 BREAK

11:45 – 12:30 KEYNOTE SPEECH

Luis Moreno-Ocampo, Prosecutor ICC

12:30 – 13:30 LUNCH

13:30 – 15:30 PANEL 2: Interpretation and application of the Rome Statute

The Mysterious Mysteriousness of Complementarity and the Invisibility of the Inaction Scenario

Prof. Darryl Robinson, Queens University

Situation and Case: Defining the Parameters

Dr. Rod Rastan, Office of the Prosecutor, ICC

The Application of the Principle of Complementarity to Decide where to Open an Investigation: The Admissibility of Situations before the International Criminal Court

Prof. Héctor Olásolo, University of Utrecht

States' Obligations to Investigate and Prosecute Perpetrators of International Crimes: The Perspective of the European Court of

Human Rights

Prof. Harmen van der Wilt, University of Amsterdam

Complementarity and 'Reverse Cooperation'

Dr. Federica Gioia, Pre-Trial Chamber, ICC

15:30 – 15:45 BREAK

15:45– 16:15 KEYNOTE SPEECH

The ICTY and the Transfer of Cases or Materials to National Authorities: Lessons in Complementarity

David Tolbert, Registrar Special Tribunal for Lebanon

16:15 – 17:45 PANEL 3: Complementarity in Practice:

Experiences from ICC situations - Colombia, Sudan, Central African Republic

Complementarity in Practice

Paul Seils, United Nations, formerly Office of the Prosecutor, ICC

The Colombian Peace Process and the Complementarity Principle

Prof. Kai Ambos, University of Göttingen

Darfur: Complementarity as the Drafters Intended?

Prof. Robert Cryer, University of Birmingham

In a State of Denial: The Catalysing Effects of Complementarity in Sudan

Sarah Nouwen, University of Cambridge

A Problem, Not a Solution: Complementarity in the Central African Republic and the Democratic Republic of Congo

Dr. Marlies Glasius, University of Amsterdam

17:45 CONCLUDING REMARKS

18:00 – 19:00 RECEPTION



Conference Programme

Wednesday 16 September 2009

Campus The Hague, Auditorium, Lange Houtstraat 5, The Hague
Auditorium of the Campus The Hague

9:30 – 10:15 OPENING KEYNOTE

Complementarity and Implementing Legislation: a Registrar's Perspective

Silvana Arbia, Registrar, ICC

10:15 – 10:35 Perspectives from Uganda

Hon. Freddie Ruhindi, Minister of State for Justice and Constitutional Affairs, Uganda

Hon. Justice Dan Akiiki – Kiiza, Head War Crimes Division, Judiciary, Uganda

10:35 – 10:45 BREAK

10:45 – 12:15 PANEL 1: PARALLEL SESSIONS

Sub-panel 1: Complementarity in Practice: Uganda, DRC

Complementarity in Practice: Practitioners Observations from Uganda

Marieke Wierda, Head Prosecution Programme, International Centre for Transitional Justice

The ICC and the Challenges of Complementarity in Congo and Uganda

Dr. Phil Clark, Centre for Socio Legal Studies and Oxford Transitional Justice Research, University of Oxford

Sub-panel 2: Complementarity in Perspective

Complementarity as Global Governance

Dr. Christoph Burchard, University of Tübingen

Horizontal Complementarity

Dr. Cedric Ryngaert, University of Leuven and Utrecht University

Complementarity and Practice under Rule 11 bis

Complementarity in the Srebrenica Trials: The Admissibility of Evidence collected by the Yugoslavia Tribunal before the Bosnian War Crimes Chamber

Fidelma Donlon, Irish Centre for Human Rights, formerly War Crimes Chamber, Bosnia

12:15 – 13:00 LUNCH

13:00 – 14:30 PANEL 2: Operationalizing Complementarity in the ICC system

In the Hands of the State: Implementing Legislation and Complementarity

Dr. Olympia Bekou, University of Nottingham

Positive Complementarity

Christopher Hall, Amnesty International

Complementarity and Alternative Justice

Prof. Gregory S. Gordon, University of North Dakota, School of Law

For a Complementarity-Based Advocacy

Dr. Cyril Laucci, Lawyer, formerly ICTY, SCSL & ICTR

14:30 – 14:45 BREAK

14:45 – 16:15 PANEL 3: Complementarity and Litigation: Implications of the Katanga decision

Unable or Unwilling: Challenges to Admissibility and the Burden of Proof

Joseph Powderly, National University of Ireland

The Katanga Trial Chamber Decision in Perspective

Gilbert Bitti, Pre-Trial Chamber, ICC

The Katanga Jurisprudence and Acceptance of Self-Referrals

Lorraine Smith, International Bar Association

The Katanga Jurisprudence and Objectives of Complementarity

Katherine Cleary, War Crimes Research Office, American University Washington College of Law

16:15 – 16:30 BREAK

16:30 – 17:30 CONCLUDING ROUNDTABLE

Complementarity in action



“Ultimately the task of tribunals is to overcome domestic issues to allow for international justice”

On 15/16 September 2009, the Grotius Centre held an interdisciplinary research conference, on the theme of complementarity, at the Peace Palace and Campus The Hague. The Conference brought together Hague officials, researchers, members of the diplomatic community and NGOs to discuss the relationship between the ICC and domestic jurisdictions.

The Conference was opened by Prof. Dr. *Jouke de Vries*, Director of Campus Den Haag and chaired by Dr. *Carsten Stahn*, convenor of the conference and Programme Director of the Grotius Centre for International Legal Studies. Speakers included Mr. *Luis Moreno-Ocampo* (Prosecutor, ICC), Mrs. *Silvana Arbia* (Registrar, ICC), Mr. David Tolbert (Registrar, Special Tribunal for Lebanon), Hon. *Freddie Ruhindi* (Minister of State for Justice and Constitutional Affairs, Uganda) and Justice *Dan Akiki* (War Crimes Division, Uganda).



Photos: Top; Luis Moreno-Ocampo (International Criminal Court) and Carsten Stahn (Grotius Centre for International Legal Studies, Leiden University), Bottom; David Tolbert (Special Tribunal for Lebanon)



Origins and theorisation

Since the negotiations of the Rome Statute, the principle of complementarity has been one of the core concepts underlying the functioning of the International Criminal Court (ICC). But the idea of complementarity developed over a period of 75 years, since the 1937 League of Nations Draft Convention on an International Criminal Court (Dr. *Mohamed El Zeidy*, ICC). Prof. *Mauro Politi*, former ICC Judge and negotiator, reminded participants that the founding fathers of the Statute originally associated three ideas with complementarity: (i) a division of labour between the ICC and domestic jurisdictions, (ii) duties of states, including the understanding that complementarity should not be a short cut for impunity, and (iii) the power of the ICC to assess the requirements under the Statute. To what extent are these conceptions still relevant? Presenters shared divided views.

Prof. *Mark Drumbl* (Washington & Lee University) argued that the ICC should leave greater leeway for “qualified deference” to domestic justice processes. Others suggested that there are certain gaps in the architecture of the Statute that require further attention, such as the parameters for case selection (Prof. *William Burke-White*, University of Pennsylvania) or the policies of non-state organised armed groups (Dr. *Jann Kleffner*). Others contended that complementarity must be newly construed from the point of view of ‘global governance’ and systems theory (Dr. *Christoph Burckhard*, University of Tübingen). A ‘positive’ or ‘proactive’ vision of complementarity was distinguished from a classical ‘carrots and sticks’ based understanding (Dr. *Carsten Stahn*, Leiden University). It was further suggested to develop a new set of criteria for “positive complementarity” (Mr. *Christopher Hall*, Amnesty International).

“...the idea of complementarity developed over a period of 75 years, since the 1937 League of Nations Draft Convention on an International Criminal Court ...”



Photo: Panel 1, Tuesday 15th September. Panel from left to right: Carsten Stahn (Grotius Centre for International Legal Studies, Leiden University), Larissa van der Herik (Leiden University), Mauro Politi (University of Trento), Mohamed El Zeidy (International Criminal Court), Mark Drumbl (Washington and Lee University), William Burke-White (University of Pennsylvania), Jann Kleffner (University of Amsterdam and the Swedish National Defence College)

Presenters



Photos: Top from left to right; Freddie Ruhindi (Minister of State for Justice and Constitutional Affairs, Uganda), Paul Seils (United Nations), Fidelma Donlon (Irish Centre for Human Rights). Bottom from left to right; Christoph Burchard (University of Tübingen), Robert Heinsch (University of Leiden), Jann Kleffner (University of Amsterdam and the Swedish Defence College)



Presenters



Photos: Top from left to right; Marlies Glasius (University of Amsterdam), Cedric Ryngaert (University of Leuven and University of Utrecht), Sarah Nouwen (University of Cambridge). Bottom from left to right; Dan Akiiki-Kiiza (Head of War Crimes Division, Ugandan Judiciary), William Burke-White (University of Pennsylvania), Robert Cryer (University of Birmingham)

Interpretation and application of the Statute



ICC Prosecutor *Luis Moreno-Ocampo* stressed the need to identify and apply legal standards in order to make complementarity operational. He supported the view that independent monitoring powers (Article 15, ICC Statute) could be used effectively to serve as an incentive for compliance. Panellists highlighted means and methodologies to bring the existing ambiguities of the Statute to life. Prof. *Darryl Robinson* (Queen's University, Canada) highlighted current misreading of the Statute (disregard of the 'inaction scenario' under Article 17) and organisational models to structure complementarity in case of inaction of domestic jurisdictions. *Lorraine Smith* (International Bar Association) pleaded for a new definition of criteria and benchmarks for 'inaction', in light of the ambiguous existing jurisprudence. Dr. *Rod Rastan* (ICC) and Prof. *Héctor Olásolo* (University of Utrecht) developed criteria to analyse complementarity at the stage of the "situation" and the "case". Prof. *Harmen van der Wilt* (University of Amsterdam) argued that the ICC could benefit from the rich jurisprudence of the European Court of Human Rights in its assessment of the "inability" or

"unwillingness" of domestic jurisdictions. Questions were raised regarding the extent to which it is necessary to re-think existing notions and approaches, in order to establish a proper balance and organisation of labour between international and domestic jurisdictions ("gravity" of crimes, overlap of judicial activities, maximisation of co-operation). The definition and cross-situational use of "gravity" as a tool of selecting situations/cases was called into question from a social science point of view.

"...the ICC could benefit from the rich jurisprudence of the European Court of Human Rights..."



Photos from left to right: Darryl Robinson (Queen's University, Canada), Lorraine Smith (International Bar Association), Rod Rastan (International Criminal Court)



Complementarity in perspective

Mr. *David Tolbert* made it clear that the ICC does not operate in a vacuum. He highlighted that the Court could learn lessons from the ICTY, both in terms of outreach and division of labour. This finding was echoed by Dr. *Federica Gioia* (ICC) who pointed out the importance of ‘reverse cooperation (i.e. cooperation from the ICC to domestic jurisdictions), Ms. *Fidelma Donlon* (Irish Centre for Human Rights) who demonstrated models of interaction between the ICTY and Bosnian Courts in the Srebrenica trials and Dr. *Cedric Ryngaert* (Leuven & Utrecht Universities) who outlined the increasing importance of the application of complementarity in the use of universal jurisdiction by states.

“...the Court could learn lessons from the ICTY, both in terms of outreach and division of labour”



Photos: Bottom from left to right; Harmen van der Wilt (University of Amsterdam), Federica Gioia (International Criminal Court), Héctor Olásolo (University of Utrecht)

Complementarity in practice



A different perspective and method (bottom-up v. top-down) was provided by panellists who addressed the theme from the angle of individual situation countries. Opposing views were expressed as to the impact of the ICC in Colombia. Some commentators praised the efforts of Colombia to be in compliance with international standards, while others stated that Colombian legislation complicated the judicial response to crimes committed (complexity, over-judicialisation, extradition) (Prof. *Kai Ambos*, University of Göttingen) or that the time had come for the ICC Prosecutor to bring forward *proprio motu* investigations (Mr. *Paul Seils*, UN). The situation was contrasted with other pending situations. The point was made that complementarity is difficult to implement under conditions where the domestic juris-

diction is *de facto* unable (DRC, Central African Republic) or unwilling to act (Sudan). On the other hand, it was also stressed that the concepts of “inability” and “unwillingness” should not serve too easily as a pretext to provide continuous preference to ICC intervention and that complementarity must be read in light of cooperation duties under Part 9 of the Statute (Prof. *Robert Cryer*, University of Birmingham). Questions were raised regarding the extent to which ‘negotiated justice’ compromises the perception of independence and impartiality of the ICC (Dr. *Phil Clark*, University of Oxford), as well as the reliability of domestic justice responses. Specific attention was drawn to the need for implementing legislation, but also to legitimate differences in domestic legislation (Dr. *Olympia Bekou*, University of Nottingham). It was discussed whether the label of an ordinary crime under domestic legislation might satisfy the requirements of complementarity, in particular in situations of demobilisation and peace building (Uganda). It was further questioned to what extent the use of military courts is an appropriate response to accountability challenges.



“...the concepts of “inability” and “unwillingness” should not serve too easily as a pretext to provide continuous preference to ICC intervention...”

Photos: Top; Phil Clark (University of Oxford) and Marieke Wierde (International Centre for Transitional Justice). Bottom; Kai Ambos (University of Göttingen)



Institutional dimensions



Throughout the two days it became evident that complementarity is not only a multi-jurisdictional, but a cross-organizational issue. Complementarity relates not only to States and the Prosecutor, i.e. by way of incentives and carrots and sticks, but also to Chambers and the Registrar. The ICC Registrar illustrated the need for greater on-site presence and harmonisation and implementation of domestic legislation in relation to crimes and procedure (e.g. relocation, protection of witnesses). It was suggested that impact could be enhanced through communication by way of judicial and executive (e.g., police), rather than diplomatic channels, and use of findings of non-cooperation. The ICC Prosecutor highlighted the usefulness of complementarity as a tool to maximize prevention and deterrence. It was further pointed out that the existing jurisprudence of Chambers on complementarity (e.g. *Katanga* case) continues to be shaped by ambiguities and possible misunderstandings. It was suggested that the issue of complementarity be taken up by States at the Review Conference, in addition

“[there is a] the need for greater on-site presence and harmonisation and implementation of domestic legislation ...”



Photos: Top; Silvana Arbia (International Criminal Court), Bottom, left to right; Carsten Stahn, Darryl Robinson, Joseph Powderly, Gilbert Bitti, Lorraine Smith and Katherine Cleary

Impact



The Conference revealed that there is a risk of mismatch between intent and results. Many of the original ideas of the drafters of the Statute are still in flux, or in need of further development. We are, in fact, still very far from the idealist vision which *Moreno-Ocampo* outlined in 2003 when taking office, namely: the dream of an International Criminal Court that has to deal with no cases because of the effective functioning of domestic judiciaries. The actual number of domestic trials held in situation countries in response to ICC engagement is limited. It is also evident that international justice carries certain risks, both in

terms of its means (e.g. prioritisation of atrocity trials, channelling of resources, judicialisation of responses to conflict, over-regulation) as well as some of its ends (sustainability). However, we are facing a new era in the interaction of international and domestic jurisdictions. It is fundamental to explore how international justice can interrelate better and more effectively with domestic justice systems. This requires a fresh look at the goals and methods of criminal justice. Propositions to this effect will be formulated in the forthcoming volume on this theme, published by Cambridge University Press.

“We are, in fact, still very far from the idealist vision which Moreno-Ocampo outlined in 2003 when taking office, namely: the dream of an International Criminal Court that has to deal with no cases...”



Photos: Top; Academy Hall, The Peace Palace, 15th September. Bottom from left to right: Olympia Bekou (University of Nottingham), Christopher Hall (Amnesty International), Mark Drumbl (Washington and Lee University), Gregory Gordon (University of North Dakota), Cyril Laucci (independent legal consultant)



Acknowledgements

This conference forms part of the Complementarity Research project and is thematically linked to NWO funded research of the Grotius Centre on 'Post-conflict justice and local ownership'. The Complementarity Research project will culminate in a collective volume, published by Cambridge University Press in 2010.

Contributors to the book are: Carsten Stahn, Leiden University; Mohamed El Zeidy, International Criminal Court; William Burke-White, University of Pennsylvania; Hector Olasolo, University of Utrecht; Enrique Carnero, International Criminal Court; Rod Rastan, International Criminal Court; Darryl Robinson, Queens University Canada; Frederic Megret, McGill University; Jann Kleffner, University of Amsterdam; Jo Stigen, University of Oslo; Megan Fairlie, Florida International University; Joseph Powderly, National University of Ireland; Harmen van der Wilt, University of Amsterdam; Olympia Bekou, University of Nottingham; Morton Bergsmo, Peace Research Institute Oslo; Roger Clark, Rutgers University; Mark Drumbl, Washington and Lee University; David Tolbert, Special Tribunal for Leba-

non; Bacle Don Taylor III, St Louis, Washington University; Fidelma Donlon, National University of Ireland; Cedric Ryngeert, University of Leuven & Utrecht; Paul Seils, United Nations; William Schabas, National University of Ireland; Kai Ambos, University of Gottingen; Robert Cryer, University of Birmingham; Sarah Nouwen, University of Cambridge; Marlies Glasius, University of Amsterdam; Christopher Hall, Amnesty International.

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Grotius Centre for International Legal Studies

The Grotius Centre for International Legal Studies seeks to develop and disseminate international law by connecting state-of-the-art expertise with academic research and high-quality courses for students, researchers and professionals. Examples are the yearly Telders International Law Moot Court Competition, The Marie Curie Research Programme, and the Supranational Criminal Law Lecture Series.

The Grotius Centre for International Legal Studies forms part of Leiden University and is located at Campus Den Haag. At the Grotius Centre for International Legal Studies, the expertise of Leiden University's Faculty of Law is combined with the position of The Hague as the City of Peace and Justice. The academic expertise of Leiden University is paired to the everyday practice of the various international legal organisations in The Hague, such as the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Court of Justice (ICJ), and the Permanent Court of Arbitration (PCA).



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