

SOVEREIGNTY and JUSTICE

Balancing the Principle
of Complementarity
between International
and Domestic
War Crimes Tribunals



MARK S. ELLIS

Sovereignty and Justice:
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Crimes Tribunals

By

Mark S. Ellis

**CAMBRIDGE
SCHOLARS**

P U B L I S H I N G

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by Mark S. Ellis

This book first published 2014

Cambridge Scholars Publishing

12 Back Chapman Street, Newcastle upon Tyne, NE6 2XX, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

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ISBN (10): 1-4438-5704-1, ISBN (13): 978-1-4438-5704-8

To Talbot 'Sandy' D'Alemberte, Justice Richard J. Goldstone, Monsignor William A. Kerr, and Justice Sandra Day O'Connor who have fought courageously for justice while others have retreated.

To the victims of atrocities whose voices are now silent but to whom we owe justice.

And to my son Andrew – may you grow to be firm in your convictions, to show empathy for those who suffer, and be filled with the grace of love and humility throughout your life.

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African Commission on Human and Peoples' Rights

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Fortunat v. Slovenia (Application No. 42977/04) ECHR 348 (18 April 2013)

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Jorgic v. Germany, (Application No. 74613/01) 2007-IX ECHR 583, (12 July 2007)

Krasuski v. Poland, (Application No. 61444/00) ECHR 2005-V (14 June 2005),

Lobo Machado v. Portugal, (Application No. 15764/89) EHRR 1996-I (20 February 1996)

Kovačič v. Slovenia, (Application No. 24376/08) ECHR 355 (18 April 2013)

Messina v. Italy, (Application No. 13803/88) Series A257-H (26 February 1993)

Morel v. France, (Application No. 34130/96) ECHR 2000-VI (6 June 2000)

Neumeister v. Austria, (Application No. 1936/63) Series A No. 8, 1 EHRR 191 (27 June 1968)

Scordino v. Italy (No. 1) (Application No. 36813/97) ECHR 2006-V (29 March 2006)

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Rogerson v. Australia, Communication No. 802/1998, 2002

Rouse v. The Philippines, Communication No. 1089/2002

International Court of Justice (ICJ)

Legality of the Threat or Use of Nuclear Weapons, ICJ Reports (8 July 1996)

Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), ICJ Reports (15 June 1954)

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) ICJ Reports (1992)

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Israel

Attorney General of the Government of Israel v. Adolf Eichmann
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Al-Skeini and Others v. Secretary of State for Defence, [2007] UKHL 26
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ACKNOWLEDGMENTS

I want to express my deep appreciation to Rein Mullerson, Professor of International Law at King's College (now President of the Academy of Law at Tallinn University, Estonia), who acted as my dissertation supervisor during my PhD studies. His keen insight and guidance were invaluable. Similarly, Jane Henderson, Senior Lecturer in Law at King's College provided valuable judgement on early drafts, which clearly made the end product significantly better!

This book would not have seen the light of day had it not been for Stephen Dycus, internationally renowned Professor of law at Vermont Law School. During numerous summer fly-fishing trips to Colorado with George, Jim, Johnny, Wayne, LeRoy, and the Judge, he somehow had the time to focus on my career – rather than catch fish - and concluded that I should publish this work.

During the last year, I have been fortunate to work with some very bright students who conducted research for me and assisted me in drafting this publication. I want to thank Matthew Bogunovich, Phillippa White, Matt Sands, Alex Green, and particularly Gillian Quinn.

This book would not have been possible without the tremendous assistance of Mandy Lee, Helen Taylor and Kim Folliott. As my assistant, Mandy kept me on track and helped with endless logistical challenges. I simply could not have completed this book without her help. Helen and Kim bore the unenviable task of typing this manuscript through rewrites. Laurie Bromberg did her usual masterful job on editing this text. She is a saint. Steven Kay provided unsurpassed insight on the Kenya situation. Cathy Hagle ensured that I was upgraded on endless flights so I would have the time and comfort to write the manuscript. My brother Scott remained supportive. Homer Moyer and George Hagle encouraged me to press on when I was in doubt. Their friendship is a rare gift.

Finally, I want to thank the Carney family for their years of support and love. Even in tough times, they were always there for me. I am truly blessed.

PREFACE

Since Nuremberg, the world has turned to international criminal tribunals to address the most far-reaching crimes: genocide, crimes against humanity, and other war crimes. The *ad hoc* tribunals for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created in 1993 and 1994, respectively. Other UN supported tribunals were created for Lebanon (the Special Tribunal for Lebanon – STL), Cambodia (the Extraordinary Chambers in the Courts of Cambodia – ECCC), East Timor (Ad-Hoc Court for East Timor) and Sierra Leone (Special Court for Sierra Leone). In 2002, the world community established the International Criminal Court (ICC), a permanent court to address these international crimes. However, eleven years after the creation of the ICC, the world is relying more and more on domestic war crimes courts to handle the investigation and prosecution of such cases. This trend toward domestic war crimes tribunals (e.g., Iraq, Croatia, Serbia, Kenya, Bangladesh) has arisen not despite the ICC but rather because of it.

The drafters of the ICC's founding document, the Rome Statute, foresaw what would become the main challenge to the ICC's legitimacy: that the Court would violate principles of national sovereignty and show disrespect for the legal traditions of a given state's domestic courts. To address this concern, the drafters of the Rome Statute added the principle of complementarity to the ICC's jurisdiction, in that the Court's jurisdiction merely complements the exercise of jurisdiction by the domestic courts of the Statute's member states. Specifically, the ICC will exercise jurisdiction over a given case only if it is at sufficient gravity and where the pertinent state is *unwilling* or *unable genuinely* to do so. Although the ICC may obtain jurisdiction through a UN Security Council referral, such a referral affects a non-State Party only in those circumstances where the state doesn't address the matter itself. For State Parties that have implemented the Rome Statute through domestic legislation, the ICC is honouring the authority of those states to conduct their own trials.

The purpose of this book is (a) to demonstrate the rise of this new trend toward domestic war crimes courts and (b) to elaborate on how the ICC can best implement the complementarity principle with domestic prosecutors. In analysing the current situation, and in making his case for the future direction of domestic courts, the author draws on his work with the ICTY, the ICC, the ECCC, the Iraqi War Crimes Tribunal, and his service as Legal Advisor to the OSCE for the creation of the Serbian War Crimes Court. This book asserts that the principle of complementarity is the key legal underpinning for domestic jurisdiction of international crimes. The principle is both dynamic and powerful. It provides the most effective framework that emphasises the cooperation between international and domestic accountability mechanisms.

However, the book shows how the goals of complementarity have not been fully achieved. In theory, the idea of domestic trials to prosecute individuals for committing gross violations of international criminal law is a laudable one. In practice, it is fraught with difficult challenges. If the principle of complementarity is to be applied, states must ensure that their own judicial systems and trials are consistent with international standards of independence and fairness. At a minimum, states will have to adhere to standards of due process found in international human rights instruments.

In addition, for complementarity to work, the ICC must be willing to actively support, embrace, and implement the principle. If the Court holds on too tightly to a self-aggrandising view of its role in promoting international justice, then it will lose all credibility in the eyes of nation states. Consequently, the international legal community will face the two most dramatic and contentious issues embodied in the principle of complementarity: (1) How exactly is a national judicial system deemed to have met or have failed to meet the international standards necessary to conduct credible and fair domestic war crimes cases? (2) Who should make this assessment and final determination – the ICC or the state? This book will answer both questions and set forth several innovative recommendations to strengthen and unify the principle of complementarity between the ICC and nation states.

Furthermore, the international community, in calling on states to address war crimes committed within their borders, must provide some of the financial, technical, and professional resources that many struggling states need in this endeavour. This should include the creation of an internationally maintained training centre, so that states can benefit from

international assistance as they create domestic war crimes courts.

Finally, State Parties to the ICC face enormous political and culture-based opposition when establishing domestic war crimes courts. Consequently, the book explores how the international community can act sensitively to help states overcome these domestic challenges. The book sets forth several innovative recommendations to strengthen and unify the principle of complementarity between the ICC and nation states and presents a course of action that will make future domestic war crimes courts work more effectively.

Sovereignty and Justice

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