

Sovereignty and Justice

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

By

Mark S. Ellis

CAMBRIDGE
SCHOLARS

P U B L I S H I N G

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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.

TABLE OF CONTENTS

Table of International Cases	x
Table of National Cases.....	xiv
Acknowledgements	xv
Preface	xvi
Introduction	1
Chapter One.....	12
The Principle of Complementarity: Its History and Function	
Introduction	
I. The International Law Commission and Post Development	
II. How does Complementarity work in practice?	
III. Complementarity and Universal Jurisdiction	
IV. Complementarity and Admissibility Standards, Interest of Justice, Gravity	
A. Interest of Justice	
B. Gravity	
Chapter Two	62
The Principle of Complementarity Under Article 17 of the Rome Statute and States' Willingness to Prosecute	
Introduction	
I. Understanding the Concepts of Unwillingness and Inability	
II. Willingness to Prosecute	
A. Shielding	
B. Unjustified Delays	
C. Impartiality	
i. Judges	

Chapter Three	112
The Principle of Complementarity Under Article 17 of the Rome Statute and States' Ability to Prosecute	
Introduction	
I. Conflict	
II. Weak Judicial System	
III. No Implementing Legislation	
IV. Fairness and Impartiality	
A. Witnesses	
B. Defence Rights	
Chapter Four	152
The Principle of Complementarity and the Issue of Enforcement	
Introduction	
I. A Case History: the UNSC and the ASP on the arrest of Omar Al Bashir	
II. <i>Ad hoc</i> Tribunals: the ICTY and ICTR	
A. ICTY	
B. ICTR	
III. International Pressure	
Chapter Five	177
Admissibility Challenges	
Introduction	
I. Timing of Admissibility Challenges	
A. Uganda	
II. Self-referral and Withdrawal	
III. Non-State Parties: The Libya Situation	
A. Saif Al-Islam Gaddafi	
B. Abdullah Al-Senussi	
IV. Sudan	
V. Article 16	
VI. Article 127, Withdraw	
VII. Creating a Third Party to Determine a State's 'Unwillingness' and 'Inability' to Investigate	

Chapter Six	238
International Financial and Professional Support for Domestic War Crimes Courts	
Introduction	
I. International Technical Assistance Office	
A. Fair, Impartial and Effective Trials	
B. Substantive Legal and Procedural Issues	
C. Trial Observations	
D. Judicial Nominations	
E. Training	
F. Gender Diversity	
G. Victim and Witness Support	
H. Post-Trial Sentencing	
I. Judicial Selection	
J. Defence Attorneys	
K. Victim Compensation	
L. Other Issues	
Conclusion	286
Appendix	299
Index	319

TABLE OF INTERNATIONAL CASES

African Commission on Human and Peoples' Rights

Constitutional Rights Project v. Nigeria, Communication No. 60/91 (1995)

Extraordinary Chambers in the Courts of Cambodia (ECCC)

The Prosecutor v. Ieng Sary, (Case No. 002/19-09/2007)

European Court of Human Rights

Arap Yalgin and others v. Turkey, (Application No. 33370/96) ECHR (25 September 2001)

Bejer v. Poland, (Application No. 38328/974) ECHR (4 October 2001)

Bottazzi v. Italy, (Application No. 34884/97) ECHR 1999-V (28 July 1999)

Eckle v. Germany (Application No. 8130/78) Series A No. 51, 5 EHRR 1 (15 July 1982)

Dimitrov and Hamanov v. Bulgaria, (Application Nos 48059/06 and 2708/09) ECHR (10 May 2011)

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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)

Human Rights Committee

Gonzalez del Rio v. Peru, Communication No. 263/1987

Karttunen v. Finland, Communication No. 387/1989

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)

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Reports (2009)

International Criminal Court

The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, (Case No. ICC-02/05-03/9)

The Prosecutor v. Omar Hassan Ahmad Al Bashir (Case No. ICC-02/05-01/09)

The Prosecutor v. Bahar Idriss Abu Garda, (Case No. ICC-02/05-02/09)

The Prosecutor v. Jean-Pierre Bemba Gombo, (Case No. ICC-01/05-01/08)

The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, (Case No. ICC-01/11-01/11)

The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, (Case No. ICC-01/11-01/11)

The Prosecutor v. Laurent Gbagbo, (Case No. ICC-02/11-01/11)

The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, (Case No. ICC-02/05-01/07)

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, (Case No. ICC-01/04-01/07)

The Prosecutor v. Uhuru Muigai Kenyatta (Case No. ICC-01/09-02/11)

The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, (Case No. ICC-02/04-01/05)
The Prosecutor v. Thomas Lubanga Dyilo, (Case No. ICC-01/04-01/06)
The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, (Case No. ICC-01/09-02/11)
The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, (Case No. ICC-01/09-01/11)

International Criminal Tribunal for the Former Yugoslavia (ICTY)

The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delic and Esad Landžo (Čelebići camp) (Case No. IT-96-21)
The Prosecutor v. Anto Furundžija, (Case No. IT-95-17/1)
The Prosecutor v. Enver Hadžihasanović and Amir Kubura, (Case No. IT-01-47)
The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, (Case No. IT-04-84)
The Prosecutor v. Astrit Haraqija and Bajrush Morina, (Case No. IT-04-84-R77.4)
The Prosecutor v. Naser Oric (Case No. IT-03-68-AR73.2)
The Prosecutor v. Vojislav Šešelj, (Case No. IT-03-67)
The Prosecutor v. Duško Tadić, (Case No. IT-94-1)

International Criminal Tribunal for Rwanda (ICTR)

The Prosecutor v. Jean-Baptiste Gatete, (Case No. ICTR-2000-61-R11bis)
The Prosecutor v. Gaspard Kanyarukiga, (Case No. ICTR-2002-78-R11bis)
The Prosecutor v. Prosper Mugiraneza, (Case No. ICTR-99-50-AR73)
The Prosecutor v. Bernard Munyagishari, (Case No. ICTR-2005-89-R11bis)
The Prosecutor v. Yussuf Munyakazi, (Case No. ICTR-97-36-R11bis)
The Prosecutor v. Bernard Ntuyahaga, (Case No. ICTR-98-40-T)
The Prosecutor v. Jean-Bosco Uwinkindi, (Case No. ICTR-2001-75-I)

International Military Tribunal

France, United Kingdom, United States and USSR v. Hermann Goering et al. (1946) 22 IMT 203

Special Court for Sierra Leone (SCSL)

The Prosecutor v. Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu (AFRC case) (Case No. SCSL-2004-16)

The Prosecutor v. Morris Kallon and Brima Bazzy Kamara, (Case No. SCSL-2004-15-AR72(E) and Case No. SCSL-2004-16-AR72(E))

TABLE OF NATIONAL CASES

Norway

NCIS Norway v. Charles Bandora, (Case No. 11-050224ENE-OTIR/01)

Rwanda

Ituri District Military Prosecutor v. Kahwa Panga Mandro, (RMP No. 227/PEN/2006)

Israel

Attorney General of the Government of Israel v. Adolf Eichmann
(Supreme Court (1962) 36 ILR 277)

United Kingdom

Al-Skeini and Others v. Secretary of State for Defence, [2007] UKHL 26
Brown and others v. Government of Rwanda and Secretary of State for the Home Department, [2009] EWCA 770
Re. Pinochet Ugarte [1998] All ER (D) 629; [1998] EWJ No. 2878

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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.

INTRODUCTION

'[T]he most serious crimes of concern to the international community as a whole must not go unpunished and... their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.¹

Since 1945 there have been 253 distinct armed conflicts in which an estimated minimum of 7.8 million people have lost their lives.² However, it is estimated that if victims of repressive authoritarian state regimes were included, the total may be as high as 101 million victims between 1946 and 2008;³ this figure does not include those who lost their lives as a *consequence* of armed conflict or state repression. Their inclusion would increase the total to 202 million victims for the same period.⁴ Nor does this figure include those injured or displaced by armed conflict or state repression as such numbers are inestimable, although unquestionably extensive. Equally distressing is the fact that during this same period of time, only 823 persons had been indicted by international and regional courts for violations of international humanitarian law.⁵

The disparity between these numbers is staggering and has consistently confounded expectations. In 2012 alone, research suggests that at least 92,600 people were killed or injured as a direct result of armed conflict,

¹ See Rome Statute of the International Criminal Court, Rome, opened for signature 17 July 1988, 2187 UNTS 90 (entered into force 1 July 2002) UN Doc. A/CONF.183/9 (hereinafter, ICC Statute or Rome Statute), Preamble [emphasis added].

² This is a composite based on an assessment of a number of sources, analysis of which can be found in Appendix I.

³ M. Cherif Bassiouni, 'Assessing Conflict Outcomes: Accountability and Impunity' in M. Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, 2 vols. (Oxford: Intersentia, 2010), vol. 1, p. 3.

⁴ *Ibid.*

⁵ *Ibid.*

and 6.5 million people were displaced.⁶ Projected into the future, the need to focus on accountability and international justice becomes paramount. This solemn realisation undoubtedly reverberated with the international community. International justice took a leap forward on 1 July 2002 with the establishment of the International Criminal Court (ICC). Created as a permanent institution to prosecute individuals accused of the most egregious international crimes, namely genocide, war crimes, and crimes against humanity; this vanguard court is a remarkable development in international law.

To date, 122 countries have ratified the Rome Statute of the International Criminal Court (hereinafter ICC Statute or Rome Statute) and are bound, as States Parties, by its various mandates. The Court embodies a number of goals, including being '[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, [and] [r]ecognizing that such grave crimes threaten the peace, security and well-being of the world'.⁷

One of the Court's laudable tenets is to provide uniformity in the exercise of jurisdiction over international crimes by domestic war crimes courts. It is reasonable and appropriate to debate the role of domestic courts in handling the most heinous of international crimes. Should gross violations of international criminal law only be tried through international courts or should domestic national courts also undertake this role? As I will address in this publication, any ambiguity over this debate is now resolved. Evidence showing that national accountability for international crimes has been lethargic and largely ignored is unequivocal.⁸ However, this trend is being reversed. With the ongoing evolution of the ICC, indigenous national criminal jurisdictions are in the process of becoming the 'accountability centres' for international criminal trials.

There is one paramount reason for this growth of accountability and that is the ICC's reliance on the principle of *complementarity*. The

⁶ Kate Halff, 'Persons displaced internally by conflict and violence in 2012', in Stuart Casey-Maslen (ed.), *The War Report 2012* (Oxford: Oxford University Press, 2013), p. 272.

⁷ ICC Statute, Preamble.

⁸ See Mark S. Ellis, 'Combating Impunity and Enforcing Accountability as a Way To Promote Peace and Stability – The Role of International War Crimes Tribunals' (2006) 2 *Journal of National Security Law and Policy*, 111, 112.

principle of complementarity is the single core attribute in support of the devolution of judicial authority, ensuring that domestic war crimes courts undertake the majority of war crimes trials. The ICC Statute's Preamble and Article 1 affirm the fundamental importance of this principle by establishing that the Court 'shall be complementary to national criminal jurisdictions'.⁹ The principle places, within national courts, the primary authority to prosecute individuals who have committed gross violations of international criminal law. Again, the Statute's Preamble refers to 'the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'.¹⁰ As Judge Fausto Pocar, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY) (also former Chairman of the United Nations Human Rights Committee), stated: '[d]eveloping domestic capacity for the prosecution of international crimes and the application [by domestic judiciaries] of international law as clarified by international courts is... a primary objective to be achieved'.¹¹

The principle of complementarity also addresses the presumed conflict between state sovereignty and the pursuit of supranational justice for the most pernicious international crimes; between a nation's right to control and enforce its own laws and the victims' right to objective justice. These considerations are not simply a matter of policy. Specific and succinct legal mechanisms have been built into the ICC Statute to uphold the principle of complementarity and give preference to the sovereignty of individual states. Thus, future systematic and widespread atrocities will likely be addressed by domestic courts, who will undertake a major role in fulfilling the universal duty for judicial accountability. Under the principle of complementarity, nation states possess the primary and preferred responsibility to suppress international crimes by bringing to account those who have perpetuated the crimes.

The first ICC Prosecutor, Luis Moreno-Ocampo, clearly addressed this issue when he stated: '[n]ational investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; states themselves will

⁹ ICC Statute, Preamble and Article 1.

¹⁰ *Ibid.*, Preamble.

¹¹ Judge Fausto Pocar, 'Dialogue with Member States on rule of law at the international level organised by the Rule of Law Unit: UN Approach to Transitional Justice', (2 December 2009), p. 2, available at www.unrol.org/files/TJ%20panel%20discssion%20-%20FP%20statement.pdf.

normally have the best access to evidence and witnesses'.¹² He went on to say that: '[i]n cases of concurrent jurisdiction between national systems and the ICC, the former have priority'.¹³ The Prosecutor was making clear that his office would undertake investigations 'only where there is a clear case of failure to take national action' by a state.¹⁴ It should come as no surprise that the majority of nation states' citizens also believe it is better to institute prosecutions in local courts than in international courts.¹⁵

Thus, the ICC *will not* undermine national sovereignty, nor interfere with judicial matters that naturally fall within the jurisdiction of states. The principle of complementarity will likely push states to retain control over investigating and prosecuting nationals charged with gross violations of international criminal law. Both States Parties and non-States Parties will stress the pre-eminence of domestic jurisdictions over international jurisdiction where they have the capacity to undertake domestic war crime trials. They certainly will argue that the primary responsibility for investigating and prosecuting international crimes should remain part of national sovereignty.

State sovereignty is a powerful, and at times tempestuous, concept in international law. States will be reluctant to admit to judicial inadequacies that would result in transferring a case to the ICC. Therefore, states will hold firm to retaining control over domestic prosecutions unless it is in the clear self-interest of the state to delegate these matters to the Court. This might happen if it is politically more appropriate to transfer a suspect to the ICC rather than undertake a domestic trial. For instance, transferring a former head of state to the Court could have a demulcent effect in a politically charged post-conflict environment. However, for most other situations, it is almost inconceivable that a state with a functioning legal system would not at least investigate alleged crimes. The risks are high if a state fails to maintain control over the proceedings; a state risks losing its jurisdictional control. Thus, States Parties will likely aggressively pursue

¹² ICC-Office of the Prosecutor (ICC-OTP), 'Paper on Some Policy Issues Before the Office of the Prosecutor' (September 2003), p. 2, available at www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

¹³ *Ibid.*, p. 4.

¹⁴ *Ibid.*, p. 5.

¹⁵ See a discussion on Serbia's views on the ICTY in Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact on the ICTY in Serbia* (Open Society Justice Initiative, 2008).

domestic prosecutions of international crimes so as not to trigger ICC jurisdiction. The influence of the general principle of complementarity is creating a direct paradigm shift among States Parties who could find themselves under possible ICC investigation.

This trend is indisputable. Three examples of this phenomenon will be discussed in this publication: the Democratic Republic of Congo (DRC); Kenya; and most recently, Libya. When the first ICC Prosecutor announced he was opening an investigation into crimes committed in the countries, all three governments responded aggressively, asserting their desire to conduct the trials within their own domestic courts. The motivation was ostensibly geared at sidestepping ICC jurisdiction. The Kenyan Parliament passed a motion to withdraw from the ICC because of the Court's decision to indict individuals rather than allowing Kenya to try the individuals through a domestic war crimes court.¹⁶ The motion also resolved to table a law that would repeal the International Crimes Act, a Kenyan Act that domesticated the Rome Statute.¹⁷ Now that the motion has been passed, a bill to this effect is expected to be introduced soon.¹⁸

Before his capture and death, the new transitional government for Libya had made it clear that it wanted to try Muammar Gaddafi in Libya, despite the fact that the ICC had already indicted him on charges of crimes against humanity. Most recently, the Libyan government has declared that it would also try Gaddafi's son – Saif Al-Islam Gaddafi – and Abdullah Al-Senussi for war crimes. Reports state that Al-Senussi and Gaddafi have been charged with murder and other offences in relation to Libya's 2011 civil war, and that a trial date has been set.

For non-States Parties to the Rome Statute as well, the possibility of surrendering jurisdiction to the ICC through a UN Security Council

¹⁶ See Parliament of Kenya, 'Kenya National Assembly Motions 2010', (22 December 2010), p. 40, available at http://www.parliament.go.ke/plone/archive/archive-10th-Parliament/motions/motion-tracker-2010/at_multi_download/item_files?name=Motion%20Tracker%202010%20as%20at%2022-12-10.pdf. The motion is not binding. See also 'Kenya MPs Vote to Withdraw from ICC', *BBC News*, (5 September 2013) available at <http://www.bbc.co.uk/news/world-africa-23969316>.

¹⁷ Charles C. Jalloh, 'Kenya Should Reconsider Proposed Withdrawal from the ICC', *Jurist*, (13 September 2013), available at <http://jurist.org/forum/2013/09/charles-jalloh-kenya-icc.php>.

¹⁸ *Ibid.*

referral is a powerful impetus for holding to account perpetrators of international crimes through domestic prosecutions. Non-States Parties cannot circumvent the possibility of ICC jurisdiction over domestic crimes by simply deciding *not* to sign and ratify the Rome Statute. In my opinion, the principle of complementarity actually applies to non-States Parties and States Parties alike. A state that fails to undertake genuine investigations and prosecutions of international crimes can still find itself within the ICC's reach via a UN Security Council referral. This is exactly what happened to Sudan when the government failed to end, and hold accountable those who committed, the atrocities in Darfur. The same occurred with Libya when the Security Council referred the humanitarian crisis in Libya to the ICC for investigation and prosecution.

Through the principle of complementarity, the ICC dramatically expands the role of national courts in trials involving international crimes. The reason is that the ICC has jurisdiction only if there is a breakdown in the national system of justice or if a States Party simply fails to prosecute. The ICC *must* defer its jurisdiction to national courts, except in situations where national jurisdictions have been 'genuinely unable' or 'unwilling' to investigate and/or prosecute the accused.¹⁹ This is an irrevocable principle. Consequently, the ICC's impact on domestic law and national capacity building will be significant and far-reaching. Most dramatic will be the increase in the number of domestic war crimes courts, even in non-States Party jurisdictions. The international community is already witnessing this burgeoning trend.²⁰

The decision by an increasing number of countries to conduct domestic war crimes trials provides significant insight into the pursuit of a domestic policy of accountability. However, the trend for states to retain control over prosecuting nationals charged with crimes that fall under the ICC Statute is not without legal constraints. In theory, establishing domestic trials to prosecute individuals for committing gross violations of international criminal law is a laudable aspiration. In practice, however, it is fraught with difficult challenges. If the principle of complementarity is to be applied, states must ensure that their own judicial systems, and subsequent trials, are consistent with international standards of independence

¹⁹ ICC Statute, Article 17(1)(a).

²⁰ Including in the Democratic Republic of the Congo, Kenya, Mexico, Poland, Estonia, Latvia, Lithuania, Chile, Argentina, Senegal, Peru, Bolivia, Iraq, Bangladesh, Burundi, Ecuador, Guatemala, Uruguay, Liberia, Croatia, Serbia, Bosnia, Macedonia, Lebanon and Rwanda.

and fairness. At a minimum, states will have to adhere to standards of due process found in international human rights instruments.

The investigation and prosecution of war crimes has proven to be a highly complicated and difficult task. Although domestic war crimes courts can and do operate under special conditions, history shows that states can find it difficult to successfully bring war criminals to justice.²¹ There remains doubt as to whether states can hold credible war crimes trials.²² Nearly every national war crimes prosecution has been heavily criticised by human rights institutions for failing to remain independent from the political institutions.²³ Generally, these trials fail on several counts that are fundamental to a fair trial. Local investigations are often not feasible. The options for gathering evidence in post-conflict environments are limited. Sitting regimes are not always willing to cooperate, because there is simply a lack of political will to prosecute war crimes suspects. The investigations run the risk of being manipulated by the very people who should be held accountable, which is completely antithetical to the prosecution process. Moreover, governments may have an interest in providing biased information about members of their own party or members of the opposition. This can easily lead to an utter absence of transparency, resulting in ‘sham trials’.

Courts will also confront the issue of security, particularly in post-conflict environments. For instance, in Iraq at least 210 lawyers and judges were killed between the fall of Saddam Hussein in 2003 and 2007.²⁴ A

²¹ Eric Wiebelhaus-Brahm, ‘Summary of Regional and Thematic Studies’ in Bassiouni, *The Pursuit of International Criminal Justice*, vol. 1, pp. 114–118.

²² See Dominic Raab, ‘Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals’, (2005) 3 *Journal of International Criminal Justice* 82, 93–94.

²³ Including the Humanitarian Law Center and the Belgrade Center for Human Rights. See John Ryan, ‘Last Stop Belgrade’, (2012) 13 *Law Dragon* 36, 50.

²⁴ See ‘IRAQ: Justice delayed as lawyers live under threat’, *IRIN News*, (30 April 2007) available at www.irinnews.org/Report.aspx?ReportId=71864. Since its publication, this figure has been quoted many times in the press, including in 2010: see ‘Post-invasion Iraq – the facts’, *New Internationalist*, (1 March 2010), p. 432 available at www.newint.org/features/2010/05/01/post-invasion-iraq-facts. Also in 2010, Amnesty International reported that ‘a number of lawyers, judges and prosecutors have been murdered by armed groups’ in Iraq, without offering a figure. See Amnesty International, *Iraq: Human rights Briefing*, (2010), p. 8, available at www.amnesty.org/en/library/asset/MDE14/004/2010/en/c2bb7123-1e17-4abf-8202-6f6f81448644/mde140042010en.pdf.

hostile security environment is also a clear threat to witnesses. Without a stable security environment, court proceedings will not be legitimate.

Yet, if structured properly, domestic war crimes courts can play an indisputable role in supporting post-conflict reconciliation. I realised the need for structural reform for domestic war crimes courts while acting as an expert for the Organisation for Security and Co-operation in Europe (OSCE) to Serbia in 2003. I was commissioned to conduct an assessment on whether Serbia was capable of conducting domestic war crimes trials. During the assessment mission, it was clear the Serbian judicial system had neither the knowledge nor expertise to undertake the enormous task of creating a domestic war crimes court. There was much to do, particularly in areas fundamental to ensuring a credible fair trial.

Two years later I encountered the same issues, complications, challenges, and questions while working with the newly created Iraqi War Crimes Court, created to bring to justice Saddam Hussein and his cohorts. Once again, this domestic court faced an intellectual ‘black hole’ on issues dealing with defence representation, judicial selection, witness protection, and the Court’s perceived legitimacy.

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. Complementarity aims to regulate, organise, and leverage the existing body of international criminal law, encouraging domestic courts to effectively make use of their own inherent jurisdiction over the most serious international crimes committed within their own territory.

However, complementarity only works under two conditions. First, national judicial systems must incorporate, embrace and enforce international judicial norms. The importance of stressing *international standards of justice* is paramount. This type of ‘due process’ approach reasons that a domestic system’s disregard for international standards of fair trial amounts to being ‘unwilling or unable’ and renders a case admissible before the ICC.²⁵ Yet, many disagree with this approach,

²⁵ Dawn Yamane Hewett, ‘Recent Developments: Sudan’s Courts and Complementarity in the Face of Darfur’, (2006) 31 *Yale Journal of International Law* 276, 277: ‘a State may be considered ‘unwilling’ to prosecute, even if

including the ICC's Office of the Prosecutor (OTP), which argues that the Court is not a human rights monitoring body, and 'its role is not to ensure perfect procedures and compliance with all international standards [at the domestic level]'.²⁶ Others have expanded this assertion by arguing that it is not necessary for domestic courts to guarantee such fundamental principles as witness protection. They reason that since the ICC adheres to more stringent due process requirements than many domestic jurisdictions, there is a danger that the Court 'will become a tool for overly harsh assessments of the [judicial proceedings and non-judicial transitional justice mechanisms] in developing countries'.²⁷ These scholars reject the 'due process thesis', disavowing the role of the ICC as a human rights monitor.²⁸ Instead, a state is 'unwilling or unable' 'only if its legal proceedings are designed to make a defendant more difficult to convict'.²⁹ Thus, so long as domestic procedures are aimed at bringing to justice those

domestic trials are taking place... or if the proceedings failed to accord with international due process norms'. See also Mark S. Ellis, 'The International Criminal Court and its Implication for Domestic Law and National Capacity Building', (2002) 15 *Florida Journal of International Law*, 215.

²⁶ ICC-OTP, 'Informal Expert Paper: The Principle of Complementarity in Practice' (2003), p. 15, available at www.icc-cpi.int/iccdocs/doc/doc654724.pdf; see also International Center for Transitional Justice (ICTJ), *Uganda: Impact of the Rome Statute and the International Criminal Court* (May 2010), p. 4, available at <http://ictj.org/sites/default/files/ICTJ-Uganda-Impact-ICC-2010-English.pdf>.

²⁷ See William A. Schabas, *An Introduction to the International Criminal Court*, 2nd edn (Cambridge: Cambridge University Press, 2004), p. 86 (ICC may find truth commissions are unacceptable, even though productive); see also Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum*, 255, 256–257, ensuring due process in domestic proceedings, (higher ICC standards regarding defendants' match the International Covenant on Civil and Political Rights). However, if non-judicial process is genuine, the OTP is unlikely to investigate. See also Ellis, 'The International Criminal Court and its Implication for Domestic Law', 230.

²⁸ See Office of the Public Counsel for the Defence (OPCD) oral arguments in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Doc. ICC-01/11-01/11-T-2-Red-ENG, 'Hearing Transcript', (9 October 2012), pp. 3-5. The Pre-Trial Chamber heard from Libya, the OTP, the OPCV, the OPCD, and Libya again. See also Heller, 'The Shadow Side of Complementarity'; Gregory S. McNeal, 'ICC Inability Determinations in Light of the Dujail Case', (2006) 39 *Case Western Reserve Journal of International Law*, 325.

²⁹ Heller, 'The Shadow Side of Complementarity', 257.

who have committed crimes, the ICC must allow the state to proceed ‘no matter how unfair those proceedings may be’.³⁰

It may be tantalising to accept these lesser standards because newly created domestic war crimes courts will most likely emerge in post-conflict environments where legal systems are weaker. However, creating a bifurcated system of measurable justice would be illogical and a mistake. It would exacerbate a perception that the principle of justice can somehow be split between a ‘north-south’ divide, allowing developing countries and post-conflict countries to meet a lesser standard of justice. Domestic war crimes courts should be foursquare in adhering to certain inviolable standards established and accepted by the international community as a whole.

Secondly, the ICC must be willing to actively support, embrace and implement the principle of complementarity. 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 with nation states. The Court’s recent admissibility decisions over cases in Kenya and Libya are examples of this worrisome trend. The decisions have caused significant animosity towards the Court. For example, the African Union (AU) has claimed that the ICC process had degenerated into ‘race hunting’ and objected to the ‘flawed’ process where ‘99%’ of those indicted by the ICC were African.³¹

The purpose of this book, therefore, is: (a) to demonstrate the rise of this new trend towards domestic prosecutions; and (b) to elaborate on how the ICC can best implement the complementarity principle domestic war crimes courts. Assessing these two issues will also bring to the forefront the two most dramatic and contentious issues embodied in the principle of complementarity. First, 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? Secondly, who should make this assessment and final determination – the ICC or the state?

³⁰ *Ibid.* But see Ellis, ‘The International Criminal Court and its Implication for Domestic Law’, 226 (seemingly supporting ICC ensuring due process in domestic proceedings).

³¹ ‘African Union Accuses ICC of ‘Hunting’ Africans’, *BBC News*, (27 May 2013), available at www.bbc.co.uk/news/world-africa-22681894.

The international community, in calling on states to address war crimes committed within their borders, must also provide some of the financial, technical and professional resources that many struggling states need in this endeavour. The assistance can be supplied through an internationally maintained training centre, so that states can benefit from international assistance, as they create domestic war crimes courts. This too will be covered in the upcoming chapters.

States Parties to the ICC also face enormous political and cultural-based opposition when establishing domestic war crimes courts. Consequently, this 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.

CHAPTER ONE

THE PRINCIPLE OF COMPLEMENTARITY: ITS HISTORY AND FUNCTION

Introduction

The International Criminal Court (ICC), and its principle of *complementarity*, ensures primary jurisdiction and accountability at the state level. The ICC is a court of last resort. Its existence and codifying legislation are designed to support a cooperative process to end impunity for international crimes. This is the crucible for domestic war crimes courts and international law.

The Rome Statute, the textual source and enabling treaty of the ICC, does not offer a robust definition of the term ‘complementarity’. Yet complementarity is clearly embodied in the Statute, and is of paramount importance if *nation states* (the Statute does not refer to regional courts) are to pursue justice against perpetrators of the most injurious international crimes.

The Preamble to the Rome Statute sets forth that:

the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.¹

Article 1 of the Statute also states that the Court:

shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be *complementary* to national criminal jurisdiction’, since it is ‘the duty of every state to

¹ Rome Statute of the International Criminal Court, Rome, opened for signature 17 July 1988, 2187 UNTS 90 (entered into force 1 July 2002) UN Doc. A/CONF.183/9 (hereinafter, ICC Statute or Rome Statute), Preamble.