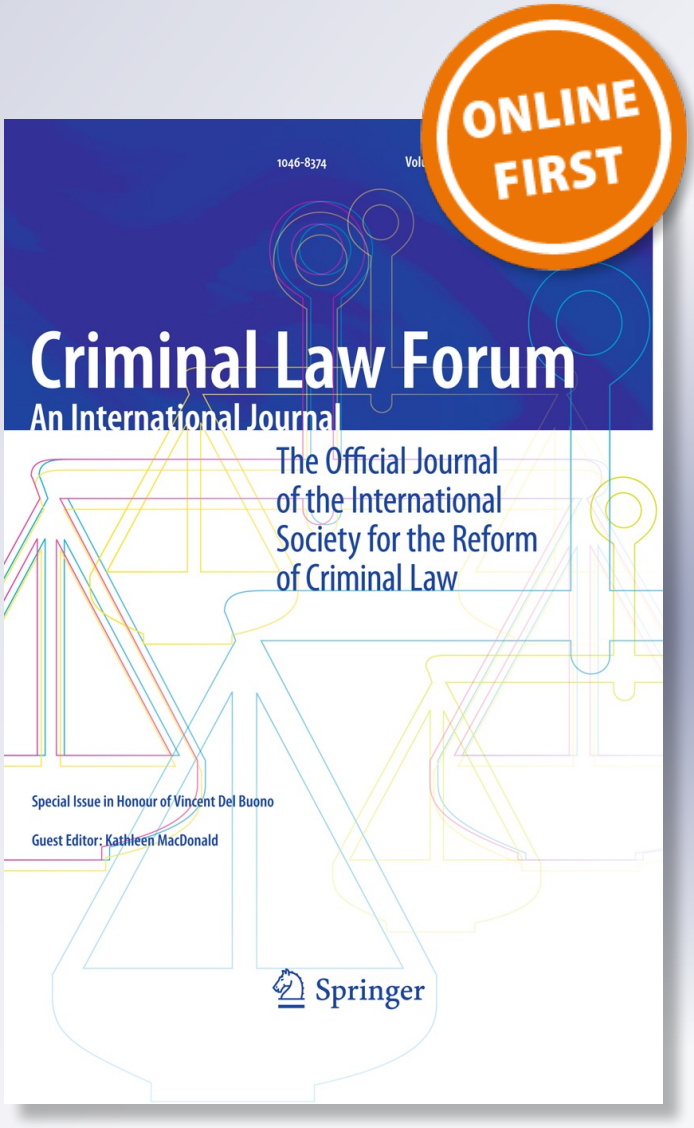
Book Review

Cheah Wui Ling

Criminal Law Forum
The Official Journal of the Society for the Reform of Criminal Law

ISSN 1046-8374

Crim Law Forum
DOI 10.1007/s10609-012-9192-2



Springer

Criminal Law Forum
DOI 10.1007/s10609-012-9192-2

CHEAH WUI LING*

BOOK REVIEW

Reviewing:

> Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010), 314 pp., ISBN 978-82-93081-14-2.

This anthology, entitled 'Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', fills an important gap in international legal research: it examines whether, and how, we should coordinate the overlapping jurisdiction of third States and more directly affected States over core international crimes (CICs).[1] Its authors put forward and examine the utility of developing a coordinating principle of subsidiarity based on the ICC's complementarity practice. Such a subsidiarity principle would require third States to defer their exercise of universal jurisdiction in favour of more directly affected States, such as those exercising territorial or national jurisdiction. In doing so, this anthology brings together existing knowledge and research on universal jurisdiction and complementarity.

This anthology's focus on the principle of subsidiarity is innovative and forward-looking. Based on classical international law, States may exercise jurisdiction over CICs on the basis of a number of jurisdictional principles: the territorial principle, the nationality principle, the passive personality principle, the protective principle,

* Assistant Professor, Faculty of Law, National University of Singapore; Senior Adviser, Forum for International Criminal and Humanitarian Law.

[1] For ease of reference, this review uses the term 'third States' to refer to States with no direct connection to the crime, and whose only jurisdictional basis would rest on universal jurisdiction. For the purposes of this review, the phrase 'core international crimes' refers to war crimes, genocide, crimes against humanity, and aggression.

Published online: 08 February 2013

and the principle of universal jurisdiction.[2] As it stands today, international law does not give priority or preference to any particular jurisdictional principle. This variety of jurisdictional bases may result in different States exercising jurisdiction over the same core international crime. This is a risk that is likely to increase in the future as national jurisdictions further institutionalise and regularise the prosecution of core international crimes. As observed by the anthology's editor, Morten Bergsmo, in the first chapter of this anthology, the ICC's complementarity principle envisages the prosecution of core international crimes to be largely undertaken by national jurisdictions (p. 6).[3] Third States may nevertheless find it hard to transfer or halt proceedings in favour of a more directly affected State due to public expectations or pressure from civil society actors. On the other hand, a third State which decides to persist in its exercise of universal jurisdiction, despite ongoing proceedings in a more directly affected State, may be criticised for failing to respect the justice processes of the society most affected by the crime. Such complications may be avoided by developing a clear coordinating principle, such as the principle of subsidiarity as discussed in this anthology.

The authors of this anthology come from a variety of backgrounds, and address the topic of subsidiarity from different perspectives. The second chapter of this anthology, by Joseph Rikhof, describes and analyses the variety of domestic CIC prosecutions undertaken in different regions, including those based on universal jurisdiction. His chapter demonstrates the dynamic nature and continuing evolution of such national prosecutions, and highlights their important role in securing accountability for CICs. The next chapter, by Rod Rastan, focuses on the ICC and its principle of complementarity. He sets out the ICC's practice of complementarity, as developed by the Court and the Office of the Prosecutor. By outlining contemporary practices on universal jurisdiction and complementarity, Rikhof's and Rastan's chapters provide the reader with updated and insightful observations on how these two principles have been interpreted and implemented.

---

[2] For an insightful and concise discussion of the various jurisdictional bases, see R. O' Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 736.

[3] See also M. Bergsmo, *Complementarity and the Challenges of Equality and Empowerment* (FICHL Policy Brief Series No. 8, Oslo: Torkel Opsahl Academic EPublisher, 2011).

The next few chapters in this anthology discuss the interplay between universal jurisdiction and complementarity through discussions of subsidiarity. In Chapter 4, Jo Stigen examines the extent to which it may be said that the subsidiarity principle is recognised in various international law sources, such as treaties and customary international law. He notes that while there is 'too little state practice' that demonstrates the acceptance of a subsidiarity principle, it may be 'fair to suggest' that a 'subsidiarity criterion is in the process of being developed' (p. 141). He highlights a number of instances during which domestic prosecutors have referred to subsidiarity when making decisions, but emphasises that these statements were couched in discretionary rather than obligatory terms (p. 147). The authors of Chapters 5–7 explore reasons in support of, and against, the development of a subsidiarity principle. Pål Lønseth, in Chapter 5, draws on his experience as a former prosecutor of CICs in Norway. He notes the numerous advantages for prosecutions to be pursued by directly affected States, rather than by States exercising universal jurisdiction. The following chapter, by Cedric Ryngaert, sets out and analyses a list of legal and systemic factors that should be considered when discussing horizontal complementarity, such as state sovereignty, deterrence, and the establishment of a compliance system.[4] Ryngaert is supportive of adopting such a coordinating principle, but he also highlights how each of the factors he examines does not conclusively decide in favour of, or against, such a decision. The chapter by Christopher K. Hall draws attention to the important role played by universal jurisdiction in promoting accountability for CICs, and argues for a stronger enforcement of universal jurisdiction based on 'an effective shared responsibility model' that will 'improve the effectiveness of universal jurisdiction' (p. 231).

The last two chapters of this anthology emphasise, among others, the need for clear guidelines and implementing mechanisms in coordinating jurisdiction between States, as well as between States and the ICC. The authors of Chapter 8 – Florian Jessberger, Wolfgang Kaleck, and Andreas Schueller – identify a number of important legal principles and standards that should be observed by the territorial or national State prior to any jurisdictional deference based on subsidiarity. The final chapter, by Fausto Pocar and Magali Maystre, suggests how the ICC and other international organisations may contribute to the coordination of universal jurisdiction by its

[4] Note that Ryngaert uses the term horizontal complementarity in his chapter, rather than subsidiarity.

member States. With respect to the ICC, they note how the Assembly of States Parties may 'develop common criteria or guidelines' on universal jurisdiction, and how the ICC may establish a reverse transfer mechanism that facilitates the transfer of cases from the ICC to domestic jurisdictions (p. 299). They also observe that a coordinating role may be played by regional organisations (p. 299). This need to develop guidelines and implementing mechanisms in support of subsidiarity is one that is taken up at various points by the authors in this anthology. The exercise of universal jurisdiction always risks becoming highly politicised; so too will the deference of universal jurisdiction based on subsidiarity. The decision to adopt subsidiarity should therefore be accompanied by clear and transparent guidelines and implementing mechanisms.

Through its study of subsidiarity, this anthology significantly contributes to our understanding of the understudied relationship between different jurisdictional bases in the area of CICs. While there is some overlap between the chapters, particularly in their discussion of the different jurisdictional bases, the authors provide a variety of views that will stimulate further debate. The anthology's focus on the idea of subsidiarity bridges existing research on extraterritorial jurisdiction and complementarity, and is both progressive and creative. The authors explore a broad range of questions related to subsidiarity: the role played by subsidiarity, lessons drawn from the ICC's complementarity practice, the advantages and disadvantages associated with subsidiarity, and questions of implementation. While a number of authors openly support the adoption of this principle, some are less enthusiastic and more cautious. The anthology's inclusive approach and inquiring spirit, as set out in Bergsmo's first chapter, leads the reader into a lively and open debate.

In terms of their methodological approach, the authors rigorously distinguish between *lex lata*, the existing law, and *lex ferenda*, the proposed law. Such careful differentiation between norm description and norm proposal is particularly important in the area of international criminal law, which is one of the most coercive areas of international law, as well as one of its most rapidly evolving and expanding areas. A clear demarcation of law-making activities is necessary to maintain international criminal law's legitimacy. All authors in this anthology also demonstrate a sensitivity towards state policy. This is essential as our international society continues to be organised around nation states. Recommendations that fail to consider the policy concerns of States will face implementation problems.

This does not call for a realist approach to international law; but it does emphasise the need for international law-making efforts to pay attention to policy, even while pursuing ideals.

It should finally be noted that Torkel Opsahl Academic EPublisher (TOAEP), the publisher of this anthology, subscribes to a policy of providing complete open access through its Internet site, in addition to the release of paper versions of its publications. The open access movement has gained impressive momentum over the past few years, but it has been largely driven by researchers from other academic disciplines. This year, UNESCO issued an important report in support of open access, entitled 'Policy Guidelines for the Development and Promotion of Open Access'.[5] Open access continues to be the exception in the area of international criminal law, so TOAEP's approach is to be much welcomed. Such an open access policy enables the broad dissemination of ideas and knowledge via the Internet, and allows criminal justice actors from materially less resourceful countries to access high quality materials free of charge. Through its open access policy, TOAEP provides an important public service and contributes to the building of a more inclusive research ethos in the area of international criminal law.

[5] UNESCO, *Policy Guidelines for the Development and Promotion of Open Access* (by Alma Swan, Paris: UNESCO, 2012).