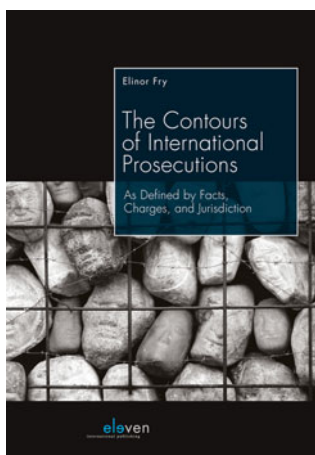


BOOK REVIEW



The Contours of International Prosecutions: As Defined by Facts, Charges and Jurisdiction

Elinor Fry*

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The Contours of International Prosecutions, by Elinor Fry, challenges the reader's understanding of a number of well-known principles of international criminal justice by questioning the outer limits of those principles. Divided into three main parts, the book addresses the typical nature of an international crime, the factual demarcation at the case level (effectively, the micro level), and the jurisdictional reach of the International Criminal Court (ICC) (the macro level of one specific international institution). She takes the reader on a journey through the various stages of a criminal prosecution – from the indictment to the facts to the evidence – in order to demonstrate the importance of “a meticulous stance

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towards and respect for the basic building blocks that are the essentials of a criminal prosecution”.¹

In Chapter 2, following an opening chapter setting out the roadmap for her analysis, Fry addresses “The Nature of International Crimes and Evidentiary Challenges”. She provides a comprehensive comparison between elements of national and international crimes, and notes the factual and evidentiary complexities involved in prosecuting international crimes. In order to address some of these evidentiary hurdles involved, Fry recommends a search for relevant procedural solutions, and suggests that any such search should consider the unique characteristics of international crimes. She essentially promotes a methodology that focuses on the crime and not on the court. Of particular interest within this chapter is a discussion of the didactic (storytelling) value of court cases – Fry suggests that while it may be a valuable general objective of international criminal justice, setting it as a goal at the trial level will have the consequence of increasing the amount of information relevant to the case. In addition, as a useful annex to these discussions, the author includes two appendices in the book: the first provides a clear visual demonstration of the link between evidence, facts and charges, and the second sets out ten pleading principles for practitioners as identified in international case law.

In Chapter 3, entitled “International Crimes and Case Demarcation: What Are We Trying to Prove?”, Fry addresses challenges faced by prosecutors during case demarcation, which she opines are largely due to the vague factual parameters inherent in international crimes. Within the discussion Fry highlights legal demarcation of evidentiary matters, which she asserts has never before been examined in international criminal justice scholarship. By drawing on illuminating experiences from the historical Nuremberg and Tokyo Tribunals, modern-day UN Tribunals (notably the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia) and the ICC, Fry argues, quite convincingly, that vague indictments at the international level are due largely to a lack of factual specificity but also to evidentiary imprecision.

In Chapter 4, entitled “Legal Recharacterisation and the Materiality of Facts at the ICC: Which Changes are Permissible?”, Fry examines Regulation 55 of the ICC Regulations of the Court. This Regulation allows the ICC Chamber to modify the legal characterization of facts in its final judgment as long as the new legal label does not exceed the facts and circumstances described in the charges. Fry attempts to address the question of which changes are permissible under Regulation 55 – a question that she suggests has not yet been explored in a systematic fashion. She suggests that the ICC may have underappreciated the important link between material facts and their legal qualification; evidence does not necessarily equal material fact, and the wide use of Regulation 55 introduces a temptation to ignore the important distinction between material and subsidiary

1 *The Contours of International Prosecutions*, p. 156.

facts. The author briefly studies the *Ruto*, *Banda* and *Ntaganda* cases, and asserts that overuse of Regulation 55 by the Court has resulted in a system of charging an accused alternatively. In fact, Regulation 55 provides an exception and should be interpreted narrowly.

Chapters 5 and 6 are notably briefer, and at the same time offer perhaps the most interesting case studies for the reader. Chapter 5, entitled “Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections”, affords the reader a thought-provoking perspective on the notion of complementarity. Fry recalls Libya’s decision to prosecute two of its nationals domestically – nationals for whom ICC arrest warrants had already been issued – and the resulting death penalty handed down in Tripoli for the accused. While the issue of complementarity has been extensively written on, Fry asks some stimulating questions. Does the ICC’s complementarity regime influence domestic due process issues? To what extent can the ICC ignore the lack of certain domestic fair trial rights? While Fry doesn’t answer all the questions that she raises, she does provide the reader with some food for thought, and proposes in conclusion an approach to complementarity that is “realistic in practice and cautious in its implementation”.²

Chapter 6, entitled “On the Verge of Engagement: The ICC’s Jurisdictional Limits”, highlights the usefulness of preliminary examinations but questions whether the expectations on the ICC are realistic. Examining the ICC’s problematic jurisdiction over Islamic State fighters as well as the situation in Palestine, Fry notes that the jurisdictional scheme of the Rome Statute is complex and restricted, especially where active nationality is the basis for jurisdiction.

Fry offers a noteworthy take on a number of practical elements concerning prosecutions for international crimes. Given that the first case at the ICC was completed in December 2014 – only two years ago – Fry provides perspectives that could certainly contribute to a “lessons learned” exercise by the Court. *The Contours of International Prosecutions* sets out to explore the boundaries of international criminal jurisdictions, and through six comprehensive chapters, Fry succeeds in raising a number of relevant concerns. The sources used are admirable – Fry references almost 100 books and book chapters alone – and the weight of her research is evident in her writing. While at times the chapters feel slightly disjointed from one another, Fry does manage to tie them together through a constant search for the outer limits of prosecutions. As she writes, “law is demarcation”.³

For those readers who are not experts in international criminal law but merely keen followers of it, *The Contours of International Prosecutions* raises many interesting and valid questions that the reader may not have considered. Upon completion of the book a number of these questions will remain unanswered, but this may have been Fry’s intention, in order to demonstrate the complexity of prosecuting international crimes globally and the consequences of

2 *Ibid.*, p. 135.

3 *Ibid.*, p. 151.

how facts and evidence are used, as well as to encourage further research in this area. As such, this book is recommended for individuals wanting to explore deeper research on the various aspects raised by Fry. In general, the book will appeal most to academics and practitioners who are active and well versed in the field of international criminal justice.

The Contours of International Prosecutions is a result of Fry's PhD research, and reads as an academic contribution to ongoing research and debate. I would recommend viewing the book as a collection of individual articles contributing to an overarching objective – Fry has published variations of each chapter as separate academic articles, and seeing them as such may make for an easier read. While the book reads academically, Fry endeavours to add practical examples where possible in order to highlight the real consequences of imposing proper (or improper) boundaries on international criminal prosecutions. Although the various questions raised will undoubtedly contribute to continued scholarship on the theory of international criminal prosecutions, further debate and analysis could also result in a practical influence at the court level.

This is a technical and at times quite complicated read, but one that is well worth the time for those comfortable with international criminal justice lingo and interested in the questions that aren't often asked.