Ovo Catherine Imoedemhe

The Complementarity Regime of the International Criminal Court

National Implementation in Africa

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I would like to dedicate this book to the memories of my father David Obowhodo Ojarikre who passed away on 20 July 2012 and my brother Emmanuel Ariomaghwa Ojarikre whose untimely death in an auto crash on 16 June 2016 robbed the world of a humane, kind and compassionate vibrant man who would have contributed immensely to the promotion of a world full of laughter, kindness and peace. The demise of my brother is a huge lesson to me and to all who knew him of the futility and vanity of all the struggles of life. Whilst I still have breath, all that counts is ensuring togetherness, peace, love and joy to every soul, and I am highly motivated in the pursuit of friendship and togetherness as epitomised in the complementarity regime of the International Criminal Court to stamp out atrocities and ensure peace in our world.

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Contents

Table of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
Af.HRJ	African Human Rights Journals
Afr J. Int'l & Comp L	African Journal of International and Comparative Law
A-G	Attorney General
AI	Amnesty International
AJIL	American Journal of International Law
ALR	Albany Law Review
Am.J.Int'l.L	Amsterdam Journal of International Law
AMF/CFT	Anti-Money Laundering/Counter Financing of Terrorism
API	Additional Protocol I
APII	Additional Protocol II
App	Appendix
APRM	African Peer Review Mechanism
Art/arts	Article/articles
ASF	African Standby Force
ASF	Avocats sans Frontières (Lawyers without Borders)
ASIL	American Society of International Law
ASP	Assembly of States Party
ASR	African Security Review
AU	African Union
BBC	British Broadcasting Corporation
BIA	Bilateral Immunity Agreement
Brklyn J. Int'l L	Brooklyn Journal of International Law
Cal. L. Rev	California Law Review
CJL&J	Canadian Journal of Law and Jurisprudence
CAR	Central African Republic
CCAIL	Code of Crimes Against International Law
Ch	Chapter
ChiJ Int'lL	Chinese Journal of International Law
CICC	Coalition for the International Criminal Court

CID	Criminal Investigation Department
CIPD	Centre for International Peace and Development
CJL&J	Canadian Journal of Law & Jurisprudence
CJN	Chief Justice of Nigeria
CLF	Criminal Law Forum
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Columbia Law Review
CLR	Criminal Law Forum
Cor Int'l LJ	Cornell International Law Journal
CPI	Corruption Perceptions Index
Crim LR	Criminal Law Review
CSPRI	Civil Society Prison Reform Initiative
CUP	Cambridge University Press
DENJILP	Denver Journal of International Law and Politics
Dept	Department
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
DRT	Demobilisation and Resettlement Team
ECOWAS	Economic Community of West African States
ed/eds	Editor/Editors
Edn	Edition
EFCC	Economic and Financial Crimes Commission
EJIL	European Journal of International Law
EL Rev	European Law Review
FARDC	Armed Forces of the Democratic Republic of the Congo
FCT	Federal Capital Territory, Abuja
FICJC	Forum for International Criminal Justice and Conflict
FJSC	Federal Judicial Service Commission
Fla. J. Int'l. L	Florida Journal of International Law
FRPI	Front for Patriotic Resistance in Ituri
FWLR	Fawehinmi Law Report
Ga. J. Int'l & Comp. L	Georgia Journal of International & Comparative Law
GIABA	Inter-Governmental Action Group Against Money Laundering in West Africa
Goe.J.Int'l L	Goettingen Journal of International Law
Harv. Int'l LJ	Harvard International Law Journal
Harv.HRJ	Harvard Human Rights Journal
Hast Int'l & Comp. L. Rev	Hastings International & Comparative Law Review
HRLC	Human Rights Law Centre
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly

HRW	Human Rights Watch
IBA	International Bar Association
ICC	International Criminal Court
ICCLR	International Centre for Criminal Law Reform
ICCM	International Criminal Court Manual
ICD	International Crimes Division
ICJ	International Court of Justice
ICL	International Criminal Law
ICLQ	International & Comparative Law Quarterly
ICLR	International Criminal Law Review
ICPC	Independent Corrupt Practices and Other Related Offences
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGP	Inspector-General of Police
IHL	International Humanitarian Law
ILC	International Law Commission
ILE	International Law Essays
ILSAJ. Int'l & Comp. L	International Law Students Association Journal of International and Comparative Law
Int'l Org	International Organisation
IRC	Independent Review Committee
IRRC	International Review of the Red Cross
J.L&Soc. Cha.	Journal of Law and Social Challenge
JAL	Journal of African Law
JEM	Justice and Equality Movement
JICJ	Journal of International Criminal Justice
JSC	Justice of the Supreme Court
LCP	Law and Contemporary Problems
LEN	Law Enforcement Network
LFN	Laws of the Federation of Nigeria
LJIL	Leiden Journal of International Law
LQR	Law Quarterly Review
LRA	Lord's Resistance Army
LS	Legal Studies
MAF	Mustapha Akanbi Foundation
Mich J. Intl.L	Michigan Journal of International Law
n/notes	Footnote/footnotes
NATO	North Atlantic Treaty Organization
NBA	Nigerian Bar Association
NDPP	National Director of Public Prosecution
NELR	New England Law Report
NGO	Non-Governmental Organisation

NILD	National Implementing Legislation Database
NJC	National Judicial Council
NOPRIN	Network on Police Reform in Nigeria
Nor.J.Int'l.L	Nordic Journal of International Law
NPF	Nigerian Police Force
NPS	Nigerian Prison Service
NWLR	Nigeria Weekly Law Report
NWULRev.	Northwestern University Law Review
NYUJIL&P	New York University Journal of International Law and Politics
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commission on Human Rights
OSJI	Open Society Justice Initiative
OSV	Other Situations of Violence
OTP	Office of the Prosecutor
OUP	Oxford University Press
Para/paras	Paragraph/paragraphs
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee
PRIO	Peace Research Institute Oslo
PSC	Peace and Security Council
PSC	Police Service Commission
Pt/pts	Part/parts
PTCI	Pre-Trial Chamber I
PTCII	Pre-Trial Chamber II
QLR	Queen's Lancashire Regiment
Que. Rev. Int'l L	Quebecois Review of International Law
R	Rules
Res	Resolution
Rev.IL&P	Review of International Law and Politics
RPE	Rules of Procedure and Evidence
RULAC	Rule of Law in Armed Conflicts
s/ss	Section/sections
SA ICC Act	South African International Criminal Court Act
SA	South Africa
SAN	Senior Advocate of Nigeria
SC	Supreme Court
SCCED	Special Criminal Court on the Events in Darfur
SCSL	Special Court for Sierra-Leone
Sing.JInt'l&Comp L.	Singapore Journal of International Comparative Law
SIPRI	Stockholm International Peace Research Institute
SJSC	State Judicial Service Commission

SL J. Int'l L.	Sri Lanka Journal of International Law
SPLM	Sudanese People's Liberation Movement
TMG	Tribunal Militaire de Garnison (Military Tribunals)
UTFL-Rev	University of Toronto Faculty of Law Review
UC Davis J. Int'l L& P	University of California Davis Journal of International Law & Policy
UCDP	Uppsala Conflict Data Program
UICC	Understanding the International Criminal Court
UK ICC Act	United Kingdom International Criminal Court Act
UK	United Kingdom
UN Doc	United Nations Documents
UNHCHR	United Nations High Commission on Human Rights
UNODC	United Nations Office on Drugs and Crimes
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission in Libya
UNSW	University of New South Wales
UNTS	United Nations Treaty Series
UP	University Press
UPR	Universal Periodic Review
US	United States
US Dept. of State	United States Department of State
USA	United States of America
UTFL-Rev	University of Toronto Faculty of Law Review
VJIL	Virginia Journal of International Law
VJIL	Virginia Journal of International Law
Vol/Vols	Volume/volumes
Yale J.Int'l.L	Yale Journal of International Law
Yale L.J	Yale Law Journal
YB	Yearbook

Chapter 1
The International Criminal Court as the New Paradigm to Close Impunity Gaps

Abstract This chapter discusses the different ways through which the international community continues to combat international crimes. Hitherto, international crimes included piracy *jure gentium*, slavery and slave trade. However, the international crimes discussed in this book are those recognised as constituting serious concern to the international community as a whole and these are the crimes listed in the Rome Statute; genocide, war crimes, crimes against humanity and aggression. Originally, international criminals were prosecuted by the Nuremberg and Tokyo International Military Tribunals, which were perceived as lopsided, as the prosecution focused only on the victims. Thereafter, the ad hoc tribunals of the former Yugoslavia and Rwanda established in the 1990s, achieved a lot in the field of international prosecution of international crimes. Despite the success of the ad hoc tribunals, their ad hoc nature and certain questions, such as the huge burden of costs, as well as the need for a permanent institution, were left unanswered. Consequently, the creation of the International Criminal Court (ICC) by the Rome Statute appeared to have solved the problem and yet even after the first ten years of the functioning of the ICC, there are new challenges regarding the implementation of the complementarity regime which is the pillar upon which the Court stands.

International criminal law encompasses the law that proscribes international crimes, such as genocide, war crimes, crimes against humanity and potentially, aggression,[1] and the principles and procedures governing the investigation and prosecution of these crimes.[2] In an attempt to ensure accountability for such serious crimes, the international community established the International Criminal Court (the ICC or the Court).[3] The Rome Statute of the International Criminal Court (the 'Rome Statute') adopted at the diplomatic conference in Rome, Italy in 1998,[4]

[1]Though included in the Rome Statute in article 5(1)(d), the crime of Aggression has only been defined at the first Review Conference of the Rome Statute held in Kampala Uganda May-June 2010. The jurisdiction of the ICC over the crime would be activated in January 2017.

[2]Cryer (2011), p. 4. (Cryer *et al*.).

[3]Scheffer and Cox (2008), p. 3.

[4]The Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 (entered into force on 1 July 2002) http://legal.un.org/icc/statute/romefra.htm (Accessed 16 November 2013). (Rome Statute).

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created the ICC in accordance with the proposition, arguably, that international prosecution is most appropriate for international crimes.[5]

The desire of the international community to establish a permanent international court dates back to the Second World War. In the aftermath of the Second World War (World War 11), the international community employed the use of the Tokyo and Nuremberg Military Tribunals for the prosecution of those who were suspected to have committed international crimes. As is common knowledge, the trials were widely perceived as lopsided, as they were held by the Allied Forces against the leaders of Nazi Germany and therefore classified as 'victor's justice'. In the 1990s new ad hoc tribunals were set up; the International Criminal Tribunals for the former Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR). The contributions made by these tribunals to the international community as a whole has been analysed by Guénaël Mettraux.[6] Despite the success of the ad hoc tribunals, the ICC was established in 1998.

The dominant theme of the Rome Statute which established the ICC is complementarity, which gives states the primary responsibility to investigate and prosecute international crimes and the ICC to intervene only where certain conditions exist. This chapter will trace the trajectory of the effort of the international community in combating international crimes that culminated in the complementarity regime of the ICC. This is important because although the international criminal justice system established under the Rome Statute set up a permanent international institution—the ICC—it nevertheless puts the primary responsibility of prosecuting international crimes on states.[7] This is a reversal of functions, as previous tribunals had primacy of jurisdiction over national courts.

The first president of the International Criminal Tribunal for the former Yugoslavia (ICTY), Antonio Cassese, once noted that the 'the tribunal can be likened to a giant without arms and legs yet it needs artificial limbs to walk and work and these artificial limbs are state authorities'.[8] As it were, the ad hoc tribunals had concurrent jurisdictions with domestic courts but had primacy over them.[9] Under the Rome Statute, however, the reverse is the case, as states have primacy of jurisdiction while the ICC is complementary to national jurisdictions. This means that despite creating an international court, the expectation of the international community is that states should bear the primary responsibility of investigating and prosecuting international crimes.

[5]Jessberger (2010), pp. 209, 214; Cassese (2010), pp. 123, 127.

[6]Mettraux (2010).

[7]Burke-White (2002–2003), pp. 1–24; Werle (2009), p. 117; Stahn (2008), pp. 87–113.

[8]See Cassese (1998), pp. 2, 13.

[9]See Article 9(2) ICTY Statute UN Doc S/RES/827 1993 and Article 8(2) ICTR Statute UN Doc. S/RES/955 1994.

1.1 The Different Phases: From Nuremberg/Tokyo IMTs, Yugoslavia and Rwanda Ad Hoc Tribunals to the Complementarity of the ICC

In the course of World War II the Allied Powers, the United States, the United Kingdom, France and the Soviet Union,[10] issued several declarations concerning the punishment of war criminals.[11] It was announced that a United Nations War Crimes Commission would be set up for the investigations of war crimes and on 20 October 1943 the Commission was established.[12] The three main Allied Powers namely, the United States, the United Kingdom and the Soviet Union issued joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed. However, the major criminals whose offences had no particular geographical location should be punished by the joint decision of the governments of the Allies. This agreement was drafted in proceedings and deliberations leading to the conference held in London from 26 June to 8 August 1945.[13]

The Allied Powers signed the London Agreement and Charter, which became the basis for the trials at the International Military Tribunals (IMT) established at Nuremberg and for the Far East Tokyo.[14] The Tribunals were established for the just and prompt trial and punishment of the major war criminals of the European Axis.[15] The jurisdiction of the Tribunals was outlined in Article 6 of the Nuremberg Charter, which defined the crimes the defendants were charged with, namely, crimes against peace, war crimes and crimes against humanity.[16]

Details of the trials and convictions by the Nuremberg and Tokyo Tribunals have been recorded and any further analysis of whether they were right or wrong is

[10]In 1991 the Soviet Union witnessed disintegration into 15 separate states and the Russian Federation continued in its stead.

[11]Although other countries later signed and ratified the London Agreement, only these four countries participated in the London Conference in 1945 (In accordance with Article 5, the following governments expressed their adherence to the Agreement: Greece, Denmark, Yugoslavia, The Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxemburg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay).

[12]'Declaration on German Atrocities' 20 October 1943. The determination of the Allies to punish the major war criminals of the European Axis first found expression in the Moscow Conference in 1943 cited in: Document: A/CN.4/5 The Charter and Judgment of the Nuremberg Tribunal—History and Analysis: Memorandum Submitted by the Secretary-General 1–100, 3.

[13]Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal London 8 August 1945.

[14]The Nuremberg and Tokyo Military Tribunals (IMT) were the first international criminal tribunals. For detailed record of the judgments of the Nuremberg Tribunal see 'International Military Tribunal (Nuremberg) Judgment of 1 October 1946'. Available at http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf (Accessed 30 June 2016).

[15]Nuremberg Charter, Article 18 (c) provided for expedited trials.

[16]Nuremberg Charter, Article 6.

beyond the scope of this book. However, the trial at the Nuremberg Tribunal is worthy of mention because of the fundamental principles of international law, albeit, international criminal law that were laid down in the judgments. In the case between the Four Allied Powers against the 22 German war criminals,[17] the defendants were tried and convicted of war crimes, crimes against humanity and aggression in violation of international treaties. The Nuremberg Tribunal found that certain of the German war criminals planned and waged aggressive wars against 12 nations and were therefore guilty of this series of crimes.[18] In The Hague Convention 1899, the signatory powers agreed that no high contracting party would have recourse to arms except there was first recourse to the good offices or mediation of one or more friendly powers.[19] A similar clause was inserted in the Convention for Pacific Settlement of International Disputes of 1907.[20] Furthermore, certain provisions of the Treaty of Versailles of 1919 were also breached by the defendants.[21] It was argued that since Germany was party to these international treaties, their violations by its nationals meant that they had to be prosecuted.

There are diverse views about the genuineness or otherwise of these trials and as is commonly known, the summary nature of the trials appeared to confirm the fact of a 'victor's justice' for which these trials and convictions are reputed. Detailed analyses of these issues are beyond the scope of this book. However, certain important principles were laid down by the Nuremberg Tribunal which became cornerstone principles on which subsequent jurisprudence of ad hoc tribunals and international criminal courts were founded. Some of these principles will be mentioned briefly below.

[17]The United States of America, The French Republic, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics v Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner et al (22 defendants in all). Robert Ley was reported to have committed suicide on 25 October 1945.

[18]These nations were Austria, Belgium, Czechoslovakia, Greece, Denmark, Luxemburg, Norway, Poland, The Netherlands, then Union of Soviet Socialist Republics, the United States and former Yugoslavia.

[19]Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague 29 July 1899. Available at http://www.opbw.org/int_inst/sec_docs/1899HC-TEXT.pdf (Accessed 20 May 2016).

[20]Convention (IV) Respecting the Laws and Customs of War on Land and its Anne: Regulations Concerning the Laws and Customs of War on Land. The Hague 18 October 1907. Available at http://www.opbw.org/int_inst/sec_docs/1907HC-TEXT.pdf (Accessed 20 May 2016). Other treaties of mutual guarantee, arbitration and non-aggression were entered into between Germany and Belgium, France, Great Britain and Italy, at Locarno in 1925. Other treaties were between Germany, The Netherlands and Denmark and between Germany and Luxemburg and between Germany, Denmark and Russia in 1926, 1929 and 1939 respectively were referred to.

[21]The Treaty of Versailles 28 June 1919. Specifically, Arts 242-44, 80, 99, 100 were breached in relation to the demilitarised zone of the Rhineland, the annexation of Austria, the incorporation of the district of Memel and the Free City of Danzig.

1.1.1 *Nullum crimen sine lege, nulla poena sine lege*

The first is the principle of Nullum *crimen sine lege, nulla poena sine lege* (there can be no punishment of crime without a pre-existing law), argued on behalf of the defendant as a fundamental principle of law both domestic and international. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed.[22] No statute had defined aggressive war, no penalty had been fixed for its commission, and also no court had been created to try and punish offenders.[23] However, the Tribunal noted that;

> [I]t is to be observed that the maxim "*nullum crimen sine lege*" is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[24]

Making reference to several international treaties to which Germany was a party,[25] the Tribunal noted that 'occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all International Law when in complete deliberation they carried out their designs of invasion and aggression.'[26] On this point the Tribunal noted that the maxim has no application to the case.

It was further argued that The Hague Convention 1907 and other international treaties mentioned did list a number of conducts as crimes, but nowhere in these laws was any sentence prescribed, nor any mention made of a court to try and punish offenders. In response to this the Tribunal noted that for many years, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by the Convention.[27]

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[22]IMT Judgment of 1 October 1946 in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* Part 22 (22nd August 1946 to 1st October 1946) available at http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf (Accessed 30 January 2016) (hereinafter 'IMT Judgment 1946').

[23]Ibid, 52.

[24]Ibid.

[25]For example, The Hague Convention 1907; the Treaty of Versailles 28 June 1919; the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes and the General Treaty for the Renunciation of War generally known as the Pact of Paris or the Kellogg-Briand Pact 27 August 1928 were binding on 63 nations including Germany, Italy and Japan at the outbreak of the war in 1939.

[26]IMT Judgment 1946, 52.

[27]Ibid.

> In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.[28]

Interpreting the Kellogg-Briand Pact,[29] the Tribunal noted that it must be remembered that 'International Law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.'[30]

The Tribunal further noted that Article 227 of the Treaty of Versailles provided for the constitution of a special Tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the First World War.[31] Thus, by Article 228 of the Treaty, the German Government expressly recognised the right of the Allied Powers 'to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.'[32] Consequently the *nullum crimen sine lege* argument was defeated and the Tribunal demonstrated that the body of treaty laws that existed prior to the commencement of the war were sufficient to ground prosecution and conviction.

1.1.2 Individual Criminal Responsibility

The second principle was that of individual criminal responsibility. Previously, international law concerned the actions of sovereign states and provides no punishment for individuals. Consequently, where the act in question is an act of state, those who carry it out were not personally responsible, but were protected by the doctrine of the sovereignty of the state for which they acted. The Nuremberg Tribunal rejected these submissions and noted that international law imposes duties and liabilities upon individuals, as well as upon states.

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[28] Ibid.

[29] The Kellogg-Briand Pact 27 August 1928.

[30] IMT Judgment 1946, 53.

[31] Article 227 of the Treaty of Versailles 1919.

[32] Article 228 of the Treaty of Versailles provides: 'The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies'. See also, Arts 229 & 230.

> Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.[33]

In placing the protection of individuals at the heart of the international legal regime, the old 'state-centric' model of international law was changed forever.[34] Thus, the Tribunal noted that the principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law.[35] The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

> The official position of defendants, whether as heads of State, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.[36]

Consequently, the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law.[37]

Furthermore, in response to the submission on behalf of the defendants that in doing what they did they were acting under superior orders, and therefore cannot be held responsible for the acts committed by them, the Tribunal noted that Article 8 of the Charter provides: 'the fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.'[38] This also put paid to the defence of superior orders, although such defence may be argued in mitigation of the punishment, but does not exclude liability. According to the Tribunal, 'the true test..., is not the existence of the order, but whether moral choice was in fact possible'.[39]

1.1.3 The Establishment of the ICTY and the ICTR

As noted earlier, the point of the above analysis is to state the origin and the principles upon which international prosecution of international crimes is founded.

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[33]IMT Judgment 1946, 55.

[34]Mansell and Openshaw (2013), p. 126.

[35]IMT Judgment 1946, 55.

[36]Nuremberg Charter, Article 7. This Article has been reproduced verbatim in all Statutes of the ICTY, ICTR and the ICC.

[37]IMT Judgment of 1946, p. 56.

[38]Nuremberg Charter, Article 8. This Article has also been reproduced verbatim in all Statutes of the ICTY, ICTR and the ICC.

[39]IMT Judgment of 1946, 56–57.

The principles analysed are, amongst others, cornerstone principles of international criminal law and they are enshrined in subsequent statutes that established ad hoc tribunals. At the Nuremberg Tribunal, Prosecutors were drawn from the four Allied Powers and in the end, Justice Robert Jackson the Chief Prosecutor for United States said;

> Of course, it would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, just as it would be extravagant to claim that our federal laws make federal crime impossible. But we cannot doubt that they strengthen the bulwarks of peace and tolerance. . .[40]

True to the words of Justice Jackson, the prosecution of the war criminals by the Nuremberg and Tokyo Tribunals did not stop aggressive war or the persecution of minorities, as there were reported widespread atrocities all over the world subsequently and specifically in the former Yugoslavia in 1991. This prompted the United Nations Security Council in accordance with Chapter VII of the Charter of the United Nations to set up the International Criminal Tribunal for the former Yugoslavia (ICTY).[41] The aim was to put an end to such crimes, to restore peace and security and to bring stability back to the region, as well as with a view of punishing those responsible for the atrocities.

For this purpose, the Statute of the 'International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991' was adopted.[42] The Statute gave the ICTY jurisdiction to prosecute those who were suspected to have violated international humanitarian law committed on the territory of the former Yugoslavia since 1991, to prosecute violations of Grave breaches of the Geneva Conventions of 1949 and other serious violations of the laws or customs of war, genocide, and crimes against humanity.[43] Although the jurisdiction of the ICTY and that of domestic courts were concurrent, the former was given primacy over the latter.[44] Furthermore, Article 29 placed a binding obligation on states to cooperate with the ICTY in its investigation and prosecution.

The ICTY was situation specific,[45] as it was a reaction of the international community to quell the atrocities and the gross violations of international

[40]Robert H Jackson, *The Reminiscences of Robert H. Jackson* (1947) available at The Robert H. Jackson Centre at https://www.roberthjackson.org/article/london-agreement-charter-August-8-1945/ (Accessed 26 July 2016).

[41]In accordance with its Chapter VII power under the United Nations Charter, on 22 February 1993 the United Nations Security Council put in motion the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in response to the widespread violations of international humanitarian law in the region of the former Yugoslavia.

[42]Security Council Resolution 827 (1993) UN Doc. S/RES/827 25 May 1993 adopted the Statute of the International Criminal Tribunal for the former Yugoslavia which established the ICTY.

[43]ICTY Statute, Articles 6 & 8.

[44]ICTY Statute, Article 9.

[45]Other Tribunals such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) were also

humanitarian law in the particular situation. Therefore, although it was a good and arguably a quick response, aimed at restoring peace and stability, the ICTY could not stop other atrocities that took place in other places. Thus, in 1994, Rwanda witnessed severe catastrophic violations of a scale that alarmed the entire world.[46] In reaction to this new violence the Security Council established the International Criminal Tribunal for Rwanda (ICTR) in 1994.[47] Apart from slight nuances, the Statute of the ICTR was similar to that of the ICTY. The jurisdiction *ratione temporis* and *ratione loci* of the ICTR relate to the crimes committed in Rwanda or neighbouring states between 1 January 1994 and 31 December 1994.[48] As was the case with the ICTY, the ICTR had concurrent jurisdiction with national courts but had primacy over domestic courts in relation to the crimes within its jurisdiction.[49]

Both the ICTY and ICTR have made huge contributions to the jurisprudence of international prosecutions of international crimes, however, as their names indicate, they were temporary measures to make up for the lack of will or ability of national courts.[50] Therefore, as the works of the ad hoc tribunals have gradually come to an end, a Residual Mechanism, which comprised of two branches, both in Arusha Tanzania and in The Hague Netherlands, was put in place to cover any future functions of both the ICTR and the ICTY respectively. The mandate of the Residual Mechanism includes the continuation of ad hoc activities, such as trials and appeals, protection of witnesses and sentencing.[51]

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established only for specific situations. See The Agreement between the United Nations Security Council and the government of Sierra Leone was for the SCSL 'to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'; signed on 16 January 2002. The ECCC was established by an agreement between the United Nations and the Government of Cambodia for the prosecution of 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979'. The Special Tribunal for Lebanon (STL) was established to hear one or more specific cases, namely 'persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons' and other connected cases; Article 1, Statute of the Special Tribunal for Lebanon, S/RES/1757.

[46]Prunier (1995).

[47]Security Council Resolution 955 (1994) UN Doc. S/RES/955. The Security Council expressed 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda'.

[48]ICTR Statute, Article 7.

[49]Ibid.

[50]Theodor Meron, 'From Ad Hoc Tribunals to the Residual Mechanism: A New Model of International Criminal Tribunals' being paper delivered at Fordham University School of Law New York 27 October 2012.

[51]Ibid.

1.2 The Rome Statute of the International Criminal Court

In addition to the ad hoc nature of the ICTY and ICTR and the costs of their maintenance, there had been discussions for over 50 years to establish a permanent international court.[52] This culminated in the adoption of the Rome Statute of the International Criminal Court by the plenipotentiaries of states in Rome Italy on 17 July 1998. The Rome Statute is based on the non-retroactivity principle, presumably, to avoid the *Nullum crimen sine lege* (no crime without law) maxim, for which the ad hoc tribunals were criticised, because arguably, the conducts for which the suspects of those situations were prosecuted and convicted were not criminalised at the time of their commission. Therefore Article 11 of the Rome Statute stipulates that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute, which is 1 July 2002.[53] The dominant theme of the Rome Statue is complementarity, which makes the ICC to exercise secondary jurisdiction where there is a lack of will or ability on the part of states to act.

However, complementarity presents several challenges. First, inactivity in conducting genuine domestic investigation and prosecutions is diverse and it is now linked to inability. There are capacity issues in connection with an absent or ineffective legislative framework for implementation, limited expertise on the part of investigators, prosecutors and judges, and the national judicial system's lack of resources. Therefore, states may have the will and intent to investigate and prosecute perpetrators of international crimes but may lack the resources, expertise and capacity, as well as functioning independent judiciaries. Second, there may be unwillingness on the part of states to conduct genuine domestic prosecutions where there is governmental complicity in the commission of the crimes. This will result in political interference in the judicial system and unwillingness to secure the arrest and surrender of the suspects.

In order to overcome some of the practical challenges, this book suggests that complementarity should be interpreted and applied as a mutually inclusive concept in which both the ICC and states share the responsibility of investigating and prosecuting international crimes. Mutual inclusivity of complementarity further implies that there must be an appropriate legal framework and the institutional capacity to investigate and prosecute international crimes domestically. This is critical to the international criminal justice system because, by their nature, international crimes often require the direct or indirect participation of a number of individuals in positions of governmental authority.[54] For example, the definition of torture in the Convention against Torture requires the involvement of a public

[52]Hunt (2004), pp. 56–70, 57.

[53]See also Articles 22–24 Rome Statute.

[54]Report of the International Law Commission, 'Overview of the Rome Statute' 1996 http://untreaty.un.org/cod/icc/general/overview.htm. Accessed 4 January 2010; Kleffner (2009), p. 2.