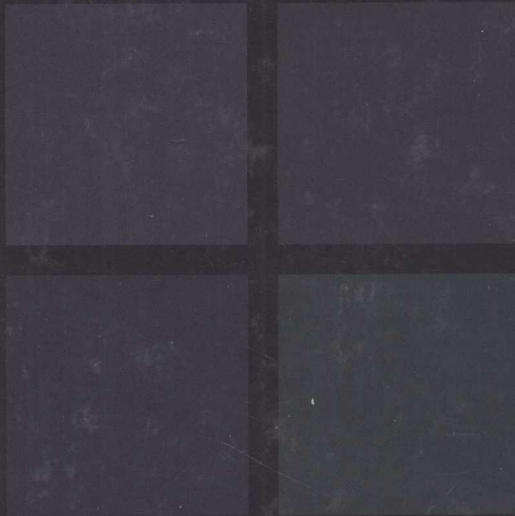


The International Criminal Court and Complementarity

From Theory to Practice

VOLUME I



EDITED BY

Carsten Stahn and Mohamed M. El Zeidy

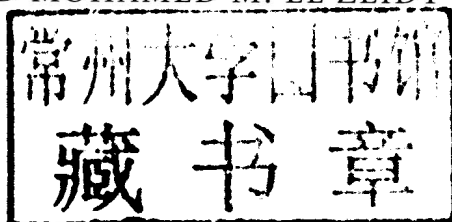
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This book is dedicated to all those victims who suffered harm from mass atrocities since the entry into force of the Statute of the International Criminal Court.

FOREWORD BY THE JUDGE SANG-HYUN SONG

The advent of the ICC as a permanent international criminal court to try and punish alleged perpetrators of the most serious crimes of concern to the international community as a whole is a crucial step forward in the architecture of international criminal justice. Nevertheless, as significant as the ICC is in the world today, we must remember that it is but one element in the broader global effort of eliminating impunity for international crimes. The role of the ICC in the framework of international criminal justice has accurately been referred to as that of a 'court of last resort'. The permanence of the ICC ensures that there will always be a forum where perpetrators of international crimes may be held accountable; but this does not mean that all such crimes can or will be prosecuted before the ICC. The Rome Statute is built upon the premise that states have the primary obligation to take measures at the national level to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished by investigating and prosecuting such crimes. Thus, national criminal jurisdictions are expected to take the lead in the fight against impunity.

The 'principle of complementarity' is one of the pillars of the system of international criminal justice created by the Rome Statute. While the principle of complementarity in its narrow sense refers to the admissibility of cases before the ICC, it has many other dimensions which are only beginning to be explored, such as 'positive' or 'proactive' complementarity. The present volume covers many of the different aspects of this fundamental principle. The authors offer insights into the theory and practice of complementarity, and the various contributions in this volume should lead to a better understanding of the principle of complementarity and its impact on the development of international justice. It is my hope that they will be a source of inspiration and provide invaluable insight for judges, practitioners, academics and researchers alike.

President of the International Criminal Court.

It is also hoped that this distinguished publication will enhance the understanding of the crucial role of states in the pursuit of justice for international crimes and in building a culture of accountability for these crimes. It is therefore with great pleasure that I present this volume, and I wish it the best of success.

FOREWORD BY PATRICIA O'BRIEN

In 1945, the peoples of the United Nations announced their determination to save succeeding generations from the scourge of war. To this end, they committed themselves to unite their strength to maintain international peace and security. The nations resolved to build an international society based on friendly relations between each other, rather than war. The United Nations was born. Half a century later, 120 states met at the Rome Conference. Recognizing that millions of children, women and men continue to be the victims of unimaginable and horrific crimes which threaten the peace and security of the world, they decided to establish the first permanent international criminal court. By so doing, they endorsed the fundamental principle which had been steadily emerging and consolidating over the preceding decades: the principle that justice is a fundamental component in any peace process.

The International Criminal Court is the very crystallization of our global culture of accountability. It enshrines the conviction, shared by the overwhelming majority of the members of the international community, that no sustainable peace can ever be built on foundations of impunity. The time has passed when we talk of peace versus justice and we now accept that justice is a necessary component of peace. The two are inseparable: they go together hand in hand. In this, the United Nations and the ICC share a common goal. At the same time, as a permanent institution, the ICC has the advantage of having a continuing deterrent effect on decision-makers at the highest level. Indeed, the system put in place by the Rome Statute is designed to reach those who bear the ultimate responsibility for the most serious crimes. As a court of last resort, the ICC provides a permanent and standing complement to national criminal accountability mechanisms. This complementarity principle is a cornerstone of the ICC regime. The fight against impunity rests upon the complementary efforts of domestic jurisdictions and the ICC. For this reason, the United

Legal Counsel, United Nations Under-Secretary-General for Legal Affairs.

Nations was a strong advocate for the establishment of an international criminal court since the early 1990s. It also played a key role in the Rome Conference and in ensuring its success. Since the Rome Statute entered into force and the Court came into being, the United Nations and the Court have built a firm relationship of cooperation which grows stronger year by year. The Secretary-General has and will continue to support and assist the ICC. Together, our two organizations are resolved to bring about the rule of law in the affairs of humanity and to ensure that the nations of the world and its peoples will cease to suffer from the scourge of war and from the atrocities which so often follow in its wake.

FOREWORD BY SILVIA A. FERNANDEZ
DE GURMENDI

‘Complementarity’ is probably the concept that best describes the nature of the International Criminal Court. However, as usually happens with fundamental concepts, its meaning is open to interpretations and the full range of its theoretical and operational implications is still unclear.

It would not be an over-statement to affirm that the early agreement on a complementarity regime was what made the Court possible. By the time delegations gathered in Rome, complementarity was the only major issue that we had largely managed to resolve – not because it was easy, but probably because it was such a key feature of the future institution that articulating an acceptable compromise on complementarity appeared as a precondition to making progress in the rest of the negotiating process.

A complementarity system was indeed essential to defining the relationship between the Court and national states and to determining the limits of their respective spheres of action. Internationalism versus national sovereignty was the inevitable tension underlying the discussions but an abstract debate was pragmatically avoided and delegations were able to bridge their differences by focusing on the practical implications of the principle of complementarity for the activities of the Court.

The concept of complementarity was not new and the main features of the regime eventually adopted for the International Criminal Court were already contained in the 1994 draft statute prepared by the International Law Commission. This draft included the idea of concurrent jurisdiction between international and national jurisdictions but left out the principle of primacy of international jurisdiction that had been granted by the Security Council to the ad hoc tribunals for the former Yugoslavia and Rwanda only a few years before. These tribunals could exercise their jurisdiction independently of the unavailability or effectiveness of local authorities to prosecute the suspected crimes. Instead, the regime finally agreed for

Judge, International Criminal Court, formerly Head of the Jurisdiction, Complementarity and Cooperation Division.

the permanent court combined recognition of national proceedings as a barrier to the admissibility of international jurisdiction with the power conferred to the Court to decide whether such proceedings were genuine.

Achieved by consensus after laborious negotiations, the complementarity regime was generally considered to strike a proper balance between opposing views. Still, many left Rome with the feeling that the complementarity provisions, which failed to recognize primacy to the international jurisdiction, were a necessary but regrettable concession to national sovereignty that could weaken the future institution to some extent.

With time, as the Court became operational and the treaty provisions started to be translated into actions, some of the old assumptions were challenged and the principle of complementarity was put into a different perspective. The practice of the *ad hoc* tribunals also demonstrated that the notions of primacy and complementarity were not mutually exclusive and that a cooperative relationship with national jurisdictions could be key to reducing the impunity gap. A novel and broader debate emerged.

Both *ad hoc* tribunals had to deal with amendments of their mandates that narrowed their jurisdictional reach to the most serious crimes, together with an imposition of dates for the completion of their proceedings by the Security Council. As a consequence, they adopted procedures and developed strategies for a division of labour with states concerned which included a transfer of cases to national courts and subsequent monitoring of domestic proceedings as well as cooperation with national prosecutors and the provision of expert advice to judicial authorities.

The increasing realization that the Court is also likely to deal with a small universe of the crimes committed has encouraged a deeper reflection on acceptable ways and means for the Court to promote national investigations and prosecutions in order to share the burden, to maximize the impact of its work and to discharge its preventative function. Furthermore, the initial referrals of situations to the Court by states in whose territories the alleged crimes were committed have contributed to the questioning of the traditional ideological mindset of sovereign states in confrontation with the Court. As a consequence, new discussions and controversies have arisen on the appropriate interpretation of the legal foundations of the system as well as on the potential limitations and risks of developing a cooperative relationship between the Court and the states concerned.

In other words, initially understood as a barrier, the principle of complementarity has begun to be perceived as an opportunity for the Court and states to join their efforts to combat impunity. New concepts, such as

'positive complementarity', have been coined to assist in this new debate. According to some, under this concept, the Court should not merely sanction state inaction or rely on its existence and authority to be an incentive for national actors to comply but should also deploy efforts to try to correct this scenario of state failure to investigate and prosecute in a proactive way.

A positive approach to complementarity has a lot of appeal as it translates the concept of a system of justice where all actors, national and international, interact in a joint effort against impunity. The experience of the ad hoc tribunals offers examples of practical ways and methods of developing a partnership between international and national jurisdictions, but there is not yet enough clarity with regard to how positive complementarity could be applied in practice in a more general context.

How much should and could the Court do itself to remedy the lack of capacity or lack of motivation of the state concerned? How far should and could the Court engage with national, regional or international actors to secure or strengthen the justice component in conflict resolution strategies? Implementation remains a challenge, both in terms of law and policy.

There are no simple answers for these and other questions and the debate has enormous value as it encourages all stakeholders to explore the most effective ways to make optimal use of the Court and to bolster national capacity and readiness to investigate and prosecute the perpetrators of the worst crimes.

I am thus honored to introduce this timely publication, which will become an essential tool for all those that wish to take part in or understand this ongoing debate. This collective work of experts and practitioners tackles all aspects of the complementarity regime. It provides a thorough analysis of its provisions and their interpretation in the first years of practice of the Court, a review of the cooperative relationship with states developed by the ad hoc tribunals and a deep reflection and fresh perspectives on the broader systemic and operational implications of the principle of complementarity. By so doing, it raises as many new questions as it answers, fueling a discussion that will be central to understanding the challenges of international criminal justice in the coming years.

For many of these questions there will probably never be a definite and final answer as they relate, after all, to the essence of the International Criminal Court, the nature of its mandate and its role in the world. And the perspectives on them will necessarily evolve in order to adapt to the evolving state of international relations.

ABBREVIATIONS

ABA-CEELI	American Bar Association Central European and Eurasian Law Initiative
AC	Appeals Chamber
ACIDH	Action contre l'impunité pour les Droits Humains
AFDL	Alliance des Forces Démocratiques pour la Libération du Congo/Zaire
AI	Amnesty International
AMIS	African Union Mission in Sudan
APIC	Agreement on the Privileges and Immunities of the International Criminal Court
ARMs	Alternative Resolution (Justice) Mechanisms
ASADHO	Association Africaine de Défense des Droits de l'Homme
ASP	Assembly of States Parties
AU	African Union
BiH	Bosnia-Herzegovina
BONUCA	United Nations Peace-building Office in the Central African Republic
CAB	Records of the Cabinet Office
CADHI	Committee of Legal Advisors on Public International Law
CAR	Central African Republic
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CID	Criminal Investigations Department
CICJ	Committee on International Criminal Jurisdiction
CIPEV	Commission of Inquiry on Post Election Violence (also known as 'Waki Commission')
CLF	Criminal Law Forum
CLPs	customary local procedures

CNDP	Congrès National pour la Défense du Peuple
CoH	Cessation of Hostilities
Court of BiH	Court of Bosnia-Herzegovina
CP	Código Penal
CPA	Comprehensive Peace Agreement
CPN-M	Communist Party of Nepal (Maoist)
CPP	Código de Procedimiento Penal
CRA	Community Reconciliation Agreement
CRP	Community Reconciliation Process
DDR	Disarmament, Demobilization and Reintegration
DFID	Department for International Development
DPP	Director of Public Prosecutions
DRC	Democratic Republic of the Congo
EC	European Commission
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EDF	European Development Fund
ELN	National Liberation Army
EU	European Union
EUNAVFOR	European Union-led Naval Force
FAO	Food and Agriculture Organization
FARC	Revolutionary Armed Forces of Colombia
FARDC	Military of the Democratic Republic of Congo
FDLR	Democratic Forces for the Liberation of Rwanda
FGN	Fiscalía General de la Nación
FICHL	Forum for International Criminal and Humanitarian Law
FIDH	Federation Internationale des ligues des Droits de l'Homme (International Federation for Human Rights)
FMLN	Farabundo Martí National Liberation Front
FNI	Front des Nationalists et de Intégrationnistes
FPA	Final Peace Agreement
FPLC	Patriotic Force for Congo Liberation
FRPI	Force de Résistance Patriotique en Ituri
GA Res.	General Assembly Resolution
GAOML	grupos armados organizados al margen de la ley (groups operating outside the law)
GAOR	General Assembly Official Records
GoS	Government of Sudan
GoU	Government of Uganda
HRC	Human Rights Committee

HRLC	Human Rights Law Centre
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
ICA	International Crimes Act
ICAO	International Civil Aviation Organization
ICB	International Crimes Bill
ICC	International Criminal Court
ICC Bill	<i>International Criminal Court Bill</i>
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICLS	International Criminal Law Society
ICRC	International Committee of the Red Cross
ICT	International Criminal Tribunal
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	ICTY Rules of Procedure and Evidence
IDF	Israeli Defence Forces
IDMC	Internal Displacement Monitoring Centre
IDPs	internally displaced persons
IEU	Information and Evidence Unit
IHL	international humanitarian law
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ILM	International Legal Materials
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCCD	Jurisdiction, Complementarity and Cooperation Division
JCE theory	joint criminal enterprise theory
JLOS	Justice, Law and Order Sector
LCDH	Ligue Centrafricaine des Droits de l'Homme
LCP	Law and Contemporary Problems
LEN Project	Law Enforcement Network Project
LIA	London International Assembly
LJIL	Leiden Journal of International Law
LRA	Lord's Resistance Army
LTTE	Liberation Tigers of Tamil Eelam
MLAA	Madripur Legal Aid Association
MLC	Mouvement de Libération du Congo
MONUC	United Nations Mission DR Congo
NGO	non-governmental organizations

NILD	National Implementing Legislation Database
NRA/M	National Resistance Army/Movement
NSIS	National Security Intelligence Service
OAG	Organized Armed Groups
OCDH	Observatoire Centrafricain des Droits de l'Homme
OCIJ	Office of Chief Immigration Judge
OCODEFAD	Organisation pour la compassion et le développement des familles en détresse
OCRB	Office for the Repression of Banditry
ODM	Orange Democratic Movement (Kenya)
OHCHR	Office of the High Commissioner for Human Rights
OHR	Office of the High Representative
ONUSAL	United Nations Observer Mission in El Salvador
OPCD	Office of Public Council for the Defense
OPCV	Office of Public Counsel for Victims Organization
OSCE	Organisation for Security and Co-operation in Europe
OSJI	Open Society Justice Initiative
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
PIC	Peace Implementation Council
PNO	Party of National Unity (Kenya)
POBiH	Bosnia-Herzegovina Prosecutor's Office
PrepCom	International Criminal Court Preparatory Commission
PTC	Pre-trial Chamber
PUSIC	Parti de l'Unité et la Sauvegarde de l'Intégrité du Congo
R2P	Responsibility to Protect
RAID	Rights and Accountability in Development
REJUSCO	EU Program for the Restoration of the Judicial System in Eastern Congo
RCN	Réseau des Citoyens Network
RFA	requests for assistance
RMP	Royal Military Police
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
RTL	Radio Television Libre des Milles Collines Sarl
SADC	South African Development Community
SC	Security Council
SC Res.	Security Council Resolution
SCCED	Special Criminal Court on the Events in Darfur
SCSL	Special Court for Sierra Leone
SDHC	Special Division of the High Court
SPSC	Special Panel for Serious Crimes

STK	Special Tribunal for Kenya
STL	Special Tribunal for Lebanon
StPO	Strafprozessordnung
SWGCA	Special Working Group on the Crime of Aggression
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
UCICC	Ugandan Coalition on the International Criminal Court
UJP	Unit for Justice and Peace
UN GAOR	United Nations General Assembly Official Records
UN SCOR	United Nations Security Council Official Records
UNAKRT	United Nations Assistance to the Khmer Rouge Trials
UNAMID	African Union/United Nations Hybrid Operation in Darfur
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIIIC	UN International Independent Investigation Committee
UNMBiH	UN Peacekeeping Mission in Bosnia-Herzegovina
UNMIK	United Nations Interim Administration Mission in Kosovo
UNPF	United Nations Populations Fund
UNRWA	United Nations Relief and Works Agency
UNSC	United Nations Security Council
UNTAET	UN Transitional Administration in East Timor
UNWCC	United Nations War Crimes Commission
UP	Union Parishad
UPC	Uganda People's Congress (Political Wing)/Union des Patriotes Congolais
UPDA	Uganda People's Democratic Army
UPDF	Uganda People's Defence Force
UVF	Uganda Victims' Foundation
VCLT	Vienna Convention on the Law of Treaties
VPRS	Victims Participation and Reparations Section
VRS	Army of Republika Srpska
WCC	War Crimes Court
WCD	War Crimes Division
WCRO	War Crimes Research Office
WTO	World Trade Organization