



Universiteit
Leiden
The Netherlands

Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm

Bakare, S.S.

Citation

Bakare, S. S. (2024, November 6). *Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm*. Retrieved from <https://hdl.handle.net/1887/4107988>

Version: Publisher's Version

License: [Licensed under Article 25fa Copyright Act/Law \(Amendment Taverne\)](#)

Downloaded from: <https://hdl.handle.net/1887/4107988>

Note: To cite this publication please use the final published version (if applicable).



Universiteit
Leiden

**REGIONAL COMPLEMENTARITY IN INTERNATIONAL
CRIMINAL LAW: MAKING SENSE OF THE FOUR-
TIERED JUSTICE PARADIGM**

Seun Solomon Bakare

Regional Complementarity in International Criminal Law: Making Sense of the Four-Tiered Justice Paradigm

PROEFSCHRIFT

ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op woensdag 6 november 2024
klokke 10.00 uur

door Seun Solomon Bakare
geboren te Lagos, Nigeria
in 1983

Promotor: prof. dr. C. Stahn

Co-promotor: prof. dr. S. Vasiliev

Promotiecommissie: prof. dr. L.J. van den Herik

prof. dr. G. Kemp (University of the West of England, UK)

prof. dr. H.G. van der Wilt (University of Amsterdam)

dr. G. Pinzauti

dr. R.W. Heinsch

ACKNOWLEDGEMENTS

This project would not have been possible without the unwavering support and encouragement of numerous colleagues, friends, and family members. First, I extend my deepest gratitude to Professors Carsten Stahn and Sergey Vasiliev for their steadfast support and invaluable supervision throughout this research. I am also profoundly thankful to the esteemed members of the Doctorate Committee - Prof. Larissa van den Herik, Prof. Gerhard Kemp, Prof. Herman van der Wilt, Dr. Robert Heinsch, and Dr. Giulia Pinzauti - for their willingness to serve on the committee, and their insightful contributions. I owe a special debt of gratitude to Prof. Kees Waaldijk for his regular advice during the Ph.D. The extended Ph.D. community at the Grotius Centre and beyond has been a source of immense support. In particular, I am grateful to Ciara Laverty and Paula Baldini for their guidance along this journey.

Immense gratitude also to my mentor, friend and brother, H.E. Mohammed Bello Adoke (SAN) CFR, former Attorney General of the Federation and Minister of Justice of the Federal Republic of Nigeria, whose sponsorship and generosity made this journey possible. Without him, this project would not have started, as it was he, in 2016, who first believed in me and introduced me to my promotor.

My life is blessed with many brothers who all played significant roles in my Ph.D. journey: Prof. Olufemi Elias, Dr. Ayodele Akenroye, Dr. Mamadou Hébié, Dr. Tshepo Madlingozi, Mr. Norman Taku and others too numerous to mention. Prof. Dire Tladi, Judge of the ICJ, stands tall among all my brother-mentors. It was he, who nearly a decade ago, provided the recommendation letter that launched my Ph.D. journey.

Family is everything. To my amazing kids and their mum, who kept faith with me during these eight years, I did this for you kids, and for generations yet unborn. To my father, who sadly passed on while I was completing this, something tells me you are smiling at me for finishing what I started. To NCB, in whose regime this came through, my love is boundless. To Dayo, Debo and Leke, my siblings in whom I am well pleased - thank you for the years of sacrifice and love in all ramifications. This journey was a collective effort, and my heart is full of gratitude for each of you.

per adua ad astra

Table of Contents

INTRODUCTION.....	1
1. MAIN THEMES OF THE STUDY	1
2. FRAGMENTATION OF INTERNATIONAL LAW AND LEGAL PLURALISM	3
3. THE REGIONALIZATION OF INTERNATIONAL CRIMINAL JUSTICE	8
4. PROBLEM STATEMENT	11
5. RESEARCH QUESTIONS AND STRUCTURE	11
6. RESEARCH METHODOLOGY AND APPROACH	13
7. CONTRIBUTION TO KNOWLEDGE	14
 CHAPTER 1. HISTORICAL PERSPECTIVES ON THE NEGLECT OF REGIONAL COMPLEMENTARITY	 18
INTRODUCTION.....	18
1. ORIGIN OF COMPLEMENTARITY	19
1.1. EARLIEST ATTEMPTS AT ENFORCING ‘INTERNATIONAL CRIMINAL LAW’	20
1.2. POST WWI COMPLEMENTARITY ATTEMPTS	24
1.3. PROSECUTION OF INTERNATIONAL CRIMES AFTER WWII.....	27
1.4. COMPLEMENTARITY IN THE DRAFT STATUTES AND THE TWO COMMITTEES.....	30
1.5. COMPLEMENTARITY AT THE ROME CONFERENCE.....	35
2. CONTEXTUALISING THE NEGLECT OF REGIONALISM IN ICL HISTORY	39
2.1. ICL’S SLOW PACE OF DEVELOPMENT AND LIBERAL FOUNDATIONS.....	40
2.2. UNIVERSALITY AND COSMOPOLITANISM OF INTERNATIONAL CRIMINAL LAW	42
2.3. PERCEPTION OF ICL AS AN ENEMY OF SOVEREIGNTY.....	45
2.4. REGIONAL JUS COGENS	46
CONCLUSION.....	49
 CHAPTER 2. NEGLECT OF REGIONAL COMPLEMENTARITY IN THE JURISPRUDENCE AND PRACTICE OF THE ICC.....	 50
INTRODUCTION.....	50
1. ICC JURISPRUDENCE ON COMPLEMENTARITY	51
1.1. COMPLEMENTARITY AS A RESTRAINING TOOL IN THE PERIOD BEFORE THE SHIFT	52
1.2. HOW THE OTP SIGNALS THE SHIFT	53
1.3. HOW THE CHAMBERS’ JURISPRUDENCE ON COMPLEMENTARITY RESTRAINS THE SHIFT.....	54
2. ICC’S EXTENSION OF JUDICIAL CONSTRUCTS AND JURISDICTIONAL OVERREACH	60
3. BURDEN SHARING AND SELF-REFERRAL AS OTP POLICIES	63
3.1. BURDEN-SHARING	64
3.2. SELF-REFERRAL	65
CONCLUSION.....	70

CHAPTER 3. THE RISE OF HYBRIDITY AND REGIONALISM AS NEW ACCOUNTABILITY MODELS72

INTRODUCTION.....	72
1. DIVERSE JUSTICE ENFORCEMENT MODELS.....	73
1.1. ICL ENFORCEMENT BEFORE NATIONAL AND INTERNATIONAL MECHANISMS.....	75
1.2. THE NEW WAVE OF HYBRIDITY	78
1.3. THE RISE OF NEW HYBRID TRIBUNALS	80
1.4. TYPOLOGY OF THE NEW HYBRID TRIBUNALS	81
1.5. HYBRID’S LEGAL BASIS, LEGITIMACY AND JUSTIFICATION.....	91
1.6. STRANDS OF REGIONALISM AND MODELS OF HYBRIDITY	96
CONCLUSION.....	98

CHAPTER 4. REGIONAL HYBRIDITY: THE EAC AND THE KSCSPO.....99

INTRODUCTION.....	99
1. HISTORICAL BACKGROUND ON REGIONAL ENFORCEMENT OF ICL	100
2. ICL DEVELOPMENT IN SPECIFIC REGIONS.....	101
3. THE EXTRAORDINARY AFRICAN CHAMBERS (EAC).....	109
3.1. BACKGROUND TO THE ESTABLISHMENT OF THE EAC.....	110
3.2. ESTABLISHMENT, STRUCTURE, JURISDICTION AND CRIMES.....	115
3.3. LEGAL STATUS OF THE EAC	119
3.4. LEGITIMACY OF THE EAC TRIBUNAL	122
3.5. COMPLEMENTARITY AND THE EAC	123
3.6. THE HABRÉ TRIAL AND THE LESSONS LEARNED	125
3.7. PROMOTING REGIONAL COMPLEMENTARITY	128
4. THE KOSOVO SPECIALIST CHAMBERS AND SPECIALIST PROSECUTOR’S OFFICE (KSCSPO)...129	
4.1. BACKGROUND AND ESTABLISHMENT.....	129
4.2. LEGAL STATUS, STRUCTURE AND COMPOSITION	130
4.3. JURISDICTION, CRIMES AND APPLICABLE LAWS	131
4.4. PERCEPTION OF LEGITIMACY	131
4.5. HOW KSCSPO PROMOTES REGIONAL COMPLEMENTARITY	132
CONCLUSION.....	133

CHAPTER 5. PRACTICE OF REGIONAL COMPLEMENTARITY IN THE FULLY-INDEPENDENT STRAND OF REGIONALISM: THE MALABO PROTOCOL..... 135

INTRODUCTION.....	135
1. AFRICA’S INTERNATIONAL JUSTICE PROJECT AND THE ROADMAP TO THE MALABO PROTOCOL 135	
2. JURISDICTION, STRUCTURE AND CRIMES IN THE MALABO PROTOCOL.....	143
2.1. JURISDICTION.....	143
2.2. STRUCTURE OF THE PROPOSED COURT.....	145
2.3. CRIMES COVERED IN THE PROTOCOL.....	146

2.4. INNOVATIVE CRIMES JURISDICTION OF THE COURT	150
3. CERTAIN PROBLEMATIC ASPECTS OF THE MALABO PROTOCOL.....	161
3.1. IMMUNITY PROVISIONS IN THE PROTOCOL.....	161
3.2. CORPORATE CRIMINAL RESPONSIBILITY IN THE MALABO PROTOCOL	165
CONCLUSION.....	170

CHAPTER 6. REGIONAL COMPLEMENTARITY IN OTHER NOTIONS OF COMPLEMENTARITY172

INTRODUCTION.....	172
1. DEFINING COMPLEMENTARITY.....	173
2. EXISTING THEORIES OF COMPLEMENTARITY AND REGIONAL COMPLEMENTARITY.....	175
2.1. POSITIVE COMPLEMENTARITY.....	176
2.2. CLASSICAL OR NEGATIVE COMPLEMENTARITY.....	180
2.3. PROACTIVE COMPLEMENTARITY	181
2.4. HORIZONTAL COMPLEMENTARITY	183
2.5. CONSTRUCTIVE COMPLEMENTARITY	186
2.6. RADICAL COMPLEMENTARITY	188
3. REGIONAL COMPLEMENTARITY AND OTHER SUPPORTING NOTIONS OF COMPLEMENTARITY ..	190
4. EXPLORING THE CLASSICAL AND POSITIVE DIMENSIONS OF REGIONAL COMPLEMENTARITY ..	191
4.1. CLASSICAL NOTION OF REGIONAL COMPLEMENTARITY	192
4.2. POSITIVE DIMENSION OF REGIONAL COMPLEMENTARITY	193
5. OTHER ORGANIZING PRINCIPLES FOR POSITIVE REGIONAL COMPLEMENTARITY.....	196
5.1. MUTUAL DEFERENCE.....	196
5.2. MONITORING AND REGULATION	199
5.3. COLLABORATION AND COOPERATION	200
CONCLUSION	202

CHAPTER 7. REGIONAL COMPLEMENTARITY AND THE RULES OF INTERPRETATION203

INTRODUCTION.....	203
1. REGIONAL COMPLEMENTARITY: A DESCRIPTION	204
2. INTERPRETATION OF STATUTES- THE VCLT AND THE ROME STATUTE	205
2.1. LITERALISTS VS PRAGMATISTS.....	207
2.2. THE FUNCTIONALIST OR TELEOLOGICAL INTERPRETATION OF STATUTES.....	209
2.3. THE EXPANDED INTERPRETATION OF STATUTE	212
2.4. THE PRINCIPLE OF INTERNATIONAL DELEGATION	214
2.5. THE OVERRIDING BENEFITS APPROACH.....	217
3. RELATIONSHIP DIMENSIONS OF REGIONAL COMPLEMENTARITY.....	218
3.1. REGIONAL COURT AND NATIONAL COURTS	218
3.2. REGIONAL COURT AND A SIMILAR REGIONAL COURT	219
3.3. REGIONAL COURT AND THE ICC.....	220
3.4. REGIONAL COURTS AND SUB-REGIONAL COURTS	221
3.5. REGIONAL COURTS AND HYBRID TRIBUNALS – THE CASE OF THE SCCCAR	223

3.6. CONCURRENT JURISDICTIONS.....	224
CONCLUSION	225

CHAPTER 8. RESOLVING CHALLENGES TO THE APPLICATION OF REGIONAL COMPLEMENTARITY: THE ICC AND THE AFRICAN CRIMINAL CHAMBER..... 228

INTRODUCTION.....	228
1. JURISDICTIONAL OVERLAP AND COMPETING OBLIGATIONS BETWEEN THE ICC AND THE ACC 228	
1.1. ADDRESSING JURISDICTIONAL OVERLAP AND COMPETING OBLIGATIONS.....	232
1.2. COMPLEMENTARITY: THE ACC AND THE ICC	235
1.3. AFRICAN COURT: PROMOTING REGIONAL COMPLEMENTARITY?	246
CONCLUSION.....	247

CONCLUSION..... 249

1. BEYOND THE STATE-OF-THE-ART	249
2. MAKING SENSE OF THE FOUR-TIERED JUSTICE PARADIGM: LOOKING BEHIND	253
3. MAKING SENSE OF THE FOUR-TIERED SYSTEM: LOOKING AHEAD	255
4. THINKING AHEAD: THE PROPOSED SPECIAL TRIBUNAL FOR AGGRESSION IN UKRAINE	258

SUMMARY 263

SAMENVATTING (DUTCH SUMMARY)..... 265

BIBLIOGRAPHY..... 267

CURRICULUM VITAE..... 323