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X-raying the evolutionary trend vis-à-vis the prospects of the principle of individual criminal responsibility under international law

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Abstract
The principle of individual criminal responsibility has evolved over centuries, both at the municipal level and at the international plane, thus, giving rise to mammoth statistics of individuals who have been prosecuted and sentenced both by municipal courts and international courts or tribunals, over commission of crimes. It is against this backdrop that this paper has written to examine and appraise the chronological order of the evolutionary realities of the principle of individual responsibility. It also examined the nature and dynamics of the principle as well as the prospects thereof. It found out that despite the long history and popularity of the principle, it has not been able to totally obliterate crime and criminality from the global society. It ends with some concluding remarks and recommendations.

Keywords: evolution, timeline, prospects, individual, criminal, responsibility, recommendations

Introduction

The idea of "A Just World Under Law " in International Law implies the desire of international lawyers to pose fundamental questions about the world we live in and the role of International Law in shaping that world [1]. Part of what may inform whether human beings will eventually live in a just world under law depends on whether modern International Law can reconcile its fundamentally state-centric nature with the increased and increasing participation of individuals and non-state actors in the processes of International Law making, while at the same time subjecting those same actors to some form of accountability or responsibility under the international legal regime [2].

In previous approaches to International Law, individuals were portrayed as lacking in any international capacity [3]. Thus, they neither enjoyed rights nor possessed any duties. In other words, individuals were regarded as objects, rather than subjects of International Law, which is a discipline that exclusively governs relations between and among states. The logical consequences of this doctrinal attitude was that whatever happened to the individual within the confines of the state in respect of its own nationals "remained its own internal affair, an element of its autonomy, and a matter of its domestic jurisdiction" [4]

Indeed, concern for individuals by International Law seeped into the international system as far back as the 18th and 19th centuries and such interest led to the emergence of a fledging international legal framework exhibiting concern for the human being by circumscribing the freedom of action of the other states in respect of specific categories of individuals such as diplomats and foreign nationals whose daily business brought them into contact with other states [5].

Recently, eminent authorities in the field of International Law raised the question whether it would not be a sound and progressive or even a necessary process to develop International Law in the direction of recognition of the responsibility of the individual [6]. If it were really true that only the state is bound by and responsible under International Law, the individual action would be of no concern to the law of nations. This study would examine that if state alone is held responsible for acts of an individual, the punishment for the crime will not be felt by the criminal himself, hence, in practice, the principle of effective responsibility is denied.

While International Law had always prescribed sanctions for unlawful or outrageous conducts by entities subject to it, the world seems to be at the threshold of a new era where not only states and abstract entities would engage international responsibility but also individuals, especially Heads of state or government as well as their agents or privies who would now be liable for heinous crimes committed by them against their nationals or foreigners without regard to time or space [7].

The global trend is that international crimes such as crimes against humanity and other egregious violations of international human rights and humanitarian law, including war crimes and genocide must be adequately redressed. The cardinal principle has been that of regulating, reducing and limiting man's inhumanity to man [8]. In the global community we inhabit, the *domaine reserve* or area of exclusive domestic jurisdiction has continued to dwindle so much so that today's dictators, tyrants and cruel rulers have nowhere to hide. Unlike in the past when the plea of domestic jurisdiction could avail oppressive regimes whenever they were confronted with allegations of human rights violations at international fora, the contemporary world no longer tolerates infringements of internationally-guaranteed minimum standards of human rights [9].

It has taken centuries for the principle of individual criminal responsibility to evolve in national law. The concept that a person is only culpable to the extent of his own free will or guilty mind can be traced to the canonical law and the insights

of Italian jurists in the Renaissance [10]. Today, the national concept of individual criminal responsibility is represented by the recognition of the concept's emancipation from collective responsibility, the release from immunity of state officials who previously relied on the Act of State doctrine [11]. This is a desk-based research which relied on both primary and secondary sources of data, which were subjected to contentual and contextual analysis.

Timeline

This study identified three chronological periods in the evolutionary trend and development of individual criminal responsibility under International Law.

Period Before 1945

In previous approaches to International Law, states were perceived as hermetically sealed entities, and only inter-state relations were deemed proper matters for international regulations [12]. Individuals were classified as potential objects rather than subjects of international law and consequently lacking any international capacity [13]. The logical consequence of this doctrinal attitude was that whatever happened to the individual within the confines of the state in respect of its own nationals "remained its own affair, an element of its autonomy, a matter of its domestic jurisdiction" [14]. In practice, however, as Henkin observed, "neither the international political system nor International Law ever closed out totally what went on inside a state and what happened to individuals within a state" [15].

Although individuals have limited international legal personality, contemporary International Law increasingly recognizes that an individual may possess both international rights and duties [16]. The greater awareness of human rights over the last 60 years has raised consciousness and prompted the guarantees of human rights for individuals through international and regional instruments [17]. At the same time, International Law imposes duties directly on individuals [18]. The most important of these duties include: [19] (a) The duty to refrain from acts of piracy which is defined as a crime *humanis generis;* and (b) The duty to refrain from committing crimes against peace, crimes against humanity, war crimes and genocide. Hijacking and associated acts are now considered to be crimes of *quasi*-universal jurisdiction as created by convention [20].

Simultaneously, it has been increasingly recognized that individuals may be held responsible for certain conduct, and the development of international individual criminal responsibility is a notable feature of International Law today [21].

A sure precedent in the international criminal law of individuals being held criminally responsible by an adhoc international tribunal is the case of Peter Von Hagenbach in the year 1474 [22]. Charles the Bold, Duke of Burgundy (1433 – 1477), known to his enemies as Charles the Terrible, had placed Hagenbach at the helm of the government of the fortified city of Breisach, on the Upper Rhine [23]. The governor, overzealously following his master's instructions, introduced a regime of arbitrariness, brutality and terror so as to reduce the population of Breisach to submission. Murder, rape, illegal taxation and wanton confiscation of private property became generalized practices. All these violent acts were also committed against inhabitants of the neighboring territories, including Swiss merchants on their way to the Frankfurt fair.

A large coalition (Austria, France, Bern and the towns and knights of the Upper Rhine) moved to put an end to the ambitious goals of the powerful Duke (who also wanted to become King and even gain imperial crown). The siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach's defeat as a prelude to Charles death in the battle of Nancy in 1477 [24].

Already, the year before Charles was killed, the Archduke of Australia, under whose authority Hagenbach was captured, had ordered the trial of the bloody governor.

Instead of remitting the case to an ordinary court, an ad-hoc tribunal was set up, consisting of 28 judges of the allied coalition states and towns. In his capacity as the sovereign of the City of Braisach, the Archduke of Austria appointed the Presiding Judge. Considering the State of Europe at the time – the Holy Roman Empire had degenerated to the point where relations among its different entities had taken on a properly international nature, and Switzerland had become independent (even though this had not yet been formally recognized) – it can be concluded that the tribunal was a real international one [25].

At the trial, a representative of the Archduke acted as Plaintiff, stating that Hagenbach had "trampled under foot the laws of God and man". More precisely, the defendant (Hagenbach) was charged with murder, rape, perjury and other *malefacta* including orders to his non-German mercenaries to kill the men in the houses where they were quartered so that women and children would be completely at their mercy. The tribunal found Hagenbach guilty, and deprived him of his rank of knight as well as related privileges (because he had committed crimes which he had the duty to prevent). Hagenbach was executed following the Marshal's order: "Let justice be done" [26].

This case is extremely interesting for several reasons. While it is not easy to establish that the acts in question were war crimes, since most of them were committed before the formal outbreak of hostilities, at the time (as today) the borderline between war and peace were difficult to distinguish and were "fluid" than in later centuries. In any case, Breisach had to be considered as occupied territory. Moreover, even if it is difficult to classify these acts as war crimes, they can nevertheless be considered as early manifestations of what are now known as "crimes against humanity" [27].

Following World War 1, a Commission of the Peace Conference reported that the war carried on by the Central Powers was conducted by barbaric methods in violation of the established laws and customs of war and the elementary laws of humanity [28]. According to the Commission,

> *All persons belonging to enemy countries, however high their positions may have been, without distinction of rank, including Chiefs of states, who have been guilty of offences against the laws and customs of war or the laws of humanity and are liable to prosecution* [29].

The Allies attempted via the Treaty of Versailles of 28 June, 1919, to try and punish individuals responsible for violations of the laws and customs of war" [30]. Articles 227 – 230 of the Versailles Treaty dealt with the issue of prosecuting the German Emperor Kaiser Wilheim II and other "persons

accused of having committed acts in violation of the laws and customs of war" [31]. The Allied powers agreed to establish" a Special Tribunal" composed of judges appointed by the United States, Britain, France, Italy and Japan to try the accused persons. In its decision, the tribunal would be guided by the highest motives of international policy, with a view of vindicating the solemn obligations of international undertakings and the validity of international morality [32].

Before he could be tried, Emperor Wilheim made his way to Netherlands where he was granted political asylum. A request to extradite him was refused and he eventually died there in 1941 [33]. The German Government resisted surrendering any of the accused. The Allied leaders realized that forcing Germans to co-operate in the surrender of German military personnel and politicians involved in war crimes would destabilize the German government and would likely bring about a Bolshevic revolution in the country [34]. A compromise was, therefore, reached to try 854 suspects of a list prepared by Britain, France, Belgium, Italy, Poland, Romania and Yugoslavia. These suspects were to be tried in Germany by the Supreme Court of the Reich in Leipzig. After other negotiations, the Allied powers agreed to reduce the list to 45 individuals. Even then, by the end, only 12 individuals were accused, and 6 were convicted [35].

On 27 September, 2016, the International Criminal Court entered conviction and sentence that marked several firsts in the history of the Court. It found the accused – Ahmad Al-Faqi Al Mahdi, guilty of the war crime of intentionally directing attacks against buildings dedicated to religious, education, art, science, or charitable purposes, historical monuments (in violation of Article 8(2)(e)(iv) of the Rome Statute). He was sentenced to 9 years imprisonment. Al-Mahdi's conviction is not only the first at the ICC arising from a guilty plea, but it is also the first for destruction of cultural heritage. AL-Mahdi destroyed nine mausoleums and mosque of Sidi Yahia during 2012 non-international conflict in Mali [36].

Period Between 1945 - 1990

After World War II, the idea of international justice was given a new impulse with the determination of the main Powers fighting the Nazi-regime to punish all "those German officers and men as well as members of the Nazi party who have been responsible to have taken a consenting part in… atrocities, massacres, and executions" [37]. The major war criminals of the European Axis countries were to be tried by an International Military Tribunal (IMT), which was to be established in Nuremberg [38]. Twenty four men of the political and military leadership of the Third Reich were initially considered to stand trial [39], but in the end, 22 accused [40] were prosecuted for crimes of waging war of aggression, war crimes, and of crimes against humanity [41] of whom one was tried in absentia [42]. Among these, 12 were convicted to death by hanging [43], seven were convicted to sentences ranging from 10 years to life imprisonment [44] and 3 were acquitted [45].

Nuremberg's International Military Tribunal represents the modern starting point and watershed at international level in holding individual criminals responsible for international crimes; it ended the Act of State doctrine previously claimed as immunity by government officials to escape criminal liability for international crimes.

Again, the main legacy of Nuremberg is the unambiguous acceptance, in contemporary International Law, of the idea that individuals may be held responsible for egregious crimes committed in the name of a state policy.

The transformed world vision is perhaps best reflected in the well-known statement of Justice Jackson during the Nuremberg proceedings, when he noted that:

> *Crimes against international law are committed by men, and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced* [46].

The principles of individual criminal responsibility under International Law was further applied in the trial of the Japanese political and military leadership by the International Military Tribunal for the Far East in Tokyo (IMTFE), which albeit not being established on the basis of an international agreement, had a function similar to the IMT [47].

Later the UN International Law Commission (ILC) under the mandate of the General Assembly determined, by formulating the Nuremberg principles, that:

> Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment [48]

Period After 1990 to Date

The second generation of International Criminal Tribunals carried forward the concept of individual culpability with respect to international criminal law in the establishment of ad-hoc international tribunals in the 1990s. In 1993, following the widespread atrocities in Bosnia, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Hague, triggering a decade of multilateral court building [49]. When, a year later, ethnic Hutus slaughtered hundreds of thousands of Tutsis in Rwanda, the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR), locating it in Arusha, Tanzania [50]. The Security Council directed both so-called ad-hoc tribunals to prosecute war crimes, crimes against humanity and genocide. During this period of court building, the United Nations convened governments and NGOs to establish a permanent international criminal court with global jurisdiction. These negotiations led to a treaty creating the International Criminal Court (ICC) [51].

The United Nations has also established hybrid tribunals in which international and domestic investigators, prosecutors, judges, defense counsel, and other judicial sector professionals try criminal cases together [52]. For instance, the Special Court for Sierra-Leone, based in Freetown since 2002; the Extraordinary Chambers in the Courts of Cambodia (also known as the Khmer Rouge Tribunal), based in Phnom Penh since 2006, bring together international and domestic personnel and law in single institutions, prosecuting the most senior officials responsible for atrocities, such as former Liberian President Charles Taylor and the leading associates of Khmer Rouge leader Pol-Pot, respectively.

The foregoing evolutionary trends of individual criminal responsibility under International Law ultimately aims at putting an end to the dark era of impunity in the global village we inhabit. The emergence of global value systems of democracy, good governance and the rule of law have led to the growth of international (and transnational) institutions to

offer realization of, guidelines to, and the enforcement of those values. These global institutions and values seek to build on local practices and institutions in order to generate domestic consensus, credibility and acceptability [53]. These value system and the need for their enforcement have led to the creation of an international justice system whose *raison d'etre* is to bring an end to the culture of impunity by both state and non-state actors who violate human rights [54].

ICC, which was created by the Rome Statute in 1998 and became operational on 1st July, 2002 seeks to give permanence to the international efforts to wipe out impunity. It was created to deal with serious crimes of international concern, specifically, crimes against humanity, war crimes and genocide.

In the words of former UN Secretary General Kofi Annan, "there can be no healing without peace, no peace without justice" [55]. Consequently, there can never be a just world unless individuals are made accountable for their actions and inactions under international legal order [56].

Nature and Dynamics of Individual Responsibility

International criminal law has developed over several decades, marked by the foundation and refinement of general principles, including theories of criminal responsibility. It is now well established that a person bears responsibility for war crimes, genocide, crimes against humanity and other international crimes on the basis of the principle of individual criminal responsibility [57]. The modern theories of criminal justice draws inspiration from Kant's individualistic approach to criminal justice and responsibility informed by the philosophy that individuals have free-will and are able to make rational decisions and self-interested choices. Consequently, as autonomous moral agents, they can fairly he held accountable and punishable for the rational choices they make [58]. Only an individual can act in violation of the law, only an individual can be put in the dock for trial, and only an individual can appreciate the pain and evils of suffering punishment. If state is held responsible for acts of a culprit, then the culprit himself goes unpunished [59].

The basis of making individuals personally responsible is to put an end to the era of impunity by preventing perpetrators of international crimes from hiding under Acts of State or sovereign immunity. Existing international courts exclusively punish individuals [60], (as opposed to other types of legal entity such as states or corporation) [61], and imprisonment constitutes the principal form of punishment imposed [62]. Principles derived from domestic criminal law have played an important role in the development of international criminal law [63]. International criminal law has adopted key philosophical commitments of national criminal justice systems. The most important of these is the focus on individual wrongdoing as a necessary pre-requisite to the imposition of criminal punishment. The international criminal law like most municipal criminal law systems, maintains that "punishment may not justly be imposed where the person is not blameworthy" [64].

According to Mirjan Damaska, the evolution of the criminal law from its early days of collective tribal guilt reveals a steady progression towards fixing punishment based solely on responsibility for one's own actions and personal degree of culpability [65]. The Nigerian Criminal Code provides that a man is directly responsible for the consequences of his actions and omissions [66]. German Criminal Code declares that "the guilt of the perpetrator is the basis for the determination of punishment" [67]. Similarly, the French Criminal Code states that one may only be held criminally responsible only for his own actions.

Although, contemporary municipal criminal systems have in many ways strayed significantly from the culpability principle in practice, it still provides a leading theoretical and moral basis for criminal punishment [68]. Indeed, most if not all modern legal systems prevent the imposition of criminal punishment for actions that were not a crime when taken [69].

Prospects of Individual Criminal Responsibility

Law has undoubtedly, exerted considerable influence on the shaping of the human destiny. Indeed, it is no exaggeration to aver that the evolution law has been a critical moment in human experience [70]. Without it, it is practically impossible to contemplate human society or as Roberto Unger once put it, law is the glue that holds society together [71]. There is a general awareness among members of the international community that peoples of the world share a common destiny and are joint shareholders in the survival of the planet [72]. Individual Criminal Responsibility has the following prospects among others:

Strengthening Universality and Discouraging Strict Adherence to the Doctrine of State Sovereignty.

One of the essential features of an international criminal tribunal whether established ad-hoc by Security Council pursuant to Chapters VI or VII of the UN Charter or whether made permanent through a multilateral treaty – is that it purports to exercise international criminal jurisdiction directly over individuals living in states subject to the exercise of the exclusive authority of such states [73]. It thus casts aside the shield of state sovereignty. There is no doubt the establishment of such tribunals and courts constitutes a major in-road into the traditional omnipotence of sovereign states [74].

However, State Sovereignty resurfaces when it comes to the day to day operation of the tribunals and its ability to fulfill its mandate. This proves once again the remark made by a renowned German Lawyer, Nlemeyer, earlier this century, he pointed out that, "international law is an edifice built on a volcano – state sovereignty" [75]. By this he meant that whenever state sovereignty explodes into the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built. It is for this reason that international law aims to build devices to withstand the seismic activities of the states to prevent and diminish their pernicious effect. This metaphor is particularly apt in relation to an international tribunal.

The tribunal must always contend with the violent eruption of State Sovereignty. Hence, absolute sovereignty of state has been compromised. Therefore, between international law and municipal law, the atrocities of Nazi Germany effectively nullified any such pretensions towards according primacy to municipal law in modern times [76]. Indeed, quite a number of countries today have constitutions which unabashedly proclaim the primacy of international law over the constitutions themselves as well as their countries legal orders. Accordingly, any attempt to disparage international law in favour of municipal law is today met with disdain and derision [77].

In practice, the area of domestic jurisdiction of state has further dwindle, hence, matters such as human rights violation have

now assumed universal status [78]. The obligation of states to cooperate with an international tribunal, whether pursuant to a binding Security Council resolution in the case of ad-hoc tribunals or pursuant to their treaty obligations in the case of a permanent international criminal court; requires each state to enact implementing legislation or to amend its existing legislation for this purpose.

A particular problem which arises with respect to most implementing legislation enacted by states to date with regards to the international tribunal [79] is the tendency to subsume cooperation with international institution under the traditional model of inter-state judicial cooperation. For example, many states, in their implementing legislation, apply extradition procedures to requests by the International Tribunal for surrender of accused persons, some even referring expressly to "extradition" of accused persons [80].

The application of the law of extradition to cooperation with the ICTY is inappropriate. Extradition to a state and surrender to an international institution are two totally different and separation mechanism. The former concerns relations between two sovereign states and is therefore a reflection of the principle of equality of states. It gives rise to a horizontal relationship [81]. The latter instead, concerns the relation between a state and an international judicial body endowed with binding authority: it is therefore the expression of a vertical relationship. The Appellate Chambers of the ICTY has recently noted that the relationship between national courts of different states is horizontal in nature [82].

Strengthening Shift from Impunity to Accountability.

The idea of "a just world under law" in international relations implies the desire of international lawyers to pose fundamental questions about the world we live in and the role of International Law in shaping that world [83]. Hence, there can never be a just world unless individuals and non-state actors are held accountable for their crimes, actions and inactions given the increasing participation of individuals and non-state actors in the process of international law-making while at the same time subjecting those same actors to some form of accountability under the international legal regime [84].

Following the World War I, a Commission [85] of the Peace Conference reported that the war carried on by the central powers was conducted by "barbarous methods" in violation of the established law and customs of war and the elementary laws of humanity. According to the commission:

> All persons belonging to enemy countries however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the law and customs of war or the laws of humanity are liable for prosecution [86].

Article 237 of the Treaty with Germany thereafter provided:

> The Allied and Associated Powers publicly arraigned Emperor Wilhelm II of Hobenzollen, formerly German Emperor, for a Supreme offence against morality and the sanctity of treaties…

The sealed box of the State was clearly broken open in the case of Emperor Wilhelm. However, before Wilhelm could be tried, he escaped to Netherlands on asylum, the government of Netherlands refused to extradite the Emperor and he was never tried till he died [87]. The transformed world view is perhaps best reflected in the well-known statement of Justice Jackson during the Nuremberg proceedings when he noted that crimes are not committed by states, they are committed by individuals thus:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international laws be enforced [88].

The Article 7 of the Charter or Agreement setting up the Nuremberg Tribunal of 8 August 1945, provides that:

> The official position of the defendant, whether as Heads of states or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment [89].

Commenting further on this, Starke stated, referring to the principles as laid down by the Tribunal:

> In these principles, as formulated references are to 'persons' as being guilty of crimes against the peace and security of mankind. In the light of these principles too, one point has been clarified, namely, that International Law can reach over and beyond traditional technicalities, and prevent guilty individuals sheltering behind the abstract of the state [90].

In this vein, an unimaginable number of individuals have been prosecuted and convicted for violation of International Law and commission of atrocious crimes in disregard of their official status or positions. Some of the prosecutions took place before International Tribunals at Nuremberg and Tokyo. Adolf Hitler committed suicide prior to the setting up of the Nuremberg Tribunal [91]. In reality, the Head of State in office at the moment of the Nuremberg trial was Admiral Doenitz who became Head of State on 1st May 1945 succeeding Hitler, he was prosecuted and convicted to ten yeas imprisonment for war crimes and crimes against humanity [92].

The Nuremberg Tribunal sentenced the following people to death. Hans Frank, Wilhelm Frick, Hermann Goring, Alfred Jodi, Ernst Kaltenbrunner, Wilhelm Keitel, Martin Bormann, Alfred Rosenberg, Fritz Sauckel, Joachim Von Ribbenstrop, Arthur Seyss-Inquant and Julius Streicher and they were all executed accordingly [93]. The Nuremberg Tribunal sentenced Walter Funk, Rudolf Hess and Erich Reader to life imprisonment while others were sentenced to various lesser terms of imprisonment [94].

The Tokyo Tribunal sentenced seven Japanese military and political leaders to death by hanging and they were executed in Sugamo prison on 23 December, 1948, while sentencing 16 more to life imprisonment while others get various lesser jail terms [95].

The Yugoslavia Tribunal (ICTY) indicted President Slobodan Milosevic and four other top officials for war crimes, genocide and crimes against humanity. Milosevic was indicted while in office as serving President. He died in prison custody while standing trial before ICTY [96]. Other indictees include Milan Milutonovic (President Serbia and member of the Supreme

Defence Council); Dragoljub Ojdanic (Chief of General Staff of Yugoslavia Army), Nikola Sainovic (Deputy Prime – Minister of Yugoslavia) and Vlajko Slojikovic Serbian Minister of Internal Affairs) [97].

The trial of Milosevic at the war crimes Tribunal in the Hague marks a victory for international humanitarian law over impunity. According to Carla-Del-Poute the ICTY prosecutor, "The trial of Milosevic proves that no individual is above the law" [98]. ICTY has however convicted several accused [99] and sentenced them accordingly.

The Rwandan Tribunal (ICTR) prosecuted and convicted Jean Paul Akayesu [100] (the Bourgnestre of Taba); Jean Paul Kambanda [101] (the Prime-Minister of Rwanda) among others.

The Special Court of Sierra-Leone has prosecuted several persons who bear the greatest responsibility for the atrocities committed in the territory of Sierra-Leone since 30 November 1996 [102]. The SCSL also tried and convicted Charles Taylor [103] and in its historic judgment delivered on 30 May 2012 sentenced sixty four years old Charles Taylor to 50 years imprisonment.

Across the world, the dictators have continued to face judicial waterloo and this has also happened in Iraq in the celebrated case of Saddam Hussein and a couple of his lieutenants who were tried, convicted and sentenced to death by Iraq Special Tribunal [104]. The International Court of Justice's first trial of Congolese militia leader

Thomas Lubanga began on 26 January 2009 and on 14 March 2012, the ICC found Lubanga guilty of war crimes (using child soldiers) among others [105].

Other evidences of shift from impunity to accountability also manifest in the municipal courts which exercise universal jurisdiction over international crimes as shown in the case of Augustus Pinochet [106] whose immunity as a head of state was torn into shreds by the British court (the House of Lords) which held that international crimes such as torture could not constitute official or state functions. The court held further that the International Law prohibition of crimes against humanity rendered ineffective the immunity that was traditionally accorded under customary international law for former state officials or heads of state [107].

Again, Ethiopian Federal High Court convicted former Ethiopian President – Megistu Haile Mariam of genocide and crimes against humanity under Article 281 of the 1957 Ethiopian Penal Code [108]. Also, Hissene Habre, former President of Chad is currently being held in Senegal for war crimes, genocide, torture and crimes against humanity [109]. On June 2, 2012, an Egyptian court sentenced 84 year old former President Hosni-Mubarak to life imprisonment 2012, while former Interior Minister – Habid al-Adly got life imprisonment from the same Egyptian court [110].

The foregoing among others has shown a good prospect that individual criminal responsibility doctrine has help strengthened the shift from the dark era of impunity (of Idi-Amin, Mobutu Sese Seko, Emperor Jean Bokasa etc) to the new dawn of accountability and the future is bright. Hence, accountability need to still be further and better strengthened.

Strengthening the Jurisprudence of International Criminal Justice

One remarkable feature of the principle of individual criminal responsibility under international law is that it has enhanced the development of international criminal law jurisprudentially.

In the Akayesu judgment, for the first time in International Law, an international court construed and applied the crimes of rape and sexual violence in an international context, finding that rape and sexual violence can constitute act of genocide. Therefore, when committed with specific intent to destroy a group, in whole or in part, rape and sexual violence constitute genocide [111].

The initial indictment against Akayesu had not charged rape and sexual violence, but during the early stages of the trial, many witnesses recounted acts of rape and sexual violence. The judges permitted an amendment to the indictment to add a count of a crime against humanity (rape). The amendment alleged that Tutsi women, who had sought refuge at the Bureau Communal were repeatedly subjected to sexual violence, and that Akayesu knew and encouraged these acts of sexual violence. The evidence advanced in support of these allegations was overwhelming [112].

In addition to finding Akayesu culpable for rape as a crime against humanity, the Trial Chambers, of its own accord, made an important pronouncement, namely, that the same acts of rape and sexual violence under-pinning crimes against humanity also constitute genocide [113].

Article 2, of the ICTR Statute, like the Genocide Convention does not expressly identify rape and sexual violence as acts of genocide, but includes two important *actus-reuses*, namely "imposing measures intended to prevent births within a group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction" [114]. In the Chamber's view, rape and sexual violence met the above two requirements or forms of *actus-reus* of genocide [115].

The international tribunals have made significant contributions to International Law with respects to the volume of case laws on immunity of state officials. ICTR was the first international criminal tribunal to prosecute and convict a former state official – Jean Kambanda [116] for genocide and other violations of international humanitarian law. The judgment sent a clear message that immunities, such as those enjoyed by state officials cannot be invoked as a defence to international crimes, or as barring international criminal tribunals from exercising jurisdiction over state officials.

Moreover, the ICTR's approach to fair trial guarantee and related matters are noteworthy. The tribunal emphasized that defendants must enjoy fair trial guarantees [117]. In addition to the redress of release, which appear to be available only in exceptional circumstances, the ICTR's jurisprudence holds that other forms of effective redress are also available to accused victims of rights violation, such as financial compensation [118] or a reduction of sentence [119].

The Tribunal's statute and Rule of evidence has further elucidated its jurisprudential endeavour to ensure the rights of the accused is properly balanced with those of the victims and witnesses, the ICTR implements appropriate measure of protection.

The ICTR has enriched the existing jurisprudence on the criteria for determining an accused's fitness to stand trial. The ICTR in *the Ngeze case* [120] made a notable contribution to the development of international criminal law by identifying the factors which are relevant, namely: (a) his ability to stand and his capacity to participate meaningfully in the said trial; (b) his mental capacity to communicate with his defence counsel in a comprehensive manner and his ability to instruct counsel with

regard to his defence; and (c) the prognosis and proposed treatment, if any [121].

The ICTR's jurisprudence, like the ICTY, has emphasized that in charging international crimes, indictments must spell out the material facts underpinning the charges, as well as the specific modes of criminal responsibility by which the accused perpetrated the crimes (i.e. Commission, ordering, instigation, aiding, and abetting or command responsibility) [122]. The Tribunal's jurisprudence that defects may be cured by post-indictment communication of clear, timely and consistent information promotes substantive justice [123].

It is pertinent to mention that similar strides were made by other international tribunals of ICTY, SCSL and the ICC details of which cannot be discussed here. The SCSL also made significant contribution to International Law, including decisions on immunity of state officials [124], enlisting or conscripting children under the age of 15 years into armed forces [125], sexual violence [126], forced marriage [127], judicial impartiality, indictments and joinder of accused persons. It is interesting to note that SCSL is the first international criminal tribunal to try persons accused of recruiting child soldiers. The SCSL in *Prosecutor V Norman* [128] handed down the first judgment regarding recruitment of child soldiers and Thomas Dyilo Lubanga is the first person to be found guilty by the ICC and he was found guilty for using child soldiers among other crimes [129].

The procedural regime of the ICC, composed of the Statute, rules as well as the regulations and has also built on the basic documents and jurisprudence of the ad-hoc tribunals. For example, the procedures regarding victims have been augmented and developed in the Rome Statute of the ICC, most notably by the provision for representation of victims [130]. Moreover, it has been said that the framers of ICC statute attempted to avoid an often criticized bias in favour of common law procedures, choosing instead to blend aspects of the adversarial and inquisitorial systems and innovate where neither system had a rule that fit the court's needs [131].

The Rome statute provides for a more comprehensive set of general principles/substantive law, applicable to trials before the ICC, and deals with, among others: (1) *nullum crimen-sine lege* (no criminal offence without a pre-existing law), (2) *nulla poena sine lege* (no punishment for a criminal offence without a pre-existing law), (3) individual criminal responsibility, (4) irrelevance of official capacity, (5) responsibility of commanders and other superiors (6) the mental requirements for the crimes within the jurisdiction of the court, (7) Grounds for excluding criminal responsibility, and (8) the defence of mistake of fact or mistake of law [132].

Also, the ICC statute provides greater responsibility towards victims and a broader role for victims. The ICC statute requires the prosecutor to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses [133].

A significant departure from the practice of the adhoc tribunals is the possibility for victims to have their own representatives in order for their views and concerns to be presented where their personnel interests are affected [134]. Interestingly the drafters of the ICTY statutes considered provisions on the appointment of a counsel for victims, but the proposal was rejected [135].

The ICC statute also provides for reparation and Trust Fund for victims of crimes. The inclusion of such provisions in the ICC statute indicates an evolution in legal thinking, and the recognition of victims rights as one of the rationales for international criminal law and consequently bringing justice to thousands of victims out there.

Both the ICTY and ICTR confirmed that the same event may give rise to more than one offence [136]. In *Tadic case* the Appeal Chambers of the ICTY recognized that the distinction between internal and international conflict is artificial and loses its relevance or importance taking into account the fact that fundamental human rights should be guaranteed irrespective of the classification of a conflict and that there are a growing number of international instruments protecting civilians in internal conflicts [137].

Furthermore, both ICTY and ICTR made significant contributions to the evolution of the theories of criminal responsibility as they are today, for instance, the theories Joint Criminal Enterprise (JCE with all its variations) and the command responsibility.

Undoubtedly, the jurisprudence of international criminal law has greatly evolved through the lofty and collective legacies of the International tribunals and the ICC. The pronouncements of these courts or Tribunals on individual criminal responsibility are therefore very significant. It is also apt to submit that the improved jurisprudence of the international criminal law has further help to strengthen the rule of law globally and ultimately give justice to the victims.

The concept of individual criminal responsibility has high prospect of better future. However, the future pace of progress will depend on the efficacy of the International Criminal Court and the cooperation of States.

Concluding Remarks

There is a general awareness among members of the international community that peoples of the world share a common destiny and are joint shareholders in the survival of the planet. The very essence of the principle of individual criminal responsibility is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. Hence, there can never be a just world unless the individuals and non-state actors are held accountable for their crimes, actions and inactions given the increasing participation of individuals and non-state actors in the process of international law-making while at the same time subjecting those same actors to some form of accountability under the international legal order.

Even though a lot remains to be done to make the principle of individual criminal responsibility more effective. Any comparism between the law today and that of yester-years demonstrates that in the area of individual criminal responsibility, International Law has clearly moved towards much greater criminalization and accountability. This shift appears in the international arena, involving international criminal tribunals and international humanitarian law and on the national level, with regards to the expanding criminal responsibility of corporations. In national legal systems, concepts of universality of jurisdiction and protective jurisdiction have gained added force. International institutions and more specifically international tribunals have enhanced the development of international criminal law. The future pace of progress will depend primarily on the efficacy of the International Criminal Court and on the cooperation of states. The problem is therefore not majorly with the existing legal

instruments and available institutions but with enforcement and implementation. Hence, since Nuremberg those who perpetrated the worst crimes have too often escape justice.

Recommendation

The following recommendations are offered on how to maximize and effectively implement the principle of individual criminal responsibility under international law.

State sovereignty with all its imputations is a major obstacle (the greatest challenges) to the effective enforcement of international criminal justice. There is no doubt that the establishment of international tribunals constitutes a major in road into the traditional omnipotence of sovereign states. However, state sovereignty resurfaces when it comes to the day by day operations of the tribunal and its ability to fulfil its manadate. Hence, it is recommended that states should restructure or amend their municipal laws especially the constitution to incorporate Restrictive Sovereignty Clause and reinforce the No-immunity Rule. By so doing, states would be voluntarily surrendering part of their sovereignty and freedom of action to the international community especially on issues bothering on human rights. Example of such restrictive sovereignty clause can be found in the constitutions of the Federal Republic of Italy, Article II of which provides:

> Italy accepts subject to reciprocity from other states, such limitations of its sovereignty as are necessary for the establishment of the system of securing mutual peace and justice among nations of the world.

Similar provision can be found in the constitution of Federal Republic of Germany which provides:

> In order to preserve peace… (the Federal Republic of Germany) may join system of mutual security – consent to those limitations of its sovereign powers, which bring a peaceful and lasting order….among the nations of the world [138].

The Federal Republic of France also has a clause, which provides:

> Subject to reciprocity – (Federal Republic of France)…. accepts such limitations of its sovereignty as are necessary for establishing and maintaining peace [139].

There is the need for states which have not yet ratify the statute establishing ICC to do so, while, a state like Nigeria need to quickly domesticate the statute through the Act of the National Assembly [140]. The foregoing will enhance and facilitate the work of the ICC and other national and international enforcement mechanisms.

Unlike national courts, international criminal tribunals and the ICC have no law enforcement agency akin to a police *judiciaire*. They thus rely primarily on the cooperation of national authorities for the effective investigation and prosecution of persons accused of violations of international humanitarian/human rights laws.

Again, an extension of ICC jurisdiction over legal or juristic persons is desirable. International criminal law is a rapidly expanding field with much potential for ending impunity relating to corporate criminality. A review of ICC statute to incorporate jurisdiction over legal or juristic persons would bring the Nuremberg precedents of Krupp, Flick and I.G. Faben into the modern age, which would also have authority in domestic jurisdiction. Interestingly, the Draft Protocol on the Statute of the African Court of Justice and Human Rights has made provision for corporate criminal liability under Article 46C of the Draft Protocol. This, provision, whose implementation may be difficult still has the potential to resolve some of the underlying perpetrators of conflict in Africa that include corporate arm suppliers [141].

States should encourage and support national and international commissions of inquiry and fact-finding mission established in accordance with international standards. States should cooperate fully with international and hybrid accountability mechanisms established by the United Nations or with its support. States that are party to the Rome Statute of the ICC must incorporate the Rome Statute into their national legislation and discharge their obligations to cooperate fully with the court. States not party to the Rome Statute should consider ratifying it.

There is a need to ensure national implementation of existing legal framework. There is a body of International Law (conventions/treaties, customary law, state legislations and case laws) on this principle of individual responsibility. While there are more areas in which law-making would be valuable, the real challenge lies in the implementation of the plethoral of existing legal framework.

States may have justice mechanisms based on tradition, custom or religion operating alongside state institutions. Such as the traditional Gacaca Panel in Rwanda. These systems can play an important part in the delivery of justice services, including the adjudication and determination of dispute. In this connection states should therefore ensure that all laws and justice mechanisms, including traditional and informal justice mechanisms, are in line with international norms and standards.

Corruption is another challenge that needs to be addressed by states. It is also recommended that states should provide adequate resources including funding of the institutional mechanisms or frameworks involved in enforcing individuals accountability. Adequate resources should be provided to enable them carry out more effective functions. The current practice under which the institutions rely on epileptic donations from states and international organizations should be discouraged.

It is also recommended that the existing international judicial mechanisms should collaborate and complement one another's effort and they should exchange or share information and possibly engage in joint investigation. Domestic institutions too should complement the efforts of the sub-regional, regional and international institutions on the enforcement of individual criminal responsibility. Again, states should strengthen the capacity of domestic courts to perform effectively and efficiently.

It is also recommended that the international community and the UN as a body need to be sensitive to the domestic and national dynamics in their pursuit of international justice. In this regard international packages should be adapted to the tradition and culture of the peoples and their communities.

Also, it is recommended that the national civil society groups should be watchdogs over the rights of their respective communities and lead in demanding accountability from their governments for their international obligation especially in

cases that address impunity within their shores. Also, international civil society groups [142] should continue to build and strengthen international justice, promote the expansion and utilization of universal jurisdiction, monitor the impact of international justice in ICC situation countries, ensure that international justice is accountable to victim communities and develop a programme of research and monitoring on international justice. We have entered a phase in the evolution of global civil society which is characterized by a transition from international to cosmopolitan norms of justice which are useful in combating impunity and in working towards global justice.

It is recommended that in addition to focusing on individual accountability, also, the underlying root causes of violence and criminality should not be ignored including poverty, inequality and cultural memory. I also urge a more reflexive understandings of how the rule of law movement impacts societies and recommends that justice advocates should focus both on criminal responsibility and addressing structural inequalities.

Also, it is recommend that democratization of governance across the globe is a new road to peace and stability.

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40. Robert Ley committed suicide before the beginning of the case and Gustav Krupp was considered in-capacitated to stand trial.
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93. Wikipedia, free encyclopedia, http://www.wikipedia.org
94. *Ibid*. For instance Albert Speer, Balder Von Schirach got 20 years imprisonment each, Baron Konstantin Von got 15 years imprisonment, Karl-Donitz got 10 years imprisonment etc. While Hans Frank and Dr. Hjalmar Schacht were acquitted.
95. Those who received death sentence are General Kenji Doibara (Airforce Comander); Baron Koki Hirota (Foreign Minister); General Seishiro Itagaki (War Minister), and Generals Heitaro Kimura, Iwane Matsui, Akira Muto, and Hideki Tojo. Those sentenced to life jail include General Sadao Araki, Colonel Kingoro Hashimoto, Fielsd Marshal Shunroku Hata, Baron Kichiro Hiranuma (prime minister) Naoki Hoshino (Chief Cabinet Secreatry), Okinori Kaya, Marquis Koichi Kido (Lord Keeper of Privy Seal), General Kuniaki Koso (Governor of Korea), General Jiro Minami (Army Commander), AdmiralTakasumi Oka (Naval Minister), General Kenryo Suto (Chief of Military Affairs Bureau), Admiral Shigetaro Shimada, Toshio Shiratori (Ambassador to Italy), General Teichi Suzuki (President Cabinet Planning Board), General Yoshijiro Umezu. See generally judgment and proceedings: International Military Tribunal for the Far East available at http://www.ibibio.org/hyperwar/PTO/IMTFE/index.html.
96. The indictment of Milosevic et al case *17-99-37-1, ICTY, May 24, 1999.* See generally http:www.un.org/icty/glance-e/index.html.
97. *Ibid*
98. Del-Poute's November 2000 address to the United Nations Security Council, Prosecutor to ICTY No. 2001, New York
99. See generally, Prosecutor V Endemovic, case No IT-96-22-A Appeal Chamber 7 October 1997 (life jail); Prosecutor V Tadic Case No IT-94-1 Appeal Chambers 15 July 1999, (life jail); Prosecutor V Blagojevic and Jovic case No IT-02-60-Trial Chamber of 17 January 2005 etc.
100. Prosecutor Akayesu V. case No ICTR – 96 – 4- T delivered. 2008.
101. Prosecutor V Kambanda case No ICTR-97-23 S delivered. 2008.
102. See Prosecutor V Fofana & Kondewa Case SCSL-04-14-A) Appeal Judgment 28 May 2008 where Fofana got 15 years imprisonment while Kondewa got 20 years; Prosecutor V Sesay, Kallon and Gbao (Case SCSL-04-14-A) Appeal judgment 25 October 2009 which sentences Sesay to 52 years, Kallon 40 years and Gbao to 25 years imprisonment. Prosecutor V Brima, Kamara and Kanu (Case SCSL-04-16-T) judgment of 19 July, 2007, Brima got 50 years, Kamara got 45 years and Kanu got 50 years imprisonment.
103. Prosecutor V Charles Taylor Case SCSL-2003-01-1) 3 March 2003, Leke Baiyeku, Taylor: Lesson for African Tyrant, PUNCH, Sunday June 3, 2012. P. 11.
104. Stahn C. The Geometry of Transitional Justice: Choice of Design, *Leiden* J.Int'l L. 18, No 3 PP 424-466. Saddam Hussein was hanged on 30 December, 2006. Also, hanged areTaha Yasin Ramadan (the Vice-President to Saddam Hussein), Ali-Hassam al-Majid (a.k.a. Chemical Alli), Sultan Hashim (former Defence Minister), Hussein Rashid al-Tikrit (Head of Republic Guard). They were found guilty of war crimes, genocide and crimes against humanity. Others sentenced to life imprisonment are Farhan al-Jibouri (ex-military Commander), Saber Abdul Aziz (ex-Intelligence Chief). See also PUNCH Newspaper. 2005-2007, 43.
105. Prosecutor V Dyilo Lubanga Case *ICC-01/04-01/06*, January 2009 available at www.icc-cpi.int. Other indictees who are currently in ICC Detention Centre and are standing trial before ICC are German Katanga, (a.k.a Simba a former leader of the Patriotic Resistance Force in Ituri DRC); Mathieu Ngudjolo Chui (also a Congolese Warlord); Jean-Pierre Bemba (a former Vice-President in the DRC). See generally ICC website: www.kc-cpi-int. Also, ICC has issued several arrest warrants particularly interesting is the one issued against Omar-al-Bashir the President of Sudan for atrocity crimes and also against the Janajweed militia leaders Ali Kushayb
106. In Re-Pinochet. 2 WLR; Jallow H & Ben Souda, F, 2008 "International Criminal Law in an African Context" in African Guide to International Criminal Justice published by Institute for Security Studies, Pretoria, S/Africa, PP 25-

55, at 19-21. Although Pinochet died without having been convicted of any of the crimes committed during his regime, the case demonstrated that immunity does not shield any head of state. 1999.

107. *Ibid*
108. Babatunde IO, Abegunde B. Investigating and Prosecuting International Crimes Domestically; Rethinking International Criminal Law Essays in Honour of Niyi Idowu, by Justice Chambers Obafemi Awolowo University, Ile-Ife. 2012, 16.
109. *Ibid*
110. *Ibid.* See also the trial of Adolf Eichmann pursuant to Israeli Nazis and Nazi Collaborators (Punishment) Law of 1950. Eichamann was tried, convicted and sentenced to death by Israeli domestic court. See Att. Gen. Israel V Eichmann (1961) 36 ILR 18, 50; 1962 36 ILR 277.
111. Prosecutor V Akayesu (supra) para 743; Mugwanya, G.W. "The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Law" in Murungu C & Biegon, J (eds), Prosecuting International Crimes in Africa, Pretoria University Law Press Pp. 63-93 at 68-71
112. *Ibid*. Previously rape was recognized as a crime against humanity and a war crime, but not genocide.
113. *Ibid*
114. *Ibid*
115. *Ibid*
116. Prosecutor V Kambadan (supra) paras 42-44
117. See Barayawiza V Prosecutor case ICTR 97-19-Judgment 3 November 199. See Decision on Prosecutor's Request for Review or Reconsideration 31 March, 2000
118. Rwamakuba V Prosecutor, Case ICTR-98-44C-A 13 Sept. 2007
119. Prosecutor V Barayawiza (Supra) para.75
120. Prosecutor V Nahimana et al Case ICTY-99-52-T 20 Feb. 2001
121. *Ibid*
122. Mugwanya, op. cit P. 94
123. *Ibid*
124. Prosecutor V Charles Taylor (supra) para 545-53
125. Prosecutor V Fofana and Kondewa (supra) para 182-199 Prosecutor V Norman, Fofana and Kondewa SCSL-04-14-T 25 may 2005 Para. 9
126. Article 2 (g) statute of SCSL, *Prosecutor V Norman,* Fofana & KOndewa (Supra) para 19.
127. Article 2 (g) statute of SCSL, Prosecutor V Sesay, Kallon, and Gbao (Supra) paras 36, 50, 51, 57; see also Prosecutor V Brima, Kamara and Kanu (supra) paras 36, 51-52, 57
128. Prosecutor V Norman et al (supra)
129. Prosecutor V Lubanga (supra)
130. Gurmendi FSA. Elaboration of the Rules of Procedure and Evidence in Lee.R (ed) The International Criminal Court: Elements of Crimes and Rules of Procedure. New York Transnational Publishers. 2001, 256.
131. Sadat L. The Legacy of the ICTY: The International Criminal Court. New England Law Review. 2002; 37(4):1076.
132. See generally Part 3 of the Rome Statute of the ICC. 2002.
133. Jallow & Bensouda, *Op. Cit* P. 45
134. *Ibid*. P.46. See also Article 68 (3) ICC Statute.
135. Morris V, Scharf M. An Insider's Guide to the International Criminal Tribunal for former Yugoslavia: A Documentary History and Analysis, P. 167; Tochilovsky, V., (2002) "Proceedings in the International Criminal Court: Lessons to Learn from the ICTY Experience". European Journal of Crime, Criminal Law and Criminal Justice. 1996; 10(4):273.
136. Prosecutor V Akayesu ICTY case (Supra); This matter was further examined in Prosecutor V Delalic et al case ICTY-IT-96-21. Appeal chambers. See also Kaczorowska, A. Op. Cit. PP. 506 – 7.
137. Prosecutor V Tadic ICTY Appeal) (supra).
138. Article 24 (2) Constitution of Federal Republic of Germany.
139. Paragraph 15 (Preamble) to the 1946 Constitution of France.
140. Section 12 (1) of Constitution of Nigeria 1999; Fawehinmi V Abacha (2000) 6 NWLR (Pt 228), Pp. 351-352; Trendtex Trading Corporation V Central Bank of Nigeria (1977) 1 ALL.E.R. 881
141. See Doc.Ex.CL/731(XXI)a, July 13, 2012 available at http://www.au.int/en/sites/default/files/Ex%20CL%20696-725%20(XXI)%200CLpdf
142. Such as Centre for Human Rights and International Justice (CHRIJ), Coalition for International Criminal Court (CICC), Human Rights Watch (HRW), Campaign Against Impurity (CAI) etc. These NGO enjoyn global network.