

**CRIMINAL JUSTICE AND
ACCOUNTABILITY
IN AFRICA:
REGIONAL AND NATIONAL
DEVELOPMENTS**

**Edited by
Rashida Manjoo
Dominique Mystris
Mashood Baderin**

Pretoria University Law Press

PULP

2022

Criminal justice and accountability in Africa: Regional and national developments

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:

Pinetown Printers, South Africa

To order, contact:

PULP

Faculty of Law

University of Pretoria

South Africa

0002

pulp@up.ac.za

www.pulp.up.ac.za

Cover design:

Octavia Roodt

ISBN: 978-1-991213-18-1

© The Editors 2022

TABLE OF CONTENTS

Foreword	v
Authors	ix
Chapter 1	1
Pursuing criminal justice and accountability in Africa – regional and national developments	
<i>Dominique Mystris and Rashida Manjoo</i>	
Chapter 2	18
International criminal justice and accountability in Africa: Balancing between legal idealism and legal realism	
<i>Mashood A. Baderin</i>	
Chapter 3	38
Indigenous and tribal mechanisms of transitional justice – filling the gaps in formal justice systems?	
<i>Agnieszka Szpak</i>	
Chapter 4	64
Post colonialism and sovereignty v international justice: The case of Angola	
<i>Rui Verde</i>	
Chapter 5	86
Criminal jurisdiction in The African Court of Justice and Human and People’s Rights: Can Africans hope for a brighter future in fighting impunity?	
<i>Lillian Mihayo Mongella and Theresa Akpoghome</i>	
Chapter 6	135
Understanding African justice mechanisms as part of the African peace and security architecture: Moving beyond an anti-ICC understanding	
<i>Dominique Mystris</i>	
Chapter 7	162
The positive implications of the Malabo Protocol and the African Court: The exercise of ‘judicial’ self-determination by African States and the possibility of the new complementary system with the ICC	
<i>Mitsue Inazumi</i>	
Select bibliography	200

FOREWORD

In the past thirty years the bulk of intrastate violent conflicts took place on the African continent. This has recently been exacerbated by the COVID-19 pandemic which led to a shift of patterns of conflict in Africa. In particular, COVID-19 legislation facilitated the suppression of citizens through the enforcement of lock-down measures, while otherwise conflict levels remained rather steady. If anything, conflicts were even slightly on the increase during the pandemic. In the first months of the outbreak of COVID-19, violent armed groups expanded their territories and inter-group clashes rose by an average rate of 25%. The effect of the pandemic was hence twofold. On the one hand, violence in Africa was perpetuated by states against their citizens, in particular to restrict movement, and, on the other hand, violence was used by armed groups to consolidate their positions.¹

While it appears that the situation has hence been worsening since 2020, this trend is visible already since the 1990s and addressing conflict and post-conflict impacts are therefore ever more important. One way of tackling the problems – and the one being the centre of this volume in particular – is redressing violence in Africa through the law in its various forms. Formal mechanisms which are probably well-known to all international lawyers interested in the African continent were the International Criminal Tribunal for Rwanda (ICTR) which operated from 1994 to 2016 and the International Criminal Court (ICC). The latter saw the light of day in 1998, started operating in 2000 and has frequently dealt with cases arising from conflicts on the African continent.

Historically, Africa has a legacy of violence that has in many cases been redressed by transitional justice mechanisms, including truth commissions, tribunals or so-called ‘traditional’ mechanisms.² To understand the ways in which justice is more holistically achieved in

1 Clionadh Raleigh ‘The pandemic has shifted patterns of conflict in Africa’ *Mail and Guardian* (22 Jun 2020).

2 Susanne Buckley-Zistel, Teresa Koloma Beck, Friederike Mieth and Julia Viebach, ‘Redressing violence in Sub-Saharan Africa’ in Bruce A. Arrigo and Heather Y. Bersot (eds) *The Routledge Handbook of International Crime and Justice Studies* (Routledge, 2014) 471.

Africa, one needs to understand the various processes aimed at achieving it and, in particular, what it means for justice to be 'transitional' rather than just justice. 'Transitional justice' is not a static concept and has shifted considerably in the last 30 years with, most prominently, the ICTR in Africa, and the International Tribunal for the Former Yugoslavia (ICTY) in Europe, as well as with the ICC globally, which is without a doubt the most prominent transitional justice mechanism today.

Next to these important formal mechanisms exist countless informal ones. They encompass anything that a society can do to work through a conflict and promote peace, including changes in narrative, law, justice, culture, and the constant fight against inequalities.³ At their heart, all transitional justice mechanisms, whether formal or informal rely on the premise that after a period of conflict follows a period of transition and that achieving justice in the latter is crucial for peace. In practice, transitional justice can use the power of international, hybrid or national war tribunals to achieve a form of formal justice, or it can reform key institutions that were involved in the conflict, such as police, military and security agencies. Transitional justice can also provide compensation to victims and eliminate corruption that led to or perpetuated the conflict. Truth can be a focus point through, for example, public discourse, but art and memory can also play a central part in changing a corrupt narrative.⁴

Considering how varied transitional justice can be it lends itself perfectly to interdisciplinary approaches, ranging from law to politics and criminology to art history. It is therefore astounding how rarely academic publications gather the various disciplines and their representatives to provide a more nuanced look at formal and informal transitional justice mechanisms. In particular, questions that could be exploited include how formal justice mechanisms, such as courts and tribunals, could be assisted by informal ones, such as cultural or political mechanisms and vice versa.

The present collection edited by Dominique Mystris, Rashida Manjoo and Mashood Baderin hence has to be applauded for providing a fresh, interdisciplinary and distinctly nuanced look at the ways transitional justice can be achieved on the African continent. The authors they gathered to provide an insight on the topic have backgrounds in various disciplines, including public international, Islamic, contract, international criminal and human rights law, political science, security studies, African studies, and criminology. The mix of perspectives is very important to gain new

3 Naomi Roth-Arriaza and Javier Mriezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006) 2.

4 Buckley-Zistel, et al, (n2) 472.

insights on existing and evaluating past conflicts and frameworks to settle them. While the law is central to this publication, the focus is not solely on formal, but also on the informal ways and methods to address the issues.

The chapters in this volume vary considerably in their academic approaches but all discuss the difficulties of achieving peace and justice in Africa. Some chapters view the problems through a more theoretical lens and, for example, juxtapose legal idealism and legal realism to ensure effective criminal justice and accountability in Africa. While pertinent in particular to Baderin's chapter (Chapter 2), most other chapters equally grapple with the discrepancy between the law in the books or the 'positive law' and the law in practice as it applies to redressing violence in Africa.

To close the gap between law and practice various instruments are addressed throughout this publication besides the traditional (European) criminal justice systems. These systems might not work 'internationally' and the more alternatives are discussed, tested and applied the narrower the gap between law and practice might become. In this context, Chapter 3 (Szpak) discusses the role of indigenous justice in order to address the operational problems and gaps in the State justice systems in the framework of transitional justice. A combination of justice systems might be more appropriate in the African context to close the gap between law and practice. Equally, Chapter 4 (Verde) highlights the differences between the various concepts of law at play in the context of Africa though with a more prominent focus on the problems rather than viewing them as part of the solution.

Also in line with a focus on the variety of concepts of law, most chapters address the Malabo Protocol and the possibility for regional justice next to national and international concepts thereof. It could be argued that a regional African court could close the gap between the international 'law in the books' and the regional lack of justice in practice as it is commonly perceived. However, whether justice could be achieved is doubted by most authors in this volume, least because the challenges currently still seem to outweigh the uses. Chapter 5 (Mongella and Akpoghome) in particular highlights the major challenges as in the lack of political will; the immunity of heads of State; and the lack of capacity of the court. The chapter does, however, end on a positive note, stressing that with the necessary political will, Africa would be able to successfully fight impunity.

Chapter 6 (Mystris) goes even further in stressing the potential impact of a regional court for the African Union. According to Mystris, the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights 'is in a unique position to advance the

AU's institutional ideology, while promoting justice and accountability'. The gap between law and practice can in her view only be closed by developing a specific regional mechanism that addresses the unique regional (transnational and international) criminal justice problems in the context of Africa. The ICLS would hence play a complementary role to the ICC, while furthermore addressing region specific concerns and crimes as well as introducing corporate criminal liability. This chapter is particularly interesting to read in comparison to Chapter 3 (Szapak) on indigenous justice as both discuss 'complementarity' of justice through different institutions.

Chapter 7 (Inazumi) has clearly been chosen as the climax of this volume as it establishes the African Court as a potential model for other regions around the world. It is argued here that to achieve justice internationally - and many authors on the topic of transnational crime and justice would agree - national, regional, and international justice systems need to interact and together form a new comprehensive system in which regional criminal courts and the ICC work together to end impunity. Peace and justice hence rely on all criminal justice systems to work together, complementing each other.

While this multi-level governance model of criminal justice could be viewed as a rather utopian approach considering the debates on the Malabo protocol and the potential overlaps the establishment of an African regional court would create between various existing systems, a comparison with other regional developments might prove that it can become a reality at some stage. Against all expectations, in the European Union (EU) the European Public Prosecutors Office has recently started its operations, and while cases are still referred to national courts, it is a further milestone achieved in the development of regional criminal justice. It hence appears that progress is possible in the field even against the political odds. This volume, by comparing various approaches to the development of a multi-level governance and more innovative models of criminal justice makes without a doubt a contribution to furthering peace and justice on the African continent and beyond.

Dr Saskia Hufnagel
Queen Mary University of London

AUTHORS

Theresa Akpoghome is a Professor with the Faculty of Law, Benson Idahosa University, Benin City, Nigeria and holds a PhD in International Humanitarian Law. She has published widely in the field of International Humanitarian Law and Human Rights Law. She has over 65 publications. The publications cover but are not limited to Prosecution and Punishment of International Crimes, Classification of Armed Conflicts and their Implications, Internal Displacements, Sexual Violence in times of Armed Conflict, Responsibilities of Non-State Actors and Environmental Protection in Armed Conflicts. The author has attended conferences on International Humanitarian Law both locally and internationally and has also attended Training Sessions in South Africa and Geneva. She also won a grant from Rape, Abuse and Incest National Network (RAINN) in the USA. In collaboration with this Organisation, she was able to conduct a research project on sexual violence in six African countries. She teaches International Humanitarian Law, Public International Law and Legal Research.

Mashood A Baderin is a Professor of Law at the School of Oriental and African Studies (SOAS), University of London. He obtained his LL.M in Public International Law from the University of Nottingham, studying Public International Law, International Humanitarian Law, International Criminal Law, International Human Rights Law, Law of International Organisations, and Collective Security Law. He obtained his PhD in Comparative Human Rights Law from the same university. He was Head of the SOAS School of Law from 2009-2012, and Chair of the SOAS Centre of African Studies from 2014-2018. He was appointed as the UN Independent Expert on the situation of human rights in Sudan from 2012-2014.

Mitsue Inazumi is a Professor of Public International Law at the Faculty of Law at Kanazawa University, Japan. She has a doctoral degree from Utrecht University in the Netherlands and her PhD thesis is published: *Universal jurisdiction in modern international law: Expansion of national jurisdiction for prosecuting serious crimes under international law* (Intersentia, Antwerpen, 2005). Before her teaching career at Kanazawa University since 1999, she studied criminal law and criminal justice at California State University at Long Beach in the United States of America from 1989-1991. She also studied Public International Law at Nagoya University in Japan and obtained a Law Degree in 1994 and Master of Laws (LL.M) in 1996,

and finished the doctorate course in 1999. She was a NGO delegate to the Rome Conference for the establishment of the International Criminal Court in July 1998. Her research focuses on the national and international criminal jurisdiction for the prosecution of gross human rights violations, and she has published many articles such as: 'Japan and the ICC: A reflection from the perspective of the principle of complementarity' in I Boerefijn & J Goldschmidt (eds) *Changing perceptions of sovereignty and human rights: Essays in honour of Cees Flinterman* (Intersentia, 2008); and 'Towards the establishment of a regional human rights mechanism in Asia' in I Lintel, A Buyse & B McGonigle Leyh (eds) *Defending human rights: Tools for social justice* (Intersentia, 2012).

Rashida Manjoo is Professor Emeritus at the University of Cape Town where she taught for many years in the Department of Public Law and where she convened the Human Rights Programme. She continues to supervise PhD candidates in the Faculty of Law. Prof Manjoo has over four decades of experience in social justice and human rights work both in South Africa and abroad. She is the former United Nations Special Rapporteur on Violence against Women, its Causes and Consequences. Prior to that, she served as the Parliamentary Commissioner in South Africa's Commission on Gender Equality (a constitutional body mandated to promote and protect gender equality and women's rights). Her research interests include human rights broadly with a particular focus on women's human rights. She has authored a number of journal articles, book chapters and reports on women's human rights, violence against women, transitional justice, and also the impact for women of the recognition of Muslim Personal Laws in South Africa.

Lillian Mongella is a judge of the High Court of Tanzania. She was previously a lecturer and Dean of the Faculty of Law, Ruaha Catholic University situated in Iringa region in Southern Tanzania. She holds a PhD, majoring in International Criminal Law, International Humanitarian Law and International Human Rights Law from the University of Dar es Salaam.

Dominique Mystris is a Senior Researcher at the South African SDG Hub, Department of Business Management, University of Pretoria and Coordinator of the SA SDG Policy Support Initiative which brings academics together with policy makers within The Presidency of the Republic of South Africa. She completed her doctoral studies in International Criminal Law at Queen Mary University of London where her thesis considered the need for a regional criminal court through analysis of the proposed African Criminal Court. She has lectured at various universities in England since 2011, worked for international research institutions and organisations, and consulted for non-profit organisations in Africa, Asia and London on human rights issues and developed policy and advocacy approaches. Her research interests lie in the areas of International Criminal Law,

International Humanitarian Law, transnational crimes and peace and security with a focus on the African Union.

Agnieszka Szpak is an Associate Professor at the Faculty of Political Science and Security Studies of the Nicolaus Copernicus University in Toruń, Poland. She is the author of more than 100 scientific publications (including nine books), including those in *The European Journal of International Law*, *The Chinese Journal of International Law* and *The Hague Yearbook of International Law*. Her specialisation is Public International Law, in particular International Law of Armed Conflicts. She teaches inter alia Public International Law, International Humanitarian Law of Armed Conflicts, Diplomatic And Consular Law, International Human Rights Law and International Organisations.

Rui Verde is a Research Associate in the African Studies Centre at the University of Oxford. He is also a non-resident Researcher at the Media Policy and Democracy Project, University of Johannesburg. Beyond that he is the chief-legal adviser of Maka Angola and UFOLO Centre for Good Governance, entities that both promote democracy and the fight against corruption in Angola. Rui received a doctorate in Law from the University of Newcastle, UK, as well as an honorary doctorate from the Indian Institute of Management, where he is a Visiting Professor. He was also a Professor of Law in Portugal, Brazil, Angola and Kazakhstan. IB Tauris published his most recent book *Angola at the Crossroads: Between kleptocracy and development* (2021). He is a founding member of the Angola Research Network and Head of Research of the think-tank CEDESA