1 Pursuing criminal justice and accountability in Africa: Regional and national developments

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Abstract

Historically Africa has suffered from numerous conflicts which are typically addressed through international criminal law mechanisms and courts, but the need for a broader approach is both evident and demanded. The chapters in this publication, and this chapter in particular, highlight the background to the discussions and debates, as well as the subsequent developments. In addition, the novelty of this publication reflects a willingness of authors to engage in the multidisciplinary pursuit of larger ideas, beyond the current discourse on the perceptions of an anti-Africa bias by the ICC. This chapter provides an overview of the discussions and presentations emanating from the conference held in 2017 at Queen Mary University, London titled 'Criminal justice and accountability in Africa' and highlights a selection of papers presented in this volume. It also situates the developments within the larger discourse around international criminal justice over seven decades ago, starting with the establishment of the International Military Tribunal at Nuremberg in 1946, post-World War II.

1 Introduction

The purpose of this publication in general is to highlight the different perspectives of authors regarding developments in Africa on justice and accountability. This chapter pulls together the debates originating from the 2017 conference 'Criminal Justice and Accountability in Africa: National and regional developments', highlights the different approaches and mechanisms used to date, and what can be taken from them to advance justice and accountability. As the contributors to this publication grapple with national, regional and sub-regional examples and emerging practices,

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concerned with Criminal Justice and Accountability, the lack of a one size fits all approach becomes clear. While Africa has suffered from numerous conflicts which are typically addressed through international criminal law mechanisms and courts,[1] the need for a broader approach was evident throughout the discussions establishing the mechanisms.[2] The different legal perspectives and additional benefits from applying notions of transitional justice were shown to contribute positively. While within the African regional system, the complexities and nuances surrounding the proposed African criminal court were debated with both scepticism and optimism over a more regionally relevant and contextualised mechanism coming into existence.[3] Overall, international criminal justice has come a long way from the days of the Nuremberg and Tokyo Military Tribunals, with Africa contributing to the emerging practices.

As mentioned above, the background to this publication has its origins in a conference. The Centre of African Studies at SOAS and the Queen Mary University of London Criminal Justice Centre hosted a two-day conference in London on the topic of 'Criminal Justice and Accountability in Africa: National and regional developments' in October 2017. The catalyst for the conference was the various developments related to Africa in International Criminal Law (ICL) and transitional justice initiatives. This included the Habré judgment of the Extraordinary African Chamber in Senegal,[4] the adoption of the Protocol to establish the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol),[5] and also the call for a hybrid court to be established in relation to the conflict in South Sudan.[6] The importance of these and other national and regional efforts lies in the fact that, in addition to the international system, regional courts, tribunals and

1 For example, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

2 See the discussion on the purpose of the International Criminal Tribunal for Rwanda, UN Security Council, Resolution 955 (1994): Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994) Preamble. In terms of the individual state beliefs see the views expressed by Russia and Pakistan, UNSC 3453rd Meeting, Tuesday 8 November 1994, UN Doc S/PV. 3453, 2 and 10 respectively; contrasted with the position of Czech Republic UNSC 3453rd Meeting, Tuesday 8 November 1994, UN Doc S/PV. 3453 6-7.

3 See Chapters 5-7.

4 *Ministère Public v Hissèin Habré* Extraordinary African Chambers, Judgment of 30 May 2016.

5 African Union, The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014).

6 As set out in the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), Addis Ababa (12 September 2018).

forums that address individual criminal justice, also play a valuable role in contributing to justice and accountability goals.

Over the course of the two days the panels covered a variety of themes by panellists from Africa, Europe and Asia. In addition, PhD candidates acted as commentators on the presentations, thereby providing an opportunity for emerging researchers and scholars in the field. The keynote address was delivered by Gabriël Oosthuizen, Programme Director at the Institute for International Criminal Investigations, with his reflections and questions providing much food for thought. With his experience across the globe, and in seeing the 'barbarity perpetuated by our fellow human beings',[7] Mr Oosthuizen was cynical about international criminal justice efforts, and opposed to extending criminal jurisdiction to the African Court. However, he encouraged efforts to engage in ways to improve justice and accountability and learn from previous attempts, as 'the global tapestry of justice and accountability for international crimes, including its African threads, is evolving and becoming richer and more colourful by the day'.[8]

The richness of discussions was evident in each of the panels. Panel 1 focused on *Understanding criminal justice and accountability*, highlighting the different perspectives and approaches taken. Panel 2 placed *The African Criminal Court in context*, situating the African Union's effort in both global and regional political, legal and institutional contexts. Panel 3 highlighted *Hybrid courts: Impact, influence and lessons*, while Panel 4 explored issues of *Complementarity* between international courts and regional courts. The Panel on *Sexual and Gender Based Violence in the African Court* reinforced then normative and policy developments that have emerged and the developments in this field which cannot be overlooked when seeking justice and accountability. Finally, the conference concluded by considering *The International Criminal Law Section of the African Court: Thematic issues, Implementation and hurdles*, which picked up on many of the concerns raised by Mr Oosthuizen in the keynote address.[9]

The conference looked into the strengths and weaknesses of international criminal law as it has been applied in Africa, and the potential of regional mechanisms and responses. The main aim of the conference

7 G Oosthuizen 'Keynote address' at the 'Criminal justice and accountability in Africa: National and regional developments' Conference, 26 October 2017 (on file with editors).

8 Oosthuizen (n 7).

9 Examples being the financial capacity to establish and run such a court, the political will and track record of African states in pursuing accountability, and whether or not efforts would be better spent focusing on alternative mechanisms.

was to discuss if regional systems can contribute to the international system of criminal justice, and further advance accountability and justice. The discussions focused on regional initiatives and efforts to address criminal liability and end impunity; including through trials, courts and mechanisms, both proposed and established at the national level, as well as sub-regionally and regionally. While African systems were the main focus under discussion, conference participants reflected on the functioning and practices of other regional systems to see how justice and accountability are promoted, and the emerging practices that could help shape African approaches.

The discussions at the conference centred around the International Criminal Law Section of the proposed merged African Court of Justice and Human and Peoples' Rights and highlighted how the justice and accountability mechanisms and their constitutive instruments relate to other AU instruments and objectives, thereby bringing in a more creative interpretation and approach to strengthen the overall human rights system in Africa.

An important aim of the conference was to provide a forum for academics, especially emerging academics, to engage with trends in regional justice mechanisms in the quest to strengthen justice and accountability for international crimes. This edited collection provides a select few contributions emanating post the conference.[10] Overall, a developmental approach was taken with this collection to enable emerging academics to benefit from the conference participation and publication process. The value added from this approach, and also the contents of this publication, reflect a broader and more nuanced attitude to justice and accountability on the African continent.

2 The pursuit of justice and accountability in general

There have been decades of discussion over adequate responses to addressing international crimes and the issue of liability for the individuals who commit them.[11] Various responses have emerged over the years, including: the establishment by the United Nations (UN) of ad

10 Unfortunately, it was not possible to include all the presentations, due to delays in finalising a publisher and other factors beyond the control of the editors.

11 See CC Jalloh (ed) *The Sierra Leone Special Court and its legacy: The impact for Africa and international criminal law* (2014); HM Weinstein, LE Fletcher & P Vinck 'Stay the hand of justice: Whose priorities take priority?' in R Shaw & L Waldorf (eds) *Localizing transitional justice: Interventions and priorities after mass violence* (2010).

hoc tribunals (the International Criminal Tribunals for Yugoslavia[12] and Rwanda);[13] the UN created courts within national systems (among others the Special Court for Sierra Leone);[14] The Special Court for Lebanon;[15] the Extraordinary Chambers in the Courts of Cambodia);[16] and most notably, with states coming together in 1998 to establish the International Criminal Court (ICC).[17]

Despite the achievement of the UN ad hoc tribunals, UN courts, and the ICC, justice and accountability still elude many. These international courts and tribunals are not without their flaws,[18] and recently the ICC has been at the receiving end of backlash from certain African states and the African Union (AU).[19] While Burundi, the Gambia, and South Africa expressed their intention to withdraw from the ICC,[20] to date only Burundi has followed through.[21] The *implications* of African states withdrawing from the ICC were discussed at the conference and Harsh Mahaseth cautioned against such action – without assurance of adequate alternative mechanisms being in place, and identifying the weaknesses in

12 UN Security Council, Resolution 827: International Criminal Tribunal for the former Yugoslavia (ICTY), 25 May 1993, UN Doc S/RES/827 (1993).

13 UN Security Council Resolution 955 (n 2).

14 UN Security Council, Report of the planning mission on the establishment of the Special Court for Sierra Leone, 8 March 2002, UN Doc S/2002/246 (2002).

15 UN Security Council, Resolution 1757, 30 May 2007, UN Doc S/RES/1757 (2007).

16 Agreement Between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (27 October 2004).

17 UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, United Nations Treaty Series vol 2187, 1-38544 p 3.

18 For example, see, Jalloh (n 11); and MR Damaška 'The International Criminal Court: Between aspiration and achievement' (2009) 14 *UCLA Journal of International Law & Foreign Affairs* 19.

19 M Ssenyonjo 'The Rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African Leaders' (2013) 13 *International Criminal Law Review* 385; and H Richardson 'African grievances and the International Criminal Court: Issues of African equity under International Criminal Law' (2013) *Temple University Legal Studies Research Paper Series* 2013-24.

20 'Burundi to leave the ICC six months after probe announced' *BBC* 7 October 2016 https://www.bbc.com/news/world-africa-37585159 (accessed 4 February 2021); 'Gambia announces withdrawal from International Criminal Court' *Reuters* 26 October 2016 https://www.reuters.com/article/us-gambia-icc-idUSKCN12P335 (accessed 4 February 2021); and 'South Africa to quit International Criminal Court' *Aljazeera* 21 October 2016 https://www.aljazeera.com/news/2016/10/21/south-africa-to-quit-international-criminal-court (accessed 4 February 2021).

21 'Burundi first to leave International Criminal Court' *Aljazeera* 27 October 2017 https://www.aljazeera.com/news/2017/10/27/burundi-first-to-leave-international-criminal-court (accessed 4 February 2021).

the existing efforts of certain African states.[22] Similarly other participants, and also authors in this publication, note the flaws and challenges facing the African system of justice and accountability – but they also acknowledge the utility of a regional mechanism towards the goals of accountability. This publication thus moves the discourse away from a negative anti-Africa/ICC discourse and provides a more nuanced approach to justice and accountability.

While the tension between the ICC, AU and certain African states occupied a significant share of the debates, and was explored during the conference, it was not the main focus of the discussions. Instead the panels and debates explored the additional mechanisms which have already been tried and tested as well as those proposed in a regional and/or national setting. It is impossible, but also not the sole responsibility of the ICC,[23] to hold accountable the majority of individuals involved in international crimes. Thus, there is an opportunity in the current context for regional human rights systems to take ownership for setting normative standards and establishing mechanisms to ensure accountability and address impunity.

However, regional efforts cannot act in isolation of international efforts and the work of the ICC given the Court's mandate. By envisioning an ecosystem of courts supporting and complementing each other's efforts, instead of competing for cases and avoiding a duplication of cases and wasting resources, criminal justice and accountability could be enhanced. The lack of explicit reference to the ICC in the African Court's Statute, and the Rome Statute's explicit recognition of state prosecutions only,[24] does not prevent such an ecosystem from developing.

Conceptually, the idea of regional courts, tribunals and individual criminal justice are not new issues.[25] As the youngest regional human rights system, the African system is in a unique position to consider how it can evolve, while taking into account practices of older human rights regional systems. Over the years, African states, as well as other states and

22 Oral input by participant.

23 ICC OTP 'Policy Paper on the Interests of Justice' September 2007 at 7-8.

24 Article 17.

25 African states considered these issues during the establishment of the regional human rights system and more recently in the Report of the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, 24-28 January 2005, Abuja, Nigeria, EX.CL/162, at 2.

the UN, have individually and collectively, grappled with how to address accountability and individual responsibility for international crimes.[26]

In a relatively short time span, there has been an increase in justice mechanisms (both permanent and ad hoc) seeking to address accountability for gross violations. In Africa, these continental led criminal justice mechanisms consist of the establishment of The Extraordinary African Chamber in Senegal,[27] The Special Criminal Court within the Central African Republic,[28] Military Courts in the Democratic Republic of Congo,[29] which are trying crimes related to the on-going conflict in the country, the adoption of the Protocol to establish The International Criminal Law Section of the African Court of Justice and Human Rights,[30] as well as calls for a hybrid court to be established in relation to the conflict in South Sudan.[31] These efforts emphasise the prominence of criminal courts and prosecutions.

When one thinks of international criminal justice, naturally thoughts go to criminal courts, and these efforts emphasise the prominence of criminal courts and prosecutions. Yet, these are not the only mechanisms and approaches which are, and should, be pursued. Chapters 3 and 6 include consideration of transitional justice and the benefit of adopting a broader understanding to justice beyond traditional criminal prosecutions, into the accountability and justice discussion, emphasising the lessons that emerge.

3 Overview of conference presentations

The opening theme of the conference was investigated by a panel reflecting on *Understanding criminal justice and transitional justice in Africa*, including an exploration of indigenous mechanisms and national prosecutions.

26 This was recently seen with the African Union's debates on how best to proceed with holding former Chadian Head of State Hissène Habré accountable, see African Union, Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (May 2006).

27 As above.

28 *Loi 15/003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour pénale spéciale*, [Law 15/003 of 3 June 2015, Establishing the Organisation and Functioning of the Special Criminal Court].

29 For example, Acts 023-2002 of 18 November 2002 on the code judiciaire militaire (military justice code) and 024-2002 of 18 November 2002 on the code pénal militaire (military criminal code).

30 n 5.

31 n 6.

Agnieszka Szpak's Chapter 3 explores whether indigenous mechanisms present an opportunity to achieve transitional justice objectives while addressing the existing and potential gaps of criminal prosecutions, and the problems often associated with state-justice systems. By considering retributive and restorative justice, Szpak highlights the importance that truth plays in both. She argues that indigenous mechanisms can complement other justice processes, even when the mechanisms have been somewhat adapted and changed to reflect the nature of the crimes under consideration. From studying the *Gacaca* courts of Rwanda, the Burundian *bashinganthe* councils and Uganda's pursuit of *mato oput*, the chapter demonstrates the strengths and weaknesses of such mechanisms. One strength identified is a pattern of crimes to be identified in addition to determining individual guilt, whereas in a criminal prosecution individual guilt is the only outcome that can be expected. Overall, by understanding criminal justice as encompassing transitional justice and indigenous mechanisms, a multi-layered justice model, reflecting legal pluralism, is presented as preferable. The potential for taking into account the victim's voices, including those of the indigenous community as a whole, are regarded as important and it is argued that such an approach presents a better opportunity to achieve justice and accountability goals.

Rui Verde's Chapter 4 reflects on Portugal's attempts to prosecute Angolan Vice-President Manuel Vicente for the crimes of corruption, money laundering and document forgery. The chapter demonstrates how the concept of law and the theoretical approach to the rule of law taken by a state impacts the stance taken to criminal justice. The historical relationship between Portugal and its former colony, Angola, is undeniably a key dynamic in the issues explored in the chapter. The tension, and different perceptions, that exist between law as a political tool and a means to search for justice, are highlighted. Verde highlights how the distinct understanding and theoretical approach adopted by Angola, since independence, influences the view of Portugal's attempted prosecution. Consequently, he argues that the Angolan perspective created an environment whereby the role of justice is lacking in the discourse of the ruling party. The different theoretical approaches to the rule of law impact how justice is viewed and pursued, with the case study of Angola reflecting a concept of law which entangles politics with the law as an operational concept. This chapter serves as a reminder that international criminal justice is not a unified concept amongst states and politics is likely to be part of the process, despite the benefit of removal of such practices.

While national and international courts provide an opportunity to pursue justice, they can be limited in practice. However, hybrid courts are thought to have the potential to combine the positive aspects from

both international and national prosecutions.[32] The panel which focused on *Hybrid courts: Impact, influence and lessons* presented some perspectives on lessons learned from various processes. Marina Brilman's insight into the Cameroonian military jurisdiction over civilians reflected the concerns around military processes, while nevertheless acknowledging their contribution. Juan-Pablo Perez-Leon-Acevedo provided an analysis of the Extraordinary African Chambers in Senegal's victim reparations and what the Malabo Protocol Court, and other potential regional courts, could learn to improve their contribution to justice.

The panel on complementarity provided the opportunity to explore how both the ICC and other international courts could approach jurisdictional conflicts as well as the promotion of national and (sub) regional prosecutions. Patricia Hobbs presented on *Achieving the catalysing effect of complementarity through a rejection of Gabon's self-referral to the ICC* and why national prosecutions need to be genuinely taken up and the responsibility of states in pursuing accountability to be upheld. By using the complementarity approach adopted with the Malabo Protocol's Court, Dominique Mystris presented on *The potential space for regional courts to contribute to international criminal justice and accountability*. Some of these complementarity issues have been taken up and explored further by Mitsure Inazumi in Chapter 7.

Unfortunately, sexual and gender-based violence (SGBV) is often pervasive in conflict situations and contexts where international crimes occur.[33] As such, they remain a focus of prosecutorial efforts, albeit imperfectly,[34] with key decisions originating from international tribunals and courts' consideration of conflict situations in Africa. For example, the ICTR *Aakayesu* case[35] provided a precedent on the definition of rape as a crime against humanity. The SGBV aspects of justice and accountability were discussed under the theme *Sexual and Gender Based Violence in the African Court* to consider current efforts and regional approaches taken. Based on her experience and research in the field, Carla Ferstman, set out the normative and policy developments by presenting an *Overview of the SGBV field from an international and regional perspective.* The

32 M Kersten 'As the pendulum swings – The revival of the hybrid tribunal' in MJ Christensen & R Levi (eds) *International practices of criminal justice* (2017) 251-273.

33 UN Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence, 3 June 2020, UN Doc S/2020/487 (2020).

34 Louise Chappell 'The politics of gender justice at the ICC: Legacies and legitimacy' *EJIL: Talk!* 19 December 2016 https://www.ejiltalk.org/the-politics-of-gender-justice-at-the-icc-legacies-and-legitimacy/ (accessed 4 February 2021).

35 *The Prosecutor v Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) 596-8.

International Criminal Tribunal for the Former Yugoslavia was also faced with addressing the widespread SGBV related crimes which occurred. However, it was not left solely to the Tribunal to investigate and prosecute such crimes, and the national level courts continue to work on such cases. Kirsten Campbell looked at the experience of prosecuting such crimes by providing insights into *SGBV crimes and Bosnian courts* and the practices and challenges that have emerged. Regarding national level efforts in Africa, Nastasja White set out some of the challenges that international attention and NGO influence can have on procedural rights and the right to a fair trial by looking at the prosecution of SGBV in the Democratic Republic of Congo.

Reflecting on the African human rights system, it was noted that during negotiations of the African Charter on Human and Peoples' Rights, international crimes as well as human rights violations were considered.[36] Ultimately, despite the recognition of the value that individual criminal responsibility has, it was never included. Instead, establishing the African Commission on Human and Peoples' Rights initially, and subsequently the African Court on Human and Peoples' Rights, have been a priority. However, until fairly recently, the question of criminal liability for gross violations of human rights has not had the same level of focus. When the prospect arose for a merger between the African Court on Human and Peoples' Rights and the African Court of Justice, then Nigerian President Obasanjo floated the idea for 'a division for cross-border criminal issues or whatever'.[37] But, a new direction for regional accountability for international crimes was nevertheless absent. The merged court decided upon by the AU Assembly did not include any criminal jurisdiction, be it transnational or international. It was not until 2014, with the adoption of the Malabo Protocol, that individual criminal liability was included. The Protocol includes core international crimes as well as more conventional transnational and treaty-based crimes.[38]

The proposed court, as set out in the Statute within the Malabo Protocol, was approached from two aspects in the conference discussion. These included *The African Regional Criminal Court in context* and an analysis of *The International Criminal Law Section of the African Court – Thematic issues, implementation and hurdles.*

36 F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 1. On the development of the African Human Rights system see CH Heyns *Human Rights Law in Africa* (1996).

37 Report of the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union (n 25) 2.

38 Article 28A-L.

Gabriël Oosthuizen, the keynote speaker warned that

> we should not be bamboozled, we should not give legitimacy and oxygen to ideas, processes and mechanisms that would divert our attention from real, or more realistic, efforts and pathways to secure justice and accountability.[39]

The panellists presented on the pros and cons of an African continental criminal court, addressing some of the issues raised by the keynote speaker.

Drawing on his experience, Oosthuizen explained his hesitation and current lack of support for the African Court because of the slow number of ratifications to the Malabo Protocol;[40] scepticism and lack of clarity on who was driving the idea; why efforts to strengthen existing national and sub-regional courts and mechanisms have not been focused on; the secrecy surrounding the drafting of the Protocol; the immunity clause and the lack of reference to the ICC; the lack of political will to pursue national prosecutions by African states when they are withdrawing from the ICC and decrying the abuse of universal jurisdiction; and, finally, the lack of opposition expressed at the time of drafting by those civil society organisation who presently oppose the Court.[41]

The views expressed by Oosthuizen resonated with participants and panellists grappled with the questions raised. For example, Chapter 5 addresses the pros and cons of the proposed African Criminal Court with Lillian Mongella and Theresa Akpoghome arguing that the Court is a welcome addition to the continental system from the perspective of addressing certain pervasive crimes which the ICC is not mandated to address,[42] and other international courts have failed to include within their jurisdiction. Additionally, the prospect of a court sitting within the continent and, potentially, closer to victims and those most affected is another positive development, according to these authors.

Notwithstanding, concerns remain.[43] For example, the immunity provision raises concerns for Mongella and Akpoghome, and others who call for the AU to remove Heads of State who commit the crimes specified under the Court's jurisdiction and which negate the impact of

39 Oosthuizen (n 7).

40 There are currently no ratifications. https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 18 May 2022).

41 Oosthuizen (n 7).

42 Article 5 of the Rome Statute sets out the crimes under the Court's jurisdiction.

43 For example, Amnesty International 'Malabo Protocol: Legal and institutional implications of the merged and expanded African Court' (2016).

the provision. Furthermore, the authors in Chapter 5 argue that African leaders have demonstrated the political will to address international crimes. Both African and non-African states 'sweep past atrocities under the carpet',[44] regarding immunity for Heads of State, and this reinforces the critique. For international and regional courts to succeed, there needs to be substantive political will and support from both member and non-member states alike. If not, the possibility of states undermining and making such courts redundant is high.

Emphasising the relevance of political will as a crucial aspect for successful prosecutions, Maria Garcia-Casas provided a perspective on *Dealing with the crime of Unconstitutional Change of Government in times of transition* to the discussion on the final day of the conference. The issue of unconstitutional changes of government is important to the AU and its members. Yet, the crime as articulated in the Malabo Protocol statute, potentially conflicts with the AU's transitional justice policy and the organisation's stated encouragement of amnesties to get combatants to surrender and disarm as well as to encourage peaceful transfers of power. This is further complicated by the political nature and roots of the crime of unconstitutional change of government in times of transition and the challenges this poses for judges.

The majority of the literature on the International Criminal Law Section of the African Court focus on the so-called anti-ICC context of the court.[45] Reflecting on views about the initial reluctance to include individual criminal liability within the regional human rights system, questions have been raised as to what has happened to change the AU and African states' approach.[46] Chapter 5 and 6 show that while the experience of the ICC and its engagement with the African continent has played a role in changing the landscape, it is simplistic to attribute this as the sole reason. Other possible aspects include: there is an expansion of the categories of crimes considered 'international' under the ICLS jurisdiction, which reflects a more African focus; elements of transitional justice are evident in some of the mechanisms aligning with AU peace and security objectives more generally; and, the potential to include these mechanisms into the broader African Peace and Security Architecture provide a unique opportunity to strengthen an often criticised regional system which is in need of strengthening.

44 Oosthuizen (n 7).

45 M du Plessis 'A New Regional International Criminal Court for Africa?' (2012) 25 *South African Journal of Criminal Justice* 286 and Amnesty International (n 43).

46 See Chapters 4 and 5.

In Chapter 6, Mystris acknowledges the imperfections within the Malabo Protocol's Court, and situates the African criminal court within the AU's institutional framework. This moves the discussion of the ICLS to being more than a competitor of the ICC, framing its understanding within a more holistic approach and as a consequence of being part of a regional organisation's judicial organ and not a standalone court. Within the AU's agenda, peace and security is central and this is reflected in its policies and official approaches which links peace, justice and reconciliation. By considering the organisation's policies and documents related to justice, the chapter identifies where the Court's aims and objectives match those of the AU more generally. It is argued that by situating the International Criminal Law Section within the African Peace and Security Architecture, it provides the more holistic understanding on both the court and organisation's objectives while simultaneously advancing the institutional ideology and potentially ICL and transitional justice.

The final chapter, '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', addresses the historical significance of the AU and member states' attempt to establish their own continental criminal court. Mitsue Inazumi views such efforts as being the 'Africanisation' of international criminal law and AU members exerting their judicial self-determination. While Africa has been said to be the receiver of International Law, Inazumi's perspective shifts this to one where the continent's potential as an active contributor is realised. The author asserts that the ability for this to fully materialise is contingent on preventing the political manipulation and abuse of the court as a means by which to protect certain individuals from prosecution. This is not a uniquely African problem as international criminal law has experienced political influence across the board,[47] ranging from attempts to prevent prosecutions of state officials to preventing cases being investigated and coming under an international court's jurisdiction.

While the extensive list of crimes included in the Malabo Protocol has been criticised, participants also considered their importance as they reflect the needs of the continent and the significance that accompanies such a list, including corporate criminal responsibility. During the conference, Taygeti Michalakea explored the notion of *Corporate accountability and transitional justice* and the challenges and potential advancements that accompany it. The need to address corporate accountability for international and other crimes is widely documented, and such actors

47 F Mégret 'The politics of international criminal justice' (2002) 13 *European Journal of International Law* 1261.

contribute to the commission of crimes in a number of African conflict situations, and creating instability.[48]

4 Conclusion

The development of international criminal justice over the past seven decades, started with the establishment of the International Military Tribunal at Nuremberg (hereafter Nuremberg Tribunal) in 1946, post-World War II.[49] There are contrasting views about the motivations and value added regarding justice and accountability emanating from this tribunal. For example, Mutua argues that 'Nuremberg was a patchwork of political convenience, the arrogance of military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe'.[50] While acknowledging that legal prosecutions embrace the rule of law, Minow on the other hand, argues that retroactivity, politicisation, and selectivity are part of the Nuremberg trials, and a danger which tarnishes the rule of law ideals that one pursues in the quest for justice and accountability.[51] She notes that

> the Nuremberg and Tokyo trials were condemned by many as travesties of justice, the spoils of the victors of war, and the selective prosecution of individuals for acts more properly attributable to government themselves.[52]

However, Cassese argues that the Nuremberg Tribunal planted the seeds on the need for a system of justice which holds individuals accountable for gross human rights violations; prevents the usage of state sovereignty as a shield; and creates a new *nomos* based on the supremacy of international law over domestic law, while respecting the rule of law.[53] The codification of the Nuremberg principles, including through the Genocide Convention,[54]

48 H van der Wilt 'Corporate criminal responsibility for international crimes: Exploring the possibilities' (2013) 12 *Chinese Journal of International Law* 43.

49 Established by the Charter of the International Military Tribunal for the Far East at Tokyo, 19 January 1946 (Reprinted in 4 Treaties and Other Agreements of the United States of America 27 (1946)).

50 M Mutua 'From Nuremberg to the Rwanda Tribunal: Justice or retribution?' (2000) 6 *Buffalo Human Rights Law Review* 77 at 79.

51 M Minow *Between vengeance and forgiveness: Facing history after genocide and mass violence* (1999) 31.

52 Minow (n 51) 27.

53 A Cassese 'Reflections on international criminal justice' (2011) 9 *Journal of International Criminal Justice* 271 at 272.

54 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol 78, p 277

The Hague[55] and Geneva Conventions,[56] and proposals for a permanent criminal court, are indicators of political will to address the challenges of impunity for gross violations of human rights.

Despite many atrocities over the decades since WW2, and debates and discussions on the need to develop the field of international criminal justice since Nuremberg, to address justice and accountability imperatives at the regional and international levels, the lack of substantive attention remained until the 1990s. The subsequent creation of Tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and Lebanon, among others, indicates a willingness to address the gap in international accountability mechanisms, after decades of inaction for gross human rights violations. The adoption by the United Nations of the Rome Statute for the International Criminal Court in 1998, is a further step in developing international criminal justice. The attempts by the UN to dispense justice at the international level are not perfect and do not necessarily provide justice, satisfaction, and non-repetition of gross human rights violations – but they do 'represent the possibility of legal responses, rather than responses grounded in sheer power politics or military aggression'.[57]

The ad hoc Tribunals have provided valuable precedents and lessons learned, and this has contributed to the normative framework of the Rome Statute, its rules and procedures, and subsequent policy developments within the ICC. These developments in turn have influenced and shaped national and regional level initiatives, including the African Court and the development of criminal justice. The ad hoc Tribunals have not escaped critiques and include the following views: that the Yugoslavia tribunal 'seems to be a political response rather than an embrace of the rule of law';[58] that the Rwanda Tribunal 'serves to deflect responsibility, to assuage the conscience of states which were unwilling to stop the genocide, or to legitimize the Tutsi regime of Paul Kagame, Rwanda's strongman';[59] that the 'haphazard creation of war crimes tribunals is selective and subject to the whims of states';[60] and that they 'have been hampered by logistical, structural and political considerations with lofty mandates tempered by

55 UNESCO, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 216.

56 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug 1949, 75 UNTS 287

57 Minow (n 51) 27.

58 Minow (n 51) 37.

59 Mutua (n 50) 78.

60 T Meron 'International criminalization of atrocities' (1995) 89 *American Journal of International Law* 554.

the political contexts in which they were set and the climates in which they operate'.[61] There is no doubt that many critiques will be articulated about the African Court and its functioning, including the development of norms within the International Criminal Law Section.

Africa's drive for regional justice mechanisms and ownership is not unique. Other regions are also searching for means through which to address their accountability needs and thus it is through consideration of these various approaches that a picture can emerge as to the potential benefits and pitfalls of regional approaches, as a whole, to justice and accountability. Mutua asserts

> Despite its contribution to the international criminalisation of internal atrocities, Nuremberg serves as the model of the triumph of convenience over principle, the subordination of justice to politics, and the arrogance of might over morality. Nuremberg gave future generations a basis for talking about accountability for the most horrible crimes; but it also emphasized the cynicism of power.[62]

This view reinforces some of the discussions around the integrity, legitimacy and independence of the African Court in general and the International Criminal Law Section in particular. As discussed above, there are conceptual and practical issues of concern regarding the effective functioning of the Court, but there is also a sense of optimism about a new justice and accountability mechanism within the African regional human rights system.

The conference, and this edited collection, demonstrate that Africa has offered a lot to our understanding of justice and the pursuit of accountability, from both a traditional ICL approach and that of transitional justice. African states appear to be engaging more and more in international criminal matters through their own approaches, national mechanisms and the regional systems, thereby avoiding the use of the ICC as the primary mechanism. Partly this is related to the existence of crimes committed before the international court existed and therefore are beyond the scope of the court's jurisdiction. This might also be related to the ICC's own jurisdiction as a court of last resort, or it could be because some African states are unhappy with the ICC and are attempting to find alternative methods to achieve accountability. Whatever the cause, African responses and mechanisms are emerging, with the potential to develop a regional approach to transitional justice and international criminal law,

61 Mutua (n 50) 87.

62 Mutua (n 50) 82.

including through a body of transnational law, a dedicated court system, and jurisprudence that will inform and shape national level accountability mechanisms. This publication contributes to the justice and accountability discussions, based on realistic notions that acknowledge the context and challenges that face the African continent. However, there is also a sense of hope that a new judicial mechanism is needed and that it can contribute to addressing the impunity gap. Thus, further research that continues to monitor developments is essential. In addition, advocacy to ensure the integrity of the implementation of the Treaty will be necessary.

In conclusion, as noted by Cassese:

> Criminal justice is among the most civilised responses to such violence. It channels the hatred and yearning for bloody revenge into collective institutions that are entrusted with even-handedly appraising the accusations. If well founded, they assuage the victims' demands by punishing the culprit. Thus, criminal justice addresses the need to satisfy both private and collective interests. It merges the private desire for an eye for an eye justice with the public need to prevent and repress any serious breach of public order and community values. In this way, criminal justice contributes potently to social peace.[63]

63 Cassese (n 53) 271.