2 International criminal justice and accountability in Africa: Balancing legal idealism and legal realism

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Abstract

This chapter argues the need for a balance between legal idealism and legal realism in the pursuit of international criminal justice and accountability in Africa with reference to the relationship between African States and the International Criminal Court (ICC). The analysis begins with a contextualisation of international criminal justice and the need for it, followed by a contextualisation of the nature of accountability in criminal justice and its complexities. It then engages with the criticisms of the ICC's engagement with Africa before ultimately arguing for a balance between legal idealism and legal realism with regard to the relationship between Africa and the ICC. In its conclusion, the chapter calls on African states to ratify the 2014 Malabo Protocol to activate the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights as a fundamental regional alternative for an effective international criminal justice and accountability mechanism in Africa.

1 Introduction

This chapter engages contextually with the general theme of this book, 'Criminal Justice and Accountability in Africa'. It advocates for a balance between legal idealism and legal realism to ensure effective criminal justice and accountability in Africa. In legal theory, idealism relates to the 'ought' in law, that is, a conceptualisation of the ideal rule at the basis of positive law, while realism relates to the 'is', that is, appreciation of a factual account of the law, namely facing the facts. It is obvious that the concept of criminal justice in Africa, as explored in this volume, relates contextually to international criminal justice because the crimes in question are designated 'international crimes' due to their acknowledged heinous nature internationally.

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Consequent to different atrocious war crimes experienced in the past century and the legal complexities encountered in bringing the perpetrators to justice, the International Criminal Court (ICC) was created in 1998 as a realist permanent judicial institution for pursuing international criminal justice and accountability in respect of certain crimes designated and acknowledged as international crimes globally. However, the Court's engagement with Africa has been characterised by idealist legal and political controversies that have questioned its veracity and resulted in a tense relationship between the Court and some African states and the African Union (AU). While the critical need for effective criminal justice and accountability in Africa is reflected in most of the subsequent chapters in this book, the introductory chapter has rightly highlighted the need to move 'the discourse away from a negative anti-Africa/ICC discourse and provide a more nuanced approach to justice and accountability' on the continent.[1] Nevertheless, being the only purposely established permanent and functional judicial institution of international criminal justice currently available, the ICC's engagement with Africa remains an essential part, if not the crux, of the debate on criminal justice and accountability in Africa, and therefore a necessary catalyst in this analysis.

It is against this background that this chapter aims to advocate for the need to achieve a balance between legal idealism and legal realism in the pursuit of criminal justice and accountability in Africa with reference to the ICC. The analysis begins with a contextualisation of international criminal justice and the need for it, followed by a contextualisation of the nature of accountability in criminal justice and its complexities. It then engages with the different perspectives on the criticisms of the ICC's engagement with Africa before ultimately arguing for a balance between legal idealism and legal realism with regard to the relationship between the ICC and Africa. It closes with some brief concluding remarks based on the preceding analysis. Essentially, the chapter argues strongly on the need for African states to ratify the 2014 Malabo Protocol to activate the International Criminal Law Section (ICLS) of the African Court of Justice and Human and Peoples' Rights (ACJHPR) as a fundamental regional alternative for an effective international criminal justice and accountability mechanism in Africa.

2 Contextualising international criminal justice and the need for it

The idea of international criminal justice is relatively new and it is underpinned by the recognised need for international responsiveness to

1 See Chapter 1, Part 2.

'the most serious crimes of concern to the international community as a whole'.[2] The Preamble of the Rome Statute of the ICC notes that during the last century, 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity' the continuance of which 'threaten the peace, security and well-being of the world' and which 'must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'[3] for that purpose. Consequently, certain atrocities are designated today as international crimes for which perpetrators must be brought to justice and made accountable, based largely on the perception that they 'are so heinous that they offend the interest of all humanity, and, indeed, imperil civilization itself'[4] and also have the tendency of constituting a threat to international peace and security beyond the immediate jurisdictions within which they were committed. The former UN Secretary General, Kofi Annan, observed in his 2004 report on the rule of law and transitional justice in conflict and post-conflict societies that one of the main objectives of establishing international criminal tribunals is to bring to justice 'those responsible for serious violations of human rights and humanitarian law, [and] putting an end to such violations and preventing their recurrence, securing justice and dignity for victims'.[5]

Despite this worthy objective, the concept of international criminal law and justice was, in its early days, considered by sceptics as an epitome of idealism in international relations and an affront to state sovereignty.[6] The concept was confronted with realist substantive and procedural arguments contesting its practicality within an international system based on the consent of states. First, there was the perceived difficulty of creating an international agreement on what would be accepted as international crimes and, second, the challenge of securing international agreement

2 Article 5(1) of the UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, United Nations Treaty Series vol 2187, 1-38544 p 3.

3 Rome Statute (n 2) Preambular paras 2-4.

4 LN Sadat 'Competing and overlapping jurisdiction' in MC Bassiouni (ed) *International Criminal Law* (2008) 201 at 207.

5 UN Security Council, Report of the Secretary-General 'The rule of law and transitional justice in conflict and post-conflict societies' 23 August 2004, UN Doc S/2004/616 (2004) para 38 http://www.legal-tools.org/doc/77bebf/ (accessed 20 August 2021).

6 See eg, RA Friedlander 'The foundations of International Criminal Law: A present-day inquiry' (1983) 15 *Case Western Reserve Journal of International Law* 13; and R Cryer 'International Criminal Law vs state sovereignty: Another round?' (2006) 16 *The European Journal of International Law* 979 at 980, noting that: 'Generally, international criminal law scholars see sovereignty as the enemy. It is seen as the sibling of realpolitik, thwarting international criminal justice at every turn'.

about the procedure for prosecuting and punishing such international crimes. For example, in his 2010 article titled 'Some objections to the International Criminal Court',[7] Alfred Rubin had observed that there were underlying inconsistencies between the intended operations of the ICC and the international order, arguing that the ICC, as an institution of international criminal justice, 'cannot work as envisaged without massive changes in the international legal order [but that] those changes cannot be accomplished without losses that nobody realistically expects and only few really wanted'. In his view, the creation of the ICC assumed there was such a thing as International Criminal Law, begging the questions: 'But what is its substance? Who exercises law-making authority for the international legal community? Who has the legal authority to interpret the law once supposedly found?'[8] These questions, he argued, arise from the fact that criminal law is different from civil claims with the traditional position being that crimes are not 'defined by international law as such' but rather 'by the municipal laws of many states and in a few cases by international tribunals set up by victor states in an exercise of positive law making' with 'the tribunal's new rules [being] "accepted" under one rationale or another, by the states in which the accused were nationals'. One rationale was that 'if all or nearly all "civilised" states define particular acts as violating their municipal criminal laws, then those acts violate "international law"'. Another rationale was that 'some acts violate "general principles of law recognized by civilized states," and thus violate general international law'.[9] Thus, from a realist perspective, the rationale of international criminal law is very much tied to its acceptance in divergent municipal orders based on shared human values, the violations of which will be frowned upon by all.

Consequently, the virtue of international criminal justice is essentially linked to the need to redress violations of shared human ideals legally protected by the rules of International Humanitarian Law (IHL), which protect human dignity by regulating and putting constraints on the conduct of warfare, the rules of International Human Rights Law (IHRL), which promote the protection of human dignity, and International Criminal Law (ICL), which prohibits and prescribes punishments for certain agreed core crimes under international law. These three specialised areas of international law constitute the three pillars of international criminal justice, as they together provide the substantive basis for the system. Thus, for example, the crime of genocide, crimes against humanity, war crimes,

7 AP Rubin 'Some objections to the International Criminal Court' (2000) 12 *Peace Review* 45.

8 Rubin (n 7) 45.

9 Rubin (n 7) 46.

and the crime of aggression, are all proscribed under article 5 of the ICC Rome Statute as punishable substantive international crimes that violate core norms of both IHL and IHRL. The acknowledgement of these crimes as 'international crimes' mainly depicts them as crimes that deeply shock the conscience of all humanity,[10] but does not necessarily mean that they can only be tried by international courts or tribunals. Such crimes are committed within states by both state and non-state actors during armed conflicts or insurgencies and, thus, the perpetrators should ideally be tried and brought to justice locally within the respective jurisdictions of the states in which they were committed. In reality, however, the perpetrators of such crimes are often not brought to justice by the state in whose jurisdiction they were committed, either due to lack of local capacity to prosecute or due to outright impunity on the part of the implicated state. Thus prompting the need for international responsiveness in bringing the perpetrators to justice before international courts or tribunals created for that purpose as a deterrence to such crimes and to ensure the maintenance of international peace and security. In this context, 'international' responsiveness would include 'regional' responsiveness as is acknowledged under the concept of 'regional arrangements' in article 52 of the UN Charter. This article provides, inter alia, that nothing in the Charter 'precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action', and that the UN Security Council (UNSC) shall encourage the settlement of local disputes through such regional arrangements by respective states.

This obviously encourages a complementary relationship between universal and regional efforts for ensuring and maintaining international peace and security, with preference given to regional efforts in that regard. Giving precedence to regional efforts is very sensible because the UN or other universal mechanisms are, practically, often too far removed from the location of local disputes and incidents that might impact on international peace and security. Thus, the reasonable expectation is that regional initiatives and mechanisms should be able to deal with such situations more effectively due to their relative local proximity. In following that approach, the concept of complementarity in ensuring accountability in international criminal justice is reflected in the ICC's jurisdiction as acknowledged in the Rome Statute.[11] However, the concept of complementarity under the Rome Statute specifically subjects the ICC's jurisdiction to national jurisdictions without specific mention of regional

10 See eg, MM deGuzman *Shocking the conscience of humanity: Gravity and the legitimacy of International Criminal Law* (2020).

11 See Preambular para 10 and art 17 of the Rome Statute (n 2).

jurisdiction. This is reflected in Preambular paragraph 10 of the Rome Statute which provides that the ICC 'shall be complementary to national criminal jurisdictions' and restated substantively in article 17(1) of the Statute. In relation to the identified importance of regional responsiveness to international criminal justice, this apparently raises the legal question about the jurisdictional relationship between the ICC and regional courts or tribunals set up for that purpose, such as the ICLS of the ACJHPR created by the AU through the Malabo Protocol adopted in 2014. Addressing this question, Miles Jackson has argued reasonably that 'a genuine criminal prosecution by a lawfully constituted regional tribunal means that the "case is being prosecuted by a State which has jurisdiction over it" for the purposes of Article 17(1)(a)' of the Rome Statute. He argued further that '[t]his conclusion follows from the proper understanding of the legal relationship between states and regional tribunals and the contextualized application of the principles of treaty interpretation … is consistent with the values underlying the central principle of complementarity and … makes sense as a matter of policy'.[12]

Over time, the moral need for international criminal justice has become universally accepted and legally solidified, through both customary international law and treaty law, as a necessary initiative spearheaded by the international community. However, the implementational obligation is primarily placed on states, with necessary regional and international responsiveness required only where an implicated state fails to fulfil that primary implementational obligation due to lack of capacity or due to obvious impunity.

Evidently, there have been a large number of past and ongoing conflicts and insurgencies in different parts of Africa such as Uganda, Sudan, Liberia, Sierra Leone, the Democratic Republic of Congo, Ethiopia, Mali and Nigeria, amongst others, in which atrocious crimes have been committed by both state and non-state actors, without local accountability. Thus, it is submitted here that instead of the practice of creating ad hoc tribunals for addressing the situation, a permanent African regional court for bringing perpetrators to justice in cases where the implicated African states have failed to do so would be more effective for both accountability and deterrence. While the ideal would be for perpetrators of such atrocities to be brought to justice by the states in which the atrocities were committed, a permanent African regional court would have the moral legitimacy and legal proximity to provide necessary regional complementary responsiveness for trying such perpetrators,

12 See eg, M Jackson 'Regional complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1061 at 1062.

where states have failed to do so. This need for regional responsiveness, when necessary, has been idealised with the adoption of the 2014 Malabo Protocol conferring the ACJHPR with complementary international criminal jurisdiction to try persons for the crime of genocide, crimes against humanity, war crimes and the crime of aggression amongst others, which would be effective when the Protocol goes into force 30 days after ratification by 15 AU member states pursuant to article 11 of the Protocol.[13] However, the international criminal jurisdiction of the ACJHPR is made complementary not only to national courts, but also to the courts of the sub-Regional Economic Communities where specifically provided for.[14] When the Malabo Protocol eventually enters into force, as this chapter strongly advocates, it will take precedence over the ICC in Africa, and it is only in the absence of regional complementary responsiveness by the ACJHPR that the ICC should step up to prevent the perpetuation of impunity due to lack of state or regional action to ensure necessary accountability.

3 Contextualising accountability in criminal justice and its complexities

While the ultimate goal of international criminal justice is to ensure accountability as a means of curbing impunity and deterring future atrocities, this is usually pursued reactively through post-conflict retributive justice in the form of judicial trials to punish perpetrators and provide redress for victims after the commission of heinous crimes. This reflects retributive accountability and courts are the most essential institutions for realising it, thus the international community has, in cooperation with states, spearheaded the creation of different courts/tribunals for that purpose at different times. These efforts have been complex and have evolved over time, often challenged as an affront to state sovereignty. The Nuremberg and Tokyo trials after World War II in 1945 and 1946 are usually referenced as the starting point of creating formal tribunals for pursuing international criminal justice and accountability in contemporary times. Andrew Novak notes that the Nuremberg and Tokyo trials 'were the first attempts to criminalize aggressive war and abuses

13 African Union, The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014) (Malabo Protocol). Currently the Protocol has 15 signatories with the last signature made on 2 April 2019 by Togo, but there has been no single ratification of the Protocol to date. See the status of ratification of the Malabo Protocol at: https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (accessed 20 August 2021).

14 Art 46H(1), Statute of the African Court of Justice and Human Rights annexed to the Malabo Protocol.

against civilian populations'.[15] The Charter of the Nuremberg Tribunal was the first formal legal basis for offences considered prohibited under international criminal law, listing crimes against peace, war crimes and crimes against humanity and complicity in committing them as crimes punishable under international law. This was followed by the establishment of the International Criminal Tribunal of the Former Yugoslavia (ICTY) through UN Security Council Resolution 827 of 1993[16] to prosecute persons responsible for war crimes committed during the conflicts in the Balkans in the 1990s, and the International Criminal Tribunal for Rwanda (ICTR) also established through UN Security Council Resolution 955 of 1994[17] to prosecute persons responsible for genocide and other serious violations of IHL committed in Rwanda and neighbouring states, between 1 January 1994 and 31 December 1994, and ultimately the establishment of the ICC through the Rome Statute of 1998. With reference to Africa, the Special Court for Sierra Leone (SCSL) was created in 2002 after the ICC, pursuant to an agreement between the UN and the Government of Sierra Leone, connoting respect for the sovereignty of Sierra Leone. While the ICTY, ICTR and SCSL were established under Chapter VII of the UN Charter on behalf of the international community, they were ad hoc and non-permanent institutions unlike the ICC which was established as a permanent court by a multilateral treaty adopted through international cooperation, with most African countries as state parties. The ICTR had jurisdiction

> to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994[18]

and the SCSL had jurisdiction 'to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.[19] Other ad hoc tribunals established to address African situations, such as the Extraordinary African Chambers within the courts

15 A Novak *The International Criminal Court: An introduction* (2015) at 8.

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

17 UN Security Council, Resolution 955 (1994): Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994).

18 Art 1 of the UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994).

19 Art 1 of the UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002).

of Senegal established in 2012 to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, are mentioned in subsequent chapters of this volume.

Considering the historical context of ICL and looking at the Preambles of all the special tribunals mentioned above, it is obvious that the objective of international criminal justice is to ensure that, in default of state action, perpetrators of war crimes are appropriately brought to justice through them and made accountable for their atrocities after the fact, to serve as future deterrence.[20] But apart from that traditional reactive retributive accountability, it is important to also appreciate the concept of proactive preventive accountability, as it has been debated whether international criminal trials have really succeeded in serving as a deterrent against future atrocities as intended.[21] Thus, Farhad Malekian has noted that:

> When we talk of the principles of international criminal justice, we do not necessarily mean only the judgments that may be delivered by international criminal courts, but also the living structures of international criminal law as it exists in the international relations of states.[22]

Similarly Richard Goldstone, the former Chief Prosecutor for both the ICTY and ICTR, has noted that while '[c]riminal prosecution is the most common form of justice, [it] is, however, not the only form, nor necessarily the most appropriate form in every case'.[23] This highlights the need for a more encompassing approach to accountability in international criminal justice, especially in Africa. Proactive preventive accountability is encouraged under both IHL and IHRL through the international obligation placed on states to widely disseminate and teach the rules of IHL amongst their populace in time of peace, even before the occurrence of armed conflicts, as provided, for example, in article 144 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, that:

20 See the Preambular statements of United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945, 82 UNTC 280; and UNSC Resolution 827 (n 16).

21 C Jenks & G Acquaviva 'Debate: The role of International Criminal Justice in fostering compliance with International Humanitarian Law' (2014) 96 *International Review of the Red Cross* 775; J Schense & L Carter *Two steps forward one step back: The deterrent effect of international criminal tribunals* (2016).

22 F Malekian *Jurisprudence of International Criminal Justice* (2014) at 1.

23 R Goldstone 'Justice as a tool for peace-making: Truth Commissions and International Criminal Tribunals' (1995) 28 *New York University Journal of International Law and Politics* 485 at 491-503.

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.[24]

This obligation to widely disseminate the knowledge of IHL rules is preventive in nature and is based on the belief that familiarising the populace about the IHL rules 'is essential for their effective application and … helps inculcate principles of humanity that limit violence and preserve peace'.[25]

With respect to IHRL, a similar provision can be found, for example in article 10 of the 1994 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[26] which provides that:

> Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.[27]

The International Committee of the Red Cross (ICRC) considers the obligation to disseminate the rules of IHL as a rule of customary international law binding on all states.[28] This places the responsibility of preventive accountability in international criminal justice on the relevant organs of the state such as the leadership and rank and file of the military to avoid the prohibited atrocities during warfare and in peacetime. While many African states may have incorporated the rules of IHL into the training and operational codes of conduct of their armed

24 There are similar provisions in art 48 of International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; and art 127 of International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, amongst others.

25 ICRC 'The obligation to disseminate International Humanitarian Law: Factsheet' *Legal Factsheet* 28 February 2003 https://www.icrc.org/en/document/obligation-disseminate-international-humanitarian-law-factsheet (accessed 19 May 2022).

26 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol 1465, p 85.

27 There are similar provisions in art 48 of the Second Geneva Convention (n 24); and art 127 of the Third Geneva Convention (n 24), amongst others.

28 ICRC (n 24).

forces, its effective use as a means of preventive accountability by most African states may be called to question in practice. For example, in a statement issued on 12 December 2020 by the former ICC Prosecutor, Fatou Bensouda, on the conclusion of preliminary investigations on alleged crimes committed during armed conflict involving the Nigerian security forces and the Boko Haram group from 2009 and 2011 onwards, she noted that while 'the vast majority of criminality within the situation [in Nigeria] is attributable to non-state actors', there was a 'reasonable basis to believe that members of the Nigerian Security Forces (NSF) have [also] committed … acts constituting crimes against humanity and war crimes'.[29] This evidences the need for African states to ensure that the obligation to disseminate the knowledge of IHL rules amongst the entire population, and including it in the training of their military, should not be a mere abstract exercise but aimed at inculcating preventive accountability to stem the violation of those rules by state security forces during armed conflicts and insurgencies.

On the other hand, a 2014 ICRC report documented the combined use of traditional practices and Shari'ah law called *Biri-ma-geydo* (literally meaning 'spared from the spear') in Somalia as a form of preventive accountability measure through local radio broadcasts to disseminate parallel principles of Somali customary code of war and IHL rules to the populace. The report noted that '[t]hese systems are complementary and share the same basic impulse to maintain a certain humanity even at the height of conflict', concluding that the use of 'traditional law alongside IHL is helpful in reaching [the] objective to protect those affected by the conflict in Somalia'.[30] This use of relevant Somali customary principles in parallel with IHL rules for preventive accountability should be encouraged and emulated in other African states. The importance of inculcating preventive accountability measures in international criminal justice is reflected in the former UN Secretary General, Kofi Annan's, observation that 'in matters of justice and the rule of law, an ounce of prevention is worth significantly more than a pound of cure [and that] prevention is the first imperative of justice'.[31]

29 ICC 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria' (11 December 2020) https://www.icc-cpi.int/Pages/item.aspx?name=201211-prosecutor-statement (accessed on 20 August 2021).

30 ICRC 'Somalia: Using traditional law in dialogues with armed groups' (10 November 2014) https://www.icrc.org/en/document/somalia-using-traditional-law-dialogues-armed-groups (accessed 20 August 2021).

31 UNSC (n 5) para 4.

Reference must also be made to the concept of restorative accountability such as Truth and Reconciliation Commissions, especially in relation to transitional justice in post-conflict situations both in the modern context, such as was used in post-apartheid South Africa, and in traditional contexts such as the *Gacaca* process used in post-genocide Rwanda as a form of restorative accountability to promote reconciliation during those post-conflict periods. Similar to the use of the *Biri-ma-geydo* customary system in Somalia for preventive accountability in international criminal justice, the successful use of the *Gacaca* customary process in Rwanda in parallel with the ICTR trials has been applauded as evidence of the relevance of traditional inputs into international criminal justice with particular reference to Africa,[32] despite some identified shortcomings in the process.[33] While the Rwandan *Gacaca* system is the most well-known example of an African customary input into international criminal justice, other such possible African traditional restorative accountability processes that can positively complement modern formal criminal justice processes to strengthen accountability in international criminal justice in Africa are identified in Chapter 3 of this volume.

However, such traditional approaches have been criticised as not necessarily meeting international criminal justice standards fully.[34] According to Gideon Boas, the problems with attempts 'to marry the retributive with the restorative is that the forensic requirements of war crimes trials are in some respect incompatible with restorative approaches'.[35] The balance that was struck in resolving those apparent problems in Rwanda was that the *Gacaca* courts 'were not permitted to try serious offenders, but rather property or other minor offences'[36] while the ICTR and the national courts focused on the more serious offences. Based on his extensive field research conducted on the *Gacaca* system in Rwanda, Phil Clark reasonably concluded that:

> The gacaca experience highlights that major innovations, including melding customary and modern law, can yield substantial benefits for the populace, provided those who create and oversee such processes can navigate inevitable tensions between issue of elite control and popular ownership, and between punitive and reconciliatory objects. Gacaca may therefore inspire further

32 See P Clark *The Gacaca Courts: Post-genocide justice and reconciliation in Rwanda* (2010).

33 See HRW 'Justice compromised: The legacy of Rwanda's community-based Gacaca Courts' (31 May 2011).

34 HRW (n 33).

35 G Boas 'What is international criminal justice' in G Boas, WA Schabas & MP Scharf (eds) *International criminal justice: Legitimacy and coherence* (2012) 1-24 at 13.

36 Boas (n 35) 16.

innovation in transitional societies, although the challenges of gacaca's hybridity must also be recognised in this regard.[37]

4 Perspectives on the criticisms of the ICC's engagement with Africa

In exercising its mandate as a permanent judicial institution of international criminal justice, the ICC has been criticised variously, particularly by African political leaders, as inappropriately targeting African states. This was precipitated by the fact that the very first trial by the court and all the cases investigated and prosecuted by the Court in the first ten years of its operation were exclusively on situations in Africa.[38] The criticisms mainly accuse the ICC of discrimination against Africa in its choice of cases to investigate and prosecute, while shutting its eyes to similar or more heinous situations outside of Africa. In essence, the ICC has been perceived as discriminatingly targeting politically weak African states, while ignoring atrocities involving more powerful Western states and thus some accuse it as being an institution representing a new form of imperialism and neo-colonialism by the powerful Western states against the less powerful African states. The AU also saw the indictments and attempt of the Court to prosecute two sitting African heads of state, former President Omar al-Bashir of Sudan and former Prime Minister Saif Al-Islam Gaddafi of Libya, as a violation of the doctrine of head of state immunity under international law, and an afront against the sovereignty of the two African states.

Similar to most international law questions, the criticisms are entangled between legal and political sensitivities, which is often difficult to separate. While the investigation and prosecution of cases by the ICC is clearly a legal matter regulated by the provisions of the Rome Statute, the process of selecting which crimes to investigate and prosecute cannot be immune from international political manipulations, especially with regard to Security Council referrals due to politically biased usage of the veto by the five permanent members, which are then blamed on the ICC. Thus, the criticisms require a delicate balance between the legal and the political to determine whether or not the Court could be said to be acting illegitimately in the selection of cases. There have been different perspectives on this, based on the facts.

37 Clark (n 32) 354.

38 See eg A Arieff et al 'International Criminal Court Cases in Africa: Status and policy issues' CRS Report for Congress (22 July 2011).

From the perspective of promoting the need for accountability in international criminal justice, the allegations of the ICC's bias against Africa have been challenged by some commentators as misplaced or unfounded. For example, based on a moral, legal and sociological assessment of the allegations, Margeret deGuzman noted that the evidentiary basis for the claims was weak, leading her to conclude that 'the ICC's focus on Africa is neither legally nor morally inappropriate'.[39] William Gumede has also argued that the criticism of the ICC by African political leaders is 'not necessarily because of the lopsided global power in international law … but because they fear they will be prosecuted for their crimes against their own people,[40] while Kai Ambos has identified that the ICC 'enjoys broad support among the African civil society'[41] in contrast to the political leaders.

From the perspective of bias in the selection of cases, Richard Goldstone has argued that the perception of the Court's bias against Africa

> is aggravated by the fact that egregious war crimes have been committed in non-African states and have not come to the ICC … The failure certainly justifies the perception that the international community is treating the investigation of serious war crimes in an unequal and unfair way.[42]

Mark Kersten has similarly noted in that regard that the view that the ICC is specifically targeting Africa 'is a difficult impression to fight against due to its lack of attention to alleged crimes committed by individuals from powerful governments outside the continent.'[43]

And from the perspective of external intervention in Africa, Phil Clark viewed the ICC

39 MM deGuzman 'Is the ICC targeting Africa inappropriately? A moral, legal and sociological assessment' in RH Steinberg *Contemporary issues facing the International Criminal Court* (2016) 333 at 333.

40 W Gumede 'The International Criminal Court and accountability in Africa' (2018) https://blogs.lse.ac.uk/africaatlse/2018/01/31/the-international-criminal-court-and-accountability-in-africa/ (last accessed 20 August 2021).

41 K Ambos 'Expanding the focus of the "African Criminal Court"' in WA Schabas, Y Mcdermott & M Hayes (eds) *The Ashgate Research Companion to International Criminal Law: Critical perspectives* (2013) 499 at 509.

42 R Goldstone 'The ICC and Africa' in S Weill, KT Seelinger & KB Carlson (eds) *The President on trial: Prosecuting Hissène Habré* (2020) 400 at 402-403.

43 M Kersten 'Constructive engagement in the Africa-ICC relationship' The Wayamo Foundation Policy Report (2018) 8.

> as the latest in a long line of international actors that have intervened in Africa including European colonial powers, the World Bank and International Monetary Fund … and multilateral peacekeeping missions ... [but which] … has failed to learn lessons from these actors' difficult entanglements in Africa.[44]

He critiqued the court as an institution caught between 'complementarity' and 'distance' in its engagement with Africa noting inter alia that:

> [T]he ICC's 'distance' from the African societies in which it intervenes has been damaging, both to the Court and to local polities. Failing to wrestle sufficiently with national politics and the expressed needs of local communities, while showing insufficient deference to national and community-level responses to mass conflict, the ICC has produced a range of negative effects for African societies.

Despite the varied perspectives of the criticisms levelled against the ICC by African political leaders and the AU, its OTP continues to receive article 15 communications[45] from individuals, groups and civil society organisations from within Africa giving information about alleged violations of international criminal law in different African states to the Court. For example, the OTP's 2018 Report on Preliminary Examination Activities indicated that the Court received 35 of these communications from Guinea, 169 from Nigeria, and 18 from Gabon[46] requesting investigations on situations in those states. This certainly indicates that as the only Court of last resort on international criminal justice, the ICC would continue to be relevant to international criminal justice and accountability in Africa, until, perhaps, the Malabo Protocol enters into force and provides an African regional alternative for addressing international criminal law situations in African states.

In digesting the different perspectives of the criticisms, it is important to appreciate Mark Kersten's cautious observation on the need to avoid the tendency to dichotomously build a picture of

44 P Clark *Distant justice: The impact of the International Criminal Court on African politics* (2018) 11.

45 Article 15(1) of the Rome Statute provides that: 'The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court'.

46 ICC 'Report on Preliminary Examination Activities 2018' Office of the Prosecutor (5 December 2018) https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf (accessed 20 August 2021).

> a barbaric Africa characterised predominantly by dictators seeking impunity, juxtaposed against a benevolent ICC acting on behalf of all victims. Viewing the ICC-Africa relationship in this way serves neither to advance international criminal justice, nor to further an understanding of the relationship between the Court and the continent [in a positive way].[47]

This then brings us to the proposition of balancing between idealism and realism in criminal justice and accountability with regard to the relationship between the ICC and Africa.

5 Achieving balance between idealism and realism

As stated at the beginning of this chapter, idealism relates to the 'ought' in legal theory, demanding strict adherence to the ideal rule at the basis of positive law, which in the current case is the ideals of international criminal justice, while realism relates to the 'is', demanding appreciation of factual circumstances in the application of the law, which relates to 'facing the fact' in applying the law. Laurence Burgorgue-Larsen has noted that in normative fields such as law, politics and policy:

> Idealism and Realism always trigger a violent pendulum movement. If ideals dominate, policy goals may not be reached; worse, they could be distorted. If only Realism … informs policy development and implementation, it could appear harmfully cynical and damage normative progress.[48]

And from an international relations perspective, Vítor Ramon Fernandes has rightly noted that

> both realism and idealism are two responses to the creation and maintenance of international order, that is, how States relate in international society … [but] not mutually exclusive and can coexist [albeit] in constant tension with one another.[49]

Thus, balancing between the two for the purpose of achieving 'idealistic realism' or 'realistic idealism', in necessary situations, is imperative for achieving policy goals effectively in international law and relations.

47 Kersten (n 43) 6.

48 L Burgorgue-Larsen 'Between idealism and realism: A few comparative reflections and proposals on the appointment process of the Inter-American Commission and Court of Human Rights members' (2015) 5 *Notre Dame Journal of International and Comparative Law* 29 at 29.

49 VR Fernandes 'Idealism and realism in international relations: An ontological debate' (2017) 7 *JANUS.net E-Journal of International Relations* 14 at 14.

From the contextual analysis provided in this chapter, it is clear that the substantive ideals of international criminal justice and accountability are to curb atrocities such as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, amongst others, and to respect human dignity during conflicts and in peacetime as guaranteed under IHL, IHRL and ICL. This is a laudable idealism that no state today would resolutely deny, and it is binding either through customary international law or treaty obligations. Even non-state actors are bound by it and are expected to comply with it as has been judicially confirmed by different international tribunals.[50] Evidently, it is in the accountability procedure for alleged violations of the substantive law on international criminal justice that the conflict between idealism and realism becomes apparent and requires necessary balancing.

As has been analysed earlier, accountability for international criminal justice is structured upon three ascending idealistic levels, namely, the primary ideal level, which requires state responsiveness; the secondary ideal level, which requires regional responsiveness; and the tertiary ideal level, which requires international responsiveness to violations of international criminal law. Realism informs how the pursuit of accountability shifts from the primary ideal level through to the tertiary ideal level while aiming for 'idealistic realism' or 'realistic idealism', that is, what is realistically ideal in a particular circumstance for ensuring accountability.

The primary ideal level is that states have the primary obligation of bringing violators of the substantive law to justice within their respective jurisdictions, and where the state fails to do so, the obligation shifts to the secondary ideal level, whereby relevant regional institutions assume the secondary obligation, and failing that, the ICC as the international court of last resort assumes the tertiary obligation of international responsiveness. Thus, idealism expects that no international criminal law cases, or a very few that may be by UNSC referrals, should end up at the ICC at all, because in an ideal world all the cases would have been dealt with effectively either at the national or regional levels of accountability respectively. However, realism evidences that African states do not usually undertake the primary obligation of effectively investigating and prosecuting violators of the substantive laws of international criminal justice, necessitating the shifting of the obligation to the secondary ideal

50 WA Qureshi 'Applicability of International Humanitarian Law to non-state actors' (2019) 17 *Santa Clara Journal of International Law* art 3. See also *Military and Paramilitary Activities in and against Nicaragua case*, Merits, ICJ Judgment, 1986, paras 218-219; *Tadić* Decision on the Defence Motion on Jurisdiction, ICTY Judgment 1995, para 98; *Akayesu* Trial Judgment, 1998, ICTR paras 608-609; and *Naletilić* and *Martinović* Trial Judgment, 2003, ICTY, para 228.

level of regional responsiveness. It is the realisation of the need to fulfil the secondary ideal level of responsiveness that the AU adopted the Malabo Protocol creating the ICLS of the ACJHPR, which is a commendable demonstration of collective political will by the AU with regard to the idealistic process of accountability in international criminal justice at the regional level.

Regretfully, however, eight years after the adoption of the Malabo Protocol the AU member states have failed to demonstrate the required individual political will to adopt and bring the Protocol into force to activate the ICLS of the ACJHPR and thereby fulfil the implementational ideal towards achieving African regional responsiveness in situations where states fail to bring perpetrators to justice at the primary ideal level. Article 11 of the Protocol requires ratification by 15 AU member states before the Protocol can enter into force. Currently only 15 of the 54 member states have signed but no single state has ratified the Protocol to date. Consequently, the reality is that this inhibits the idealism of regional responsiveness when necessary in Africa. Thus, in balancing between idealism and realism in the absence of an African regional responsiveness, there are only two obvious alternative choices to make. The first alternative would be to abandon accountability in such situations, which will amount to 'cynical realism', and would, in the words of Laurence Burgorgue-Larsen, be 'harmfully cynical and [thereby] damage [the] normative progress' of international criminal justice and accountability in Africa. The second alternative would be for the ICC to step up to discharge the tertiary ideal level of international responsiveness as the international Court of last resort created for that purpose, which will amount to 'idealistic realism' or 'realistic idealism' and thereby achieve the ideal policy goals of international criminal justice and accountability based on the practical reality of the situation.

It is submitted that by failing to demonstrate the necessary political will at both the primary and secondary ideal levels of accountability, African states would lack the legal and moral justification to oppose the ICC from exercising its complementary jurisdiction at the tertiary ideal level as the Court of last resort for international criminal justice and accountability as legitimised by the Rome Statute. An African philosophical maxim of the Yoruba people says: *Bi akò bá rígún, à fàkàlà* ṣẹbọ meaning, in order to fulfil a required ideal, 'one can use a hornbill for sacrifice if one cannot find a vulture',[51] that is, making do with an available effective substitute to achieve one's objective in the absence of a first ideal. To overcome that situation, the political leaders of each member state of the AU have the

51 O Owomoyela *Yoruba Proverbs* (2005) No 1406, at 156.

moral and legal responsibility to mobilise the individual political will of their respective states and ratify the Malabo Protocol to bring the ICLS of the ACJHPR into being and thereby divest the ICC of the possibility of exercising international responsiveness in deference to the jurisdiction of the ACJHPR in situations where any African state in question fails to exercise their primary obligation at the first ideal level of international criminal justice and accountability when the need arises. That will enable African states to apply 'African Solutions to African Problems' (ASAP), a catchphrase developed to bolster African solidarity after the Rwandan genocide towards the end of the last century. Incidentally, the acronym ASAP also means 'as soon as possible', so the sooner the ratification is achieved the better for international criminal justice and accountability in Africa.

Mark Kersten has rightly noted that despite all the time, effort and energy spent so far on addressing the problematic relationship between Africa and the ICC, 'it cannot be said today that the problems at the heart of this relationship have been resolved'.[52] It is submitted that until African states summon their individual political will to ratify the Malabo Protocol to activate the ICLS of the ACJHPR, the problem at the heart of international criminal justice and accountability in Africa would not be resolved.

6 Concluding remarks

The main objective of this book and the conference leading to it is to highlight the need for an effective international criminal justice and accountability system in Africa in view of the many atrocities that have been witnessed and still ongoing both during conflicts and in peacetime in different parts of the continent. As was expressed by the participants at the conference and reflected variously in the chapters of this book, it is time for African leaders and the populace to step up in the spirit of African unity and the universal respect for human dignity to make every effort to improve international criminal justice and accountability in Africa. In doing that all three aspects of accountability discussed in this chapter, namely retributive, preventive and restorative accountability, must be explored and enhanced.

This chapter has deliberately focused specifically on what Africa needs to do to improve its own situation in international criminal justice and accountability, rather than what the ICC and the international community need to do in that regard. To reiterate, it is strongly advocated that the one

52 Kersten (n 43) 4.

internal step that can completely change the dynamics of international criminal justice and accountability in Africa and resolve the current uneasy calm in the relationship between the ICC and Africa, is for African states to summon up their political will to bring the Malabo Protocol into force and thereby activate the ICLS of the ACJHPR. African states need to take this seriously and history will surely vindicate the first 15 African states that take the lead in making that objective a reality. Thus, this chapter provides the premise for urging African civil society organisations to intensify their persuasion and lobbying of African states towards the ratification of the Malabo Protocol, in the spirit of ASAP,[53] as soon as possible.

I will end this chapter metaphorically, with a paraphrase of Neil Armstrong's famous statement when he first stepped on the moon on 20 July 1969, that, in relation to criminal justice and accountability in Africa, the ratification of the Malabo Protocol to activate the ICLS of the ACJHR will be 'one small step for African states, [but] one giant leap for the African people' and for humanity generally.

53 African Solutions 'African Solutions to African Problems' https://www.africansolutions.org/ (accessed 19 May 2022).