REGIONAL INTERNATIONAL CRIMINAL COURTS: AN IDEA WHOSE TIME HAS COME?

Firew Kebede Tiba*

I. INTRODUCTION

Regionalism in international relations is a fact of life.1 Regional judicial implementation of international norms is relatively common in the fields of international human rights, international investment, and trade laws. There are attempts to break ground in the realm of international criminal law by creating a regional international criminal court, such as the proposed addition of the criminal jurisdiction to the African Court of Justice and Human Rights. Although there was momentum in creating a universal permanent international criminal court, the enthusiasm for the tribunal’s exercise of jurisdiction has not continued. The International Criminal Court (“ICC”) will remain short of its promises in the foreseeable future, as long as the UN Security Council’s (“UNSC”) notable veto wielding states largely remain outside it, while prosecutions remain focused on weaker member states, due to the sheer size of global conflicts. Furthermore, the ICC, during its existence of a little over a decade, has only managed to secure two convictions at a price tag of $1 billion US dollars.2 State cooperation, in relation to some of the indictments regarding cases in notable situations in Sudan and Libya, has not been forthcoming. The refusal by South Africa in June 2015 to execute the arrest warrant issued against President Omar al Bashir of Sudan, while the latter was attending the African Union Heads of States Summit, and African National Congress’s (“ANC”) decision in October 2015 to withdraw from the Rome Statute are the latest blows to the ICC. The ad hoc international & internationalized courts had played their roles, but their roles are limited in time and space. Consensus for establishing UN backed ad hoc tribunals is proving very difficult, as shown

* Lecturer, Deakin School of Law, Melbourne, Australia.


521
in the failure to refer the Syrian situation to the ICC. In view of these, as well as the proposed establishment of a criminal division of the African Court of Justice and Human Rights, this paper queries whether the time for the establishment of regional courts has come, at least in Africa’s regional context. It does so by examining the theoretical basis for regionalization of international criminal law enforcement, the possible mechanisms for doing so, and critically examining the viability of the proposed African Court with criminal jurisdiction.

II. INTERNATIONAL CRIMINAL LAW ENFORCEMENT

The generation of international criminal law norms and enforcement has come a long way. The patchy network of international customary law norms were solidified into the various humanitarian law conventions under the Hague and Geneva conventions and treaties adopted in the post II World War period. The enforcement of these norms has largely been left to the national states. A successful international enforcement has been largely an exception until the establishment of the Nuremberg & Tokyo tribunals. According to Bassiouni, in fact the first international criminal court was established in 1474 in Breisach, Germany, “where 27 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach for his violations of the ‘laws of God and man’ because he allowed his troops to rape and kill innocent civilians and pillage their property.”

In this trial, Peter von Hagenbach was found guilty and sentenced to death. While Bassiouni relied on Geroge Schwarzenberger’s analysis of the trial as being international, there have been critics who pointed out that the trial does not qualify as international because, among others, the entities represented in the trial were all part of a larger superstructure, which was the Holy Roman Empire. However, there were several at-

---

6 Id. at 41.
tempts since then, especially during the interwar period and thereafter.\footnote{7} After the end of the Cold War in the 1990s, there emerged UN Security Council backed ad hoc and internationalized hybrid tribunals.\footnote{8} These developments would have been inconceivable during the polarized atmosphere of the Cold War era.

The establishment of a permanent international criminal court is a milestone.\footnote{9} However, this permanent international criminal court does not have universal membership.\footnote{10} The absence of key veto wielding permanent members of the United Nations Security Council, such as the US, China, & Russia, along with key states such as India, Pakistan, and most of the Middle East and North Africa (with the exception of Jordan and Tunisia) refusing to join, means that there are ample instances where the ICC may not be the default choice in prosecuting those suspected of committing international crimes. This means most conflict prone regions, excluding sub Saharan Africa, are not covered by the ICC unless these states self-refer their matters or the UNSC seizes the matter, as in the case of the Darfur situation in Sudan. While the UNSC theoretically has the power to refer to the ICC any situation it finds a threat to international peace and security pursuant to its power under Chapter VII of the UN Charter and Art 13(b) of the ICC Rome Statute, doing so has been bedeviled by disagreements among its permanent members. The failure to refer the situation in Syria to the ICC due to negative votes by China and Russia is one such instance.\footnote{11}

Similarly, the US and its Western allies are routinely accused of using their votes at the UNSC to protect their

\footnote{7} Bassiouni, supra note 4, at 36–38.


\footnote{9} Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

\footnote{10} Currently ICC membership stands at 123 states out of nearly 193 UN member states. Of these, 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States. See The States Parties to the Rome Statute, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Sept. 2, 2015).

allies and client states. Such practices are against international rule of law and diminish respect for international rules and norms.

The jurisdiction of both ad hoc and permanent international criminal courts is limited to the most serious crimes of genocide, war crimes, and crimes against humanity. Surely these are not the only international crimes of concern to the international community in general and its sub regions in particular. However, as the negotiations for the Rome ICC Statute and subsequent discussions demonstrated, it is extremely difficult to get universal agreement for inclusion of crimes other than the typical international crimes in the statutes on which widespread consensus can be achieved.\textsuperscript{12} That is why it is remarked that while universalism is the aspiration, regionalism is the practical reality in international relations.\textsuperscript{13} In view of this, the following sections will discuss the emergence of regional international criminal law enforcement mechanisms.

III. THE REGIONAL COURTS LANDSCAPE

For the purposes of this paper, we can adopt Joseph Nye’s definition of regions as a group of states linked together by both a geographical relationship and a degree of mutual interdependence.\textsuperscript{14} To avoid confusion as to whether a given regional arrangement exists or not, it is suggested that focus be placed on States that have formally agreed to act in a collaborative fashion in a given global region or sub region.\textsuperscript{15} In regional institutions sense these are institutions that occupy the “space between the universal global system and the state level.”\textsuperscript{16} This includes sub regional institutions.

Regional courts are judicial bodies established under the auspices of regional or sub regional international organizations for the purpose of promoting economic and political integration between


\textsuperscript{14} Joseph S. Nye, International Regionalism: Readings vii (Little, Brown and Company 1968).

\textsuperscript{15} Id. at 209.

\textsuperscript{16} Richard Burchill, Regional Approaches to International Humanitarian Law, 41 Victoria U. Wellington L. Rev. 205, 209 (2010).
its members. The subject matter jurisdiction (rationae materiae) of these courts range from human rights to economic issues broadly defined to general legal issues in cases where regional courts are mandated to sit as appeal courts, as in the Caribbean Court of Justice. The courts tend to replicate design features of courts of universal scope or other older regional courts, a phenomenon which Karen J. Alter refers to as multiplication through emulation. For example, modern international criminal tribunals were established based on the Nuremberg tribunal while improving it. Older tribunals have generally served as inspiration for the newer ones. There are also courts where national judges may seek advisory opinion (preliminary ruling) from regional courts on certain issues. These courts tend to have jurisdiction over the following matters: trade, human rights, and interstate disputes. Numerically, regional and sub-regional courts outnumber courts of universal nature.

Regional international courts started emerging at a time when there were no universal international courts that could fulfill the unmet need. The Central American Court of Justice was probably the first modern regional court to be established in 1907 and operated for ten years in Costa Rica. This Court grew out of the 1907 Central American Peace Conference, which in turn was held two weeks after the Second Peace Conference at The Hague. As Manley Hudson noted, the consideration of the “problem of a permanent tribunal” was influenced in part by the revision of the Convention for the Pacific Settlement of International Disputes and by the proposal to establish a permanent Court of Arbitral Justice at The Hague. In that regard, this regional initiative was directly inspired by global developments of the time. It was reestablished in 1991 and its Statute adopted in 1992.

17 Katrin Nyman Metcalf & Ioannis Papageorgiou, Regional Integration and Courts of Justice (Intersentia Uitgevers N.V 2005).
19 Id. at 69.
20 Id.
21 Id.
23 Id. at 760.
24 Id.
this tribunal was that, pursuant to Article 17 of the 1907 Convention, it will be “in force during the term of ten years counted from the last ratification.” Thus, the countries having not agreed to extend its life, the Court ceased to exist on March 12, 1918. In modern times, regional and international courts may be ad hoc to prosecute specific situations without there being a limit on the number of years it can operate.

With the proposal to establish such courts, there have always been concerns about conflict of jurisdiction and “danger that regional courts might be inspired by regional legal conceptions to such an extent that their decisions might prejudice the future unity of the law of nations in respect of matters regarding which uniform rules of worldwide validity are desirable.” Such concerns did not eventually materialize.

In instances where there were universal courts, such as the International Court of Justice (“ICJ”), the Courts were not functionally designed to deal with matters naturally falling within the jurisdiction of regional courts although states can always agree to endow the ICJ with the necessary jurisdiction. In the post World War II period, when the European Court of Human Rights and the European Court of Justice were established, there were no other courts that could have served the functions of these two new tribunals. ICJ is designed to resolve inter-state disputes. Individuals have no standing before the ICJ, unlike before the European Court of Human Rights. Thus, in the realm of human rights and eco-

26 Hudson, supra note 22, at 781.
27 Id.
29 In particular, see Charney, supra note 28.
30 For example, the ICJ is concerned with general international law disputes between states. It does not have criminal jurisdiction and individuals or other private organisations such as investors or corporations are not subjects of its jurisdiction.
31 Europe was at the forefront of the creation of a regional human rights system under the auspices of the Council of Europe and regional economic integration courts within the European Communities. The European Court of justice was established in 1952 and its counterpart for human rights, the European Court of Human Rights came in to being in 1959.
nomic integration, regional courts were created prior to their international counterparts. Later regional courts largely copied design features of other regional or universal judicial bodies already in existence. These regional efforts were replicated in other regions and sub regions, mainly in the Americas, the Caribbean and Africa. In some other regions, such as the wider Asia, there is a visible lack of regional international tribunals.

Another important observation to make is the bulk of regional courts tend to be dormant, inactive, or less active, especially in the African region. This begs the question of why states create regional tribunals if they do not intend to use them actively. This merits a study of its own and this short piece does not intend to get into the reasons for this phenomenon.

In the field of international criminal law, there have been a number of ad hoc tribunals with limited jurisdictional scope to events in a single country and countries in a given region. Thus, Nuremberg and other ad hoc tribunals cannot be characterized as regional courts even if their material jurisdiction is limited to international crimes committed within a confined geographical region. This is due to the fact that the United Nations Council did not create these tribunals under the auspices of regional organizations. Furthermore, the tribunals were not necessarily created for a specific region. For instance, when the Nuremberg Tribunal was established, it was charged with trying offences of “no particular geographical location.”

On another point of comparison, the number of regional international criminal tribunals is lower compared to tribunals in other international law subject areas. One therefore wonders why regional international criminal courts are a rarity compared to tribunals in other branches of international law. This intriguing state of

32 In the Americas the Inter American Court of Human Rights was established in 1979; the Caribbean Court of Justice in 2001 and the African Court of Human and Peoples’ Rights in 2004. The regional human rights courts, in particular developed out of the initial Commission that had more of a promotional than protective powers.

33 Of the inactive and less active regional courts in Africa one can mention: West African Economic and Monetary Union Court; Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA) (1997); Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998); Central African Monetary Community (CEMAC) (2000); Court of Justice of the East African Community (EACJ) (2001); Economic Community of West African States Court of Justice (ECOWAS CCJ) (2002); Southern African Development Community (SADC) (2005).

34 Agreement for the prosecution and punishment of the major war criminals of the European Axis. 82 U.N.T.C. 280 (Aug. 8, 1945) [hereinafter London Agreement].
IV. Why Create International Tribunals?

Perhaps it is worth beginning this discussion at the generic level as Suzzane Katzenstein does by inquiring why governments create international courts even though doing so requires a sacrifice of sovereignty. The sacrifice of sovereignty is even more pronounced in criminal law matters. Exercise of criminal jurisdiction is one of the prominent expressions of state sovereignty. On the other hand, historically, states had shown a relative degree of comfort with ceding sovereignty on economic and trade matters compared to criminal law issues, as their relatively widespread existence attests to. Ceding sovereignty in economic affairs brings more benefit, in terms of quid pro quo, than submitting to international tribunals on criminal law matters.

There have been attempts to endow global courts with criminal jurisdictions at least since the days of the Permanent Court of International Justice (“PCIJ”) and its successor, the ICJ. These initiatives did not make it past the proposal stage.

The effort to establish a criminal tribunal after the First World War was spurred by the need to hold to account the perpetrators of international crimes during the War. There was a proposal at the 1919 Paris Peace Conference for the trial by international courts of accused persons of nationalities of the defeated Powers. This, however, did not succeed. It encountered the same fate as the Treaty of Versailles, which had called for the international trial of the ex-head of the German State.

The first firm proposal to establish a parallel criminal tribunal to the proposed permanent court during the League of Nations came from Baron Descamps, President of the advisory council

---

38 Id.
charged with the responsibility to create such institution for the trial of “crimes against international public order, and against the universal law of nations.” \textsuperscript{39} This proposal was taken over and expounded on by scientific bodies, such as the International Law Association, the Inter-Parliamentary Union, and the International Association of Penal Law.\textsuperscript{40}

Another notable development was the 1937 French proposal, prompted by the assassination of King Alexander of Yugoslavia, for “repression of terrorism and for its punishment by an international tribunal.” \textsuperscript{41} Successes of Nuremberg and Tokyo aside, there were other proposals to establish permanent international criminal courts until the eventual success with the adoption of the 1998 ICC Rome Statute.

Following the early setbacks, a different tack of creating international criminal tribunals (whether ad hoc or permanent) had been adopted. The previous efforts sought to establish international criminal law divisions within a court of general jurisdiction, notably PCIJ and the ICJ. When that failed to gain traction, the chosen approach invariably remained the creation of tribunals specializing in international criminal law. On the other hand, the recent extension of the criminal jurisdiction of the African Court of Justice and Human and People’s Rights signals a departure in that it ushers a new era in which most forms of international adjudication can come under the umbrella of one judicial body i.e. human rights, interstate disputes and international criminal law matters. Time will tell if this experiment will succeed, but this is a strong indication that regional international criminal courts integrated into regional governance structures are starting to appear as strong contenders.

Coming back to the reasons for the establishment of international tribunals, functionalist reasons are usually cited as driving forces for the creation of international courts.\textsuperscript{42} Functionalism argues that “states create and design international institutions to solve cooperation problems, such as the need to signal commitment about intent to adhere to legal obligations or to reduce uncertainty about other states’ preferences.” \textsuperscript{43} This reasoning in general sense could also apply to regional courts in regions with inter-

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 3.
\textsuperscript{41} Id.
\textsuperscript{42} Katzenstein, supra note 35, at 159.
\textsuperscript{43} Id.
twined peace and security concerns. A cursory look at the preamble of the Protocol on the Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights reflects the desire to achieve the specified goals of the region under the auspices of the African Union. These include: commitment to resolve their disputes through peaceful means, commitment to promote peace, security, and stability on the continent, and to protect human and people’s rights in accordance with the African Charter on Human and Peoples Rights and other relevant instruments, commitment to intervene in member states pursuant to the assembly’s decision if grave international crimes are being committed, and of course the commitment to fight impunity. The Protocol clearly sees the Court as an important organ of the African Union entrusted with the responsibility to achieve the functional goals of the regional organization.

Functionalist arguments are not without their problems. As Katzenstein argues, functionalist arguments leave unanswered three fundamental questions: firstly, why do courts emerge in some issue areas but not in others? In this regard, one may ask why has it taken the Africa region longer to establish a criminal division when it thought of establishing other courts under the auspices of the African Union? One explanation is the African regional system followed similar trajectory as other regional and global dispute resolution mechanisms. Historically, mechanisms for peaceful settlement of disputes were primarily established to resolve interstate disputes. In fact, individuals, to whom human rights and international criminal law regimes largely cater, did not start to appear as subjects of international law until after the emergence of the international bill of rights, a process that was kick-started by the adoption of the Universal Declaration of Human Rights in 1948. In the field of international human rights, a process that started with soft laws such as declarations grew into human rights systems that call for state accountability. Once state accountability mechanisms were firmly anchored, there emerged mechanisms for holding individuals criminally responsible for those human rights violations through establishment of occasional ad hoc tribunals and, more recently, a permanent criminal court.

45 Id.
It is also claimed that functionalist logic struggles to explain the timing of international judicialization.46 Thus, why did it take states until the end of the 1990s to create the first criminal court, rather than do so earlier in the decade or in the 1950s, right after they had drafted the relevant treaty?47 Why did efforts to create the first world court fail in 1907 and succeed in 1920?48 This is somewhat related to the first shortcoming. Timing closely follows the decision to take up the issue in the first place. If one is to look at development of international judicial institutions in Africa, one of course notices that for a very long time the African regional system only had the African Commission for Human and Peoples Rights. The Commission, being a quasi-judicial body, lacks enforcement powers and its decisions are not binding. Perhaps it is the establishment of the human rights court and the African Union in early 2000s that spurred the rationalization process that has now led to the establishment of a consolidated judicial body with three major divisions: general, human rights, and international criminal law. This is a significant development in international judicial bodies landscape. But at the same time, it needs to be pointed out that when the Constitutive Act of the African Union was adopted in 2000, it did not occur to African leaders that Africa needs an international criminal court regardless of the horrific genocide committed in Rwanda and numerous other conflicts that occurred in other parts of the continent since independence.

Evidently, no single reason, functionalist or otherwise, can fully account for causes for the establishment of international tribunals.49 As pointed out, it seemed, at least in African context, that the expansion of criminal jurisdiction came at a later date while the need had already been there when other courts were being considered.

Thus, if functionalist arguments fail to explain adequately the establishment of judicial tribunals, explanations have to be sought elsewhere. Other candidates include hegemonic power and crisis arguments.50 The hegemonic power argument holds that the most powerful state dictates the creation of institutions.51 However, the hegemonic power explanation is unable to account for judicializa-

46 Katzenstein, supra note 35, at 159.
47 Id.
48 Id.
49 See this author’s earlier work for the summary of these reasons, Firew Kebede Tiba, What Caused the Multiplicity of International Courts and Tribunals, 10 GONZ. J. INT’L L. 202 (2006).
50 Katzenstein, supra note 35, at 153.
51 Id.
tion in fields outside economic courts. This is a variant of realist and structuralist notion of core and periphery. The realist argument holds that “the exigencies of state power and interest, and the systemic influences that produce patterns of balancing and bandwagoning by states” play important roles in regionalization. The core and periphery argument too posits that “core regions set the economic, political and security agendas; peripheral regions have more limited choices and room for manoeuvre.” While this argument may work for some regions characterized by vast intra-regional power differences, it may not work as well in regions like Africa where the sway of the relatively economically strong over the weaker nations is not very pronounced. In developed regions such as Europe, liberal theories of interdependence, neo-functionalism, and institutionalism have been offered as explanations.

In view of the above, it is not palatable to maintain that the expansion of criminal jurisdiction by AU can be explained by any hegemon or a group of hegemons exercising influence over fifty-four member states of the African Union. This, of course, is not to say that influential African states do not have the diplomatic clout to keep the issue on the agenda. Arguments for Africa’s own criminal court, as will be shown later, seek to exploit the legitimate African grievances towards colonialism, racism, and double standards in international relations. This claim falls in to what is described as the politics of identity. As Fawcet observes:

The politics of identity, captured by theories of social constructivism, which prioritize shared experience, learning and reality— as against crude measurement of state power—also offers some interesting clues. Alone, it does not explain the success or failure of a given regional project. Yet identity invariably looms large at some stage of the regional process. In the case of the Middle East, identity—as Arabism or Islam—explains important aspects of alliance behavior, even if there remains a striking disjuncture between shared ideas and institutions. In East and South-East Asia, the notion of an Asian way appears to have some salience in framing regional options. In the European case, construction of a shared identity has proceeded slowly.

52 Id.
53 Fawcett, supra note 1, at 442.
54 Id.
55 Id.
56 Id.
2016] INTERNATIONAL CRIMINAL COURTS 533

hand in hand with institutional development and deepening integration. 57

This identity politics is not without its pitfalls. Regions invoking identity politics in international relations are invariably run by unaccountable and mostly unelected oligarchs. It is not the priority of these oligarchs to establish a system of governance and accountability that meets acceptable standards. A case in point is the recent African heads of states and governments granting themselves immunity from prosecution while still in power. Granting immunity to African senior officials does nothing to protect the unique identity or place of Africa in international relations. Article 46A bis of the amendment Protocol provides: “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure in office.” 58

When the Protocol was adopted, news headlines around the world legitimately exclaimed, “African leaders vote themselves immunity from new human rights court.” 59 Opposition to the provision by African civil societies and international organizations with presence in Africa were to no avail. 60 Thus, the immunity provision is intended to shelter African leaders from prosecution while they are still in power. The consequence of such blanket immunity is not hard to imagine in a continent not known for democratic power transition. Such provision, in addition to being anathema to the principle of equality before the law and irrelevance of official capacity for individual criminal responsibility, will bring a catastrophic result for the fight against impunity given the incentive it gives to leaders suspected of heinous crimes to actively seek to prolong their stay in power through vote rigging and sheer brute force.

57 Id. (citation omitted).
The other explanation for creation of international tribunals includes the rather nimble “international crisis” rationale.\footnote{Katzenstein, \textit{supra} note 35, at 153.} International crisis is defined as “events that challenge an existing legal rule or rules that some states seek to protect.”\footnote{Id.} The legal nature of this upheaval is that it “moves states to look specifically to a judicial, rather than a simply legal or political, solution.”\footnote{Id. at 154.} States resort to judicialisation when legal crises are no longer resolvable through a political means or even legal operation without the involvement of third party dispute resolution mechanism. For example, the two world wars that Europe went through has been cited as an important event to have led to legal crisis which beget some of Europe’s post war judicial institutions.\footnote{Id. at 165.}

It is also pointed out that reasons for creation of universal international courts do not necessarily follow the same trajectory as the regional ones.\footnote{Katzenstein, \textit{supra} note 35, at 157.} In this regard, Katzenstein draws a distinction between the creation of regional courts and their universal counterpart. She cites three reasons for the distinction.\footnote{Id.} The first reason is the high barrier associated with creating universal courts compared to regional courts. Obviously there are more states internationally than there are in a given region. However, in regions like Africa where fifty-four states are members of the African Union, getting the consensus of all member states to extend jurisdiction is not necessarily easy. Secondly, states are less likely to exert political influence over an international than a regional judicial body. Again in regions like Africa where all fifty-four states cannot be represented by appointing national judges, the argument that States can wield more influence over regional courts appears tenuous. Thirdly, “state motives for creating regional courts are sometimes shaped by emulation and learning from other regions, and sometimes by dynamics that are specific to the region or regional organization with which the court is associated.”\footnote{Id. at 165.} As will be shown below, some elements of this argument may have played a role in the expansion of criminal jurisdiction for African regional system. For example, the sovereignty crisis triggered by ICC’s prosecution of Africa’s sitting heads of states and the perceived selective prosecution of Africans suspects only has undoubtedly
given the impetus to Africa’s drive to establish its own regional criminal court.

V. Legal Basis for Creating Regional International Criminal Tribunals

Under international law there is no bar to the existence of appropriately established regional courts exercising concurrent, complementary, and exclusive jurisdiction with universal international courts. In the absence of world government, states are free to organize in a way they see fit in line with the United Nations Charter and their freely assumed international obligations. Article 52(1) of the United Nations Charter expressly allows for: 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 provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Unless a case is made for the existence of such conflict, it can be assumed that regional enforcement of international criminal law is prima facie consistent with the principles of the United Nations Charter. If such a case is made, the UN Charter trumps by virtue of its Article 103, which provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

It would not be the first time a court of general jurisdiction would seek to expand its scope to international criminal law matters. As noted earlier, at the time of PCIJ’s formation, there was a proposal to give it a jurisdiction over criminal matters. The International Law Association had also adopted a statute for international criminal court as the division of PCIJ. However, this does not mean that other regions cannot follow a different tack. For example, the quasi-criminal role already played by existing and future human rights courts can serve as another model.

---

68 Romano et al., supra note 18, at 54.
69 Id.
instances where exercise of direct criminal jurisdiction is untenable, exercise of quasi-criminal jurisdiction may fill a needed gap.

VI. THE MERITS OF ESTABLISHING REGIONAL INTERNATIONAL CRIMINAL COURTS: THE CASE OF AFRICAN REGIONAL CRIMINAL COURT

In addition to providing theoretical explanations for establishment of regional international criminal courts, it is also important to point out perceived and concrete advantages and disadvantages resulting from creation of regional criminal courts. In a compelling essay in 2003, William Burke-White argued that regionalization provides a “hitherto unavailable means of balancing the benefits and dangers of both supranational and national enforcement.” However, he does not call for “a strong form of regionalization through the creation of regional criminal courts along the lines of the ICC,” but to consider “softer forms of regionalization within already existent enforcement mechanisms.” He proposed loose forms of regional enforcement, which includes establishment of hybrid courts, encouragement of national prosecution as in the case of the prosecution of Hissen Habre, former Chad president, by Senegal, and by supervision of regional courts. His assumption then was that ICC had gained significant support and it would be an unnecessary duplication of effort to establish regional international criminal courts. Although there have been some significant changes since his article appeared in 2003, his observations remain valid as there is no significant rush to embrace full-fledged regional international criminal courts in all regions of the globe. In fact, in some regions, indifference, apathy, or worse hostility towards international criminal justice looms large.

It has often been the case that regionalism has been cast as the opponent of the nascent universalist aspirations in enforcement of international criminal norms. Some are quick to point out that there lies an ulterior motive behind the promotion of regional systems. William Schabas laments that the debate about the merit of regional criminal courts has been “short circuited” because it was...
put forward by the United States as an alternative to the ICC.\textsuperscript{75} He recommends the desirable application of the “evolutionary interaction” between the universal and the regional human rights to the analogous field of international criminal law.\textsuperscript{76} In the same vein, and in regards to international humanitarian law, Richard Burchill argues that regional level occupies unique space between the “discreteness of the State and the undifferentiated international system” and is able to mediate by “providing space for assertions of a particular communal identity within the overall international system.”\textsuperscript{77} Needless to say, there needs to exist an appropriate balance between universalist aspirations and the need to be cognizant of regional differences. Other benefits of regional enforcement of international criminal laws often cited are: physical proximity to the alleged crimes; legitimacy of the tribunal; reduced financial costs of regional enforcement; availability of sufficient judicial resources in regional enforcement mechanisms; and reduced likelihood of political manipulation in regional enforcement mechanisms.\textsuperscript{78}

Regardless of the heightened universalist aspiration in promoting international criminal justice, regionalization drive has not been stopped due to establishment of the International Criminal Court. The African experience previously referred to is a good example. Even before this recent development, there has already existed a regional criminal law enforcement mechanism. The Caribbean Court of Justice enjoys an appellate jurisdiction over civil and criminal law matters from the highest courts of member states that have ceased to allow appeals to the Judicial Committee of the Privy Council.\textsuperscript{79} The Court enjoys original jurisdiction in the interpretation of the treaty establishing the Caribbean Community. The Caribbean model is less known perhaps because its membership is limited to twelve states and only fewer numbers of these states allow appeal from national jurisdictions, these being states that no longer refer matters to the Privy Council.

\textsuperscript{76} Id.
\textsuperscript{77} Burchill, supra note 13.
There are also some unorthodox forms of international criminal law enforcement by courts not established for that particular purpose. For instance, as Alexandra Huneeus argues, regional human rights courts have long been exercising quasi-criminal jurisdictions. This has been achieved through the supervision of prosecution when “states have been initially unable or unwilling to act.” The Inter-American Court of Human Rights, in particular, has been playing a pioneering role in this regard through a creative interpretation of its remedial power, which allows it to order states to “investigate, try, and punish those responsible for gross human rights violations as a form of equitable relief.” The Court has also further interpreted its mandate in a manner that allows it to supervise states’ implementation of its orders, which included holding mandatory hearings and issuing of compliance reports. Other bodies who have exercised similar roles include the Inter American Commission for Human Rights, the Council of Europe’s Committee of Ministers, and the United Nation’s Human Rights Committee. Such interpretative expansion of the criminal jurisdiction, while innovative, will not be able to fill the gaps that could be filled by a full-fledged international criminal court, whether universal or regional.

VII. AFRICA AND INTERNATIONAL JUSTICE

A. Introduction

Sub-Saharan Africa has the largest concentration of international judicial bodies. In this sense, it is no surprise that the African region has already achieved a head start in establishing the first-ever regional international criminal court sitting in competition with the ICC.

The African regional group started to partake in international affairs following the decolonization of the post 1950s period. However, Africa as a cohesive region did not start to take shape until 1963 when the Organisation of African Unity (“OAU”) was estab-

\cite{Huneeus, supra note 70, at 1.}
\footnote{Id at 2.}
\footnote{Id at 4.}
\footnote{Romano et al., supra note 18, at 98.}
lished. But this does not mean Africa did not have encounters with international courts before the establishment of the OAU and decolonization of the entire continent. One good example is the 1960 ICJ action instituted by Liberia & Ethiopia against South Africa concerning the situation in the South West Africa [Namibia].\footnote{South-West Africa Case (Preliminary Objections), I.C.J. Reports, 1962, at 339; South West Africa, Ethiopia v South Africa, Second Phase, [1966] ICJ Rep 6.} In that case, Liberia and Ethiopia brought action in their capacity as member states of the League of Nations, raising several questions about the validity and operation of South Africa’s mandate over South West Africa [Namibia], including its extension of Apartheid policy to the mandate territory. In the first phase of this case in 1961, the Court determined that it had jurisdiction to hear the case, rejecting South Africa’s preliminary objections. In the second phase, however, the Court, with the casting vote of the President, decided that the applicants did not establish any legal rights or interest in the subject matter of their claim. This decision did not go down well with African States. As Dapo Akande points out:

The ripple effects of this decision were felt for many years and in many ways—both institutionally and even in term of normative development of the law. African States turned away from the Court, in the 1970s and 80s, largely as a result of this decision. Perhaps the International Tribunal for the Law of the Sea might not have been created had developing countries not been so dissatisfied with the ICJ.\footnote{Dapo Akande, Cases in which the ICJ/PCIJ Were Evenly Split, EJI (Sept. 12, 2012), http://www.ejiltalk.org/cases-in-which-the-icjpcij-were-evenly-split/}

The legacy of that decision arguably has set the tone of Africa’s relationship with international courts, although there have been changes in the 1990s during which a number of African countries appeared before the court, both as applicants and respondents.

### B. Africa Post ICC

The enthusiastic reception the establishment of the International Criminal Court got among many African countries could also be taken as a good indication that African countries had started to gain confidence in international judicial institutions. It is also argued that the decision by the AU to establish mechanisms of accountability contrasts sharply with the long held view by its pred-
cessor, the OAU, of respect for sovereignty and non-interference in internal affairs of members’ states. The continuity of the enthusiasm in post ICC period was severely tested during the open confrontations between the ICC and the African Union in regards to the pending indictment of sitting heads of states of Sudan and Kenya. It is to be remembered that some African delegations were even proposing a mass withdrawal from the ICC protesting the perceived targeting of African suspects only by the Court. While not being the only cause, it is important to note the contribution this confrontation made to the acceleration of the expansion of the criminal jurisdiction of the African Court of Justice and Human Rights, an institution whose establishment and consolidation has been long time coming. This process will be described in the paragraphs that follow.

Recommendation to overhaul the African Courts has been coming up at least since 2004, with the suggestion by then-Chairman of the Assembly of Heads of State and Government of the AU, Nigeria’s then President, Olusegun Obasanjo, who proposed the merger of the AU Court of Justice and the African Court into one Court, “urging the organization to guard against a ‘danger of proliferation of organs of the organization.’” The process that was kick started by this specific direction charted in that speech had passed through several phases. While there are several factors contributing to the expansion of criminal jurisdiction, there is no denying the impact of the continued rationalization of the African Courts.

The rationalization process commenced with the proposed merger of the African Court of Human and Peoples Rights and the African Court of Justice. At the time of the proposal, both courts were at the formation stage and it seemed a reasonable institutional consolidation to make at least on the basis of cost considerations. This consolidation in itself is a significant departure from

how courts of a similar nature are organized in other regions. For instance, in the European region, both the European Court of Justice and the European Court of Human Rights are two separate institutions established under the auspices of separate institutions, the former within the European Communities and the latter within the Council of Europe. Of course, the novelty of the new arrangement cannot be a good reason for objecting to it.

The merger was criticized by scholars on other grounds.91 Five out of fifty-four African countries have so far ratified the merged court protocol adopted in 2008, while thirty countries have signed it.92 Fifteen member states are required to ratify the merger protocol for it to enter into force. The Protocol establishing the African Court of Human and Peoples Rights had a head start and it entered into force on January 25, 2004, having been ratified by fifteen AU member states.93 To date, twenty-six states have ratified the protocol. A protocol to set up the African Court of Justice was adopted in Maputo, Mozambique, in July 2003 and entered into force on February 11, 2009. However, it did not commence operation due to the decision made to merge it with the African Court of Human and Peoples Rights.

Concurrently, there emerged a further recommendation to extend criminal jurisdiction to the merged courts. In 2006, a Committee of Eminent Jurists appointed by the AU to advise it on the question of possible trial in Africa of former Chadian President, Hissène Habré, among others, recommended the addition of criminal jurisdiction to the merged African Court.94 The African Group Experts, who were tasked by the African Union to advise it on the ‘merger’ of the African Court on Human and Peoples’ Rights with the African Court of Justice, made a similar proposal in 2007.95 This particular recommendation was not accepted by the Assembly then, only to be taken up again two years later.96 In 2009, the Assembly of Head of States and Government of the African Union

---


92 The countries that ratified it are Libya, Mali, Burkina Faso, Benin, and Congo.


94 Id.


96 Id.
(the Assembly) instructed the AU Commission, in consultation with the two bodies of African Court and Commission of Human and Peoples Rights, to commission a study on the implications of extending the jurisdiction of the Court to deal with international crimes. That same year, the Court produced a report on the implication of the extension of criminal jurisdiction. The report focused on the following eight points:

- The current role of the Court in the fight against impunity
- Substance and scope of the criminal jurisdiction that could be conferred on the Court
- The implications of extending the jurisdiction of the Court, on the Configuration of the Court itself
- The implications of extending the jurisdiction of the Court on the entire African institution system for judicial protection of human rights
- The implication on human resources, infrastructure, logistics and financial resources in general
- The impact on the international penal system: complementarity or competition between the Court and the International Criminal Court (ICC)
- The impact on the national legal systems of the African Union Member States
- The need to amend the Protocol to the African Charter on Human and Peoples’ Rights

Some of these points raise very significant issues, especially for the relationship between the ICC and African court in particular and for the overall relationship between regional courts and a universal court, such as the ICC.

During 2008, there was also a new development that contributed to international criminal law development in Africa. The African Charter on Democracy, Elections and Governance adopted in 2008 provided for the novel crime of the prosecution of the crime of Unconstitutional Change of Government in the African Court of Justice. This was inevitably premised on the future establishment of a tribunal empowered to try individuals suspected

---

97 Assembly/AU/Dec.213 (XII).
99 See infra Section C.
of committing the crime of Unconstitutional Change of Government.

It is important to note that these suggestions were being floated before the friction between the AU and ICC started to surface, but one cannot discount the impact the friction had in accelerating the adoption of the protocol expanding criminal jurisdiction.

This proposal was also tabled at the time African leaders had been growing wary of the use of universal jurisdiction by some domestic courts in Europe to indict African officials. Karen Alter is on point when she states, “the more extra territorial enforcement exists, the more attractive local adjudicative strategies become.”

C. The Protocol

At the outset, it is interesting to note that the initial draft protocols were drafted by Pan African Lawyers Union (“PALU”), which was commissioned by the AU Commission to produce a “detailed study with comprehensive recommendations and a draft legal instrument amending the Protocol on the Statute of the African Court of Justice and Human Rights.” PALU submitted its first draft report and draft legal instrument in June 2010. After a second round of draft and validation workshops, meetings, and consideration by the Ministers of Justice and Attorneys General and the Executive Council of AU, the Protocol was eventually adopted on June 27, 2014 by the Assembly of Heads of States in Malabo, Equatorial Guinea. The Protocol and the Statute annexed to it enters into force thirty days after deposit of ratification instruments by fifteen Member States. It is worth pointing out some of the salient features of this new protocol in light of some of the significant departures from the existing international criminal law enforcement mechanisms.

The Court shall have three sections: a General Affairs Section, a Human and People’s Rights Section, and an International Crimi-
nal Law Section. The International Criminal Law section in turn shall have three chambers: a Pre-Trial Chamber, a Trial Chamber, and an Appellate Chamber. These chambers are endowed with similar powers as other international tribunals of similar jurisdiction. AU Courts are the first of their types to be operating under the same roof.

The Court’s international criminal law section is empowered with expansive material jurisdiction. This includes: Genocide; Crimes Against Humanity; War Crimes; The Crime of Unconstitutional Change of Government; Piracy; Terrorism; Mercenarism; Corruption; Money Laundering; Trafficking in Persons; Trafficking in Drugs; Trafficking in Hazardous Wastes; Illicit Exploitation of Natural Resources; and The Crime of Aggression. The Protocol is groundbreaking in other respects too, one of which is the extension of criminal liability to corporate bodies other than States. Most of these crimes are not included in the ICC Rome Statute or any other ad hoc tribunals. It would have been impossible to achieve global consensus if such crimes were considered for inclusion. In regards to those included in the ICC Statute, there does not seem to exist an observable significant difference between the two definitions of the crimes covered.

Some of the prohibited acts are uniquely African or problems usually associated with regions of the world where rule of law and human rights are not entrenched. Africa has been watching itself helplessly as numerous governments were unconstitutionally over-

---

104 Art. 6 amending Art. 16 of the earlier protocol.
105 Id.
106 Id. at Art. 14.
107 Id. at Art. 46C:

Corporate Criminal Liability
1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.
thrown, its human and material resources looted, became a dumping ground for hazardous wastes and its waters infested by pirates. While it would take decades for this court to bring about the much-needed change, there is no denying the fact that a truly regional court should aim to go beyond the typical smorgasbord of international crimes.

It is also worth mentioning that all these crimes falling within the jurisdiction of the Court (not only the typical international crimes) shall not be subject to any statute of limitation. It is the first time that white-collar crimes, such as corruption and money laundering, are treated in par with the most egregious crimes known to man, in regards to statute of limitations.

D. Relation with ICC and Other Bodies

Strangely, the Protocol does not make any reference to the ICC, while it mentions its complementarity relationship with national courts and the courts of the regional economic communities. A question as to the legal co-existence of the ICC with African regional Court has been discussed. In this regard, C.B. Murungu questions whether the criminal chamber has a legal basis under the ICC Statute. While noting that the ICC Rome Statute does not expressly allow or even imply the establishment of a re-

108 The Crime of Unconstitutional Change of Government (Art 28A) is defined as:
1. For the purposes of this Statute, ‘unconstitutional change of government’ means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:
   a) A putsch or coup d’etat against a democratically elected government;
   b) An intervention by mercenaries to replace a democratically elected government;
   c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
   d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
   e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
   f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.
2. For purposes of this Statute, “democratically elected government” has the same meaning as contained in AU instruments.

109 Id.
110 Art. 46H(1).
111 See generally Murungu, supra note 78, at 1080.
Regional criminal chamber, he posits that it can be contended that regional courts have jurisdiction to try international crimes by analogy.\textsuperscript{112} He further argues that even if the clear position of the ICC statute is to confer jurisdiction to try international crimes on national courts, “a progressive interpretation of positive complementarity might, for the purposes of closing all impunity gaps, infer that even regional criminal courts could have jurisdiction over international crimes within the ICC jurisdiction.”\textsuperscript{113} Thus, it can be safely concluded that principle of complementarity under Article 17 of the ICC Rome statute can be interpreted to extend to regional international criminal courts.

The Protocol recognizes \textit{res judicata} as basis for inadmissibility, if the person concerned has already been tried for conduct that is the subject of the complaint.\textsuperscript{114} This can arguably extend to suspects tried by regional courts. Perhaps of some additional relevance is Article 46L (3) on cooperation and judicial assistance which provides that the “Court shall be entitled to seek the cooperation or assistance of regional or international courts, non-states parties or co-operating partners of the African Union and may conclude Agreements for that purpose.” Thus, one can anticipate a future cooperation agreement with judicial bodies such as the ICC.

Entities eligible to submit cases to the Court are the AU Assembly; the Peace and Security Council; the Office of the Prosecutor; African individuals or African Non-Governmental organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a declaration accepting the competence of the Court to receive cases or application submitted to it directly.\textsuperscript{115} While it is clear that the office of the Prosecutor is the one instituting cases under Article 17, the reference to other entities in Article 16 seems to be in regards to other cases. If not, it makes little sense to confine the ability to submit information to the office of the prosecutor to entities that have observer status with AU and its institution in regards to States that have made declaration to that effect.

\textsuperscript{112} Id. at 1081.
\textsuperscript{113} Id.
\textsuperscript{114} Art. 46H(2)c. \textit{See also Non bis in idem} provision, Art. 46I(1).
\textsuperscript{115} Art. 16.
E. Other Regions

It is a forgone conclusion that a regional international criminal court will be up and running in Africa in the not too distant future, when the necessary ratifications of the Protocol amending the Statute of the African Court of Justice and Human Rights are obtained. But will the trend catch on? Will other regions follow suit? It is hard to say, because much depends on the future conflict dynamics and how the ICC deals with those conflict situations. This is to say that as long as the ICC continues to sit on the fence in regards to conflicts in other parts of the world, there would probably be no appetite in those regions to agitate for the establishment of their own regional international criminal courts. In the 1990s, countries in Latin America were particularly receptive to the idea of establishing an international criminal court for terrorism and drug offences. In fact, at the time, the Organization of American States had begun the possibility of establishing Regional Criminal Courts for the Americas. The region, however, failed to take concrete steps to establish such court and the 1998 ICC Rome Statute does not have jurisdiction over terrorism and drug offences.

However, it can be remarked in general that some regions, such as the Middle East and the wider Asia region, lack a history of regional enforcement of international norms. International criminal law enforcement does not start from a clean slate. Thus, it is difficult to imagine a movement in the direction of regional courts, in the absence of this history and lack of regional organizations under whose auspices such initiatives could take shape. As Steven Freeland points out in regards to the Asia Pacific Region, the “absence of a regional human rights protection and enforcement system goes hand-in-hand with the overall reluctance within the region to accept the jurisdiction of the Court [ICC].” This begs the question why human rights protection and enforcement mechanisms in the Middle East or wider Asia failed to keep pace with developments in other major regions of the world. Reasons often advanced are variation of the usual arguments, such as sovereignty, culture, and aversion to intervention in countries’ internal affairs. As in other ad hoc efforts in other regions of the world, the international and hybrid and international tribunals established in the

---

116 Bassiouni, supra note 4, at 17–18.
117 Id. at 18.
past in Tokyo, Cambodia, and East Timor, the push did not come from the regional groupings.

F. Concluding Remarks

As Victor Hugo remarked, nothing is as powerful as an idea whose time has come. In that sense, almost all of humanity’s accomplishments had to happen. On the other hand, there have been far too many experiments that failed because they arrived either far too early or were poorly planned and executed. Even when an idea is ripe for further action, it would take time for it to come to fruition. In the realm of international peaceful dispute resolution, the emergence of truly global judicial bodies is a recent phenomenon relative to the long history of the existence of modern states. Even more recent is the establishment of a truly global international criminal court.

As shown in this paper, the further development of international criminal tribunals in various regions of the world is not a matter of if but when. The decision taken in July 2014 by African Union member states to expand the criminal jurisdiction of a court being set up is one such indicator. The African experience shows not only the political side of the issues, but also the need for international criminal jurisdiction to cover a wider range of international crimes, which hitherto did not fall within the ambit of the material jurisdiction of similar tribunals. While international criminal tribunals were established to end impunity for the most egregious crimes, there is now an opening for crimes, such as terrorism and unconstitutional change of governments, to be included in the list of crimes subject to international criminal jurisdiction. There is no doubt that different regions may have different pressing needs. For example, countries in Latin America were repeatedly pushing for an international mechanism for prosecuting drug traffickers. In this regard, there is a clear unmet need for regional international criminal tribunal.

At a broader level, as long as multi-polarity continues to characterize international relations, the institutional responses will remain diverse, and regional blocks will continue to play a crucial role, if not emerge as the most important forms of deliberation and decision-making. That said, current developments in that direction are not evenly distributed among different regional groupings.
Likewise, setting up of institutions is just a preliminary step and much needs to be done for the institutions to thrive and make a difference to the fight of impunity in their respective regions. It is one thing to establish tribunals for justifiable reasons or even based on the spur of the moment, but it is another to ensure the successful operation of such tribunals. If one is to go by the experience of tribunals in various African sub regions, a not well thought out establishment of tribunals without the political will and resources will not achieve the outcomes hoped for.