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Regionalism, Regime Complexes and the Crisis in International Criminal Justice

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Regionalism, Regime Complexes, and the Crisis in International Criminal Justice

MATIANGAI V.S. SIRLEAF*

This Article identifies an emerging regime complex in the field of international criminal law and analyzes the development of the regional criminal court to the African Court of Justice and Human Rights. A regime complex refers to the way in which two or more institutions intersect in terms of their scope and purpose. This Article discusses how the International Criminal Court's institutional crisis created a space for regional innovation. It demonstrates how the development of a regional criminal court in Africa is the result of intersecting factors in international criminal justice. It finds that regime complexes can form not only due to strategic inconsistencies as discussed in the literature, but also because of the influence of regional integration. It argues that the regionalization of international criminal law is a useful addition to the field of international criminal justice, which has hitherto been hampered by the limitations of both domestic and international adjudication. This Article concludes that regionalization of international criminal law is a positive development.

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INTRODUCTION

The African Union (AU) adopted an instrument in Malabo, Equatorial Guinea, to create the first-ever regional criminal court in May 2014.[1] The African Court of Justice and Human Rights has not come into existence at the time of writing. The Malabo Protocol (Protocol) provides for corporate criminal liability,[2] which presents a significant innovation for the field of international criminal justice.[3] The regional criminal court also criminalizes a number of acts, such as trafficking in humans, drugs, and hazardous waste,[4] piracy,[5] terrorism,[6] mercenarism,[7] and corruption,[8] among others. The Protocol presents an opportunity for African states to alter the status quo in international criminal justice.

Historically, the field of international criminal justice, like other fields in international law, has been preoccupied with crisis.[9] As Hilary Charlesworth has articulated, this has led to the deprioritization of "issues of structural justice that underpin everyday life."[10] International criminal law essentially ignores quotidian crimes, which may undermine the effectiveness of the field because it

1. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights art. 16, A.U. Doc. No. STC/Legal/Min. 7(1) Rev. 1 (May 14, 2014) [hereinafter Malabo Protocol]. The Assembly of the African Union adopted the Malabo Protocol on June 30, 2014, at its Twenty-Third Ordinary Session. *See* A.U. Doc. No. Assembly/AU/Dec.529 (XXIII) (June 26–27, 2014).

2. Malabo Protocol, *supra* note 1, at art. 46C.

3. None of the existing international criminal tribunals provide for corporate criminal liability. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 9 [hereinafter Rome Statute]; S.C. Res. 1877, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (July 7, 2009) [hereinafter ICTY Statute]; S.C. Res. 995, Statute of the International Criminal Tribunal for Rwanda (Aug. 14, 2002) [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, Apr. 12, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute]. *See generally* S.C. Res. 1315 (Aug. 14, 2000) (on the establishment of the SCSL).

4. Malabo Protocol, *supra* note 1, at arts. 28J, 28K, 28L (criminalizing trafficking in persons, drugs, and hazardous waste, respectively).

5. *Id.* at art. 28F.

6. *Id.* at art. 28G.

7. *Id.* at art. 28H.

8. *Id.* at art. 28I.

9. *See* Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MODERN L. REV. 377, 389 (2002).

10. *Id.* at 391.

"abstracts crises"[11] from the root causes of the field's core crimes—genocide, war crimes, and crimes against humanity. International criminal law violations are viewed as more severe and deserving of action. Meanwhile, other human rights violations, no matter how prolonged, systematic, or serious, "recede drably into the background."[12] This has created a hierarchy in which crisis crimes like genocide, crimes against humanity, and war crimes require urgent action and are the exclusive focus of international criminal tribunals like the International Criminal Court (ICC).[13] Some may view this hierarchy as justified given the limited resources of tribunals and the seriousness of crisis-related crimes, which may threaten international peace and security. The Malabo Protocol represents a radical departure from the traditional model of international criminal tribunals because its jurisdiction includes both crisis-related crimes and quotidian crimes.[14] By straddling the quotidian and the crisis, the Protocol recognizes that any violation "implicates both a pattern of conduct and a need for decisive action."[15] The Protocol allows us to think more creatively about what the project of international criminal justice should look like—the types of claims, actors covered, as well as the appropriate level of adjudication.

Yet, the efforts to establish the regional criminal court in Africa have been widely derided as a thinly disguised attempt to further entrench impunity. Controversially, the court does not have jurisdiction over 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 of office."[16] This immunities provision is in stark contrast with the statutes of other international criminal tribunals.[17] It has caused significant backlash to-

11. Sonja B. Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. L. REV. 1257, 1285 (2007).

12. Benjamin Authers & Hilary Charlesworth, *International Human Rights Law and the Language of Crisis* 14 (Ctr. for Int'l Governance & Justice, Working Paper No. 18, 2013).

13. Rome Statute, *supra* note 3, at art. 5 (enumerating the ICC's jurisdiction over core crimes—genocide, crimes against humanity, war crimes, and the crime of aggression).

14. *See generally* Malabo Protocol, *supra* note 1.

15. Authers & Charlesworth, *supra* note 12, at 23.

16. Malabo Protocol, *supra* note 1, at art. 46A *bis*.

17. Rome Statute, *supra* note 3, at art. 27 (detailing the irrelevance of official capacity for exempting someone from criminal responsibility); ICTR Statute, *supra* note 3, at art. 6 (same); ICTY Statute, *supra* note 3, at art. 7 (same); SCSL Statute, *supra* note 3, at art. 6 (same).

ward the court from scholars and practitioners.[18] The immunities provision is a red herring that has obscured discussion of a number of substantive innovations of the court. For one, the provision does not in any way impact the ICC's jurisdiction and the universal system remains as a check. Furthermore, there are valid legal and policy reasons why inclusion of the provision does not render the entire project suspect.[19] The knee-jerk dismissiveness toward the regional criminal court because of the immunity provision has blinded commentators. This has led to the failure to consider how the regionalization of international criminal law could uniquely position regional mechanisms between the system established by the Rome Statute of the ICC and national judicial systems—not to be merely complementary or reinforcing, but as essential parts of a robust system of global justice.

This Article argues that the emergence of the regional criminal court is due in part to the influence of regionalism[20] in international relations. It argues that the regionalization of international criminal law is a useful addition to the field of international criminal justice, which has hitherto been hampered by the limitations of both domestic and international adjudication. The ICC's institutional crisis has created a space for this regional innovation. Hilary Charlesworth and others have argued that times of crisis often act as catalysts to action in the field of international human rights law.[21] The same can also be said for the field of international criminal law, with the crisis between the ICC and the AU prompting the proposed creation of an alternative institution. Prior to this, the AU decided that it

18. *See, e.g.*, Mark Kersten, *What Gives? African Union Head of State Immunity*, JUST. CONFLICT (July 7, 2014), http://justiceinconflict.org/2014/07/07/what-gives-african-union-head-of-state-immunity/; Mireille Affa'a-Mindzie, *Leaders Agree on Immunity for Themselves During Expansion of African Court*, IPI GLOBAL OBSERVATORY (July 23, 2014), http://theglobalobservatory.org/2014/07/leaders-agree-immunity-expansion-african-court/.

19. See discussion in Part II.

20. Regionalism spawned "new political, economic, security, and culturally driven projects which sought in different ways to find a new space for regions in an increasingly interdependent global order." Louise Fawcett & Mónica Serrano, *Introduction*, *in* REGIONALISM AND GOVERNANCE IN THE AMERICAS: CONTINENTAL DRIFT xxii (Louise Fawcett & Mónica Serrano eds., 2005). I rely on the three criteria put forward by the United Nations in its 1945 draft definition for a region: geographical proximity, community of interest, and common affinities. *See* Kennedy Graham, *Models of Regional Governance: Is There a Choice for the Pacific?*, *in* MODELS OF REGIONAL GOVERNANCE FOR THE PACIFIC: SOVEREIGNTY AND THE FUTURE ARCHITECTURE OF REGIONALISM 19, 20–21 (Kennedy Graham ed., 2008) (noting that, although the definition was not adopted, it is "as good as any other definition").

21. *See* Authers & Charlesworth, *supra* note 12, at 8.

would no longer cooperate with the ICC in its investigations and prosecutions in Africa.[22] African states' views regarding non-cooperation with the ICC are not monolithic. Indeed, some states like Botswana, Malawi, and others have signalled their displeasure with the AU's call for non-cooperation.[23] Nonetheless, because almost all of the ICC's cases are from the African continent, and the court is completely dependent on member states for cooperation and enforcement of its decisions, the current strained relationship between the AU and the ICC is potentially deeply problematic for the larger project of international criminal justice. This is especially so considering that Kenya received support for a proposal at a January 2016 AU summit meeting for mass African-state withdrawal from the Rome Statute regime.[24]

While no legally binding decision has been made to date, the ICC's failure to adequately manage this crisis has led to the emergence of a regime complex.[25] Regimes are "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[26] Regime complexes consist of "several legal agreements that are created and maintained in distinct fora with participation of different sets of actors."[27] Scholars have identified regime complexes in the areas of "climate change, energy, intellectual

22. *See, e.g.*, A.U. Doc. Assembly/AU/Dec. 245(XIII) Rev.1, Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) (July 3, 2009), http://www.au.int/en/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf (deciding that AU Member states "shall not cooperate . . . in the arrest and surrender of President Omar al-Bashir of Sudan").

23. *See, e.g.*, Assembly of the African Union, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dec.482(XXI) (May 27, 2013), http://www.au.int/en/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf (noting Botswana's reservation to the entire decision, which endorsed domestic prosecutions of the Kenyan cases in lieu of ICC proceedings and reaffirmed prior decisions that expressed concern about the misuse of ICC indictments against African leaders); *Malawi Rebuffs Mugabe's Call for ICC Withdraw*, NYASA TIMES (June 1, 2015), http://www.nyasatimes.com/2015/06/01/malawi-rebuffs-mugabes-call-for-icc-withdraw (discussing the Malawian government's commitment to the Rome Statute).

24. Agence Fr.-Presse, *African Union Members Back Kenyan Plan to Leave ICC*, GUARDIAN (Feb. 1, 2016), http://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court.

25. Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 279 (2004) (defining regime complexes).

26. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982).

27. Raustiala & Victor, *supra* note 25, at 279.

property, and anti-corruption."[28] The literature on regime complexes is ever expanding,[29] and emerging complexes have been identified in the areas of refugee law[30] and security.[31]

This Article is the first to identify an emerging regime complex in the field of international criminal law. It mines an under-researched area as the scholarship on regime complexes has not sufficiently analyzed the ways in which regionalism can inform the development of new regime complexes. Regime-complex and regionalism theory help explain the AU's decision to merge the African Court of Human and People's Rights with that of the African Court of Justice[32] and to add a separate chamber for criminal jurisdiction to the new African Court of Justice and Human Rights.[33]

This Article is organized as follows: Part I provides a brief background on the ICC, the African human rights architecture, the ICC's institutional crisis, and the development of the regional criminal court. Part II analyzes how regionalism and regime complexes provide a better conceptual framework for understanding the emergence of the regional criminal court. Part III examines the implica-

28. Grainne de Búrca, Robert O. Keohane & Charles F. Sabel, *New Modes of Pluralist Global Governance* 13 (NYU Sch. of Law Pub. Law & Legal Theory Res. Paper Series, Working Paper No.12-08, 2013); *see, e.g.*, Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia,* 2007 MICH. ST. L. REV. 1, 16 (2007) (intellectual property); Raustiala & Victor, *supra* note 25 (plant genetics). *See generally* Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7 (2011) (climate change); Laurence Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004) (intellectual property); Kenneth W. Abbott, *The Transnational Regime Complex for Climate Change*, 30 ENV'T & PLANNING C: GOV'T & POL'Y 571 (2012) (climate change); Kal Raustiala, *Density & Conflict in Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021 (2007) (intellectual property).

29. *See generally* Sigrid Quack, *Regime Complexity and Expertise in Transnational Governance: Strategizing in the Face of Regulatory Uncertainty*, 3 ONATI SOCIO-LEGAL SERIES 647 (2013); Keith Aoki & Kennedy Luvai, *Reclaiming "Common Heritage" Treatment in the International Plant Genetic Resources Regime Complex*, 2007 MICH. ST. L. REV. 35 (2007); Denis Borges Barbosa et al., *Slouching Toward Development in International Intellectual Property*, 2007 MICH. ST. L. REV. 71 (2007).

30. *See generally* Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURV. Q. 12 (2010).

31. *See generally* Malte Brosig, *Introduction: The African Security Regime Complex—Exploring Converging Actors and Policies*, 6 AFR. SEC. 171 (2013).

32. Protocol on the Statute of the African Court of Justice and Human Rights, July 21, 2008 (entered into force Feb. 11, 2009), http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf [hereinafter Merger Protocol].

33. *See generally* Malabo Protocol, *supra* note 1.

tions of utilizing these theoretical frameworks. This study has a number of main contributions. First, regionalism can influence the development of regime complexes. Next, crises are important predictors of institutional change and development. This Article concludes that regionalization of international criminal law is a welcome development.

I. OVERVIEW OF THE ICC, THE AFRICAN REGIONAL HUMAN RIGHTS ARCHITECTURE, AND THE DEVELOPMENT OF THE REGIONAL CRIMINAL COURT

This Part provides a brief overview of the ICC and discusses the African regional human rights system. This Part also provides background and context on the ICC's institutional crisis that led to the development of the regional criminal court. Finally, this Part discusses how institutional crises are important predictors of institutional change and development.

A. The ICC in Crisis

1. Crisis Defined

Perceptions of legitimacy[34] gaps have shaped debates about international organizations for decades.[35] As such, the legitimacy of an organization is largely dependent on subjective determinations made by states, groups, and individuals within states on how a given organization is performing.[36] I am most concerned with states here,

34. I rely on the definition of legitimacy used most often in the sociology literature, wherein legitimacy is defined as involving the actual acceptance of authority by a relevant constituency. *See* YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 138–40 (2014) (discussing how the sociology, law, and philosophy literatures differ in their understandings of legitimacy with the latter viewing it as justified authority); *see also* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 325 (Talcott Parsons ed., 1947) (describing the bases for sociological legitimacy).

35. ALISON DUXBURY, THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANIZATIONS: THE ROLE OF HUMAN RIGHTS AND DEMOCRACY 30 (2011) (noting how Keohane and Nye have focused on international institutions' lack of legitimacy in their scholarship).

36. *Id.* (explaining that, whether "(linked to a particular viewpoint) or an objective notion," these determinations are still "dependent on the fulfillment of certain criteria," which is also subject to individual assessment); *see also* Jaya Ramji-Nogales, *Designing*

because internationally they are the only ones that can enter into treaties and form internationally legally binding obligations. There are of course many different audiences: the international community, civil society, and individual actors, to name a few. Although their perception of an institution is important, it is not my primary focus.

International organizations' claims to legitimacy are tenuous at best because of "the lack of a close connection between [them] and ordinary citizens."[37] In an effort to close this gap, there have been efforts to ground international institutions' legitimacy on the record of its democratic membership or the extent to which decisions are made based on democratic values.[38] International courts face special challenges because "they lack grounding in domestic politics and law" such that their rulings appear "as foreign imposition[s] on national communities."[39] Accordingly, international tribunals must engage in two forms of trials: actual criminal trials and "virtual or political trials," where the tribunal competes for domestic and international support.[40] This is because international tribunals are not simply legal institutions; they are also political institutions that have to rely heavily on domestic support to secure arrests and access to crime scenes and witnesses.[41] As one scholar noted, persuading audiences is a key dimension of institutional legitimacy because their judgments are paramount.[42] Where an international institution does not reflect shared beliefs in its practices and objectives due to normative changes, or because it imposes rules in contexts where support-

Bespoke Transitional Justice: A Pluralist Process Approach, 32 MICH. J. INT'L L. 1, 15 (2010) (noting that the effectiveness of institutions should "be measured by perceptions of legitimacy on the part of relevant actors").

37. DUXBURY, *supra* note 35, at 30.

38. *Id.* at 31.

39. Mark Pollack, *The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence* 2 (draft paper on file with author).

40. Michael D. Thurston, *Should We Press the Victims?: Uneven Support for International Criminal Tribunals*, *in* TRIALS AND TRIBULATIONS OF INTERNATIONAL PROSECUTION 135, 136 (Henry F. Carey & Stacey M. Mitchell eds., 2013).

41. *Id.*

42. Paul D. Williams, *Regional and Global Legitimacy Dynamics: The United Nations and Regional Arrangements*, *in* LEGITIMATING INTERNATIONAL ORGANIZATIONS 41, 59 (Dominik Zaum ed., 2013); *see also* Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, 407 n.2 (2012) (noting that numerous studies by psychologists and sociologists conclude that "legitimacy is important to political and legal institutions because individuals are more likely to voluntarily adopt the norms of such institutions to regulate their own conduct when the institutions are perceived as legitimate").

ing beliefs are lacking, it develops a legitimacy gap, which in the worst cases turns into an institutional crisis.[43]

What exactly distinguishes disagreement with particular decisions of an international court or general disaffection from an institutional crisis is not at all clear.[44] For example, the "crisis" label has been used to characterize situations that fall closer to a legitimacy gap,[45] or low levels of legitimacy, than the institutional crisis currently faced by the ICC. Helpful concepts in elucidating the distinction between a legitimacy gap and institutional crisis are the differences between specific support and diffuse support. Specific support exists for international courts where "audiences" derive "substantive satisfaction with the decisions of the court."[46] Diffuse support, on the other hand, exists where actors evince "a willingness to support and defend the court and its jurisdiction even in the face of decisions with which audience members disagree."[47] Identifying the precise turning point where a legitimacy gap becomes an institutional crisis is not necessary for our purposes. In determining indicators of where a given institution falls along this spectrum, we would look to formal indicators like "adherence to the constitutive instrument of the court and acceptance of its jurisdiction."[48] We would also consider de facto indicators such as judgment compliance and diffuse support for an institution.[49] Where an institution has both formal and de facto indicators of adherence to its authority, I postulate that it would make little sense to speak of a legitimacy gap. However, where an institution is wanting in two or more of these attributes, I contend that it could accurately be characterized as facing an institutional crisis.

43. Dominik Zaum, *International Organizations, Legitimacy and Legitimation*, *in* LEGITIMATING INTERNATIONAL ORGANIZATIONS 3, 7 (Dominik Zaum ed., 2013).

44. Laurence R. Helfer & Karen J. Alter, *Legitimacy & Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479, 502 (2013) (noting that a court that is "controversial is not the same as one whose legitimacy is suspect").

45. *See, e.g.*, Molly K. Land, *Justice as Legitimacy in the European Court of Human Rights* 1 (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2608578 (discussing the legitimacy concerns at the European Court of Human Rights due to several recent decisions on prisoner voting, which have caused "[o]utcry in the United Kingdom," as well as decisions that have been criticized by Russia and Germany); *see also* Ameya Kilara, *Facing the Demons of the Past: Transitional Justice in Gujarat*, 3 SOCIO-LEGAL REV. 100, 122 (2007) (explaining that a legitimacy crisis occurs when a judicial body's perceived legitimacy is so diminished that it may "sound the death knell of the rule of law in a state").

46. Pollack, *supra* note 39, at 6.

47. *Id.*

48. SHANY, *supra* note 34, at 139.

49. *Id.*

2. The ICC's Institutional Crisis

The Rome Statute establishing the ICC came into effect in July 2002.[50] It created a permanent institution responsible for prosecuting core crimes[51]: genocide, crimes against humanity, and war crimes.[52] The ICC is based on the principle of complementarity wherein the court will not investigate and prosecute cases when states are willing and able to do so themselves.[53] Its temporal jurisdiction is limited to crimes taking place after the statute came into effect and after a state has ratified the statute.[54] Cases fall within the court's jurisdiction if a State Party refers a case to the court—and if the crimes occurred on the territory of that State or on board a vessel or aircraft registered to that State, or if the crime involves a national of that State—or if the United Nations Security Council (UNSC) refers a case to the court.[55] Cases can also come under the court's jurisdiction by referral from the prosecutor under Article 13(c) of the Rome Statute.

There are 124 countries that are States Parties to the Rome Statute; African States form the biggest regional block, with thirty-four States Parties.[56] Notably, Senegal was the first country in the world to ratify the Rome Statute, which symbolizes "Africa's early support for the idea of a permanent [ICC]."[57] The ICC is currently conducting investigations and prosecutions in eight countries in Africa: the Democratic Republic of Congo (DRC), the Central African Republic (CAR), Uganda, the Darfur region of Sudan, Kenya, Libya,

50. Rome Statute, *supra* note 3.

51. The crime of aggression was also included in the Rome Statute as a placeholder. *Id.* There was some definitional agreement at the Assembly of States Parties on what the contours of the crime are and what the jurisdictional prerequisites would be. This resulted in a compromise document, which postpones decision on the crime of aggression until 2017. *See generally* Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression (June 11, 2010), https://treaties.un.org/doc/Publication/CN/2010/CN.651.2010-Eng.pdf.

52. Rome Statute, *supra* note 3, at art. 5.

53. *Id*. at arts. 1, 17(1)(a). The ICC will also not investigate in cases of double jeopardy or where a case is not of sufficient gravity. *Id*. at art. 17(1)(c)–(d).

54. *Id*. at art. 11.

55. *Id*. at arts. 12–13.

56. *The States Parties to the Rome Statute*, ICC, https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Mar. 25, 2016).

57. Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 446 (2009).

Côte d'Ivoire, and Mali.[58] Five of these situations were the result of "self-referrals" by the countries for investigations and possible prosecutions.[59]

The Rome Statute that established the ICC was supposed to create a comprehensive international institution, but has failed to garner universal support from powerful states like the United States, Russia, and China.[60] For example, the United States enacted the American Service Members Protection Act of 2002.[61] It is known as the "Hague Invasion Act," because it provides for the use of military force against any country that hands over a U.S. national to the ICC.[62] The United States signed several "Bilateral Immunity Agreements" with developing countries that faced the prospect of losing all financial, military, and humanitarian aid if they failed to sign.[63] These agreements generally provide that countries will not hand over U.S. nationals to the ICC without first securing the U.S. government's consent. Approximately thirty-six African countries have signed them.[64] The Bilateral Immunity Agreements served to insulate the United States further from the reach of the court. Yet, since the United States is not a party to the Rome Statute, it was within its rights to conclude such agreements.[65] However, for States

58. *All Situations*, ICC, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx (last visited Mar. 3, 2016) [hereinafter ICC Situations].

59. *Id.* (noting the five countries that referred situations: the DRC, the CAR, Uganda, Côte d'Ivoire, and Mali). Self-referrals are provided for under Article 14 of the Rome Statute. Rome Statute, *supra* note 3, at art. 14. The situations in Darfur, Sudan, and Libya involved UNSC referrals, which I will discuss in detail below. *See infra* Part II. Lastly, Côte d'Ivoire voluntarily accepted the jurisdiction of the ICC. *See* Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11-01/11, Warrant of Arrest for Laurent Koudou Gbagbo (Nov. 23, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1276751.pdf.

60. *The States Parties to the Rome Statute*, *supra* note 56 (noting that 124 countries are States Parties to the Rome Statute); *see also* de Búrca, Keohane & Sabel, *supra* note 28, at 10 (noting how the court was established by mostly European states and remarking on the absence of the United States from the ICC).

61. American Service Members Protection Act of 2002 § 2001 et seq., 22 U.S.C. § 7401 (2002).

62. *See* Jalloh, *supra* note 57, at 493.

63. *Id.*

64. *Id.*

65. Vienna Convention on the Law of Treaties art. 18, 1155 U.N.T.S. 331 (May 23, 1969) [hereinafter VCLT] (providing that a state is "to refrain from acts that would defeat the object and purpose of a treaty when it has signed a treaty" or begun the treaty ratification process "until it shall have made its intention clear not to become a party to the treaty"). Accordingly, once the United States made its intention clear not to become a party to the Rome Statute, it no longer had any obligation not to defeat the object and purpose of the

Parties to the Rome Statute, their participation in these agreements violated the norm of *pacta sunt servanda*.[66] Accordingly, States Parties to the Rome Statute that concluded Bilateral Immunity Agreements with the United States could be in violation of this norm by not exercising good faith by attempting to shield U.S. nationals alleged to have committed crimes under the Rome Statute's jurisdiction. The ICC has done its best not to antagonize the United States any further, and the relationship now is one of "mutual accommodation."[67] Notably, during the UNSC debates about whether to refer the situation in Darfur to the ICC, the United States "mooted as an alternative the establishment of a regional African criminal court."[68] That proposal was not taken seriously at the time because "it was perceived as a gambit aimed at the ICC."[69]

The relationship between the ICC and the UNSC is one of the most crucial issues influencing the ICC's judicial processes and its ability to promote accountability. In particular, the UNSC's referral power to the ICC has come at a "high cost for the legitimacy and functioning of" the ICC.[70] This is because the UNSC is an undemocratic and political body. Moreover, three of the five permanent members on the UNSC have not ratified the Rome Statute.[71] They can veto any referral to the ICC, effectively immunizing themselves and their allies from any potential prosecutions. Scholars have adequately canvassed how the wording of UNSC resolutions referring the situations in Sudan and Libya "limited the ICC's jurisdiction to the relevant state under investigation . . . suggesting a hierarchy of crimes based on the individuals that perpetrated them."[72] The Suda-

Rome Statute, and as such the Bilateral Immunity Agreements were not in conflict with its obligations under the Rome Statute.

66. *Id.* at art. 26 (providing that treaties are binding upon signatory parties and obligations under a treaty "must be performed . . . in good faith").

67. Jalloh, *supra* note 57, at 495.

68. William A. Schabas, *Regions, Regionalism and International Criminal Law*, 4 N.Z. Y.B. INT'L L. 3, 12 (2007).

69. *Id.* at 18.

70. Rosa Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court*, *in* THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 147, 149 (Dawn L. Rothe et al. eds., 2013). *See generally* Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591 (2002) (arguing that the ICC's authority over non-party states through Security Council referrals creates a legitimacy problem for the court).

71. *The States Parties to the Rome Statute*, *supra* note 56. Note the omission of Russia, China, and the United States. *Id.*

72. Aloisi, *supra* note 70, at 153. The UNSC's referral of the Sudan and Libyan situations to the ICC provided immunity from ICC prosecutions to contributing states from

nese and Libyan referrals risk turning the court into a "mere tool of diplomacy" and suggest that the court is a "means to exert political pressure" on regimes.[73] In addition, the UNSC has not referred similarly grave situations to the ICC, such as the current crisis in Syria.[74] Given the complexity of the situation in Syria, it is unlikely that the ICC's intervention would have been particularly helpful in resolving the conflict or stopping mass atrocities. However, the perceived bias in the selection of cases has only served to further undermine the ICC[75] and given the impression that political concerns predominate over criminality considerations.[76] Accordingly, the ICC has been charged with ignoring blatant human rights violations perpetrated by powerful nations that have permanent membership on the UNSC or their allies[77] in selecting its situations. Some observers have argued that it is not coincidental that the only places where the ICC is investigating and prosecuting are in situations where the United States and other powerful states have few interests.[78]

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the UNSC- or AU-authorized operations that were non-state parties to the ICC. *See* S.C. Res. 1593, ¶ 6 (Mar. 31, 2005) (Sudan); S.C. Res. 1970, ¶ 6 (Feb. 26, 2011) (Libya). For further discussion, see PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1345–49 (2013).

73. José Alvarez, *Opening Remarks, How Best to Assure the Independence of the ICC Prosecutor*, *in* PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1350, 1350–51 (2013).

74. *See, e.g.*, Neil MacFarquhar & Anthony Shadid, *Russia and China Block U.N. Action on Crisis in Syria*, N.Y. TIMES (Feb. 4, 2012), http://www.nytimes.com/2012/02/05/world/middleeast/syria-homs-death-toll-said-to-rise.html?pagewanted=all (discussing China and Russia blocking the UNSC from acting against Syria).

75. Aloisi, *supra* note 70, at 164–65.

76. Peter J. Stoett, *Justice, Peace, and Windmills: An Analysis of "Live Indictments" by the International Criminal Court*, *in* TRIALS AND TRIBULATIONS OF INTERNATIONAL PROSECUTION 121, 130 (Henry F. Carey & Stacey M. Mitchell eds., 2013).

77. *See, e.g.*, Ifeonu Eberechi, *"Rounding up the Usual Suspects": Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance*, 4 AFR. J. LEGAL STUD. 51, 56 (2011); Jalloh, *supra* note 57, at 491–95 (discussing U.S. exceptionalism). *See generally* Ntombizozuko Dyani, *Is the International Criminal Court Targeting Africa? Reflections on the Enforcement of International Criminal Law in Africa*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 185 (Vincent O. Nmehielle ed., 2012).

78. Mahmood Mamdani, *Darfur, ICC and the New Humanitarian Order: How the ICC's "Responsibility to Protect" Is Being Turned into an Assertion of Neo-Colonial Domination*, PAMBAZUKA NEWS 396 (Sept. 17, 2008), www.pambazuka.org/en/category/features/50568; *see also* Victor Peskin, *Things Fall Apart: Battles of Legitimation and the Politics of Noncompliance and African Sovereignty from the Rwanda Tribunal to the ICC* 29 (draft on file with author) (discussing how the ICC has steered clear of U.S. spheres of influence and has not opened formal investigations in Afghanistan despite widespread

The ICC has encountered difficulty in Africa[79] and has faced countless questions about its relationship with the UNSC. There are charges that the ICC's exercise of its jurisdiction has contributed to neo-imperialism, as the court is perceived as just another tool used by the West to control Africa.[80] There is a common perception that the ICC engages in "selective justice."[81] These challenges to the ICC regime are due to a number of factors. One aspect negatively impacting the ICC's credibility is its practice of issuing indictments during the midst of conflicts.[82] Many African states have begun to question the wisdom of these indictments and view this practice as decreasing the international reputational validity of the ICC, because it prolongs

knowledge of atrocities committed in these areas). *But see* ICC Situations, *supra* note 58 (demonstrating the ICC prosecutor opened an investigation in Georgia in January 2016, which is arguably in Russia's sphere of influence).

79. For more, see, for example, Karim A. A. Khan & Anand A. Shah, *Defensive Practices: Representing Clients Before the International Criminal Cour*t, 76 LAW & CONTEMP. PROB. 191, 227–30 (2013) (addressing the impact of the type of jurisdiction on defense investigative practices, such as the prosecutor's request and authorization to exercise *proprio motu* jurisdiction on Kenya and the ICC's exercise of jurisdiction pursuant to a referral from the UNSC on Darfur, Sudan, and Libya); Peskin, *supra* note 78, at 15–23 (discussing the situation in Kenya); *Situation in Libya, ICC-01/11*, ICC, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx (last visited Mar. 12, 2016). *See generally* Benson Chinedu Olugbuo, *Implementing the International Criminal Court Treaty in Africa: The Role of Nongovernmental Organizations and Government Agencies in Constitutional Reform*, *in* MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA 106 (Kamari Maxine Clarke & Mark Goodale eds., 2010); Sarah Nouwen, *The International Criminal Court: A Peacebuilder in Africa?*, *in* PEACEBUILDING, POWER, AND POLITICS IN AFRICA 171 (Devon Curtis & Gwinyayi A. Dzinesa eds., 2012) (discussing the situations in Uganda and Sudan); Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, *in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 37 (Nicholas Waddell & Phil Clark eds., 2008); Angela Walker, *The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process*, 18 UCLA J. INT'L L. & FOR. AFF. 303 (2014) (discussing the Libya situation); John J. Liolos, *Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes*, 35 B.C. INT'L & COMP. L. REV. 589 (2012) (discussing the Libya situation).

80. *See generally* David Chuter, *The ICC: A Place for Africans or Africans in Their Place?*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 161 (Vincent O. Nmehielle ed., 2012); James Nyawo, *Historical Narrative of Mass Atrocities and Injustice in Africa: Implications for the Implementation of International Criminal Justice*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 125 (Vincent O. Nmehielle ed., 2012).

81. *See, e.g.*, Eberechi, *supra* note 77, at 52; Dyani, *supra* note 77, at 185–220; Jalloh, *supra* note 57, at 491–95 (discussing U.S. exceptionalism).

82. Stoett, *supra* note 76, at 121–34.

conflict.[83] Others have argued for the need to take a more holistic view of peace and the ways in which the ICC could potentially facilitate peace.[84] The ICC's involvement in Uganda illustrates the concern because the indictments against the rebel leaders of the Lord's Resistance Army are seen as incentivizing the rebels to remain fighting.[85] Yet, there are also questions about how committed the rebels were to peace negotiations prior to ICC intervention. Nonetheless, the issuance of indictments in situations where the court is unable to apprehend suspects further weakens the court.[86] A prime example of this is the indictment of Sudanese President Omar al-Bashir, who is the "first head of state to be re-elected while facing an international arrest warrant."[87] Al-Bashir's reception in China, Qatar, Saudi Arabia, and a number of African states following his arrest warrant also highlights the perceived lack of influence of the ICC.[88] The ICC prosecutor highlighted the court's ineffectiveness when it suspended the Darfur investigations in December 2014.[89] The UNSC

83. *Id.* at 125–27 (discussing criticisms of ICC live indictments in Uganda and Sudan and finding their timing either counterproductive to ensuring stability in Uganda or as possibly undermining peace efforts in Sudan).

84. *See* Janine Natalya Clark, *Peace, Justice and the International Criminal Court*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 269, 290–93 (Vincent Nmehielle ed., 2012); *see also* Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions* (draft paper presented at the ASIL Mid-Year Research Forum, Chicago, Nov. 6–8, 2014), http://tulane.edu/liberal-arts/political-science/upload/Dancy-Montal-IO-2014.pdf.

85. For further discussion of this situation, see Nouwen, *supra* note 79, at 185–87; *see also* Dawn L. Rothe & Victoria E. Collins, *The International Criminal Court: A Pipe Dream to End Impunity?*, *in* THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 191, 201–03, 207–08 (Dawn L. Rothe et al. eds., 2013). *See generally* Steven C. Roach, *Multilayered Justice in Northern Uganda: ICC Intervention and Local Procedures of Accountability, in* THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 249 (Dawn L. Rothe et al. eds., 2013).

86. Rothe & Collins, *supra* note 85, at 191, 198.

87. *Id.*

88. *Id.* at 199; *see also* Peskin, *supra* note 78, at 19 (discussing the Chadian and Kenyan governments hosting al-Bashir and their failure to arrest al-Bashir despite obligations to do so as States Parties to the Rome Statute); Editorial Bd., *South Africa's Disgraceful Help for President Bashir of Sudan*, N.Y. TIMES (June 15, 2015), http://www.nytimes.com/2015/06/16/opinion/south-africas-disgraceful-help-for-president-bashir-of-sudan.html?_r=1 (discussing the South African government's refusal to arrest al-Bashir during its hosting of an AU meeting despite its being a State Party to the ICC and a domestic court order to prevent al-Bashir from leaving); Agence Fr.-Presse, *Omar al Bashir Celebrates ICC Decision to Halt Darfur Investigation*, GUARDIAN (Dec. 14, 2014), http://www.theguardian.com/world/2014/dec/14/omar-al-bashir-celebrates-icc-decision-to-halt-darfur-investigation (discussing al-Bashir's travel to Egypt and Ethiopia).

89. *See* David Smith, *ICC Chief Prosecutor Shelves Darfur War Crimes Probe*,

has failed to take coercive measures under its Chapter VII powers,[90] which could compel al-Bashir and the other accused to stand trial. The failure to enforce six-year arrest warrants in one of the court's most high-profile cases and the decision to suspend the Darfur investigations undermine the court's credibility.

Moreover, the ICC's credibility is reduced because it is perceived as involving itself in local politics.[91] This can occur when the ICC issues one-sided indictments in conflicts where the government is also implicated in abuses. An example of this is the situation in the DRC, where the court issued indictments against militia leaders, but not any officials in the army, even though they are believed to be implicated in many grave abuses.[92] The ICC duplicated this situation in Côte d'Ivoire where opponents of the government were targeted for indictments, but not any government officials, even though there are allegations that both sides of the conflict were implicated in abuses.[93] All of the above is not lost on the domestic populace and affects the "overall perceived legitimacy of the Court."[94] These issues contribute to the sentiment that the ICC is a biased and illegitimate organization with the moniker, the "European Court for African Affairs."[95]

As noted above, an institutional crisis is marked by substantial resistance to an institution's authority. This can be demonstrated by the dearth of diffuse support for the institution and either incomplete compliance with its judgments or lack of adherence to its constitutive instrument or acceptance of its jurisdiction, or both. This subsection has illustrated how the ICC does not have formal indicators of adherence to its authority from a number of major powers on the UNSC, because they have not accepted the court's jurisdiction. Of the eight situations in Africa in which the ICC is currently conducting investigations and prosecutions, five were the result of "self-referrals" by the countries.[96] The nations that provided the self-

GUARDIAN (Dec. 14, 2014), http://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan.

90. *See* U.N. Charter arts. 39–51.

91. *See generally* Stoett, *supra* note 76.

92. Rothe & Collins, *supra* note 85, at 199.

93. *ICC/Côte d'Ivoire: Gbagbo to Go to Trial*, HUM. RTS. WATCH (June 12, 2014), http://www.hrw.org/news/2014/06/12/icccote-d-ivoire-gbagbo-go-trial.

94. Rothe & Collins, *supra* note 85, at 199.

95. Nouwen, *supra* note 79, at 171. *See generally* Henry J. Richardson, *African Grievances and the International Criminal Court: Issues of African Equity Under International Criminal Law*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 81 (Vincent Nmehielle ed., 2012).

96. ICC Situations, *supra* note 58 (noting the five countries that referred situations: the

referrals clearly recognize the ICC's formal authority.[97] African states also form the biggest regional block of state parties to the ICC, another indicator of the court's formal authority.[98]

Yet, states have had a tendency of "playing hot potato" with the court, by referring politically troublesome cases to the ICC even when they can conduct the trials themselves.[99] The UNSC has also engaged in this practice of referring troublesome cases to the court in order to be seen to be doing something. The ICC depends on states and the UNSC for cooperation to gain access to witnesses and documents and to assist with investigations and prosecutions. States have been able to undermine the ICC by the lack of de facto compliance with requests for cooperation not only from self-referring governments but also from other States Parties.[100] The UNSC has similarly undermined the ICC by not following up with enforcement measures on any of the cases that it has referred to the court. This reality has placed the court in the predicament of not wanting to ostracize government officials in self-referring countries out of fear that they might withhold further cooperation from the court.[101] This may also help to explain the ICC's pattern of issuing one-sided indictments. Self-referring governments have taken advantage of this and have used the court for "strategic aims," and as another "instrument of

DRC, the CAR, Uganda, Côte d'Ivoire, and Mali). State Party self-referrals are provided for under Article 14 of the Rome Statute. Rome Statute, *supra* note 3, at art. 14. The situations in Darfur, Sudan, and Libya involved UNSC referrals. Lastly, Côte d'Ivoire voluntarily accepted the jurisdiction of the ICC before its ratification of the Rome Statute. *See Case Information Sheet, The Prosecutor v. Laurent Gbagbo*, ICC, http://www.icc-cpi.int/iccdocs/PIDS/publications/LaurentGbagboEng.pdf (last updated Nov. 18, 2014); *see also The States Parties to the Rome Statute*, *supra* note 56 (noting Côte d'Ivoire's ratification on February 15, 2013). The ICC's Office of the Prosecutor exercised its *proprio motu* jurisdiction in Kenya. *See* ICC Situations, *supra* note 58.

97. *But see* Schabas, *supra* note 68, at 14 (noting that the "so-called referrals were actually actively solicited by the Prosecutor" and that while "Africa may have selected itself, it was also selected").

98. *The States Parties to the Rome Statute*, *supra* note 56.

99. ALSTON & GOODMAN, *supra* note 72, at 1352–53.

100. *See, e.g.*, Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar al Bashir*, 34 FORDHAM INT'L L.J. 1584, 1587 (2011) (citing Chad's refusal to cooperate with the ICC's request to arrest President al-Bashir); Lana Ljuboja, *Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness*, 32 HOUS. J. INT'L L. 767, 788–99 (2010) (citing U.S., Chinese, Indian, Iraqi, and Israeli non-compliance with ICC policies and requests).

101. *See, e.g.*, Clark, *supra* note 79, at 40 (discussing the need for the ICC to maintain good relations with the government in the DRC to ensure the security of its personnel working as investigators in volatile provinces).

war," to "delegitimize and incapacitate [political] enemies."[102] Thus, these states have been able to appear to be cooperating with the court while actually undermining the court's ability to be effective.[103] Instead of formal withdrawal, some African states have employed less aggressive strategies like delays in compliance, partial noncompliance, and, potentially, regime switching.[104]

This subsection has explored some of the challenges to the court's authority, with the proposed regional criminal court being the latest instance. The emergence of the regional criminal court can also be understood as an attempt to bolster the capacity of the African human rights system.

B. African Human Rights Architecture

States have established regional human rights bodies in Africa, the Americas, and Europe to protect and promote human rights.[105] Regional human rights systems have served as both "institutional and normative building blocks and instruments for the realization of human rights . . . ."[106] Under the African regional human rights system, the first institution created to ensure compliance with the African Charter on Human and Peoples' Rights[107] was the quasi-judicial African Commission in 1981.[108] Scholars and practitioners view the African Commission as a "toothless bulldog"[109] because of the lack

102. Nouwen, *supra* note 79, at 187.

103. For further discussion on how governments can be adept at non-compliance, see Peskin, *supra* note 78, at 15–25 (discussing the Kenyan government's strategy of non-compliance with the ICC while appearing to cooperate with the court).

104. *See* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 615 (2007) (discussing how changing or threatening to change regimes is a common fragmentation strategy).

105. *See, e.g.*, DINAH L. SHELTON & PAOLO G. CAROZZA, REGIONAL PROTECTION OF HUMAN RIGHTS 1019 (2013) (canvassing the various mechanisms that have been established).

106. George William Mugwanya, *Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 IND. INT'L & COMP. L. REV. 35, 40 (1999).

107. African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR].

108. *See id.* at arts. 30–61; *see also* ABDULKADER MOHAMMED, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: CHALLENGES AND OPPORTUNITIES IN PROTECTING HUMAN AND PEOPLES' RIGHTS IN AFRICA 13 (2010).

109. Githu Muigai, *From the African Court on Human and Peoples' Rights to the*

of compliance with its decisions.[110]

The Organization of African Unity (OAU)[111] created the African Court on Human and Peoples' Rights[112] in 1998 to be the principal judicial organ for enforcing the African Charter on Human and Peoples' Rights as well as other international human rights treaties.[113] The idea of creating an African human rights court first arose in 1961, twenty years before the African Charter was drafted.[114] The African Court on Human and Peoples' Rights was created to be complementary to the African Commission.[115] With the transition from the OAU to the AU,[116] the AU established the African Court of Justice to "administer matters of interpretation arising from the application or implementation of the AU Constitutive Act."[117]

African Court of Justice and Human Rights, *in* THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 265, 265 (Manisuli Ssenyonjo ed., 2012); *see* Ekuru Aukot, *The Future of Regional Courts in Redressing Human Rights Violations: Is the Establishment of the African Court on Human and Peoples' Rights' A Plus?*, *in* JUDICIARY WATCH REPORT: REGIONAL AND SUB-REGIONAL PLATFORMS FOR VINDICATING HUMAN RIGHTS IN AFRICA 94, 98–99 (George Mukundi Wachira ed., 2007) (referring to the commission as a "paper tiger").

110. *See* Muna Ndulo, *The African Commission and Court Under the African Human Rights System*, *in* AFRICA'S HUMAN RIGHTS ARCHITECTURE 182, 187 (John Akokpari & Daniel Shea Zimbler eds., 2008). *See generally* Lilian Keene-Mugerwa, *The African Court on Human and People's Rights: A Myth of Reality*, *in* REGIONAL AND SUB-REGIONAL PLATFORMS FOR VINDICATING HUMAN RIGHTS IN AFRICA 1 (George Mukundi Wachira ed., 2007).

111. The OAU "steered Africa's political and ideological matters since its inception" in 1963. ABOU JENG, PEACEBUILDING IN THE AFRICAN UNION: LAW, PHILOSOPHY AND PRACTICE 136 (2012). The OAU was mainly focused on decolonization of Africa. *See* Tiyanjana Maluwa, *The Transition from the Organization of African Unity to the African Union*, *in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 25, 28–29 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012). By the end of the Cold War, many felt that the OAU had become "disconnected from the realities and challenges" Africa faced, and was in "need of a major or complete overhaul." JENG, *supra*, at 151; *see* Walter Lotze, *Building the Legitimacy of the African Union: An Evolving Continent and Evolving Organization*, *in* LEGITIMATING INTERNATIONAL ORGANIZATIONS 111, 112–16 (Dominik Zaum ed., 2013).

112. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force Jan. 25, 2004).

113. Ndulo, *supra* note 110, at 195.

114. *See* MOHAMMED, *supra* note 108, at 14.

115. *Id.* at 16, 18–19.

116. Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. I-37733 [hereinafter AU Constitutive Act]. For more on the transition from the OAU to the AU, see JENG, *supra* note 111; Maluwa, *supra* note 111, at 25–52.

117. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 448–49 (2d ed.

The AU was created to promote and protect human rights, to promote democratic principles and to promote peace, security, and stability on the continent.[118] Yet, membership on the Peace and Security Council of the AU includes several states that are "suffering from internal conflict and several that had shown no respect for human rights."[119] Additionally, the African human rights system has yet to achieve universal ratification, which prevents the African Court for Human and Peoples' Rights from "exercising its mandate effectively."[120] At the time of writing, "only about half of AU member states" had ratified the protocol for the African Court for Human and Peoples' Rights, and only five had allowed the court "direct individual access."[121]

The AU has "historically failed to provide adequate resources to its human rights institutions."[122] Moreover, external partners primarily fund the AU.[123] This has limited the organization's ability to engage in "self-legitimating actions because of the fewer resources" at its disposal.[124] The AU's overreliance on external funding, mainly from Europe, "has also elevated the status of external audiences' perceptions of legitimacy."[125] The AU has, however, been able to enhance its performance legitimacy because of its willingness to engage in peace operations in many circumstances where the United Nations and other actors will not.[126] Yet, recent forays managing conflicts in Libya and Mali have laid bare the limitations of the AU, because the AU needed external support for its peacekeeping missions.[127]

The enforcement of the African human rights system's deci-

2012); *see* AU Constitutive Act, *supra* note 116, at art. 26.

118. AU Constitutive Act, *supra* note 116, at art. 3(f)–(h).

119. Lotze, *supra* note 111, at 129–30.

120. VILJOEN, *supra* note 117, at 463, 470.

121. *Id.* at 456.

122. Ibrahima Kane & Ahmed C. Motala, *The Creation of a New African Court of Justice and Human Rights*, *in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE (1986–2006) 406, 438–39 (Malcom Evans & Rachel Murray eds., 2d ed. 2008).

123. Lotze, *supra* note 111, at 120.

124. *Id.* at 123.

125. *Id.* at 124.

126. *Id.* at 130.

127. For further discussion, see Theodore Christakis, *The Emperor Has No Clothes? The Secondary Role of African Regional Organizations in Recent Armed Conflicts in Africa*, 107 AM. SOC'Y INT'L L. PROC. 327, 328–29 (2013).

sions also remains a problem.[128] The "foremost challenge" has been "the lack of political will."[129] For example, one study found that the rate of compliance with the Commission's decisions was fourteen percent.[130] As such, it is important to keep in mind that the mere addition of the regional criminal court is "unlikely by itself to address sufficiently the normative and structural weaknesses that have plagued the African human rights system."[131] Indeed, the creation of an additional legal institution will not somehow magically resolve real issues of lack of political will to address human rights violations on the continent. And, in fact, there have been numerous instances where the African human rights machinery has not functioned to encourage compliance with human rights norms from recalcitrant states.[132] The issue of non-compliance is not unique to the African human rights system.[133]

128. Dan Juma, *Provisional Measures Under the African Human Rights System: The African Court's Order Against Libya*, 30 WISC. INT'L L.J. 344, 373 (2012); *see* Manisuli Ssenyonjo, *Strengthening the African Regional Human Rights System*, *in* THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 455, 463–68 (Manisuli Ssenyonjo ed., 2012) (detailing how compliance has been largely lacking with the judicial and quasi-judicial decisions handed down at the national, sub-regional, and regional levels).

129. Ssenyonjo, *supra* note 128, at 462.

130. *See* Kristen Rau, *Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights*, 97 MINN. L. REV. 669, 700 (2012).

131. Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342, 343 (1999); *see* Wilfred Ngunjiri Nderitu, *African Regional Courts and Their Role in the Promotion and Protection of Human Rights: The Case of the United Nations International Criminal Tribunal for Rwanda*, *in* REGIONAL AND SUB-REGIONAL PLATFORMS FOR VINDICATING HUMAN RIGHTS IN AFRICA 47, 61 (George Mukundi Wachira ed., 2007).

132. *See, e.g.*, Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737, 777 (2013) (discussing a case in Zimbabwe in which white farmers filed suit against the government regarding land redistribution and, due to the court's upholding the claims, the Tribunal of the South African Development Community was temporarily disbanded, resulting in an inability to prosecute any further human rights violations under the Tribunal's jurisdiction). *See generally* Karen Alter, James Gathii & Laurence Helfer, *Backlash Against International Courts in West, East, and Southern Africa: Implications for Theories of Judicial Independence* (draft paper presented at the ASIL Mid-Year Research Forum, Chicago, Nov. 6–8, 2014, on file with author) (discussing the backlash that sub-regional courts adjudicating human rights issues have faced from individual states).

133. *See* Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law*, 19 IND. J. GLOBAL LEGAL STUD. 257, 264 (2012) (discussing that, despite the illegality of immigration detention under the law of the European Court of Human Rights, many European countries still engage in the activity). *See generally* Alexandra Huneeus, *Courts Resisting Courts:*

The analysis in this Article is not dependent on the African human rights system being more legitimate than the ICC or vice-versa. The concept of relative legitimacy is helpful here because it provides that an institution can be "regarded as legitimate in the eyes of some constituencies and illegitimate in the eyes of others."[134] Accordingly, it is conceivable that the African human rights system could and would have more perceived relative legitimacy in the eyes of African states than the ICC. It is against this background that the creation of the regional criminal court must be understood.

C. Establishment of an African Regional Criminal Court

The creation of the regional criminal court has a complicated history. In 2004, the AU determined that the African Court of Justice and the African Court on Human and Peoples' Rights were to be merged into one court. This merged court would be called the African Court of Justice and Human Rights. African states created this body due to concerns about funding and the proliferation of too many organs.[135] In 2005, the AU instituted the African Court on Human and Peoples' Rights because of worries that delays with the ratification of the African Court of Justice and Human Rights would hinder the creation of an effective human rights enforcement mechanism.[136] In July 2008, the AU adopted a protocol for the merged court. This merger protocol provided that the African Court of Justice and Human Rights would have two chambers: one with general jurisdiction to hear claims on all matters relating to treaty interpretation and questions of general international law, and the other with civil jurisdiction over human rights cases.[137] Before the merger protocol had garnered the fifteen ratifications needed for it to come into effect,[138] the AU

Lessons from the Inter-American Court's Struggle to Enforce Human Rights, 44 CORNELL INT'L L.J. 493 (2011).

134. SHANY, *supra* note 34, at 139.

135. VILJOEN, *supra* note 117, at 449.

136. Muigai, *supra* note 109, at 281.

137. Merger Protocol, *supra* note 32, at arts. 16, 17, 28; *see also* VILJOEN, *supra* note 117, at 449.

138. Merger Protocol, *supra* note 32, at art. 11 (provision regarding the protocol's entry into force); *see Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights*, AFR. CT. COALITION, http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12 (last visited Mar. 22, 2016) (indicating that five countries have ratified the Merger Protocol and the need for fifteen state ratifications for the Protocol to come into effect).

adopted the Malabo Protocol, adding a third chamber with criminal jurisdiction to the African Court of Justice and Human Rights.[139] The Protocol requires fifteen States to ratify it before it can enter into force.[140] At the time of writing, no states have ratified the Protocol and only four have signed it.[141] Because internal procedures for treaty signature and ratification vary widely among states, it is impossible to know how long it will take to garner the fifteen ratifications necessary for the Protocol to come into force.

The AU's decision to create a regional criminal court as an alternative to the ICC was influenced by a number of factors. First, the AU had been raising concerns about the abuse of the principle of universal jurisdiction by European states for some time.[142] One of the disputed cases of the exercise of universal jurisdiction that triggered the AU to action involved a French arrest warrant for the Chief of Protocol to the President of Rwanda.[143] In addition, at one point a Paris court had issued indictments against five serving heads of African States alleging corruption.[144] An AU-European Union expert panel on universal jurisdiction was subsequently established, which recommended that African states be "empowered to try international crimes on African soil."[145] The AU took up this recommendation in February 2009 and requested that the Commission and the court study the implications of vesting the merged court with jurisdiction over international crimes.[146] A group of African experts commissioned by the AU to advise it on the Merger Protocol had previously recommended that the jurisdiction of the court be expanded to cover international crimes, but the AU did not endorse the suggestion at

139. Malabo Protocol, *supra* note 1, at art. 16.

140. *See* Merger Protocol, *supra* note 32, at art. 11.

141. Only Kenya, Benin, Guinea-Bissau, and Mauritania have signed. *See* Walter Menya, *Only Four Nations Have Signed Pact for African Court*, DAILY NATION (Apr. 11, 2015), http://mobile.nation.co.ke/news/Only-four-nations-have-signed-pact-for-African-court/-/1950946/2682996/-/format/xhtml/item/0/-/uuq8e2z/-/index.html.

142. VILJOEN, *supra* note 117, at 450; *see also* Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 J. INT'L CRIM. JUST. 1067, 1069–72 (2011).

143. Don Deya, *Is the African Court Worth the Wait?*, OPEN SOC'Y INITIATIVE FOR SOUTHERN AFR. (Mar. 6, 2012), http://www.osisa.org/openspace/regional/african-court-worth-wait.

144. Murungu, *supra* note 142, at 1069.

145. Deya, *supra* note 143. For a detailed discussion, see *The African Union-European Union Expert Report on the Principle of Universal Jurisdiction* (Apr. 16, 2009) http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf.

146. Deya, *supra* note 143.

that time.[147]

The AU's decision was also influenced by a desire to respond to internal member state failure to prosecute gross human rights violations. For example, Belgium initially wanted Senegal to extradite former Chadian President Hissène Habré (who was exiled in Senegal) to prosecute him for torture among other alleged crimes.[148] Senegal refused to extradite him to Belgium and contended that Senegal lacked the power to prosecute him domestically.[149] A sub-regional court in West Africa held that Habré could only be tried by an ad hoc international court and not the domestic courts of Senegal, which at the time lacked jurisdiction.[150] The main judicial organ of the United Nations, the International Court of Justice (ICJ), ordered Senegal to extradite Habré to Belgium if it did not put him on trial in Senegal without delay.[151] In response, Senegal amended its ex post facto laws and enacted laws for a number of international crimes to enable it to try Habré.[152] The delay in Senegal's prosecution of Habré spurred the AU to create a forum to prosecute international crimes at the regional level as opposed to relying on the judiciaries of individual member states.[153]

The ICC's intervention in Kenya was an additional factor driving the Malabo Protocol.[154] The ICC indicted six individuals for their alleged involvement in post-election violence that took place in Kenya in 2007–2008.[155] Yet, others like the former Prime Minister Raila Odinga and the former President Mwai Kibaki, who are arguably the individuals most responsible for actions taken by their subor-

147. *Id.*

148. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, Dec. 10, 1984, 23 I.L.M. 1027 (providing for the prosecution or extradition of persons alleged to have committed torture).

149. Murungu, *supra* note 142, at 1076–77.

150. VILJOEN, *supra* note 117, at 450.

151. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, 461 (July 20).

152. Murungu, *supra* note 142, at 1076.

153. Deya, *supra* note 143.

154. *Building the Court We Want: Reflecting on Perspectives of the Proposed African Court with Criminal Jurisdiction*, at 3 (Mar. 12, 2015), http://www.africancourtcoalition.org/images/docs/about/ga2015/Colloquium%20Report.pdf [hereinafter *Building the Court We Want*].

155. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 50–54 (Mar. 31, 2010), http://icc-cpi.int/iccdocs/doc/doc854287.pdf.

dinates, have been "glaringly absent from the Court's attention."[156] Remarkably, the current President of Kenya, Uhuru Kenyatta, and the Deputy President William Ruto were elected into power while under an ICC indictment.[157] Notably, by the end of 2013, three of the six Kenyan cases were dismissed for lack of evidence with a number still on the verge of collapse.[158] The ICC's high-profile case against President Kenyatta collapsed in December 2014 in spectacular fashion due to insufficient evidence.[159] Now that the majority of the Kenyan cases have collapsed, including most recently the case against Deputy President Ruto in April 2016,[160] it remains to be seen whether there will be sufficient political will to ensure that the Malabo Protocol comes into effect. Yet, the continued, almost-exclusive focus of the ICC's jurisdiction in Africa may mean that political will to formulate an African regime may be forthcoming.

The AU's adoption of the Malabo Protocol has been characterized as "revolutionary" because it would create the world's first regional criminal court.[161] The regional criminal court will be composed of a Pre-Trial Chamber, a Trial Chamber, and an Appellate Chamber.[162] The regional criminal court will have jurisdiction over crimes covered under the Rome Statute.[163] It also expands international criminal law by punishing the following systemic quotidian

156. Rothe & Collins, *supra* note 85, at 199.

157. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf.

158. *See* Peskin, *supra* note 78, at 23.

159. For further discussion, see Anna Holligan, *Uhuru Kenyatta Case: Most High Profile Collapse at ICC*, BBC NEWS AFR. (Dec. 5, 2014), http://www.bbc.com/news/world-africa-30353311; Joanna Gill, *ICC Prosecutor Laments Collapse of Kenyatta Case*, EURONEWS (Dec. 5, 2014), http://www.euronews.com/2014/12/05/icc-prosecutor-laments-collapse-of-kenyatta-case/; Fiona Mungai & Yusuf Kiranda, *The Collapse of Uhuru Kenyatta's Case Could Be a Potential Deathblow to the International Criminal Court*, AFR. LONDON SCH. ECON. & POL. SCI. BLOG (Dec. 16, 2014), http://blogs.lse.ac.uk/africaatlse/2014/12/16/the-collapse-of-uhuru-kenyattas-case-could-be-a-potential-deathblow-to-the-international-criminal-court.

160. Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya's William Ruto*, N.Y. TIMES, (Apr. 5, 2016) http://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html.

161. SHELTON & CAROZZA, *supra* note 105, at 1019. *But see* Schabas, *supra* note 68, at 3, 9–10 (discussing how the Nuremberg and Tokyo tribunals prosecuted crimes that occurred across the European and Far East regions).

162. Malabo Protocol, *supra* note 1, at art. 16(2).

163. *Id.* at arts. 28B, 28C, 28D, 28M (criminalizing genocide, crimes against humanity, war crimes, and the crime of agresssion, respectively).

crimes: unconstitutional change of government,[164] piracy,[165] terrorism,[166] mercenarism,[167] corruption,[168] trafficking of humans, drugs, and hazardous waste,[169] and money laundering, among others.[170]

The regional criminal court has both limited and expansive jurisdiction over these crimes. It can only exercise jurisdiction over crimes committed after the Protocol enters into force.[171] When the Protocol enters into force, the Assembly of the Heads of State and Government, the Peace and Security Council,[172] the state parties, and the independent prosecutor[173] can submit cases to the court.[174] The court can only exercise its jurisdiction when a state accepts its jurisdiction, when the crime was committed on the territory of the state, when the accused or victim is a national of the state, or when the vital interests of a state are threatened by the extraterritorial acts of nonnationals.[175] The court does not have jurisdiction over persons who were under the age of eighteen during the alleged commission of the crime.[176] The court's jurisdiction is also expansive because it provides for corporate criminal liability,[177] which is something over which none of the existing international criminal tribunals have jurisdiction.[178] The AU inserted the controversial immunity provision into the Malabo Protocol during the last rounds of negotiations.[179]

164. *Id.* at art. 28E.

165. *Id.* at art. 28F.

166. *Id.* at art. 28G.

167. *Id.* at art. 28H.

168. *Id.* at art. 28I.

169. *Id.* at arts. 28J, 28K, 28L (criminalizing trafficking in persons, drugs, and hazardous waste, respectively).

170. *Id.* at arts. 28I *bis*, 28L *bis* (criminalizing illicit exploitation of natural resources).

171. *Id.* at art. 46E.

172. Protocol Relating to the Establishment of the Peace and Security Council of the African Union art. 2, July 9, 2002, http://www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf [hereinafter PSC Protocol] (establishing the Peace and Security Council as the permanent mechanism for conflict prevention and resolution on the continent).

173. Malabo Protocol, *supra* note 1, at art. 46G.

174. *Id.* at art. 15.

175. *Id.* at art. 46E *bis*.

176. *Id.* at art. 46D.

177. *Id.* at art. 46C.

178. *See generally* Rome Statute, *supra* note 3; ICTR Statute, *supra* note 3; ICTY Statute, *supra* note 3; SCSL Statute, *supra* note 3.

179. Malabo Protocol, *supra* note 1, at arts. 46A *bis*, 46B, 46C.

Some civil society groups very much contested its inclusion.[180] I discuss the corporate criminal liability provision and immunities provision in detail below.[181]

While there has been some scholarship on the regional criminal court, what little has been written has focused on the principle of complementarity[182] and the legality of the regional criminal court vis-à-vis the ICC.[183] A few scholars have focused on the paucity of national judicial mechanisms to prosecute grave international crimes in Africa as the reason for the overrepresentation of African cases before the ICC.[184] Commentators sympathetic to the regional criminal court have categorized it as an example of positive complementarity[185] and have sought to define clearly the relationship between the

180. *See, e.g.*, Beth Van Schaack, *Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier*, JUST SECURITY (July 10, 2014), http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/ (discussing the public backlash resulting from the inclusion of the immunity provision and the inconsistency with the AU's Constitutive Act); *see also Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights*, HUM. RTS. WATCH (Nov. 13, 2014), http://www.hrw.org/sites/default/files/related_material/Immunity%20Statement%20-%20African%20Court%20of%20Justice%20and%20Human%20Rights.pdf; *African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute*, INT'L JUST. RESOURCE CTR. (July 2, 2014), http://www.ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/.

181. *See* Part II.

182. Rome Statute, *supra* note 3, at art. 1 (stating that the court "shall be complementary to national criminal jurisdictions"). As envisioned under the Rome Statute, the ICC is only to exercise its jurisdiction where states are "unwilling or unable genuinely to carry out the investigation or prosecution." *Id.* at art. 17(1)(a). *See generally* Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK UNYB. 591 (2003).

183. *See, e.g.*, Murungu, *supra* note 142, at 1067, 1075 (arguing that African States Parties to the Rome Statute are in breach of their obligations by establishing a regional criminal court and contending that the Rome Statute only envisioned national criminal jurisdictions and not regional institutions for purposes of complementarity). *But see* Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 EUR. J. INT'L L. 933, 941–42 (2013) (arguing that the Rome Statute is not a hierarchical treaty that can preclude states from entering other multilateral treaties).

184. *See generally* Vincent O. Nmehielle, *Taking Credible Ownership of Justice for Atrocity Crimes in Africa: The African Union and the Complementarity Principle of the Rome Statute*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 223 (Vincent Nmehielle ed., 2012).

185. *See generally* William Burke-White, *Proactive Complementarity: The*

ICC and the proposed regional criminal court.[186] On the other hand, skeptics fear that any regional court will only insulate the "dictators club" from facing international criminal justice.[187] They view it as potentially undermining the ICC regime.[188] This Article focuses on an uncharted area of these debates and provides a more nuanced analysis of the emergence of the regional criminal court.

II. REGIONALISM, REGIME COMPLEXES, AND THE EMERGENCE OF THE REGIONAL CRIMINAL COURT

This Part identifies an emerging regime complex in the field of international criminal law. Additionally, this Part demonstrates that regionalism can influence the development of regime complexes. Moreover, this Part shows that the regionalization of international criminal law may be an increasing trend.

A. Regionalism and the Emergence of an African Regional Criminal Court

Regionalism as used in this Article refers to regional integration. Regional integration requires the pooling of national sovereignty.[189] Regional integration generally begins with economic integration, and much has been written about this topic.[190] The integration

International Criminal Court and National Courts in the Rome System of Justice, 49 HARV. INT'L L.J. 53 (2008) (discussing the concept of proactive or positive complementarity under which the ICC participates more actively in encouraging national governments to prosecute international crimes and assists with such prosecutions).

186. *See generally* Pacifique Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 375 (Vincent Nmehielle ed., 2012).

187. *See, e.g.*, Godwin Odo, *At the Crossroads: Deconstructing the Challenges of International Justice and the Fight Against Impunity in Africa*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 321, 349 (Vincent Nmehielle ed., 2012) (arguing that the court would become a regional African exceptionalism to international criminal law); Lutz Oette, *The African Union High-Level Panel on Darfur: A Precedent for Regional Solutions to the Challenges Facing International Criminal Justice?*, *in* AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 353, 370–71 (Vincent Nmehielle ed., 2012) (arguing that the court gives a license to impunity).

188. *See, e.g.*, Rau, *supra* note 130, at 669, 693; *see also* Murungu, *supra* note 142, at 1082; Kane & Motala, *supra* note 122, at 406, 428 (stating that the focus should be to strengthen the ICC rather than create more criminal tribunals).

189. Graham, *supra* note 20, at 27.

190. *See, e.g.*, Mónica Serrano, *Regionalism and Governance: A Critique*, *in*

of states into new political and economic units is largely a response to globalization.[191] Indeed, the "new wave of regionalism relates to the current transformation of the world order, and is associated with or caused by certain structural changes of and in the global system, including the restructuring of the nation-state and the growth of interdependence, transnationalism," and globalization.[192] States form regional institutions because they recognize there are challenges, which they cannot effectively address independently.[193] The new regionalism includes "economically oriented objectives, but also environmental, political, social, and democratic objectives."[194] It also incorporates multilevel regional arrangements and reflects "a vastly increased density, breadth, and range of interactions above, between, and below states."[195] The foremost example of regional integration is the European Union.[196] Regional integration in Europe has demonstrated that it is a long and complex process.[197] Scholars have classified the AU and the European Union as hybrids in terms of regional integration because states retain national sovereignty in some areas, but not others.[198]

1. Regionalism in Africa

The move toward deepening regionalism in Africa can be explained by a confluence of factors, one of which is the desire to fur-

REGIONALISM AND GOVERNANCE IN THE AMERICAS: CONTINENTAL DRIFT 1, 9 (Louise Fawcett & Mónica Serrano eds., 2005). *See generally* Sungoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419 (2001).

191. Adam Lupel, *Regionalism and Globalization: Post-Nation or Extended Nation?*, 36 POLITY 153, 159 (2004). Globalization is a term that "summarizes a variety of processes that together increase the scale, speed, and effectiveness of social interactions across political, economic, cultural, and geographical borders." *Id.* at 155.

192. Anél Ferreira-Snyman, *Regionalism and the Restructuring of the United Nations with Specific Reference to the African Union*, 44 COMP. & INT'L L.J. S. AFR. 360, 362 (2011).

193. *Id.* at 361.

194. Stephen J. Powell & Patricia Camino Perez, *Global Laws, Local Lives: Impact of the New Regionalism on Human Rights Compliance*, 17 BUFF. HUM. RTS. L. REV. 117, 122 (2011).

195. Fawcett & Serrano, *supra* note 20, at xxii.

196. Thomas Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 16 IND. J. GLOBAL LEG. STUD. 647, 648 (2009).

197. Maluwa, *supra* note 111, at 51.

198. Graham, *supra* note 20, at 27–28.

ther ideological solidarity within the region.[199] The Pan-Africanist project of "forging closer unity between African States as well as between African peoples within the continent . . . has a long history."[200] Pan-Africanism has a "strong imprint on African political thinking and sensitivities, and covers cultural, political, and economic dimensions."[201] Although Pan-Africanism has a long and complex trajectory from pre-independence to the present, its first institutional manifestation was the OAU.[202] The creation of the AU is the next instance of the Pan-Africanist project and the move toward greater African integration.[203]

The creation of the African Economic Community[204] and various sub-regional economic communities[205] demonstrates deepening regionalism in Africa. These communities were expected to lead to the development of a common market "embracing the whole continent."[206] The slow pace of economic integration on the continent[207] has not stopped these communities from expanding their reach. Like other regional integrative institutions, these communities' spheres of influence expanded to include other matters not simply limited to economics. At the sub-regional level, some of the courts established to adjudicate economic matters had their jurisdiction extended explicitly to include cases involving human rights violations. This was the

199. Ricardo Pereira, *The Regionalization of Criminal Law—The Example of European Criminal Law*, *in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 217, 222 (Larissa van den Herik & Carsten Stahn eds., 2012).

200. Maluwa, *supra* note 111, at 27.

201. *Id.* at 28.

202. *Id.*

203. AU Constitutive Act, *supra* note 116, at art. 3(a).

204. Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241 (entered into force May 12, 1994). For more on the African Economic Community, see generally Makane M. Mbenge & Ousseni Illy, *The African Economic Community*, *in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 187 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012).

205. African Regional Economic Communities include the Arab Maghreb Union, the Common Market for Eastern and Southern Africa, the Community of the Sahel-Saharan States, the East African Community, the Economic Community of Central African States, the Economic Community for West African States (ECOWAS), the Intergovernmental Authority on Development, and the Southern African Development Community (SADC). For more on these communities, see generally Stephen Karangizi, *Regional Economic Communities*, *in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 231 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012).

206. Maluwa, *supra* note 111, at 36.

207. *See* James Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. & COM. REG. 571, 601–08 (2010).

case with the Economic Community for West African States Community Court of Justice.[208] Other courts expanded their mandate through judicial interpretation, as happened with the Southern African Development Community Tribunal[209] and the East African Court of Justice.[210] Some of the sub-regional communities like the East African Community have even considered expanding the jurisdiction of the sub-regional courts to include international criminal law matters.[211] A thorough discussion of the varied experiences of these sub-regional bodies is beyond the scope of this Article.[212]

At the regional level, the AU was created to accelerate the slow pace of socioeconomic and political integration on the continent, to promote sustainable economic, social, and cultural development, as well as to establish the necessary conditions for Africa to play its rightful role in the global economy.[213] Similar to how regional integration in Europe developed to include greater emphasis

208. For further discussion, see generally Alter et al., *supra* note 132.

209. Helen Duffy, *Human Rights Cases in Sub-Regional African Courts: Towards Justice for Victims or Just More Fragmentation*, *in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 163, 182 (Larissa van den Herik & Carsten Stahn eds., 2012) (noting how the court's human rights jurisdiction ended with the unlawful evictions case in Zimbabwe). For further discussion, see Frederick Cowell, *The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction*, 13 HUM. RTS. L. REV. 1, 157 (2013) (discussing how the SADC Tribunal, unlike other sub-regional bodies, did not have a mandate to adjudicate human rights claims and noting how the court's human rights jurisdiction was based on the tribunal's own interpretation of its mandate, which rendered the tribunals' decisions especially sensitive to political controversy).

210. James Thuo Gathii, *Variation in the Use of Subregional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice*, 79 LAW & CONTEMP. PROB. 37, 56 (2015) (discussing the Ugandan challenge to the court's exercise of human rights jurisdiction). *See generally* Katabazi v. Sec'y Gen. of the E. African Cmty., Ref. No. 1 of 2007 (Nov. 1, 2007), http://www.saflii.org/ea/cases/EACJ/2007/3.html (establishing a cause of action for challenging violations of human rights for member states); Independent Medical Legal Unit v. Attorney General of Kenya, Ref. No. 3 of 2010 (First Instance Div. June 29, 2011), http://eacj.org/wp-content/uploads/2012/11/3-of-20101.pdf (holding that the court had jurisdiction to interpret the provisions of the community treaty, and the exercise of its jurisdiction was not precluded even if the case involved allegations of human rights violations); JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES (2013).

211. *See* Press Release, E. Afr. Cmty., 25th Extraordinary Meeting of the Council of Ministers Concludes (June 30, 2012), http://www.eac.int/news/index.php?option=com_content&view=article&id=729:25th-extraordinary-meeting-of-council-of-ministers-concludes&catid=48:eac-latest&Itemid=69.

212. *See generally* Alter, Gathii & Helfer, *supra* note 132.

213. AU Constitutive Act, *supra* note 116, at art. 3(c), (i)–(j).

on human rights,[214] African states founded the AU with a stronger commitment to human rights than its predecessor, the OAU.[215] For example, the AU can suspend member states in the event of an unconstitutional change in government.[216] The AU Charter on Democracy, Elections, and Governance envisioned an AU court with the ability to prosecute "perpetrators of unconstitutional change of government."[217] This proposed court can be seen as a precursor to the regional criminal court. Given the many objectives of the AU, as well as its enhanced role in maintaining peace and security,[218] it is a matter of logical progression that regional integration in Africa would develop to encompass both quotidian criminal law and international criminal law matters.[219] For instance, the AU is the only organization, international or regional, empowered to intervene forcibly in certain grave violations of human rights and the only organization that incorporates the principle of the Responsibility to Protect.[220]

Regionalism allows for more innovation than may be possible in a domestic or global institution.[221] This innovation is evident not

214. DUXBURY, *supra* note 35, at 124–64 (discussing regional integration in Europe and the importance placed on human rights and democracy in this process).

215. AU Constitutive Act, *supra* note 116, at art. 3(g)–(h); *see also* Kane & Motala, *supra* note 122, at 408.

216. *See* African Charter on Democracy, Elections and Governance art. 25(1), Jan. 30, 2007, O.A.U. Doc. No. Assembly/AU/Dec.147 (VIII) (entered into force Feb. 15, 2012) (empowering the AU to suspend state parties from the Union in the event of an unconstitutional change of government).

217. *Id.* at art. 25(5).

218. AU Constitutive Act, *supra* note 116, at art. 3(f); *see* Lotze, *supra* note 111, at 116–20, 125–30. For further discussion, see generally Roland Adjovi, *The Peace and Security Council*, *in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 143 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012)

219. *Cf.* Abass, *supra* note 183, at 939–40 (discussing the AU's obligation to prosecute crimes peculiar to African states). *See generally* Pereira, *supra* note 199 (discussing the degree of criminal law integration in the European Union).

220. AU Constitutive Act, *supra* note 116, at art. 4(h); Graham, *supra* note 20, at 28. The principle of the Responsibility to Protect provides for states to act, if need be by forcible intervention in other states, in order to stop genocide, war crimes, and crimes against humanity. For further discussion, see generally Abdulqawi A. Yusuf, *The Right of Forcible Intervention in Certain Conflicts*, *in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 335 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012).

221. In the debate of universal, local, or regional approaches to addressing human rights violations, I have made arguments for regional approaches in other contexts. In my article, *Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia*, I proposed the creation of regional and transnational institutions to respond to massive human rights violations that occur across societies. *See generally* Matiangai Sirleaf, *Regional Approach to Transitional*

only in the types of crimes covered by the regional criminal court, but also in the attempt to regulate corporate criminality; both are discussed in the subsections below.

2. Regionalism and the Crimes Covered by the African Regional Criminal Court

Regional integration in "criminal matters could allow states to respond to common security threats more effectively."[222] Open and porous borders facilitate common security threats like terrorism and human trafficking,[223] which incentivizes cooperation among neighboring states. The borders in Africa are notoriously non-natural, which renders these states even more susceptible to transnational crimes. Colonial powers constructed these borders, and when African states obtained their independence they maintained them despite their artificiality. African state borders have caused and sustained much instability and conflict in the region.[224] Furthermore, the neglect of these border areas has contributed to criminality, making these areas vulnerable to armed insurgents and even terrorist groups.[225] For example, West Africa is particularly vulnerable to cross-border criminal activities resulting from porous borders.[226] Some of these activities involve the illicit trafficking of arms and human beings, especially women and children.[227] Another example is the proliferation and illicit trafficking of small arms and light

Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia, 21 FLA. J. INT'L L. 209 (2009). I analyzed the institutional challenges faced in societies where gross human rights violations have occurred across nations and argued that where transitional justice institutions have been established without regard to the regional or transnational nature of human rights violations, such mechanisms encounter problems of coordination including disputes over legal primacy, information sharing, and access to detainees. I maintained that, contrary to the preoccupation of the literature, much more is needed than the mere coordination or sequencing of disparate national-level mechanisms. *Id.*

222. Pereira, *supra* note 199, at 220.

223. *Id.*

224. *See generally* Francis Nguendi Ikome, *Africa's International Borders as Potential Sources of Conflict and Future Threats to Peace and Security* (Inst. for Sec. Studies, Paper No. 233, May 2012), https://www.issafrica.org/uploads/Paper_233.pdf.

225. *Id.* at 6.

226. *See generally* Prosper Addo, *Cross-Border Criminal Activities in West Africa: Options for Effective Responses* (KAIPTC Paper No. 12, 2006).

227. *Id.* at 2.

weapons in the Great Lakes region,[228] which fuels and sustains conflicts.[229] Yet another example is the spate of terrorist attacks that have taken place in the East Africa region. Kenya has been particularly vulnerable to these attacks from neighboring Somalia.[230] The inclusion of these transnational crimes responds to the needs of both regional hegemons and less powerful states in the region. For example, criminal activities such as the robust drug trade in West Africa and the Sahel region, the recent outbreak of terrorist attacks in Burkina Faso, Niger, and Mali resulting from the porous borders in that same subregion, and the unregulated arms trade emerging from Libya's collapse are all priorities for powerful and weaker states alike. The frequency and pervasiveness of these crimes ultimately compromises the security and stability of many African states.

Unsurprisingly, most of the quotidian crimes that the regional criminal court has jurisdiction over are crimes involving common security threats,[231] including unconstitutional change of government,[232]

228. The Great Lakes regional conflict refers to the interrelated conflicts and crises in Rwanda, Uganda, Burundi, the DRC, and to some extent Sudan. *See generally* Peter Mwangi Kagwanja et al., *Regional Conflict Formation in the Great Lakes Region of Africa: Structure, Dynamics and Challenges for Policy* (Ctr. on Int'l Cooperation, N.Y.U., and African Peace Forum, Nairobi, Kenya, Nov. 2001).

229. *See generally* Paul Eavis, *SALW in the Horn of Africa and the Great Lakes Region: Challenges and Ways Forward*, 9 BROWN J. WORLD AFF. 251 (2002).

230. For further discussion, see Joshua Meservey, *False Security in Kenya: When Counterterrorism Is Counterproductive*, FOR. AFF. (Jan. 21, 2015), https://www.foreignaffairs.com/articles/east-africa/2015-01-21/false-security-kenya.

231. *See generally* Stacy-Ann Elvy, *Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance*, 27 EMORY INT'L L. REV. 41 (2013) (discussing, *inter alia*, the impact of mercenarism on African countries, the condemnation of unconstitutional change of government by the AU Constitutional Act, the need to allocate natural resources equitably, and the imposition of anti-terrorism laws in Ethiopia to combat terrorist growth domestically); *see also* Tintswalo Baloyi, *Lesotho Military Effect Coup, SA Condemns It*, CAJ NEWS AFR. (Aug. 30, 2014), http://allafrica.com/stories/201408300106.html (discussing the general condemnation of unconstitutional government change); *African Union Leaders Look to Enhance Terror Fight*, TELESUR (Sept. 3, 2014), http://www.telesurtv.net/english/news/African-Union-Leaders-Look-to-Enhance-Terror-Fight-20140903-0056.html (addressing the concern the AU has over terrorism growth in member nations); *Ministers Meet as Boko Haram Attacks Intensify*, NEWS24 (Sept. 3, 2014), http://www.news24.com/Africa/News/Ministers-meet-as-Boko-Haram-attacks-intensify-20140903-2 (discussing other domestic terrorism and mercenarism concerns in AU member states); Sébastien Porter, *The Exploitation of Natural Resources and Land Grabbing*, AEFJN, http://www.aefjn.org/index.php/370/articles/the-exploitation-of-natural-resources-and-land-grabbing.html (last visited Apr. 17, 2016) (discussing some of the issues regarding natural resource use and exploitation in AU member nations).

232. Malabo Protocol, *supra* note 1, at art. 28E.

piracy,[233] terrorism,[234] mercenarism,[235] trafficking in persons, drugs, and hazardous waste,[236] as well as the illicit exploitation of natural resources.[237] Because many of the conflicts or common security threats in Africa tend to diffuse or have a contagion effect, a regional tribunal may be the best placed institution to adequately address the many different groups. A regional approach is useful where regional conflict contagion exists, because regional conflicts span territories with different sovereigns.[238] A regional approach recognizes the interconnectedness of conflicts. Regional institutions can be created with mandates, which do not ignore regional dynamics.[239] A regional approach makes sense where massive violations have occurred across states because, "while international crimes are of concern to the entire international community, the peace and security implications of such crimes are often greatest within the region where the crimes occur."[240]

Not all of the crimes in the Malabo Protocol are defined to require a transborder element. For example, the Protocol also criminalizes corruption.[241] Sonja Starr puts forward strong legal arguments for international criminal tribunals to prosecute grand government corruption. She forcefully argues that the "large-scale ransacking of treasuries by heads of state and their associates" results in catastrophic consequences to vulnerable populations.[242] It is not necessary to rehash those arguments here. It suffices to say that socioeconomic injustice and structural violence are at the "heart of many modern conflicts."[243] Dr. Paul Farmer defined structural violence as "describing social arrangements that put individuals and populations in harm's way. The arrangements are structural because they are

233. *Id.* at art. 28F; *see also* William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. J. INT'L L. 729, 732 (2003) (noting that the international legal regime for piracy lacks an effective mechanism and that regional enforcement mechanism in this area would be welcome).

234. Malabo Protocol, *supra* note 1, at art. 28G.

235. *Id.* at art. 28H.

236. *Id.* at arts. 28J, 28K, 28L (criminalizing trafficking in persons, drugs, and hazardous waste, respectively).

237. *Id.* at art. 28L *bis*.

238. Sirleaf, *supra* note 221, at 272.

239. *Id.*

240. Burke-White, *supra* note 233, at 733.

241. Malabo Protocol, *supra* note 1, at art. 28I.

242. Starr, s*upra* note 11, at 1259.

243. Authers & Charlesworth, *supra* note 12, at 22.

embedded in the political and economic organization of [a society]; they are violent because they cause injury to people."[244] Yet the field of international criminal law rarely takes this into account. Breaking with this mold, the Malabo Protocol recognizes both the background and foreground of international criminal law violations. It recognizes that massive atrocity and the core crimes of the field do not take place in a vacuum, but instead are embedded in systems of criminality.[245] It is entirely rational that African states would seek regional cooperation to "facilitate the development of common rules or principles," regarding quotidian crimes.[246] This could lead to greater consistency in legal provisions and perhaps even greater deterrence regionally of both quotidian and crisis crimes.

The regional criminal court also allows states to cooperate on more matters than they would otherwise be able to in a multilateral institution like the ICC. States form regional organizations because it may be easier to further their interests there than in a global institution. This phenomenon is not unique to the field of international criminal law. For example, when trade negotiations stalled at the World Trade Organization, a number of states moved to conclude regional free trade agreements instead of concentrating on the more global process.[247] Similarly, states debated many of the crimes included in the Protocol for the regional criminal court during the earlier negotiations for the Rome Statute, but decided against including them.[248] Terrorism and drug trafficking were some of the crimes

244. Paul Farmer, *An Anthropology of Structural Violence*, 45 CURRENT ANTHROPOLOGY 305, 305–26 (2004).

245. *See, e.g.*, Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice As Transitional Justice*, 79 TEMP. L. REV. 1, 86 (2006) (discussing the challenges transitional justice mechanisms face with regard to mass atrocity and mass criminality).

246. Pereira, *supra* note 199, at 220–21.

247. For further information, see generally Sherzod Shadikhodjaev, *Keeping Regionalism Under "Control" of the Multilateral Trading System: State of Play and Prospects*, 19 LAW & BUS. REV. AM. 327 (2013); Erik M. Dickinson, *The Doha Development Dysfunction: Problems of the WTO Multilateral Trading System*, 3 GLOBAL BUS. L. REV. 229 (2013); ALEJANDRO FOXLEY, CARNEGIE ENDOWMENT FOR INT'L PEACE, REGIONAL TRADE BLOCS: THE WAY TO THE FUTURE (2010), http://carnegieendowment.org/files/regional_trade_blocs.pdf.

248. *See, e.g.*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Official Records*, Part 2(F)(3) art. 5, U.N. Doc. A/CONF.183/13(Vol. III) (June 15–July 17, 1998), http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf [hereinafter *Official Records*] (citing drug trafficking and terrorism as possible crimes under the ICC's jurisdiction). However, these were not included in the final Rome Statute, but *are* included in the Malabo Protocol. *Compare* Rome Statute, *supra* note 3, at art. 5, *with* Malabo Protocol, *supra* note 1, at arts. 28G, 28K (criminalizing terrorism and trafficking in drugs, respectively).

considered during the discussions leading up to the Rome Statute.[249] In fact, the idea for the ICC was originally conceived from Caribbean states seeking a solution to transnational drug trafficking.[250] Due to the numerous states engaged in the negotiations for the Rome Statute, it was not possible to agree upon a definition for a number of the proposed crimes. Many were seen as insufficiently grave to be included in the Rome Statute.[251] In the Malabo Protocol, African states decided to expand the number of crimes deserving of regional, if not international, attention.

3. Regionalism and Corporate Criminal Liability in the African Regional Criminal Court

The regional criminal court also provides for corporate criminal liability.[252] This is unique among international criminal tribunals. In fact, none of the existing international criminal tribunals have jurisdiction over corporate criminal liability.[253] The punishment of corporations for international criminal law violations is not entirely without precedent. Following the Allied defeat of the Nazi regime in World War II, the Allied Control Council passed laws aimed at punishing the corporations that were complicit with the Nazi regime.[254]

249. *Official Records*, *supra* note 248, at art. 5.

250. Starr, *supra* note 11, at 1270.

251. Abass, *supra* note 183, at 939 (discussing the "perception amongst a great majority of ICC State parties that such acts do not constitute international crimes *at all*" or "that these international crimes are not 'serious' enough for the purpose of the ICC").

252. Malabo Protocol, *supra* note 1, at art. 46C.

253. *See generally* Rome Statute, *supra* note 3; ICTY Statute, *supra* note 3; ICTR Statute, *supra* note 3; SCSL Statute, *supra* note 3.

254. *See generally Control Council Law No. 57: Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front*, *in* 8 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1 (Aug. 30, 1947), http://www.loc.gov/rr/frd/Military_Law/Enactments/08LAW57.pdf (ordering seizure of insurance company assets). The Allied Control Council passed a law to effectuate a corporation's dissolution, "Control Council Law No. 9: Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof." *Control Council Law No. 9: Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, *in* 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225, pmbl. (Nov. 30, 1945), http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW06.pdf [hereinafter Control Council Law No. 9]; *see also id.* at art. I ("All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized by and the legal title thereto is vested in the Control Council."). I.G. Farbenindustrie "was the largest industrial supporter of the Nazi regime. The corporation manufactured Zyklon B gas that

The Council's passing of Control Council Law No. 9 is a precedent for attempting to hold corporations accountable for international law violations. The Allied Control Council also established the Nuremberg tribunal through Control Council Law No. 10 to bring criminal prosecutions against the Nazi industrialists who ran I.G. Farbenindustrie among others.[255] The Nuremburg prosecutors considered bringing charges against I.G. Farbenindustrie and other corporations and did not perceive there to be any bar to such prosecutions under international law.[256] Although no criminal prosecutions were brought against corporations during the Nuremberg trials, this may simply reflect a determination that "other remedies had already been enacted."[257] For example, the Allies "dismantled I.G. Farbenindustrie to ensure that the company would not keep profits earned through illicit support of the German war effort, and this remedy may have been viewed as more severe and appropriate than a criminal conviction."[258]

Corporate criminal liability is a complex issue both interna-

was used to commit genocide by exterminating four million concentration camp inmates at Auschwitz, an I.G. Farben slave camp that produced rubber and oil." Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. 119, 127 (2010) (citing JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 2–3, 122–23 (1979)). The law was passed "to insure that Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential." Control Council Law No. 9, *supra*, at pmbl.

255. *See Control Council Law No. 10: Punishment of Persons Guilty of War Crimes*, *in* 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306 (Dec. 20, 1945), http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW09.pdf [hereinafter Control Council Law No. 10]; *see also* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10: "*THE FLICK CASE*" 1190–91 (1952) (discussing the application of international law to individuals and noting that there is "no justification for a limitation of responsibility to public officials").

256. *See* Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1118 (2009).

257. Giannini & Farbstein, *supra* note 254, at 129. The Allied Control Council also passed Control Council Law No. 8, which "purged all Nazi party members from supervisory or managerial posts in business." *See* Bush, *supra* note 256, at 1147. The Council also passed Control Council Law No. 9, which provided that important I.G. Farben assets, including some plants, should be destroyed. Control Council Law No. 9, *supra* note 254, at art. III(b) (providing for "destruction of certain plants"); *see also* Giannini & Farbstein, *supra* note 254, at 129 (citing BORKIN, *supra* note 254, at 157–58).

258. Giannini & Farbstein, *supra* note 254, at 131.

tionally and domestically. Some courts have mistakenly interpreted the non-prosecution of corporations at Nuremberg as determinative of whether international law provides for corporate criminal liability.[259] A number of jurisdictions provide that criminal liability necessitates having a mens rea, which is difficult to ascribe "to an abstract juristic person."[260] The regional criminal court's provision for corporate criminal liability puts pressure on the prevailing legal landscape both within and outside of Africa. This regional innovation in the field of international criminal justice will help to clarify the status of corporate criminal liability. It also presents a number of opportunities for the field of international criminal law. The regional court could allow for greater coordination on the regulation of corporate activity, and allow states to respond more effectively to the challenges posed by large corporations.

Multinational corporations (MNCs) are economic entities operating in more than one country or a cluster of economic entities operating in two or more countries.[261] Efforts to regulate their activities present a host of challenges, especially for the governments of developing countries. With the age of globalization marked by the increased mobility of capital and competition among states to attract foreign direct investment, individual developing countries are dissuaded from taking measures that would place additional burdens on MNCs to comply with human rights obligations.[262] These countries would normally be scared of any initiatives that would potentially drive away MNCs and foreign direct investment. Global efforts toward regulation of MNCs have led to the proliferation of numerous standards of conduct, which vary in their content, participation, arrangements for monitoring, and include various forms of accountability that have proven unsatisfactory.[263]

259. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co. et al., 621 F.3d 111, 118–20 (2d. Cir. 2010); Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 322 (2d Cir. 2007) (Korman, J., dissenting).

260. Giannini & Farbstein, *supra* note 254, at 130 n.49; *see also* 2 INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY 57–58 (2008). For further discussion of the reasons why imposing criminal punishment on a corporation is problematic, see *Kiobel*, 621 F.3d at 149, 151–52 (Leval, J., concurring).

261. U.N., Econ. & Soc. Council, Sub-Comm'n on the Promotion & Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Norms on Responsibilities of TNCs].

262. Lupel, *supra* note 191, at 157 (discussing how globalization challenges states in their administrative effectiveness, territorial sovereignty, collective identity, and democratic legitimacy).

263. *See generally* Norms on Responsibilities of TNCs, *supra* note 261; *The Ten*

The regional criminal court could allow for greater accountability for corporations than is currently possible at the domestic or international level. This is especially so if African states establish any extradition and mutual assistance in criminal matters arrangements.[264] The "Trafigura" incident in Côte d'Ivoire is emblematic of why regional cooperation on corporate criminal accountability is needed. In August 2006, a ship named Probo Koala, charted by the Dutch-based oil and service shipping company Trafigura Beheer BV, offloaded toxic waste. Probo Koala left the waste at the port of Abidjan, the capital city of Côte d'Ivoire.[265] A local contractor of Trafigura disposed of the waste at approximately eighteen open-air sites in and around the city of Abidjan.[266] The ship had attempted to discharge this waste in Amsterdam, but was unable to due to the toxicity of the waste.[267] Following the toxic dumping in Abidjan, people living near the discharge sites began to suffer from a range of illnesses including nausea, diarrhea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs.[268] The exposure to this waste caused the death of 16 people, and more than 100,000 people sought medical attention.[269] Trafigura denied any wrongdoing.[270] In early 2007, the

Principles of the UN Global Compact, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Mar. 14, 2016) (asking companies to embrace ten principles in the areas of human rights, labor standards, the environment, and anti-corruption); Draft United Nations Code of Conduct on Transnational Corporations, U.N. Doc. E/C.10/1982/6 annex (1982), *reprinted in* 22 I.L.M. 192 (1983); OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, OECD (2011), http://www.oecd-ilibrary.org/docserver/download/2011101e.pdf?expires=1460937619&id=id&accname=ocid177456&checksum=0D67D31415044695B4B1F373AF6834F4 (establishing that firms should respect human rights in every country in which they operate and committing countries to new, tougher standards of corporate behavior).

264. Pereira, *supra* note 199, at 220–21.

265. AMNESTY INT'L & GREENPEACE NETH., THE TOXIC TRUTH ABOUT A COMPANY CALLED TRAFIGURA, A SHIP CALLED THE PROBO KOALA, AND THE DUMPING OF TOXIC WASTE IN CÔTE D'IVOIRE 9 (Sept. 25, 2012), http://www.greenpeace.org/international/Global/international/publications/toxics/ProboKoala/The-Toxic-Truth.pdf.

266. *Toxic Waste Dumping in Abidjan, Ivory Coast*, ENVTL. JUST. ATLAS, http://ejatlas.org/conflict/toxic-waste-dumping-in-abidjan-ivory-coast (last visited Mar. 14, 2016).

267. *Trafigura Lawsuits (re Côte d'Ivoire)*, BUS. & HUM. RTS. RES. CTR., http://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire (last visited Mar. 14, 2016); *see* AMNESTY INT'L & GREENPEACE NETH., *supra* note 265, at 8.

268. AMNESTY INT'L & GREENPEACE NETH., *supra* note 265, at 57.

269. *Id*. at 10.

270. *Id.* at 9; *see* Bianca Lazzari, *The International Movement of Hazardous Waste: The Ivory Coast*, PREZI (May 28, 2014), https://prezi.com/nd1b96exyf1j/the-international-movement-of-hazardous-waste-the-ivory-coa/.

company paid approximately USD 195 million for cleanup to the Ivorian government.[271] The Ivorian government waived its right to prosecute the company.[272] Today, almost ten years after the dumping of large quantities of toxic waste in Côte d'Ivoire, despite the huge numbers of people affected, international coverage of the issue, and several legal proceedings, there remains no effective national, regional, or international mechanism to prevent and address a similar disaster.[273]

According to a three-year investigative report by Amnesty International and Greenpeace International, "too little has been done to strengthen national and international regulations, even after the scale of the toxic dumping became clear."[274] Greenpeace Executive Director Kumi Naidoo stated:

> [Trafigura is] a story of corporate crime, human rights abuse and governments' failure to protect people and the environment. It is a story that exposes how systems for enforcing international law have failed to keep up with companies that operate transnationally, and how one company has been able to take full advantage of legal uncertainties and jurisdictional loopholes, with devastating consequences.[275]

The victims of Trafigura's toxic dumping in Côte d'Ivoire were not able to seek redress in their domestic judiciary. They had to

271. AMNESTY INT'L & GREENPEACE NETH., *supra* note 265, at 9.

272. *Id.*

273. *See, e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649, 1673 U.N.T.S. 28911; *see also* Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 30 I.L.M. 773, 2101 U.N.T.S. 36508. For more on the limitations of the current legal framework, see generally Matiangai Sirleaf, *Criminalization of Trafficking in Hazardous Waste in Africa*, *in* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS (Kamari Clarke & Charles Jalloh eds., 2017) (forthcoming); Robert Percival, *Global Law and the Environment*, 86 WASH. L. REV. 579 (2011); Frederic Megret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195 (2011); Laura A. W. Pratt, *Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste*, 41 TEX. ENVTL. L.J. 147 (2011).

274. Fiona Harvey, *Trafigura Lessons Have Not Been Learned, Report Warns*, GUARDIAN (Sept. 25, 2012), http://www.theguardian.com/environment/2012/sep/25/trafigura-lessons-toxic-waste-dumping.

275. *Report Slams Failure to Prevent Toxic Waste Dumping in West Africa*, AMNESTY INT'L (Sept. 25, 2012), https://www.amnesty.org/en/articles/news/2012/09/report-slams-failure-prevent-toxic-waste-dumping-west-africa/.

seek justice in Europe, which ultimately proved unsatisfactory.[276] The regional criminal court could provide an avenue for seeking corporate criminal liability in Africa.[277] As noted above, the regional criminal court criminalizes trafficking in hazardous waste,[278] which is something that none of the existing international criminal tribunals have jurisdiction over.[279] African states may be particularly sensitive to concerns about toxic waste, given a history of negative external interventions.[280] The failure of both domestic and international institutions to adequately deal with corporate criminal responsibility or complicity in the commission of international and transnational crimes has created a space for African states to innovate and attempt to change the status quo by utilizing a regional institution.

This section has shown that the regional criminal court presents an opportunity for African states to alter the status quo of international criminal justice. The Malabo Protocol provides more protection against certain crimes and explicitly allows for the prosecution of legal entities, which is more than what is currently permitted in the field of international criminal law.[281] African states are attempting to develop a number of regional customary norms. The formation of regional customary international law "allows for a few states existing in a given region, bound together perhaps by the same culture or common attributes, to recognize certain practices among themselves as constituting international law."[282] The ICJ has recognized the existence of regional customary law and has held that it is the state's burden to prove that the customary norm exists.[283] African states are attempting to form an alternative regime, which will allow them to criminalize certain activities of common concern

276. For further discussion of the case against Trafigura, see, for example, Cyril Gwam, *Symposium Powering the Future: A 21st Century Guide for Energy Practitioners: Human Rights Implications of Illicit Toxic Waste Dumping from Developing Countries Including the U.S.A., Especially Texas to Africa, in Particular Nigeria*, 38 TEX. MARSHALL L. REV. 241, 259–66 (2013); Holly Hall, *Super-Injunction, What's Your Function*, 18 COMM. L. & POL'Y 309, 320–22 (2013).

277. Malabo Protocol, *supra* note 1, at art. 46C.

278. *Id.* at arts. 28J, 28K, 28L (criminalizing trafficking in persons, drugs, and hazardous waste, respectfully).

279. *See generally* Rome Statute, *supra* note 3; ICTY Statute, *supra* note 3; ICTR Statute, *supra* note 3; SCSL Statute, *supra* note 3.

280. For further discussion, see Richardson, *supra* note 95, at 88–89 (discussing the continent's history with slavery, colonialism, and neo-colonialism).

281. *Compare* Malabo Protocol, *supra* note 1, *with* Rome Statute, *supra* note 3, ICTY Statute, *supra* note 3, ICTR Statute, *supra* note 3, *and* SCSL Statute, *supra* note 3.

282. Abass, *supra* note 183, at 946.

283. Asylum Case (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 266, 277 (1950).

regionally, and to increase the number and kind of actors subject to criminal liability.

B. Regime Complexes, Regime Shifts, and the Development of the Regional Criminal Court

1. Regime Complexes and the Regional Criminal Court

The growth of international institutions has been marked by a concomitant increase in international regimes.[284] Recalling that regime complexes are an "array of partially overlapping and nonhierarchical institutions governing a particular issue-area,"[285] one can think of nested or multiple institutions with authority over the same or similar issue areas, wherein obligations may or may not contradict one another.[286] Scholars have argued that regime complexes emerge because of the distribution of interests weighted by power.[287] That is, when the interests of powerful actors are sufficiently similar across a broad issue area, then one is more likely to see the development of a singular regulatory regime. However, when interests differ and there is increased uncertainty, the development of smaller "clubs of cooperation" or regime complexes will develop.[288] Regime complexes form where there is an overlap of governance activities.[289] They result because of "[d]isaggregated decision making in the international legal system[,] [which] means that agreements reached in one forum do not automatically extend to, or clearly trump, agreements developed in other forums."[290] This phenomenon is heightened when it comes to international courts because "[t]here is no hierarchy in the international judicial arena."[291] This Article starts the conversation

284. Quack, *supra* note 29, at 653.

285. Raustiala & Victor, *supra* note 25, at 279.

286. Betts, *supra* note 30, at 13–14.

287. Keohane & Victor, *supra* note 28, at 8–9.

288. *Id.*

289. Thomas Gehring & Benjamin Faude, *The Dynamics of Regime Complexes: Microfoundations and Systemic Effects*, 19 GLOBAL GOVERNANCE 119, 123 (2013).

290. Raustiala & Victor, *supra* note 25, at 279.

291. Chiara Giorgetti, *Horizontal and Vertical Relationships of International Courts and Tribunals—How Do We Address Their Competing Jurisdiction?*, 30 ICSID REV. 98, 99 (2015); *see also* Israel de Jesús Butler, *Securing Human Rights in the Face of International Integration*, 60 INT'L COMP. L.Q. 125, 134 (2011) (noting that "international law is not a particularly refined hierarchical system").

on how regime complexes can also emerge due to increased regionalization, as this has not been given sufficient attention in the literature.

Salient characteristics of regime complexes are "incoherence, inconsistency, and fragmentation."[292] Scholars and practitioners are concerned about the fragmentation of international law because there are concerns that it will prevent the evolution of a more egalitarian system of international law and potentially damage the integrity of international law.[293] In particular, there are concerns that fragmentation may lead to norm conflict and hierarchy where courts interpret the same norm differently or where norms compete.[294] The International Law Commission's Study Group has identified three different types of substantive fragmentation: "conflicting interpretations of general law, emergence of special law as an exception to the general law, and . . . conflict between different types of special law."[295] Fragmentation of international law seems "inevitable,"[296] and inconsistency and conflict occur as regime complexes develop and new actors and new institutions emerge.[297] The key aspects of fragmentation of the emerging regime complex that I examine below relate to institutional and substantive fragmentation.

a. Institutional Fragmentation and the Regional Criminal Court

The field of international criminal law is already marked by fragmentation.[298] Generally, there are three different aspects of fragmentation relating to international criminal law—institutional, which concerns the dialogue, or lack thereof between "diverse international judicial institutions"; substantive, which concerns the diversity in substantive criminal law; and lastly procedural, which relates to diversification in procedural issues.[299] Historically, the only su-

292. Yu, *supra* note 28, at 16.

293. *See generally* Benvenisti & Downs, *supra* note 104.

294. Carsten Stahn & Larissa van den Herik, *"Fragmentation," Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?*, *in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 21, 75 (Larissa van den Herik & Carsten Stahn eds., 2012).

295. Siobhán McInerney-Lankford, *Fragmentation of International Law Redux: The Case of Strasbourg*, 32 OXFORD J. LEGAL STUD. 609, 611–12 (2012).

296. *Id.* at 612.

297. Yu, *supra* note 28, at 16–17.

298. *See generally* Stahn & van den Herik, *supra* note 294.

299. Flavia Lattanzi, *Introduction*, *in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 1, 5, 10, 15 (Larissa van den Herik & Carsten Stahn eds., 2012).

pranational institutions with international criminal jurisdiction were the Nuremberg and Tokyo tribunals,[300] specialized-hybrid criminal tribunals,[301] or ad hoc international tribunals.[302] The majority of these institutions existed prior to the Rome Statute coming into effect.[303] A few tribunals were created after the Rome Statute entered into force, but they were either created to prosecute crimes that do not have sufficient gravity to justify further action by the ICC[304] (e.g., the Special Tribunal for Lebanon),[305] or were created to prosecute crimes that occurred prior to the ICC coming into existence (e.g., the Iraqi High Tribunal[306] and the Kosovo War Crimes Court[307]). The assumption was that there would be no need for the creation of additional specialized or ad hoc international criminal tribunals to investigate and prosecute war crimes, crimes against humanity, and genocide occurring after 2002 (when the Rome Statute came into effect).[308] Yet, the proposed regional criminal court as well as the creation of a number of other tribunals has undermined this assumption. For example, the peace agreement in South Sudan provides for a hybrid tribunal to investigate war crimes and crimes against humanity

300. *See* Schabas, *supra* note 68, at 9–10 (discussing how in practice the tribunals were prosecuting crimes that occurred across the European and Far East regions).

301. S.C. Res. 1757 (May 30, 2007) (creating a special tribunal for Lebanon); SCSL Statute, *supra* note 3, at art. 8; G.A. Res. 57/228 (May 22, 2003) (establishing the Extraordinary Chambers of the Courts of Cambodia). *See generally* COURT OF BOSN. & HERZ., http://www.sudbih.gov.ba/ (last visited Feb. 21, 2016).

302. *See, e.g.*, ICTY Statute, *supra* note 3, at art. 6; ICTR Statute, *supra* note 3, at art. 5.

303. *Compare* Rome Statute, *supra* note 3 (entered into force on June 30, 2002), *with* ICTY Statute, *supra* note 3 (entered into force on May 25, 1993), ICTR Statute, *supra* note 3 (entered into force on June 29, 1995), *and* SCSL Statute, *supra* note 3 (entered into force on August 14, 2000).

304. Rome Statute, *supra* note 3, at art. 17 (detailing the criteria for admissibility of cases, one of which is whether a case is of "sufficient gravity to justify further action by the Court").

305. The Lebanon tribunal was established to prosecute those who were involved in the murder of the former Lebanese Prime Minister Rafik Hariri in 2005. S.C. Res. 1757 (May 30, 2007). *See generally* Sari Hanafi & Are Knudsen, *Special Tribunal for Lebanon (STL): Impartial or Imposed International Justice?*, 31 NORDIC J. HUM. RTS. 176 (2013).

306. *See Statute of the Iraqi Special Tribunal*, LIBRARY OF CONG., http://www.loc.gov/law/help/hussein/docs/20031210_CPAORD_48_IST_and_Appendix_A.pdf (last visited Feb. 21, 2016).

307. *Kosovo Parliament Approves New War Crimes Court*, BBC (Aug. 4, 2015), http://www.bbc.com/news/world-europe-33770897 (discussing the Kosovo's parliament decision to alter Kosovo's constitution to enable the establishment of a Special Court).

308. Rome Statute, *supra* note 3.

committed by both parties to the conflict.[309] The AU is supporting this court as a partial solution to the conflict that began in South Sudan in 2013.[310] Additionally, a Special Criminal Court was created with jurisdiction over all war crimes and crimes against humanity committed on the territory of the CAR since 2003.[311] This will be the first time that a hybrid court has been established in a place where the ICC has ongoing investigations and cases.[312] Moreover, the U.N. Commission of Inquiry on Syria has called for a special tribunal to investigate war crimes and mass atrocities in Syria due to the low probability of the UNSC referring the situation to the ICC.[313]

All of the above demonstrates that in the same manner that the ICJ, the main judicial organ of the United Nations,[314] has "never stood at the apex of some universal judicial hierarchy,"[315] the ICC has not been at the apex in the field of international criminal law. This is especially so when one considers that international criminal law can always be enforced through domestic courts. Indeed, the ICC was founded on the basis that it is the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[316] This can occur either by states directly impacted by the crime(s) carrying out the prosecutions or, as discussed above,[317] through the controversial practice of universal jurisdiction. Because no singular regulatory regime has emerged in the area of international criminal law to encompass all actors, international and specialized

309. *African Union Announces South Sudan War Crimes Court*, BBC (Sept. 29, 2015), http://www.bbc.com/news/world-africa-34393329.

310. *Id.*

311. Géraldine Mattioli-Zeltner, *Taking Justice to a New Level: The Special Criminal Court in the Central African Republic*, JURIST (July 9, 2015), http://jurist.org/hotline/2015/07/G%C3%A9raldine-Mattioli-Zeltner-CAR-Special-Court.php.

312. *Id.*

313. Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, GUARDIAN (Mar. 17, 2015), http://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria.

314. Statute of the International Court of Justice art. 3, June 26, 1945, 59 Stat. 1055. The ICJ has jurisdiction over all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. The ICJ may be asked to deliver either non-binding advisory opinions or binding decisions between the parties. *Id.* at art. 59. The ICJ mainly hears cases from states, although certain organizations are also eligible to request advisory opinions. *Id.* at art. 65.

315. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 576 (2002).

316. Rome Statute, *supra* note 3, at pmbl.

317. *See* Part I.C.

tribunals as well as domestic courts have been free to accept or reject the ICC's decisions. These various judicial bodies adjudicating international criminal law violations form part of an emerging regime complex. The proposed creation of the regional criminal court in Africa would expand the regime complex and will likely further magnify the institutional fragmentation of international criminal law.

The existence of institutional fragmentation and incoherence are evidenced by the lack of any meaningful connections between the regional criminal court and the ICC despite their coverage of similar issue areas. The Malabo Protocol, although clearly influenced heavily by the Rome Statute, does not address the relationship between the ICC and the regional criminal court.[318] Instead, the Malabo Protocol discusses the court's complementary relationship with national courts and the courts of regional economic communities within Africa should they be given international criminal jurisdiction in the future.[319] The AU adopted the Protocol for the regional criminal court after the Rome Statute came into force, yet it is completely silent on the ICC. The Malabo Protocol gives no indication of how the courts are to act in coordination with one another.[320] This was not by happenstance as the drafters of the Protocol for the regional criminal court were very aware of the ICC. As some scholars have noted, "actors will tend to shape their preferences and make their decisions within one elemental institution against the backdrop of the other institutions that form part of the process."[321]

b. Substantive Fragmentation and the Regional Criminal Court

The AU's action can be understood as an attempt to create a "strategic inconsistency" with the ICC. A strategic inconsistency occurs when actors in an existing regime that are dissatisfied with an earlier rule intentionally develop inconsistencies within the regime complex in the hope of changing the unfavorable rule.[322] The regime-complex literature predicts strategic inconsistency, but has not yet explained if and how a regime complex "settles" into a stable

318. Malabo Protocol, *supra* note 1, at art. 46H (noting that the jurisdiction of the court will be complementary to national courts and the courts of the regional economic communities); *see also* VILJOEN, *supra* note 117, at 451.

319. Malabo Protocol, *supra* note 1, at art. 46H.

320. *See* Rau, *supra* note 130, at 690 (discussing how the issue of overlapping jurisdiction with the ICC was "expressly avoided").

321. Gehring & Faude, *supra* note 289, at 122.

322. Yu, *supra* note 28, at 17.

equilibrium in which the regime's core objectives can be achieved. Strategic inconsistencies are meant to put pressure on or alter the earlier rule.[323] I have already analyzed several examples of substantive fragmentation, for example where the regional criminal court has sought to create strategic inconsistencies with other international tribunals—including the expansion of the crimes deserving of regional, if not international attention,[324] and the provision for corporate criminal liability.[325] Another example of a rule that the regional criminal court is putting pressure on or seeking to alter is the scope of official immunity. The AU raised the issue of immunity of state officials in its decision not to cooperate with the ICC regarding the arrest and surrender of Sudanese President al-Bashir,[326] as well as the arrest of former Libyan President Muammar Gaddafi.[327] The AU's stance on official immunity is related to its determination that indictments against officials in power have seriously undermined the AU's role in peace processes.[328] In particular, the AU has reaffirmed in its decisions that "the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace and [expressed its] concern with the misuse of indictments against African leaders."[329]

Official immunities only attach to certain state officials and only while that particular official is in office. These immunities are termed *ratione personae* because they pertain to a limited group as a result of their office or status and differ from functional immunities that attach to acts performed by state officials in the exercise of their functions (*ratione materiae*).[330] As applied to Heads of States, official immunities evoke the "dignity that was once attached to kings"

323. Raustiala, *supra* note 28, at 1027–28.

324. For further discussion, see Part II.A.2.

325. For further discussion, see Part II.A.3.

326. *See* A.U. Dec. 221(XII) (July 3, 2009); *see also* VILJOEN, *supra* note 117, at 451.

327. *See* A.U. Dec. 366(XVII) (July 1, 2011).

328. Hendrick Johannes Lubbe, *The African Union's Decisions on the Indictments of al-Bashir and Gaddafi and their Implications for the Implementation of the Rome Statute by African States*, *in* POWER AND PROSECUTION: CHALLENGES AND OPPORTUNITIES FOR INTERNATIONAL CRIMINAL JUSTICE IN SUB-SAHARAN AFRICA 179, 194–95 (Kai Ambos & Ottilia A. Maunganidze eds., 2012).

329. *See, e.g.*, A.U. Dec. 13(XXI) (May 27, 2013), http://www.au.int/en/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf.

330. For further discussion, see Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 817 (2011). *See generally* Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407 (2004).

and the idea of "the incarnation of the state in its ruler."[331] To arrest and detain the Head of State of a government would be tantamount to "changing the government of that state" and would "eviscerate the principles of sovereign equality and independence" of states.[332] The ICJ deemed these immunities necessary to maintain international peace and cooperation between states.[333] Official immunity as applied to Heads of States[334] has been relatively uncontroversial and applied in numerous domestic cases.[335] The below paragraphs will explore what customary international law provides regarding official immunities, in order to fully comprehend how the regional criminal court is seeking to shape international law relating to official immunity.

Customary international law requires both a generalized practice of states around a particular norm and *opinio juris*—that is, it must appear that states are following the practice because of a sense of legal obligation.[336] With regard to consistent state practice, evi-

331. Akande & Shah, *supra* note 330, at 824.

332. *Id.*

333. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 63, 86 ¶ 75 (Feb. 14) (separate opinion by Higgins, Kooijmans & Buergenthal, Js.).

334. *See, e.g.*, Institut de Droit International, *Resolution on Immunities from Jurisdiction and Execution of Heads of State and Government in International Law*, arts. 1, 2, 15, JUSTITIA ET PACE (Aug. 26, 2001), http://www.justitiaetpace.org/idiE/resolutionsE/2001_van_02_en.PDF.

335. *See, e.g.*, Auto del Juzgado Central de Instrucción No. 4, 2008, http://www.latinreporters.com/espagneRwandaAudienceNationale06022008.pdf (Spain) (concluding that Spanish courts did not have the jurisdiction to prosecute President of Rwanda Paul Kagame for international crimes); *see also* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 13, 2001, Bull. crim., No. 1414 (Fr.) (dismissing criminal proceedings against the former Libyan Head of State relating to the bombing of a French airliner on the grounds of immunity); S.A.N., Mar. 4, 1999 (R.G.D., No. 1999/2723) (Spain) (dismissing a criminal case against Fidel Castro, then-Head of State of Cuba, on grounds of immunity); H.S.A. et al., v. S.A. et al., 42 I.L.M. 596 (2003) (decision of Court of Cassation of Belgium regarding a criminal case against Israeli prime minister Ariel Sharon alleging war crimes and crimes against humanity dismissed on immunity grounds); R. v. Bow Street Stipendiary Magistrate and Others, Ex parte Pinochet (No. 3) 1999 2 All ER 97 at 126–27, 149, 179, 189 (HL, per Lords Goff, Hope, Millet, and Phillips) (finding that serving Heads of States are immune from the criminal jurisdiction of foreign states); Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003) (dismissing civil proceedings against the Chinese president alleging torture, genocide, and other human rights violations on immunity grounds); Tachonia v. Mugabe, 169 F. Supp. 2d 2590 (S.D.N.Y. 2001) (dismissing civil proceedings against Zimbabwean President Robert Mugabe alleging torture on grounds of immunity).

336. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987).

dence includes the statutes of international criminal tribunals including the ICC, which points in the direction of official capacity as no bar to prosecution for international crimes.[337] State practice also includes the prosecutions of Slobodan Milošević,[338] Saddam Hussein,[339] and Charles Taylor.[340] Both the Milošević and Taylor indictments were issued while these Heads of States were still in power. Taylor filed a motion claiming sovereign immunity and requested the court to quash the indictment. The court held that Taylor's official position was not a bar to his prosecution, given the court's status as an international tribunal.[341] Yet, the prosecutions of all three Heads of States did not take place until after these individuals were no longer in power.

African states also have taken the issue of official immunity to the ICJ.[342] The seminal case involved a Belgium arrest warrant against Abdulaye Yerodia Ndombasi, the former Minister of Foreign Affairs of the DRC. In a contentious decision,[343] the ICJ held that

337. *See, e.g.*, Rome Statute, *supra* note 3, at art. 27(1); ICTY Statute, *supra* note 3, at art. 7(2); ICTR Statute, *supra* note 3, at art. 6(2); SCSL Statute, *supra* note 3, at art. 6(2); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 7, Aug. 8, 1945, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East art. 6, Jan. 19, 1946, T.I.A.S. No. 1,589; *see also In re* Goering, 13 I.L.R. 203, 221 (Int'l Mil. Trib. 1946).

338. Prosecutor v. Milošević, Case No. IT-99-37-I, Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2001), http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai010629e.htm.

339. *See generally Saddam Hussein Trial*, LIBRARY OF CONG., http://www.loc.gov/law/help/hussein/ (last visited Mar. 16, 2016); Luis Kutner & Ved P. Nanda, *Draft Indictment of Saddam Hussein*, 20 DENV. J. INT'L L. & POL'Y 91 (1991).

340. Prosecutor v. Taylor, Case No. SCSL-03-01-A-1389, Appeals Judgment (Sept. 26, 2013), http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf. The Special Court for Sierra Leone indicted Taylor for supporting rebels in neighboring Sierra Leone. There is extensive documentation on the level of support Taylor provided, including training, weapons, and safe haven. *See, e.g.*, Rep. of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone, ¶¶ 183–93, U.N. Doc. S/2000/1195 (Dec. 20, 2000).

341. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004).

342. Liberia initially brought Sierra Leone before the ICJ for violating the immunity of its Head of State by prosecuting Taylor. *See* Press Release, Liberia Applies to the International Court of Justice in a Dispute with Sierra Leone Concerning an International Arrest Warrant Issued by the Special Court for Sierra Leone Against the Liberian President, I.C.J. Press Release 2003/26 (Aug. 5, 2003); *see also* Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. Rep. 177, ¶ 170 (June 4) (noting that serving Heads of States possess official immunity).

343. *See, e.g.*, Murungu, *supra* note 142, at 1071–72; WILLIAM SCHABAS, AN

Yerodia Ndombasi enjoyed immunity from prosecution in foreign national courts under customary international law because he was then serving as a foreign minister.[344] The ICJ did not provide supporting state practice, which demonstrated that official immunity applies not only to Heads of States, but also to ministers of state.[345] Also, the ICJ did not consider Belgium's argument that customary international law requires states to prosecute individuals alleged to have committed international crimes,[346] irrespective of official capacity.[347] The ICJ in dictum discussed the exceptions where the immunities provided under international law would allow for the prosecution of Heads of States and ministers of state.[348] One of these exceptions is

INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 231–32 (3d ed. 2007). *See generally* J.J. Wouters, *The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 265 (2003); Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 855 (2002).

344. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 3, 24 ¶ 58 (Feb. 14) [hereinafter *Arrest Warrant Case*].

345. *Id.* ¶ 53.

346. For more on the emerging duty to prosecute, see, for example, the Convention on the Prevention and Punishment of the Crime of Genocide arts. 1, 4–6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Geneva Convention Relative to the Protection of Civilian Persons in Times of War arts. 146–47, Aug. 12, 1949, 75 U.N.T.S. 287; Rome Statute, *supra* note 3, at art. 5; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5, 7, 12, 14, Dec. 10, 1984, 1465 U.N.T.S. 85; *see also* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 20–25 (1995); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 451 (1990). *But see generally* Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481 (2003) (arguing, while it is relatively clear that states are under a duty to prosecute those responsible for genocide, acts of torture, and grave breaches of the Geneva Conventions, that this duty is less clear for crimes against humanity and serious violations of the laws of armed conflict; that actual state practice regarding the duty is unsupportive and has instead condoned the granting of amnesties; and that the "paper practice" supports the duty to prosecute and indicates a sense of legal obligation to condemn amnesties).

347. *See Arrest Warrant Case*, *supra* note 344, ¶¶ 56–60.

348. *Id.* ¶ 61. These exceptions include first, where such persons are prosecuted under domestic law in their own countries; second, where the relevant state decides to waive the immunity; and third, where the individual concerned is no longer in office and no longer enjoys the immunities provided by international law, then such individuals can be prosecuted by another state provided it has jurisdiction under international law. However, this prosecution could only be for acts committed prior to or after the person's official position, unless the acts while the person was in office were done in the person's private capacity.

where international tribunals, such as the ICC, have treaty-based jurisdiction.[349]

African states are challenging whether a customary international law norm has formed on immunity—separate from treaty law and the treaty-based jurisdiction exercised by international criminal tribunals. The controversy usually arises when the UNSC, acting under its powers from Chapter VII of the U.N. Charter,[350] refers a situation from a state that is not part of the ICC regime[351] for prosecution under Article 13(b) of the Rome Statute. The Rome Statute bars official immunity under Article 27(2). Yet, this provision is only applicable to states that are bound by the treaty regime because generally only parties to a treaty are bound by its provisions.[352] For non-state parties to the ICC, officials would likely "continue to enjoy [immunity] under customary international law."[353] A treaty like the Rome Statute "cannot remove immunities that international law grants to officials of states that are not party to the treaty."[354] This is because it is only the parties to the ICC regime that have agreed to waive the immunities that international law grants. Some commentators have suggested that the UNSC, when acting under its Chapter VII powers and referring situations to the ICC, can somehow bind non-States Parties to the Rome Statute including the provision waiving immunities.[355] This argument is problematic because, "while the Security Council is competent to adopt measures aimed at restoring international peace and security,"[356] it does not possess the power to unilaterally impose treaty obligations upon a state.[357] A related issue is how far UNSC authority extends under Chapter VII of the U.N. Charter—for example, whether UNSC resolutions can obligate a state to arrest a Head of State and turn the individual over to the ICC. However, it is beyond the scope of this paper to discuss any potential

349. *Id.*

350. The UNSC has previously used its Chapter VII powers, which are aimed at the restoration of international peace and security, to establish tribunals in Rwanda and the former Yugoslavia. *See* U.N. Charter arts. 39–51; *see also* ICTR Statute, *supra* note 3, at art. 1; ICTY Statute, *supra* note 3, at art. 1.

351. For further discussion, see Jalloh, *supra* note 57, at 482–85.

352. *See* VCLT, *supra* note 65, at art. 34.

353. Jalloh, *supra* note 57, at 483.

354. Akande, *supra* note 330, at 417.

355. Dapo Akande, *The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution*, *in* DEBATING INTERNATIONAL JUSTICE IN AFRICA: OTJR COLLECTED ESSAYS, 2008–2010, at 87, 88–89 (2008).

356. *See* U.N. Charter art. 24(1).

357. Jalloh, *supra* note 57, at 484.

conflict between a UNSC Resolution and customary international law norms.

African states' inclusion in the Protocol of an immunities provision[358] serves to clarify the rule on immunities because, if the prohibition on official immunities is simply a matter of treaty law, then it is permissible for states to form treaties that do not contain the prohibition.[359] On the other hand, if the prohibition is a developing norm of customary international law, then the "reaction of African States" to the issue of Head of State immunity "questions the notion of constant and uniform usage or general acceptance"[360] to meet the first requirement for customary international law to form.[361] It also challenges the second prong of *opinio juris*.[362] That is, because of the inability to establish consistent state practice, then by definition states would not be acting out of a sense of legal obligation. Major inconsistencies will prevent the creation of a rule of customary international law from forming.[363] The immunity provision in the regional criminal court could certainly factor into any customary international law analysis regarding whether a sufficient inconsistency has arisen.[364] However, complete consistency is not required for customary international law to form.[365] Accordingly, inclusion of the immunity provision in the Protocol may represent an attempt to utilize the normal rules of persistent objection in international law.[366] This could exempt African states from being bound, to the extent a norm of customary international law is forming that prohibits official immunity.[367] Under ordinary customary international law principles,

358. Malabo Protocol, *supra* note 1, at art. 46A *bis*.

359. *See, e.g.*, VCLT, *supra* note 65, at art. 38 (providing that rules in a treaty can become binding on non-party states to the extent that the norm is recognized as customary international law).

360. Lubbe, *supra* note 328, at 179–99.

361. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987).

362. *Id.*

363. *Id.*

364. Because the Protocol has not yet entered into force, it is too soon to discuss whether the number of parties adopting the immunity rule in the Protocol would be sufficient to constitute a "major inconsistency."

365. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987).

366. The only way for states to not be bound by customary international law is if a state protests at the emergence of the rule and continues to protest against the rule. VCLT, *supra* note 65, at arts. 19–23.

367. Lubbe, *supra* note 328, at 190.

the only circumstance where it would not be permissible for a state to derogate from a norm is if the norm has reached the status of a *jus cogens* or a peremptory norm.[368] If the prohibition on immunities reached this status, then states would not be permitted to contract around it.[369] Yet, it does not appear that a prohibition on official immunities has become *jus cogens* or a peremptory norm. Before a norm can take on the higher quality of *jus cogens* or a peremptory norm, it must first be established that the norm has reached the status of customary international law.[370] Because official immunity is recognized as customary international law,[371] it would be difficult to demonstrate that a prohibition of official immunity has reached the level of *jus cogens* or a peremptory norm. The analysis above indicates that at least some parts of the much maligned immunity provision comport with existing customary international law.

The regional criminal court is also attempting to expand the scope of immunities. The provision bars the prosecution of not only Heads of States, but also of "senior state officials" based on their functions.[372] This provision is somewhat consistent with what the ICJ has held customary international law currently permits.[373] State

368. *Jus cogens* norms are peremptory norms of general international law that states are not allowed to contract out of. Peremptory norms of general international law are norms that are "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." VCLT, *supra* note 65, at art. 53. Examples of such norms are the prohibitions against slavery and genocide. Any treaty that attempted to do so would be invalid, as well as any local custom. *See generally* Carolyn A. Dubay, *Peremptory Norms and Jus Cogens*, INT'L JUDICIAL MONITOR (Fall 2011), http://www.judicialmonitor.org/archive_fall2011/generalprinciples.html; Anthony J. Colangelo, *Jurisdiction, Immunity, Legality, and Jus Cogens*, 14 CHI. J. INT'L L. 53 (2013); Akande & Shah, *supra* note 330, at 817.

369. VCLT, *supra* note 65, at art. 53.

370. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987).

371. *See Arrest Warrant Case*, *supra* note 344, ¶¶ 52–54; *see also* Rome Statute, *supra* note 3, at art. 98(1) ("The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.").

372. Malabo Protocol, *supra* note 1, art. 46A *bis*.

373. *See Arrest Warrant Case*, *supra* note 344, ¶¶ 53–55; *see also* Int'l Law Comm'n, Rep. of the Int'l Law Comm'n on the Work of Its Sixty-Fifth Session, U.N. Doc. A/RES/68/112 (Dec. 18, 2013) (draft article 4) ("Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals."); *id.* (draft article 5) ("(1) The immunity from

delegations were concerned about the extension of immunities for ministers of foreign affairs, recognized in the ICJ judgment,[374] to "senior state officials" in the Malabo Protocol.[375] Delegations were concerned about the provision's "conformity with international [and] domestic laws,"[376] as well as the lack of a precise definition for "senior state officials."[377] For example, who precisely is included and what the "functions" are that would qualify them under this definition is unclear. The provision's ambiguity and inconsistency with other criminal tribunals' statutes led to a compromise position emerging. This position reflected the view that senior state officials already had functional immunity under customary international law and Article 46A *bis* was formulated to state that immunities would be provided to "senior state officials based on their functions."[378]

The analysis above indicates that the issue of official immunity cannot fully explain the development of the regional criminal court in Africa as some commentators suggest.[379] The AU did not insert the provision granting official immunity[380] until the last round of negotiations when drafting the Protocol. The drafters of the Malabo Protocol were undoubtedly aware that the Rome Statute does not provide for official immunity. Moreover, the Malabo Protocol does

foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office. (2) Heads of State, Heads of Government and Ministers for Foreign Affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office."); *id.* (draft article 6) ("(1) Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Minister for Foreign Affairs and expires automatically when it ends. (2) The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.").

374. *See Arrest Warrant Case*, *supra* note 344, ¶¶ 53–55.

375. Malabo Protocol, *supra* note 1, at art. 46A *bis*.

376. African Union, Rep. of the First Ministerial Meeting of the Specialized Technical Comm. on Justice and Legal Affairs, ¶¶ 25–26, STC/Legal/Min/Rpt (May 15–16, 2014), https://www.justsecurity.org/wp-content/uploads/2014/07/Legal-Instruments-Adopted-in-Malabo-July-2014.pdf.

377. *Id.*

378. *Id.*; *see also* Malabo Protocol, *supra* note 1, at art. 46A *bis*.

379. *See, e.g.*, Murungu, *supra* note 142, at 1087; Rau, *supra* note 130, at 700; Odo, *supra* note 187, at 349; Oette, *supra* note 187, at 370–71.

380. *See* Malabo Protocol, *supra* note 1, at art. 46A *bis*.

not impact the ICC's ability to carry out prosecutions against state officials. Some have argued that it is nonsensical to establish a criminal chamber while "knowing that the ICC can prosecute and punish individuals, including state officials who commit international crimes."[381] This is only the case if you view the regional criminal court as a substitute for the ICC.

Focusing solely on official immunity obscures a number of important phenomena influencing the development of the regional criminal court. As discussed more fully above,[382] the Malabo Protocol goes well beyond the Rome Statute by covering quotidian[383] and crisis crimes, while the ICC only covers crisis crimes.[384] Additionally, the Malabo Protocol also provides for corporate criminal liability.[385] Due to this dramatic expansion of the scope of criminal liability, the drafters of the regional criminal court may have surmised that greater protections from prosecutions were warranted for Heads of States and senior state officials. Indeed, if the drafters were only concerned with securing official immunity and thwarting ICC prosecutions, then there would not have been any need for the drafters to include any other provisions to the Malabo Protocol.

Moreover, the immunity provision can be analogized to the UNSC deferral and referral powers in the Rome Statute.[386] While the permanent members of the UNSC were unsuccessful in ensuring a de jure veto power in the Rome Statute, they effectively have a de facto veto over prosecutions. The UNSC has the ability to both refer cases to the ICC and continually defer prosecutions in exercising its U.N. Chapter VII powers in the event of a threat to international peace and security. It is unlikely that any UNSC referral will involve permanent members of the UNSC or their allies. And, in the off chance

381. Murungu, *supra* note 142, at 1082 (discussing the mootness of establishing a criminal chamber while "knowing that the ICC can prosecute and punish individuals, including state officials who commit international crimes").

382. *See* Part II.A.2.

383. *See e.g.*, Malabo Protocol, *supra* note 1, at arts. 28J, 28K, 28L (criminalizing trafficking in persons, drugs, and hazardous waste, respectively).

384. *Compare id.* at arts. 28B, 28C, 28D, 28M (criminalizing genocide, crimes against humanity, war crimes, and the crime of aggression, respectively), *with* Rome Statute, *supra* note 3, at arts. 5–8 (criminalizing the same crimes).

385. For further discussion, see Part II.A.3.

386. Rome Statute, *supra* note 3, at art. 13(b); *id.* at art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

that any prosecution threatens their interests, they always have the ability to defer prosecutions indefinitely. Some permanent members on the UNSC like Russia, the United States, and China did not view these protections as sufficient and have been able to immunize themselves fully from potential ICC prosecutions by not joining the ICC regime.

This circumstance where major world powers are not subject to the Rome Statute has not led to the widespread rejection of the ICC regime by commentators, perhaps justifiably so. It is likely that commentators have concluded that even though the ICC regime is imperfect and not universal, it can at least achieve some modicum of justice. The response to the Malabo Protocol has largely lacked this nuanced perspective. For example, approximately forty civil society groups expressed their disapproval of the inclusion of the immunity provision.[387] The African Court Coalition[388] took a more cautious view, supporting the regional criminal court if it comes into existence, but expressing concerns about the immunity provision and debating ways to limit its reach.[389]

This subsection has discussed a number of legal and policy reasons why the inclusion of the immunity provision does not render the entire regional criminal court project suspect. For example, the provision may actually work to encourage state cooperation with the regional criminal court because leaders will not have to fear that the court will be used as a tool by more powerful states for regime change. Additionally, the coverage of both quotidian and crisis crimes and the provision for corporate criminal liability are significant and necessary innovations in the field of international criminal law. It is also worth mentioning that institutions are developing entities that do not remain static from the time of their establishment, but rather continue to change in response to events and international normative developments; as such, it may be that the most disfavored provisions of the proposed regional criminal court are amended or change with subsequent state practice or interpretation of the Proto-

387. For more on the backlash of some civil society groups, see Schaack, *supra* note 180; *Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights*, *supra* note 180; *African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute*, *supra* note 180.

388. The Coalition for an Effective African Court on Human and Peoples' Rights (African Court Coalition) is a network of non-governmental organizations and independent national human rights institutions, which was formed during the first conference for the promotion of the protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights in Niamey, Niger, in May 2003.

389. *See generally Building the Court We Want*, *supra* note 154.

col. In sum, the regional criminal court can be seen as an example of a burgeoning "counter regime," established as an alternative or a platform "to influence the development of existing international organizations"[390] and international law.

2. Regime Shifts and the Emergence of the Regional Criminal Court

Regime complexes are discernible by "horizontal, overlapping structures and the presence of divergent rules and norms,"[391] and the field of international criminal law clearly exhibits these qualities. Regime complexes create opportunities for regime shifts. Regime shifts occur when states "attempt to alter the status quo ex ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another."[392] Intra-regime shifts occur when there is movement to a different venue situated within the same regime, for example from a multilateral institution to a regional institution.[393] Inter-regime shifts occur when there is movement to another forum located in an entirely different regime covering another issue area.[394] If the regional criminal court in Africa comes into existence, this would be characterized as an intra-regime shift as there would be a move from the ICC, a multilateral organization, to the regional criminal court in Africa.

Regime shifting allows "counter regime norms," which seek to change the "prevailing legal landscape," to flourish.[395] An example of a counter regime norm is official immunity, discussed above.[396] The AU's establishment of the regional criminal court can be understood as a way to shift the prevailing legal landscape to a regime where Heads of States as well as "senior state officials," based on their functions, are provided protection from prosecution for international crimes. Counter regime norms can seek either to modify the existing rules incrementally or to be more revolutionary by challenging the underlying principles of existing rules.[397] The creation of the regional criminal court is a fundamental challenge to the existing rules of international criminal law. This is not simply because of the

390. de Búrca, Keohane & Sabel, *supra* note 28, at 10.

391. Raustiala & Victor, *supra* note 25, at 305.

392. Helfer, *supra* note 28, at 14.

393. *Id.* at 16.

394. *Id.*

395. *Id.*

396. *See* Part II.B.1.b.

397. Helfer, *supra* note 28, at 14.

issue of immunities, but also because of the expansion of criminal liability to include corporations[398] as well as the regional criminalization of quotidian activities.[399]

This section has illustrated how a number of the salient characteristics of regime complexes are evident when analyzing the field of international criminal law: overlapping legal agreements, incoherence, fragmentation, and inconsistency. It has demonstrated how the emergence of the regional criminal court in Africa will lead to increased institutional and substantive fragmentation of the field. This section has also distinguished the concepts of regime complexes from regime shifts. Because the regional criminal court in Africa has not yet come into existence, it may be too early to speak of a definitive regime shift. Perhaps the most that can be said is that we are witnessing the emergence of a regime complex in the field of international criminal law.

III. THEORETICAL AND POLICY IMPLICATIONS

This Part discusses the Article's theoretical contributions to both the regime complex literature and regionalism literature. These theoretical frameworks provide a richer and more accurate explanation of the emergence of the regional criminal court than conventional accounts. This Part also explores the potential benefits of the development of a regime complex in the field of international criminal law. Additionally, this Part finds that crises are important predictors of institutional change and development. Lastly, this Part examines the potential implications of the regionalization of international criminal law.

A. Emerging Regime Complex in International Criminal Law

There are a number of theoretical and policy implications of an emerging regime complex in the field of international criminal law. The development of a regime complex may mean increased competition on international criminal justice issues. Regime complexes are marked by competition wherein the "elemental institutions compete for support from constituents for governance functions and resources."[400] One scholar has argued that competition between in-

398. *See* Part II.A.3 for further discussion.

399. *See* Part II.A.2 for further discussion.

400. Gehring & Faude, *supra* note 289, at 124.

ternational judicial forums can also occur due to different interpretations of the substantive principles of the applicable law or because of jurisdictional competition where two or more forums are competent to hear a dispute between parties.[401] Whatever form of competition that eventually emerges in the regime complex, increased competition can lead to increased inefficiency and "turf battles."[402] It is also possible that a "division of labor" between elemental institutions will emerge replacing open conflict because, over time, institutions may learn that "mutual accommodation" is preferred as "neither institution gains from lasting conflict."[403]

There are a number of predictions about what may occur in the field of international criminal justice based on the regime complex literature. Regime complexes can create opportunities for powerful states to continue to dominate international law-making. For example, during the negotiations that led to the formation of the World Trade Organization (WTO), the United States and the European Union exited the old General Agreements on Tariffs and Trade regime where decisions were based on consensus. They set up the WTO with the higher protections for international property rights that they wanted, and then invited weaker states to join the new regime as is.[404] Regime complexes can also create strategic opportunities for countries from the Global South to pursue their respective interests.[405] Because of their flexibility, regime complexes enable states that have historically played a minimal role in international law generation to play a law-making role.

Regime complexes are characterized by forum shopping, through which actors attempt to select the forum that best suits their interests.[406] Different rules of access, membership, and participation in international institutions empower and disempower distinct actors.[407] The creation of the regional criminal court will allow African state parties to the ICC to forum shop between the ICC and the regional body. Of course, the prosecutor of the ICC can still exercise

401. Giorgetti, *supra* note 291, at 98–99; *see also* Stahn & van den Herik, *supra* note 294, at 75 (discussing the academic literature on the fragmentation of international law due to the proliferation of international courts and how fragmentation may lead to norm conflict and hierarchy where courts interpret the same norm differently or where norms compete).

402. Abbott, *supra* note 28, at 584.

403. Gehring & Faude, *supra* note 289, at 124–25.

404. Benvenisti & Downs, *supra* note 104, at 615.

405. Gehring & Faude, *supra* note 289, at 126.

406. Raustiala & Victor, *supra* note 25, at 299.

407. Raustiala, *supra* note 28, at 1027.

her independent powers to initiate a prosecution by requesting and seeking authorization from the court to exercise her *proprio motu* powers.[408] Yet, the early enthusiasm African states exhibited toward state referrals of situations to the ICC may be dampened, with states preferring to refer cases to the regional court. The likelihood of the UNSC referring cases involving non-state party African states may also be impacted if the regional court is seen as a viable alternative. States may prefer the protection granted to state officials in the regional tribunal, or prefer the more expansive list of triable offenses, or even wish to see a wider set of actors prosecuted like corporations.

A division of labor could develop between the ICC and the regional criminal court with the ICC focusing on crisis crimes and the regional criminal court focusing on more quotidian crimes, perhaps even involving the same country. The Special Criminal Court established in the CAR, where the ICC has ongoing cases, provides some indication that a division of labor between the regional criminal court and the ICC could work.[409] This could allow for a fuller picture of the violations suffered to develop following a conflict. A regional criminal court may also be viewed as unnecessarily duplicative of international efforts. However, the principle of complementarity means that the ICC exercises its jurisdiction when states are "unwilling or unable" to exercise jurisdiction.[410] The Rome Statute only refers to "national criminal jurisdictions."[411] Yet, the existence of a competent regional court may mean that states in the region are willing and able to exercise their jurisdiction over international and regional crimes.[412] The regional criminal court presents another option for African states whose domestic judiciaries and related institutions are not able to prosecute international crimes and where the international system has failed to pay attention to systemic quotidian crimes

408. Rome Statute, *supra* note 3, at art. 15(3) ("If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."); *id.* at art. 15(4) ("If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation.").

409. Mattioli-Zeltner, *supra* note 311 (discussing the overlapping jurisdiction between the ICC and the special court in the CAR).

410. Rome Statute, *supra* note 3, at art. 1 (stating that the ICC "shall be complementary to national criminal jurisdictions").

411. *Id.*

412. As envisioned under the Rome Statute, the ICC is only to exercise its jurisdiction where states are "unwilling or unable genuinely to carry out the investigation or prosecution." *Id.* at art. 17(1)(a).

or corporations involved in a given situation. The emergence of the regional criminal court may require the ICC to develop its jurisprudence on whether the principle of complementarity encompasses regional courts as I have articulated above, or whether the principle of complementarity should be interpreted more narrowly.

Due to principles of *lis alibi pendens* and *res judicata*, disputes involving the same parties, issue, and cause of action litigated at the ICC would unlikely be relitigated at the regional criminal court.[413] Additionally, the emphasis in the AU on negotiating political solutions to deeply intractable conflicts may mean that a quick resort to judicial measures is de-emphasized.[414] This may be a welcome development given the need for more flexibility in peace and justice issues,[415] and the ICC's troubling pattern of issuing indictments in the midst of conflicts with no prospect of enforcement. It is too early to determine whether the relationship between the ICC and the regional criminal court will be one marked by competition related to resources, governance functions, jurisdiction, and decision-making, or one marked by mutual accommodation.

Politically, regime complexes are more realistic because they do not require that all actors be incorporated in a single institution. They offer significant advantages such as flexibility and adaptability when compared to comprehensive regimes.[416] Because regime complexes allow different states to sign on to different agreements, they make "it more likely that [states] will adhere to some constraints" on their behavior.[417] At the time of writing, only two states that are not party to the Rome Statute have signed the Protocol: Guinea-Bissau and Mauritania.[418] It is premature to say definitively whether the regional criminal court in Africa will attract the participation of a sig-

413. *Lis alibi pendens* controls parallel proceedings and provides that "when proceedings are pending in one forum, the same dispute cannot be brought in another tribunal." Giorgetti, *supra* note 291, at 105. *Res judicata* provides that a final judgment of a competent tribunal "is binding upon the parties." *Id.* at 105.

414. Juma, *supra* note 128, at 371–72.

415. For further discussion, see Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 43–44 (2004). *See generally* Christopher McCrudden & Brendan O'Leary, *Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements*, 24 EUR. J. INT'L L. 477 (2013). *But see generally* KATHRYN SIKKINK, THE JUSTICE CASCADE (2011) (arguing that it is not clear that human rights prosecutions leads to conflicts).

416. Keohane & Victor, *supra* note 28, at 7.

417. *Id.* at 15.

418. Compare *The States Parties to the Rome Statute*, *supra* note 56, with signatories to the Malabo Protocol, *supra* note 1.

nificant number of states that have not ratified the Rome Statute. However, to the degree that these states were not likely to be a party to the Rome Statute in any event but do ratify the Malabo Protocol, we might consider their participation in some regime, which seeks to regulate the behavior of states committing mass atrocity and systematic quotidian crimes, as a constructive step. That is, the regional criminal court could function as a complement to the ICC. The ICC would continue to function as is, and the regional criminal court would offer additional protection allowing for adaptability within the field of international criminal justice.

Some may view a comprehensive integrated regime on international criminal justice issues as optimal, because it is believed that this will encourage maximum compliance with international criminal law.[419] Yet, it is not evident that a comprehensive regime would necessarily lead to that outcome. Moreover, a comprehensive regime encompassing all states does not seem attainable in the near future. While a hierarchical system for deciding international law questions might be more orderly and coherent, "this has not been the case for as long as international law has existed,"[420] and there is no reason to think that international criminal law is any exception. For example, before the regional human rights regime developed, there was concern from the United Nations and other actors in the international community that regions did not need separate human rights treaties. The hope at the time was that the non-binding Universal Declaration of Human Rights (UDHR)[421] would be transformed into a comprehensive treaty.[422] Due to the Cold War, it was impossible to get Western-aligned and Eastern-aligned countries to agree on a comprehensive treaty regime.[423] This led to the conclusion of two separate treaties in the field of human rights—the International Covenant on Civil and Political Rights[424] and the International Covenant on Eco-

419. *See, e.g.*, Rau, *supra* note 130, at 669, 693; *see also* Murungu, *supra* note 142, at 1082; Kane & Motala, *supra* note 122, at 406, 428 (stating that the ICC should be strengthened as opposed to creating more criminal tribunals).

420. J. I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 74 (1996).

421. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

422. Maya Hertig Randall, *The History of International Human Rights Law*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW 3, 3–34 (Robert Kolb & Gloria Gaggioli eds., 2013).

423. *Id.*

424. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR].

nomic, Social and Cultural Rights.[425] Regional systems led the way—creating regional human rights treaties in the Americas that predated the UDHR[426] and in Europe that predated the two covenants.[427] A regional human rights treaty was also adopted in Africa.[428] Regional systems demonstrated creativity and flexibility by adopting regional human rights treaties to fill the gaps in international law.[429] Regional systems also innovated to cover rights and duties not recognized in the main international human rights treaties.[430] International actors had the same fears that regional differentiation would lead to incoherence, fragmentation, and challenges to the universality of human rights.[431] Yet, the regional human rights system has functioned to strengthen the enforcement of human rights across the globe and fill in gaps that the U.N. system cannot accommodate.[432] Given the experience of regionalization in the international human rights regime, a similar outcome may pertain in the field of international criminal law.

The regional criminal court's innovation in the quotidian and crisis crimes covered and the range of actors that can be held liable push the boundaries of international criminal law in a much needed direction. Other scholars have postulated that regime complexes can also "generate positive feedback: providing incentives for a 'race to the top.'"[433] This occurs where countries take stronger action on a

425. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3. [hereinafter ICESCR].

426. Compare the entry into force of the UDHR, *supra* note 421, with the American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, Doc. 21, rev. 6 (May 2, 1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, Doc.6, rev.1 at 1 [hereinafter American Declaration].

427. Compare the entry into force of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, with UDHR, *supra* note 421, ICCPR, *supra* note 424, and ICESCR, *supra* note 425.

428. ACHPR, *supra* note 107.

429. *See, e.g.*, Chaloka Beyani, *Reconstituting the Universal: Human Rights as a Regional Idea*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 173, 176 (Conor Gearty & Costas Douzinas eds., 2012).

430. Compare ACHPR, *supra* note 107, and its concept of peoples' rights and the American Declaration, *supra* note 426, and its concept of duties, with the omission of these concepts from the UDHR, *supra* note 421, ICCPR, *supra* note 424, and ICESCR, *supra* note 425.

431. *See generally* Makau Mutua, *Human Rights and the African Fingerprint*, *in* HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 71 (2002) (rejecting similar criticisms leveled against the ACHPR).

432. *See, e.g.*, Beyani, *supra* note 429, at 190; Mugwanya, *supra* note 106, at 40.

433. Keohane & Victor, *supra* note 28, at 19.

given issue, which generates imitation by others.[434] Prime examples of this are the rights to peace, development, and the environment, which were included in the African Charter on Human and Peoples' Rights.[435] This action at the regional level, although maligned at the time, has had generative consequences for the development of international human rights law at the global level. The United Nations has established several intergovernmental working groups that are formulating draft declarations of the content of these more solidarity-oriented rights.[436] Similarly, states could innovate and mimic the provisions regarding corporate criminal responsibility, or reach agreement on a wider set of behavior to criminalize regionally or internationally.

This expansion in the field of international criminal law may assist in rendering international criminal trials more credible. International criminal trials generally focus on individual cases, and not the complex relationships that exist between individuals, groups, institutions, and other entities that make massive human rights violations possible.[437] And in the effort to move away from collectivizing guilt (which may lead to further violence or recriminations) and instead attempt to individualize it, trials tend to absolve other states, corporations, groups, institutions, bystanders, and the rest of society of any responsibility, as if individuals committed massive violations in a vacuum.[438] The focus on establishing individual accountability for a small number of crimes may present the opportunity for many criminal participants including corporations "to rationalize or deny their own responsibility for crimes,"[439] which limits the ability of such trials to establish the "truth."[440] As such, international criminal

434. *Id.*

435. ACHPR, *supra* note 107, at arts. 22–24 (enumerating the rights to development, peace, and the environment, respectively).

436. *See, e.g.*, *U.N. Human Rights Council: Open-Ended Intergovernmental Working Group on a Draft United Nations Declaration on the Right to Peace*, U.N. HUM. RTS. OFF. HIGH COMM'R, http://www.ohchr.org/EN/HRBodies/HRC/RightPeace/Pages/WGDraftUNDeclarationontheRighttoPeace.aspx (last visited Mar. 14, 2016); *The Intergovernmental Working Group on the Right to Development*, U.N. HUM. RTS. OFF. HIGH COMM'R, http://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx (last visited Mar. 14, 2016).

437. Matiangai V.S. Sirleaf, *Beyond Truth & Punishment in Transitional Justice,* 54 VA. J. INT'L L. 223, 249 (2014).

438. *Id.*

439. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 601 (2002).

440. Sirleaf, *supra* note 437, at 249.

trials are not aimed at determining the "truth,"[441] but instead focus on whether a particular criminal standard of proof has been met, based on the limited charges brought and the individuals indicted. The regional criminal courts ability to prosecute crimes the Rome Statute does not cover and the provision for corporate criminal liability may advance the already-limited ability of international criminal trials to establish an accurate historical record of conflicts,[442] thereby increasing the credibility of such trials, even if minimally. This improvement, while not eliminating the history-distorting tendencies of international criminal trials, would be a welcome development, because it at least potentially lessens the problems discussed above.

On the other hand, regime complexes can also result in a "race to the bottom,"[443] with countries seeking lower barriers to entry into the regime. That is, instead of states deciding to bind themselves to higher obligations, states can seek to lower their obligations. Regime complexes potentially allow powerful states to avoid international obligations. The formation of a regime complex may allow states to push the boundaries of international criminal law backward. For example, the regional criminal court is the only international criminal tribunal to include an immunity provision.[444] Irrespective of what customary international law provides as a background norm, the immunities provision is in stark contrast with the trend for international criminal tribunals not to recognize official immunity for purposes of adjudicating international criminal law violations. It may be that the flexibility provided by a regime complex is undesirable in the field of international criminal law, given the need to maintain certain baselines. It is yet to be determined how and in what direction the regime complex will push the field of international criminal law.

What is clear with the emergence of the regime complex is that there will be increased fragmentation of international criminal law both substantively and institutionally. However, this fragmentation is unavoidable in a "rapidly transforming international system"

441. For example, the rules of evidence, like the prohibitions against hearsay or unduly prejudicial evidence, reflect competing "public policy concerns" that may limit the ability of prosecutions to establish the truth. *See* Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 74 (2002).

442. Sirleaf, *supra* note 437, at 249.

443. Abbott, *supra* note 28, at 584 (discussing how regime complexes can lead to "pathological effects of unnecessary fragmentation").

444. Rome Statute, *supra* note 3, at art. 27 (detailing the irrelevance of official capacity for exempting someone from criminal responsibility); ICTR Statute, *supra* note 3, at art. 6; ICTY Statute, *supra* note 3, at art. 7; SCSL Statute, *supra* note 3, at art. 6.

and is a "positive demonstration of the responsiveness of legal imagination to social change."[445] In essence, new institutions are "an attempt to advance beyond the [unsatisfactory] political present."[446] Further development of the regime complex in international criminal law could potentially occur in a multitude of ways, with states continuing to prosecute international criminal law violations domestically, and/or utilizing universal jurisdiction. Perhaps more states will continue to domesticate international criminal law, which would empower domestic courts to prosecute international criminal law violations. States might even create more formal agreements for additional specialized tribunals as has been done in South Sudan and the CAR.[447] The regional criminal court may even serve as a platform or resource for hybrid and domestic efforts at prosecuting international criminal law violations in Africa. The court may serve as a resource or guide for regional best practices and help strengthen domestic efforts at adjudicating international criminal law. Additionally, states may form separate multilateral institutions in lieu of, or in addition to, utilizing the ICC. This Article has focused on the latter as the most dramatic evidence of an emerging regime complex.

B. Crisis and International Criminal Justice

This subsection discusses how crises are important predictors of institutional change and development. The emergence of the regional criminal court can be understood as an attempt to respond to the ICC's institutional crisis. Or perhaps, the ICC is not in crisis at all and the AU has employed the crisis rhetoric to mask its resistance to the ICC. On this view, the AU's pushback against the ICC is simply an indication of the ICC's effectiveness. The ICC is, after all, a relatively young institution, and what we are witnessing may be no more than growing pains that will be resolved with greater judicial maturity. Yet, what is evident from the analysis above is that perceptions about international criminal justice institutions matter, because the "justice that people see and experience shapes the reality of what is."[448] Scholars have noted that the ICC should be concerned with "perceptions about its regional focus, and suspicions about the motivations behind this" because the "legitimacy of an institution whose predominantly white judges from Europe and America mete out jus-

445. Koskenniemi & Leino, *supra* note 315, at 575.

446. *Id.* at 578.

447. See notes 309–12 and accompanying text for further discussion.

448. Sirleaf, *supra* note 437, at 228.

tice to black Africans" suggests that the ICC is "universal in name only."[449] The increased skepticism about the court has resulted in threats of and actual non-cooperation with the ICC from the AU and others and the potential emergence of a regional criminal court. A rhetoric and practice of "geographies of justice"[450] has developed to address the perceived biases of the international system. Thus, it would seem that international institutions ignore perceptions at their peril, as these perceptions can shape institutional success and effectiveness.[451]

There are a number of ways that the regional criminal court could help fill the gaps created by the ICC's institutional crisis. First, due to the existence of geographic, historical, and cultural bonds among states of particular regions, decisions of regional bodies may meet less resistance than global bodies.[452] The Malabo Protocol situates the regional criminal court within a larger judicial architecture in the AU. This might result in international criminal justice issues not being marginalized, as states may be more willing to submit to judicial oversight from a regional body.[453] Because the merged court is the primary vehicle for resolving disputes on the continent, states that have acquiesced to the court's general dispute mechanism may also seek to utilize other chambers of the court, including the international criminal law chamber. Further, the existence of two other chambers, one aimed at determining state responsibility, and the other aimed at determining individual criminal responsibility for human rights violations and international criminal law violations, may assist in fostering greater accountability on the continent.[454] In contrast, the fact that the ICC is not embedded within any other judicial institution creates little incentive for states uninterested in pursuing international criminal justice through the court to join the Rome Statute regime.

On the other hand, this assessment may seem too sanguine given the experience of the sub-regional bodies that have adjudicated

449. Schabas, *supra* note 68, at 14.

450. Mark Goodale & Kamari Maxine Clarke, *Introduction*, *in* MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA 1, 14–17 (Kamari Maxine Clarke & Mark Goodale eds., 2010) (discussing the concept of "geographies of international law").

451. *See* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 603 (1999).

452. *See* Beyani, *supra* note 429, at 186.

453. *See, e.g.*, Muigai, *supra* note 109, at 281 (discussing the human rights chamber of the court).

454. *But see* Rau, *supra* note 130, at 689 (arguing that instead of merging two institutions to deal with individual and state level violations, there should be coordination between two distinct bodies).

human rights matters on the continent. These bodies have all experienced varying levels of backlash.[455] Most significantly, the Southern African Development Community's tribunal may provide a cautionary tale, as it effectively had its human rights jurisdiction challenged and is no longer operational.[456] That tribunal, however, never had a mandate to adjudicate human rights claims, which rendered the tribunal's decisions especially sensitive to political controversies.[457] In contrast, the regional criminal court has clear jurisdiction to adjudicate international criminal law violations. In addition, the ability of a regional hegemon to capture the proceedings of a sub-regional body, as was the case with Zimbabwe and the Southern African Development Community's tribunal, may not be easily repeated at a regional level. This is because there are more regional hegemons acting like Nigeria and South Africa than there are at a sub-regional level. This may counteract the ability of one state to exercise undue influence over the regional criminal court. However, there is always the danger of powerful states using regional mechanisms to extract greater concessions than they would be able to in a global setting. We see this happening in other fields of international law such as trade. For example, the popularity of regional free trade agreements like the North American Free Trade Agreement and the Trans-Pacific Partnership is in part due to the inability of states to achieve similar objectives at the global level through the WTO. There is no reason to think that the field of international criminal law will be an exception to the influence of regional hegemons. Thus, in the same way that powerful states on the UNSC shield their allies from potential prosecutions, we may see this duplicated at the regional level.

Yet, because the court is linked to the regional political bodies of the AU, this may also facilitate stricter oversight in the event of non-compliance. The AU is empowered to intervene in the sovereign affairs of other member states in the event of war crimes, genocide, and crimes against humanity,[458] which "evinces African states['] willingness in theory to respond collectively to grave circumstances."[459] The AU has intervened in the Darfur region of Sudan, in Bu-

455. *See generally* Alter, Gathii & Helfer, *supra* note 132 (discussing the backlash that sub-regional courts adjudicating human rights issues have faced from individual states).

456. *See* Alter et al., *supra* note 132, at 777; *see also* Duffy, *supra* note 209, at 182 (noting how the court's human rights jurisdiction ended with the unlawful evictions case in Zimbabwe).

457. For further discussion, see Cowell, *supra* note 209 (noting how the court's human rights jurisdiction was based on the tribunal's own interpretation of its mandate).

458. AU Constitutive Act, *supra* note 116, at art. 4(h).

459. Jeremy Sarkin, *The Role of the United Nations, the African Union and Africa's*

rundi, and in Somalia. The AU has also suspended Mauritania and Togo from membership for unconstitutional changes of government.[460] Other relevant regional bodies that may assist with issues of compliance include the Panel of the Wise, the Peace and Security Council, and the African Standby Force.[461] Of course, the existence of a connection with regional institutions does not completely deal with issues of non-compliance.[462] For example, the AU has been notoriously silent on human rights violations taking place in Zimbabwe and other countries with influential or revered leaders.[463] The regional criminal court could then be subject to the same criticism leveled against the ICC for lack of sufficient political independence from the UNSC, but this time with respect to the AU political bodies.

Nonetheless, it is possible that the regional criminal court will face less difficulty than the ICC has faced in getting African states to cooperate with its decisions. The crisis the ICC is facing on the continent has resulted in South Africa, one of the countries that has played a leading role in human rights, announcing plans to exit the Rome Statute regime.[464] Moreover, other states have also signaled that African states should withdraw en masse from the ICC.[465] Movement from the current crisis, with minimal to no cooperation with the ICC, to at least some cooperation with the regional criminal court would be an improvement. Cooperation even if *de minimis* would not be insignificant because the lack of global or regional police forces necessitates that supranational institutions use shaming[466]

Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect, 53 J. AFR. L. 1, 18–19 (2009).

460. *Id.* at 23.

461. PSC Protocol, *supra* note 172, at arts. 7, 11, 13(1) (providing the authority for the Peace and Security Council, establishing the Panel of the Wise, and providing for the African Standby Force); AU Constitutive Act, *supra* note 116, at arts. 3–4.

462. George William Mugwanya, *International Criminal Tribunals in Africa*, *in* THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 301, 307–10 (Mainsuli Ssenyonjo ed., 2012) (discussing the difficulties securing state cooperation with the criminal tribunals in Rwanda and Sierra Leone); *see also* Beyani, *supra* note 429, at 187.

463. *See generally* Alter et al., *supra* note 132.

464. *South Africa Plans to Leave the International Criminal Court*, REUTERS (Oct. 11, 2015), http://www.reuters.com/article/us-safrica-icc-idUSKCN0S50HM20151011#E86CD8g672d75MkC.97.

465. Agence-Fr. Presse, *supra* note 24.

466. Shaming occurs when such institutions generate social opprobrium by turning alleged perpetrators into social outcasts or forcing alleged perpetrators to face their victims. *See, e.g.*, Aukerman, *supra* note 441, at 69; *see also* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 767 (2004) (discussing

and pressure tactics in order to get nonconforming states to change their behavior. These strategies may be more effective "at a regional level where states are in constant contact."[467]

The court's proximity to those affected could also increase its legitimacy and credibility with Africans. Regional bodies may be better placed to respond to human rights violations because of their ability to develop more familiar systems of redress.[468] For example, in addition to imposing sentences[469] and forfeiture of any property[470] following a conviction, the court is empowered to provide compensation and reparation to victims.[471] The Malabo Protocol also provides for the establishment of a trust fund for victims to provide legal aid and assistance.[472] While the ICC has similar provisions,[473] the regional criminal court may be better placed to fashion remedies that resonate. For example, if the regional criminal court follows the lead of the Inter-American Court for Human Rights in fashioning remedies, it might order communal reparations,[474] or formulate broad reparative and restorative measures,[475] which require the state to end the consequences of a violation through formulating specific policies and programs.[476] The court might also develop something akin to the

how one of the main purposes of shaming is to expose perpetrators and collaborators "to public outrage").

467. Mugwanya, *supra* note 106, at 42; *see also* Ssenyonjo, *supra* note 128, at 469–75.

468. Mugwanya, *supra* note 106, at 41.

469. Malabo Protocol, *supra* note 1, at art. 46F.

470. *Id.* at art. 43A(5).

471. *Id.* at art. 45.

472. *Id.* at art. 46M.

473. Rome Statute, *supra* note 3, at arts. 68, 75, 79 (providing for victim's representatives, reparations for victims, and the trust fund for victims, respectively).

474. *See, e.g.*, Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006). The court fashioned an order, which provided that the state was to allocate USD 1 million to a community development fund for educational, housing, agricultural, and health projects. In addition, the state was to provide compensation of USD 20,000 each to the nineteen members of the community who died as a result of events.

475. For further discussion, see generally Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279 (2011).

476. *See, e.g.*, Miguel Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006) (providing, *inter alia*, that the state needed to carry out a public act of acknowledgment of its international responsibility in relation to the violations declared and for satisfaction of the next of kin; to conduct a public ceremony covered by the media; to carry out human rights education and programs for the security sector; and to create a monument for those who died as a form of reparation).

margin of appreciation doctrine used by the European Court of Human Rights[477] "to avoid determining issues upon which there is great regional diversity."[478] Additionally, the court could seek to work with other structures in the AU to provide redress, such as the Peace Fund or the Post-Conflict and Reconstruction Framework.[479] This is another example of how the court's linkages with other regional bodies of the AU may prove to be beneficial.

Regional courts are also better "equipped to take into account variations in procedural traditions."[480] For example, the court might even require a convicted defendant to participate in local reconciliatory procedures as a means of securing reparations to victims. It is premature to determine how broadly the court will construe these provisions. Yet, the court could potentially be a vehicle for regional innovation in providing fuller redress to victims. This would be an improvement on the "imagined victims" of international justice actors. These "imagined victims" always demand retributive justice and support the ICC unquestionably, when in reality, victims have diverse desires for redress, which also emphasize reparative and restorative justice.[481] This is particularly important in some communities within African countries where justice is conceptualized in reference to reconciliatory and/or redistributive processes, rather than a retributive process.[482]

The regional criminal court could also potentially address charges of a foreign institution imposing its will. The sensitivities to Western intervention in Africa, given the continent's history with slavery, colonialism, and neo-colonialism,[483] may allow the regional

477. *See, e.g.*, Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U. S.F. L. REV. 1, 49 (2005) (explaining that the concept of margin appreciation allows for "countries to differ in what is acceptable under the terms of the Convention based on cultural differences").

478. Schabas, *supra* note 68, at 21.

479. *See* Protocol Relating to the Establishment of the Peace and Security Council of the African Union, arts. 7, 21 (Jul. 9, 2002), http://www.au.int/en/sites/default/files/Protocol_peace_and_security.pdf (establishing and qualifying the need for the AU's Peace Fund and Post-Conflict Reconstruction Framework).

480. Schabas, *supra* note 68, at 19.

481. Laurel E. Fletcher, *Refracted Justice: The Imagined Victim and the International Criminal Court*, *in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 302, 313 (Christian De Vos, Sara Kendall & Carsten Stahn eds., 2015).

482. *See id.* at 303 (discussing the varied demands of victims); *see also* Matiangai V.S. Sirleaf, *The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 CARDOZO L. REV. 2263, 2337–40 (discussing the same).

483. For further discussion, see Richardson, *supra* note 95, at 88–89; *see also* Jalloh,

body to operate with greater freedom, and with less perceived baggage compared to the ICC. However innocuous the ICC's operations in Africa may be, global institutions are not always "optimally efficient" and different regions may have "regional particularities that global mechanisms cannot penetrate."[484] The forces of regionalism, Pan-Africanism, and the ICC's failure to manage the crisis with the AU have allowed for a rhetoric and practice of "African solutions to African problems" to take hold. The development of the regional criminal court can be understood as an embodiment of this statement. African states may have surmised that, if the ICC is going to focus its energies on Africa, then it is a reasonable response to create an African regime with personnel and judges from the region.[485] The likelihood of norm promotion may also be greater as a result, due to the proximity of the regional body to the communities impacted by the human rights violations.[486] It is also conceivable that the regional body may be similarly distant from the place of the crimes as the ICC and that its remoteness could impact its effectiveness.[487]

There are numerous political, financial, and other obstacles that may impede the regional criminal court's ability to offer a robust alternative. Once established, the regional criminal court will likely also face credibility issues. It is likely that the court will face challenges regarding political will to enforce decisions, funding constraints, and the issue of official immunity. Additionally, the regional court will probably encounter challenges ensuring international fair trial standards and conducting its proceedings with sufficient transparency. Moreover, the court will likely have difficulty guarding against bias accusations, particularly when the individuals or entities are from outside of the African region. Furthermore, the regional criminal court may suffer from less judicial and lawyering experience than exists at the international level. The regional criminal court may also face similar challenges that the ICC has in the selection of its cases and the timing of indictments given peace and justice considerations. Likewise, the limitations of regionalism might make an escape to a universal system as a potential check necessary. For exam-

supra note 57, at 452.

484. HAO DUY PHAN, A SELECTIVE APPROACH TO ESTABLISHING A HUMAN RIGHTS MECHANISM IN SOUTHEAST ASIA: THE CASE FOR A SOUTHEAST ASIAN COURT OF HUMAN RIGHTS 14 (2012).

485. Schabas, *supra* note 68, at 18.

486. *See* Williams, *supra* note 42, at 59 (discussing how regional organizations may be better at persuading their neighborhood that their approach is legitimate because of local knowledge and proximity).

487. *See* Rau, *supra* note 130, at 695.

ple, regional powers may tend to distort or even abuse regional processes[488] by using the court to further political aims or protecting allies from the court's reach. Yet, the danger of political manipulation is present at the national, regional, and international level. It may be that the regional level presents a useful midway point of balancing these concerns.[489] The regional body might achieve a healthy balance between the local and the international with the former being too close and susceptible to political capture of local elites, and the latter being too remote to fully appreciate context.

For all of the reasons enumerated above, the regional criminal court may be able to position itself as the institution with the most resonance on the continent. The ICC's institutional crisis makes it unlikely that it will be able to fulfill the role of a comprehensive institution in the near future. The ICC, faced with a growing legitimacy gap in Africa, needed to engage in "legitimation" to justify its roles and practices and ground them in the wider social context.[490] Yet, the ICC has failed to do so, which has led to the emergence of a regime complex and a burgeoning regime shift.

C. Regionalization of International Criminal Law

This Article has shown that regional integration efforts allow for innovation and can influence the development of regime complexes. Of course, regional integration efforts are also occurring in other areas of the world. However, the unique mixture of deepening regional integration and the crisis the ICC is facing in Africa has led to the development of an emerging regime complex in international criminal justice. The ICC has not penetrated or intervened in any other region as much as it has in Africa, so it makes sense that this would occur in Africa first. This subsection examines the potential implications of the regionalization of international criminal law.

Reconstituting international criminal justice as a regional idea will add significance to international criminal law as a "concrete and not abstract concept."[491] Regional systems benefit from states with

488. *See generally* Christoph Schreuer, *Regionalism v. Universalism*, 6 EUR. J. INT'L L. 477 (1995).

489. *See* Burke-White, *supra* note 233, at 742; *see also* Jaya Ramji-Nogales, *Bespoke International Criminal Justice at the International Criminal Court* 3 (Temple Univ. Legal Studies Research Paper Series, Research Paper No. 2014-31, 2014) (discussing the "inescapably political nature" of the ICC).

490. Zaum, *supra* note 43, at 8.

491. *See* Beyani, *supra* note 429, at 190.

greater socioeconomic, environmental, and security interdependence, because it encourages greater compliance with the decisions of regional bodies.[492] Other scholars have also argued convincingly that "regional problems of criminality deserve regional approaches."[493] For example, one scholar has asserted that:

> [Regionalism can] provide a hitherto unavailable means of balancing the benefits and dangers of both supranational and national enforcement. In terms of cost, legitimacy, political independence, and judicial reconstruction, regionalization may be a normatively preferable means of enforcing international criminal law, [which] merits attention as a viable part of a system of international criminal law enforcement.[494]

Regional mechanisms like the criminal court can help to serve as intermediaries "between the state's domestic institutions which violate or fail to enforce human rights and the global human rights system which alone cannot provide redress to all individual victims of human rights violations."[495] The ICC will never be able to deal with all situations involving international crimes and, even where it does operate, the issuance of lopsided indictments means that a criminality gap will persist. The regional criminal court could theoretically help to fill this gap by prosecuting situations that the ICC does not, by prosecuting quotidian crimes the Rome Statute does not cover, and by prosecuting individuals and entities that the ICC has not indicted or cannot indict. The creation of a regional criminal court may allow the ICC to concentrate its attention on the most severe international situations, allowing it to dedicate its limited resources and staff most effectively.

A regional approach will similarly limit the difficulties of determining competing claims to the "duty to prosecute"[496] and trying to balance one society's rights and interests over another, as well as balancing victims' rights, by attempting to adjudicate which society "has the most valid claim in any one case."[497] A regional body would circumvent situations where several states have a keen interest in exercising jurisdiction, and where one state's exercise of juris-

492. Mugwanya, *supra* note 106, at 42.

493. Schabas, *supra* note 68, at 18; *see also* Burke-White, *supra* note 233, at 730.

494. Burke-White, *supra* note 233, at 730.

495. Mugwanya, *supra* note 106, at 41.

496. For more on the emerging duty to prosecute, see *supra* note 346.

497. Frédéric Mégret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT'L L.J. 725, 739 (2005).

diction inevitably frustrates the aspiration of the other state(s).[498] A regional criminal court's jurisdiction could be based on the reality of the conflict lines, both territorially and temporally. Significantly, this means that the regional court could investigate and prosecute crimes occurring in all affected states. Investigations and prosecutions could examine all aspects of criminality, including the transnational nature of abuses, and not arbitrarily focus on one select instance, limiting the problems posed by lopsided prosecutions and investigations.[499] A regional approach would also deal with double jeopardy concerns raised by the possibility of multiple prosecutions from different states.

A regional body could presumably fulfill the interests of all affected States in seeking "justice,"[500] instead of the current situational approach of the ICC, which atomizes conflicts. For example the ICC's prosecution of Jean-Pierre Bemba Gombo, a former Vice President and warlord from the DRC,[501] for committing war crimes in the neighboring CAR does not address any violations he allegedly committed in the DRC.[502] Prosecuting select instances of criminality is unsatisfactory, and victims from the DRC's interests in Bemba's prosecution might be negatively impacted by the ICC's failure to adopt a regional approach.[503] A regional court would be better equipped to address the regional dimensions of many conflicts and could be seen as a better arbiter than national or international tribunals. Moreover, given the analysis above, regional action might be preferable to international action, particularly in situations where massive violations have taken place across societies in a region.

The increasing relevance of regionalism in international relations could also influence other regions to expand the sphere of influence of their regional bodies from economic integration to human rights issues, and even to international criminal law and systemic quotidian violations. The legal borrowing or "transplanting" of institutions[504] to different regions is by no means a recent phenomenon.[505]

498. Sirleaf, *supra* note 221, at 273.

499. *Id.*

500. *Id.*

501. *See Case Information Sheet, The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, https://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf (last updated Mar. 21, 2016).

502. *See Central African Republic*, ICC, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/Pages/situation%20icc-0105.aspx (last visited Mar. 14, 2016).

503. Sirleaf, *supra* note 221, at 272.

504. Alan Watson, the scholar who coined the term "legal transplants," defined it as

States may even seek to create regional customary criminal law for some behaviors that are endemic to particular regions. For example, the Inter-American Court of Human Rights has developed a rich jurisprudence on the "right to truth" and forced disappearances due to the prevalence of authoritarian regimes in the region.[506] Similarly, the regional criminal court in Africa could develop a regional jurisprudence on such crimes as piracy, or the unconstitutional change of government due to the prevalence of these issues in Africa.[507] The emergence of a regime complex in international criminal law would allow for regional innovation and differentiation on the crimes worthy of regional, if not international, attention.

Admittedly, the general application of my analysis is limited, as I only provided an in-depth analysis of one region. My analysis above is also very state-centric and does not adequately examine the role of non-state actors like non-governmental organizations and individuals' views on regionalization. Much more research is needed using other regions to determine definitively how these factors are playing out elsewhere. It is unclear whether we will see the regionalization of international criminal justice issues in other regions. Yet, according to one scholar, regions have been "the defining characteristic of the modern generation of international tribunals."[508] Indeed, there is already some evidence that regional human rights bodies are

"the moving of a rule or a system of law from one country to another, or from one people to another." ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21 (1974).

505. *See, e.g.*, Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 605–07 (2010); Tanja A. Börzel & Thomas Risse, THE TRANSFORMATIVE POWER OF EUROPE: THE EUROPEAN UNION AND THE DIFFUSION OF IDEAS 7–8 (KFG, Working Paper No. 1, 2009), http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/WP_01_Juni_Boerzel_Risse.pdf. *See generally* Penelope (Pip) Nicholson, *Comparative Law and Legal Transplants Between Socialist States: An Historical Perspective*, *in* LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 143 (Tim Lindsey ed., 2007); Wade Jacoby, *Inspiration, Coalition and Substitution: External Influences on Postcommunist Transformations*, 58 WORLD POL. 623 (2006) (reviewing books considering the role that the United States and Western Europe have played in encouraging post-communist institutional change).

506. Inter-American Convention on Forced Disappearances of Persons pmbl., Jun. 8, 1994, 33 I.L.M. 1994.

507. Baloyi, *supra* note 231 (discussing the prevalence of unconstitutional change of government); *see also* Sandra L. Hodgkinson, *Current Trends in Global Piracy: Can Somalia's Successes Help Combat Piracy in the Gulf of Guinea and Elsewhere*, 46 CASE W. RES. J. INT'L L. 145, 147 (2013) (discussing the prevalence of piracy in Somalia, its recent decline, and the emergence of piracy in Eastern Africa and the Gulf of Guinea).

508. Schabas, *supra* note 68, at 10 (discussing how the ICTY and the ICTR were also created to prosecute crimes occurring over certain regions).

beginning to address international criminal law issues outside of Africa. For example, the Inter-American Court of Human Rights has required and is monitoring the prosecutions of international criminal law violations in approximately fifty-one cases across fifteen states.[509] The quasi-criminal review of the Inter-American Court puts greater emphasis on fostering national prosecutions and is more deferential to local processes of justice.[510] This mechanism for fostering international criminal accountability in the Americas goes beyond the court's strictly human rights mandate.[511] The Inter-American Court innovated by construing prosecutions for international criminal law violations as an equitable remedy to human rights violations.[512] The African human rights system is improving on this innovation by seeking to adjudicate both international criminal law violations and systematic quotidian crimes regionally. This is noteworthy when one considers that "no state has ever fully complied with an Inter-American Court order to prosecute or punish an international crime."[513] Both regions indicate that the expansion of the sphere of influence of regional human rights bodies to encompass international criminal law issues is a phenomenon that is not fleeting.

CONCLUSION

The main takeaway from the above analysis is that regionalism can influence the development of regime complexes. In addition, crises are important predictors of institutional change and development. Moreover, regional integration efforts may allow for innovation and expand to include criminal law and certain aspects of international criminal law. This Article has identified an emerging regime complex in a previously unacknowledged area. Over time, if there is a convergence of the interests of states, the ICC could emerge as a comprehensive institution. Yet, the present reality suggests that a regime complex in the field of international criminal law is here to

509. Alexandra Huneeus, *International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 2 (2013).

510. *Id.*

511. O.A.S. Res. 448 (IX-0/79), Statute of the Inter-American Court of Human Rights (1980); *see also* Huneeus, *supra* note 509, at 11–12 (noting that, although the court is not a criminal court, it supervises prosecutions, tells states how to investigate, names individuals who should be investigated, and makes suggestions about connections between cases, and discussing how this has not been without controversy).

512. Huneeus, *supra* note 509, at 6.

513. *Id.* at 15.

stay. International justice advocates may be concerned that the regionalization of international criminal law will result in a concession to moral relativism or a return to hegemons exercising outsized influence over particular regions. Yet, if the field of international human rights law is any indication, regionalization of international criminal law may lead to greater enforcement and promotion than is possible at the international or domestic level.