SELECT ESSAYS ON GOVERNANCE AND ACCOUNTABILITY ISSUES IN PUBLIC LAW

EDITORS
HENNIE STRYDOM
JOANNA BOTHA

7

THE RELATIONSHIP BETWEEN THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLE'S RIGHTS AND REGIONALISM

*Sabreen Hassen**

7.1 INTRODUCTION

Sudanese President, Omar Al-Bashir, was the first sitting head of state to be indicted by the International Criminal Court (ICC). This has resulted in tension between the African Union (AU) and the ICC. The AU's initial bone of contention with the ICC was that directly after the Al-Bashir warrants, African states became the sole focus of the ICC's investigations and prosecutions.¹ Other African states which have been the focus of the ICC include Kenya, Central African Republic, Libya, Republic of Côte d'Ivoire, Democratic Republic of Congo and Uganda.² The ICC has been accused as having a Western or Northern concept of justice as opposed to an African concept of justice.³ Professor Dire Tladi, an expert in Public International Law in Africa, questions how the quest for international justice by the ICC can be regarded as imperialistic, colonial or even racist, when the respect for human rights is a common goal for all states.⁴

- 1 Swart and Krisch "Irreconcilable differences? An analysis of the standoff between the African Union and the International Criminal Court" 2014 *AJICJ* 38-40.
- 2 See generally *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11; *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08; *The Prosecutor v Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11; *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* ICC-02/11-01/15; *The Prosecutor v Germain Katanga* ICC-01/04-01/07; *The Prosecutor v Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.
- 3 Slye "Reflections on Africa and international criminal law" in Slye (ed) *The Nuremburg principles in non-western societies: A reflection on their universality, legitimacy and application* (2016) 232.
- 4 Tladi "The African Union and the International Criminal Court: The battle for the soul of international law" 2009 *SAYIL* 57-58.

* LLB, LLM; Lecturer in the Department of Practical Business Law, Faculty of Law, University of Johannesburg.

As a direct result of the tension between the AU and ICC, African States have mobilised towards creating a regional court with international criminal law jurisdiction. The African Court of Justice and Human and People's Rights (ACJHPR), initially only had jurisdiction over human rights violations and any disputes regarding the AU's treaties or Constitutive Document. The ACJHPR was then granted jurisdiction over international crimes. As a result of the expansion of the courts' jurisdiction, the ACJHPR will be the first regional court with jurisdiction over international crimes. To date, regional courts are only used to regulate human rights in Europe and South America and not to prosecute international crimes.⁵

Shortly after Al-Bashir's controversial visit to South Africa in 2015 – for the AU Summit – South Africa gave notice of its intention to withdraw from the Rome Statute,⁶ but was subsequently ordered, by the South African High Court, to revoke the notice of withdrawal because it was unconstitutional.⁷ This decision of the South African High Court was later confirmed by the ICC's Pre-Trial Chamber.⁸ To date, South Africa has no yet withdrawn from the Rome Statute and therefore remains within the ICC's jurisdiction.

Burundi was the first African state to successfully withdraw from the Rome Statute.⁹ Neither South Africa nor Burundi have signed the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and People's Rights (Malabo Protocol). Assuming South Africa had successfully withdrawn from the Rome Statute, like Burundi, a lacuna would have been created. This is because South Africa and Burundi would have – in part – excluded themselves from the ICC's jurisdiction and would not have included themselves in the ACJHPR's jurisdiction. The new ACJHPR could have the potential to close this gap and ensure that international crimes within the African region do not go unpunished.

The ACJHPR has been severely criticised,¹⁰ but has the potential to transform and develop international criminal law in multiple ways. The Malabo Protocol includes 14 international crimes in the court's jurisdiction. In addition to Crimes Against Humanity, Genocide, War Crimes and the Crimes of Aggression are 10 international

5 European Court of Human Rights, Inter-American Court of Human Rights and the African Court on Human and People's Rights.

6 South Africa: Withdrawal Depository Notification C.N.786.2016.TREATIES-XVIII.10, 19 October 2016.

7 *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) case no 83145/2016 (ZAGPPHC) (unreported).

8 ICC-02/05-01/09.

9 Burundi: Withdrawal C.N.805.2016.TREATIES-XVIII.10, 28 October 2016.

10 See generally Du Plessis "A new regional international criminal court for Africa?" 2012 2 *SACJ* 286; Viljoen "AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol" <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-africancourt-protocol/> (2016-08-15); Du Plessis "Implications of the AU decision to give the African Court jurisdiction over international crimes" *Institute for Security Studies* 2012 1.

crimes which plague the African continent on a daily basis.¹¹ The inclusion of these quotidian crimes is just one example of how international criminal law will be developed through this court.

Regional courts have managed to regulate areas such as piracy, environmental pollution, money laundering and human rights successfully. With this in mind, one should consider that international criminal law may be able to be effectively managed at a regional level as well.

This chapter will examine the relationship between the ACJHPR and regionalism. The first part of this chapter will provide the reader with a background to the current regional court system which protects human rights in Africa. This will be followed by an outline of the process in which the ACJHPR was created; how this regional court with human rights jurisdiction ultimately acquired its international criminal jurisdiction.

The second part of this chapter will examine the role of regionalism in international criminal law as a whole. Part two will determine the effect that this new court will have with special reference to an intensification of the regime complex already present within international criminal law, as well as the creation of a regime shift within international law.

In considering regionalism, a *grossraum* has been identified as a model of regionalism which has been used previously by Western states. A *grossraum* is described as a “political idea with which other member states broadly identify, and which they accept as generally legitimate on the basis of their overlapping cultural traditions and aspirations”.¹² By creating the ACJHPR, African states are identifying with a political idea based on their cultural traditions. The last part of this chapter will explain how the ACJHPR could be described as a *grossraum* model, with specific reference to the characteristics a *grossraum* should have, for example the political idea, geographical links in territory and a leading power.

7.2 BRIEF BACKGROUND OF THE REGIONAL COURT SYSTEM PROTECTING HUMAN RIGHTS IN AFRICA

Before we can explore the ACJHPR, it is necessary to familiarise oneself with the human rights court system in Africa. The Organisation of African Unity (OAU) was established in 1963.¹³ A number of factors forced the OAU to take its human rights protection more seriously. Amongst these factors was a pressure on Africa to create

11 Crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources.

12 Schmitt “Grossraum versus universalism: The international legal struggle over the Monroe Doctrine” in Legg (ed) *Spatiality, sovereignty and Carl Schmitt: Geographies of the nomos* (2011) 101.

13 Organisation of the African Union Charter.

a regional human rights protection mechanism, the importance given to human rights on an international level, the fall of many dictatorships within Africa,¹⁴ as well as the human rights violations being committed on the continent itself.¹⁵

The African Charter on Human and People's Rights (African Charter) was adopted by the OAU in 1981.¹⁶ However, it only entered into force in 1986. The African Charter, also referred to as the Banjul Charter, established the African Commission on Human and Peoples Rights (African Commission).¹⁷ The African Commission is primarily tasked to promote and protect human and people's rights.¹⁸ The African Commission is a quasi-judicial body and may only issue recommendations, which are not formally binding.¹⁹

In 1988, the OAU adopted the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (African Human Rights Court Protocol).²⁰ The African Human Rights Court Protocol established the African Court on Human and People's Rights (ACHPR),²¹ which would complement the African Commission in protecting human rights.²² The African Human Rights Court Protocol required 15 ratifications to enter into force.²³ Ratification was slow and, as a result, the African Human Rights Court Protocol only entered into force in 2002. In the four years between the adoption and entry into force, the OAU was dissolved and replaced by the African Union (AU).²⁴

In 2003, the AU sought to create the African Court of Justice,²⁵ which would be tasked with adjudicating any disputes arising from any AU related treaty or document.²⁶ Before the Protocol of the Court of Justice of the African Union received the 15 ratifications required to enter into force,²⁷ the AU decided to merge the African

14 Bekker "The African human rights system: An uphill struggle" 2009 *German Yearbook of International Law* 46-48.

15 Heyns "The African regional human rights system: The African Charter" 2004 *Penn State Law Review* 679-685.

16 The African Charter on Human and People's Rights.

17 A 30 The African Charter on Human and People's Rights.

18 A 45(1) & 45 (2) The African Charter on Human and People's Rights.

19 A 53 The African Charter on Human and People's Rights.

20 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

21 A 1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

22 A 2 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

23 A 34(3) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

24 Constitutive Act of the African Union.

25 A 2 The Protocol of the Court of Justice of the African Union.

26 A 19 The Protocol of the Court of Justice of the African Union.

27 A 60 The Protocol of the Court of Justice of the African Union.

Court on Human and People's Rights and the African Court of Justice.²⁸ The merged court would be the African Court of Justice and Human Rights.²⁹

7.3 CREATION OF THE ACJHR³⁰

The thought of an African regional court with international criminal jurisdiction is not a new concept. There are two periods of time which must be distinguished: the first being the mere notion of a regional criminal court, the second being an actual movement towards the creation of such a court.

A regional court that would have international criminal jurisdiction was initially suggested by Guinea during the drafting of the African Charter on Human and People's Rights in 1980.³¹ The idea lay dormant for two decades and resurfaced in 2004. While recommending that the ACHPR be merged with the African Court of Justice (ACJ), Nigerian President, Olusegun Obasanjo – the chairperson of the AU Assembly at the time – questioned why the ACJ could not have both a human rights and criminal division as well.³² 2006 saw a re-emergence of the idea by the committee established by the AU to advise on the possibility of prosecuting Hissen Habre, the former President of Chad. The committee recommended that the proposed African Court of Justice and Human Rights (ACJHR)³³ should be enabled to hear international crimes.³⁴ International criminal jurisdiction was again suggested in the 2007 African Charter on Democracy, Elections and Good Governance, which stated, "perpetrators of unconstitutional changes of government may also be tried before the competent court of the Union",³⁵ thus hinting at the creation of a court with international criminal jurisdiction in the future.³⁶

From 2009 onward, there was now a concerted effort to create this regional court with international criminal jurisdiction. In 2009, under the direction of the African Union Commission, the Pan African Lawyers Union (PALU) began an enquiry

28 A 1-3 The Protocol on the Statute of the African Court of Justice and Human Rights.

29 A 2 The Protocol on the Statute of the African Court of Justice and Human Rights.

30 While the protocol establishing the ACJHR is called the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, article 8 specifically states "In the Protocol and the Statute wherever it occurs "African Court of Justice and Human Rights" is deleted and replaced with "African Court of justice and Human and People's Rights".

31 Ouguergouz *La Charte Africaine des droits de l'homme et des peuples* (1993) 72.

32 Report on the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, EX.CL/162 (2005).

33 The merged ACHR and ACJ.

34 Report of the Committee of Eminent African Jurists on the Case of Hissene Habre www.hrw.org/legacy/justice/habre/CEJA_Report0506.pdf (2016-08-05).

35 A 25(5) African Charter on Democracy, Elections and Good Governance (2012).

36 Amnesty International *Malabo Protocol: Legal and institutional implications of the merged and expanded African Court* (2016) 7.

into putting forward proposals to amend the ACJHR Protocol.³⁷ PALU was also tasked with investigating the consequences that would ensue if the court is granted jurisdiction over crimes against humanity, genocide, war crimes and other international crimes.³⁸ PALU submitted a draft for the amendments to the Protocol, as well as a report on its findings in this regard in 2010.³⁹ African Ministers of Justice met in 2012 and endorsed the Draft Protocol suggested by PALU.⁴⁰ The AU Assembly refused to adopt the 2012 Draft Protocol. The AU Assembly instructed the AU Commission and ACHR to submit a definition for unconstitutional change of government as a crime, as well as conducting an investigation into the financial and structural repercussions of including criminal jurisdiction to the ACJHR.⁴¹

African leaders met in early 2014 to discuss the 2012 draft. The aim of this meeting was, amongst others, to define the crime of ‘unconstitutional change of government’, as well as to decide whether or not to include the immunity provision.⁴² The crime unconstitutional change of government was defined and is contained in Article 28E.⁴³ The original 2012 Draft Protocol made no provision for Head of State immunity; however, an immunities provision was inserted into the 2014 draft at the First AU Ministerial Meeting of the Specialized Technical Committee on Justice and Legal Affairs.⁴⁴ The immunities provision which was already a cause for concern on its own was expanded. Traditionally immunity *ratione personae* (personal immunity), is only awarded to Heads of State and Ministers of Foreign Affairs.⁴⁵ The provision in the 2014 draft, was expanded to include not only heads of state and ministers of foreign affairs, but also the undefined category of “other senior state officials”.⁴⁶ Later that year, the AU Assembly adopted the 2014 draft, which included the contentious immunities provision.⁴⁷

37 Amnesty International (n 36) 9.

38 Decision on the implementation of the Assembly Decision on the abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec. 213(XII) (2009); Decision on the implementation of the Assembly Decisions on the International Criminal Court Doc. Assembly/AU/Dec.366 (XVII) (2011).

39 Amnesty International (n 36) 9.

40 See generally The Report, The Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General on Legal Matters EX.CL/731(XXI) (2012); “Opening statement by HE Mr Erastus Mwencha, Deputy Chairperson of the African Union Commission at the First Session of the Specialized Technical Committee on Justice and Legal Affairs” www.au.int/en/sites/default/files/newsevents/workingdocuments/13148-wd-dcp-speech.pdf (2016-07-29).

41 Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Assembly/AU/Dec.427 (XIX) (2012).

42 Opening statement by Prof Vincent O Nmeihelle, legal counsel and director for Legal Affairs of the African Union Commission, 1st Session of the Specialized Technical Committee on Justice and Legal Affairs (Government Legal Experts) www.au.int/en/sites/default/files/newsevents/workingdocuments/13148-wd-lc-opening_statement-stc_meeting-experts-may_2014_0.pdf (2016-07-29).

43 Statute of the African Court of Justice and Human Rights (as amended).

44 Amnesty International (n 36) 11.

45 Dugard *International Law: A South African Perspective* (2011) 253.

46 A 46Abis Protocol on Amendments to the Protocol of the African Court of Justice and Human Rights (Malabo Protocol) 2014.

47 Decision on the Draft Legal Instruments Assembly/AU/Dec.529 (XXIII) (2014).

The Malabo Protocol will enter into force once it has received the minimum 15 ratifications.⁴⁸ At the time of writing, only 15 out of the 55 African Union states have signed the Malabo Protocol.⁴⁹ None of these states have ratified the Protocol as yet.⁵⁰ South Africa has not signed the Malabo protocol.

It is important to note that the Malabo Protocol does not create a separate court. It simply adds on international criminal jurisdiction to the jurisdiction of the ACJHR, which the AU created in 2008. The ACJHR will now be known as the ACJHPR.⁵¹ Effectively the ACJHPR will now have three chambers: a General Affairs Section, a Human and People's Rights Section and an International Criminal Law Section.⁵²

Amnesty International aptly stated that "the proposal to extend that mandate of the ACJHR to include a criminal jurisdiction would probably be still-born if it were not for specific events that motivated the AU to seriously consider it."⁵³ This could also be described as an international crisis rationale.⁵⁴ Katzenstein explains that an international crisis is "events that challenge an existing legal rule or rules that some seek to protect".⁵⁵

Prior to the indictment and trial of the Kenyan President, Uhuru Muigai Kenyatta and his Deputy, William Ruto, France and Spain had both issued indictments against Rwandan State officials, under the principle of universal jurisdiction.⁵⁶ However, it was ultimately the indictment of Sudanese President Al-Bashir⁵⁷ that put the final nail in the ICC's coffin for the AU. This is one of the reasons that steered the African continent towards the creation of a regional court with international criminal jurisdiction.

Each of the aforementioned indictments qualify as an international crisis. These indictments all challenge the customary international law principle of immunity. Immunity is the legal rule which is not only being challenged but also being protected by African states.

48 A 11 Malabo Protocol.

49 Benin, Chad, Comoros, Congo, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, Sao Tome and Principe and Uganda.

50 List of countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf (2020-06-01).

51 A 8 Malabo Protocol.

52 A 19 Statute of the Court of Justice and Human Rights (as amended).

53 Amnesty International (n 36) 9.

54 Katzenstein "In the shadow of crisis: The creation of international courts in the twentieth century" 2014 *Havard International Law Journal* 151-153.

55 Katzenstein (n 55) 153.

56 African Union-European Union expert report on the principle of universal jurisdiction, Council of European Union 8672/1/09. REV 1 (2009).

57 *The Prosecutor v Omar Hassan Ahmad Al-Bashir* ICC-02/05-01/09.

Some have criticised the AU's initiative to create this 'regional criminal court'. The main points of criticism are that its creation is, firstly in fact a means for protecting African Heads of State that are guilty of perpetrating international crimes, and secondly a hostile backlash against the ICC for focusing on the African continent.⁵⁸

The motivation behind the creation of the court is not the only aspect under scrutiny. Concern has been expressed over the manner in which the Malabo Protocol was drafted. Unfortunately, African governments were not invited to attend the 'validation workshops'⁵⁹ which took place in South Africa in August and October–November 2010.⁶⁰ These workshops were attended by the AU Commission, legal advisors of various AU institutions and legal advisors of the Regional Economic Communities (RECs).⁶¹ As a result, the African states, which will be most affected by the Malabo Protocol, have had only one year to review it.⁶² States from Southern Africa have raised concern that the process did not allow for sufficient time for adequate consideration.⁶³

Du Plessis has described the drafting of the Malabo Protocol as "rushed".⁶⁴ He believes that the process did not involve sufficient participation from Civil Society Organisations, NGO's and the public. The criticism is justified since the concerns raised by Civil Society Organisations were not addressed, NGOs were not asked for comment, the Malabo Protocol was not posted on the AU's website and it was not posted in other media sources for public comment.⁶⁵ Du Plessis is of the opinion that the current human rights protection mechanisms in Africa are at risk of being weakened by the Malabo Protocol – which he describes as a "deeply flawed legal instrument".⁶⁶

Viljoen echoes Du Plessis' sentiment. In a blog post, Viljoen raises the following concerns: firstly, that the focus on human rights has been reduced by including a criminal section and secondly that the Appellate Chamber – who will have the authority to overturn the decisions made by the Human Rights Section – may not

58 Amnesty International (n 36) 6.

59 At a validation workshop, key findings are presented to stakeholders, they are given an opportunity to discuss these findings and to ultimately validate the draft being considered.

60 Carter, Ellis and Jalloh *The International Criminal Court in an effective global justice system* (2016) 245.

61 Deya "Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes" 24 <http://www.osisa.org/openspace/regional/african-court-worth-wait> (2016-10-02).

62 Du Plessis "A case of negative regional complementarity? Giving the African Court of Justice and Human Rights jurisdiction over international crimes" <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-africancourt-of-justice-and-human-rights-jurisdiction-over-international-crimes/> (2016-10-02).

63 Du Plessis (n 62).

64 Du Plessis "A new regional International Criminal Court for Africa?" 2012 *SAJCJ* 286-288.

65 Du Plessis (n 64) 288.

66 Du Plessis (n 62).

have adequate expertise in the human rights field.⁶⁷ Du Plessis describes the Malabo Protocol as an example of “negative complementarity”.⁶⁸

Negative complementarity, he explains, occurs when efforts are made, supposedly, to advance international criminal justice but “are intended to distract from or undermine those ideals”.⁶⁹ This could be for example using a mechanism – other than the ICC – which in all likelihood will not be able to succeed, to prosecute international crimes.⁷⁰

7.4 THE ROLE OF REGIONALISM

A preference for universalism is clear in both the Covenant of the League of Nations⁷¹ and the Charter of the United Nations (UN Charter).⁷² The Covenant of the League of Nations acknowledged regional agreements like the Monroe Doctrine.⁷³ The discussion regarding regionalism and universalism with reference to international organisations is a mirror image of the classic argument regarding a preference between centralism and local governance.⁷⁴

The purpose and function of the ACJHPR is comparable to the ICC. Like the ICC, the ACJHPR will have jurisdiction over crimes against humanity, genocide, war crimes, and the crime of aggression. The difference is that the ACJHPR will have jurisdiction over 11 international crimes that the ICC does not.⁷⁵ The additional crimes that the ACJHPR will have jurisdiction over are not the classic or traditional international crimes. The ICC is the universal institution and the ACJHPR is the regional institution and it would be better suited to have jurisdiction over international crimes which are prevalent in its region.

The provisions in the Malabo Protocol which grants immunity to heads of state and senior government officials,⁷⁶ the additional crimes created and the provision of corporate criminal liability are all examples of how different courts – the ACJHPR

67 AU Assembly should consider human rights implications before adopting the amending merged African Court Protocol May 2012 <https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/> (2018-07-09).

68 Du Plessis (n 62).

69 Du Plessis “African efforts to close the impunity gap: Lessons for complementarity from national and regional actions” 2012 *Institute for Security Studies Paper number 241* 7.

70 Du Plessis (n 69) 2.

71 The League of Nations no longer exists; it was replaced by the United Nations in 1945.

72 Schreuer “Regionalism v Universalism” 1995 *EJIL* 477.

73 A 21.

74 Schreuer (n 72) 477.

75 Unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and crime of aggression.

76 A 46 *Abis* Malabo Protocol: “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”

and the ICC – are interpreting the same norms in different and competing manners.⁷⁷ If the ACJHPR receives the required ratifications, it will be the first regional court with international criminal jurisdiction to ever be created.

The relationship that the ICC and ACJHPR will share has not been mapped out in the Malabo Protocol but it is hoped that it will be one of complementarity rather than superiority. Ideally the two courts should work together and share the burden of ensuring that those responsible for committing human rights violations and international crimes are brought to justice. Neither court should believe that it is superior to the other, nor should there be any hostility between them. More often than not, the functions of the universal institution are also assigned to the regional institution, as is the case here.⁷⁸ These functions must be divided between the institutions in a manner which does not result in an overlap.⁷⁹

Since the Nuremburg Tribunal, international criminal law has mainly been enforced at an international level.⁸⁰ This is because states have come together, either because of treaties or the United Nations Security Council's powers and created *ad hoc* tribunals,⁸¹ hybrid tribunals⁸² and ultimately the ICC.⁸³ It is only more recently that international law is being enforced at a national level, either through domestic courts acting under universal jurisdiction or the creation of hybrid international courts like the Special Court for Sierra Leone (SCSL).⁸⁴ There has yet to be enforcement of international criminal law at the regional level.⁸⁵

At the international level of enforcement, the concept of a region has been an important characteristic in defining the jurisdiction of the international tribunals.⁸⁶ The ICTY was granted jurisdiction over “serious violations of international humanitarian law committed in the territory of the former Yugoslavia”.⁸⁷ The ICTR's jurisdiction was also confined to crimes committed within Rwanda.⁸⁸ The Special Court for Sierra Leone's jurisdiction is also limited to crimes committed within

77 Sirleaf “Regionalism, regime complexes and crisis in International Criminal Justice” 2016 *Columbia Journal of Transnational Law* 699-747.

78 Schreuer (n 72) 484.

79 Schreuer (n 72) 484.

80 Burke-White “Regionalization of international criminal law enforcement: A preliminary exploration” 2003 *Texas International Law Journal* 729-730.

81 Such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

82 Such as the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and the Special Court and Residual Special Court for Sierra Leone.

83 Burke-White (n 80) 730.

84 Burke-White (n 80) 730.

85 Burke-White (n 80) 730.

86 Schabas “Regions, regionalism and international law” 2007 *New Zealand Yearbook of International Law* 3-10.

87 SC Resolution 827 S/Res/827 (1993).

88 A 1 Statute of the International Tribunal for Rwanda.

Sierra Leone.⁸⁹ The ICC is the only international tribunal which is truly universal in its nature.⁹⁰ The Security Council may refer any UN member state to the ICC and as a result its territorial jurisdiction is not subject to any limitation.⁹¹

International law enforcement at both international and national levels has its respective advantages and disadvantages.⁹² It is at the regional level of enforcement that a balance between these advantages and disadvantages of supranational and national law enforcement can be achieved.⁹³ Supranational tribunals are exceptionally costly⁹⁴ and more often than not are located far away from the crime scenes and affected communities.⁹⁵ National tribunals are less costly and closer in proximity but are, however, more susceptible to bias and rarely have the necessary judicial resources required for an effective trial.⁹⁶ A regional tribunal provides an alternative which is closer to the crime scenes and affected communities, less expensive than a supranational tribunal, less susceptible to bias than a national tribunal because it would have a variety of judges from different states, more likely to have adequate judicial resources,⁹⁷ familiar with the underlying factors of the dispute and have a greater interest in resolving the matter.⁹⁸ In addition, a regional tribunal will facilitate regional ownership over the crimes.⁹⁹

The increase in international organisations has brought with it the traditional argument between local and centralised governance, but also added some unique features.¹⁰⁰ The universal sector is perceived as being ineffective and has resulted in a move towards regional organisations.¹⁰¹ The move towards regionalism and away from universalism is as a result of multiple factors.¹⁰² The most important factor is the inability of the UN to perform its duties.¹⁰³ Other reasons include the preference to address issues in a smaller forum ensuring greater cooperation, a revival of unity amongst member states and lastly the prohibition of non-member-

89 SC Resolution 1315 S/Res/1315 (2000).

90 Schabas (n 86) 12.

91 Schabas (n 86) 12.

92 Burke-White (n 80) 730.

93 Swart "The prospects for regional and sub regional complementarity in Africa" in Slye (ed) *The Nuremburg Principles in Non-Western Societies, A Reflection of their Universality, Legitimacy and Application* (2016) 217.

94 ICTY and ICTR spent a total of \$695 000 000 and \$1 000 000 000, respectively.

95 Burke-White (n 80) 734.

96 Burke-White (n 80) 734.

97 Schabas (n 86) 19.

98 Swart (n 93) 227.

99 Moghadam "Revitalizing universal jurisdiction: Lessons from hybrid tribunals applied to the case of Hissene Habre" 2008 *Columbia Human Rights Law Review* 471-515.

100 Schreuer (n 72) 477.

101 Schreuer (n 72) 477.

102 Schreuer (n 72) 479.

103 Schreuer (n 72) 479.

state interference.¹⁰⁴ Regional and subregional mechanisms have proved useful in regulating issues such as piracy, environmental pollution, money laundering and human rights.¹⁰⁵ With the international community's waning faith in the Security Council, regional organisations have had no choice but to step up and actively ensure peace and security within their region.¹⁰⁶

Another concept worth mentioning here is the "regionalization of universal jurisdiction".¹⁰⁷ Jebberger highlights that the exercise of universal jurisdiction in Europe has declined.¹⁰⁸ He explains that this is possibly due to states realising that exercising universal jurisdiction is expensive, difficult and tiring.¹⁰⁹ Universal jurisdiction has been criticised for being a "concept of jurisdictional imperialism" because it is almost always exercised by states in the Northern Hemisphere against states in the Southern Hemisphere.¹¹⁰ Cases which have arisen as a result of universal jurisdiction tend to lose momentum from political pressure and judges often struggle to navigate international criminal law provisions.¹¹¹

The 'regionalization of universal jurisdiction' is best illustrated by the creation of the Extraordinary African Chambers (EAC). The EAC was created through an agreement between Senegal and the AU to prosecute Hissene Habre, Chad's former Head of State.¹¹² While the EAC is a hybrid tribunal, it is different from a traditional hybrid tribunal because it is created in a third-party state (Senegal) and exercises universal jurisdiction as opposed international criminal jurisdiction in terms of a treaty.

Enforcement on a regional level is based on two key factors. Firstly, the international legal issue at hand is one that concerns an entire region, secondly because of their geographical proximity to the communities affected by human rights violations and international crimes.¹¹³ Lastly, a regional organisation will be better equipped to enforce the relevant rule in question because of its political relations.¹¹⁴ Regionalism can therefore be defined as "a voluntary pooling of resources for a common purpose by two or more sets of partners belonging to different states",¹¹⁵ to address particular

104 Schreuer (n 72) 479.

105 Burke-White (n 80) 731.

106 Swart (n 93) 215.

107 Jebberger "On behalf of Africa: Towards the regionalization of universal jurisdiction?" in Werle, Fernandez and Vormbaum (ed) *Africa and the International Criminal Court* (2014).

108 Jebberger (n 107) 167.

109 Jebberger (n 107) 167.

110 Moghadam (n 99) 484.

111 Moghadam (n 99) 484.

112 Agreement between the government of the Republic of Sénégal and the African Union on the establishment of the Extraordinary African Chambers within the courts of Sénégal, 22 August 2012.

113 Burke-White (n 80) 733.

114 Burke-White (n 80) 733.

115 Biswara *A rhetoric v reality: A comparative study* (2012) 13.

issues at a level between international enforcement and national enforcement. States create regional organisations because they recognise that certain issues are more effectively addressed collectively, rather than individually.¹¹⁶

It has also been argued that states are more inclined to accept a regional method of enforcement because the benefits of a regional mechanism are greater than the sovereignty costs of such membership.¹¹⁷ Moravcsik describes sovereignty costs as a “surrender of national discretion ... to an international authority”.¹¹⁸ African states are particularly inclined to accept a regional mechanism for these reasons.

As a result of international cooperation, political leaders and heads of state are no longer able to control policy variables as freely as they would have been, had they not been a member to the mechanism.¹¹⁹ For example, the number of members to the Rome State, a supranational mechanism, inhibits the influence that a state can have on the selection of judges which will preside over these international crimes. Whereas in a regional mechanism, such as the ACJHPR, the number of member states are fewer, thereby increasing the possibility that the judge who was nominated by his or her state, will be elected to serve.¹²⁰ As the number of members in the mechanism increase, the more difficult it is to manipulate the policy. The membership and sovereignty costs of a regional enforcement mechanism are significantly lower than those of a supranational mechanism because there are fewer members.¹²¹

There are over 20 regional and subregional organisations within Africa.¹²² The creation of these organisations indicates an enhancement of regionalism on the African Continent.¹²³ The idea of subregional courts acquiring international criminal jurisdiction is not far-fetched. Modern international law academics have acknowledged the co-dependence of International Human Rights Law, International Humanitarian Law and International Criminal Law.¹²⁴ It is not inconceivable to assume that the courts of these subregional organisations will be able to acquire

116 Mills “Reconstructing sovereignty: A human rights perspective” 1997 *Netherlands Quarterly of Human Rights* 267-274.

117 Burke-White (n 80) 746.

118 Moravcsik “The origins of human rights regimes: Democratic delegation in postwar Europe” 2000 *International Organization* 217-227.

119 Burke-White (n 80) 746.

120 Burke-White (n 80) 747.

121 Burke-White (n 80) 746.

122 Economic Community of West African States, Southern African Development Community, East African Community, African Union, Intergovernmental Authority on Development, African Economic Community, Economic Community of Central African States, Common Market for Eastern and Southern Africa, Arab Maghreb Union, New Partnership for Africa’s Development, African Development Bank Group, West African Economic and Monetary Union, Arab League, Community of Sahel-Saharan States, United Nations Economic Commission for Africa, Southern African Customs Union and the African, Caribbean and Pacific Group of States.

123 Sirleaf (n 77) 729.

124 Swart (n 93) 214.

jurisdiction over war crimes and other international crimes as a result of the mutually inclusive relationship between International Human Rights Law, International Humanitarian Law and International Criminal Law.¹²⁵

7.4.1 Regime complexes

Regionalism in this case leads to a regime complex. Regime complexes are “an array of partially overlapping and non-hierarchical institutions governing a particular issue area”.¹²⁶ These complexes form as a result of an overlapping of jurisdictional areas.¹²⁷ The overlap can be caused in two manners.¹²⁸ First, “issue areas” which are governed by international institutions are expanded upon and therefore create an overlap with another international institution.¹²⁹ This expansion is usually as a result of a change in policy demands and not to deliberately cause conflict between the institutions.¹³⁰ The second possibility occurs when a group of states create a new institution which must be integrated within the existing system of institutions.¹³¹ The creation of the ACJHPR would be an example of the second instance.

With regards to international tribunals, the regime complex is intensified because “there is no hierarchy in the international judicial arena”.¹³² While Alter and Meunier acknowledge that “rule complexity” is present within the domestic context as well, it is more difficult to reconcile within the international arena because there is no overarching international body with the final say.¹³³ In the domestic context, the hierarchy is constitutionally regulated,¹³⁴ whereas within the international arena, no obligation can take preference over another¹³⁵ with the exception of *jus cogens* norms. *Jus cogens* norms are “norm[s] that enjoy a higher rank in the international hierarchy than treaty law and even ordinary customary rules”.¹³⁶ The lack of a hierarchy in the international regime complex directly affects the cooperation

125 Swart (n 93) 214.

126 Raustiala and Victor “The regime complex for plant genetic resources” 2004 *International Organization* 277-279.

127 Gehring and Faude “The dynamics of regime complexes: Microfoundations and systemic effects” 2013 *Global Governance* 119-123.

128 Gehring and Faude (n 127) 123.

129 Gehring and Faude (n 127) 123.

130 Gehring and Faude (n 127) 123.

131 Gehring and Faude (n 127) 123.

132 Giorgetti “Horizontal and vertical relationships of International Courts and Tribunals – How do we address their competing jurisdiction?” 2015 *ICSID Review* 98-99.

133 Alter and Meunier “Nested and overlapping regimes in the transatlantic banana trade dispute” 2006 *Journal of European Public Policy* 362-365.

134 Kelsen *General theory of law and state* (1961) 123.

135 Vidmar “Norm conflicts and hierarchy in international law: Towards a vertical international system?” in De Wet and Vidmar (ed) *Hierarchy in international law: The place of human rights* (2012) 13.

136 *Prosecutor v Anto Furundzija* 1998 ICTY IT-95-17/1 260.

between states and the institutions.¹³⁷ This is because a decision made within one institution may be challenged within another institution.¹³⁸

A regime complex in the field of international criminal law will be inherently present because the Malabo Protocol does not explain the relationship that the ACJHPR and ICC will share. This is a perfect example of institutional fragmentation within international criminal law.¹³⁹ Institutional fragmentation is caused by a “lack of dialogue between international institutions”.¹⁴⁰ The ACJHPR is not the only court that will have caused an institutional fragmentation. Other courts which have contributed to the institutional fragmentation of international criminal law are: The Special Court for Sierra Leone,¹⁴¹ the Extraordinary Chambers in the Courts of Cambodia,¹⁴² the War Crimes Chamber of the Court of Bosnia and Herzegovina,¹⁴³ and the Extraordinary African Chambers.¹⁴⁴ Until the ICC and ACJHPR agree on the type of relationship they will share, the regime complex will continue to be intensified. While regime complexes usually create conflict and competition amongst the various institutions, it is also possible that it could result in dividing the workload amongst them,¹⁴⁵ as was the case with the War Crimes Chamber of the Court of Bosnia and Herzegovina and the ICTY.

The ICTY, ICTR, Special Court for Sierra Leone and the Special Tribunal for Lebanon were all conferred concurrent jurisdiction over international crimes committed within their respective regions within the given times.¹⁴⁶ In addition to this, each of these courts enjoyed primacy over their respective national courts.¹⁴⁷ While the ICC also enjoys concurrent jurisdiction, it does not have primary jurisdiction, but rather complementary jurisdiction.¹⁴⁸ Primary jurisdiction enables

137 Alter and Raustiala “The rise of international regime complexity” 2018 *Annual Review of Law and Social Science* 329-331.

138 Alter and Raustiala (n 137) 331.

139 Sirleaf (n 77) 746.

140 Lattanzi “Introduction” in Van den Herik and Stahn (ed) *The diversification and fragmentation of international criminal law* (2004) 5.

141 Security Council Resolution 1315 (2000), S/RES/1315 (2000), 14 August 2000.

142 United Nations Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of democratic Kampuchea, 6 June 2003.

143 Law on Court of Bosnia and Herzegovina, Official Gazette of BiH 49/09.

144 Agreement between the government of the Republic of Sénégal and the African Union on the establishment of the Extraordinary African Chambers within the courts of Sénégal, 22 August 2012.

145 Gehring and Faude (n 127) 120.

146 A 9(1) Statute of the International Tribunal for the Former Yugoslavia; Article 8(1) Statute of the International Tribunal for Rwanda; A 8(1) Statute of the Special Court for Sierra Leone and A 4(1) Statute of the Special Tribunal for Lebanon.

147 A 9(2) Statute of the International Tribunal for the Former Yugoslavia; A 8(2) Statute of the International Tribunal for Rwanda; A 8(2) Statute of the Special Court for Sierra Leone and A 4(1) Statute of the Special Tribunal for Lebanon.

148 A 17(1) Rome Statute.

the international tribunal to “formally request national courts to defer”,¹⁴⁹ the proceedings to it whereas with complementary jurisdiction, the national court must be given first option to initiate proceedings.¹⁵⁰ In addition to the Malabo Protocol not specifying the relationship between the ACJHPR and the ICC, it also does not stipulate whether the international criminal law chamber of the ACJHPR will have primary or complementary jurisdiction.

There are three essential characteristics of regime complexes that have an effect on cooperation.¹⁵¹ Firstly, continuous legal contradictions between the various institutions encourage state parties to ‘forum shop’, which in turn creates conflicting regimes.¹⁵² If the ACJHPR is created, African states will be able to forum shop between it and the ICC depending on how they feel about immunity at the time. Secondly, regimes which are created independently from each other are more likely to clash with each other than institutions which are created with existing institutions in mind.¹⁵³ Lastly, the presence of both the above factors results in the creation of uncertainty within the regime. As a result of the uncertainty within the regime, enforcement becomes highly complicated which, in turn, requires a “greater outlay of resources”, further reinforcing the inequalities between various member states.¹⁵⁴

Regime complexes affect both the enhancement of legal principles and rules as well as politics in general, in several ways.¹⁵⁵ The overlapping rules and institutions within the regime complex mean that, “new rules and institutions are not negotiated on a clean slate”.¹⁵⁶ Rule makers are bound not only by the existing rules, but also the political agendas advanced by these rules.¹⁵⁷ Secondly, as the substantive rules increase in number, there is greater conflict as there are more rules that compete with each other.¹⁵⁸ Third, as there is little to no guidance on resolving the conflict between international rules, there is more likely to be a renegotiation of the international rules, rather than adjudication on the conflict.¹⁵⁹

149 A 9(2) Statute of the International Tribunal for the Former Yugoslavia; A 8(2) Statute of the International Tribunal for Rwanda; A 8(2) Statute of the Special Court for Sierra Leone and A 4(1) Statute of the Special Tribunal for Lebanon.

150 Nouwen *Complementarity in the line of fire: The catalysing effect of the International Criminal Court in Uganda and Sudan* (2013) 15.

151 Struett, Nance and Armstrong “Navigating the piracy regime complex” 2013 *Global Governance* 93-95.

152 Alter and Meunier “The politics of international regime complexity” 2009 *Perspectives on Politics* 13-16.

153 Struett (n 151) 95.

154 Struett (n 151) 95.

155 Peter “International enclosure, the regime complex and intellectual property schizophrenia” 2007 *Michigan State Law Review* 1-14.

156 Raustiala “Density and conflict in intellectual property law” 2007 *UC Davis Law Review* 1021-1025.

157 Raustiala (n 156) 1026.

158 Raustiala (n 156) 1027.

159 Raustiala (n 156) 1028.

Leebron has developed the idea of a regime complex into a conglomerate regime. Conglomerate regimes, he explains,

are regimes that remain somewhat separate, in terms of both norms and institutional structure, within an overarching regime. Like corporate conglomerates, they are marked by important institutional relationships and perhaps common policies among the constituent parts, but also by institutional separation.¹⁶⁰

In essence, what Leebron is describing is a situation in which international criminal law intersects with other regimes relating to different aspects of law. As a result of globalisation, areas of law which would normally be completely unrelated to international criminal law will end up in this international criminal law regime complex.¹⁶¹

7.4.2 Regime shifting

Regime complexes create an opportunity for states to try and “alter the status quo ex ante by moving treaty negotiations, law making initiatives, or standard setting activities from one international venue to another”.¹⁶² This is referred to as a regime shift. There are two types of regimes shifts.

An intra-regime shift is a movement to a different venue within the same regime whereas an inter-regime shift which is a movement to not only a different venue but also a different regime area.¹⁶³ The creation of the ACJHPR will be an intra-regime shift because the venue would have moved from the ICC, a multilateral organisation, to a regional organisation.¹⁶⁴ For states which have withdrawn from the Rome Statute, the ACJHPR will ultimately replace the ICC.

Some authors believe that “forum shifting [regime shifting] is a strategy that only the powerful and well-resourced can use”.¹⁶⁵ Helfer however disagrees. Helfer states that “regime shifting is a game that both strong and weak actors can play”.¹⁶⁶ This view is more plausible as African states are generally viewed as being less developed and less powerful than European states, and are creating an intra-regime shift.¹⁶⁷

Helfer proposes that less developed states, such as African states, can greatly benefit from regime shifting in multiple ways. First, states which have been previously ignored are given the opportunity to change policy objectives to suit them better.¹⁶⁸

¹⁶⁰ Leebron “Linkages” 2002 *American Journal of International Law* 5-17.

¹⁶¹ Peter (n 155) 14.

¹⁶² Helfer “Regime shifting: The TRIPs agreement and new dynamics of international intellectual property lawmaking” 2004 *Yale Journal of International Law* 1-14.

¹⁶³ Helfer (n 162) 16.

¹⁶⁴ Sirleaf (n 77) 757.

¹⁶⁵ Braithwaite and Drahos *Global Business Relation* (2000) 565.

¹⁶⁶ Helfer (n 162) 17.

¹⁶⁷ This is a prime example of imperialism and colonialism in public international law.

¹⁶⁸ Helfer (n 162) 55.

Second, it allows states to evaluate issue areas within the law.¹⁶⁹ Third, it allows these states to “consign an issue area to a venue where consequential outcome and meaningful rule development are unlikely to occur” and thus operating as a safety net for states.¹⁷⁰ Finally, these states are also provided with the opportunity to start creating the political will required for new laws to be made.¹⁷¹

Looking at the current regime shift being created by the AU the aforementioned benefits can be seen. African states which have previously been ignored are now able to create their own policy objectives and exercise an African version of justice. They have also begun to evaluate areas within international criminal law which are problematic. By creating the ACJHPR, the AU is generating the political will to create new laws in international criminal law, for example a change with respect to immunity for sitting heads of state. It is also hoped that the crimes included in the Malabo Protocol will be adopted into the domestic law of African states.

While Helfer believes that less developed states can benefit from regime shifting, Benvenisti and Downs believe that regime shifting harms developing states in the following ways. Firstly by creating more institutions, the scope of multilateral agreements is limited, thereby inhibiting the ability of less powerful states to “build the cross issue coalitions”, which would in turn grant these states greater influence and bargaining powers.¹⁷² Secondly, the membership costs of states to international courts and tribunals are increased by the overlap in jurisdiction as states attempt to fulfil their obligations under the various agreements.¹⁷³ Lastly, powerful states are able to escape their liability for creating the fragmentation if they simply assert that the fragmentation was unintentional.¹⁷⁴ These authors also suggest that powerful states use this approach because they are aware, “that weaker states are not only more numerous than they are, but they are also far more diverse with respect to size, wealth and their level of development”.¹⁷⁵ Whether Helfer’s view or Benvenisti and Downs’ view is a true reflection of the current shift from the ICC to the ACJHPR remains to be seen after – and if ever – the court comes into existence.

7.4.3 *Grossraum*

The term *grossraum* initially referred to a provision of transnational resources in an economic context.¹⁷⁶ This term is now also used in international law and inter-

169 Helfer (n 162) 58.

170 Helfer (n 162) 56.

171 Helfer (n 162) 59.

172 Benvenisti and Downs “The empires new clothes: Political economy and the fragmentation of international law” 2010 *Stanford Law Review* 595.

173 Benvenisti and Downs (n 172) 596.

174 Benvenisti and Downs (n 172) 596.

175 Benvenisti and Downs (n 172) 610.

176 Salter and Yin “Analysing regionalism within international law and relations: The Shanghai cooperation organisation as a grossraum?” 2014 *Chinese Journal of International Law* 819-822.

national relations.¹⁷⁷ *Grossraum* is a model of regionalism.¹⁷⁸ Schmittian describes *grossraum* as a “political idea with which other member states broadly identify, and which they accept as generally legitimate on the basis of their overlapping cultural traditions and aspirations”.¹⁷⁹ A *grossraum* is made up of a group of adjacent states. As such, the internal borders of the states themselves are called the second-tier borders and the border of the *grossraum* itself is called the first-tier border.¹⁸⁰ A regional organisation can be classified as a *grossraum* if its territory is linked geographically and it has a particular interest in its distinguishing beliefs and key principles.¹⁸¹

In terms of the above, the movement towards the creation of the ACJHPR can be seen as a *grossraum*. The ‘political idea’ with which African states are identifying and accepting as legitimate is twofold. First, the ICC has solely focused on African States as the subject of its prosecutions. Secondly, African states feel a strange sense of ownership over these international crimes and believe they should be prosecuting it themselves. The internal borders of each individual African state will be the second-tier borders and the continental border will be the first-tier border of the *grossraum*. The AU may also be described as a *grossraum*, because the states which are members of the AU are geographically linked and they identify with similar beliefs and principles.

Liberal democracy, social democracy and communism are all examples of *grossraum* principles.¹⁸² The prohibition on “foreign extra regional intervention” is a key *grossraum* principle.¹⁸³ This principle is one with which African states, within the AU, strongly identify with and support. The traditional law system, which is largely based on relationships between member states which are all seen as equals, has been replaced with a system which focuses on different, “regional power blocks”, known as *grossraume*.¹⁸⁴ The shift is based on a multiple of reasons including military, geopolitical, technological reasons as well as globalisation.¹⁸⁵

Schmitt asserts that the first *grossraum* characteristics were present in the 1832 Monroe Doctrine.¹⁸⁶ In this doctrine, United States President Monroe declared that “further efforts by European Nation states to colonise land or interfere with American nation states would be viewed as acts of aggression requiring US intervention”.¹⁸⁷

177 Salter and Yin (n 176) 822.

178 Salter and Yin (n 176) 827.

179 Schmitt (n 14) 101.

180 Hooker “Carl Schmitt’s international thought: Order and orientation” (2009) 142.

181 Salter and Yin (n 176) 824.

182 Schmitt (n 14) 101.

183 Salter and Yin (n 176) 824.

184 Schwab “Contextualizing Carl Schmitt’s Concept of *grossraum*” 1994 *History of European Ideas* 185-187.

185 Salter “The return of politicised space: Carl Schmitt’s re-orientation of transnational law scholarship” 2012 *Tilburg Law Review* 5-8.

186 Schmitt *Writings on war* (2011) 88.

187 Salter (n 185) 6.

The main principle of this declaration was that the idea of non-intervention of extra regional states would be able to be transferred into other situations.¹⁸⁸ This, “short lived *grossraum* principle”, was an important moment for US Foreign policy which was used by many United States presidents.¹⁸⁹ While this doctrine provided a guideline as to what a *grossraum* analysis of international law would be, it was not received in the other continents at that time.¹⁹⁰

Regions which since then have embodied this principle prohibiting extra-regional interventions include the Russian Commonwealth and the United States of America (USA).¹⁹¹ Africa could possibly be one of the newest regions to embody this principle as well. Apart from the AU repeatedly voicing its disapproval of the ICC’s interference within the region, the AU has gone a step further in initialising the creation of the ACJHPR. The creation of this court could be seen as an additional measure in prohibiting extra-regional intervention.

The UN Security Council has been described as a “world government”.¹⁹² However, Africa, Antarctica, Australia and South America are all continents which lack representation “in the highest decision making circle”, whereas both the European and Asian continents are more than sufficiently represented.¹⁹³ The *grossraum* approach would seek to protect regional entities and keep their territorial areas free from extra-regional interference. Each entity will be under the supervision of a “leading power”, which will be responsible for the security and development of that particular region.¹⁹⁴ The “leading power” would also take on the responsibility of the region’s economic coordination, while still respecting and maintaining the member states’ independence and sovereignty.¹⁹⁵ Traditionally the “leading power” in a *grossraum* is a state. Why can the “leading power” not be a representative body of all the *grossraum* states, like the African Union? In the African region, the AU could then be seen as the “leading power” for the African region.

Schmitt believes that the integration of a “*grossraum* analysis” is essential for a workable and practical structure of international law.¹⁹⁶ International law in this sense would be open to “substantive spatial questions” and is able to deal with a demarcated planet that coexists.¹⁹⁷ This form of international law is in direct conflict with the current form, which is ignorant to spatial differences and is

188 Schmitt (n 186) 88.

189 Salter (n 185) 7.

190 Schmitt *The nomos of the Earth in the international law of jus publicum Europaeum* (2003) 231.

191 Salter and Yin (n 176) 824.

192 Salter and Yin (n 176) 824.

193 Salter and Yin (n 176) 824.

194 Carr *Nationalism and after* (1945) 74.

195 Rasch “Enmity as a structuring principle” 2005 *South Atlantic Quarterly* 253-261.

196 Salter (n 185) 8.

197 Salter (n 185) 8.

premised on state equality.¹⁹⁸ Schmitt completely disregards the principle of state equality, because it does not take into account the difference in apportionment of geopolitical power.¹⁹⁹ Other factors which influence international law issue areas include, “spheres of influence, back country, contiguity and propinquity”.²⁰⁰

It would not be logical to assume the question of whether a state's territory is one continuous piece of land, or could it be broken up into multiple pieces, is not linked to the concept of sovereignty.²⁰¹ It would also not be logical to assume that the lines which appear on the world map are a true reflection of the demarcation of geopolitical power.²⁰² Nor could it be suggested that a state with no military power, be considered as an equal of a state with a sophisticated military base.²⁰³ A *grossraum* approach to international law is able to evolve itself to fit into the new 20th-century setting taking these factors into account.²⁰⁴

The Hillebrand Herman Moyer Index measured the power within Africa and has indicated that as a result of Nigeria, West Africa is the most powerful on the continent.²⁰⁵ Within Africa Algeria, Egypt, Ethiopia, Nigeria and South Africa are known as “the Big Five”.²⁰⁶ These five states have been identified as being the most influential on the continent by measuring their economic, demographic and military strength.²⁰⁷ Other measures of power may include wealth, trade, investment, technological capability, government capacity and human capital.²⁰⁸ This illustrates that there is a difference in each state's geopolitical power and not all states are in fact equal.

A *grossraum* can also be described as an “historical and politically contemporary idea” which is connected to foreign relations.²⁰⁹ A *grossraum* is more of a “historical event” than a “legal concept”.²¹⁰ Should the states which make up the African region or even a subregion within Africa choose to withdraw from the ICC, it could be considered as a *grossraum* forming event.

198 Salter (n 185) 8.

199 Schmitt (n 14) 101.

200 Kruszewski “International affairs: Germany's lebensraum” 1940 *The American Political Science Review* 964 974.

201 Salter (n 185) 19.

202 Salter (n 185) 19.

203 Salter (n 185) 19.

204 Salter (n 185) 8.

205 Cilliers, Schunemann and Moyer “Power and influence in Africa: Algeria, Egypt, Ethiopia, Nigeria and South Africa” 2015 *Institute for Security Studies Paper African Futures Paper number 14* 5.

206 Cilliers, Schunemann and Moyer (n 205) 1.

207 Hughes “IFs interstate politics model documentation” 2014 *Working Paper 2014.02.17* 13.

208 Cilliers, Schunemann and Moyer (n 205) 3.

209 Salter and Yin (n 176) 826.

210 Salter and Yin (n 176) 826.

In order for a *grossraum* to be able to function, member states must follow the *grossraum*'s key principles at all times, irrespective of whether they are directly beneficial to the state's interests.²¹¹ Member states should all have a cultural connection in addition to a resolution to recognise equality and respect amongst themselves and a prohibition on intervention by non-member states.²¹² Structuring the organisations in a manner which ensures that public law, including public international law, is administered in a coherent manner and that policy decisions are correctly applied is a problem for all *grossraume*.²¹³

7.5 CONCLUSION

In conclusion, we can see that despite there being a clear preference for universalism in the UN Charter, states have naturally gravitated towards a more regionally centred approach. The fact that both the ICTY and ICTR were granted jurisdiction over crimes committed only within a particular region, is indicative of this.

It is possible that regionalism in international criminal law may be achieved through a less controversial manner than the creation of regional court with international criminal law jurisdiction. Other options may include the creation of hybrid international tribunals,²¹⁴ the effective exercise of universal jurisdiction and of course the ICC could also sit regionally.²¹⁵ The Rome Statute provides for the latter: "The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute."²¹⁶ Unfortunately, the circumstances in which the ICC may sit regionally is not prescribed and ultimately has been left to the court's discretion, providing little to no guidance in this regard. Unsurprisingly, ICC has not made use of this possibility to date.

The creation of the ACJHPR, even if only in theory, will have contributed to the development of regionalism by being the first regional court to have international criminal jurisdiction. Up until now regional mechanisms have been used primarily to enforce human rights norms, a mechanism which has worked fairly well.

The addition of international criminal jurisdiction to the ACJHPR is not without fault. The additional International Criminal Law Section will only intensify the current regime complex which is present in international criminal law. Perhaps this intensification will force both the ICC and the ACJHPR to not only acknowledge the other's presence but also establish a working relationship with each other and ultimately achieve their common goal, ending impunity.

211 Salter and Yin (n 176) 832.

212 Salter and Yin (n 176) 842.

213 Salter and Yin (n 176) 832.

214 Such as the Special Court for Sierra Leone, Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia

215 Burke-White (n 80) 748.

216 A 3(3).

The substantive fragmentation of laws, in particular the granting of immunity by the ACJHPR, might even have the potential to foster a working relationship between the ICC and ACJHPR. Effectively, the immunity provision in the Malabo Protocol does not bar prosecution at the ICC; it merely serves as a jurisdictional filter for the ACJHPR. The ICC could then focus on prosecutions of leaders who enjoy immunity at this regional level and the ACJHPR could prosecute other parties who would not be entitled to immunity.

An intra regime shift has the potential to either benefit weaker states or disadvantage them even further. Only after the ACJHPR is functional will we see if these weaker African states have benefited or been disadvantaged. This is also dependent on how the weaker states choose to view the ACJHPR. For example, the AU may believe the ICC is disadvantaging African states by making them the sole focus of their prosecutions, whereas non-African states may disagree. The fate of these weaker states lies not only in the hands of the ACJHPR prosecutors, but also in the hands of the *grossraum*'s leading power.

Previously, scholars thought the *grossraum* model could only be used by Western states as it was not received elsewhere. However, if we accept that the AU can be the 'leading power' in a *grossraum*, the creation of this ACJHPR is the historical event which the model is based on and the principle of non-intervention is the political idea being identified with, this means that the ACJHPR is a prime example of a *grossraum* analysis/model of international law. The model is therefore successfully adopted by African States.

Many are sceptical as to whether the ACJHPR will ever come to fruition. The Malabo Protocol, which includes the international criminal law into the court's jurisdiction, was only adopted in 2014. In the past four years, the Malabo protocol has received 11 signatures, whereas the African Charter received 18 signatures within the first four years. Granted, the African Charter received 17 ratifications in the first four years, but the Malabo Protocol is asking states to submit themselves to the jurisdiction of the court. Given the history with the ICC, many may be hesitant to give up a fraction of their sovereignty. South Africa only signed the African Charter in 1996, 10 years later. Although the ACJHPR has not physically manifested as yet, there is a definite intention amongst the AU to get this court off the ground – both literally and figuratively.