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Regionalization of International Criminal Law Enforcement: A Preliminary Exploration

WILLIAM W. BURKE-WHITE[†]

SUMMARY

I.	INTRODUCTION.....	729
II.	THE TREND TOWARD REGIONAL INTERNATIONAL LAW ENFORCEMENT.....	731
III.	THE NORMATIVE APPEAL OF REGIONAL INTERNATIONAL CRIMINAL JUSTICE.....	733
	A. <i>Physical Proximity to the Alleged Crimes</i>	734
	B. <i>Legitimacy of the Tribunal</i>	736
	C. <i>Reduced Financial Costs of Regional Enforcement</i>	738
	D. <i>Availability of Sufficient Judicial Resources in Regional Enforcement Mechanisms</i>	739
	E. <i>Reduced Likelihood of Political Manipulation in Regional Enforcement Mechanisms</i>	741
IV.	THEORIZING REGIONALIZATION OF INTERNATIONAL CRIMINAL JUSTICE.....	743
V.	IMPLEMENTING REGIONALIZATION OF INTERNATIONAL CRIMINAL JUSTICE.....	748
	A. <i>Regional Criminal Courts</i>	749
	B. <i>The International Criminal Court Sitting Regionally</i>	750
	C. <i>Regional Preference for the Exercise of Universal Jurisdiction</i>	751
	D. <i>Specialized Domestic Courts with Regional Judges</i>	753
VI.	THE EFFECTS OF REGIONAL ENFORCEMENT ON INTERNATIONAL LAW: TWO VARIANTS.....	755
	A. <i>Fragmentation of International Criminal Law</i>	756
	B. <i>Procedural Differentiation Within a Universal System</i>	758
VII.	CONCLUSION.....	760

I. INTRODUCTION

Since the establishment of the International Military Tribunal at Nuremberg in 1945, the enforcement of international criminal law has largely occurred at the supranational

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level. Groups of states have come together either through interstate agreements after war,¹ through Chapter VII action by the UN Security Council,² or through international treaty-making³ to grant jurisdiction over international crimes to various international tribunals. More recently, the enforcement of international criminal law has migrated to the domestic level, first through the exercise of universal jurisdiction and subsequently through the establishment of semi-internationalized criminal courts, effectively grafted on to domestic judiciaries, such as the Special Panels in East Timor⁴ or the Special Court for Sierra Leone.⁵ As I have argued elsewhere, these developments have led to the emergence of a system of international criminal law enforcement operating at a variety of different levels.⁶ Within this system, domestic courts are on the front lines of enforcement, with supranational courts such as the International Criminal Court (ICC) stepping in under the regime of complementarity⁷ when domestic courts are unable or unwilling to act.

To date, a core level of this system—the regional level—remains unexplored and underdeveloped. There has yet to be any systematic study of either the normative implications of enforcing international criminal law at the regional level or of the possible means for regionalization of international criminal justice. The lack of attention paid to regional opportunities for enforcing international criminal law is surprising in light of the trend toward new regionalism in the study of international relations and the growing number of regional regimes enforcing other substantive areas of international law. This article seeks to fill this void, providing a preliminary consideration of whether regionalization of international criminal justice would be a useful development and how regionalization can be achieved.

National and supranational enforcement each offer various benefits and drawbacks that are in inherent tension. Regional enforcement of international law, however, would be situated at a unique midpoint between the national state and the international system. Regionalization could, therefore, 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. To that extent, regionalization merits attention as a viable part of a system of international criminal law enforcement.

The potential normative benefits of regionalization are relatively easy to achieve within the already existing structure of international criminal law. From a neo-functionalist political science perspective, regional enforcement of international criminal law offers states political advantages, while decreasing the sovereignty costs of membership in

1. See, e.g., Charter of the International Military Tribunal, *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280.

2. See, e.g., S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (creating the ICTY pursuant to Chapter VII of the U.N. Charter).

3. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 [hereinafter Rome Statute].

4. See *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses*, United Nations Transnational Administration in East Timor (UNTAET) Reg. 2000/15, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000).

5. See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/246, *appended to* Letter Dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council, app. II (2002) [hereinafter Sierra Leone Agreement].

6. See generally William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Justice*, 24 MICH. J. INT'L L. 1 (2002) (arguing that international criminal law will be enforced at the domestic level in the future).

7. See Rome Statute, *supra* note 3, art. 17 (establishing the complementarity regime).

international criminal law enforcement bodies.⁸ States may therefore be more willing to enter into and deepen their relationships with regional, rather than supranational, enforcement mechanisms. While regionalization could come in many forms, including the creation of new regional criminal courts, a variety of softer options for regionalization within existing mechanisms of international criminal law are already available. For example, pursuant to the Rome Statute, the ICC can sit regionally. Likewise, a preference could be given to regional courts exercising universal jurisdiction, or semi-internationalized courts could draw heavily on judges and procedures from within their own region. Any or all of these three pathways to regionalism could be followed with relatively little cost or need for major change to existing institutional arrangements.

Part II of this article sets a background for the possibilities of regional international criminal law enforcement by exploring regionalization of other substantive areas of international law enforcement. Part III argues that regionalization of international criminal law could be a normatively positive development as it might better balance the benefits and drawbacks of national and supranational enforcement. Part IV applies political science and international relations methods, particularly from a neo-functionalist perspective, to develop a theory of regionalization of international criminal law, arguing that states are highly likely to support regionalization. Part V explores various pathways to regionalization including the creation of regional criminal courts as well as a variety of softer forms of regionalism. Part VI considers two possible impacts of regionalization on substantive international law and suggests the likely development of procedural differentiation within a universal system.

This article should not be interpreted as a call for a strong form of regionalization through the creation of regional criminal courts along the lines of the ICC. Rather, it is intended to open a debate about alternate means of enforcement of international criminal law. Given that the ICC Statute has already come into force and attracted significant support, the creation of regional criminal courts may be an unnecessary duplication. Nonetheless, this presentation of the strong argument for regional enforcement highlights the importance of possibilities for softer forms of regionalization within already existent enforcement mechanisms. The article is thus best read as a call for greater consideration of regional criminal justice and an argument that a softer form of regionalism, primarily through existing mechanisms, is relatively easy to achieve and could offer powerful normative benefits.

II. THE TREND TOWARD REGIONAL INTERNATIONAL LAW ENFORCEMENT

Outside of the arena of international criminal law, regional mechanisms have become the enforcement means of choice for many international legal regimes. From piracy to environmental pollution, from money laundering to human rights, regional regimes are more frequently proving to be effective means of enforcement. A brief overview of this trend to regional enforcement in other areas highlights the potential effectiveness of regional enforcement generally and the possibilities for regional international criminal law enforcement.

The area of international law enforcement in which regional organizations have been most active for the longest period of time is in the maintenance of international peace and security. This role for regional organizations, of course, derives from Article 52 of the UN

8. Sovereignty costs are defined herein as the costs imposed on a national government by the loss of direct control over particular areas of domestic and foreign policy.

Charter, according to which, “[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action”⁹ Regional organizations have been extremely active in creating and maintaining international legal rules to preserve international peace and security.¹⁰ Examples range from the Organization of American States in the Cuban Missile Crisis¹¹ and the Economic Community of West African States (ECOWAS) in Liberia¹² to NATO in Kosovo.¹³

Money laundering provides a second example of a contemporary international legal regime which seeks regional solutions to transnational problems. Regional organizations have been particularly active in developing new mechanisms for prevention and punishment. The 1991 Convention on Laundering, Search, Seizure and Confiscation of Assets was created under the auspices of the Council of Europe.¹⁴ The Organization of American States, acting through the Inter-American Drug Abuse Control Commission announced recommendations for regionally based solutions in 1997.¹⁵ Commentators have argued that “strengthening of the emerging international money movement enforcement regime” depends on implementation at the “universal [and] regional . . . levels.”¹⁶

Closer to the realm of international criminal law, regional solutions have been suggested for the prohibition and punishment of piracy on the high seas, often considered the genesis of universal jurisdiction in international criminal law. Sea piracy has suffered from “an international legal regime that lacks an effective enforcement mechanism.”¹⁷ Noting the differences among “regionally-based piracy ‘clusters,’” various commentators have called for “a regional approach to combat modern piracy.”¹⁸ They observe that the United Nations Convention on the Law of the Sea “appears to invite a regional, ‘Piracy Charter’ enforcement approach to piracy,” which would include the establishment of “a regional enforcement mechanism to suppress piracy.”¹⁹

In a variety of other substantive areas, the enforcement of international law has been strengthened through regional mechanisms. International fisheries law, for example, “provides for enforcement to be carried out by regional organizations and arrangements.”²⁰

9. U.N. CHARTER art. 52, para. 1.

10. See generally Zsuzsanna Deen-Racsmany, *A Redistribution of Authority Between the UN and Regional Organizations in the Field of the Maintenance of Peace and Security?*, 13 LEIDEN J. INT’L L. 297 (2000).

11. See, e.g., Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. OF INT’L L. 175, 197–213 (1967).

12. See, e.g., Matthew S. Barton, *ECOWAS and West African Security: The New Regionalism*, 4 DEPAUL INT’L L.J. 79, 94–100 (2000); Timothy M. Shaw, *The Revival of Regionalism in Africa: Cure for Crisis or Prescription for Conflict?*, 11 JERUSALEM J. INT’L REL. 79 (1989).

13. See, e.g., Tarcisio Gazzini, *NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)*, 12 EUR. J. INT’L L. 391 (2001); Deen-Racsmany, *supra* note 10, at 298 (observing that NATO strikes in Kosovo were one of the most controversial enforcement measures carried out by a regional organization since the end of the Cold War).

14. Bruce Zagaris, *Trends in International Money Laundering from a U.S. Perspective*, 35 INT’L LAW. 839, 841 (2001).

15. *Id.* at 863.

16. *Id.*

17. Timothy H. Goodman, Note, *Leaving the Corsair’s Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements*, 31 CASE W. RES. J. INT’L L. 139, 141 (1999).

18. *Id.* at 154–55; see also Samuel P. Menefee, *The New “Jamaica Discipline”: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT’L L. 127, 149–50 (1990) (discussing the possibility of regional responses to piracy within the context of the 1982 Law of the Sea Convention).

19. Goodman, *supra* note 17, at 159.

20. Christopher C. Joyner, *Compliance and Enforcement in International Fisheries Law*, 21 TEMP. INT’L & COMP. L.J. 271, 294 (1998).

Pursuant to the Straddling Stocks Agreement, regional organizations may authorize the inspection and sanction of vessels, irrespective of whether the flag state is a member of the organization.²¹ Similarly, regional enforcement of media and intellectual piracy law has proved effective. For example, copyright infringements in the Caribbean Basin Area have been significantly reduced through the Caribbean Basin Initiative, where “trade benefits and economic assistance [to the region] were conditioned on copyright protection.”²² Based on this success, commentators have called for further regional efforts to combat intellectual piracy.²³ Enforcement of international environmental law has also been migrating to the regional level. In the 1980s and 1990s alone the European Commission “has brought more than fifty cases to the ECJ [European Court of Justice] involving the failure of a member State to comply with environmental regulations.”²⁴

Each of these examples in which regional enforcement of international law has been utilized or proposed share two important elements. First, the international legal problem in question is either regional in nature or poses a particular regional concern. Second, for reasons ranging from geographic proximity to cross-border politics, regional organizations are more effectively positioned and/or politically able to enforce the legal rules in question than are supranational entities. In many respects, the enforcement of international criminal law shares these elements. First, 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. The United States’ and Europe’s failure to intervene in Rwanda but willingness to do so in Kosovo is indicative thereof. Second, as will be explored further in Part III below, regional mechanisms are uniquely positioned to enforce international criminal law. It may well be, therefore, wise to apply Secretary-General Boutros-Ghali’s 1992 advice to the area of international criminal law: “[I]n this new era of opportunity, regional arrangements or agencies can render great service [R]egional arrangements or agencies in many cases possess a potential that should be utilized in . . . preventive diplomacy, peacekeeping, peacemaking and post-conflict peacebuilding.”²⁵ The next Part explores this normative appeal of regionalization.

III. THE NORMATIVE APPEAL OF REGIONAL INTERNATIONAL CRIMINAL JUSTICE

In the emerging system of international criminal justice,²⁶ enforcement of international law has had two primary focal points. At the supranational level, states have delegated authority, often through the United Nations to international tribunals such as the ICC, to prosecute international crimes. At the national level, the international community has delegated authority to national courts to enforce international criminal law directly, either through the exercise of universal jurisdiction or the creation of specialized international courts within the domestic judiciary of post-conflict states.

21. *See id.* at 295.

22. Linda W. Tai, *Music Piracy in the Pacific Rim: Applying a Regional Approach Towards the Enforcement Problem of International Conventions*, 16 LOY. L.A. ENT. L.J. 159, 180–81 (1995).

23. *Id.* at 184–87.

24. Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT’L ENVTL. L. & POL’Y 191, 209 (2001).

25. *Agenda for Peace: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Preliminary List Item 10, para. 63–64, U.N. Doc. A/47/277-S24111 (1992), reprinted in 31 I.L.M. 953 (1992) [hereinafter *Agenda for Peace*].

26. *See generally* Burke-White, *supra* note 6.

Both supranational and national approaches to the enforcement of international criminal law have been much criticized, often properly so. Supranational tribunals are often unwieldy, expensive, and both physically and psychologically distant from the particular crimes in question. National courts, while less expensive to administer and closer to the events in question, often lack judicial resources and run the risk of bias. Unfortunately, the costs and benefits of supranational and national enforcement are in direct tension with one another. As the benefits of supranational adjudication are realized, those of domestic adjudication are lost. Because regional enforcement is situated at a midpoint between the supranational and domestic levels of authority, regional mechanisms are uniquely positioned to strike a balance between these costs and benefits.

This Section explores the normative appeal of a regional approach to international criminal justice. The first two factors—proximity to the site of the crimes and the potentially lower costs of prosecution—seem to support an argument for national prosecutions. The second two factors—the potential for greater judicial experience and the reduced likelihood of political manipulation—suggest that supranational prosecution would be preferable. A regional approach to international criminal law enforcement can balance these factors, offering a tribunal situated relatively close to the affected communities and comparatively less expensive than international tribunals. Likewise, regional courts could have greater judicial resources and less political bias than national courts. Thus, regional adjudicatory mechanisms could offer an ideal compromise between national and supranational adjudication.

A. *Physical Proximity to the Alleged Crimes*

One of the chief drawbacks of supranational adjudication of international criminal law is the physical distance of the court from the events in question. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been much criticized for its lack of connection to the national context of the cases it adjudicates.²⁷ ICTY staff, for example, have only had “occasional contacts and exchanges” in the affected region, rather than the kind of local engagement which would “make the work of the tribunal relevant to the national justice systems in the region.”²⁸ Such concerns are likely to expand with the operation of the ICC when cases from countries geographically removed, such as those in Southern Africa or Latin America, are adjudicated in The Hague.

The physical distance of supranational courts from the site of the alleged crimes has troubling consequences in two respects: judicial reconstruction and restorative justice. From the perspective of judicial reconstruction, a core goal of international criminal justice should be to “catalyze future prosecutions” domestically by restoring the rule of law and the efficacy of national judicial institutions.²⁹ Yet, supranational tribunals, because of their physical distance and judicial separation from the domestic context, have failed “to assist in preparing the local prosecutors and courts to carry out investigations and trials” and have only marginally contributed to judicial reconstruction.³⁰

27. See David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 12 (2002) (observing that the ICTY suffered from a “strategic failure in that [it] has not had much impact on the development of courts and justice systems in the region”).

28. *Id.* at 14.

29. Note, *The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1974 (2001). Not all accept judicial reconstruction as a goal of international criminal justice, leaving that to international development programs. However, if reconstruction is a goal of prosecution, the proximity factor is crucial. See generally, José Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 25 YALE J. INT’L L. 365 (1999).

30. Tolbert, *supra* note 27, at 12.

Regional courts may offer significantly greater opportunities for judicial reconstruction than do supranational institutions such as the ICTY.³¹ While semi-internationalized courts grafted onto the national judicial system based on the Sierra Leone or East Timor model³² are most likely to directly engage and thus enhance the national judicial systems in question, the relative proximity of regional courts would allow far greater engagement and training for national judiciaries than do supranational tribunals. Regional courts would presumably draw on prosecutors, judges, and staff from the region, thereby providing training and experience for those likely to return to domestic judicial systems. Particularly if regional courts were given a specific mandate of engaging with and training national courts, they could offer a powerful tool for post-conflict reconstruction.

Second, the physical separation of supranational enforcement mechanisms from the communities in which the crimes occurred has led to a failure of restorative justice. Restorative justice seeks, in the words of Desmond Tutu, “not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people.”³³ The goals of restorative justice are “(1) to affirm and restore the dignity of those whose human rights have been violated; (2) to hold perpetrators accountable . . . ; and (3) to create social conditions in which human rights will be respected.”³⁴

Achieving the goals of restorative justice requires a close connection between the adjudicating court and the society affected by international crimes. With thousands of miles and trans-oceanic flights separating witnesses and evidence from the court in The Hague, the ability of the ICC to perform a restorative justice function is limited. To provide a concrete example, the first case of rape as a crime against humanity in international law—the *Kunarac* case before the ICTY³⁵—had an enormous cathartic potential to restore the people of Foca, the town in southern Bosnia in which the events occurred. Yet, even as thirty-eight women detained in rape-camps told their stories to the ICTY, the people of Foca were isolated from the events of the trial and largely unable to personally benefit from the proceedings.³⁶ Despite improvements in technology and dissemination, many areas where international crimes occur remain technologically isolated. Moreover, personal physical presence is often thought crucial to the restorative justice process.

A regional approach to international criminal law enforcement presents much greater opportunities for affected communities to benefit from legal proceedings against international criminals. First, regional courts are likely to be physically more proximate to the events in question, thus reducing the cost and time involved in giving affected communities access to proceedings. If, for example, a court adjudicating crimes in Chile

31. Both the ICTY and ICTR already reflect some aspects of regional justice—being situated at some distance from the site of the crime and having a regionally or nationally restricted jurisdiction. Yet, both of these courts are still conceived of within the framework of supranational courts and fail to incorporate many of the aspects of regionalization discussed herein.

32. See Burke-White, *supra* note 6, at 61–75.

33. Tina Rosenberg, *A Reporter at Large: Recovering from Apartheid*, NEW YORKER, Nov. 18, 1996, at 90. As Martha Minow summarizes, “Restorative justice emphasizes the humanity of both offenders and victims. It seeks repair of social connections and peace rather than retribution against the offenders.” MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 92 (1999).

34. Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE 68, 79 (Robert I. Rotberg & Dennis Thompson eds., 1999).

35. Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T (I.C.T.Y. Feb. 22, 2001).

36. The author served in ICTY Trial Chamber II during the Foca case and observed this testimony first hand. While some of the testimony was available through closed-circuit television in the region, few of the residents of Foca were able to participate directly in or bear witness to the case.

were located in Argentina, rather than in say The Hague, the likelihood of witnesses, victims, and ordinary citizens attending the trial or being familiar with the proceedings, is greatly enhanced. While even the International Criminal Tribunal for Rwanda (ICTR), located in Arusha, Tanzania, has been criticized for its distance from the crimes in Rwanda,³⁷ bringing witnesses or victims to the ICTR has been facilitated by the relative proximity of Arusha to Kigali. Moreover, efforts by the ICTR and NGOs to bring the proceedings in Arusha home to Rwanda have been expedited by this proximity.³⁸ For example, radio documentaries and traveling plays that recreate the trial in local communities would have been significantly harder to implement if the trials themselves were geographically farther away than Arusha.³⁹ The relative proximity of Arusha also made possible a proposal by then Prosecutor Louise Arbour to hold “periodic sessions in Kigali.”⁴⁰ The trial of the Lockerbie bombing suspects at Camp Zeist in the Netherlands, in many ways similar to a regional model of criminal justice, had a highly effective victims’ assistance unit largely funded by the U.S. government, which ensured that the families of Scottish, American and other victims could attend the trial.⁴¹

While regional courts will never be as effective at assisting to reconstruct domestic judiciaries or facilitating the processes of restorative justice as semi-internationalized domestic courts, regional mechanisms are likely to be far more effective at these goals than are supranational tribunals. If judicial reconstruction and restorative justice are part of the core mission of international criminal justice, than regional approaches ought to be considered as viable alternatives to supranational prosecution.

B. *Legitimacy of the Tribunal*

Regional enforcement mechanisms are also far more likely to exhibit a second, and possibly more significant, form of proximity—namely the psychological proximity and sense of connection between the tribunal and the local community, upon which legitimacy depends. Supranational enforcement mechanisms risk being seen as “an instrument of hegemony for powerful states.”⁴² When a tribunal is perceived as a foreign agent, imposing its will on a national system, it quickly loses credibility. An August 2000 survey in Croatia, for example, found a high percentage of Croatians believed that The Hague is biased, while fifty-two percent “believed that ‘The Hague wants to criminalize the Homeland War.’”⁴³ Not surprisingly seventy-eight percent felt that Croatia should not “extradite its citizens if the Hague Tribunal requests it.”⁴⁴ For a national government to be

37. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 14 (2001). “The ICTR has often been faulted for its remoteness from the Rwandese people. Its geographical location . . . makes it visibly distant.” *Id.* at 25. Of course, regional criminal justice would not completely solve this problem of physical distance—Tanzania and Rwanda are, after all neighbors. It might, however, ameliorate some of the challenges presented by any physical distance whatsoever. And, in some cases, purely local prosecutions may still be preferable.

38. See *id.* at 25. “[The ICTR] has tried increasingly to inform the public about its activities through the Rwandese media.” *Id.*

39. See, e.g., Kate Gehring, *Independent Media and Justice in Rwanda: Rwandans Laud Film on Genocide Trials, Want to See More*, INTERNEWS, March 28, 2001, at http://www.internews.org/activities/ICTR_reports/ICTR_genocidefilm_03_01.htm (last visited Apr. 8, 2003).

40. See Akhavan, *supra* note 37, at 25.

41. Norman McFadyen, Lecture at the Lauterpacht Center for International Law at the University of Cambridge (Nov. 22, 2002).

42. See Akhavan, *supra* note 37, at 30.

43. *Id.* at 22 (citing *Survey Shows ‘Anti-Hague Atmosphere’ Increasing In Croatia*, FBIS Doc. EUP20000823000244 (Aug. 19, 2000) (trans. of JUTARNJI LIST (Zagreb), at 31)).

44. *Id.*

politically able to cooperate with an international criminal tribunal, the tribunal must be perceived as legitimate by the affected national polity.

Regional criminal law enforcement mechanisms are far more likely to be perceived as legitimate in affected communities than are their supranational counterparts. As José Alvarez observes, “[i]f Rwandan society shares comparable notions of judicial legitimacy, it stands to reason that having judges who come from the local community may itself be determinative of the legitimacy of these processes.”⁴⁵ He also states: “[T]hose who seek primacy for international processes are preferring certain [externally imposed] goals . . . over the desires of many of those who have been most immediately affected by genocide.”⁴⁶ In many ways, the perceived legitimacy of the tribunal turns on the connection of the proceedings to those most affected by the crimes being adjudicated. As applied to international law enforcement, Jonathan Charney has observed that this greater sense of legitimacy leads states to “be more comfortable with a tribunal whose members are chosen from the region in which the dispute arose.”⁴⁷ A regional court would presumably have a greater concentration of prosecutors, staff, and judges from the local community, thereby augmenting the perceived domestic legitimacy of the tribunal.

Part of this notion of greater legitimacy of a regional tribunal derives from the claim that regional groupings share some sense of common identity.⁴⁸ Many regionalists have argued “members of a common region also share cultural . . . linguistic, or political ties.”⁴⁹ Taken to an extreme, such shared cultural values were inherent in the original conception of the Organization of African Unity, which “envisioned an amalgamation of African states into a continental body based on equal sovereignty of all states.”⁵⁰ Where regional groupings do share a common set of values or identities, regionalization allows those values to be better reflected in adjudicative tribunals. Shared values within a particular region, again to borrow from Charney, have led states to create regional “international dispute settlement forums [because] the composition of the tribunal may be important to the disputants for reasons of expertise or cultural factors.”⁵¹

A final way in which regional courts may garner greater legitimacy within affected communities than their supranational counterparts stems from the greater opportunities for public debate and deliberation offered by the regional approach. Martha Minow has noted the “value of the process of public deliberation in creating legitimacy for the undertaking.”⁵² A regional court, with fewer member states, may be perceived as more responsive to local customs, values, and preferences. In that sense regionalization may contribute to the democratization of international law. As Secretary-General Boutros-Ghali has observed, regional action can “contribute to a deeper sense of participation, consensus and democratization in international affairs.”⁵³ If Boutros-Ghali is right, regional criminal

45. Alvarez, *supra* note 29, at 416.

46. *Id.* at 409–10.

47. Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals*, 271 RECUEIL DES COURS 105, 125 (1998).

48. This claim is explored more thoroughly *infra* Part IV.

49. Edward D. Mansfield & Helen V. Milner, *The New Wave of Regionalism*, 53 INT’L ORG. 589, 591 (1999); see generally KARL W. DEUTSCH ET AL., *POLITICAL COMMUNITY IN THE NORTH ATLANTIC AREA: INTERNATIONAL ORGANIZATION IN THE LIGHT OF HISTORICAL EXPERIENCE* (1957) (noting the importance of cultural ties to early European integration).

50. P. Mwetli Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 582 (1999).

51. Charney, *supra* note 47, at 133.

52. MINOW, *supra* note 33, at 55.

53. *Agenda for Peace*, *supra* note 25, para. 64.

law enforcement mechanisms may generate a greater “buy-in” among affected communities more directly represented in a regional court.

C. *Reduced Financial Costs of Regional Enforcement*

Regional enforcement of international criminal justice also offers the prospect of significantly reduced costs as compared to supranational or global enforcement mechanisms. The monetary costs of international criminal law enforcement have been and will continue to be a significant hindrance to the effective operation of international tribunals. As Pierre Prosper, the U.S. Ambassador at Large for War Crimes Issues testified to the U.S. House International Relations Committee, “the process [of international justice] at times has been costly, [and] lacked efficiency.”⁵⁴ Even judges at the ICTY and ICTR have been quick to criticize the high costs of such tribunals. Patricia Wald, the former U.S. judge at the ICTY has observed that the “United Nations is understandably anxious to bring to closure the ICTY and the tribunal for Rwanda (ICTR), which together consume almost ten percent of the total UN budget.”⁵⁵

Regional courts could significantly reduce the financial burden of international criminal law enforcement for a number of reasons. First, regional courts by definition would have a limited territorial jurisdiction. As such, they could specialize, focusing their attention on a particular region and not expending limited resources attempting to investigate and prosecute crimes committed elsewhere. Second, a regional criminal court could pay staff salaries calculated to reflect costs of living within the region, thus reducing what is usually a court’s largest single cost. While regional salaries might not cause considerable savings in Europe, the impact on an African court could be substantial. For example, most professional-level UN employees at the ICTY are in the P-3 or P-4 bracket, earning in the U.S.\$60-80,000 range.⁵⁶ While a regional court might need to pay some salaries in this range to attract some necessary international staff, the bulk of salaries could be far lower in regional courts.⁵⁷ Third, particularly where linguistic patterns correspond to a court’s jurisdiction, significant savings could be attained by minimizing the working languages of the court.⁵⁸ Fourth, the collection and production of evidence in regional courts would be significantly reduced, through lower travel costs, ease of scheduling, and potentially greater cooperation with national authorities. A variety of similar efficiencies of scale and focus may be available at the regional level.

The lower costs of regional criminal justice become particularly apparent when comparing international tribunals such as the ICTY and ICTR with semi-internationalized

54. Pierre-Richard Prosper, Statement Before the House International Relations Committee (Feb. 28, 2002).

55. Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT’L L.J. 535, 536 (2001).

56. See United Nations Salaries, Allowances, Benefits and Job Classification, at http://www.un.org/Depts/OHRM/salaries_allowances/salary.htm (last visited Apr. 8, 2003). Most professional staff at the ICTY and ICTR are at the P-2, P-3 and P-4 levels, while judges are at the D-1 level.

57. Even lower salaries more on par with regional norms would provide advantages for local employees over the domestic job market.

58. A considerable portion of the ICTY budget, for example is devoted to translation costs, with more than 170 staff members employed in the Language Services Section. See *Budget of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 for the biennium 2002–2003*, 56th Sess., Agenda Item 131, at 7, U.N. Doc. A/56/495/Add.1 (2001) [hereinafter *Budget*]. Theoretically the number of translators needed in a regional court could be significantly reduced. While the European Union spends more than €95 million per year in its attempt to operate in all twenty-one languages, a regional court might need only operate in one or two languages. See European Foundation Intelligence Digest, No. 146 (July 9, 2002), at <http://www.europeanfoundation.org/pubs/id/146id.htm> (last visited Apr. 25, 2003).

courts such as those in operation in Sierra Leone and East Timor. The estimated appropriation for the ICTY for 2002–2003 is just over U.S.\$256 million⁵⁹ and in the past eight years, the U.N. Security Council “has paid some \$1.6 billion . . . to operate International Criminal Tribunals in Yugoslavia and Rwanda.”⁶⁰ In comparison, the 2001 budget of the semi-internationalized courts in East Timor (which hear only cases of crimes committed in East Timor in 1999) was merely U.S.\$6.3 million, with approximately U.S.\$6 million spent on prosecution and U.S.\$300,000 dedicated to the operation of the court itself.⁶¹ Similarly, the budget of the semi-internationalized court in Sierra Leone⁶² is approximately U.S.\$56 million (less than one-fifth that of the ICTY).⁶³ Admittedly, the significant variation in budgets also reflects a variation in the quality of justice rendered. The Special Panels in East Timor have numerous flaws and resource constraints.⁶⁴ But they are nevertheless dispensing reasonably fair and competent international justice. Obviously, regional courts are likely to cost more to operate than the semi-internationalized courts in East Timor. The striking differences in cost between a supranational enforcement mechanism such as the ICTY and semi-international courts such as those in Dili and Freetown are, nevertheless, strong evidence of the financial savings which may be offered by regional international criminal law enforcement. Such savings could easily translate into greater political willingness of states to enforce international criminal law, as the oft-stated fears of unchecked expenses are allayed.

D. *Availability of Sufficient Judicial Resources in Regional Enforcement Mechanisms*

Admittedly, the need for proximity between the adjudicating court and the affected community as well as the lower costs of national tribunals suggest that purely domestic trials might be the ideal means of enforcement. Yet, these factors, must be counterbalanced by two other considerations that argue in favor of supranational prosecution: the availability of judicial resources and the likelihood of political manipulation. Regional tribunals, however, are uniquely able to offer many of the benefits which characterize international courts, without sacrificing the aforementioned strengths of local prosecutions.

One of the primary criticisms of using national judicial mechanisms for the trial of international crimes is that national courts—usually in post-conflict situations—lack sufficient judicial resources to effectively adjudicate international crimes. For example, after the 1994 genocide in Rwanda, over 120,000 suspects were incarcerated. Given the extremely limited number of judges and lawyers, at that time “it [was] estimated it would take anywhere between two to four centuries to try all those in detention.”⁶⁵ In addition to the overwhelming numbers of cases, the Rwandan judiciary has faced significant resource and personnel shortages.

Resource constraints such as those in Rwanda plague many national attempts at international justice. In East Timor, for example, Judge Maria Gusmao Pereira, the leading

59. See *Budget*, *supra* note 55, Annex IX.

60. David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, ASIAPACIFIC ISSUES, No. 61 (Aug. 2002), available at <http://www.ewc.hawaii.edu/stored/pdfs/api061.pdf> (last visited Apr. 25, 2003).

61. *Id.* at 5.

62. See Statute of the Special Court of Sierra Leone (Jan. 16, 2002), available at <http://www.sierra-leone.org/specialcourtstatute.html> (last visited Apr. 25, 2003).

63. Richard Dowden, *Justice Goes on Trial in Sierra Leone*, GUARDIAN (London), Oct. 3, 2002.

64. See Burke-White, *supra* note 6, at 66–75.

65. International Panel of Eminent Personalities (IPEP), Report on the 1994 Genocide in Rwanda and Surrounding Events (Selected Sections), 40 I.L.M. 141, 214 para. 18.37 (2001).

East Timorese Judge on the Special Panels adjudicating international crimes, had no training in international law and had never served as a judge before her appointment by the United Nations Transitional Authority.⁶⁶ Despite Judge Maria's education at a law faculty in Bali, under Indonesian rule she was not permitted to practice law. In East Timor, the limited judicial experience in international and criminal law is significantly exacerbated by the lack of available support resources. There are no judicial clerks or assistants, as is common in most jurisdictions.⁶⁷ There is likewise no judicial library (though a few legal books have recently been collected).⁶⁸ Until December 2001, judges did not have personal internet access, making any research almost impossible.⁶⁹ Similar resource constraints have affected the office of the public defender. For most of 2001, six public defenders had to cover all cases in East Timor—both regular cases and those before the Special Panels.⁷⁰ Inadequate resources and personnel limitations in the office of the public defender have meant that one defender is often assigned to multiple defendants in the same trial, creating unacceptable conflicts of interest.⁷¹

Regional courts could solve many of the resource constraints facing national prosecution of international crimes for three primary reasons. First, regional courts could draw on the judicial experience of an entire region, increasing the likelihood that judges have both courtroom experience and international law training. A regional court in Africa, for example, could draw on South African, Ghanaian, Nigerian, or Ethiopian jurists as well as those from countries with less developed judiciaries such as Rwanda or the Democratic Republic of Congo. Second, regional courts could pool resources from across an entire region. Thus, if a pencil shortage hampers the administration of justice in Rwanda, other countries in the region could provide the necessary facilities, technology, and resources to ensure relatively effective operation of the courts. A regional court would thus facilitate the subsidization of justice by richer countries in the region for the benefit of states emerging from violent conflict.⁷² Third, a regional court can maximize the efficiency of the administration of international criminal justice. Thankfully, few states—with the exception of post-conflict situations, such as Rwanda or Sierra Leone—have an abundance of international crimes to investigate and prosecute. Thus, through regionalization, the administrative and judicial costs of setting up and operating a court with the capabilities to prosecute international crimes can be distributed over a larger body of cases. Whereas vesting a court with the jurisdictional authority and judicial resources to prosecute a single

66. Interview with Maria Natercia Gusmao Pereira, Judge, District Court of Dili, in Dili, East Timor (Michael Anderson trans., Jan. 18, 2002).

67. See Interview with Sylver Ntukamazina, Judge, in Dili, East Timor (Jan. 19, 2002) [hereinafter Ntukamazina Interview]. While a number of Australian law graduates had offered their services as legal assistants, the East Timorese Ministry of Justice refused to allow them to serve due to budgetary and administrative constraints. *Id.*

68. See JUDICIAL SYSTEM MONITORING PROGRAMME, JUSTICE IN PRACTICE: HUMAN RIGHTS IN COURT ADMINISTRATION § 3.1.2, JSMP Thematic Report No. 1 (Nov. 2001), available at <http://www.jsmp.minihub.org/Reports/JSMP1.pdf> (last visited Apr. 25, 2003).

69. Ntukamazina Interview, *supra* note 67.

70. See Interview with Siphosami Malunga, Public Defender, UNTAET, in Dili, East Timor (Jan. 17, 2002). Malunga, from Zimbabwe, is serving in East Timor.

71. See JUDICIAL SYSTEM MONITORING PROGRAMME, THE GENERAL PROSECUTOR V. JONI MARQUES AND 9 OTHERS (THE LOS PALOS CASE) § 3.1.2, JSMP Trial Report (Mar. 2002), available at <http://www.jsmp.minihub.org/Resources.htm> (last visited Apr. 25, 2003).

72. The necessary inequality of financial contributions to a regional court might cause some states to refrain from membership in such a court. But, the benefits of regional stability and the intangible benefits of supporting other states in the region in need of assistance might be sufficient to outweigh the monetary costs. Likewise, domestic political factors combined with constructivist beliefs might motivate states to undertake “costly international moral action” without direct benefit. See Chaim D. Kaufmann & Robert A. Pape, *Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade*, 53 INT'L ORG. 632, 632–33 (1999).

international crime may be prohibitively expensive, the creation of a regional court by a number of states to hear cases of crimes arising in an entire region would more effectively utilize legislative, judicial, and financial resources.

E. Reduced Likelihood of Political Manipulation in Regional Enforcement Mechanisms

While some of the normative arguments presented above would favor enforcement of international criminal law at the national level, national courts are frequently subject to political manipulation, particularly in the transitional societies where international criminal law is most frequently enforced. Political manipulation, or the capture of the judicial process by particular factions within a national government, can prevent the creation of an international court or undermine its effectiveness and legitimacy. Regional courts, because of their relative separation from national politics, are significantly less likely to be captured by any particular nation or group within a nation. They are thus more likely to operate effectively and garner greater legitimacy both within the region and in the larger international community. Of course, international courts such as the Nuremberg Tribunal, have been criticized as political institutions of victors' justice, but judicial capture by elements within a post-conflict government is far more likely and potentially damaging than is manipulation by the international community. Moreover, the existence of a group of States-Parties to a regional court would limit the influence of particularly powerful states in the region.

The danger of national criminal courts being captured or manipulated by political interests at the expense of fair justice is all too well illustrated by the ongoing attempts to create an internationalized criminal court in Cambodia for the trial of the senior leadership of the Khmer Rouge. As I have argued extensively elsewhere, international justice in Cambodia has been captured by a sub-group of the political elite that has controlled negotiations with the United Nations.⁷³ The Cambodian government divided "precisely along the line of the establishment of a tribunal for the Khmer Rouge. The side of this issue on which a member of the Cambodian elite falls depends largely on the individual's position during the time of Khmer Rouge rule."⁷⁴ As the UN Group of Experts explains, "both of the principal political parties have over the years had strong connections with the Khmer Rouge and include former Khmer Rouge among their members, including some who might be targets of any investigation into atrocities in the 1970s."⁷⁵ As elements of the governmental elite have captured the process of the creation of a court, political infighting has thwarted the establishment of a tribunal. Despite a strong domestic public opinion in favor of prosecution,⁷⁶ Prime Minister Hun Sen's shifting views of the United Nations may be indicative of changing alignments within the government.⁷⁷ To borrow a phrase that Jack Snyder used in the context of British imperialism, anti-prosecution elements may have "hijack[ed] state policy," forcing government action to diverge from public preferences in

73. See Burke-White, *supra* note 6, at 35–41.

74. *Id.* at 35.

75. *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, U.N. GAOR, 53d Sess., Annex, Agenda Item 110(b), para. 96, U.N. Doc. A/53/850, S/1999/231 (1999).

76. See generally William W. Burke-White, *Preferences Matter: Conversations with the Cambodian People on the Prosecution of the Khmer Rouge Leadership*, in *AWAITING JUSTICE: ESSAYS ON KHMER ROUGE ACCOUNTABILITY* (Beth van Schaack et al. eds., forthcoming 2004) (manuscript on file with author).

77. Christine Chaumeau, *More Denial*, *FAR E. ECON. REV.*, July 26, 2001, 26 (noting Prime Minister Hun Sen's sentiments following negotiations between the U.N. and the Cambodian government that the "UN should 'shut up' and not intervene in internal matters").

favor of trials.⁷⁸ The end result of this process of political capture of judicial process has been the failure to create an internationalized court in Cambodia after the UN withdrew from negotiations with the Cambodian government in February 2002, concluding that “as currently envisaged, the Cambodian court would not guarantee independence, impartiality and objectivity.”⁷⁹

While the difficulty of creating a tribunal in Cambodia highlights the problem of political manipulation, even more dangerous consequences may ensue where an already existent domestic court is captured by particular political or ethnic factions. In Kosovo, for example, the United Nations created a semi-internationalized court embedded in the domestic political context, on which one international judge sat together with two national judges. These tribunals were dangerously susceptible to capture by the Kosovar Albanian majority, which could usually outvote the international judge on any particular panel.⁸⁰ They therefore quickly lost legitimacy, particularly among the Serb minority, leading to eventual United Nations restructuring and reform of the Kosovar judiciary.⁸¹ Similar dangers of capture and political manipulation exist with respect to semi-internationalized courts in East Timor and the Gacaca courts in Rwanda.⁸²

For a variety of reasons, regional international criminal tribunals are far less subject to political capture than are national and semi-internationalized courts. Whereas national courts are embedded in a domestic political context at every stage—from the creation of the court to investigation, trial, verdict, and sentencing—once a regional court has been established through national political means, its proceedings and operation are more insulated from domestic political factors. While the assembly of states parties to the regional court may be influenced by national politics, if there are a sufficiently large number of states involved, the domestic politics of any particular member state will be sufficiently diluted to prevent capture by particular political, ethnic or religious groups.

Even where national courts are not, in fact, manipulated by domestic politics, regional courts may still offer a greater perception of legitimacy to all interested parties. In transitional states, it is often the case that the government represents a particular ethnic or religious group. A court that appears subject to that group’s control may lose credibility in the eyes of the minority. A regional court is more likely to be seen as separated from domestic political strife and more removed from the particular conflicts that may have occurred in the territorial state. As such, a regional court may have more buy-in from minority groups and from the international community at large.

Again, none of the normative arguments above are conclusive support for regional criminal law enforcement. Some factors such as judicial experience and lack of political bias argue in favor of supranational enforcement, whereas other factors such as proximity to the crimes and reduced costs favor enforcement at the national level. But in balancing these factors the effectiveness, cost, and legitimacy of international criminal justice appear

78. JACK SNYDER, MYTHS OF EMPIRE 15 (1991).

79. Seth Mydans, *U.N. Ends Cambodia Talks On Trials for Khmer Rouge*, N.Y. TIMES, Feb. 9, 2002, at A4. After a nine-month hiatus, these talks have resumed but face an uncertain future; see also Elizabeth Becker, *U.N. Revives Plan to Try Remnants of Khmer Rouge in Cambodia*, N.Y. TIMES, Nov. 21, 2002, at A8.

80. See Organization for Security and Co-operation in Europe (Mission in Kosovo), Review of the Criminal Justice System: September 2001–February 2002, at 25–44, available at http://www.osce.org/kosovo/documents/reports/justice/criminal_justice4_eng.pdf (discussing the independence of the judiciary) (last visited Apr. 25, 2003); see also *Observations and Recommendations of the OSCE Legal System Monitoring Section: Report 2—The Development of the Kosovo Judicial System (10 June through 15 December 1999)*, Dec. 17, 1999, at <http://www.osce.org/kosovo/documents/reports/justice/report2.htm> (last visited Apr. 25, 2003).

81. Llazar Semini, *Kosovo Albanians say US Congress is Playing with Fire*, 2 CEN. EUR. REV. No. 20, May 22, 2000, at <http://www.ce-review.org/00/20/kosovonews20.html> (last visited Apr. 25, 2003).

82. See generally Burke-White, *supra* note 6.

to be maximized through enforcement at the regional level. At the very least, then, it is worth exploring the possibilities of regional criminal law enforcement and the benefits a regional system of international criminal law enforcement could offer.

IV. THEORIZING REGIONALIZATION OF INTERNATIONAL CRIMINAL JUSTICE

Once the normative proposition that regional approaches to international criminal justice should, at the least, be considered, positive questions about how to implement regional enforcement emerge. The creation of regional courts to enforce international criminal law requires states to delegate jurisdiction over international crimes to a regional enforcement body. Why should states do this, particularly in light of the fact that the ICC has already come into existence? This is a political question: Why would states delegate aspects of their sovereign criminal jurisdiction to a regional body? For regional criminal enforcement to be possible, an answer to this question must be found in political science theory.

For such a theory of regional international criminal law enforcement to be useful it must do three things. First, it must situate regional international criminal justice within the political science debate over regionalism. Second, it needs to articulate why states would follow a regionalist approach to international justice given the already existent ICC and the relatively easy exercise of universal jurisdiction domestically. And third, it must suggest how, from a political science and international relations perspective, the regionalization of international criminal justice can be achieved.

A theory of regional international criminal justice finds its starting point within the overall political science literature of regionalization. Yet, on the surface that literature is for regional justice. Theories of regionalism have largely developed in two waves, the first corresponding to the early regionalization in the post-WWII era⁸³ and the second drawing from the more recent economic regionalization beginning in the 1980s.⁸⁴ Theories of first-wave regionalism were largely limited to the study of Europe, particularly the European Coal and Steel Community⁸⁵ and drew on ideas of shared cultural identity as well as functionalist international relations scholarship. The second wave of theories has looked toward economics and functional economic integration, rather than political or cultural ties, as the basis for regionalization.⁸⁶

Neither theories of first nor second wave regionalism alone can provide a sound theoretical basis for regional international criminal law enforcement. First wave regionalism began with the proposition that “members of a common region also share cultural, . . . linguistic, or political ties.”⁸⁷ Such cultural ties, however, while possibly

83. This first wave of regionalization came largely “during the 1960s. Under the impetus of the European Common Market, regionalism spread throughout Africa, Latin America and other parts of the developing world.” Jamie De Melo & Arvind Panagariya, *Introduction*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 3 (Jamie De Melo & Arvind Panagariya eds., 1993).

84. The second wave began largely in the 1980s. This included NAFTA, deeper regionalism within Europe, the Central American Common Market, ASEAN, and MERCOSUR to name just a few. *See id.* at 3–4.

85. *See, e.g.*, ERNST B. HAAS, *THE UNITING OF EUROPE* (1958).

86. *See, e.g.*, Mansfield & Milner, *supra* note 49, at 601 (noting that second wave regionalism theories have looked to “high levels of economic interdependence, a willingness by the major economic actors to mediate trade disputes, and a multilateral (that is, the GATT/WTO) framework . . .”); Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION*, *supra* note 83, at 22–23 (defining the new wave of regionalism as “preferential trade agreements among a sub-set of nations”).

87. Mansfield & Milner, *supra* note 49, at 591; *see generally* DEUTSCH, *supra* note 49 (noting the importance of cultural ties to early European integration).

existent in Europe, have been relatively slow to materialize elsewhere and alone cannot generate the requisite delegation of criminal jurisdiction from the nation-state to a regional court. First wave regionalization further drew on the literature of functionalism. First-wave regionalists used functionalism to show that functional areas of governance could be disaggregated and that regional solutions would be more cost effective.⁸⁸ According to early regionalists, cooperation in these areas “would set in motion an ongoing process . . . that would lead eventually to political integration.”⁸⁹ But functionalism alone also fails to explain regionalization of international criminal justice. The exercise of criminal jurisdiction is well within the core political functions of the domestic state and does not necessarily call for regional solutions. Thus, there is no functional reason to expect regionalism of criminal enforcement.

Second-wave theories of regionalization appear equally unhelpful in theorizing regional international criminal law enforcement. The economic integration oriented second-wave theories⁹⁰ have focused on trade flows and the need for economic cooperation within a globalizing political economy. While such economic ties may well explain regional trade groups, a common regional mechanism for the adjudication of international crimes⁹¹ is unconnected to economic integration. Nonetheless, second generation regionalism highlights the ways that globalization—of economics or even crime—calls for regional solutions to common problems.

An alternative theoretical approach to regional criminal law enforcement is therefore needed. By drawing on certain elements of both first- and second-wave theories of regionalism, a theoretical basis can be found to achieve the normative benefits of regionalization discussed in Part III. Such a theory stems from recent scholarship at the intersection of domestic politics and international relations more particularly. The theory starts from the basic proposition of liberal international relations theory that “individuals and private groups” are the “fundamental actors in international politics.”⁹² International outcomes, in this case regionalization, depend on the “policy interdependence” among the preferences of these domestic actors as mediated through the nation-state.⁹³ Helen Milner has articulated such a theory with respect to economic regionalization,⁹⁴ drawing on Robert Putnam’s two-level game analysis, in which the domestic and international levels each impose mutual constraints on one another.⁹⁵ Milner argues that “international negotiations to conclude regional co-operative agreements and domestic politics are intertwined” and

88. See ERNST B. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* 6–7 (1964) (noting that functionalists “believe in the possibility of specifying technical and ‘non-controversial’ aspects of governmental conduct, and of weaving an ever-spreading web of international institutional relationships on the basis of meeting such needs. They would concentrate on commonly experienced needs initially, expecting the circle of the non-controversial to expand at the expense of the political . . .”).

89. Andrew Hurrell, *Regionalism in Theoretical Perspective*, in *REGIONALISM IN WORLD POLITICS: REGIONAL ORGANIZATION AND INTERNATIONAL ORDER* 59 (Louise Fawcett & Andrew Hurrell eds., 1995).

90. See generally *NEW REGIONALISMS IN THE GLOBAL POLITICAL ECONOMY* (Shaul Bresin et al. eds., 2002); *REGIONALISM AND GLOBAL ECONOMIC INTEGRATION* (William D. Coleman & Geoffrey R.D. Underhill eds., 1999); De Melo & Panagariya, *supra* note 83.

91. If such courts focused on economic crimes, the situation might be different, but economic crimes have largely been excluded from the jurisdiction of international criminal courts.

92. Andrew Moravcsik, *Taking Preferences Seriously*, 51 *INT’L ORG.* 513, 516 (1997).

93. *Id.* at 520.

94. Helen Milner, *Regional Economic Co-operation, Global Markets, and Domestic Politics: A Comparison of NAFTA and the Maastricht Treaty*, in *REGIONALISM AND GLOBAL ECONOMIC INTEGRATION* 20 (William D. Coleman & Geoffrey R.D. Underhill eds., 1999).

95. See generally Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 *INT’L ORG.* 427 (1988).

that domestic politics largely turns on the “electoral concerns” of political leaders and the ability to get any agreement ratified by parliament.⁹⁶

Regionalism must be understood as a two-step process. First, states must develop a set of preferences in favor of regional outcomes. Second, they must articulate and implement a particular strategy of regionalization to attain those goals. The first step in developing a theory of regional international criminal law enforcement along these lines requires, to borrow from Andrew Moravcsik, that “government formulate a consistent set of national preferences” in favor of regionalization.⁹⁷ In other words, the preferences of particular actors and domestic interests must favor outcomes associated with regional law enforcement. In addition, those actors must succeed at having their preferences reflected in government policy. In many states across numerous regions, the number of interest groups in civil society advocating international justice has grown rapidly.⁹⁸ Where such interests are predominately of a regional character, or where they seek to attain the normative benefits of regionalization discussed in Part IV above,⁹⁹ the creation of a “transnational regional civil society” united around regionalization may occur. These interests would, in turn, lobby their various governmental institutions or produce electoral benefits for the government if it follows a policy of regionalization.

One potential domestic political calculus that could drive states—democratic and non-democratic alike—toward a set of national preferences in favor of regionalization is what Moravcsik calls a political lock-in device.¹⁰⁰ As applied to European integration, he argues that governments sought regional cooperation or international commitments to lock-in domestic policies in the face of “uncertainty about the future.”¹⁰¹ Used to explain the origins of an enforceable European Human Rights system, Moravcsik argues that “domestic political self-interest of national governments” was the key factor.¹⁰² “Establishing an international human rights regime is an act of political delegation akin to establishing a domestic court or administrative agency [It] is a tactic used by governments to ‘lock in’ and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis nondemocratic political threats.”¹⁰³ In short, Moravcsik claims “governments turn to international enforcement when an international commitment effectively enforces the policy preferences of a particular government at a particular point in time against future domestic political alternatives.”¹⁰⁴

Moravcsik’s notion of a lock-in mechanism may also provide a theoretical basis for governmental preferences in favor of regionalization of international criminal law enforcement. By delegating sovereignty to a regional criminal enforcement mechanism, governments can precommit to “a series of smaller, uncertain decisions” in the future, such as whether to prosecute particular international crimes.¹⁰⁵ The benefits of such a lock-in mechanism, in terms of both legitimacy and policy commitment, may generate a

96. Milner, *supra* note 94, at 23.

97. ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE & STATE POWER FROM MESSINA TO MAASTRICHT* 20 (1998).

98. Amnesty International and Human Rights Watch are clear examples, just to name a few. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* ch. 3 (1998) (discussing human rights advocacy networks in Latin America).

99. *See id.*

100. MORAVCSIK, *supra* note 97, at 73.

101. *Id.*

102. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 220 (2000).

103. *Id.*

104. *Id.*

105. MORAVCSIK, *supra* note 97, at 73.

sufficiently strong government preference in favor of regionalization to create or shift policy.

Once a preference for regional enforcement has been established, a second, and analytically separate, step in the process of regionalization is the choice by a government of a particular strategy of regionalization. This decision stems from what Moravcsik calls a “bargaining over substantive cooperation” among states.¹⁰⁶ Such bargaining will only lead to regionalization when “the benefits of reducing future political uncertainty outweigh the ‘sovereignty costs’ of membership” in a regional organization.¹⁰⁷ In Milner’s formulation, the “central cost [to a regional mechanism] seems to be the loss of a policy instrument. International cooperation means that political leaders are prevented from manipulating some policy variable that they otherwise could.”¹⁰⁸ This is, of course, costly in political terms. States will only cooperate when the loss of that policy instrument is less costly than the gains from regionalization. In particular, a state which commits to enforce international criminal law through membership in a regional organization is prevented in the future from violating international criminal law and must cooperate in the enforcement of such rules vis-à-vis other violators even when such enforcement is not in the state’s national interest as then determined. This is, of course, the primary U.S. argument against ratification of the Rome Statute of the ICC.¹⁰⁹

So far, this argument suggests that states may develop policy preferences in favor of regionalization, but will only delegate sovereignty to a regional enforcement mechanism when the domestic benefits outweigh the sovereignty costs of membership.¹¹⁰ The micro-foundational benefits of regional enforcement are rooted in the fact that the sovereignty costs of membership in a regional organization may be significantly lower than those associated with membership in a supranational or global tribunal such as the ICC. As Milner explains, the sovereignty costs of membership in some organizations “may be very high—so high that political leaders would not rationally choose cooperation.”¹¹¹ The propensity for cooperation can then be enhanced by decreasing the sovereignty costs of membership in a particular organization. The normative benefits of regionalism discussed above suggest that regional international criminal law enforcement institutions offer lower sovereignty costs for Member States than do their supranational counterparts.

The literature of first-wave regionalism is strongly indicative of the lower sovereignty costs of membership in a regional enforcement body. The proto-constructivist theories of first-generation regionalism depend on a kind of regional awareness, a “shared perception of belonging to a particular community [that] can rest on internal factors, often defined in terms of common culture, history, or regional traditions.”¹¹² This approach to regionalism sees particular regions as sharing common values, ideals, and practices. Karl Deutch described this regionalism in terms of “security communities,” sharing a sense of common identity and common defense.¹¹³ Writing about regionalism in terms of “rudimentary value sharing,” Ernst Haas defined political integration as the process whereby “political actors in

106. *Id.* at 21.

107. Moravcsik, *supra* note 102, at 220.

108. Milner, *supra* note 94, at 25.

109. See, e.g., Lee A. Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 840 (2002).

110. In addition, states may face international, as well as domestic, pressure to enforce international law or enter into regional enforcement mechanisms. Conceived in terms of liberal international relations theory, such policy interdependence will have an effect on state behaviour. This analysis, however, is largely focused at the level of domestic political decision making and assumes that international pressure may independently alter the perceived benefits of regionalization.

111. Milner, *supra* note 94, at 25.

112. Hurrell, *supra* note 89, at 41.

113. See generally DEUTSCH, *supra* note 49.

several distinct national settings are persuaded to shift their loyalties, expectations, and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states.”¹¹⁴

More recently, strong constructivists have stressed the cultural roots of regionalism, defining regions as “social constructions”¹¹⁵ and regionalism as “a set of cognitive practices shaped by language and political discourse, which through the creation of concepts, metaphors, analogies, determine how the region is defined.”¹¹⁶ They point to “cultural and political similarities” within NAFTA or to “Asian values” as indicative of cultural and social aspects of regionalism.¹¹⁷

If the shared values inherent in first-generation regionalism and reasserted by modern constructivists are correct, then the sovereignty costs of regional enforcement of international criminal law may be far lower than those associated with supranational enforcement mechanisms. If a regional court shares the values of its Member States and enforces international criminal law within the scope of that value set, then members should have less to fear from such an organization. Within a regional framework, the potential range of perceived “foreign” invasive action by a criminal court would be reduced, thus increasing domestic demand for regionalization and easing the government’s decision to delegate sovereignty.

The lower sovereignty cost of regional arrangements can also be considered empirically, based on the absolute numbers of states involved. In a supranational enforcement body such as the ICC, the sheer number of members of the assembly of states parties (in the future, possibly as many as 200 in the case of the ICC) limits the influence of any particular state on issues referred to the assembly, such as amendments to the elements of crimes or the selection of judges.¹¹⁸ Whereas, within the framework of a regional mechanism, the smaller number of states-parties increases the influence of any particular state, thereby reducing the sovereignty costs of membership. Likewise, the reduction in the number of states parties increases the likelihood that a particular state’s nominees for judges or will be chosen, again reducing the sovereignty costs of membership.

The neo-functionalist arguments of second-generation regionalism and European integration, upon which much of the above argument rests, further suggest that opportunities for regional criminal law enforcement can be enhanced if regional courts were also delegated jurisdiction over region-specific issues. As Andrew Hurrell argues, regional mechanisms are more likely to arise where they “solve common problems, especially problems arising from increased levels of regional interdependence.”¹¹⁹ Anne-Marie Slaughter and Walter Mattli explain the development of the European Court of Justice based on this neo-functionalist approach, arguing “that the Court’s success in constructing an effective Community legal system was best explained in neofunctionalist

114. HAAS, *supra* note 85, at 16; *see generally* Ronald Yalem, *Theories of Regionalism*, in REGIONAL POLITICS AND WORLD ORDER 218 (Richard Falk & Saul Mendlovitz eds., 1973) (noting the importance of sociological-solidarity to regionalism).

115. Peter J. Katzenstein, *Regionalism and Asia*, in NEW REGIONALISMS IN THE GLOBAL POLITICAL ECONOMY 105–06 (Shaul Bresin et al. eds., 2002).

116. *Id.* at 105 (quoting Kanishka Jayasuria, *Singapore: The Politics of Regional Definition*, 7 PAC. REV. 411, 412 (1994)).

117. *Id.* at 106.

118. *See* Rome Statute, *supra* note 3, art. 9 (requiring a two-thirds vote of the members of the Assembly of States Parties to amend the Elements of Crimes).

119. Hurrell, *supra* note 89, at 42.

terms.”¹²⁰ They find that “individuals . . . who could point to a provision in the Community treaties . . . that supported a particular activity they wished to undertake . . . were able to invoke Community law.”¹²¹ While in international criminal law individuals cannot bring cases, independent prosecutors can. The “self-interested private actors” essential to the neo-functional argument are still part of the international criminal system, even if in a different form.¹²² If this argument is correct, increasing the number of possible issues of regional relevance that prosecutors can pursue should increase the robustness of regional courts. As most regional arrangements are related to economic cooperation and preferential trade arrangements, vesting regional international criminal courts with jurisdiction over certain economic crimes, which are of concern to Member States but not sufficiently redressed by domestic tribunals, would enhance the likelihood of the emergence of regional courts.

While the ICTY, ICTR, and ICC do not have jurisdiction over such crimes and such crimes are not subject to universal jurisdiction, there is nothing to prevent states from delegating jurisdiction over economic crimes to a regional court, subject to the member states’ particular domestic laws. Vesting regional courts with such jurisdiction could well enhance the political and electoral benefits of regional courts without significantly increasing the sovereignty costs of membership, thereby enhancing their value and likelihood of creation.

What emerges then is a theoretical explanation for a move toward the regionalization of international criminal law enforcement that explains how and why states would choose regional rather than supranational enforcement mechanisms. Based on micro-foundational international relations analysis, it asserts that domestic political calculations lead states to develop policy preferences in favor of regionalization. States then choose to delegate sovereignty to a regional enforcement mechanism when these benefits of regionalization outweigh the sovereignty costs of membership in a regional court.

V. IMPLEMENTING REGIONALIZATION OF INTERNATIONAL CRIMINAL JUSTICE

Having provided a theoretical account of why states would choose regional enforcement of international criminal law, it is necessary to examine how they could do so. What are the specific pathways to regionalization currently available? There are four potential means to regionalizing the enforcement of international criminal law, ranging from hard to soft regionalism. These include: (1) the creation of specialized regional criminal courts; (2) the ICC sitting regionally; (3) a preference in the exercise of universal jurisdiction for prosecution by a state within the region in which the crime occurred, and (4) semi-internationalized criminal courts drawing on judges and precedents from within the region. This section considers in detail the ways that each of these four options could be pursued, exploring the possibilities from the perspective of international law and the challenges of implementation from the perspective of political science.

120. Anne-Marie Slaughter & Walter Mattli, *Revisiting the European Court of Justice*, 52 INT’L ORG. 177, 178 (1998); see also Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993).

121. Slaughter & Mattli, *supra* note 120, at 180.

122. *Id.* at 182 (citing Alec Stone & James Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration* § 2 (Berkeley Ctr. for German and European Stud., Univ. of Cal. Berkeley, Working Paper No. 2.45, 1996), available at <http://www.ciaonet.org/wps/caj01/> (last visited Apr. 9, 2003)).

A. *Regional Criminal Courts*

The strongest possible form of regionalization of international criminal justice would be the creation of truly regional international criminal courts. Such courts would in theory follow the model of the ICC, yet would have their territorial jurisdiction limited to the particular region in which they sit and draw upon judges from that region. Like the ICC, such courts would need to be established by the potential regional member states through treaty. However, such a treaty would be far easier to negotiate as fewer member states would be involved and the potential for greater consensus may exist within the region. Thus, a regional criminal court could avoid much of the discord that characterized the negotiation of the Rome Statute of the ICC.¹²³

In many ways, the ICTY has become a regional criminal court for the Balkans as it has jurisdiction over international crimes, which occur on the entire territory of the former Yugoslavia, now including Bosnia, Serbia and Montenegro, and Croatia.¹²⁴ Yet, while the ICTY draws its judges and staff from all UN member and observer states and follows a kind of universal procedure, a truly regional criminal court would presumably include judges only from the particular region and allow regional procedural variation.

While it might at first seem to be reinventing the wheel to create regional criminal courts now that the ICC statute has come into force,¹²⁵ the normative appeal of regionalization discussed in Part III and the theoretical explanation for regionalization considered in Part IV, may make the effort worthwhile. Moreover, many parts of the world already have strong regional mechanisms in place, within which regional criminal courts could be situated. For example, Europe already has an extremely robust regional court system,¹²⁶ including both the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). An amendment to the Treaty of European Union¹²⁷ or the Statute of the European Court of Human Rights,¹²⁸ for example, could vest the ECJ and the ECHR with jurisdiction over international crimes committed in the region or by Member-State nationals.¹²⁹ Alternatively, an entirely new regional court with jurisdiction over individuals could be established. Likewise, the Organization of American States has a pre-existing legal structure, including the Inter-American Court of Human Rights.¹³⁰ While the purpose

123. See Young Sok Kim, *The International Criminal Court: A Commentary on the Rome Statute* (2000) (unpublished J.S.D. dissertation, Univ. of Ill. at Urbana-Champaign, on file with author) (describing the negotiation of the Rome Statute in the excruciating, though informative, detail of a 790-page J.S.D. dissertation).

124. See Statute of the International Criminal Tribunal for the Former Yugoslavia, *annex to* Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute]. The Security Council adopted the Secretary General's draft of the Statute without change in Resolution 827, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 8, U.N. Doc. S/RES/827 (1993) (noting that "the territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.").

125. The Rome Statute of the ICC entered into force in July 2002, after the sixtieth ratification on April 12, 2002. Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, at A3.

126. See generally Slaughter & Mattli, *supra* note 120.

127. See TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1, 31 I.L.M. 247.

128. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.pfc.org.uk/legal/echrtxt.htm> [hereinafter ECHR].

129. Given the already overwhelming caseload of the ECJ, additional juridical resources would be needed to realize this proposal. Alternatively a new tribunal could be created within the pre-existing legal structure of the European Union.

130. See, e.g., CARLOS STOETZNER, *THE ORGANIZATION OF AMERICAN STATES* (1993).

of the Inter-American Court of Human Rights is the “application and interpretation of the American Convention on Human Rights” to states¹³¹ and its statute does not provide for individual criminal responsibility, a new treaty or protocol could extend its jurisdiction to include individual criminal responsibility.

Alternatively, in regions without strong pre-existing judicial mechanisms, entirely new regional courts could be created. South Africa provides an excellent example. In Sub-Saharan Africa there are few strong regional organizations but numerous international crimes have been committed.¹³² An entirely new regional tribunal would therefore be necessary. South Africa could take the lead in this effort, furthering its regionalist project to “bind the region together under South African leadership.”¹³³ Such a regional international criminal court seated in South Africa would further Thabo Mbeki’s goal of bringing “to an end the practices as a result of which many throughout the world have the view that as Africans, we are incapable of establishing and maintaining systems of good governance” and could “encourage all other countries on our continent to move in the same direction”¹³⁴ The Asian region, whether defined narrowly or broadly, would likewise require a ground-up effort if strong regional criminal courts are to be created.

Admittedly, the creation of entirely new judicial mechanisms or even the vesting of existing regional courts with individual criminal jurisdiction would not be either a quick or easy task. While this option has been presented here to provide a complete range of options, such strong regionalization may not be necessary to achieve the normative benefits discussed above. Although there may be particular benefits associated with such a strong form of regional international criminal justice, similar goals can be achieved through the softer, more easily implemented alternatives considered next.

B. *The International Criminal Court Sitting Regionally*

The ICC Statute already provides for the possibility of the Court sitting regionally. While the ICC is primarily a supranational enforcement mechanism, with its seat in The Hague—far removed from most of the cases it is likely to hear—Article 3 of the Rome Statute envisions a regional seat in certain circumstances. Pursuant to Article 3, “[t]he seat of the Court shall be established at The Hague in the Netherlands,” but “[t]he Court may sit elsewhere, whenever it considers it desirable.”¹³⁵

The Rome Statute thus explicitly authorizes sessions outside of The Hague and leaves a great deal of leeway to the Court to determine when it should do so. The Rome Statute provides little guidance as to when the Court should sit regionally, only observing that the court should do so when it “considers it desirable.”¹³⁶ According to the *travaux préparatoires*, the basic considerations for the court in determining whether to sit outside of The Hague are the practicality of such arrangements and whether it is in the interests of

131. Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992), available at <http://www.cidh.oas.org/basic.eng.htm> (last visited May 13, 2003).

132. In Rwanda, Burundi, and Congo alone, the number of potential international crimes far exceeds the current resources of either the ICTR or domestic judicial mechanisms.

133. Ian Taylor, *Good Governance or Good for Business? South Africa’s Regionalist Project and the African Renaissance*, in NEW REGIONALISMS IN THE GLOBAL POLITICAL ECONOMY 190, 191 (Shaul Bresin et al. eds., 2002).

134. Thabo Mbeki, *The African Renaissance, South Africa and the World*, Address at the United Nations University (Apr. 9, 1998), in AFRICA: THE TIME HAS COME 247 (Thabo Mbeki ed., 1998).

135. Rome Statute, *supra* note 3, arts. 3(1), 3(3).

136. Rome Statute, *supra* note 3, art. 3(3).

justice to do so.¹³⁷ Pursuant to Article 38(3)(a) of the Statute, decisions regarding the seat of the court in a particular case and the logistical arrangements necessary are the responsibility of the Presidency of the Court. Thus, a decision of the President of the Court that it is normatively preferable and logistically possible to sit regionally would be sufficient to allow the Court to sit out of The Hague, presumably in the region where the crimes occurred. From a legal perspective then, the possibility of the ICC sitting in a regional context is both possible and easy to achieve without structural changes.

From a logistical standpoint, the possibility of the ICC sitting regionally is also realizeable. First, the Court would need to negotiate with a state in the region to sit for at least the purposes of obtaining evidence and conducting the trial in that state. A temporary headquarters agreement might need to be negotiated with the temporary host state to ensure the safety and sanctity of UN personnel during the proceedings.¹³⁸ Such agreements “have evolved into a fairly standardized format” and are unlikely to present serious difficulties.¹³⁹ Second, the ICC would need to identify and secure facilities for the trial. National facilities of a state in the region could be borrowed or rented by the Court as needed. As the Court would bring its own legitimacy and independence to the region, it could probably utilize host state facilities without significant claims of bias and improper influence. Alternatively, the Court could utilize existing UN facilities in the region—such as the court rooms of the ICTR in Arusha. The use by the U.K. government of Camp Zeist in the Netherlands for the Lockerbie trial is illustrative of this possibility.¹⁴⁰

While one of the leading commentaries on the Rome Statute is somewhat skeptical of the ICC sitting out of The Hague, there are clear benefits to this arrangement. In the 2002 Commentary, Adriaan Bos observes: “[G]reater risks may be involved in sittings outside the Host State. Proximity of the trial to the place where the crime was allegedly committed may cast a shadow over the proceedings. It can raise questions concerning the respect for the defendant’s right to a fair and impartial trial or it may create unacceptable security risks”¹⁴¹ Nonetheless, he acknowledges conducting the “trial closer to the scene of the alleged crime” may “facilitate the attendance of witnesses and the production of evidence.”¹⁴² If the ICC Presidency were to make the decision to sit regionally, the concerns Bos raises could largely be avoided as the Court would still have the distance from the actual site of the crime as well as the international legitimacy to ensure security and impartiality. As the ICC begins operations it should give strong consideration to this possibility of a regional seat in appropriate cases.

C. *Regional Preference for the Exercise of Universal Jurisdiction*

A third means of moving enforcement of international criminal law from the supranational to the regional level, completely independent of the ICC, is through the regional exercise of universal jurisdiction. Universal jurisdiction delegates authority from

137. Preparatory Commission for the International Criminal Court Working Group on the Basic Principles Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country, U.N. Doc. PCNICC/2001/WGHQA/L.1, princs. 16–23 (2001).

138. Adriaan Bos, *Seat of the Court*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 196 (Antonio Cassese et al. eds., 2002) (observing that “[a]lmost every international organization has some form of agreement with its Host State”).

139. *Id.* at 196.

140. See Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, ILSA J. INT’L & COMP. L. 355, 356–58 (2000).

141. Bos, *supra* note 138, at 200.

142. *Id.* at 199.

the international system to states to prosecute crimes in their domestic courts committed by non-nationals extraterritorially.¹⁴³ While universal jurisdiction can be exercised with respect to serious international crimes by any state that has delegated to its courts the jurisdiction to hear such cases, regionalization can be achieved by granting a jurisdictional preference to states within the region in which the crime occurred. There are states in all regions of the world with the domestic legislation to exercise universal jurisdiction. More than 120 states have adopted legislation to prosecute war crimes under the universality principle,¹⁴⁴ and at least ninety-five have adopted legislation with respect to crimes against humanity.¹⁴⁵ Wherever international crimes occur, there are states within the region capable of prosecution under the universality principle.

Presently there are no generally observed rules for resolving jurisdictional conflicts with respect to the exercise of universal jurisdiction. As any state with the requisite domestic laws can prosecute international crimes under universal jurisdiction, jurisdictional conflicts can arise. Thus, when Augusto Pinochet was arrested in the United Kingdom in 1999, there was no clear hierarchy of jurisdiction to determine by which of a number of states seeking extradition he should be prosecuted. The Princeton Principles on Universal Jurisdiction, an attempt by leading scholars in international law to develop a set of guiding principles for the exercise of universal jurisdiction, sought to resolve this tension by providing a set of criteria for determining priority in the exercise of jurisdiction. The Princeton Principles direct states to resolve jurisdictional conflicts based on

an aggregate balance of . . . (a) multilateral or bilateral treaty obligations; (b) the place of commission of the crime; (c) the nationality connection of the alleged perpetrator to the requesting state; (d) the nationality connection of the victim to the requesting state; (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim; (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state; (g) the fairness and impartiality of the proceedings in the requesting state; (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and (i) the interests of justice.”¹⁴⁶ The Commentaries make clear that this list “is not intended to be exhaustive,” but rather is designed “to provide states with guidelines for the resolution of conflicts.”¹⁴⁷

A complex balancing test thus arises which does not offer a clear solution to jurisdictional conflicts.

The Principles include a tacit acknowledgement of the importance of regionalism, noting the priority of the territorial state and specifically mentioning the “convenience to

143. See generally Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 820 (1988).

144. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION, IOR 53/006/2001, ch. 4, Part A, § 1, Sept. 1, 2001, at <http://web.amnesty.org/library/Index/engior530062001?OpenDocument?OpenDocument> (last visited Apr. 9, 2003) (describing in an exhaustive 15-part review the domestic implementing legislation).

145. AMNESTY INTERNATIONAL, *supra* note 144, IOR 53/009/2001, ch. 6, at <http://web.amnesty.org/library/Index/engior530092001?OpenDocument?OpenDocument> (last visited Apr. 9, 2003). For a complete chart of domestic implementing legislation for the exercise of universal jurisdiction, see AMNESTY INTERNATIONAL, *supra* note 144, IOR 53/018/2001, ch. 15, at <http://web.amnesty.org/library/Index/engior530182001?OpenDocument?OpenDocument> (last visited Apr. 9, 2003).

146. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 32 (2001).

147. *Id.* at 53.

the parties and witnesses, as well as the availability of evidence” as key factors to consider.¹⁴⁸ A more explicit preference for the exercise of universal jurisdiction by states within the region could be accomplished merely by state practice and jurisdictional restraint by non-regional states.

Of course, regionalization of universal jurisdiction would not resolve all jurisdictional conflicts nor should it be the sole determinant for the exercise of universal jurisdiction. If two states within the region where the crime occurred both seek to exercise universal jurisdiction, the other factors included in the Princeton Principles would need to be considered. Moreover, where the requesting state within the region lacks “good faith” and “effectiveness”¹⁴⁹ or is unable to “observe international due process norms,”¹⁵⁰ jurisdictional preference should not be granted to it. Likewise, where the regional exercise of universal jurisdiction would produce dangerous political repercussions, such as India exercising universal jurisdiction against a Pakistani official, other options should be considered. Thus, regionalization of universal jurisdiction must be considered in the context of regional politics and the domestic institutions and intent of the requesting state.

Regionalization of international criminal law through a regional preference in the exercise of universal jurisdiction, like the ICC sitting regionally, would be relatively easy to achieve. States such as Belgium, Switzerland, and Germany are already active in the exercise of universal jurisdiction.¹⁵¹ Thus, war crimes in say Kosovo could be prosecuted regionally in the national courts of Belgium or Switzerland. While the exercise of universal jurisdiction has to date largely been a European phenomenon,¹⁵² it is not limited thereto. International crimes committed in Congo or Rwanda could be prosecuted in South Africa while those in Sierra Leone could be heard in Ghana, for example. The only necessary prerequisites for regionalization through universal jurisdiction are for states in regions other than Europe to demonstrate the political willingness to exercise universal jurisdiction and the emergence of a state practice whereby jurisdictional preference is granted to states within the region.¹⁵³

D. *Specialized Domestic Courts with Regional Judges*

A fourth opportunity for regionalization is through specialized domestic courts in post-conflict situations drawing on resources and personnel from within the region. A significant development in the enforcement of international criminal law is the growing number of specialized domestic or semi-internationalized courts adjudicating cases of international crimes.¹⁵⁴ Such courts are most often created in post-conflict transitional situations in which a fully internationalized tribunal is impracticable, yet the domestic judiciary is unable to deal with the complexity and number of outstanding cases. These

148. *Id.* at 32, 53.

149. *Id.* at 32.

150. *Id.* at 29.

151. See generally Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide*, REDRESS, June 30, 1999, available at <http://www.redress.org/publications/unijeur.html> (last visited Apr. 25, 2003).

152. See *id.*

153. For a discussion of ways of implementing the Princeton Principles into national law, see Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles or the International Criminal Court Accomplish this Goal?*, 15 *TRANSNAT'L LAW* 357, 396–98 (2002).

154. See generally Burke-White, *supra* note 6; Daryl Mundis, *Current Developments: New Mechanisms for the Enforcement of International Humanitarian Law*, 95 *AM. J. INT'L L.* 934, 942–45 (2001).

courts are currently sitting in East Timor,¹⁵⁵ Kosovo,¹⁵⁶ and Sierra Leone¹⁵⁷ and have been proposed in Cambodia.¹⁵⁸ In both East Timor and Sierra Leone, the courts are effectively grafted onto the domestic judiciary, applying international criminal law within the overall structure of the domestic courts. Likewise, in both countries, the judicial panels consist of local and international judges sitting together on a mixed panel.¹⁵⁹

As these courts are effectively part of the national judicial system, it may seem anomalous to talk of regionalization. Yet, these semi-internationalized courts include international judges, effectively borrowed from other legal systems. Regionalization, thus, can be achieved through the selection of international judges who sit in these courts. The Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone explicitly provides for such regionalization. It specifies that “[t]hree judges shall serve in the Trial Chamber where one shall be appointed by the Government of Sierra Leone and two judges appointed by the Secretary-General, upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.”¹⁶⁰ The actual selection of judges has reflected this preference for nominees from the Economic Community of West African States and the Commonwealth. Judges hail from Cameroon, Nigeria, and The Gambia, as well as Sierra Leone and the United Kingdom.¹⁶¹ Even where such regionalization is not specifically provided for, it can be achieved easily through the selection of judges and personnel. In East Timor, for example, there are no formal guidelines for determining the national origin of judges.¹⁶² To date, judges have come from Portugal, Cape Verde, East Timor¹⁶³ as well as Burundi. During the UN Transitional Administration in East Timor, judges were recruited through the United Nations, which sought applications directly from national judges and nominations from Member States.¹⁶⁴ To regionalize these courts, the particular court administration and the United Nations would simply need to select judges from within the region where the courts sit and the crimes occurred, rather than from a general international pool.

Regionalization has been explicitly considered by the Cambodian Government for the operation of the Extraordinary Chambers in the Courts of Cambodia for the Trial of the Senior Leadership of the Khmer Rouge. If Cambodia and the United Nations are unable to reach an agreement on the creation of these courts through UN mechanisms, the

155. See *On the Organization of Courts in East Timor*, United Nations Transitional Administration in East Timor (UNTAET) Reg. 2000/11, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000) [hereinafter UNTAET Reg. 2000/11].

156. See *On the Appointment and Removal from Office of International Judges and International Prosecutors*, United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation 2000/6, U.N. Doc. UNMIK/REG/2000/6 (Jan. 12, 2001), available at <http://www.un.org/peace/kosovo/pages/regulations/reg06.html> (last visited Apr. 10, 2003).

157. Statute of the Special Court of Sierra Leone, *supra* note 60.

158. See His Excellency Sok An, Presentation and Comments to the National Assembly on the Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Dec. 29, 2000 & Jan. 2, 2001) (outlining the details of the law and describing it as consisting of “new formulas, new concepts, and new and significant principles”), available at <http://www.camnet.com.kh/ocm/government60.htm> (last visited May 13, 2003).

159. See, e.g., UNTAET Reg. 2000/11, *supra* note 155, para. 10 (providing for a mixed panel of national and international judges in the special panels in East Timor).

160. Sierra Leone Agreement, *supra* note 5.

161. *War Court Judges for Sierra Leone Take Their Oaths*, N.Y. TIMES, Dec. 3, 2003, at A8.

162. Ntukamazina Interview, *supra* note 67.

163. Interview with Caitlin Reiger, Co-Director, Judicial Systems Monitoring Program, in Dili, East Timor (Jan. 18, 2002).

164. Ntukamazina Interview, *supra* note 67.

Cambodian government has suggested a strategy to work around the United Nations and draw judges directly from neighbouring states. The government of India, for example, has explicitly offered to provide a judge to sit on such a tribunal.¹⁶⁵

Similarly, a kind of regionalization is being considered for the trial of war crimes and crimes against humanity committed by Saddam Hussein's regime in Iraq. On April 8, 2003, U.S. Ambassador for War Crimes Pierre Prosper and W. Hays Parks, Special Assistant to the Army's Judge Advocate General, announced plans for crimes against humanity trials in special Iraqi courts in "what Mr. Prosper called 'an Iraqi-led process that will bring justice for the years of abuses.'"¹⁶⁶ M. Cheriff Bassiouni has developed a plan for a mixed tribunal, similar to those in Sierra Leone and East Timor, "that employs Iraqi judges along with experienced jurors from other Arab nations."¹⁶⁷ Similarly, the author along with co-author Anne-Marie Slaughter have called for the creation of "mixed panels of Iraqi and international judges applying both domestic and international law."¹⁶⁸ By drawing on international judges from Arab countries with distinguished judiciaries such as Egypt these proposed courts could enhance their legitimacy both within Iraq and the international community.

While regionalization through the creation of regional criminal courts might have been a preferable option prior to the creation of the ICC, in the current context, the establishment of such courts is probably an unnecessary duplication. Nonetheless, many of the normative benefits of regionalization can be achieved through relatively simple options such as the ICC sitting regionally, a regional preference in the exercise of universal jurisdiction, and the regionalization of semi-internationalized tribunals.

VI. THE EFFECTS OF REGIONAL ENFORCEMENT ON INTERNATIONAL LAW: TWO VARIANTS

A move toward regional enforcement as part of a larger system of international criminal law consisting of national, regional, and supranational enforcement tribunals may also have an important effect on substantive international law. Two possible variants of this effect seem most likely. One possibility would be a fragmentation of international criminal law, whereby different substantive rules emerge in different regions. A second and preferable possibility is differentiation of procedural law within a relatively unified substantive jurisprudence. This section explores these two possible effects of regional enforcement of international criminal law, arguing that a fragmentation of substantive international criminal law is a highly unlikely, though dangerous possibility. Procedural differentiation with a universal system, however, would be normatively beneficial and is far more likely.

165. His Excellency Sok An, Presentation to The Stockholm International Forum: Truth, Justice, and Reconciliation (Apr. 23–24, 2002) (thanking "the Prime Minister of the Republic of India . . . who has just pledged to send a judge" to Cambodia), available at http://www.stockholmforum.com/extra/link/?module_instance=3 (last visited Apr. 25, 2003).

166. Frank J. Murray, *U.S. Will Prosecute Iraqis for War Crimes*, WASH. TIMES, Apr. 9, 2003.

167. Susan Dominus, *Their Day in Court*, N.Y. TIMES MAG., Mar. 30, 2003, at 33.

168. Anne-Marie Slaughter & William Burke-White, *The UN Must Help Bring Justice to Iraq*, FIN. TIMES, Apr. 9, 2003, available at 2003 WL 15524322.

A. *Fragmentation of International Criminal Law*

As the number of tribunals independently adjudicating similar legal issues, without any hierarchical review procedures, increases, so too does the possibility for variations in the substance of international law. Indicative of such variations are splits in the various U.S. Circuit Courts of Appeals on key legal issues that would be quite dangerous if it were not for the writ of certiorari to the United States Supreme Court through which some degree of uniformity can be achieved. Likewise, disagreements between the French Council d'Etat (the high court for administrative matters), the Cour de Cassation (the high court of general jurisdiction), and the Conseil Constitutionnel (which has, among other duties, the right of constitutional review of treaties) have proved challenging with respect to the direct application of European Community law in France.¹⁶⁹

While both the U.S. and French systems have developed mechanisms to resolve such disputes, the emergent system of international criminal law has neither a high court of review nor a requirement of stare decisis. Without a high court, the decisions of any regional court—or at least of that court's own appellate body—would be binding and not subject to review for uniformity. Without a system of stare decisis, previously decided cases would not be binding, and regional courts would not be under any obligation to follow the decisions of other tribunals. Jonathan Charney explains the danger: “Significant variations in general international law . . . could undermine the perceived uniformity and universality of international law As a result, the increased multiplicity of international dispute settlement forums may present particular difficulties for the international legal system.”¹⁷⁰

Even a slight variation in substantive rules of international criminal law could prove extremely damaging. Thomas Buergenthal, a judge on the International Court of Justice, has observed that “the proliferation of international tribunals can . . . have adverse consequences”¹⁷¹ Take, for example, the law of crimes against humanity. The standard definition of crimes against humanity, as articulated by the ICTR, is any of a series of enumerated acts including murder conducted against a civilian population as part of a wide-spread and systematic attack.¹⁷² The core elements of the crime are (1) a widespread and systematic attack on (2) a civilian population.¹⁷³ If a regional court were to change the definition of widespread or systematic even slightly, great variation in what constitutes a crime against humanity could occur. For example, a system might emerge in which crimes against humanity in Africa require a nexus to an international conflict—thereby excluding from the definition many crimes against humanity committed in internal conflicts, particularly frequent in Africa. A European definition might not require this nexus, thereby expanding the scope of the crime. Variation in the substantive elements of crimes could emerge such that international crimes have distinct regional definitions.

Such a development would be dangerous for a number of reasons. First, international crimes that are supposedly universal in nature would lose their sense of universality and global condemnation as they come to have regional variation. Second, loopholes might be created whereby perpetrators of international crimes could avoid conviction by relying on

169. See, e.g., N.M. Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57, 65–66 (1994); Charney, *supra* note 47, at 357.

170. Charney, *supra* note 47, at 134.

171. Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 272 (2001).

172. See ICTY Statute, *supra* note 124, art. 5; Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 240 (2002).

173. See Mettraux, *supra* note 172, at 252–62.

regional variation in the definitions of crimes. Third, judges in certain regions could possibly reshape international criminal law to allow particular individuals to avoid conviction. Finally, the legitimacy of international criminal law could be fundamentally threatened. Charney observes: "To the extent that international tribunals announce different views on rules of general international law, the legitimacy of those rules in this fragile community may be placed at risk."¹⁷⁴

To evaluate regional criminal law enforcement, we must assess whether the threat of fragmentation of substantive international law is real. It is here argued that the threat is minimal at most. Evidence from the proliferation of general international law tribunals and the nature of international criminal law itself suggest that serious fragmentation of substantive international criminal law is highly unlikely.

In the past few decades, the number of tribunals adjudicating questions of general international law has greatly increased, now including the ICJ, the WTO, the ECJ, and a countless array of international arbitral bodies. Jonathan Charney has conducted an exhaustive study to determine whether this proliferation of such tribunals has undermined the viability and legitimacy of the international legal system. Considering the jurisprudence of more than ten international tribunals¹⁷⁵ across eight substantive areas, such as sources of law, the law of state responsibility, and the law of exhaustion of domestic remedies, Charney found remarkably little difference in substantive international law. In fact, he found the various tribunals "share a coherent understanding of that law."¹⁷⁶ He concludes: "[T]he variations among tribunals deciding questions of international law are not so significant that they challenge its coherence and legitimacy as a system of law."¹⁷⁷

Just as the proliferation of international tribunals generally has not threatened the international legal system through wide substantive variation, the nature of international criminal law itself suggests that such fragmentation is unlikely. Currently international criminal law is being enforced and applied by a variety of tribunals including the ICTY, the ITCR, various national courts exercising universal jurisdiction, as well as specialized semi-internationalized courts in Bosnia, Kosovo, East Timor, and, soon, Sierra Leone. While there is no court of general appellate jurisdiction for international criminal law, a great deal of deference has been accorded to the decisions of the ICTY and a similar deference to the decisions of the ICC can be expected. Given the limited experience most judges have in international criminal law, the decisions of the ICTY have been given particular weight. In East Timor for example, Judge Sylver Ntukamazina "rel[ies] frequently on the ICTY and ITCR."¹⁷⁸ Likewise, Stuart Alford, one of the international prosecutors in East Timor, consults the Rome Statute, the ICC Preparatory Commission materials, and the "judgments of the two ad hoc tribunals."¹⁷⁹ This deference to the ICTY has effectively created a system whereby ICTY decisions have a quasi-stare decisis effect, thus helping to ensure uniformity of the international legal system. In an analysis of the jurisprudence of crimes against humanity in the ICTY and other international tribunals, Guenael Mettraux observes: "Whereas national courts sometimes relied upon distinctively domestic definitions of [crimes against humanity,] . . . [b]y vesting the Tribunals with the binding authority of

174. Charney, *supra* note 47, at 134.

175. These include, among others, the Iran-U.S. Claims Tribunal, the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of Justice of the European Communities, the ICJ, the GATT/WTO Tribunals, and various arbitral bodies. See generally Charney, *supra* note 47.

176. *Id.* at 347.

177. *Id.* at 371.

178. Ntukamazina Interview, *supra* note 67.

179. Interview with Stuart Alford, Prosecutor, UNTAET Special Crimes Unit, in Dili, East Timor (Jan. 14, 2002).

customary law, the Secretary General, and through him the Security Council, guaranteed the enduring impact of the Tribunals' decisions. This approach also afforded a welcome degree of jurisprudential uniformity"¹⁸⁰

This is not to say that a proliferation of international criminal law enforcement mechanisms, particularly at the regional level, will not lead to some variation in jurisprudence. However, to borrow again from John Charney, the appropriate question is "whether, despite minor differences, are the cases and the tribunals engaged in the same dialectic and do they render decisions that are relatively compatible."¹⁸¹ The preliminary answer with respect to international criminal law is "yes," and that the creation of additional tribunals at the regional level will not threaten this coherence and compatibility. In fact, some minor variation in jurisprudence may in fact be a positive development to the extent that it allows "a degree of experimentation and exploration."¹⁸² Minor experimentation in international law may well help "find the best rule to serve the international community as a whole."¹⁸³ This is the same concept inherent in Michael Dorf and Charles Sabel's argument for "democratic experimentalism."¹⁸⁴ Of course, the line between minor experimentation and serious fragmentation is a thin one, but it is one that has been successful in general international law and can likely succeed in international criminal law as well.¹⁸⁵

B. *Procedural Differentiation Within a Universal System*

A second, and far more likely, outcome of regionalization of international criminal law enforcement is the emergence of procedural differentiation between regions within the context of a universal substantive law. Marked procedural differences in criminal law exist between domestic legal systems. The distinctions between a common law adversarial system and a civil law inquisitorial system, for example, are myriad. Greater still are the differences between sharia justice in the Islamic world and, say, traditional justice under the Rwandan Gacaca laws. Blending common law and civil law traditions has long been a challenge of supranational criminal law enforcement. Daryl Mundis has observed a "discernible shift in the trial practice of the [ICTY from] . . . common law trials . . . in the direction of the civil law approach."¹⁸⁶ This tension has driven much of the reform of the ICTY Rules of Procedure and Evidence¹⁸⁷ and has been particularly frustrating to many ICTY judges.¹⁸⁸

Regionalization of international criminal law enforcement would allow regional variation in the procedure, structure, and format of international tribunals. A European Court—despite possible U.K. resistance—could take a more civil law-oriented approach, with investigating judges, written affidavits,¹⁸⁹ and an active bench. A North American

180. Mettraux, *supra* note 172, at 238.

181. Charney, *supra* note 47, at 137.

182. *Id.* at 347.

183. *Id.* at 354.

184. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 323 (1998).

185. Regionalization of international criminal justice may, in fact, be a means of preventing the dangers of substantive fragmentation of international criminal law. In a regional framework a limited number of courts and tribunals could protect against countless national courts developing separate jurisprudence.

186. Daryl A. Mundis, *From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367, 367–68 (2001).

187. *Id.* at 369–72.

188. See Patricia Wald, *Inside A War Crimes Tribunal: Does International Justice Really Work?*, Lecture at Harvard Law School (Feb. 6, 2002).

189. See generally Wald, *supra* note 55.

court might prefer a more common law-oriented approach. Similarly, variation in other procedural elements would be possible in an African or Asian court, which might better reflect the traditions and value sets of such nations. For example, differences in the qualifications for judges, the composition of the bench, or the amount of evidence to be heard are possible through regionalization. National preferences on these often decisive issues could be better accommodated by regional courts which would have a narrower range of values and views to accommodate.¹⁹⁰ As such, procedural variation may be a significant benefit to international justice, increasing the willingness of states to cooperate with courts and enhancing the perceived legitimacy of such courts within affected communities. Such procedural differences might well drive the lower sovereignty costs of membership in a regional criminal court.¹⁹¹

A second reason for regional differentiation might be caused by financial resources constraints. For example, a regional court in Africa may well have fewer resources available or decide to allocate its available resources over a larger number of cases than might a better funded court in Europe with fewer cases to hear. Such variation is far from ideal and would, admittedly, lead to a different quality of justice rendered in each court. While in a perfect world variation based on financial resources would not be necessary, given the limited resources available in many regions where international crimes are particularly frequent and the relative unwillingness of donor states to contribute significantly to judicial reconstruction, such variation may sadly be unavoidable.

It may be far better to confront these financial realities head-on, allowing courts to respond to their financial circumstances in the way they deem most effective, while simultaneously encouraging donor aid and support, rather than hiding the fact that judicial resources are not equally well distributed around the globe. Whatever level of judicial assistance from the developed world, the ICTR cannot try the more than 100,000 suspects in Rwanda. In accordance with the principle of subsidiarity, whereby decisions are rooted as the lowest possible level at which “objectives can adequately be achieved,”¹⁹² the hard choice between complex procedural trials for a few and impunity for the rest or more flexible procedure for all may be best left to the region to make.¹⁹³ Instead of forcing courts to follow, say, the comparatively expensive Anglo-American procedure in the face of massive resource constraints, allowing them the flexibility to allocate available resources more efficiently through, say, the Rwandan Gacaca, might enhance the overall justice process.

This procedural differentiation would occur within a universal context, both in terms of substantive law and core procedural rights. As discussed above, it seems most likely that the basic substantive rules of international criminal law would continue to apply in all regions with some degree of uniformity. Likewise, procedural variation would be limited by core universal guarantees of rights. The right to a free and fair trial is recognized by all major political, social, religious, and cultural systems. The Universal Declaration of Human Rights states that everyone “is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.”¹⁹⁴ Even in times of war, Common Article 3 of the Geneva Conventions requires that anyone accused of a crime be afforded “all the

190. Procedural issues such as these were the cause of much debate and disagreement in the process of negotiation of the Rome Statute of the International Criminal Court. *See* Bos, *supra* note 138, at 196.

191. *See supra* Part IV.

192. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994).

193. *Id.* at 348.

194. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁹⁵ The International Covenant on Civil and Political Rights,¹⁹⁶ the Inter-American Convention on Human Rights,¹⁹⁷ the Cairo Declaration on Human Rights in Islam,¹⁹⁸ the African Charter on Human and People’s Rights,¹⁹⁹ and the European Human Rights Convention²⁰⁰ all contain similar guarantees of fair judicial process. What emerges from these numerous international instruments are five core principles of international due process: the presumption of innocence;²⁰¹ the right to a speedy trial;²⁰² the right to counsel of choice;²⁰³ the right to confront evidence and witnesses in a public forum;²⁰⁴ and the right to an appeal.²⁰⁵

In practice at least, any regional court, wherever it may sit, would thus be bound by these core guarantees of fair process. While regions would have to borrow from the jurisprudence of the European Court of Justice, a “margin of appreciation” within which their particular values and preferences could be accommodated, they would be constrained by core universal guarantees.²⁰⁶ Procedural differentiation among regional courts within a universal system would thus reflect what Anthony Appiah refers to as “universalistic cosmopolitanism: a celebration of difference that remains committed to the existence of universal standards.”²⁰⁷ States and regions would be allowed to follow their own preferences and values to a limited degree, while remaining committed to and part of a larger universal system of international criminal law.

VII. CONCLUSION

As international criminal law matures and new means for its enforcement are sought, it is at the very least worth exploring the opportunities of regional enforcement. While by no means a panacea, regionalization does offer important benefits. As contrasted with supranational enforcement mechanisms, regional enforcement may be significantly less expensive, have greater legitimacy within affected communities, contribute to restorative justice, engage domestic courts in reconstructive efforts, and facilitate deeper commitments

195. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3(1)(d), 6 U.S.T. 3217, 75 U.N.T.S. 85.

196. International Covenant On Civil And Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

197. Inter-American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, Doc. No. OEA/Ser.L.V./II.82 doc. 6 rev. 1 (1992) [hereinafter Inter-American Convention].

198. Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Human Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [hereinafter Cairo Declaration].

199. African Charter on Human and Peoples’ Rights, adopted June 27, 1981, 21 I.L.M. 59 (entered into force Oct. 21, 1986) [hereinafter African Charter].

200. ECHR, *supra* note 128.

201. *See, e.g.*, African Charter, *supra* note 199, art. 7(1)(b); Inter-American Convention, *supra* note 197, art. 8(2); Cairo Declaration, *supra* note 198, art. 19(e); ECHR, *supra* note 128, art. 6(2).

202. *See, e.g.*, African Charter, *supra* note 199, arts. 6, 7(1)(d); Inter-American Convention, *supra* note 197, arts. 7(5), 7(6); Cairo Declaration, *supra* note 198, art. 19(e); ECHR, *supra* note 128, arts. 5(3), 5(4).

203. *See, e.g.*, African Charter, *supra* note 199, art. 7(1)(c); Inter-American Convention, *supra* note 197, arts. 8(2)(d), 8(2)(e); Cairo Declaration, *supra* note 198, art. 19(e); ECHR, *supra* note 128, art. 6(3)(c).

204. *See, e.g.*, African Charter, *supra* note 199, art. 7(1)(c); Inter-American Convention, *supra* note 197, art. 8(2)(f); Cairo Declaration, *supra* note 198, art. 19(e); ECHR, *supra* note 128, art. 6(3)(d).

205. *See, e.g.*, African Charter, *supra* note 199, art. 7(1)(a); Inter-American Convention, *supra* note 197, art. 8(2)(h).

206. *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737, 753 (1976).

207. Anthony Appiah, *The University in an Age of Globalization*, Lecture at the Princeton-Oxford Conference on Globalization at Oxford University (June 2002).

by states that face lower sovereignty costs of membership. As compared to domestic enforcement, regional tribunals may have greater resources, be less susceptible to political capture, and carry greater legitimacy within the international community.

This paper is not a call for the exclusive exercise of regional criminal justice nor even necessarily for the creation of regional criminal courts. Rather, it has been argued that, for a variety of reasons, it is important to consider regional enforcement options within the larger context of an emerging system of international criminal justice.²⁰⁸ Such a system would include the ICC, the exercise of universal jurisdiction by non-territorial states, and special semi-internationalized courts as well as regional mechanisms of enforcement. Moreover, many of these already existent enforcement options provide room for regionalization, which has to date been under-explored. At the least, then, this paper should be read as a call to consider these regional options—both in terms of feasibility and normative benefit. In so doing, the overall legitimacy, effectiveness, and future prospects of international criminal justice could be enhanced.

208. See generally Burke-White, *supra* note 6.

