Denver Journal of International Law & Policy

Volume 44
Number 1 *Fall*

Article 5

January 2015

Jurisdictional Conflicts between the ICC and the African Union: Solution to the Dilemma

Jacky Fung Wai Nam

Jurisdictional Conflicts between the ICC and the African Union: Solution to the Dilemma

Keywords

African Union, Human Rights Law, International Courts and Tribunals, International Criminal Law, Jurisdiction

JURISDICTIONAL CONFLICTS BETWEEN THE ICC AND THE AFRICAN UNION - SOLUTION TO THE DILEMMA

JACKY FUNG WAI NAM*

I. INTRODUCTION

Any fragmentation of jurisdiction has a deleterious effect on international criminal law as it may create jurisdictional confusion, conflicts of laws, forum shopping, and can ultimately lead to impunity for perpetrators. Recently, this confusion was further aggravated when the South American Government refused to extradite Omar Al-Bashir to the International Criminal Court ("ICC") upon issuance of a South African Court Order and a warrant issued by the ICC in order to preserve the relationship with the African Union ("AU").[1]

This paper discusses the fragmentation of jurisdiction of international criminal law, and discusses the basic jurisdictional mechanism of the ICC and African Court of Justice and Human Rights ("ACJHR").

In January 2013, a proposal ("ACJHR Draft Protocol") was submitted to expand the jurisdiction of the ACJHR. Though the Draft Protocol has failed to meet with widespread support of African States, it serves to pose a risk of defunctionality of the ICC, as it adds confusion as to which entity—the ACJHR or the ICC—is empowered to adjudicate international crimes. The ICC was intended to be the final adjudicator for individual responsibility for international crimes in the new era.[2] Yet, this mandate will be diluted if the ACJHR's jurisdiction is expanded to include international crimes.

The regional court system has always been chaotic in Africa.[3] Recently, the ACJHR was established by the Protocol on the Statute of the African Court of Justice and Human Rights ("Protocol on the ACJHR"),[4] which was a merger of the

---

* Jacky Fung Wai Nam received his LL.B. education at the City University of Hong Kong and graduated in 2014 with first class honors. He also won the 2012 International Criminal Court Competition in The Hague. He finished his Postgraduate Certificate in Laws and currently is a trainee solicitor at an international leading law firm. He wishes to thank Dr. Kielsgard for his comments and endless efforts and his friend Bettina Wang for proofreading this paper. He also wants to thank his family, in particular to his mother and father, for their love and support - no matter how dark the sky is, he can always see the brightest stars when they are around.

1. Mehari Taddele Maru, *Why South Africa Let Bashir Get Away,* AL JAZEERA (15 Jun. 2015), http://www.aljazeera.com/indepth/opinion/2015/06/south-africa-bashir-150615102211840.html.

2. *See* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, 53, 425,440 (1st ed. 2010).

3. *See generally* Marc Schulman, *The African Court Of Justice And Human Rights: A Beacon Of Hope Or A Dead,-End Odyssey?*, 2 INKUNDLA (2013), http://www.inkundlajournal.org/sites/default/files/2013_Inkundla_2_0.pdf.

4. *See* Afr. Union, *Protocol on the Statute of the African Court of Justice and Human Rights*

African Court of Human and Peoples' Rights ("ACHPR")[5] and the Court of Justice of the African Union ("ACJ")[6]. The ACHPR and the ACJ were replaced by the ACJHR and the Protocol on the ACJHR became the single primary legal instrument for the ACJHR.[7]

While the legality and the reputation of ACJHR are still being questioned by commentators,[8] the African Union, in its January 2013 Summit of Assembly of African Union Heads of State ("the AU Assembly"), considered expanding the jurisdiction of the ACJHR to include criminal competence in the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("the Draft Protocol").[9] The international crimes under the expanded jurisdiction include genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and crimes of aggression.[10]

The expansion of jurisdiction is under consideration. At its 2013 January Summit, the AU Assembly asked the African Union Commission to consider jurisdictional legitimacy and financial implications for the expanded power of the ACJHR.[11] Specifically, the African Union Commission was requested to

> conduct a more thorough reflection . . . on the issue of popular uprising . . . and on the appropriate mechanism capable of deciding the legitimacy of such an uprising; . . . [and] to submit, a report on the structural and financial implications . . . from the expansion of the jurisdiction of the African Court . . . to try international crimes . . . .[12]

While it is impossible to predict whether the expansion of jurisdiction will materialize, it is nonetheless beneficial to consider the potential relationship between the ICC and the ACJHR if it is empowered with expanded criminal jurisdiction. This is particularly relevant as most of the current ICC situations are

---

art.2, (July 1, 2008) [hereinafter *Protocol on ACJHR*], http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf (Protocol on ACJHR will be entered into force only after 30 days with 15 member states of the African Union ratifying it).

5. *Id.*

6. *Id.*

7. *Id.* at 5.

8. Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 EUR. J. INT'L L. 933, 934-35 (2013); *see also,* Schulman, *supra* note 3.

9. Afr. Union EX.CL/Dec.766 (XXII), ¶ 1, *Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Jan. 21, 2013) [hereinafter *Decision on Draft Protocol*].

10. Afr. Union Specialized Technical Comm. on Just. and Legal Aff., *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Exp/Min/IV/Rev.7, annex art. 28(a) (May 15, 2012) [hereinafter *Draft Protocol on Amendments*].

11. *Decision on Draft Protocol, supra* note 9.

12. *Id.* ¶ 2-3.

in Africa.[13] This discussion will examine the jurisdictional basis of these two important international courts.

This paper will first give an overview of the historical background of the African regional court system. It will discuss the basic jurisdictional mechanism of the ICC and the current ACJHR, as well as the proposed mechanism of the latter. It will further discuss the conflict of laws between the Draft Protocol on the ACJHR and the Rome Statute of the International Criminal Court ("Rome Statute")[14] and the possible consequences. Finally, it will provide possible solutions calculated to resolve the dispute.

II. HISTORICAL BACKGROUND OF AFRICAN REGIONAL COURT SYSTEM

In order to fully understand the current situation in Africa, it is necessary to first understand the background of the African regional court system. For several decades, the states in Africa have ratified different human rights treaties and conventions.

The African Union is the successor of the Organization of the African Unity ("OAU"). The OAU was established on May 25, 1963 and was adopted by thirty-two African States[15] with the following objectives:

> (a) To promote the unity and solidarity of the African States;
>
> (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
>
> (c) To defend their sovereignty, their territorial integrity, and independence;
>
> (d) To eradicate all forms of colonialism from Africa; and
>
> (e) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.[16]

Towards these ends, the African Charter on Human and Peoples' Rights ("African Charter") was adopted by the OAU and entered into force in 1986 with ratifications from all fifty-three African member states.[17] The African Charter established the first complaint mechanism with the African Commission on Human and Peoples' Rights, which required State Parties to provide self-reports on their

---

13. INT'L CRIM. CT., *All Situations*, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx (last visited Sept. 20, 2015).

14. *See generally* Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

15. DEP'T OF INT'L REL. AND COOPERATION FOR THE REP. OF S. AFR., *Organization of African Unity (OAU) / African Union (AU)*, http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm (last visited Sept. 20, 2015).

16. Charter of the Organization of African Unity, art. 2, ¶ 1, May 25, 1963, 479 U.N.T.S. 39; *see also id* at pmble.

17. AFR. COMMISSION ON HUMAN AND PEOPLES' RIGHTS, Ratification Table: African Charter on Human and Peoples' Rights, http://www.achpr.org/instruments/achpr/ratification/ (last visited Oct. 4, 2015).

human rights status every two years.[18]

In June 1998, the OAU adopted the Protocol on the ACHPR, which entered into force in 2004, and established the first regional court in Africa, the African Court of Human and Peoples' Rights.[19] The role of the ACHPR is "to complement and reinforce the functions of the [African] Commission in promoting and protecting human and peoples' rights, freedoms and duties in African Union Member States. The [African] Commission, being a quasi-judicial body, can only make recommendations while the Court makes binding decisions."[20]

In 1999, the Heads of State Assembly of the OAU issued the Sirte Declaration, calling for the establishment of the AU.[21] In 2000, The Lome Summit adopted the Constitutive Act of the African Union ("Constitutive Act"), which specified the objectives, principles, and organs of the AU.[22] Thereafter, the AU was established in 2001.[23] The AU then adopted the Protocol on the African Court of Justice ("ACJ") and it entered into force in 2009.[24] The ACJ is the principal judicial organ of the Union[25] with functions similar to that of the International Court of Justice: to interpret the Constitutive Act, deal with questions relating to international law, and to deal with disputes arising out of a breach of the obligations of the treaties between State Parties to the AU.[26]

However, before the ACJ was established, the AU passed a motion in 2004 to merge the ACHPR with the ACJ.[27] The Protocol on the African Court of Justice and Human Rights ("ACJHR") was adopted on July 1, 2008 and would only enter into force thirty days after its ratification by fifteen member states.[28] As of February 3, 2014, out of fifty-three member states of the AU, thirty have signed

---

18. African Charter on Human and Peoples' Rights art. 62, OAU Doc. CAB/LEG/67/3 rev. 5 (Jun. 27, 1981).

19. AFR. CT. OF HUMAN AND PEOPLES' RIGHTS, *Frequently Asked Question,* http://www.african-court.org/en/index.php/vacancies-3/frequent-questions#court-establishment (last visited Oct. 6, 2015).

20. *Id.*

21. Org. of Afr. Unity EAHG/Draft/Decl. (IV) Rev.1, ¶ 8(i), *Sirte Declaration* (Sept. 9, 1999) [hereinafter *Sirte Declaration*].

22. *See generally* Constitutive Act of the African Union, July 11, 2001, 2158 U.N.T.S. 3. [hereinafter Constitutive Act of the AU].

23. *Id. See also* U.N. ECON. COMMISSION FOR AFR., *History & Background of Africa's Regional Integration Efforts,* U.N., http://www.uneca.org/oria/pages/history-background-africas-regional-integration-efforts (last visited Dec. 8, 2015).

24. Afr. Union, *Protocol of the Court of Justice of the African Union* (Jul. 1, 2003) [hereinafter *Protocol of the Court of Justice of the African Union*]; AFR. UNION, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union,* http://au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf [hereinafter *List of Countries*].

25. *Protocol of the Court of Justice of the African Union, supra* note 24 at art. 2, ¶ 2.

26. *Id.* at art. 19.

27. Afr. Union Assembly/AU/Dec.83(V), *Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union-Assembly/AU/6(V)* (July 4-5, 2005); Afr. Union Assembly/AU/Dec.45 (III) Rev.1, ¶ 4, *Decision on the Seats of the African Union* (July 6, 2004).

28. *Protocol on ACJHR, supra* note 4, at ch. III art. 9.

the Protocol on the ACJHR but only five have ratified it.[29] The five states are Benin,[30] Burkina Faso,[31] Congo,[32] Libya,[33]and Mali.[34]

Although only five states ratified the Protocol on the ACJHR, the importance of the draft protocol extending court's jurisdiction is significant because out of those five states, two are currently being prosecuted by the ICC (Libya and Congo)[35] and one is currently being investigated (Mali)[36] Moreover, the AU also passed a motion to call on state parties to ratify the Protocol on ACJHR.[37] Given that thirty state parties have signed the protocol but not yet ratified,[38] it may become part of the legal landscape in Africa in near future.

If the Protocol on ACJHR comes into force, it could result in a new way of thinking about the relationship between international courts. Therefore, a comparison of the jurisdictional triggering mechanism of the ICC and the proposed mechanism under the Protocol of the ACJHR, with a particular emphasis on jurisdictional superiority, will be fruitful.

III. JURISDICTION OF THE ICC AND THE DRAFT PROTOCOL OF THE ACJHR

There are four crimes that are within the jurisdiction of the Rome Statute: genocide, crimes against humanity, war crimes, and crimes of aggression.[39] Moreover, there are three triggering mechanism in the ICC. Article 13 of Rome Statute states that:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

> (a) A situation . . . is referred to the Prosecutor by a State Party in accordance with article 14;
>
> (b) A situation . . . is referred to the Prosecutor by the Security Council; or
>
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.[40]

Thus, the ICC may assume jurisdiction through state-referral, Security Council referral, or the Prosecutor's exercise of his *proprio motu* powers.

---

29. *List of Countries*, supra note 24.
30. *Id.* (ratified June 28, 2012).
31. *Id.* (ratified June 23, 2010).
32. *Id.* (ratified Dec. 14, 2011).
33. *Id.* (ratified May 6, 2009).
34. *Id.* (ratified Aug. 13, 2009).
35. INT'L. CRIM. CT., *supra* note 13.
36. *Id.*
37. INSTITUTE FOR WAR AND PEACE, *African Court No Substitute for ICC*, https://iwpr.net/global-voices/african-court-no-substitute-icc.
38. *List of Countries*, *supra* note 24.
39. Rome Statute, *supra* note 14; *see also* Int'l. Crim. Ct. Res. RC/Res. 6, at art. 15 bis ¶ 3 (Jun. 11, 2010) (The ICC will only exercise jurisdiction over crimes of aggression after 1 January 2017 if the same majority of the Rome Statutes have adopted this amendment will be entered).
40. Rome Statute, *supra* note 14, at art. 13.

Currently, the ICC has eight situations of which four are self-referrals (Mali,[41] Uganda,[42] Democratic Republic of Congo,[43] and Central African Republic[44]). The ICC may also exercise jurisdiction when the crime is committed on the territory of a state party,[45] or when the crime is committed by a national of a State Party on the territory of a non-State Party.[46] In case of a non-state party, the country can voluntarily accept the jurisdiction of the ICC by declaration under Article 12(3) of the Rome Statute.[47] The United Nations Security Council may also refer non-state parties to the ICC[48]

After referral to the ICC, the court will determine whether it satisfies the conditions laid down under the complementarity regime (Article 17 of the Rome Statute).[49] Thus, the case will be inadmissible if the case "has been investigated"[50] or "is being investigation"[51] or the person previously "has been tried"[52] for the same crime.[53] Additionally, the case will be inadmissible if the state party concerned is willing[54] and able[55] to prosecute such case. Finally, the case will be inadmissible if the offense is of insufficient gravity.[56] The ICC will only prosecute when both the jurisdictional and the admissibility tests have been satisfied.

Article 98 of the Rome Statute also obliges the court not to proceed with a request for surrender or assistance which would require the requested state to act inconsistently with their obligations under international agreements [57] or international law.[58] Article 41 of the U.N. Charter also gives power to the Security

41. Situation in the Republic of Mali, ICC-01//12-1, Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II (Jul. 19, 2012).

42. Situation in Uganda, ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005).

43. Situation in Democratic Republic of Congo, ICC-02/04-1,Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I (Jul. 5, 2004).

44. Situation in Central African Republic, ICC-01/05-01, Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III (Jan. 19. 2005).

45. Rome Statute *supra* note 14, at 99 (This basis also provides jurisdiction to the ICC when the crime is committed on board a vessel or aircraft where the place of registration is a State Party to the Rome Statute).

46. *Id.*; *see also* Andreas Th. Müller & Ignaz Stegmiller, *Self-Referrals on Trial: From Panacea to Patient,* 8 J. INT'L CRIM. JUST. 1267, 1273 (2010).

47. Rome Statute *supra* note 14, at art. 12.

48. *Id.* at art. 13(b).

49. *Id.*

50. *Id.* at art. 17(1)(b).

51. *Id.* at art. 17(1)(a).

52. *Id.* at art. 17(1)(c).

53. *See* Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 52 (May 30, 2011).

54. Rome Statute, *supra* note 14, at art. 17, ¶ 2.

55. *Id.*

56. *Id.*

57. *Id.* at art. 96.

58. *Id.*

Council to refer situations to the ICC, which overrides other treaty obligations.[59] Article 98 of the Rome Statute will pose problems if the Draft Protocol enters into force by further confusing the jurisdictional priority of these two courts.[60]

By contrast, the Draft Protocol and Protocol on ACJHR are more aggressive than the Rome Statute. Article 28 of the Protocol on ACJHR defines the jurisdiction of the ACJHR where it can exercise competence over legal disputes relating to the interpretation and application of the Constitutive Act of the AU, other AU Treaties, any legal instruments adopted by the OAU, and all human rights instruments which the AU has adopted (including the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa).[61] The ACJHR can also exercise its jurisdiction relating to the interpretation of international law, any decisions or acts handed down by the organs of the AU, any matters arising out of agreements between the State Parties, any breach of obligation owed to a State Party or the AU, and the extent of reparations of the breach of international obligation.[62] Arguably, Article 28 of the Protocol on the ACJHR and Article 4(h) Constitutive Act of the AU legally obliges the ACJHR to expand its jurisdiction to international crimes.[63] This is because Article 4(h) requires the AU "to intervene . . . in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the [African] Union . . ." and Article 28 of the Protocol on the ACJHR requires the AU to attach itself to human rights instruments.[64]

Further, state parties to the Protocol on the ACJHR, the Assembly, the Parliament, and organs of the AU, and any staff member of the AU can bring legal disputes to the ACJHR.[65] Also, the African Commission on Human and Peoples' Rights, African intergovernmental organizations, or any non-governmental organizations relating to the state party to the Protocol on the ACJHR can submit cases to the ACJHR for violation of human rights guaranteed under the African Charter, Charter on the Rights and Welfare of the Child, or the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

---

59. U.N. Charter art. 41 (stating "The Security Council may decided what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.").

60. Brett D. Schaefer & Steven Groves, *The U.S. Should Not Join The International Criminal Court*, THE HERITAGE FOUNDATION (Aug. 19, 2009), http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court.

61. *Protocol on ACJHR, supra* note 4, at art. 28.

62. *Id.*

63. *See* Terefa Degu, *Regional Systems in Pursuing International Criminal Justice: An Examination of the African Court of Justice and Human Rights*, ABYSSINIALAW (June 17, 2015), http://www.abyssinialaw.com/blog-posts/item/1506-regional-systems-in-pursuing-international-criminal-justice.

64. Abass, *supra* note 8, at 937. *See also* Constitutive Act of the AU, *supra* note 22, at art. 4(h).

65. *Protocol on ACJHR, supra* note 4, at 19.

Africa.[66]

The Draft Protocol proposes to extend the ACJHR's jurisdiction to international crimes, including those four crimes triable at the ICC and other serious international crimes.[67] Moreover, it also calls for establishing an Office of Prosecutor and a Peace and Security Council.[68] It provides the Office of Prosecutor with powers to initiate investigation while the Peace and Security Council is authorized to submit cases to the ACJHR.[69] Moreover, the ACJHR contains two additional triggering powers, similar to that of the ICC, which are State Party Referral[70] and the exercise of the *pro prio motu* powers.[71]

The Draft Protocol allows the court to exercise jurisdiction over the crimes that occur in the territory of a State Party[72] (operating on the territoriality principle), crimes that occur on the vessel or aircraft of a State Party[73] (operating on the territoriality principle), or the State of which the person accused of the crime is a national[74] (operating on the active nationality principle). Additionally, it assumes jurisdiction over crimes where the victim is a national of a State Party[75] (operating on the passive personality principle) or extraterritorial acts by non-nationals who threaten a vital interest of a State Party[76] (operating on the protective principle).

IV. THE CONFLICTS BETWEEN THE DRAFT PROTOCOL AND ROME STATUTE

A. The Incompatibility of Rome Statute and the Draft Protocol

Both the Rome Statute and the Draft Protocol of the ACJHR are established multilateral treaties, which are in conflict as the obligations under the Rome Statute are incompatible to that of the Draft Protocol. This issue turns on the law of termination and validity of treaties.

The International Court of Justice ("ICJ") regards the Vienna Convention on the Law of Treaties ("VCLT")[77] as the customary international law in the application of treaties. In the *Gabčíkovo–Nagymaros Project Case*,[78] the ICJ stated clearly, in relation to issues of law relating to termination and validity of treaties, that there is

---

66. *Id.* at art. 30(b), (d), (f).

67. *Draft Protocol on Amendments*, *supra* note 10, at annex art. 14 *proposing* to amend art. 28A, ¶¶1-3.

68. *Id.* at annex art. 15.

69. *Id.* at annex art.15; *Id.* at annex art. 22 *proposing* to amend art. 46F, ¶¶ 2-3.

70. *Id.* at annex art. 22 *proposing* to amend art. 46F, ¶ 1.

71. *Id.* at annex art. 46F, ¶ 3.

72. *Id.* at annex art. 46E bis, ¶¶ 1-2(a).

73. *Id.* at annex art. 46E bis, ¶ 2(a).

74. *Id.* at annex art. 46E bis, ¶ 2(b).

75. *Id.* at annex art. 46E bis, ¶ 2(c).

76. *Id.* at annex art. 46E bis, ¶ 2(d).

77. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter *VCLT*].

78. Gabc˘íkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25).

> . . . no need to dwell upon the question of applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law.[79]

It has been opined that the customary character of the provisions of VCLT is applicable to provisions relating to the validity and termination of treaties.[80] The only caveat is seen in the ICJ decision of *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of Congo v Rwanda)*[81] where the ICJ found that Article 66 of the VCLT did not represent customary international law,[82] but is irrelevant to the instant inquiry.

According to Article 59 of the VCLT, a treaty is incompatible with another if they relate to the "same subject-matter."[83] Article 59 does not deal directly with incompatibility of treaties but provides guidance in situation for incompatible treaties where a subsequent treaty is signed and the obligations of these two treaties overlap.[84] The International Law Commission has interpreted Article 59 to mean that the "terms relating to the same subject matter must be strictly interpreted that that the two treaties shall only be considered as covering the same matter if their object is identical and presents a comparable degree of generality."[85]

These criteria are applicable to the Rome Statute and the Draft Protocol. Preambles of both treaties share many similarities. For example, paragraph 16 of the Preamble of the Draft Protocol states that "the present Protocol will complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and people rights in keeping with Article 58 of the [African] Charter [on Human and Peoples Rights] and ensuring accountability for them whenever they occur."[86] This is similar to paragraph 5 of the Preamble of the Rome Statute which states that the objective of the ICC is to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[87] Paragraph 10 of the Preamble of Draft Protocol is also similar to paragraph 7 of the Preamble of the Rome Statute, where

---

79. *Id.* ¶ 46. *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (S. Afr.) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 94 (June 21).

80. OLIVER CORTEN & PIERRE KLEIN, THE VIENNA CONVENTION ON THE LAW OF TREATIES – A COMMENTARY 1237 (2011).

81. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda) 2006 I.C.J. 6 ¶ 125 (Feb. 3).

82. ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 89 (4th ed. 2010).

83. VCLT, *supra* note 77, at art. 59(1).

84. *Id.*

85. Francois Dubuisson, *Article 59, in* THE VIENNA CONVENTION ON THE LAW OF TREATIES, A COMMENTARY 1336 (Olivier Corten & Peter Klein eds., 2011). *See also* Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶¶ 229 – 32, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

86. *Draft Protocol on Amendments*, *supra* note 10, at pmbl.

87. Rome Statute, *supra* note 14, at pmbl.

they emphasize respect for human life and the importance of refraining from the use of force.[88]

In fact, the Draft Protocol and the Rome Statute shared more common features than just the objective, such as the language in the criminal elements of the four international crimes,[89] the exercise of jurisdiction for prosecution,[90] and the mode of jurisdiction.[91] These similarities create conflicts arising from state obligations for parties to both instruments. One common example of conflicts would be when both the ICC and the ACJHR would prosecute the same person (national of Country A) for the same conduct related to the same crime, and both courts have asked Country B (a state party to both the Rome Statute and the Draft Protocol) to surrender the respective suspect to their respective courts. Ultimately, Country B can only choose one court to surrender the suspect, which would inevitably violate their treaty's obligation under the other instrument.

The impact of this conflict between can be shown clearly with reference to the following. Although only five states have ratified the Draft Protocol so far,[92] the AU has thirty-two states[93] that are state parties to the Rome Statute. Thus, the Draft Protocol has a potential to significantly impact the functionality of the ICC. If thirty-two states withdraw from the Rome Statute or give superior jurisdiction to the Draft Protocol, the jurisdiction of the ICC in Africa will be functionally eliminated. For example, Kenya has passed a motion to withdraw from the ICC in their national assembly on September 5, 2013.[94] Although no law implementing such withdrawal was made, this has already forced the ICC to re-consider the motion to consider proposed amendments to address AU's member states concerns.[95]

---

88. *Draft Protocol on Amendments*, *supra* note 10, at pmbl.; Rome Statute, *supra* note 14, at pmbl.

89. *Draft Protocol on Amendments*, *supra* note 10, at art. 14, *proposing* to amend arts. 28B-D, M; *see also* Rome Statute, *supra* note 14, at arts. 6-8bis. (Draft Protocol basically mirrors the language in the Rome Statute).

90. The entities eligible to exercise jurisdiction are prosecutors, state-party referral–which is unique in Rome Statute–and United Nations Security Council, except that it is Peace and Security Council of the AU in Draft Protocol. *Draft Protocol on Amendments*, *supra* note 10, at art. 22, *proposing* to amend art. 46F; *see also* Rome Statute, *supra* note 14, at art. 13.

91. Both the Draft Protocol and the Rome Statute are complementary to national courts. *Draft Protocol on Amendments*, *supra* note 10, at art. 22 *proposing* to amend art. 46H; *see also* Rome Statute, *supra* note 14, at art. 1.

92. *Protocol on ACJHR*, *supra* note 4.

93. Rome Statute, *supra* note 14 (The States are: Benin, Botswana, Burkina Faso, Burundi, Cape Verde, the Central African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Cote d'Ivoire, Djibouti, Gabon, Gambia, Ghana, Kenya, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe).

94. Gabriel Gatehouse, *Kenya MPs vote to withdraw from ICC*, BBC NEWS (Sep. 5, 2013), http://www.bbc.com/news/world-africa-23969316.

95. Judie Kaberia, *Win for Africa as Kenya agenda enters ICC's Assembly*, CAPITAL NEWS (Nov. 20, 2013), http://www.capitalfm.co.ke/news/2013/11/win-for-africa-as-kenya-agenda-enters-icc-assembly.

This Draft Protocol creates an additional threat to the ICC as the ICC relies mainly on the cooperation from state parties. Even states that wish to comply with treaty obligations in good faith will be conflicted. The issue of who has superior jurisdiction will inevitably arise.

B. Which instrument has superior jurisdiction?

1. Voluntary withdrawal

One way to resolve this conflict is by voluntary withdrawal. Article 127 of the Rome Statute provides that State Parties can withdraw from the Rome Statute by written notification one year from the date of the receipt of the notification.[96] To the contrary, both the Draft Protocol and the Protocol on ACJHR do not provide any provisions regarding withdrawal of the treaty.[97]

Article 54 of the VCLT provides that the party may expressly agree to terminate any treaty.[98] Article 54 of the VCLT states that:

> The termination of a treaty or the withdrawal of a party may take place:
>
> (a) In conformity with the provisions of the treaty; or
>
> (b) At any time by consent of all the parties after consultation with the other contracting States.[99]

Article 54(a) of the VCLT simply "serves as a reminder to the *pacta sunt servanda* rule[100] and affirms that this rule applies to the provision of the treaty governing its termination or the withdrawal of a party."[101] On the other hand, "Article 54(b) requires the fulfillment of two conditions to terminate a treaty or allow a party to withdraw from it: first all parties must consent to the termination or withdrawal; second, the other contracting States must be consulted."[102]

Under the current situation, because the Rome Statute is a multilateral treaty, it is unlikely that all of the parties will terminate or withdraw from the Rome Statute. This leaves countries that wish to withdraw from the Rome Statute the option of exercising their rights under Article 54(a) of the VCLT and in accordance with Article 127 of the Rome Statute.

However, not every state will make its stance clear. For those states that do not withdraw from the Rome Statute, it may be implied that they intend the Rome Statute to have superior jurisdiction. Yet, this creates ambiguity to jurisdictional superiority. On the contrary, a mass withdrawal of State Parties to the Rome Statute would seriously cripple the functionality of the ICC. After all, the

---

96. Rome Statute, *supra* note 14, at art. 127 ¶ 1.

97. *Draft Protocol on Amendments*, *supra* note 10; *Protocol on ACJHR*, *supra* note 4.

98. VCLT, *supra* note 77, at art. 54.

99. *Id.*

100. S.E. Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 AM. J. INT'L L. 736, 746 (1971).

101. CORTEN & KLEIN, *supra* note 80, at 1238.

102. *Id.*

situations currently being pursued by the ICC are in Africa (with five out of seven situations as self-referrals).[103]

2. Possibility of Auto-Termination of the Rome Statute

Assuming the States do not withdraw from Rome Statute and ratify the Draft Protocol, this Draft Protocol will be ratified at a time later than the Rome Statute. The later ratification triggers Article 59 of the VCLT, which provides for the situation where the conclusion of a later treaty may impliedly terminate the earlier treaty if the treaty obligations are in conflict.[104]

Article 59 of the VCLT states that:

> A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
>
> (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.[105]

Article 59 sets out a specific mode of termination or suspension of treaties: the tacit abrogation or suspension of a treaty in the case of subsequently concluded treaty.[106] This covers situations where all the parties to the treaty, without expressly terminating or modifying an earlier treaty, must be considered to have implicitly abrogated or suspended the first treaty because it was either the intention of the parties to the treaty or the latter treaty is incompatible with the earlier one.[107]

Nonetheless, Article 59 of the VCLT is not of much assistance regarding the issue of conflicts between the Rome Statute and the Draft Protocol because it is unlikely that all the parties in the Rome Statute would withdraw. Therefore, it is impossible to automatically terminate the Rome Statute should the Draft Protocol pass. However, Article 59 of the VCLT merely establishes measures based on the general principles stated in Article 54 of the VCLT: the parties to a treaty are competent to terminate it by the way of any subsequent agreement.[108] It is commented that the purpose of Article 59 is "to respond to a particular situation of

---

103. Wenke Brückner & Angar Verma, *In Troubled Waters: The International Criminal Court (ICC)*, *in* GLOBAL TRENDS 2015, 101 (2015) http://www.global-trends.info/fileadmin/Globale-Trends/beitraege_kapitel/gt-2015_en.pdf.

104. VCLT, *supra* note 77, at art. 59 ¶ 1.

105. *Id.*

106. CORTEN & KLEIN, *supra* note 80, at 1326.

107. *Report of the International Law Commission to the General Assembly*, 19 U.N. GAOR Supp. No. 9, at 203, U.N. Doc. A/5509 (1963), reprinted in [1963] 2 Y.B. Int'l L. Comm'n 187, U.N. Doc. A/CN.4/SER.A/1963/Add.1 [hereinafter *Report ILC, U.N. Doc. A/5509*]; *see also* *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, at 252, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1966/Add. 1 [hereinafter *Report ILC*, U.N. Doc. A/6309].

108. Richard Plender, *The Role of Consent in the Termination of Treaties*, 57 BRIT. Y.B. INT'L L. 133, 153 (1986).

conflict between successive treaties . . . it cannot cover problems of conflicts between treaties, which imply the concurrent application of two treaties in force."[109] The interpretation of Article 59 is based on the rationale that "the States concluding the second treaty are then fully competent to amend or annul the prior treaty."[110]

Since it is only for parties intending to disregard their old agreement and enter into a whole new agreement with the same parties to the earlier treaty, Article 59 is not applicable here because the conflicts between the Rome Statute and the Draft Protocol are more than mere modification. They are two separate treaties and the ratification of Draft Protocol is in fact a breach of the treaty obligation to the Rome Statute because the states ratifying the Draft Protocol would have taken away the jurisdiction of the ICC. It cannot be said that "none of the parties' intention is to have the first treaty incompatible with the second treaty."[111]

From this perspective, this essentially raises "a question of the construction of the two treaties in order to determine the extent of their incompatibility and the intention of the parties."[112]

3. Entering into the Draft Protocol may Result in a Breach of International Law

It is a well-established principle that a country has the right of freely consent to any treaty.[113] This is embraced by Article 34 of the VCLT, which states "[a] treaty does not create either obligations or rights for a third State without its consent."[114] This embodied the maxim *pacta tertiis nec nocent nec prosunt* (agreements neither harm nor benefit third parties) and is founded on the principles of sovereignty and independence of states.[115]

However, it does not mean a country shall neglect the treaty obligations they have previously taken. Article 30 of the VCLT is applicable to parties who entered into a treaty with conflicting obligations and do not want to actively withdraw from their current treaty at the same time.[116]

Article 30(4) of the VCLT is particularly relevant in this regard where it states that:

> (4) When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) As between States parties to both treaties the same rule applies as in

---

109. CORTEN & KLEIN, *supra* note 80, at 1326; *see also* Sir H. Waldock (Special Rapporteur), *Third Report on the Law of Treaties*, U.N. Doc. A/CN.4/1 67 and Add.1–3 (1964), reprinted in [1964] 2 Y.B. Int'l L. Comm'n 1 at 40.

110. Sir H. Waldock, *supra* note 109.

111. Report ILC, U.N. Doc. A/5509, *supra* note 107.

112. *Id.* at 252-53.

113. VCLT, *supra* note 77, at pmbl (stating "the principles of free consent and of good faith. . .are universally recognized. . .").

114. *Id.* at art. 34.

115. Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B), No. 5, ¶ 33 (Jul. 23).

116. CORTEN & KLEIN, *supra* note 80, at 888.

paragraph 3;

(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.[117]

Article 30(4) of the VCLT and subsequent case law essentially gives a solution for the Draft Protocol and Rome Statute to co-exist together.[118] Before further application of Article 30(4) of the VCLT, it is important to understand the background and rationale establishing Article 30.

The general principle under international law is that states that have contracted themselves to an earlier treaty cannot contract into another treaty that has conflicting treaty obligations. This is the opinion laid down in many international cases, such as the *Honduras-Nicaragua case*.[119] In the *Honduras-Nicaragua case*, Nicaragua entered into a treaty with the United States, which violated the prior treaty rights Nicaragua entered into with El Salvador and Costa Rica. The Central American Court of Justice was careful in balancing the freedom of the country to conclude a later treaty at their will with the prior treaty obligation and stated that:

> without competence to declare the Bryan-Chamorro Treaty to be null and void, as in effect, the high party complainant requests it to do when it prays that the Government of Nicaragua be enjoined "to abstain from fulfilling the said Bryan-Chamorro Treaty". . .To declare absolutely the nullity of the Bryan-Chamorro Treaty, or to grant the lesser prayer for the injunction of abstention, would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court.[120]

The Central American Court of Justice thus held that Nicaragua should avail "itself of all possible means provided by international law to reestablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between litigant Republics."[121]

In fact, the above court holding was well embodied in Article 26 of VCLT as a maxim *pacta sunt servanda*—every treaty in force is binding upon the parties to it and must be performed by them in good faith.[122] Article 26 restates the pillar of treaty law, and together with the principle of free consent and good faith, they form the three basic concepts in VCLT.[123] This maxim is important in international law

117. VCLT, *supra* note 77, at art. 30, ¶ 4.

118. CORTEN & KLEIN, *supra* note 80, at 789.

119. El Salvador v. Nicaragua, Judgment, 11 AM. J. INT'L L. 674 (Cent. Am. Ct. J. 1917).

120. *Id.* at 729.

121. *Id.*

122. OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES : A COMMENTARY (3rd. ed. 2012) 427.

123. Christina Binder, *The Pacta Sunt Servanda Rule in the Vienna Convention on the Law of Treaties: A Pillar and Its Safeguards*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER 317, 317-21 (Isabelle Buffard &

because it often requires cooperation between states; breaching the trust could result in high levels of mistrust between state parties. This rationale was upheld by the Permanent Court of International Justice ("PCIJ") in the *Lotus Case* while balancing the principle of free consent and *pacta sunt servanda*:

> The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[124]

Thus, the freely given consent to be bound generates legal obligations independent of any future changes in the sovereign will (*ex consensu advenit vinculum*).[125] At the same time, many scholars also express the view that prevailing consent-based theory, which is stated in the VCLT Preamble 3rd recital, requires a preconditioned, legally binding rule that commands that treaties are to be obeyed—*pacta sunt servanda*.[126] In its famous *Nuclear Tests* judgment, the ICJ interprets the terms 'good faith' to the very foundation of the *pacta sunt servanda* principle:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.[127]

If a country enters into a treaty that concludes the same subject matter as the previous one, the latter treaty is said to be tainted with illegality. This principle is also reflected in Special Rapporteur Lauterpacht's comment during the codification process of the VCLT where he stated that "if parties to a treaty bind themselves to act in a manner which is a violation of the rights of a party under a

---

James Crawford ed., 2008).

124. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 ¶ 44 (Sep. 7).

125. Mr. G.G. Fitzmaurice (Special Rapporteur), *Rep. on the Law of Treaties*, U.N. Doc. A/CN.4/101 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 187, U.N. Doc. A/CN.4/SER.A/1956/Add.l, at art. 4, ¶ 1 ("The foundation of treaty obligation is consent, coupled with the fundamental principle of law that consent gives rise to obligation."); *cf.* Edwin M. Borchard, *Governmental Responsibility in Tort, VI*, 36 YALE L.J. 1039, 1086 (1927) (stating that "[o]nly new international law . . . rests on consent or agreement to be bound, and even then probably only for a comparatively restricted period would the unwilling state be able to deny the force of a rule generally accepted."). Critics include Leon Duguit, *The Law and the State*, 31 HARV. L.R. 1 139–44 (1917) (explaining that even though the state's previous consent establishes rules of international law, the present will of the state should be put higher than any International law); Alfred Verdross, *Le Fondement Du Droit International*, 16 Recueil des Cours 251, 265–66 (1927).

126. 1 JOST DELBRUCK, in *DIE GRUNDLAGEN. DIE VOLKERRECHTSSUBJEKTE 37 (Georg Dahm, Jost Delbruck & Rudiger Wolfrum* 2nd. ed., 1988); *see also* THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 187 (3rd. ed. 1990).

127. Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 473, para. 49 (Dec. 20).

pre-existing treaty, they commit a legal wrong which taints the subsequent treaty with illegality."[128] Under this view, the conflict of the treaty obligation caused the invalidity of the subsequent treaty.[129] Similar rationales and decisions are echoed in later cases in the PCIJ including the *Oscar Chinn Case*[130] and the case of the *European Commission of the Danube*.[131]

However, the taint of a subsequent treaty does not necessarily invalidate it. The subsequent treaty is invalid "only if the departure of the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or seriously impair the original purpose of the treaty."[132]

This is particularly relevant to a multilateral treaty because of the plurality of interests of states and it emphasizes the difference of invalidity and that of application of treaty because "incompatibility with the provisions of a previous treaty gives rise prima facie to a conflict of obligation, rather than, necessarily, to the invalidity of the treaties."[133] However, the conflicting provision between the Draft Protocol and the Rome Statute is the jurisdiction of the ICC. This is fatal to the operation of the Draft Protocol because this constructively invalidates the Draft Protocol's ability to function.

Therefore, freedom to consent is not unlimited and it has its obligations and boundaries. By ratifying the Draft Protocol, the states will breach the obligation owed under the Rome Statute and impair the function of the ICC. Professor William Schabas commented that "[a]lready, the International Criminal Court is the international justice institution that can make the most credible claim to a demonstrable deterrent effect."[134] Taking the freedom to consent to ratify the Draft Protocol and not fulfilling the obligations to the Rome Statute will have detrimental effect on fighting international crime. As such, it seems to satisfy the standard set out by Lauterpacht and the later ratification may be invalidated because it impairs the object and purpose of entering into the Rome Statute.

Furthermore, states are free to invoke Article 127 of the Rome Statue to opt out from their treaty's obligation;[135] failing to do so may give superior jurisdiction to the ICC.[136] Mali is an example. Mali is a state party to the Rome Statute[137] and it is also one of the five state parties to the Protocol on ACJHR.[138] Presumably, it will also ratify the Draft Protocol. However, Mali has shown its intention to be

128. H. Lauterpacht (Special Rapporteur), *Rep. on the Law of Treaties*, U.N. Doc. A/CN.4/63 (1953), reprinted in [1953] 2 Y.B. Int'l L. Comm'n 1 at 156.

129. CORTEN & KLEIN, *supra* note 80, at 772.

130. Oscar Chinn (U.K. v. Belg.), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63, at 80 (Dec. 12).

131. Jurisdiction of the European Commission of the Danube Between Galatz and Braila, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14, at 23 (Dec. 8).

132. Lauterpacht, *supra* note 127, at 93, 156.

133. CORTEN & KLEIN, *supra* note 80, at 773.

134. WILLIAM SCHABAS, *supra* note 2, at 44.

135. *See* Rome Statute, *supra* note 14.

136. *See id.*

137. *Id.*

138. List of Countries, *supra* note 24, at 2.

bound by the jurisdiction of the ICC since it has made a self-referral under the Rome Statute.[139] Yet, invoking Article 127 may not mean the withdrawal from the jurisdiction of the ICC because jurisprudence indicates the non-reciprocity of human rights conventions, as will be discussed in further detail below.

4. Violations of the Non-Reciprocity of Human Rights Conventions

Cases and customs show that human rights conventions also have a special status in international law—non-reciprocal obligations. Non-reciprocal obligations "do not result in the exchange of direct, reciprocal benefits owed to the other States Parties but in the performance of the treaty for the benefit of the community good, which is tantamount to an 'immaterial' benefit of each State Party."[140] This is because, when dealing with Article 30 of the VCLT, the ICJ held in its *Advisory Opinion on the Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide* that:

> In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[141]

This holding is also reflected in Article 60(5) of the VCLT which states that the termination of treaties due to breaches will not apply to human rights conventions due to the protection of human persons contained in treatises of a humanitarian character.[142]

The International Criminal Tribunal of Former Yugoslavia also corroborates this approach and held in *Kupreškic case* that:

> The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called "humanization" of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. [. . .] Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This

139. Situation in the Republic of Mali, Case No. ICC-01/12-1, Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II (July 19, 2012).

140. DÖRR & SCHMALENBACH, *supra* note 121 at 442; *see also* Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility,* 13 EUR. J INT. L. 1127 (2002).

141. Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 23 (May 28).

142. VCLT, *supra* note 77.

> trend marks the translation into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfill an obligation regardless of whether others comply with it or disregard it.[143]

Therefore, it may not be the practice of the ICC to give away suspects if the ACJHR fails in fighting impunity because "no State Party to the Rome Statute would be expected to negotiate an agreement with another government that would facilitate a suspect's impunity from all forums of justice for the atrocity crimes that the ICC is designed to investigate and prosecute . . . Article 98 sets forth the exceptions to the rule of surrender but it does not seek to deny the Rome Statute's core purpose of fighting impunity."[144]

Consequently, even if Article 98 of the Rome Statute is invoked in requesting for the surrender of the suspect and if the ACJHR does not prosecute properly with reference to the admissibility requirement laid down in Article 17(2) of the Rome Statute or in compliance with international standards, the ICC can still assume the jurisdiction, theoretically and legally, because it is distinguishable from a classic situation under the Rome Statute Article 98.[145]

By the entering into the Draft Protocol, state parties are provided with an additional option for forum shopping, which is contrary to the object and purpose of the Rome Statute. There are at least three forums to conduct a trial: the ICC, the ACJHR, and the national court of the state party. The framers of the Rome Statute foresaw the risk of forum shopping when they put complementarity protections in the treaty.[146] However, the ACJHR is not bound by complementary rules, only the more general principles laid down in the VCLT.[147] Assuming there is a sham trial going on in the ACJHR by unjustified delay[148] or shielding of the accused,[149] this second treaty entered into by the states will not be valid because this is a scheme agreed between different states to seriously deviate from the original purpose of the Rome Statute.[150] Forum shopping is, thus, incompatible with the objective of ending impunity.

5. Resolution of the Dilemma

In the event the Draft Protocol is consistent with international norms, then it

---

143. Prosecutor v. Kupreškic, Case No. IT-95-16-T, Decision In The Trial Chamber, ¶ 518 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

144. David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CT. JUST. 333, 336 (2005).

145. *See generally id.* (explaining the purpose and situation contemplated under Article 98(1) and Article 98(2)). *See also Questions & Answers: U.S. Bilateral Immunity Agreements or So-called "Article 98" Agreements,* Coalition for the Int'l Crim. Ct., http://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf.

146. *See* Rome Statute, *supra* note 14.

147. *See* WILLIAM SCHABAS, *supra* note 2, at 344-49; *see generally* VCLT *supra* note 77.

148. Rome Statute, *supra* note 14, at art. 17(2).

149. *Id.*

150. *See* VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 720 (2009).

must be reconciled with the ICC's jurisdiction. Therefore, when dealing with the Rome Statute and the Draft Protocol, the key is to find out what provisions in these two treaties are incompatible and if they are dealing with the same subject matter. The International Law Commission's study on Fragmentation in International Law states "the test of whether two treaties deal with the 'same subject matter' is resolved through the assessment of whether fulfillment of the obligation under one treaty affects the fulfillment of the obligation of another."[151] This effect might then take place either as strictly preventing the fulfillment of the other obligation or undermining its object and purpose in one way or another.[152] It is proven in the previous sections that both treaties' obligations are in conflict.

According to Article 30(4)(a), for states who are parties to both treaties under this situation, it is opined that the two treaties co-exist to the extent that their provisions are not incompatible with each other.[153] If the provisions cannot be applied simultaneously, the earlier treaty will be terminated or suspended according to Article 59 (*lex posterior*-rule).[154] Article 30(4)(b) concerns situations as between state parties to both treaties and a state party to only one of the treaties.[155] It provides that the treaty which both states are party to govern their mutual rights and obligations.[156]

Therefore, according to article 30(4)(b), only one set of treaty obligation will govern the situation at any given time.[157] The difficulty lies in Article 30(4)(a) and in figuring out a method for both treaties to co-exist, especially under the current complementarity regime of the ICC. Article 98 of the Rome Statute adds weight to the difficulty because it obliges the ICC not to proceed with a request for surrender or assistance that would require the requested state to act inconsistently with their obligations under international agreements[158] or international law.[159] Assuming the ICC applies Article 98 to the case, different situations can be set out to see what may happen.

i. Situation 1:

Country A is party to both the Rome Statute and the Draft Protocol. Suspect A is a national of country A. Suspect A flees to Country B where it is only party to the Rome Statute. Under this situation, Country B only has the obligation to surrender suspect A to the ICC (or to the national jurisdiction if there is an extradition treaty under Article 98 of the Rome Statute and it passes the

151. Int'l Law Comm'n, on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law of Its Fifty-Eight Session, ¶ 254, U.N. Doc. A/CN.4/L.682 (2006).

152. *Id.* ¶ 253.

153. VILLIGER, *supra* note 149, at 406.

154. *Id.*

155. *See* VCLT, supra note 77, at art. 30(4)(b).

156. *See id.*

157. *Id.*

158. Rome Statute, *supra* note 14, at art. 98(1).

159. *Id.* at art. 98(2).

complementary requirement). If Country B were only a party to the Draft protocol, then Country B would be obliged to surrender the suspect to the ACJHR (or their national jurisdiction if they satisfy the complementarity requirement under the Draft Protocol).[160]

ii. Situation 2:

Country A is party to both the Rome Statute and the Draft Protocol. Suspect A is a national of Country A. Suspect A flees to Country B, which is a party to the Rome Statute and the Draft Protocol. Under this situation, Country B has to decide who has priority to prosecute. Under Article 98 of the Rome Statute, Country B has no choice but to surrender Suspect A to the ACJHR because Country B is bound by international obligations to surrender the suspect under the Draft Protocol (or to the national jurisdiction if there is an extradition treaty and the national court satisfies the complementarity requirement under the Draft Protocol).[161]

iii. Situation 3:

Country A is only a party to the Rome Statute, but it is a member of the AU. Suspect A is the national of Country A. Suspect A committed a relevant crime within its own country and Country B. Country B is only a party to the Draft Protocol. Under this situation, there will be concurrent jurisdiction because either court has the absolute right over jurisdiction to prosecute: the ACJHR can operate on the territoriality principle while the ICC can operate on the nationality principle. At the same time, Country A is not bound by international obligation to surrender the suspect to the ACJHR, thus Article 98 of the Rome Statute will not apply.

6. Concurrent Jurisdiction—Different Approaches to Solving the Disputes

"The fact that there are different grounds of jurisdiction means that several states have concurrent jurisdiction over a particular person or event."[162] Situation 3 (above) illustrates the concept of concurrent jurisdiction. Currently, there is no set of rules in international law to solve disputes over jurisdiction between international courts. Judge Fitzmaurice stated in *Barcelona Traction Case*:

> . . .under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction . . . . It does however . . . involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State.[163]

---

160. *See* VCLT, *supra* note 77, at art. 30(4)(a).

161. *See* VCLT, *supra* note 141, art. 30(4)(b).

162. KACZOROWSKA, *supra* note 82, at 338.

163. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970

While international law does not provide much guidance on jurisdictional disputes between international courts, one can draw reference to the different approaches adopted by national courts.[164]

There are several relevant principles in international law resolving disputes between national courts for guidance, including genuine connection, proportionality, and responsibility to protect.[165] The ICJ stated in the *Nottebohm Case* that the genuine connection requires "the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence. . ."[166] The rationale behind this principle is to require a significant nexus between the regulated matter and the regulating organization.[167] This must be discerned in order for that organization to be authorized to assert its jurisdiction.[168] Proportionality is a legal principle or a "measure used to achieve an objective. . .that is, properly related in size or degree to that objective."[169] This principle may prohibit a state from asserting its jurisdiction over a situation, which arises in another state, by using unjustified intervention, as proportionality requires an interest-balancing exercise in a way that a state would not encroach upon the interests of another state or to an extent that is disproportionate.[170] Proportionality has been applied in the law of the World Trade Organization.[171] Responsibility to Protect is that "if a state 'manifestly' fails to protect its population, the responsibility and authority to do so shifts to the international community."[172] It operates on a broader scope than humanitarian intervention[173] and encompasses responsibility to prevent conflict,[174] to react to conflict,[175] and to rebuild after conflict.[176] The Responsibility to Protect concept has been incorporated into

---

I.C.J. Rep. 3, 70. (Feb. 5) (separate opinion by Fitzmaurice, J.).

164. *See* Statute of the International Court of Justice, Annexed to U. N. Charter, 1945 I.C.J. 26, art. 38; *see* KACZOROWSKA, *supra* note 82, at 339.

165. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 145 (2008).

166. Nottebohm Case (Liechtenstein v Guatemala), Judgment, 1955 I.C.J. Rep. 23, (Apr. 6).

167. *See id.*

168. RYNGAERT, *supra* note 164, at 146.

169. *Id.* at 158

170. *Id.* (providing the example that proportionality can be "invoked in the law of war, which prohibits States from mounting 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians. . .which would be excessive in relation to the concrete and direct military advantage anticipate.' It may also play a role in the field of countermeasures. . .").

171. *Id.*; Axel Desmedt, *Proportionality in WTO Law*, 1 J. INT'L ECON. L. 441(2001).

172. ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 1 (2011). *See also* G.A. Res. 60/1 ¶ 139 (Oct. 24, 2005).

173. Adam Roberts, Humanitarian War: Military Intervention and Human Rights, Address at the John Vincent Memorial Lecture at Keele University (Feb. 26, 1993), *in* Int'l Aff., July 1993, at 429, 445 (stating that humanitarian intervention may be summed up as military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants.).

174. *See* G.A. Res. 60/1 ¶ 139 (Oct. 24, 2005) (discussing that the responsibility to prevent includes, amongst others, surveillance).

175. *See* G.A. Res. 60/1 ¶ 140 (Oct. 24, 2005) (discussing that the responsibility to react includes the use of force).

176. *See* G.A. Res. 60/1 ¶ 141 (Oct. 24, 2005) (discussing that the responsibility to rebuild

United Nations policy[177] and is central to the international community, focusing on the preventive measure.[178] This is applicable to gross human rights violations and courts can assume jurisdiction over internationally harmful activities originating in their territory.[179] Thus, the United Nations Security Council can intervene (under Articles 41 and 42 of the United Nations Charter) to protect at risk populations when the states fails to protect.[180]

In contrast, the approach adopted by United States' courts makes reference to a reasonableness standard. The forum takes account of the different factors set out in the U.S. Restatement (Third) of the Foreign Relations Law to decide whether it is reasonable for U.S. courts to assert jurisdiction in a particular case. The factors include: (1) links of the activity to the territory of the regulating state; (2) the connections, such as the nationality; (3) residence or economic activity; (4) the character of the activity to be regulated; (5) the importance of the regulation to the regulating state; (6) the extent to which other states regulate such activities; (7) the importance of the regulation to the international political, legal or economic system; and (8) the extent to which another state may have an interest in regulating the activity and the likelihood of conflict with regulation by another state.[181] The courts, even when reasonableness is satisfied, can reject jurisdiction on the grounds of comity.[182]

However, these jurisdictional bases have very limited application because international courts have no "connections" in the conventional sense. Most importantly, genuine connection and proportionality are impossible to eliminate cases with jurisdictional competency because both the ICC and the ACJHR are equally competent to exercise jurisdiction. The Responsibility to Protect has also been criticized as an overly ambitious concept because its broad scope of operation gives a legal basis for military adventurism.[183] At the same time, the U.S.

---

includes development assistance, administration, and punishment).

177. *See generally* RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT (2006) (discussing that responsibility to protect is a central policy in the U.N. policy community). *See also* U.N. Secretary-General, Address to the Summit of the Africa Union, (January 31, 2008), http://www.un.org/sg/statements/index.asp?nid=2978 (Secretary-General Ban Ki-moon stated that he would "spare no effort to operationalize the Responsibility to protect" and subsequently handed in a report to the General Assembly on plans for implementing the Responsibility to Protect on Jan. 12, 2009, found in *infra* note 176).

178. *See* U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 18, U.N. Doc. A/63/677 (Jan. 12, 2009) (stating that "implementing the responsibility to protect will focus upon prevention, capacity-building and assistance to states as the bases for implementing the responsibility to protect concept.").

179. *See id.* at ¶ 10(b).

180. *See* U.N. Charter art. 41-42.

181. U.S. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §403(2)(a)-(c) (AM. LAW INST. 1987). *See also* U.S. RESTATEMENT (SECOND) OF CONFLICTS § 6 (AM. LAW INST. 1971).

182. *See Laurittzen v. Larsen* 345 U.S. 571, 582, 585-86 (1953).

183. *See* Ronda Hauben, *The Justification to Wage War: Libya and U.N. Security Resolution 1973*, GLOBAL RESEARCH (Dec. 15, 2011), http://www.globalresearch.ca/the-justification-to-wage-war-libya-and-un-security-resolution-1973/28230 (discussing that responsibility to Protect (R2P) is a "dangerous

approach is unable to properly establish a system to filter out cases on jurisdictional disputes between competing international courts.

Another more idealistic approach is that courts should "exercise their jurisdiction with a view to furthering the interests of the international community rather to advancing their own interests."[184] It proposes that instead of relying on the strongest nexus between the case and the forum, states should be entitled to exercise subsidiary jurisdiction over persons and events in a situation where a state with the strongest nexus fails to deal adequately with the case.[185] In fact, the Rome Statute has been exercising this "subsidiary jurisdiction" if the national prosecution is impartial or is not independent, or if the prosecution is shielding the accused, or if the case has been delayed without justification.[186] This "subsidiary jurisdiction" is known as the complementary regime.[187] Article 17(2) of the Rome Statute allows the ICC to exercise the jurisdiction if states fail to prosecute.[188] However, even though the ACJHR did not fail to prosecute, the geographical location and component of the ACJHR has already increased the possibility of bias and conflict of interest to the trials conducted in ACJHR because they are connected to the states in Africa. The relative lack of funding in the ACJHR is also a problem to its establishment of the ACJHR, which would be difficult to provide an unbiased forum for trials at the ACJHR.[189]

Furthermore, Article 98 of the Rome Statute limits the authority of Article 17(2) because the state is constrained from sending the accused to the ICC if it is bound by international agreement or law to send the accused to another state.[190] Thus, the result arising from the conflict of jurisdiction between the ACJHR and the ICC is forum shopping.

As described by the U.S. Court of Appeals for the Second Circuit:

> The concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit . . . raising the fear that applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails)."[191]

---

concept").

184. RYNGAERT, *supra* note 163, at 227.

185. *Id.*

186. Rome Statute, *supra* note 14, at art. 17(2).

187. *See* SCHABAS, *supra* note 2, at 344-49.

188. Rome Statute, *supra* note 14, at art. 17(2).

189. *See generally* International Monetary Fund, *Report on the GDP by Continents,* (Apr. 11, 2014), http://www.imf.org/external/country/index.htm (illustrating that African States has the lowest GDP amongst Asia, Europe, North America and South America). *See also* Jon Silverman, *Ten Years, $900M, One Verdict, Does the ICC cost too much?,* BBC NEWS (Mar. 14, 2012), http://www.bbc.com/news/magazine-17351946 (last visited on Oct. 6, 2015) (discussing that the 122 state parties to the ICC paid U.S.D. $140M over ten years for the operation at the ICC. Arguably, the African States may lack the funding to establish a court that is unbiased and just for the accused).

190. Rome Statute, *supra* note 14, at art. 98.

191. Sheldon v. PHH Corp., 135 F.3d 848, 855 (2d Cir. 1998) (citing Olmstead v. Anderson, 428

Therefore, the accused may have the option to choose the most favorable forum to try his own case if the Draft Protocol comes into force and this is incompatible with the objective of international justice.[192]

Although this approach may not be practical, it nonetheless provides a possible idea to allow the ICC to exercise "the subsidiary jurisdiction" if the ACJHR fails to prosecute. However, all these jurisdictional bases have their limitations. Nonetheless, by falling back on international law as discussed above, the ACJHR may not be in conformity with international norms and may have a difficulty in getting jurisdictional superiority.

V. CONCLUSION

The Rome Statute and the Draft Protocol are incompatible because the Draft Protocol fragments the jurisdiction of the ICC. The Draft Protocol satisfies the standard of incompatibility because it has identical objectives and shares a comparable degree of generality with the Rome Statute. This is shown in the Preamble of the Draft Protocol and the Preamble of the Rome Statute where they aim at ending impunity.[193] This is fatal to the function of the ICC in Africa because all of the current situations in the ICC now are in Africa. It would greatly impact the ICC.

Yet African States are free to enter into the Draft Protocol but this creates the problem of jurisdictional superiority. One way to solve this dispute is by voluntary withdrawal. The African States can withdraw from the Rome Statute by invoking Article 127 of the Rome Statute in accordance with article 54 of the VCLT.[194] This paper also rejects the possibility of auto-termination of the Rome Statute because it is unlikely that all the state parties to the Rome Statute withdraw from it.

However, this does not mean the withdrawal from the Rome Statute and the subsequent ratification of the Draft Protocol is in conformity with international norms. This may result in breaches of international norms, since Article 26 of the VCLT requires the African States to perform treaty obligation with good faith *(pacta sunt servanda)*.[195] Performing treaty obligations with good faith is important in international relations because breaching the trust will result in a high level of distrust between different states. The freedom to consent also binds the parties to the treaty that they have ratified. Therefore, entering into a treaty that concludes the same subject matter as the previous one may taint the latter treaty with illegality. Since the conflicting provision between the Draft Protocol and the Rome Statute is jurisdictional, this constructively invalidates the Draft Protocol's functionality. This conclusion is also implied by the fact that states are free to

---

Mich. 1, 400 N.W.2d 292 (Mich. 1987)).

192. In most cases, the accused is the head of state; therefore if the country decides to prosecute the accused and the prosecution is a sham, the underlying effect is that the accused may be able to forum shop.

193. *Draft Protocol on Amendments*, *supra* note 10, at pmbl.; Rome Statute, *supra* note 14, at pmbl.

194. Rome Statute, *supra* note 14, at art. 127; VCLT, *supra* note 77 at art. 54.

195. VCLT, *supra* note 77 at art. 26.

withdraw from the Rome Statute under Article 127;[196] failing to do so will create ambiguity as to superior jurisdiction. Mali is the example here.

Further, the non-reciprocity of the human rights convention also bars the African States from withdrawing. This is because human rights conventions do not have an exchange of interests between state parties; it is for the interests of human beings and the international community as a whole. Human rights run with land and, once assumed, are irrevocable and cannot be removed under subsequent instruments, treaties, or agreements. This is reflected in the Article 60(5) of the VCLT and the *Kupreskic* case.[197]

Nonetheless, if states insist on entering into the Draft Protocol, Article 98 of the Rome Statute would be the greatest bar for the ICC to exercise jurisdiction because it restricts states from sending the accused if there is a competing request by international law or agreement.[198] This will result in forum shopping where the accused can predict the outcome of the trial by selecting a favorable jurisdiction for trial. This is incompatible with the objective to end impunity. Although the ICC can distinguish Article 98 by the reason of forum shopping and invalidity of the Draft Protocol (e.g. the ACJHR is merely used as a plan or scheme to delay prosecution) from its usual application, the basis is debatable. Article 98 has proven to be an obstacle for the ICC to exercise its jurisdiction in other areas as well, including head of state immunity and extradition agreement.[199] This has also been proven to be an obstacle in the recent Omar Al-Bashir event in South Africa where the South African Government refused to extradite Omar Al-Bashir.[200]

The next Review Conference for the Rome Statute is scheduled in 2017.[201] The state parties to the Rome Statute should consider whether Article 98 of the Rome Statue should be removed (perhaps making allowances for state parties to make reservations to this change). Article 98 did not fulfill its purpose as discussed during the negotiation[202] and did not provide any constructive function to help fulfill the objective of the ICC. This has limited the ICC's jurisdiction.[203] Since Article 98 has lost its meaning and restrains the ICC from exercising jurisdiction, Article 98 should be removed in the next amendment.

---

196. Rome Statute, *supra* note 14, at art. 127.

197. VCLT, *supra* note 77 at art. 60(5). *See also* Prosecutor v. Kupreškic, *supra* note 143, at ¶ 520.

198. *See* Rome Statute, *supra* note 14, at art. 98(1)-(2).

199. *See generally* Dapo Akande, *Head of State Immunity is a Part of State Immunity: A Response to Jens Iverson*, EJIL: TALK, http://www.ejiltalk.org/head-of-state-immunity-is-a-part-of-state-immunity-a-response-to-jens-iverson (last visited on Oct. 4, 2015).

200. *See* Bill Corcoran, *South African Government Loses Appeal Over Not Arresting Sudan President*, THE IRISH TIMES (Sep. 16, 2015), http://www.irishtimes.com/news/world/africa/south-african-government-loses-appeal-over-not-arresting-sudan-president-1.2354106.

201. Coalition for International Criminal Court, *Review Conference of the Rome Statute*, http://www.iccnow.org/?mod=review (last visited on Oct. 4, 2015).

202. SCHABAS, *supra* note 2, at 1037; *see also* David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 5 (2001); MARK D. KIELSGARD, RELUCTANT ENGAGEMENT- U.S. POLICY AND THE INTERNATIONAL CRIMINAL COURT, 130 (2010).

203. KIELSGARD, *supra* note 194; *see also* WILLIAM SCHABAS, *supra* note 2, at 1038.

The objective of the ICC is to end impunity, regardless of the forum.[204] If the ACJHR is exercising its criminal jurisdiction with integrity while upholding criminal justice, it should be encouraged. It is the reason why the ICC has adopted the complementarity regime. The spirit of the preamble was explicitly reiterated by former Prosecutor Moreno-Ocampo, who observed that, "the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[205] However, if the ACJHR is a cynical effort at forum shopping designed to allow impunity for crimes committed by international leadership, it must be unmasked and the ICC must be allowed to carry on its historical task. Hopefully, the establishment of the ACJHR will not be fatal to the efforts of fighting international crimes and the objective to end impunity.

204. Rome Statute, *supra* note 14, at prmbl.

205. Luis Moreno-Ocampo, *Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court*, http://www.iccnow.org/documents/MorenoOcampo16June03.pdf, (last visited on Oct. 6, 2015).