Denver Journal of International Law & Policy

Volume 44
Number 1 *Fall*

Article 7

January 2015

Vol. 44, no. 1: Full Issue

Denver Journal International Law & Policy

Vol. 44, no. 1: Full Issue

Denver Journal
of International Law and Policy

VOLUME 44 NUMBER 1 FALL-2015

2015-2016
University of Denver
Administration

Rebecca Chopp, *Chancellor*
Gregg Kvistad, *Provost*
Craig W. Woody, *Vice Chancellor for Business and Financial Affairs*
Kevin A. Carroll, *Vice Chancellor of Marketing and Communications*
Thomas Willoughby, *Vice Chancellor of Enrollment*
Armin Afsahi, *Vice Chancellor for Advancement*
Peg Bradley-Doppes, *Vice Chancellor for Athletics and Recreation*
David Greenberg, *Vice Chancellor of Institutional Partnerships*
Amy King, *Vice Chancellor of Human Resources*
Liliana Rodriguez, *Vice Chancellor of Campus Life and Inclusive Excellence*
Barbara J. Wilcots, *Associate Provost for Graduate Studies*
Paul H. Chan, *University General Counsel*
Martin J. Katz, *Dean of the Sturm College of Law and Professor of Law*
Viva Moffat, *Associate Dean of Academic Affairs and Professor of Law*
Joyce Sterling, *Associate Dean for Faculty Scholarship and Professor of Law*
Jessica Boynton, *Associate Dean of Student Affairs*
Catherine E. Smith, *Associate Dean for Institutional Diversity and Inclusiveness and Associate Professor of Law*
Eric Bono, *Assistant Dean for Career Opportunities*
Iain Davis, *Assistant Dean of Student Financial Management and Admissions*
Laura E. Dean, *Assistant Dean of Alumni Relations*
Clint Emmerich, *Assistant Dean of Budget and Planning*
Meghan S. Howes, *Assistant Dean of the Office of Communications*
Daniel A. Vigil, *Assistant Dean of External Relations and Adjunct Professor*
Susan D. Daggett, *Executive Director of the Rocky Mountain Land Use Institute and Lecturer*
Ricki Kelly, *Executive Director of Development*
John Wilson, *Director of the Graduate Program in Taxation and Associate Professor of Taxation*
Julie Gordon, *Registrar*
Molly Rossi, *Human Resources Manager*
Lauri Mlinar, *Director of Events*

Sturm College of Law
Faculty List

Robert Anderson
Rachel Arnow-Richman
Debra Austin
Rebecca Aviel
Tanya Bartholomew
Brad Bartlett
Arthur Best
Jerome Borison
Stacey Bowers
Kelly Brewer
J. Robert Brown, Jr.
Teresa M. Bruce
Phoenix Cai
John Campbell
Bernard Chao
Fred Cheever
Allen Chen
Roberto Corrada
Patience Crowder
Courtney Cross
Stephen Daniels
Susan Daggett
K.K. DuVivier
Nancy Ehrenreich
Ian Farrell
Alexi Freeman
César Cuauhtémoc García Hernández
Rashmi Goel
Robert M. Hardaway
Jeffrey H. Hartje
Mark Hughes
Timothy Hurley
Sheila K. Hyatt
Scott Johns
José R. (Beto) Juárez, Jr.
Sam Kamin
Hope Kentnor
Tamara L. Kuennen
Margaret Kwoka
Jan G. Laitos
CJ Larkin
Christopher Lasch
Nancy Leong
Kevin Lynch
Justin Marceau
Lucy A. Marsh
G. Kristian McDaniel-Miccio
Michael G. Massey
Kris McDaniel-Miccio
Suzanna K. Moran
Ved P. Nanda
Stephen L. Pepper
Justin Pidot
Raja Raghunath
Paula Rhodes
Edward J. Roche
Tom I. Romero, II
Laura Rovner
Nantiya Ruan
Thomas D. Russell
Ann C. Scales (1952–2012)
David C. Schott
Michael R. Siebecker
Don C. Smith
John T. Soma
Michael D. Sousa
Mary A. Steefel
Robin Walker Sterling
Kate Stoker
Celia Taylor
David Thomson
Komal Vaidya
Kyle C. Velte
Ann S. Vessels
Robin Walker Sterling
Eli Wald
Lindsey Webb
Annecoos Wiersema
John R. Wilson

Denver Journal
of International Law and Policy

VOLUME 44 NUMBER 1 FALL-2015

Table of Contents

Articles

REHABILITATION & REINTEGRATION OF JUVENILE WAR CRIMINALS: A *DE FACTO* BAN ON THEIR CRIMINAL PROSECUTION?

ALICE S. DEBARRE*

I. INTRODUCTION

Although child soldiers that commit acts of atrocity and war crimes constitute a minority[1] of the estimated 250,000 child soldiers worldwide,[2] the question of their prosecution, as yet unsettled in international law, raises complex issues of "culpability, a community's sense of justice and the 'best interests of the child'."[3] International law does not define the term "child soldier," and, given the lack of a single or discrete instrument specifically concerned with this issue, no consensus exists as to who falls within that category;[4] the main issues being the minimum age of lawful participation in armed conflict, and the level of participation required for the child to be considered a soldier. One operational definition is that which can be extricated from Article 1 of the Optional Protocol on Children in Armed Conflict, which raises the minimum age of lawful participation in armed conflict to eighteen years and refers to child soldiers as those children who take a "*direct part in hostilities*."[5] Since this paper is concerned with child war criminals, there is no need to define the scope of the notion of taking a direct part in hostilities, as it can be assumed that any child soldier who commits a war crime has, in fact, taken a direct part in the armed conflict.[6]

---

* Alice S. Debarre is a young law graduate, recently admitted to the New York State bar, with a focus on International Human rights and Humanitarian Law. She has studied law at King's College London, Paris I Panthéon-Sorbonne, and the Georgetown University Law Center. Currently a legal intern with Human Rights First's National Security Team in Washington D.C., Ms. Debarre will start working for the International Committee of the Red Cross's International Law and Policy division in Geneva, in March, 2016.

1. MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 85 (2012).

2. Press Release, Ex-Child Soldiers: From Victims of War to Protagonists of Peace, UNICEF (June. 23, 2009), http://www.unicef.org/media/media_50066.html.

3. U.N. Secretary-General, *Promotion and Protection of the Right of Children: Impact of Armed Conflict on Children*, ¶ 250, U.N. Doc. A/51/306 (Aug. 26, 1996) http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm.

4. DRUMBL, *supra* note 1, at 102.

5. Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I art. 6(3) U.N. Doc. A/RES/54/263, (May 25, 2000) (entered into force Feb. 12, 2002) [hereinafter Optional Protocol on Children in Armed Conflict].

6. *See* UNICEF, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, (Feb. 2007),

The ban on recruiting or using any individual under the age of fifteen in armed forces or armed groups is settled international law,[7] and, although it is still ambiguous for armed forces, the minimum age is now considered to be eighteen for armed groups.[8] However, the question remains of what is to be done with child soldiers who themselves have committed war crimes. International law provides no explicit guidelines for whether, or at what age, child soldiers should be prosecuted for war crimes.[9] In an international armed conflict ("IAC"), child soldiers are combatants and will therefore benefit from the 'combatant privilege,' which ensures that they cannot be prosecuted for actions taken during an armed conflict that comply with the rules of International Humanitarian Law ("IHL").[10] However, no such concept exists in non-international armed conflicts ("NIACs"), where child soldiers are most often used, and in any case, no child soldier who has committed a war crime, in an IAC or a NIAC, will be immune from prosecution under IHL.[11] The only provisions relating to criminal prosecution of child war criminals are Articles 77(5) of Additional Protocol I to the 1949 Geneva Conventions[12] and 6(4) of Additional Protocol II[13] that ban the death penalty for crimes committed by individuals when under the age of eighteen. IHL, along with International Human Rights Law ("IHRL") and International Criminal Law ("ICL"), contain little guidance and no express prohibition on the prosecution of child soldiers for war crimes.[14]

Despite the absence of a ban on the criminal prosecution of child soldiers, none have ever been prosecuted by an international court.[15] Much of the reticence to trying child war criminals in criminal courts stems from the fact that, given their young age, they lack the necessary mental and moral development, and are

---

http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf [hereinafter *The Paris Principles*]. Principle 2.1 goes beyond the notion of taking a direct part in hostilities and defines the child soldiers as

> . . .any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.

Id. ¶2.1.

7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 77, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

8. DRUMBL, *supra* note 1, at 5.

9. Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323, 335 (2007).

10. Erin Lafayette, *The Prosecution of Child Soldiers: Balancing Accountability with Justice*, 63 SYRACUSE L. REV. 297, 302 (2013).

11. Matthew Happold, *Child Prisoners in War*, *in* PRISONERS IN WAR 237-250, 243 (Sibylle Scheipers ed., 2010).

12. AP I, *supra* note 7, art. 77.

13. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

14. Leena Grover, *Trial of the Child Soldier: Protecting the Rights of the Accused*, 65 HEIDELBERG J. OF INT'L L., 217, 218 (2005).

15. Paola Konge, *International Crimes & Child Soldiers*, 16 SW. J. INT'L L. 41, 41 (2010).

therefore more easily coerced or influenced into committing atrocities.[16] Indeed, they are less socialized, more malleable, and more docile than adults.[17] As the U.S. Supreme Court in *Roper v. Simmons* held, children have a "lack of maturity and an underdeveloped sense of responsibility," which makes them more susceptible to be influenced by outside pressures.[18] Furthermore, it is common for commanders to give child soldiers either drugs or alcohol,[19] thereby further lowering their inhibitions. Alongside these concerns, the criminal prosecution of child soldiers for war crimes also gives rise to more juridical issues. Directly related to this question of a child's development is the difficulty of proving the child soldier's *mens rea*. Does he or she possess the *mens rea* sufficient to be held responsible for his or her war crimes? According to Article 8(2)(a) of the Rome Statute, the *mens rea* required for war crimes is the proof that "[t]he perpetrator was aware of the factual circumstances that established the existence of an armed conflict" and that the victim was a protected person under one or more of the Geneva Conventions,[20] which would have to be proven in addition to the traditional *mens rea* required by the particular crime committed. Further juridical issues arise, even were it to be found that the child soldier met the substantive intent requirements for the commission of a war crime, as the court would likely then have to look at the defenses of duress,[21] intoxication,[22] and superior orders.[23] Finally, the major problem with child soldier prosecution for war crimes is that, while Article 40 of the Convention on the Rights of the Child calls on state parties to set a minimum age of criminal responsibility,[24] the little guidance that international law provides leaves states with a considerable amount of discretion on the question.[25] The current lack of consensus of the different state laws on this issue is an important obstacle, as it is unclear who may or may not be prosecuted for war crimes under international law.

---

16. Lafayette, *supra* note 10, at 305.

17. HAPPOLD, *supra* note 11, at 142.

18. Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 366 (1993)).

19. HAPPOLD, *supra* note 11, at 142.

20. Elements of the Crimes of the International Criminal Court, Sept. 9, 2002, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), at art. 8(2)(a) [hereinafter Elements of Crimes]. *See also* Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90, at art. 8(a)(2), [hereinafter Rome Statute].

21. Grover, *supra* note 14, at 230 (although the defense of duress was rejected by both the ICTY and the ICTR, it was included in article 31(1)(d) of the Rome statute).

22. Rome Statute, *supra* note 20, art. 31(1)(b).

23. Grover, *supra* note 14, at 230 (this defense was rejected in Nuremberg, the ICTY, the ICTR, and the SCSL Statute but is available under Article 33 of the Rome Statute in limited circumstances).

24. Convention on the Rights of the Child art. 40, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

25. HAPPOLD, *supra* note 11, at 246 (discussing the guidelines that can be found in international law–the minimum age of criminal responsibility should not be so low as to result in the punishment of children who were too young at the time of the commission of the offence to understand the consequences; even children above the age of criminal responsibility should be treated differently from adults. He identifies a trend to standardizing the minimum age of criminal responsibility in the mid-teens.).

The reaction of the global community to this judicial uncertainty has been to create and uphold what Mark Drumbl has described as the "*faultless passive victim*" image of the child soldier, one of the goals of which is to curb punitive policies and harsh measures.[26] Despite this, and while it is clear in international law that, when dealing with child soldiers, the standard is the "best interests of the child,"[27] it cannot as yet be said that there exists a customary international law banning the prosecution of child soldiers. The Rome Statute is the only international law instrument precluding the prosecution of an individual under the age of eighteen at the time the offence was committed;[28] and, although the Rome Statute plays a powerful trendsetting role,[29] only a minority consider this to be a substantive, fundamental rule of international law.[30] However, not only is there no precedent in international law for the prosecution of war child criminals, examples of such prosecutions in national courts are also extremely rare.[31] More than exemplifying the reticence to try child soldiers, this seems to point towards an emerging customary ban.

As opposed to the incertitude concerning prosecution, international law is clear on the fact that states have an obligation both to rehabilitate and reintegrate all child soldiers.[32] Reintegration has been defined as a "long-term process which aims to give children a viable alternative to their involvement in armed conflict and help them resume life in the community."[33] Measures of rehabilitation and reintegration include Truth and Reconciliation Commissions ("TRCs"), Disarmament Demobilization and Reintegration ("DDR") programs, and local traditional and cultural rites.[34] Although the particular context will determine which measure is the most appropriate, it is clear that both family reunification and education are key aspects of the rehabilitation and reintegration objectives.[35]

Assuming the existence of such a customary international norm obligating states to reintegrate and rehabilitate child soldiers, would this not, in fact, prohibit their criminal prosecution? Considering that the purpose of such an obligation is to reintegrate the child war criminals and other child soldiers into their communities and to help them heal,[36] how does criminal prosecution fit into this

26. DRUMBL, *supra* note 1, at 10.

27. CRC, *supra* note 24, at art. 1.

28. Rome Statute, *supra* note 20, art. 26.

29. DRUMBL, *supra* note 1, at 119.

30. *See, e.g.*, SONJA C. GROVER, CHILD SOLDIER VICTIMS OF GENOCIDAL FORCIBLE TRANSFER – EXONERATING CHILD SOLDIERS CHARGED WITH GRAVE CONFLICT-RELATED INTERNATIONAL CRIMES, 64 (2012).

31. DRUMBL, *supra* note 1, at 117

32. *The Paris Principles*, supra note 6, §7.

33. *Coalition to Stop the Use of Child Soldiers, Child Soldiers:Global Report 2008*, at 412 (2008), http://www.child-soldiers.org/global_report_reader.php?id=97.

34. Lafayette, *supra* note 10, at 309.

35. *See* UNICEF, Cape Town Principles and Best Practices art. 32, (Apr. 30, 1997), http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf (covering family reunification); HAPPOLD, *supra* note 11, at 110 (covering education).

36. Lafayette, *supra* note 10, at 309.

process? The existence of international standards and protections for accused juveniles, as well as the possibility, at the sentencing phase, to order purely rehabilitative measures, would seem to argue for the compatibility of criminal prosecution of child soldiers with their rehabilitation and reintegration. However, this is in tension with the idea that a criminal trial undoubtedly leads to the increased stigmatization of child soldiers, while causing them further trauma.[37] Moreover, the nature of the available safeguards and the supposedly rehabilitative nature of a juvenile criminal trial are ill defined and insufficiently provided for in international law.[38] Finally, accountability does not necessarily have to involve criminal responsibility. Therefore, there is a strong argument to be made according to which a state's obligation to rehabilitate and reintegrate child soldiers, who have committed war crimes, is incompatible with their criminal prosecution, thereby creating a *de facto* ban on criminally trying these child soldiers.

II. THE EMERGING CUSTOMARY INTERNATIONAL NORM BANNING THE PROSECUTION OF CHILD SOLDIERS FOR WAR CRIMES

In conventional international humanitarian, human rights, and criminal law, there is no clear prohibition on the criminal liability of individuals for war crimes committed while they were under the age of eighteen. The 1949 Geneva Conventions and their Additional Protocols (hereinafter AP I and AP II) contemplated both possibilities that minors could commit war crimes,[39] and that they could lawfully be prosecuted for their acts.[40] In the context of an IAC, article 77(5) of AP I prevents the execution of the death penalty on a person who had not yet reached the age of eighteen years at the time the offence related to such an armed conflict was committed.[41] Although Brazil's delegate had sought during the AP I negotiations to include the prohibition on penal prosecution of children under sixteen in article 77, the decision not to address this issue and to leave it to state discretion prevailed.[42] In NIACs, Article 6(4) of AP II similarly prohibits the pronouncement of the death penalty on persons under eighteen.[43] The Geneva Conventions, therefore, do not set a minimum age of criminal responsibility, and apart from excluding the most extreme sentence, do not distinguish between

37. Megan Nobert, *Children at War: The Criminal Responsibility of Child Soldiers*, 3 PACE INT'L L. REV. ONLINE COMPANION 1, 34-35 (2011). http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1025&context=pilronline.

38. *See Analysis: Should Child Soldiers by Prosecuted for Their Crimes?* IRIN NEWS, Oct. 6, 2011, http://www.irinnews.org/report/93900/analysis-should-child-soldiers-be-prosecuted-for-their-crimes.

39. Lafayette, *supra* note 10, at 106.

40. Grover, *supra* note 14, at 219.

41. *See* AP I, *supra* note 7, at art. 77(5). This was an improvement on article 68 of Geneva Convention IV, which prohibited the pronouncement of the death penalty on a protected person who was under eighteen at the time the offence was committed. Indeed, in general, child soldiers are not protected persons. *See* HAPPOLD, *supra* note 11, at 105.

42. Geneva convention, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian law Applicable in Armed Conflicts, 307 (1974-1977).

43. AP II, *supra* note 13, at art. 6(4).

prosecuting adults and juveniles.[44] Given that Article 40 of the CRC enumerates the fundamental guarantees of due process that a child alleged as, or accused of, having infringed the penal law is entitled to in judicial proceedings, and that Article 37 bars capital punishment and life imprisonment without parole but not incarceration, the CRC also seems to allow the criminal prosecution of juvenile offenders.[45] Although these articles are not specifically concerned with child soldiers and crimes committed during an armed conflict, nothing in the CRC prohibits child soldier prosecutions for war crimes.[46] Furthermore, the Committee on the Right of the Child has advised states to report on "the criminal liability of children for crimes they may have committed during their stay with armed forces or groups and the judicial procedure applicable [. . .]."[47]

Whereas both these conventions therefore suggest that child soldiers may be criminally prosecuted, a consideration of the statutes of the various international, regional, and mixed tribunals does not give rise to an established and consensual position. Indeed, neither the statute of the International Criminal Tribunal for Rwanda ("ICTR") nor that of the International Criminal Tribunal for the former Yugoslavia ("ICTY") sets a minimum age of criminal responsibility.[48] For some, this omission was intentional, suggesting that the court would be entitled to prosecute a minor, and, should it decide to do so, that person could raise his or her age as an affirmative defense.[49] The statutes' silence can however be interpreted differently, for some it does not necessarily preclude the prosecution of children,[50] while others have argued that such a deliberate omission "seems to have been premised on a belief that such a provision was unnecessary as no such prosecutions would take place."[51] Regardless, these statutes theoretically permit the prosecution of child soldiers for international crimes. The Rome Statute, however, clearly states in Article 26 that the ICC's jurisdiction does not extend to individuals under eighteen years of age.[52] Although Sonja Grover argues that this jurisdictional exclusion relates to a presumed lack of criminal responsibility of individuals under the age of eighteen,[53] there seems to be a general tendency to interpret Article 26

44. Grover, *supra* note 14, at 2199.

45. *Id.*

46. *Id.*

47. Committee on the Rights of the Child, *Guidelines regarding initial reports to be submitted by States Parties under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,* CRC/OP/AC/1 art. 6(3)(f) (Nov. 14, 2001).

48. Luz E. Nagle, *Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict,* 19 CARDOZO J. INT'L & COMP. L. 1, 26 (2011).

49. Brief of International Law Scholars as Amici Curiae in Support of Respondent Omar Khadr at 23, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1196), [hereinafter Brief of International Law Scholars]
http://ccrjustice.org/files/Brief%20of%20International%20Law%20Scholars%20as%20Amici%20Curiae%20in%20Support%20of%20Respondent%20Omar%20Khadr.pdf.

50. Grossman, *supra* note 9, at 338-39.

51. Matthew Happold, *Child Soldiers: Victims or Perpetrators*, 29 U. LA VERNE L. REV. 56, 84-85 (2008).

52. Rome Statute, *supra* note 20, at art. 26.

53. *See* GROVER, *supra* note 30, at 63.

as a procedural, rather than a normative, provision.[54] Indeed, it is said, given the lack of a consensus on the minimum age of criminal responsibility, that provision was the result of a political compromise, and therefore, not intended to set out a legal principle.[55] As a result, it excludes the ICC's jurisdiction only. It does not formally prohibit other tribunals, whether international, national, or local, from prosecuting children for international crimes.[56] Indeed, Article 26 was arguably not based on the belief that children under eighteen should not be prosecuted for war crimes, but rather on the sense that this decision should be left to state discretion.[57] As for the mixed tribunals, the United Nations Transitional Administration in East Timor ("UNTAET") Regulation 2000/30 Article 45 gave the Special Panels for Serious Crimes ("SPSC") *de jure* jurisdiction over minors from the ages of twelve to eighteen;[58] whereas the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") does not mention juvenile prosecution and restricts the jurisdiction of the Chambers to those most responsible.[59] Finally, Article 7(1) of the Statute of the Special Court for Sierra Leone (SCSL) permits the prosecution of children aged fifteen and above.[60] No general legal principle can be extricated from these different statutes, which, when they actually provide for it, set different minimum ages of criminal responsibility, and for some, under eighteen years.[61]

Even what can be termed soft law instruments have not denounced a clear prohibition on the prosecution of children for war and other international crimes. Indeed, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), although they favor diversion to community and other services,[62] they do not remove states' ability to prosecute children.[63] Although the Paris Principles assert "children should not be prosecuted by an international court or tribunal,"[64] they simply dissuade national prosecutions

54. Daniel Ryan, *International Law and Laws of War and International Criminal Law – Prosecution of Child Soldiers - United States v. Omar Khadr*, 33 SUFFOLK TRANSNAT'L L. REV. 175, 180 (2010); Konge, *supra* note 15, at 50; DRUMBL, *supra* note 1, at 119.

55. GROVER, *supra* note 14, at 220.

56. DRUMBL, *supra* note 1, at 119.

57. U.N. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* 37, Working Paper No. 3, Sep. 2011, http://www.refworld.org/docid/4e6f2f132.html.

58. U.N. Transitional Administration in East Timor, Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure sec. 45, UNTAET/REG/2000/30 (Sept. 25, 2000).

59. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1, (2001), as amended by NS/RKM/1004/006 (Oct. 27, 2004) [hereinafter Cambodia art.1].

60. Statute of the Special Court for Sierra Leone art. 7(1), 2178 U.N.T.S. 138, 145; 97 A.J.I.L. 295; U.N. Doc. S/2002/246, (2002) [hereinafter Statute of the SCSL].

61. *See id.*; Cambodia art. 1, *supra* note 59; Nagle, *supra* note 48.

62. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") G.A. Res. 40/33, rule 11, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter The Beijing Rules].

63. DRUMBL, *supra* note 1, at 108.

64. *The Paris Principles*, supra note 6, ¶ 8.6.

by suggesting that "[a]lternatives to judicial proceedings should be sought for children at the national level."[65]

An analysis of the relevant international conventions, court and tribunal statutes, and soft laws leads to the conclusion that child soldiers who have committed war crimes may well be legally prosecuted, internationally or nationally, and held criminally responsible for their acts. However, both prosecutorial strategies in international and mixed tribunals, as well as the practice of courts and tribunals, show a clear reluctance to have child soldiers criminally tried, and a move towards a customary ban on the criminal prosecution of persons under the age of eighteen who have committed international crimes.

There is no precedent for the prosecution of a child soldier before an international criminal court.[66] Prosecutorial strategies have excluded such prosecutions in international and *ad hoc* tribunals in which they would be *de jure* possible. Indeed, the ICTR prosecutor decided that children from ages fourteen to eighteen would neither be tried by the tribunal nor be called as witnesses to testify.[67] In the same way, the SCSL prosecutor decided to focus on those most responsible and therefore announced he would not prosecute children.[68] Furthermore, while a seventeen-year-old was initially charged with crimes against humanity and murder in *Prosecutor v. X*,[69] his indictment was eventually modified to state only the murder charge, which is an example of the burgeoning norm according to which juveniles are not prosecuted for extraordinary international crimes.

It has been suggested that there is an expectation by the international community that domestic courts, being the more appropriate forum for such prosecutions, should handle such cases.[70] Although there are no examples of such trials in traditional domestic courts, children have, on rare occasions, been prosecuted for war crimes by military courts, tribunals, or commissions, although mainly under domestic law.[71] Indeed, after World War II, a British Military Court convicted a fifteen-year-old for his involvement in the killing of a prisoner of war,[72] and the Permanent Military Tribunal convicted two juveniles under the French Penal Code for the war crime of receiving stolen goods belonging to French citizens.[73] More recently, the U.S. military commissions tried two

65. *See The Paris Principles*, *supra* note 6., ¶ 8.9.0.

66. *See* Brief of International Law Scholars, *supra* note 49, at 18.

67. UNICEF, *Children and Truth Commissions*, 17 (Aug. 2010), http://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf.

68. Press Release, Public Affairs Office, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002).

69. Prosecutor v. X, Case No. 04/2002, Judgment (Dili Dist. Court Special Panel for Serious Crimes) (Dec. 2, 2002), http://wcsc.berkeley.edu/wp-content/uploads/ET-Docs/CE-SPSC%20Final%20Decisions/2002/04-2002%20%20X%20%20Judgment.pdf.

70. *See* GROVER, *supra* note 30, at 81.

71. *Id.* at 96.

72. Trial of Johannes Oenning and Emil Nix, British Military Court, Borken, Ger., LRTWC 74 (Dec. 1945).

73. Trial of Bommer, Permanent Military Tribunal at Metz, LRTWC 62 (Aug. 1947).

juveniles for acts committed in Afghanistan. In both *Jawad* and *Khadr*, the accused were charged, amongst other things, with attempted murder in violation of the law of war.[74] Although this is an offense under Section 950v(b)(15) of the Military Commissions Act of 2006, it is not, however, an internationally recognized war crime, unless the accused was proved to be both an unprivileged belligerent and to have killed a protected person or used a means, weapon, or technique considered illegal under IHL.[75] Since the charges against Jawad were eventually dropped,[76] and the government conceded in *Khadr's* case that there was no evidence that he had violated international law in any way,[77] these two juveniles were not tried for international war crimes. However, the commission in the *Khadr* case found that "neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age."[78]

In some states, minors can be prosecuted as adults or in adult venues for particularly serious or violent crimes.[79] In the U.K., two boys, aged eleven, faced an adult public trial for the abduction and murder of a two-year-old in 1993.[80] In 2001, Human Rights Watch intervened to prevent the execution of four child soldiers who had been sentenced to death in the DRC; and in 2002, it urged the Ugandan Government to release two former juvenile LRA fighters who had been charged with treason.[81] There are therefore a few examples of children being tried for domestic offenses other than war crimes in domestic courts. However, the reluctance in both ICL and soft law with regard to child soldier prosecution influences national criminal prosecutions. For war crimes in particular, the U.N. Office of the Special Representative of the Secretary-General for Children and Armed Conflict encourages states to consider excluding children below eighteen from criminal responsibility for crimes committed during an armed conflict.[82]

Although generally not prohibited by international law instruments, the criminal prosecution for war crimes committed by an individual below the age of eighteen is unprecedented in international or internationalized courts and tribunals,

---

74. Defense Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to R.M.C. 907(b)(1)(A) (Child Soldier); United States v. Jawad (Military Comm'n Guantánamo Bay, Cuba June 13, 2008) [hereinafter Defense Motion]; United States v. Khadr, 717 F. Supp. 2d..1215, 1220 (C.M.C.R. Sept. 24, 2007).

75. Brief on Behalf of Appellant at 27, United States v. Khadr, 717 F..2d 1215, 1220 (C.M.C.R. Nov. 8, 2013) [hereinafter Brief on Behalf of Appellant].

76. David Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo*, 60 DUKE L.J. 1367, 1375 (2011).

77. *See* Brief on Behalf of Appellant, *supra* note 75, at 17.

78. EUGENE R. FIDELL ET AL., MILITARY JUSTICE: CASES AND MATERIAL ¶ 18 (LexisNexis ed., 2nd ed. 2012).

79. DRUMBL, *supra* note 1, at 105.

80. *Id.*

81. *See* HAPPOLD, *supra* note 11, at 141.

82. DRUMBL, *supra* note 1, at 175 (providing the examples of Colombia, where not a single criminal case has been brought against a child soldier, even within the juvenile justice system; and in the DRC, which enacted a legislation in 2002 prohibiting the military courts' jurisdiction over children under eighteen).

and extremely rare in domestic fora. Furthermore, it has been argued that the exclusion from prosecution of children under eighteen in the ICC Statute and by the SCSL prosecutor,[83] as well as the failure to set a universal minimum age of criminal responsibility,[84] has led to the general principle according to which the prosecution for war crimes of individuals under eighteen is contrary to international law.[85] Despite this, such a principle does not yet appear to have crystallized into customary international law. Indeed, international law does not prohibit the prosecution for international crimes of children under eighteen, including child soldiers,[86] and there is no *opinio juris* establishing that such prosecution, by an international court or tribunal, or any national court, would be unlawful.[87] The U.S. has even stated that, given the fact that the Geneva Conventions and their Protocols contemplate the prosecution of those under eighteen for violations of IHL, juveniles may "face the possibility of a war crimes trial."[88] Nonetheless, it is clear that prosecuting child soldiers for war crimes is increasingly seen as inappropriate, and even illegitimate, as reflected in the small number of domestic criminal prosecutions;[89] and that there is a move towards a customary norm of international law, an "emerging standard," prohibiting the criminal prosecution of minors.[90]

Although there is a clear progression towards the ban on criminal prosecutions of child soldiers who have committed war crimes,[91] both in international and internationalized tribunals, as well as in national courts, that ban is currently not a part of international law. However, it seems that in dealing with individuals who have committed war crimes while they were under the age of eighteen, the requirement to rehabilitate and reintegrate these children has evolved into a norm of customary international law.

III. THE CUSTOMARY OBLIGATION OF REHABILITATION AND REINTEGRATION

In both the hard and soft law sources that directly concern children and armed

83. *See* GROVER, *supra* note 30, at 63.

84. *Id.* at 70.

85. *Id.* at 81.

86. DRUMBL, *supra* note 1, at 126.

87. *Id.* at 133.

88. Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *United States Written Response to Questions Asked by the Committee on the Rights of the Child*, U.S. Treaty Reports (May 13, 2008), http://2001-2009.state.gov/g/drl/rls/105437.htm.

89. *See* DRUMBL, *supra* note 1, at 18.

90. *Id.* at 126.

91. Brief for Canadian Parliamentarians & Law Professors et al. as Amici Curiae Supporting Respondent at 16 United States v. Khadr, 717 F. Supp. 2d 1215 (C.M.C.R. Jan. 18, 2008), http://www.barhumanrights.org.uk/sites/default/files/documents/biblio/Amicus_Curiae_Brief_Omar_Khadr.pdf.

conflict, the emphasis is on the child's "best interests."[92] Given the particular context, the vulnerabilities associated with individuals of a young age, but also their potential, there is a general consensus around the notion that a full-fledged adult criminal trial is unhelpful to deal with child soldiers who have committed serious violations of IHL.[93] The efforts of both the international community and individual states need to be focused towards these children's rehabilitation and reintegration.

According to Article 40 of the CRC, which deals with juvenile criminals and not solely war criminals, state parties should promote the establishment of measures for children accused of violating penal law "without resorting to judicial proceedings."[94] Article 40(3)(b) sets out different available dispositions such as counseling, educational, vocational training programs, and other alternatives to institutional care to ensure that "children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."[95] Indeed, Article 39 requires states to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of. . .armed conflicts" and further emphasizes the need for it to "take place in an environment which fosters the health, self-respect and dignity of the child."[96] The Optional Protocol on Children in Armed Conflict also obligates state parties to demobilize child soldiers and ensure their reintegration as well as to prevent any activity contrary to their rehabilitation and reintegration.[97] Although the ICTR and ICTY statutes do not address the issue of child soldiers, and the Rome Statute excludes them from its jurisdiction, Article 15(5) of the SCSL statute requires the prosecutor to seek, where appropriate, alternatives to criminal prosecution and Article 7(1) highlights the "desirability of promoting [a juvenile defender's] rehabilitation, reintegration into and assumption of a constructive role into society."[98]

The language in the relevant soft law instruments is similar and focuses on rehabilitation and reintegration rather than justice and accountability for individuals who were under eighteen years of age when they committed a war crime. In 1997, the Cape Town Principles and Best Practices were already focused on child soldier demobilization and social reintegration programs, with no mention of criminal prosecution.[99] According to the Paris Principles, these children should be "considered primarily as victims of offences against international law"[100] and should therefore not be prosecuted by an international court or tribunal.[101]

92. CRC, *supra* note 24, at art. 3(1).
93. *See* DRUMBL, *supra* note 1, at 127.
94. CRC, *supra* note 24, at art. 40(3)(b).
95. *Id.*
96. *Id.* at art. 39.
97. Optional Protocol on Children in Armed Conflict, *supra* note 5, at art. 7(1).
98. Statute of the SCSL, *supra* note 60, at art. 7.
99. *See generally* Cape Town Principles and Best Practices, *supra* note 35.
100. *The Paris Principles*, *supra* note 6, ¶ 3.6.
101. *Id.* ¶ 8.6.

Furthermore, Principle 8.9.0 advises that alternatives to the judicial prosecution of children should be sought at the national level.[102] The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups also put forward the need to seek alternatives to judicial proceedings wherever appropriate and desirable, and the states entrenched in these Commitments the necessity to treat children accused of crimes against international law "in accordance with international standards of juvenile justice, such as in a framework of restorative justice and social rehabilitation."[103]

In practice, this has led to the inclusion of provisions regarding disarmament or reintegration in many peace agreements, such as the 2003 Liberian peace agreement.[104] The requirement of dealing with child soldiers through rehabilitation and reintegration has translated into the creation of both Disarmament Demobilization and Reintegration ("DDR") programs and Truth and Reconciliation Commissions ("TRCs"), and has also manifested itself in the use of endogenous ceremonies or mechanisms.[105] The context and circumstances dictate which approach is most appropriate,[106] and their effectiveness and success will depend on how well tailored the chosen mechanism is to the particular situation at hand.

DDR programs are often part of the formal procedure following a peace agreement, although many are active in countries where ongoing fighting is taking place. They are meant to progressively help combatants return to their civilian lives and, for child soldiers in particular, the three phases of the program aid in "'turning a child soldier back into a child.'"[107] The first two steps of disarmament and demobilization entail taking child soldiers physically out of the military environment,[108] by collecting or destroying their weapons, disbanding armed forces or groups and discharging individual members.[109] The final and most complicated step, reintegration, is an ongoing process,[110] involving the return to civil life in families and communities, and, hopefully, reinsertion into sustainable employment.[111] The Secretary-General for Children and Armed Conflict has identified several "overreaching considerations" that should inform any DDR program, such as the need for separate and child-specific programs, monitoring

---

102. *Id.* ¶ 8.9.0.

103. Free Children from War International Conference, Paris, Fr., Feb 5-6, 2007, The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, Commitments ¶11, https://childrenandarmedconflict.un.org/publications/ParisCommitments_EN.pdf.

104. *See* HAPPOLD, *supra* note 11, at 114-15.

105. *See* DRUMBL, *supra* note 1, at 188.

106. *See* HAPPOLD, *supra* note 11, at 116.

107. Aaron Young, *Preventing, Demobilizing, Rehabilitating, and Reintegrating Child Soldiers in African Conflicts*, 7 J. INT'L POL'Y SOLUTIONS 19, 20 (2007) (quoting PETER WARREN SINGER, CHILDREN AT WAR 188 (Pantheon Books, 2005)).

108. *Id.*

109. *See* DRUMBL, *supra* note 1, at 168.

110. *Id.*

111. *See* Young, *supra* note 107, at 20.

and follow-up of demobilized children, and an emphasis on an integrated community approach in order to ensure long-term reintegration.[112] Through Sierra Leone's DDR program, children under the age of fifteen were sent to interim care centers and older children were either placed in group homes or occasionally allowed to live independently.[113] All were given the option to obtain skills training, agricultural training, enter the national armed forces, or go back to school.[114] Although traditionally distinct from transitional justice mechanisms, in 2006, the United Nations published the Integrated Disarmament, Demobilization, and Reintegration Standards,[115] which exhort U.N. DDR programs to include more judicial processes for certain children.[116]

An example of more judicially oriented mechanisms are the TRCs that arguably enable holding children responsible for the crimes they commit as child soldiers, all-the-while facilitating their reintegration into society.[117] Indeed, for some, TRCs serve to find forgiveness, reconciliation, and justice, making them preferable for prosecution.[118] However, it has been argued that TRCs render former child soldiers insufficiently accountable,[119] and that they may lead to stigmatization, despite the lack of criminal prosecution.[120] Depending on the conflict, a TRC may take different forms and have differing mandates. A TRC may be empowered to identify individual perpetrators and assign institutional responsibility; it may be tasked with recommending reform or even simply to provide an abstract description of the conflict. The TRC in Sierra Leone was the first to involve children, although their participation was voluntary, and their individual conduct was not subjected to assessment, evaluation, or critique.[121] In Liberia, the TRC also involved children, although it excluded them from its prosecutorial mandate.[122] Although some have expressed uncertainty as to the actual positive effect of child soldier participation in the Liberian TRC,[123] such mechanisms are now considered to be a viable alternative to trials for former child soldiers, particularly when necessary precautions are taken to ensure their

112. U.N. Secretary-General, *Children and Armed Conflict*, ¶ 65, U.N. Doc. A/58/546-S/2003/1053 (Nov. 10, 2003).

113. *See* DRUMBL, *supra* note 1, at 170-71.

114. *Id.*

115. U.N. Inter-agency Working Group on Disarmament, Demobilization and Reintegration, Operational Guide to the Integrated Disarmament, Demobilization, and Reintegration Standards, 15 (2010), http://www.iddrtg.org/wp-content/uploads/2013/05/Operational-Guide-REV-2010-WEB.pdf, [hereinafter IDDRS].

116. *See* DRUMBL, *supra* note 1, at 174.

117. *See* GROVER, *supra* note 30 at 264.

118. *See* Ryan, *supra* note 55, at 181.

119. Tanya M. Monforte, *Razing Child Soldiers*, 27 ALIF: J. COMP. POETICS 169 (2007).

120. *See* GROVER, *supra* note 30 at 266 (underlining the fact that TRCs are not always inherently therapeutic and can, like prosecution, lead to the attribution of legal and moral responsibility by the community).

121. *Id.*

122. *See id.* at 278-79.

123. *Id.*

therapeutic value and when they do not conflict with local methods.[124]

Although child soldiering is a global problem, its challenges are inherently local.[125] Given the many complex issues that child soldier reintegration entail, particularly related to culture and tradition, special attention should also be given to endogenous and traditional mechanisms.[126] These may constitute apologies, reparations, or cleansing processes that will help reluctant communities in welcoming back child soldiers who have committed atrocities in those same communities.[127] In Mozambique, for example, in an adaptation of traditional rituals, child soldiers were declared dead and a new, balanced, and harmonious child was born.[128] Other such ceremonies and rituals have been used in countries such as Sierra Leone and Uganda where they are said to have helped towards reconciliation and community acceptance.[129] The IDDRS also recognize the reintegration potential for child soldiers and are leading the way for their inclusion in DDR programs.[130]

It is clear by looking at the relevant international law and the practices in war-affected countries that have had to deal with child soldiers, that rehabilitation is the main goal of any proceedings involving these children. Different approaches, both centralized or governmental and decentralized or community-based, have been adopted in the effort to rehabilitate and reintegrate child soldiers.[131] In Uganda, the centralized approach assumed that child soldiers required specialized, individual care before returning to their families and they were, therefore, sent to centralized rehabilitation centers.[132] Other NGO strategies took more cultural and social factors into account.[133] Although it is unclear which strategy is the most effective, and post-conflict societies are often divided on the question of how to deal with child soldiers, particularly those that have committed war crimes,[134] the consensus that rehabilitation and reintegration is required remains unchanged. Considering the CRC and its Optional Protocol, extensive state practice, and *opinio juris*,[135] it can be said that there exists a customary international norm that requires child soldiers, including those that have committed war crimes, to be both rehabilitated and reintegrated into their families and communities.[136] The question is, then, what this obligation entails regarding the prosecution of these child soldiers.

---

124. Grossman, *supra* note 9, at 351-52.
125. Young, *supra* note 107, at 19.
126. *See* DRUMBL, *supra* note 1, at 188.
127. *See* Lafayette, *supra* note 10, at 310.
128. *See* GROVER, *supra* note 30, at 277.
129. *See* DRUMBL, *supra* note 1, at 190.
130. *Id.* at 191.
131. *See* Young, *supra* note 107, at 21.
132. *Id.*
133. *Id.*
134. *See* GROVER, *supra* note 30, at 283.
135. Ryan, *supra* note 54, at 177.
136. *See* Grossman, *supra* note 9, at 324. (asserting that states have an affirmative obligation to rehabilitate and reintegrate former child soldiers into society).

IV. THE INCOMPATIBILITY OF REHABILITATION AND REINTEGRATION WITH CRIMINAL PROSECUTION

In the *Khadr* case,[137] the Military Commission declined to answer the question of whether or not being tried for alleged crimes committed when under the age of eighteen is rehabilitative. However, if it is accepted, as argued above, that there is a customary international law that requires juveniles responsible for having committed war crimes to be rehabilitated and reintegrated, that customary norm may very well constitute a *de facto* bar to their criminal prosecution.

International law recognizes that children should benefit from a particular treatment, different from that of adults. Article 3 of the CRC requires that in all dealings with children, the "best interests of the child shall be a primary consideration."[138] For children accused of having committed a crime more particularly, although international law provides no bar to their prosecution, it ensures that, if criminally prosecuted, they benefit from special protections.[139] Article 7 of the SCSL statute provides that if children over fifteen are being tried, that they be treated "with dignity and a sense of worth . . . and in accordance with international human rights standards, in particular the rights of the child."[140] The CRC also provides for many procedural safeguards such as the right to full information and understanding,[141] the right to legal advice and care according to the age of the accused,[142] the right for the hearing to take place in a setting appropriate to a child's understanding,[143] and other fair trial guarantees.[144] The Beijing Rules require the juvenile justice system to emphasize the "well-being of the juvenile"[145] and the need for professionalism, training, and appropriate qualifications of the persons working with accused juveniles.[146]

The necessity of having juvenile justice standards is universally accepted. As Amnesty International asserts, criminal action against children must respect international fair trial standards, prioritize the best interests of the children, and recognize their special needs and vulnerabilities.[147] The various national legal systems recognize that, when it comes to criminal responsibility and the criminal process, juveniles should be treated differently than adults.[148] For children accused of war crimes, "compliance with the international standards relating to juvenile justice is a condition with which any law of war tribunal must comply in order to

137. United States v. Khadr, 717 F.2d 1215 (C.M.C.R. Sept. 24, 2007).

138. CRC, *supra* note 24, art. 3(1).

139. Grossman, *supra* note 9, at 343.

140. Statute of the SCSL, *supra* note 60, art. 7(1).

141. *See* CRC, *supra* note 24, art. 12.

142. *Id.* at art. 37(c)-(d).

143. *See id.* at art. 40(3).

144. *See id.* at art. 40(2)(b).

145. The Beijing Rules, *supra* note 62, ¶¶ 5.1, 17.1.

146. *Id.* ¶¶ 6.3, 22.1.

147. Amnesty Int'l, *Child Soldiers: Criminals or Victims*, AI Index IOR 50/002/2000, at 9 (Dec. 22, 2000), https://www.amnesty.org/en/documents/ior50/002/2000/en/.

148. Konge, *supra* note 15, at 55.

exercise jurisdiction over child soldiers."[149] Do these international standards, guarantees and protections make criminal prosecution compatible with the obligation of reintegration and rehabilitation?

Many of the international instruments containing these standards, in their provisions concerning the criminal prosecution of juveniles, mention rehabilitation and reintegration. Article 7 of the SCSL mentions the need to take into account the desirability of promoting the child's rehabilitation and reintegration.[150] Similarly, Article 14(4) of the ICCPR mentions the desirability of "promoting [juvenile] rehabilitation"[151] and Article 40(1) of the CRC of "promoting the child's reintegration and the child's assuming a constructive role in society."[152] These instruments, and particularly the SCSL Statute, seem to indicate that prosecution does not necessarily preclude rehabilitation.[153] Some argue that while it is possible to be both a victim and a perpetrator, it is also possible to prosecute and rehabilitate.[154] Indeed, the well being of the juvenile, and hence rehabilitation, is one of the primary objectives of most juvenile justice systems.[155]

Although procedural safeguards are an undisputedly important source of protection, it is unclear whether they are rehabilitative and whether they will further reintegration. This doubt is further enhanced by the fact that while the requirement of special protections and different treatment for children in criminal proceedings can be said to constitute a customary international law, in practice it is not clear what exactly is required.[156] Given that there are no strict rules governing the applicable standards, the question of the treatment of juveniles has been settled in very different ways across different jurisdictions.[157] Therefore, until there are both very precise standards governing the treatment that should be accorded to children accused of committing war crimes, as well as explicit and definite rules defining the ways in which that special treatment will participate and benefit the child's rehabilitation and reintegration, it is hard to argue that criminal prosecution of child soldiers for war crimes is compatible with their rehabilitation and reintegration into society, as understood in international law and practice. Indeed, without precise guidelines, a criminal process may be entirely oriented towards the child's welfare, but it can just as much have more punitive objectives.[158]

It seems, from an analysis of the above-mentioned international instruments, that it is mostly in the sentencing phase that criminal prosecution can arguably be

149. Brief of International Law Scholars, *supra* note 49, at 26.

150. Statute of the SCSL, *supra* note 60, at art. 7.

151. International Covenant on Civil and Political Rights art. 14(4), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

152. CRC, *supra* note 24, at art. 40(1).

153. Konge, *supra* note 15, at 59.

154. *Id.*

155. *See* The Beijing Rules, *supra* note 62, rule 5 commentary.

156. *See* Konge, *supra* note 15, at 55-56.

157. *Id.* at 55-56.

158. *See id.* at 56.

oriented towards rehabilitation.[159] As mentioned above, Article 7 of the SCSL Statute gives the Special Court the possibility of ordering counseling, community service, foster care, vocational and educational training programs or DDR programs, and does not authorize incarceration for juvenile offenders.[160] It is also advised that detention of children must be a measure of last resort[161] and both Article 37(a) of the CRC and Article 6(5) of the International Covenant on Civil and Political Rights[162] prevent capital punishment from being imposed on juveniles.[163] Instead of imprisonment, the prescribed sentence resulting from prosecution can therefore consist of different rehabilitative measures.[164] The U.S. Congress itself recognized that "imprisonment is not an appropriate means of promoting correction and rehabilitation,"[165] and this would be particularly true in the context of child soldiering. The rehabilitative intent of such prosecution could therefore be argued to be compatible with the customary norm according to which these children should be rehabilitated and reintegrated. However, some criminologists believe that the aims of the most effective and morally legitimate criminal justice systems are first to shame the offender through punishment before reintegrating him into society.[166] Indeed, some argue that prosecution is "punitive in and of itself," and that it is illogical to couple it with a wholly rehabilitative sentencing strategy for child soldiers.[167]

If indeed rehabilitative measures such as those proposed in Article 7 of the SCSL Statute may be ordered, the juvenile accused of a war crime is nonetheless subjected to a criminal process, some aspects of which may be difficult to reconcile with the objectives of rehabilitation and reintegration. Indeed, regardless of the special safeguards guaranteed by international law, the child soldier that faces a criminal trial is at high risk of stigmatization and trauma.[168] A criminal trial may be psychologically damaging, as well as humiliating, as the child soldier may be forced to recount the violence he has engaged in and his involvement in atrocities.[169] This forces the child to relive the trauma and also delays the return to any semblance of normalcy.[170] This, as well as the stigma of a criminal trial, can, in turn, create considerable obstacles to the child's accessing effective community rehabilitative services and in the longer term, his reintegration into society.[171] Indeed, after the conflict in Sierra Leone, both international and local children's

159. *See* GROVER, *supra* note 30, at 72.

160. Statute of the SCSL, supra note 60, at art. 7.

161. *See* CRC, *supra* note 24, art. 37(b).

162. ICCPR, *supra* note 151, art. 6.5.

163. This is considered to be customary law. Konge, *supra* note 15 at 56.

164. Lafayette, *supra* note 10, at 325.

165. 18 U.S.C. § 3582(a) (2012).

166. *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (Cambridge University Press 1989); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984).

167. *See* GROVER, *supra* note 30, at 74.

168. *Id.* at 72.

169. *See* Grossman, *supra* note 9, at 350-51.

170. *Id.*

171. *Id.* at 350.

rights organizations were unanimous in their opposition to the prosecution of children under eighteen, as they believed this would undermine their efforts to reintegrate the child soldiers into their communities.[172] It has been asserted that putting a child soldier on trial will endanger his or her reintegration and rehabilitation into society,[173] and that it is inconsistent with the notion that child soldiers should be seen as victims.[174] From a more practical standpoint, many post-conflict governments do not have the necessary resources to prosecute children in a way that will uphold the procedural safeguards required by international law.[175] Indeed, domestic juvenile systems often lack resources and therefore breach international standards for juvenile justice.[176] Such a lack of resources would lead to a criminal process totally unsuited to children, even more traumatizing and stigmatizing, and completely incompatible with the obligation to reintegrate and rehabilitate child war criminals.

On the other hand, it could be argued that the prosecution of child soldiers, were it to uphold the required international standards, actually plays a role in their reintegration. In many post-conflict societies, such as in Sierra Leone, there are calls for justice and for the accountability of children who have committed atrocities. In a previously violent society, prosecuting child soldiers may, in part, facilitate the shift towards peace and forgiveness.[177] Indeed, Amnesty International believes that in some cases, child soldiers must be held accountable for their actions.[178] Furthermore, the Committee on the Rights of the Child advises states to report on the "various measures adopted to ensure the social reintegration of children," including "relevant judicial measures."[179] This shows that judicial measures are not excluded and could signify a belief by the Committee that they may even be helpful to a child soldier's reintegration into society.

The notion that criminal prosecution may help a child's rehabilitation and reintegration, however, is evident neither from all the relevant international documents nor from practice. In Section 7 of the Paris Principles, which contains very detailed provisions concerning the release and reintegration of child soldiers, there is no mention of any justice aspect.[180] This separation could be understood to

172. U.N. Secretary-General, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, ¶ 35, S/2000/915 (Oct. 4, 2000).

173. Grossman, *supra* note 9, at 351.

174. *See* HAPPOLD, *supra* note 11, at 5.

175. *See* Grossman, *supra* note 9, at 350.

176. Amnesty Int'l, *supra* note 147, at 9.

177. *See* Grover, *supra* note 14, at 236. Indeed, although Grover does not argue for child soldier prosecution, she identifies the positive educative functions it may have (if the identity of the accused is protected), as well as its potential to facilitate national reconciliation and therefore child soldier reintegration.

178. Amnesty Int'l, *supra* note 147, at 2.

179. U.N. Comm. on the Rights of the Child, *Guidelines Regarding Initial Reports of State Parties of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, art. 6(3), U.N. Doc. CRC/OP/AC/1 (Oct. 12, 2001).

180. *See* DRUMBL, *supra* note 1, at 113.

imply that justice is to operate separately from release and reintegration.[181] This was exemplified in Liberia's TRC, despite its prosecutorial agenda, where the TRC would not recommend for prosecution those who cooperated and admitted their wrongs.[182] Although this did not concern children, it shows that the criminal process was considered to be separate from the objectives of rehabilitation and later reintegration of those who had committed war crimes.

Furthermore, the consequences of trauma and stigmatization do appear as an overriding issue, and considering these, it assuredly seems more appropriate to avoid criminal prosecution and instead to rehabilitate and reintegrate former child soldiers. However, the complete separation of criminal prosecution, rehabilitation, and reintegration does not entail a foregoing of justice and accountability. Indeed, these goals and motivations can be incorporated into rehabilitation and reintegration mechanisms, such as the TRCs or endogenous ceremonies.[183] It is argued that "[t]ransitional justice processes outside of courtrooms and jailhouses can enhance reintegration, reconciliation, restoration, and social repair even in the very toughest cases – such as with child soldiers."[184] Such processes have numerous benefits, both for the community, in which it redresses pain, expiates resentment and restores a center of gravity, and for the children, as it will expose the crimes committed against them, and help dissipate the stigma of their association with armed forces or armed groups.[185]

Child war criminals are ill suited for the criminal process. In the context of an armed conflict, every right of the child is violated;[186] he or she is taken away from their family, and is deprived of their right to a normal physical and emotional development.[187] Even considering the different and protective treatment they are entitled to under international law (when it can be afforded by the forum in which they are being tried), the arguments for the incompatibility of criminal prosecution with the objectives of rehabilitation and reintegration of the child soldier are strong. Indeed, some recognized this incompatibility when the United States decided to put the young Khadr on trial, arguing, "the policy of the United States to detain and prosecute juveniles for war crimes is inconsistent with the United States' obligations to rehabilitate and reintegrate child soldiers."[188] Whatever the form of the criminal trial, and even assuming the existence of a bar on punitive sentencing measures and clear, binding rehabilitative standards, it seems like such a trial would remain an obstacle to an accused juvenile's rehabilitation and reintegration.

---

181. *Id.*
182. *Id.*
183. *Id.* at 200.
184. *Id.*
185. *Id.*
186. *See* Konge, *supra* note 15, at 65.
187. Lafayette, *supra* note 10, at 309.
188. Ryan, *supra* note 54, at 175.

V. CONCLUSION

The recruitment and use of child soldiers in armed conflict is prohibited in international law. Unfortunately, the scourge of child soldiering remains an endemic problem around the world, and in almost every single armed conflict. While the image of the child soldier as a victim has, in recent years, dominated the international discourse, there have been several examples of juveniles committing wartime atrocities. Although no child soldier has ever been prosecuted in an international court, the question of how to deal with this small minority of juvenile war crime perpetrators remains unsettled.

This paper argues that there is, as yet, no customary international norm banning the prosecution of child soldiers for war crimes. However, as this paper suggested, states do have a customary obligation to rehabilitate and reintegrate children who have been recruited and used in armed conflicts and that this relatively recent norm constitutes, in fact, a bar to the criminal prosecution of juveniles accused of having committed war crimes.

Indeed, Article 26 of the 1998 Rome Statute has been described as "affirming an emerging consensus that international courts and tribunals should not prosecute children under 18 for international crimes,"[189] and as underscoring the "tendency towards an international legal status of minors as exempt from criminal liability and prosecution for war crimes."[190] Until the prohibition of the prosecution of children for war crimes matures into a customary norm of international law, these children are still susceptible to be put on trial. The above-mentioned international instruments ensure that children benefit from the safeguards that international law provides any accused individual, in addition to more child-specific ones. They further ensure that children will benefit from a different, ideally entirely rehabilitative sentencing regime. It seems undisputed that the best interests of these children be consistently taken into account, with the ultimate goal of rehabilitating and reintegrating them into their societies.

This obligation to rehabilitate and reintegrate can well be said to have matured into a customary international norm. The consequences of this on criminal prosecution are important, and may go so far as to constitute, as argued above, a *de facto* prohibition. Although special consideration is given in international law to children accused of war crimes, these may be insufficiently precise and developed to ensure that all these children benefit from the treatment that will most ensure their rehabilitation and reintegration. Indeed, the trauma and stigma associated with the criminal trial are not small obstacles. Furthermore, the problem of the need for accountability, in the sense that it may help in the reintegration process, can be resolved by the use of transitional justice processes, without the harsh structure of the criminal trial. If the goal is purely to rehabilitate and reintegrate these children, the criminal trial is not the appropriate venue.

189. *See* DRUMBL, *supra* note 1, at 121.

190. *See* Brief of International Law Scholars, *supra* note 49, at 19.

A COMPARATIVE APPROACH TO PRISONERS' RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS AND INTER-AMERICAN COURT OF HUMAN RIGHTS JURISPRUDENCE

FRANCESCO SEATZU AND SIMONA FANNI*

I. INTRODUCTION

In its landmark decision of 1984 on the *Campbell and Fell* case[1], the European Court of Human Rights ("ECtHR") correctly observed that: "justice cannot stop at the prison gate."[2]

This statement perfectly captured the rationale for a human rights approach to prison management. It also vividly expresses the auspices of all the actors involved in ensuring respect for human rights in prisons and similar institutions: public authorities, civil society organizations, and prominently, judicial and quasi-judicial human rights bodies. The ECtHR's remark also helps to understand why legal scholars from all countries have produced detailed commentaries and critical examinations of the rules of international law, including the numerous non-binding international standards, guidelines, and provisions applying directly to the prison sector or intended to provide protection in cases where the detainees' rights are at risk.[3] The international community clearly feels the need to identify international standards on the protection of the fundamental rights of detainees.[4]

This need stems firstly from the fact that a number of monitoring bodies—including the ECtHR and the Inter-American Court of Human Rights ("ACtHR"),[5] but not the United Nations human rights bodies[6]—have usually been partially or sometimes even totally unaware of their practical significance for the detainee population and have therefore not exercised their functions with full effectiveness.

---

* Professor Francesco Seatzu is currently a professor of International and European Union Law at the Univeresity of Calgiari, Italy. Simona Fanni is currenlty a teaching assistant in the Department of Law at the University of Calgiari, Italy. This article is the result of joint efforts and discussions of the authors who together wrote the Introduction. Professor Seatzu is responsible for Sections II and III and Simona Fanni is responsible for Sections IV and V.

1. *Campbell v. United Kingdom*, Eur. Ct. H.R. 29 (1984).
2. *Id.* at 30.
3. *Id.*
4. *Id.*
5. EUROPEAN COURT OF HUMAN RIGHTS, http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]} (last visited Sept. 20, 2015); INTER-AMERICAN COURT OF HUMAN RIGHTS, http://www.corteidh.or.cr/index.php/en (last visited Sept. 20, 2015).
6. Office of the U.N. High Comm'r for Human Rights (OHCHR), *Human Rights And Prisons Manual on Human Rights Training for Prison Officials*, U.N. Doc. HR/P/PT/11 (2005), http://www.ohchr.org/Documents/Publications/training11en.pdf.

Secondly, and more significantly, the identification and subsequent application of those standards, including the results of the Council of Europe's standard-setting work in the area of the protection of detainees' fundamental rights,[7] have significant consequences for the treatment of detainees inside prisons. Such standards (as a whole) can help courts and quasi-jurisdictional bodies operating at both national and supranational levels to ensure effective respect of human rights and fundamental freedoms for detainees. Although the United Nations Standard Minimum Rules for the Treatment of Prisoners ("SMR"),[8] the European Prison Rules ("EPR"),[9] the Principles and Best Practices on the Protection of Persons Deprived of Their Liberty in the Americas,[10] the United Nations Draft Charter on the Fundamental Rights of Prisoners adopted by the United Nations Commission on Crime Prevention and Criminal Justice in 2003,[11] and other similar documents only have the force of policy guidelines;[12] they are largely incorporated in the relevant detention provisions of various international human rights treaties, including the International Covenant on Civil and Political Rights ("ICCPR"),[13] the

7. Incidentally, since the early 1960s the Council of Europe has issued a number of soft law rules addressing particular aspects of prison life and specific rights of detainees, including Resolution (62)2 on electoral, civil and social rights of prisoners, Resolution (82)16 on prison leave, Resolution (82)17 on the custody and treatment of dangerous prisoners, the Resolution (84)11 concerning information about the Convention on the Transfer of Sentenced Persons, Resolution (89)12 on education in prison and-Recommendation(92)18 concerning the practical application of the Convention on the Transfer of Sentenced Persons. COUNCIL OF EUROPE, *Minimum Corpus of the Council of Europe standards*, Doc. RL-BU(2008)2, 16, 19-20 (2008), http://www.coe.int/t/dghl/cooperation/lisbonnetwork/rapports/RL-BU_2008_2MinimumCorpus_en.pdf; BÉATRICE BELDA, LES DROITS DE L'HOMMES DES PERSONNES PRIVÉES DE LIBERTÉ: CONTRIBUTION À L'ÉTUDE DU POUVOIR NORMATIF DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME (Bruylant 2010); Isabelle Berro-Lefèvre, *Les conditions de vie en détention et la CEDH, in* IN HONOREM CORNELIU BIRSAN 715-724 (Adriana Almăşan ed., 2013).

8. U.N. Economic and Social Council, *Standard Minimum Rules for the Treatment of Prisoners* (Aug. 30, 1955), http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b36e8 [hereinafter *Standard Minimum Rules*].

9. Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules* (Jan. 11, 2006), http://www.refworld.org/docid/43f3134810.html [hereinafter *European Prison Rules*].

10. Inter-Am. Comm'n H.R., *Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, (ser. A) No. 26 (Mar. 13, 2008), http://www.refworld.org/docid/48732afa2.html [hereinafter *Principles and Best Practices*].

11. U.N. Comm'n on Crime Prevention and Criminal Justice, *For Human Dignity–Towards the Charter of Fundamental Rights of Prisoners*, U.N. Doc. E/CN.15/2003/CRP.9 (May 16-18, 2003).

12. *See also* Christine Chinkin, *Normative Development in the International Legal System, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 23 (Dinah Shelton ed., 2000) (stressing that, "drawing a formal distinction between hard and soft obligations is less important than understanding the processes at work within the law-making environment and the products that flow from it."); *see also*, Humberto Cantú-Rivera, *The Expansion of International Law Beyond Treaties*, AMERICAN SOCIETY OF INTERNATIONAL LAW (last visited Aug. 21, 2015), http://www.asil.org/blogs/expansion-international-law-beyond-treaties-agora-end-treaties (stressing that, "[s]oft law has established itself as a form of international law that serves as a driving vehicle to adopt standards, resolutions, and principles that might not be ripe enough for adoption as a conventional text, that is, of a formally binding nature for the ratifying States.").

13. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. No. E, 95-

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),[14] the European Convention on Human Rights ("ECHR"),[15] and the American Convention on Human Rights ("ACHR").[16] Finally, if consistently applied by national and supra-national courts, these standards, guidelines, and principles may greatly contribute to building a body of consistent case law on detainees' rights under the international human rights conventions including the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[17] though there is no specific reference to detention made in the ICESCR. The main reason for their potential contribution is the fact that these soft law instruments (unlike international human rights treaties which lack specific rules addressed to detainees and prisoners as a vulnerable group)[18] embrace a considerable set of issues related to detention conditions—accommodation (for instance, overcrowding, hygiene, sanitary facilities, food, and clothing), discipline and punishment, legal counsel, and free communication in general, health and medical services, work, and recreation.[19] While perhaps not essential, building such a body of '*jurisprudence constante*' would certainly be useful, since several states are parties simultaneously to the ICCPR, the CAT, the ECHR, and the ACHR.[20]

Although the international law standards on the protection of detainees' fundamental rights have been the subject of numerous peer-reviewed articles and at least one monograph in French,[21] to date, very few contributions have investigated in depth the reasons behind the different approaches taken by the international monitoring bodies currently operating within the main international legal instruments for the protection of human rights.

2, 999 U.N.T.S. 171.

14. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. no. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987).

15. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221 (European Convention on Human Rights, ECHR signed on 4 November 1950 in Rome and entered into force in 1953; all Council of Europe Member States party to it, i.e. forty-seven states) [hereinafter ECHR].

16. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

17. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

18. *See* Alphonse Spielmann, *Les Déteneus et Leurs Droits (de l'Homme)*, *in* LES DROITS DE L'HOMME AU SEUIL DU TROISIÈME MILLÉNAIRE: MÉLANGES EN HOMMAGE À PIERRE LAMBERT 777-88 (Bruylant, 2000).

19. *See* Jiri Toman, *The Treatment of Prisoners: Development of Legal Instruments and Quasi-Legal Standards, in* LIVING LAW OF NATIONS: ESSAYS ON REFUGEES, MINORITIES, INDIGENOUS PEOPLES AND THE HUMAN RIGHTS OF OTHER VULNERABLE GROUPS: IN MEMORY OF ATLE GRAHL-MADSEN 421-439 (Gudmundur Alfredsson, Peter Macalister-Smith, Kehl-am-Rhein eds. N.P. Engel, 1996).

20. *Id.*

21. *See* JIM MURDOCH, LE TRAITEMENT DES DÉTENUS: CRITÈRES EUROPÉENS (Editions du Conseil de l'Europe ed., 2007).

This paper aims firstly at assessing, and subsequently comparing and contrasting, the respective contribution of the ECtHR, the IACtHR, and the Inter-American Commission of Human Rights ("IACommHR") to the widespread success of the values embodied in international legal instruments on the protection of detainees' rights. As Professor Thomas Buergenthal indirectly suggests, this type of comparative approach to the topic is strongly advisable because "although the American Convention is modelled on the European Convention, it departs from or improves upon the latter in a number of important respects."[22] In this paper, an empirical analysis is conducted on the compliance of the judicial decisions and advisory opinions of the two regional human rights courts in Europe and the Americas with the international standards on the protection of detainees' rights. This requires comparative study of the influence of those legal instruments on the case law of the ECtHR and the IACtHR. To do so, this paper starts with a brief discussion of the SMR, followed by examination of the EPR, the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, and the Kampala Declaration on Prison Conditions in Africa.

II. A SURVEY OF THE INTERNATIONAL STANDARDS ON THE PROTECTION OF THE HUMAN RIGHTS OF DETAINEES

To ascertain and assess critically the relationship between detention provisions in the regional human rights conventions and international standards and guidelines on the protection of the fundamental rights of detainees, it is useful to consider those standards and guidelines that have succeeded in clarifying the most difficult issues that arise from a human rights approach to prison management.

A broad array of international standards on the protection of the fundamental rights of detainees have existed for the international community since the early 1950s.[23] The historical origins and main features of the standards that are, objectively speaking, the most useful for interpreting and applying the articles on detention in the ECHR and ACHR are briefly outlined below.

The first modern (non-legally binding) international standards for the protection of the rights of detainees were adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and were approved by the Economic and Social Council in its resolutions of 31 July 1957

22. *See* Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U. L. REV. 155 (1981).

23. *See, e.g.*, G.A. Res. 3452(XXX), ¶ 1, U.N. Doc. A/RES/30/3452, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 9, 1975); G.A. Res. 40/33, Annex, U.N. Doc. A/RES/40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (Nov. 29, 1985); G.A. Res. 43/173, Annex, U.N. Doc. A/RES/43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Dec. 9, 1988); G.A. Res. 45/111, ¶¶ 1-11, U.N. Doc. A/RES/45/111, Basic Principles for the Treatment of Prisoners (Dec. 14, 1990).

and 13 May 1977.[24] The most noteworthy aspects of these standards—the SMR—are their expansion on and detailed elaboration of a wide range of fundamental rights, including certain social and economic rights, and their reference to human dignity as an interpretative tool for all of the provisions.[25] Clearly, the latter aspect was developed on the ground that detention conditions could easily debase or even annihilate human dignity.[26] Another aspect worthy of note is that the SMR also addressed and applied to juvenile detainees and prisoners.[27] This feature of the SMR is in common with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the so-called "Beijing Rules"), which boosts the application of several standards, values, and requirements set by the SMR, such as proportionality of the sanction, and the requirements for rehabilitation and resocialization inside prisons and similar institutions.[28] This feature is also in line with the Basic Principles for the Treatment of Prisoners, which was adopted in 1990 to facilitate the enforcement of the SMR values at a national level.[29]

The EPR were originally adopted in 1973 and were subsequently updated in 1987 and 2006.[30] The EPR were drafted to address the specific needs of detainees in Council of Europe Member States.[31] More precisely, the rules were formulated with the purpose of boosting the application of the globally acknowledged soft law

---

24. Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex 1 (Aug. 30, 1955).

25. *See id.*, ¶¶ 22-6, 60, 77-8.

26. *See* Phillippa Kaufmann, *The price of dignity and liberty: legal aid for prisoners*, 5 EUR. HUM. RTS. L. REV., 482-493 (2013) (stressing that the status of persons deprived of their liberty makes prisoners more vulnerable and exposes to easy threats their dignity, since they are under the control of state's authority); Piet Hein van Kempen, *Positive obligations to ensure the human rights of prisoners*, INTERNATIONAL PENAL AND PENITENTIARY FOUNDATION WEBSITE, http://www.internationalpenalandpenitentiaryfoundation.org/Site/documents/Stavern/05_Stavern_Contribution%20Van%20Kempen.pdf (last visited July 18, 2015). For analysis of the IACtHR and the ECtHR's views, *see Juvenile Re-education Institute v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 153-155 (Sept. 2, 2004) (also known as Panchito Lopez v. Peru case); *Kudla v. Poland*, 2000-XI Eur. Ct. H. R. 197, ¶ 94 (2000); *Kalashnikov v. Russia*, 2002-VI Eur. Ct. H. R. 93, ¶ 95 (2002). The centrality of human dignity is also stressed in the U.N. Draft Charter on the Fundamental Rights of Prisoners, *see* G.A. Res. 45/111, *supra* note 23.

27. G.A. Res. 40/33, *supra* note 23. The SMR addresses and applies to juvenile detainees and prisoners too, in line with the express reference made by Rule 27 of the "Beijing Rules" and pursuant to the saving clause provided by Rule 9, which confirms the applicability of international standards concerning juvenile justice issues, in particular the SMR. *Id.*

28. *Id.*

29. G.A. Res. 45/111, *supra* note 23.

30. Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, 11 January 2006, Rec(2006)2, http://www.refworld.org/docid/43f3134810.html, http://www.coe.int/t/dghl/standardsetting/prisons/E%20commentary%20to%20the%20EPR.pdf (last visited Sept. 22, 2015).

31. *See* MURDOCH, *supra* note 21, at 15. (Council of Europe Publishing, 2006); DENIS ABELS, PRISONERS OF THE INTERNATIONAL COMMUNITY 49 (Springer, 2012).

rules on detention, in particular those of the SMR.[32] The EPR are mirrored, in the Inter-American system of human rights protection, by the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas.[33] The Inter-American Commission on Human Rights ("IACHR") adopted these Principles in 2008 with the aim being to set specific and more effective rules concerning detention conditions and issues related to torture and other inhuman or degrading treatment within the framework of the Organization of the American States ("OAS").[34] The EPR and the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas have many points in common. Firstly, they share the same goal: namely to increase the effectiveness of the protection of detainees in their contexts of application.[35] Secondly, they were both inspired by the SMR, which constitute their archetype.[36] The Kampala Declaration on Prison Conditions in Africa ("the Kampala Declaration")[37] serves the same purpose and restates that prisoners do not forfeit their rights.[38] This soft law instrument on prison management was adopted by a pan-African conference in 1996[39] and, similar to the EPR and the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, it is patterned on the SMR (albeit its statements are more concise). Both the United Nations General Assembly and the United Nations Economic and Social Council ("ECOSOC"), in Resolution 1997/36, recognized the Kampala Declaration's importance as a tool to enforce the most fundamental rights of detainees.[40]

---

32. *Id.* at 34-7; from this standpoint, also the ECtHR's "regionalism" is relevant: *see* Lech Garlicki, *Conferencia introductoria: Universalism v. Regionalism?: the Role of the Supranational Judicial Dialog, in* EL DIALOGO ENTRE LOS SISTEMAS EUROPEO Y AMERICANO DE DERECHOS HUMANOS 27, 36 (Civitas, 2012).https://translate.google.com/translate?hl=en&sl=pl&u=http://bibliografia.icm.edu.pl/g2/english.pl%3Fmod%3Ds%26p%3D2%26a%3D1%26s%3D4577%26imie%3DLech%26nazwisko%3DGarlicki%26lim%3D25%26ord%3D1&prev=search.

33. *Principles and Best Practices*, *supra* note 10.

34. University of Bristol OPCAT Research Team, *The Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and the Optional Protocol to the Convention Against Torture*, (last visited Sept. 22, 2015), http://www.bris.ac.uk/media-library/sites/law/migrated/documents/iacmhrprinciples.pdf.

35. *European Prison Rules*, *supra* note 9; *Principles and Best Practices*, *supra* note 10.

36. *Standard Minimum Rules*, *supra* note 8.

37. Afr. Union, Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1, *Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa*, (Oct. 23, 2009), http://www.refworld.org/docid/4af0623d2.html.

38. More precisely, the second Recommendation on Prison Conditions of the Kampala Declaration refers to prisoners' human rights. *See* Amanda Dissel, *Comments on the Kampala Declaration, in* PRISON CONDITIONS IN AFRICA 99-118 (1996), http://www.csvr.org.za/index.php/publications/1360-comments-on-the-kampala-declaration.html (last visited Sept. 22, 2015).

39. The 4th Pan African Conference was convened in Kampala, Uganda, from 23 to 27 September 1996 with delegates from forty-six African National Red Cross and Red Crescent Societies in attendance. ICRC Resource Centre, *Kampala Declaration*, INTERNATIONAL REVIEW OF THE RED CROSS 318 (1997), https://www.icrc.org/eng/resources/documents/misc/57jnpl.htm.

40. S.C. Res. 1997/36 at 2 (Jul. 21, 1997),

III. THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE INTERNATIONAL GUIDELINES AND PRINCIPLES ON THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF DETAINEES

The violation of human rights in detention is a serious concern for all human rights supervisors. It is therefore not surprising that, similar to the ICCPR and ACHR, the ECHR also contains a key provision, Article 3, which grants protection to people under custody and detention, albeit indirectly.[41]

Article 3 ECHR forbids inhuman or degrading treatment.[42] It is a common understanding that this Article does not allow limitations or derogations under any conditions.[43] However, as Michael K. Addo and Nicholas Grief lucidly observed, Article 3 "does not expressly provide that its terms are absolute."[44] Moreover, settled case law of the ECtHR has established that Article 3 also "imposes [a *positive*] obligation on the State to protect the physical well-being of persons deprived of their liberty."[45] More specifically, in *Orchowski v. Poland*, the Strasbourg judges maintained that the state must ensure that the accommodations provided for detainees, especially sleeping accommodations, respect human dignity, privacy (to the extent possible), and meet the requirements of hygiene and health, with due regard being paid to climatic conditions, especially to cubic content of air, floor space, lighting, heating, and ventilation.[46]

Furthermore, and even more significantly, in the same line of cases, the ECtHR held that, pursuant to Article 3 of the ECHR:

> the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and

---

http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm.

41. ECHR, *supra* note 15, at 6.

42. *Id.* at art. 3 (stating "No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

43. *See* Nigel S. Rodley, *The Prohibition of Torture: Absolute Means Absolute*, 34 DENV. J. INT'L. L. & POL'Y 145, 159 (2006); Gianluca Gentili, *European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-treatment is a Genuine Risk*, 8 . INT'L. J. CONST. L. 311, 314 (2010). The absolute nature of the prohibition foreseen by Art. 3 of the ECHR was stated in many ECtHR's decisions. *See, e.g.* Soering v. United Kingdom, 11 Eur. Ct. H. R. 439 (1989), ¶ 88; Selmouni v. France, 1999-V Eur. Ct. H. R. 149, ¶ 95; Saadi v. Italy, 2008-II Eur. Ct. H. R. 145, ¶¶ 120, 127.

44. *See* Michael K. Addo, Nicholas Grief, *Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?*, 9 EUR. J. INT'L L. 510 (1998).

45. Mouisel v. France, 2002-IX Eur. Ct. H. R. 191, ¶ 40; *see also* Kudla v. Poland, 2000-XI Eur. Ct. H. R. 197, ¶ 94; Musial v. Poland, Appl. (No. 28300/06) Eur. Ct. H. R. ¶ 86 (2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90783 (last visited Sept. 22, 2015); Gulay Cetin v. Turkey, App. no. 44084/10 (Eur. Ct. H. R., Mar. 5, 2013) ¶ 84, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116946 (last visited Sept. 22, 2015) (providing a peculiar reference to physical integrity and third parties' attitudes–in particular medical negligence).

46. Orchowski v. Poland, Appl. no. 17885/04 (Eur. Ct. H. R., Oct. 22, 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95314 (last visited Sept. 22, 2015), ¶¶ 119-122.

> method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. . .[47]

A similar approach is found in the ECtHR's decision in the *Mouisel* case.[48] In this case the Court of Strasbourg considered that

> [a]lthough Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[49]

This approach was strengthened three years later in the *McGlinchey and Others v. the United Kingdom* case, where the ECtHR held that the United Kingdom was responsible under Article 3 of the ECHR for the unlawful conduct of its prison authorities who had failed to comply with their obligation to provide the victim, a woman with a long history of heroin addiction, with the requisite medical care.[50] More recently, in the case of *Salakhov and Islyamova v. Ukraine*, the ECtHR clarified that: "[i]n order to establish whether an applicant received the requisite medical assistance while in detention, it is crucial to determine whether the State authorities provided him with the minimum scope of medical supervision for the timely diagnosis and treatment of his illness."[51] In the same line of cases, the ECtHR stated in the *Slawomir Musial* case that Article 3 of the ECHR cannot be interpreted as imposing on states a duty to release prisoners if detention conditions do not suit their health needs appropriately or to place them in civil facilities, regardless of the fact that the disease affecting them is hard to treat.[52]

Article 3 of the ECHR was drafted primarily during the early 1950s.[53] Having the longest case law concerning detentions and prisons, Article 3 has significantly influenced the content of detention provisions in other more recent international human rights conventions, such as Article 5 of the ACHR.[54] Curiously enough, Article 3 of the ECHR does not contain a fully operative rule that gives effect to or properly describes the conditions the ECHR's contracting

47. Kudla, *supra* note 45, ¶ 94; Kalashnikov, *supra* note 26, ¶ 95.

48. Mouisel, *supra* note 45.

49. *Id.* ¶ 40.

50. McGlinchey v. United Kingdom, 2003-V Eur. Ct. H. R. 183, ¶ 67.

51. Salakhov v. Ukraine, Appl. no. 28005/08 ¶ 127 (Eur. Ct. H. R., Mar. 14, 2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117134 (last visited Sept. 22, 2015).

52. Musial, *supra* note 45.

53. *See* Thomas Buergenthal, *Centennial Essay: The Evolving International Human Rights System*, 100 Am. J. Int'l. L. 783, 787, 792 (2006); Tania Groppi, Anna Maria Lecis Cocco-Ortu, *Le citazioni reciproche tra la Corte europea e la Corte interamericana dei diritti dell'uomo: dall'influenza al dialogo?*, 19 FEDERALISMI.IT 1, 8 (2013), http://www.academia.edu/4603003/ (last visited Sept. 22, 2015).

54. *See* Tania Groppi, Anna Maria Lecis Cocco-Ortu, *supra* note 41, at 7; Buergenthal, *supra* note 22. OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW 29 ff. (Cambridge, 2nd ed. 2014).
https://books.google.com/books/about/International_Human_Rights_Law.html?id=Uv8OBAAAQBAJ.

states must comply with.[55] On the contrary, its wording gives rise to several uncertainties on the meaning and operational character of numerous expressions used therein. Clearly this also has consequences on the application of Article 3 in the prison field. For instance, there are uncertainties in relation to the expressions "torture," "degrading treatment," and "inhuman treatment," as has been repeatedly pointed out by various commentators.[56] Further uncertainties concern the question of whether "[i]ll-treatment must attain a minimum level of severity in order to trigger the provision's application."[57] Moreover, uncertainty is inherent in the distinction between the three types of infringement recognized in Article 3.

As Article 3 of the ECHR is so ambiguous in these and several other respects, the ECtHR would benefit from referring to the above-mentioned and far more detailed international standards as the major (or even crucial) tools for its interpretation. This is in addition to the understanding and application of this Article provided by the case law of the Strasbourg Court.[58] A landmark example of this case law is the ruling in the *Güveç* case, where the ECtHR found for the first time that the imprisonment of a minor in an adult prison amounted to degrading and inhuman treatment.[59] Nevertheless, as the above-named international instruments of soft law on detention contain various elucidations on issues, such as the meaning of the term "treatment," the basic criteria for interpreting the content of the right of those deprived of liberty to decent and humane treatment, the threshold of severity indispensable to meet the definition of torture, and the forms of ill-treatment which can be considered inhuman treatment, can provide valuable guidance to the Strasbourg Court for the application of Article 3 of the ECHR. Moreover, such guidelines, standards, and general principles may also help the Court to assess the proportionality of a punitive measure imposed upon a prisoner. Furthermore, guidelines, standards, and general principles can help the Strasbourg Court to establish the procedural guarantees afforded to prisoners. Additional useful guidance, *mutatis mutandis*, can be found in the annual reports of the Working Group on Arbitrary Detention established by Resolution 1991/42 of the former Commission on Human Rights and in the reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[60]

---

55. ECHR, *supra* note 15.

56. *See, e.g.*, Pietro Pustorino, *'Articolo 3', in* Commentario Breve alla Convenzione Europea per la Salvaguardia dei Diritti dell'Uomo e della Libertà fondamentali 63 (Sergio Bartole, Pasquale De Sena, Vladimiro Zagrebelsky eds., CEDAM 2012).

57. Addo, *supra* note 44, at 511.

58. *See* Pustorino, *supra* note 56, at 63; Addo, *supra* note 44, at 510.

59. Güveç v. Turkey, 2009-I Eur. Ct. H. R. 17, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22G%C3%BCve%C3%A7%20v.%20Turkey%22], %22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22: [%22001-90700%22]}.

60. *See, e.g.*, Human Rights Council, *Report of the Working Group on Arbitrary Detention: A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court*, 27th Sess., June 30, 2014, U.N. Doc. A/HRC/27/47, http://www.refworld.org/docid/53ff197d4.html; Human Rights Council , *Report of the Working Group*

The next question is therefore whether the ECtHR in its case-law under Article 3 has already referred to the European Prison Rules, the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, the United Nations' Draft Charter on the Fundamental Rights of Prisoners, or other international standards and guidelines on the treatment of detainees as interpretative aids to this provision. In other words, in light of these rules and instruments, the question is now whether the ECtHR has ever scrutinized measures taken by the state parties to the Convention in the field of prison management. To answer this question it is necessary to investigate the most significant judicial decisions by the ECtHR on prisoner rights.

In the case of *G. v. France,*[61] which concerned the continued detention over a four-year period of the applicant who suffered from a chronic schizophrenic-type psychiatric disorder, the ECtHR confirmed the determination by the European Commission of Human Rights ("ECommHR") that Article 3 of the ECHR must be interpreted in the light of "its natural and customary" meaning. With the only exception of a brief reference to the Council of Europe's Recommendation Rec(2006)2, the Court however did not refer to sources of law outside the ECHR framework, namely the European Prison Rules or SMR, to support its decision.[62] The ECtHR's contention was that this was unnecessary since ". . .treating the applicant—in prison and in a psychiatric institution—and detaining him in prison had clearly impeded the stabilisation of his condition, demonstrating that he was unfit to be detained from the standpoint of Article 3."[63] A similar pattern emerges from the *Slawomir Musial* case, where the ECtHR referred to the EPR but only for the purpose of stressing its existence.[64] This is why the reference to the "the most important regional guidelines on detention," as the EPR were called in the judgment, did not help the ECtHR in identifying the content and scope of the protection granted to detainees under Article 3 of the ECHR.[65] Furthermore, and more recently, in the *Velyo Velev* case,[66] the Court relied neither on the EPR nor on the SMR when it illustrated its understanding of the detainees' right to education under Article 2 of Protocol No. 1 of the ECHR.[67] This is clear from the judgment,

---

on Arbitrary Detention, 27th Sess., June 30, 2014, U.N. Doc. A/HRC/27/48, http://www.refworld.org/docid/53eb29a04.html; *see also* Juan Ernesto Mendez, (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment*, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015), http://www.refworld.org/docid/550824454.html.

61. G. v. France, 2012-II Eur. Ct. H. R., http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22G.%20v.%20France%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57968%22]}.

62. *Id.* at 15.

63. *Id.*

64. Musial, *supra* note 45.

65. *Id.* at 96.

66. Velev v. Bulgaria, 2014-V, Eur. Ct. H. R., http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22VELYO%20VELEV%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-144131%22]}.

67. *See* Protocol to the European Convention for the Protection of Human Rights and

although the ECtHR formally acknowledged the existence of both the EPR and Recommendation of the Committee of Ministers No. R. (89) 12 on education in prison.[68]

Nevertheless, in the *Guvec v. Turkey* case the Court felt it necessary to mention the EPR and the United Nations Convention on the Rights of the Child ("CRC") as support for affirming the states' duty to separate children from adult prisoners.[69] In particular, the Court held that different standards on detention on the basis of the age are justified in the context of Article 3 of the ECHR.[70] It also maintained that

> . . .although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[71]

Moreover, the idea that the above-mentioned international standards on detention are not indispensable tools for interpretation of Article 3 can be derived, implicitly, from the case of *Mathew v. the Netherlands*, where the ECtHR states that the principles applicable to the treatment of detainees are those developed in its own case law on Article 3 of the ECHR.[72] A similar line of reasoning is found in the *Slawomir Musial v. Poland* case, which concerned the transfer of the applicant, who had suffered from epilepsy since early childhood and had also been diagnosed with schizophrenia and other serious mental disorders, to a specialized institution.[73] Confirming its interpretative approach in the *Mathew* case, the ECtHR held that to determine whether the inadequate medical care and inappropriate conditions in which the applicant was held during his detention should be qualified as degrading and inhuman, each contracting state must consider the general principles on prison management developed by the Strasbourg Court.[74] In particular, each contracting state must look at the manner and method used for execution of the measure as well as the duration of the treatment; its physical and mental effects; and in some circumstances, the age, sex, and state of

---

Fundamental Freedoms, art. 2, Mar. 20, 1952, C.E.T.S. No. 009, http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.

68. Velev, supra note 66, ¶¶ 21-4.

69. Güveç, *supra* note 59, ¶¶ 58, 83.

70. *Id.* ¶¶ 88, 91.

71. *Id.* ¶ 96; *see also* Ilaşcu v. Moldova, 2004-VII Eur. Ct. H. R. 100, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Ila%C5%9Fcu%20and%20Others%20v.%20Moldova%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61886%22]}; on the subject, *see* Clara Burbano Herrera, *How does the European system of human rights protect detainees in bad health?*, 6 INTER-AM. & EUR. HUM. RTS. J. 157-172 (2013).

72. Mathew v. Netherlands, 2005-IX Eur. Ct. H.R. 34, (ECtHR expressly recalled principles developed in its case-law).

73. *See* Musial, *supra* note 45, ¶ 97.

74. *Id.* ¶¶ 85, 88.

health of the detainee.[75] Moreover, and more recently, a similar approach was also endorsed in the *Torreggiani* line of cases,[76] where the ECtHR referred to the standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT")[77] as relevant criteria for assessment of the contracting states' responsibility under Article 3 of the ECHR and as yardsticks in the allocation of the burden of proof.[78]

Why are the international standards on detention not routinely used as tools for interpreting the most relevant ECHR Articles for the protection of detainees? In other words, why are these standards not routinely incorporated in the ECtHR's legal reasoning? This paper takes the view that these reasons are unclear and difficult to identify. Especially, if one considers that, at least since the 1990s, the ECtHR has acknowledged that public international law rules can be used as supportive evidence in order to extend the applicability of the ECHR's provisions.[79] Furthermore, the doctrine of margin of appreciation,[80] which is the main reason for the quasi-systematic rejection of the international standards on the protection of fundamental rights in states of emergency as tools for interpreting Article 15 of the ECHR,[81] has never been invoked in respect of Article 3, which is the key provision in relation to prison management and the treatment of detainees.[82] Moreover, international soft law instruments, such as the SMR and

---

75. *Mathew*, *supra* note 72, ¶ 175.

76. Torreggiani v. Italy, App. Nos. 43517/09, 35315/10, 37818/10, 46882/09, 55400/09, 57875/09, 61535/09 Eur. Ct. H. R., 25 (2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115860.; for a commentary, *see* Gabriele Della Morte, *La situazione carceraria italiana viola strutturalmente gli standard sui diritti umani (a margine della sentenza Torreggiani c. Italia)*, 7 (1) DIR. UM. DIR. INT. 147-158 (2013).

77. Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The CPT Standards,* CPT/Inf/E (2002) 1-Rev 2010, http://www.refworld.org/docid/4d7882092.html (last visited May 9, 2015).

78. For some interesting considerations on the ECtHR's jurisprudence on detention after the *Torreggiani* case, *see* Francesca Cancellaro, *Da Roma a Bruxelles: la Corte EDU applica i principi della sentenza Torreggiani anche alle condizioni di detenzione in Belgio*, DIRITTO PENALE CONTEMPORANEO (Dec. 9, 2014), http://www.penalecontemporaneo.it/tipologia/0-/-/-/3523-da_roma_a_bruxelles__la_corte_edu_applica_i_principi_della_sentenza_torreggiani_anche_alle_condizioni_di_detenzione_in_belgio/ (last visited May 9, 2015).

79. *See* Gustafsson v. Sweden, 1996-II Eur. Ct. H. R. 2, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Gustafsson%20v.%20Sweden%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58213%22]}.

80. *See* Joseph Jean-Louis Correa, *Le voile islamique devant la Cour européenne des droits de l'Homme : entre marge nationale d'appréciation et nécessité d'un droit commun des droits fondamentaux : les cas de la France et de la Suisse*, 14 AFR. J. INT'L & COMP. L. 234, 237 (2006); Françoise Tulken, *L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme, Paravent juridique superflu ou mécanisme indispensable par nature?*, 1 REV. SC. CRIM. 3,14 (2006).

81. *See* Francesco Seatzu, *The Experiences of the European and Inter-American Courts of Human Rights with the International Standards on the Protection of Fundamental Rights in Times of Emergency, in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 573-585 (Nerina Boschiero, Tullio Scovazzi, Cesare Pitea and Chiara Ragni eds., T.M.C. Asser, 2013).

82. Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European*

EPR, can indeed help both supranational and national courts to ensure the respect of human rights and fundamental freedoms for prisoners.[83] Last, an increasing number of ECtHR's rulings attach importance to the EPR and other recommendations of the Council of Europe's Committee of Ministers dealing with specific aspects of penitentiary policy, despite their non-binding character.[84] One example of this approach is the *Güveç* case, where the Strasbourg Court referred to international binding and non-binding instruments relevant to the field of prison management and used them in its legal reasoning.[85] Likewise, in the *Al Nashiri* case the ECtHR found that Poland failed to comply with its international duties by allowing the torture, secret detention, and extraordinary rendition of a Saudi Arabian national and a stateless Palestinian, both allegedly guilty of terrorist acts.[86] Finally, the ECtHR's position is strikingly different from the IACtHR's case law on detention and fundamental prisoner rights. This said, it might nevertheless be useful to briefly speculate on some possible explanations for the ECtHR's conduct.

A first possible explanation for the non-generalized use of the above-mentioned soft law standards in the ECtHR's case law on prison management and detainee rights is that these standards were drafted to facilitate the application of detention provisions in other international human rights instruments such as the ICCPR and the CAT.[87] Another possible explanation is the difficulty of selecting, from among the various international standards currently existing on the treatment of detainees, those most appropriate for the interpretation of the relevant ECHR Articles for the protection of this category of vulnerable individuals. Mainly, this is because of the diversity of the content of the existing soft law instruments on detention. Finally, the non-generalized use of the standards by the Strasbourg Judges might be influenced, albeit indirectly, by the fact that the ECtHR has traditionally resisted extending its constructive interpretation method to the use of non-legally binding international instruments, and often avoids incorporating them into its purposive interpretation technique.[88]

Convention of Human Rights, 17 HUM. RTS. FILES 1, 7-13 (Jul. 2000), http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17%282000%29.pdf.

83. *See* G. v. France, *supra* note 61; Musial, *supra* note 45; Neptune v. Haiti, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 180, ¶ 131 (May 6, 2008); Loor v. Panama, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 218, ¶ 215 (Nov. 23, 2010); Vera v. Ecuador, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 226, ¶ 50 (May 19, 2011).

84. *See* Council of Europe Committee of Ministers, *Recommendation Rec(2006) 2 on the European Prison Rules* (2006), http://www.refworld.org/docid/43f3134810.html.

85. Güveç, *supra* note 59, ¶¶ 58-9, 60-4, 83.

86. Nashiri v. Poland, App. No. 28761/11 Eur. Ct. H. R. (2014), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044.

87. U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 U.N.T.S. 85 (entered into force Jun. 26, 1987); *see also* International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966).

88. *See e.g.*, Isayeva v. Russia, App. No. 57950/00, Eur. Ct. H. R.(2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68381; *see also* Cesare Pitea, *Interpretation and Application of the European Convention on Human Rights in the Broader Context of International*

However, these reasons do not justify the non-use of these and other correspondent non-binding instruments to assist interpretation of Article 3 of the ECHR and of the other ECHR provisions relevant to the treatment of detainees. On the contrary, the strong analogies between Article 3 of the ECHR and Article 5 of the ACHR,[89] and above all the need for a "jurisprudence constante" on prisoners' rights and prison management, show that such instruments may indeed be regularly used as tools for the interpretation, at least of Article 3 of the ECHR. In other words, the EPR and SMR are very helpful in clarifying the meaning and operational character of detention provisions in human rights treaties. Therefore, the ECtHR's approach to Article 3, as well as with Articles 2, 6, and 8 of the ECHR and to Article 2 of Protocol No. 1 to the ECHR, when they are applied to prisoners' cases should be based on a systematic use of the non-binding international standards on prison management. For example, the EPR, the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, the SMR, and the United Nations Working Group on Arbitrary Detention's Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court ("Basic Principles and Guidelines") may be useful to this end.[90] Furthermore, by complying with such rules—notably with the EPR and SMR, which aim to lay down universal standards having binding force outside any treaty process and hence applicable irrespective of their specific acceptance by states, and available to any fundamental rights supervisory mechanism[91]—the ECtHR may clarify the meaning and operational character of various expressions used in Article 3 of the ECHR.

To summarize, perusal of the ECtHR' s case law on prisoner rights reveals that the negative approach of the ECtHR towards the standards and principles has significant consequences, whose impact has not been yet universally recognised.[92] A notable, though implicit, recognition has been made by Clare Ovey, who rightly observed that the main focus of the case law of the ECtHR on prisoners has been:

Law: Myth or Reality?, in HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21ST CENTURY 1-14 (Yves Haeck, Eva Brems eds., Springer, 2014); Jean-François Flauss and Gérard Cohen-Jonathan, *Cour européenne des droits de l'Homme et droit international general*, 51 A.F.D.I. 675–677 (2005).

89. ECHR, *supra* note 15, at art. 3; ACHR, *supra* note 16, at art. 5.

90. European Prison Rules, *supra* note 30; *Principles and Best Practices*, *supra* note 33; *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 24; Human Rights Council Res. 20/16, *Arbitrary Detention*, U.N. GAOR, 20th Sess., A/HRC/RES/20/16 (July 17, 2012), http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx%20.

91. PENAL REFORM INTERNATIONAL, *A Compendium of Comparative Prison Legislation* 6 (2008), http://www.penalreform.org/wp-content/uploads/2013/06/man-2008-compendium-prison-legislation-en.pdf (last visited Sept. 19, 2015).

92. This point emerges *a contrario* from some recent works on the ECtHR's jurisprudence on detainees' rights. *See e.g.*, Daniela Ranalli, *Nuovi interventi della Corte europea dei diritti dell'uomo in tema di trattamento carcerario* 2 RASS. PEN. CRIM. (2013) 157-172; Fabiana Fucci, *La tutela del diritto alla corrispondenza dei detenuti nella giurisprudenza della Corte europea dei diritti dell'uomo*, 16 1 DIRITTI DELL'UOMO, CRONACHE E BATTAGLIE (2005) 37-44; Andreana Esposito, *Condizioni della detenzione e trattamento dei detenuti: la cultura della detenzione*, 1-2 DOCUMENTI GIUSTIZIA: L'ITALIA E LA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO (2000) 99-116.

"to ensure that prisoners are not placed in health-threateningly bad conditions, enjoy access to medical care and are protected from other forms of serious ill-treatment," which is the same focus as the EPR and SMR.[93] This position has also been indirectly endorsed by Professor Laurence Burgorgue-Larsen, who recalls the main solution of the Strasbourg Judges to guarantee protection of detainees under Article 3 of the ECHR, namely the 'creation' of an Article 3a.[94]

IV. THE APPROACH OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS TO THE INTERNATIONAL GUIDELINES AND PRINCIPLES ON THE PROTECTION OF DETAINEES' FUNDAMENTAL RIGHTS

The ACHR expressly indicates that there may be situations in which the deprivation of liberty may be justified. Deprivation of liberty issues are addressed in Article 5 of the ACHR.[95] Article 5 provides that:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
>
> 3. Punishment shall not be extended to any person other than the criminal.
>
> 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
>
> 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
>
> 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.[96]

Article 5 is of paramount importance for the system of protection of human rights under the ACHR's aim to establish precise restrictions on the states' actions and allow the international community to identify violations of the right to humane

---

93. *See* Clare Ovey, *Ensuring respect of the rights of prisoners under the European Convention on Human Rights as part of their reintegration process*, REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS (last visited May 10, 2015), http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Conference_19_files/COURT-%20Clare%20Ovey%20Helsinki.pdf.

94. *See* Laurence Burgorgue-Larsen, *Les équivalents de l'article 3 de la Convention européenne dans le système interaméricain des droits de l'homme, in* LA PORTÉE DE L'ARTICLE 3 DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 23-46 (Catherine Amélie Chassin ed., Bruylant, 2006).

95. ACHR *supra* note 16, at art. 5.

96. *Id.*

treatment.[97] Article 5's terms regulate the measures used in the Inter-American States in some of the most critical human rights situations—the imprisonment and punishment of people, including minors.[98]

The Inter-American States Parties must ensure that their rules on detention and punishment are fully in line with all the requirements of the ACHR.[99] While not questioning the right of Inter-American States Parties to restrict and limit the personal liberty of individuals for the legitimate purposes of punishment or investigation, the IACtHR always requires them to withdraw the restrictions on personal liberty as soon as possible.[100] In other words, when restricting or limiting the right to personal liberty under Article 5 of the ACHR, the ultimate aim of a Inter-American State shall be to return to normality as soon as possible. In both theory and practice, the detention of individuals is by definition a temporary measure. Indeed, the temporary nature of detention and of restriction on personal liberty constitutes an essential safeguard for any individual, including and especially accused persons.

As noted, the ACHR had to acknowledge that the limitations and restrictions on personal liberty may be necessary in exceptional circumstances.[101] Instead of approaching the matter exclusively from a prohibition perspective, as the ECHR does, the ACHR wisely sets out the formal requirements and prerequisites under which such limitations and restrictions of personal liberty are allowed.[102] In addition, Article 5 of the ACHR also establishes the aim, degree, and scope of punishment.[103] Professor Laurence Burgorgue-Larsen observes that this feature distinguishes Article 5 of the ACHR from corresponding provisions in other human rights conventions such as the ECHR.[104] While both conventions aim to establish many of the same guarantees, and both forbid degrading treatment within the framework of the ban on torture, the array of content-related elements is more comprehensive in the ACHR than in the ECHR. However, like the ECHR, the

---

97. WILLIAM SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 40-1 (Ne. Univ. Press) (1996).

98. ACHR, *supra* note 16, at art.5 ¶¶ 3-6 (focusing on the rehabilitative aim–reform and social readaptation of the prisoners–of the deprivation of liberty).

99. *Id.* at art. 1(1). Under Article 1, titled "Obligation to Respect Rights," provides that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Id. See also Portugal v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 186, ¶¶ 179, 203 (Aug. 12, 2008).

100. *See, e.g.*, Álvarez v. Ecuador, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 170, ¶ 53 (Nov. 21, 2007); Argüelles v. Argentina, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 288, ¶ 120 (Nov. 20, 2014).

101. Argüelles, *supra* note 100, ¶ 128.

102. ACHR, *supra* note 16, at art. 5 ¶ 6, art. 7 ¶¶ 2-3.

103. ACHR, *supra* note 16, at art. 5.

104. *See* Burgorgue-Larsen, *supra* note 94, at 23.

ACHR fails to provide expressly that the prohibition from torture and degrading treatments admits no exception under any circumstances.[105]

Comparison with the ECtHR shows that for the purpose of interpreting Article 5 of the ACHR, the IACtHR has occasionally referred to international instruments of soft law on the detention and treatment of detainees, such as the SMR and the Body of Principles for the Protection of All Persons under Any Form of Detention or Prison ("the Body of Principles").[106] This approach was justified by the IACtHR on the premise that these international non-binding tools can help to ascertain the precise content and scope of the Inter-American States' obligations regarding the protection of detainees.[107] In this respect, it is worth recalling the *Ver Vera* ruling, where the Inter-American Court referred to Principle 24 of the Body of Principles to identify a breach of Article 5 of the ACHR.[108] Further confirmation of the Court's recourse to different external sources to interpret the rights enshrined in the ACHR is found in the landmark case *Panchito Lopez* concerning Paraguay where the IACtHR developed tailored protection of juvenile prisoners' right to education by combining Articles 4 and 5 of the ACHR with Article 13 of the Protocol of San Salvador and the CRC.[109] Again, a similar line of reasoning is found in the case of *Maritza Urrutia v. Guatemala,*[110] where the IACtHR used the relevant practice of the courts of other Inter-American States and of other human-rights monitoring bodies to conclude that:

> An international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, has been developed and, with regard to the latter, it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered "psychological torture."[111]

In the leading case of *Bayarri v. Argentina*, to show that the duty of judicial authorities to guarantee the rights of the person detained entails the obligation to obtain and ensure the authenticity of any evidence that can demonstrate acts of torture, the IACtHR referred to sources of law outside the Inter-American system, namely the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Manual or Istanbul Protocol").[112] Moreover, in the case of *Valle Jaramillo and others v.*

---

105. *See* ACHR, *supra* note 16.

106. Neptune, *supra* note 83, ¶ 131; Loor, *supra* note 83, ¶ 215; Vera, *supra* note 83, ¶ 50; Fleury v. Haití. Merits, Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 236, ¶ 85 (Nov. 23, 2011).

107. De la Cruz-Flores v. Perú. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 115, ¶ 132 (Nov. 18, 2004); Vera, *supra* note 83, ¶ 69.

108. Vera, *supra* note 83, ¶ 69.

109. Juvenile Re-education Institute, *supra* note 26.

110. Urrutia v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 103 (Nov. 27, 2003).

111. *Id.* ¶ 92.

112. Bayarri v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 92 (Oct. 30, 2008).

Colombia, the IACtHR also referred to external sources of law to hold the existence of a duty under Article 5 of the ACHR to take all reasonable measures necessary to guarantee the right to personal liberty and personal integrity of the human rights defenders who denounce human rights breaches and who are in a situation of special vulnerability.[113] Furthermore, in *Yvon Neptune v. Haiti,* the Inter-American Court held that, "detention in conditions of overcrowding, with lack of ventilation and natural light, without a bed to rest on or adequate conditions of hygiene, in isolation or with undue restrictions to the visiting regime, constitutes a violation of personal integrity" by referring, *inter alia,* to the Standard Minimum Rules for the Treatment of Prisoners.[114]

Nevertheless, an even cursory review of the case law of the IACtHR on Article 5 shows there are some exceptions to this approach. For instance, one exception to the use of sources of law outside the Inter-American system for supporting a purposive interpretation of Article 5 of the ACHR is found in the leading case of *Heliodoro Portugal v. Panama* relating to the forced disappearance of Heliodoro Portugal, a "well-known member of the Panamanian Communist Party," from Panama City in 1970.[115] Nearly thirty years after his forced disappearance from Panama, the Panamanian Attorney General's Office discovered human remains in a barracks in Tocumen, which, after undergoing DNA testing, were identified as being those of the victim.[116] For this reason, the IACtHR rightly alleged violation of Article 5(2) of the ACHR relating to personal integrity and human dignity.[117] More precisely and significantly, it held that the violation of certain rights of the primary victim, in cases of enforced disappearances, killings, or extra-judicial killings, for instance, might also lead to a breach of the right to integrity of 'secondary victims' (friends or relatives).[118] The United Nations General Assembly adopted a consensus resolution on principles to protect all persons from enforced disappearance, the Declaration on the Protection of All Persons from Enforced Disappearance,[119] and extensive studies on this topic have been conducted by the International Committee of the Red Cross ("ICRC")[120] and Amnesty International;[121] notwithstanding that, the IACtHR did not refer to

113. Jaramillo v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 192, ¶ 89 (Nov. 27, 2008).

114. Neptune, *supra* note 83, ¶ 131.

115. *See* Portugal, *supra* note 99.

116. Portugal, *supra* note 99, ¶ 2.

117. *Id.* ¶¶ 3, 162-63, 174, 181.

118. *Id.* ¶ 175; *see also* Jaramillo, *supra* note 113, ¶ 119.

119. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res 47/133 U.N. GAOR, 47th Sess., 92nd Plen Mtg, U.N. Doc A/RES/47/133 (Dec. 18, 1992).

120. Statement by the International Committee of the Red Cross to the United Nations Human Rights Council concerning the draft, International Convention for the Protection of all Persons from Enforced Disappearances (Jun. 27, 2006), https://www.icrc.org/eng/resources/documents/statement/human-rights-council-statement-270606.htm (last accessed May 6, 2015).

121. Amnesty Int'l, *Disappearances: A Workbook* (1981).

these documents as aids to the interpretation of Article 5.[122] As a consequence, the IACtHR failed to avoid the "pitfalls of regulating the legal status of disappeared persons through a declaration of death," as remarked by Gabriella Citrioni.[123] Another exception is found in the case of *Cantoral Huamaní and García Santa Cruz v. Peru,* which concerned the alleged kidnapping, torture, and extrajudicial execution of Saúl Isaac Cantoral-Huamaní and Consuelo Trinidad García-Santa Cruz on February 13, 1989 in Lima, and the complete impunity of the perpetrators of these facts.[124] In this case the IACtHR found that the right to mental and moral integrity of the victims' next of kin had been infringed as a result of the particular circumstances of the violations perpetrated against their loved ones, again without referring to external sources of law—the SMR, EPR or the ECHR—to support its interpretation, but referring solely to its previous decisions on the subject.[125]

V. CONCLUSION

Will there ever be a change in the ECtHR's approach inspired by IACtHR case law?

The answer should be yes, at least *prima facie.* Indeed, this change is reasonably expected if one takes into account the strong similarities between Article 3 of the ECHR and Article 5 of the ACHR in general and, in particular, the substantial coincidence of their aims and regulatory principles. A further indication of this change is the increasing number of references to the IACHR in the ECtHR's case law.[126] However, there are equally strong arguments supporting the opposite conclusion. Most of these arguments have already been discussed above, but this paper will now consider them here according to their practical significance.

The first argument is that unlike Article 3 of the ECHR, Article 5 of the ACHR addresses the protection of the right to personal, mental, and moral integrity, not just from a prohibition perspective.[127] Clearly, the different approach of Article 5 may also lead to different results as to the requirements and prerequisites justifying limitations and restrictions of personal liberty.

The second argument is that Article 5 of the ACHR has two significant features that distinguish it from Article 3 of the ECHR. Although both Articles

---

122. *See* Portugal, *supra* note 99.

123. *See* Gabriella Citroni, *The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death*, 12 J. INT'L CRIM. JUST. 787-803 (2014); *see* also Juan E. Mendez & José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507 (1990).

124. Cantoral-Huamaní v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 167 (July 10, 2007).

125. *Id.* ¶¶ 11-121.

126. Eur. Ct. H.R., *References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights*, Research Report, http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf (last accessed May 9, 2015).

127. *See* ACHR, *supra* note 16, at art. 5 ¶ 1.

forbid torture and cruel, inhuman, or degrading punishment or treatment under any circumstances,[128] only Article 5 of the ACHR deals with the legitimate degree of punishment allowed for violations of the right to personal liberty.[129] In addition, only Article 5 of the ACHR provides that: "[m]inors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible."[130]

The third argument is that the ECtHR has all too frequently refused to extend its constructive-interpretative approach to the use of international non-binding rules on detention and prison management, and expressly failed to integrate these non-binding instruments into its tools of purposive interpretation.[131]

The fourth argument is that the IACtHR's case law on detainees' rights and prison management also includes certain rulings, such as in the ground-breaking cases *Heliodoro Portugal v. Panama* and *Huamaní and García Santa Cruz* which significantly omit to refer to non-binding 'soft law' instruments concerning the protection of the fundamental rights of detainees as tools for interpreting Article 5 of the ACHR.[132]

The fifth argument is that the IACtHR's case law on detainees' rights has grown and developed in a socio-economic environment characterized by strong peculiarities, namely the high level of inmate violence inside Latin American prisons.[133]

The sixth and final argument is that the ECtHR, unlike the IACtHR, has never demanded improvements in general prison conditions.[134]

For all of these reasons this paper does not expect the ECtHR to align itself with the IACtHR's case law on detainee rights. In other words, it seems unlikely that in the near future the ECtHR will assume a more positive attitude with respect to the role of international soft law rules on detention—such as the EPR, the SMR, or the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas—as possible guides to the interpretation of Article 3 of the ECHR.

128. ACHR, *supra* note 16, ¶ 2; *see also* ECHR, *supra* note 15, at art. 3.

129. *See e.g.*, ACHR, *supra* note 16, at art. 5 ¶ 4.

130. ACHR, *supra* note 16, ¶ 5.

131. *See* ACHR, *supra* note 16, ¶ 3.

132. Portugal, *supra* note 99; Cantoral-Huamaní, *supra* note 124.

133. CECILIE DINESEN ET AL., VIOLENCE AND SOCIAL CAPITAL IN POST-CONFLICT GUATEMALA, 34 REV. PANAM. SALUD PUBLICA 162 (2013), http://www.scielosp.org/scielo.php?script=sci_arttext&pid=S1020-49892013000900003.

134. For a fuller discussion of this issue, *see* Herrera, *supra* note 71, at 165.

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).

THE MEANING OF "GROSS VIOLATION" OF HUMAN RIGHTS: A FOCUS ON INTERNATIONAL TRIBUNALS' DECISIONS OVER THE DRC CONFLICTS

ROGER-CLAUDE LIWANGA*

I. INTRODUCTION

In December 2005, the International Court of Justice ("ICJ") delivered a judgment on the case—between the Democratic Republic of the Congo ("DRC") and Uganda—concerning Armed Activities on the Territory of the Congo, declaring that the killings, tortures, and destruction of properties of the DRC civilian population by Uganda and its army constituted "massive human rights violations."[1] Two years earlier (in March 2003), the African Commission on Human and Peoples' Rights ("African Commission") had also issued a decision in response to a call to adjudicate on the same situation of armed conflicts in the DRC (*DRC v. Burundi, Rwanda and Uganda case*) where it described the actions of the respondent states as "flagrant violations" of human rights.[2] Yet in their respective rulings, the two judicial bodies failed to define what specifically constituted a "massive violation" or "flagrant violation" of human rights. Additionally, both the

* Roger-Claude Liwange is a Fellow at Harvard University's FXB Center for Health and Human Rights; Lecturer of International Law of War at Suffolk University Law School; SJD candidate (Suffolk University); LL.M (University of Cape Town); and Licence en Droit (Université Protestante au Congo). This article is an adaptation of a paper presented as part of a directed study at Suffolk Law School in 2015.

1. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 206-07 (Dec. 19).

2. Dem. Rep. Congo v. Burundi, Rwanda Uganda, Decision 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 79-80 (May 15-29, 2003), http://caselaw.ihrda.org/doc/227.99/view/en. As background information on the cases relating to the armed conflicts in the DRC: In February 1999, the DRC lodged a complaint to the African Commission on Human and People's Rights and claimed, among other things, that it was the victim of an armed aggression perpetrated by Burundi, Rwanda and Uganda; and that the armed forces of those three countries also perpetrated gross violations of the human rights against its population since August 1998. *See* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 245 (3rd ed., 2014). Concurrently, in June of 1999, the DRC also lodged another complaint before the ICJ against the same countries concerning the same events and the same issues (act of armed aggression on its territory and violation of the human rights of its civilian population). *See* TOMUSCHAT, *supra* note 2. The African Commission and the ICJ have respectively issued their decisions in 2003 and 2005 in regards with the DRC cases. Dem. Rep. Congo v. Burundi, Rwanda Uganda, Decision 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6 (Feb. 3); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168 (Dec. 19); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Burundi), Application: Instituting Proceedings, 1999 I.C.J. Rep. 117 (June 23).

ICJ and African Commission did not clearly establish the criteria that led them to conclude the killings and tortures against the DRC population were effectively "massive/flagrant violations" rather than "regular violations" of human rights. This silence has raised some questions as to: What makes some acts of killing to be perceived as "massive" or "flagrant" violations of human rights while other acts of killing are just "regular violations" of individuals' right to life? What are the parallels between the terms "flagrant," "massive," "gross," "systematic," and "serious" violations of human rights?

The paper explores the meaning of "gross violation" of human rights and examines the criteria making a given violation to be ascertained as a "gross violation" of human rights. This paper posits that the terms "gross," "flagrant," "massive," "systematic," or "serious" violations of human rights are often interchangeably or cumulatively used by both international legal instruments and quasi-judicial bodies in order to refer to a violation of the same gravity.[3] The paper also suggests that, even though there is no unanimous definition of the concept "gross violations" of human rights, the scope of coverage of this concept concerns the violations of two categories of rights, namely civil and political rights and socio-economic rights. The paper concludes that several elements need to be taken into account while assessing the seriousness of a violation, including: the type of the violated rights and the character of the violation, the quantity of victims, the repeated occurrence of the violation and its planning, and the failure of the government to take appropriate measures relating to the violation in question.[4]

This paper is divided into two main parts. Section I will examine the different definitions of "gross violation" of human rights as suggested by international legal documents and scholars. Section II will analyze the criteria of classification of "gross violation" of human rights in light of recent international and regional jurisprudence.

II. DEFINING THE CONCEPT OF "GROSS VIOLATION" OF HUMAN RIGHTS

The term "gross violation" of human rights draws its origin from different international and regional legal instruments within different legal systems. International and regional legal instruments and judicial bodies are inconsistent in their language when referring to the term "gross violation" of human rights.[5]

---

3. Takhmina Karimova, *What Amounts To 'A Serious Violation of International Human Rights Law?: An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty, in* ACADEMY BRIEFING NO. 6, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS 12 (Geneva Academy, 2014), http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20breifs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf. *See generally,* Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, at 283-85 (2001).

4. CECILIA MEDINA QUIROGA, THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM 11 (1988). *See also* M. E. Tardu, *United Nations Response to Gross Violations of Human Rights: The 1503 Procedure*, 20 SANTA CLARA L. REV. 559, 582-84 (1980).

5. Karimova, *supra* note 3, at 12.

These international legal instruments and judicial bodies have been using interchangeably and cumulatively the terms "gross," "grave," "flagrant," "massive," "systematic," and "serious." For instance, the 1967 U.N. Resolution 1235 of the Economic and Social Council ("ECOSOC") compelled the U.N. Commission "to examine information relevant to gross violations of human rights... as exemplified by the policy of apartheid."[6] The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment cumulatively speaks of "gross, flagrant or mass" violations of human rights in connection with torture,[7] the 1993 Vienna Declaration and Program of Action refers to "gross and systematic violations" of human rights;[8] and the 2005 U.N. Basic Principles and Guidelines uses the term "gross" and "serious violations" to qualify the gravity of the violations.[9] Likewise, international and regional judicial bodies have also employed different terminologies when talking about certain acts violating international laws: the ICJ talks of "massive human rights violations" in the case concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*).[10] The African Commission and the African Court on Human and Peoples' Rights ("ACtHPR") utilize interchangeably the terms "gross," "grave," "flagrant," "serious," or "massive;"[11] and the European Court of Human Rights ("ECtHR") and the Inter-American Court of Human Rights ("IACtHR") refer to "serious violation" to depict the gravity of some acts.[12]

---

6. Economic and Social Council Res. 1235 (XLII) U.N. Doc E/4393 (June 6, 1967).

7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, ¶ 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

8. World Conference on Human Rights, *Vienna Declaration and Program of Action*,¶ 30, U.N. Doc. A/CONF.157/23 (Jun. 25, 1993).

9. G.A. Res. 60/147, preamble, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005) [hereinafter Basic Principles and Guidelines].

10. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 207 (Dec. 19).

11. *See* Dem. Rep. Congo v. Burundi, Rwanda Uganda, Decision 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 79-80. *See also* Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Decision 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], fn. 120 (Nov. 11-25, 2009) (using terms "grave" and "gross" violations of human rights to refer to the forced evictions); Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, Decision 279/03-296/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 100-102 (May 13-27, 2009) (employing the term "serious and massive violations" to characterize the situation where about ten thousand people were forcibly evicted from their properties).

12. The European Court of Human Rights has respectively upheld that the attitudes of Bulgaria and Romania amounted "serious violations" under the European Convention of Human Rights. Moldovan and Others v. Romania (No. 2), 2001-XII Eur. Ct. H.R. 167, 192; Velikova v. Bulgaria, 2000-VI Eur. Ct. H.R. 1, 31. The IACtHR employed the term "grave" human rights violations to refer to the extrajudicial executions and forced disappearances occurred respectively in Colombia and Guatemala. Tiu Tojin v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser C) No. 190, ¶ 53 (Nov. 26, 2008); Pueblo Bello Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 143 (Jan. 31, 2006). The IACtHR used "serious violations" to qualify acts of torture. Vera-Vera et al. v. Ecuador, Prelim. Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 226, ¶ 117 (May 19, 2011).

It should be noted that, while using interchangeably and cumulatively the concepts of "gross," "massive" or "serious," both the international instruments and judicial bodies have always failed to distinguish between the content of each concept.[13] This may lead one to conclude that, under international law, the epithets "gross," "grave" "flagrant" or "serious" have the same meaning in terms of qualifying the gravity of certain human rights violations. However, for the purpose of this paper, the term "gross violation of human rights" will be preferably used for the sake of uniformity of terminology. But, beyond the issue relating to the use of terminology, the most important problem is to understand the meaning of the concept itself. What does "gross violation" of human rights mean?

There is no universally accepted definition of the term "gross violation" of human rights, nor is there a formally determined content of the concept itself.[14] The existing definitions of "gross violation" of human rights are provided by quasi-legal instruments that lack a binding effect (such as the declarations and guidelines of the U.N. or EU's commissions and agencies), rather than treaties with binding effects. For instance, Paragraph 30 of the 1993 U.N. Vienna Declaration and Program of Action provides an enumeration of acts that should constitute "gross violation" of human rights by stating that:

> Gross and systematic violations. . .include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.[15]

Likewise, the Council of Europe's Guidelines on Eradicating Impunity for Serious Human Rights Violations catalogued acts comprising "gross violation" of human rights.[16] Scholars such as Stanislav Chernichenko and Theo Van Boven have also proposed some definitions of "gross violation" of human rights. In his Working Paper submitted to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Chernichenko noted that

gross and large-scale human rights violations . . . [should include] murder,

---

13. Karimova, *supra* note 3, at 12.

14. *Id.*

15. World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 30, U.N. Doc. A/CONF.157/23 (June 25, 1993).

16. *Guidelines on Eradicating Impunity for Serious Human Rights Violations*, at 23, COM (2011) 13 add (Mar. 30, 2011), stipulates:

> For the purposes of these guidelines, "serious human rights violations" concern those acts in respect of which states have an obligation under the Convention, and in the light of the Court's case-law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of forced labour and slavery (Article 4 of the Convention) and with regard to certain aspects of the right to liberty and security (Article 5, paragraph 1, of the Convention) and of the right to respect for private and family life (Article 8 of the Convention).

including arbitrary execution; torture; genocide; apartheid; discrimination on racial, national, ethnic, linguistic, or religious grounds; establishing or maintaining over persons the status of slavery servitude, or forced labour; enforced or involuntary disappearances; arbitrary and prolonged detention; deportation or forcible transfer of population."[17]

Chernichenko's definition of "gross violation" of human rights is relatively similar to the one suggested by Van Boven.[18]

Two observations can be made from all of the above definitions. First, there is no exhaustive list of violations that may constitute "gross violation" of human rights; meaning that the term "gross violation" of human rights includes panoply of violations. Second, the scope of coverage of "gross violations" of human rights concerns the violations of both categories of rights: (1) civil and political rights, and (2) social, economic, and cultural rights. But, there is a limitation within these definitions to the extent that they seem to merely offer an enumeration of violations that may constitute "gross violations" rather than supply the criteria to assess the seriousness of the violations committed.[19] In other words, those definitions are descriptive rather than prescriptive of criteria necessary to evaluate the gravity of the enumerated violation(s).[20] In this regard, the U.N. Human Rights Due Policy on U.N. Support to Non-U.N. Security Forces has recently provided a "complex" definition of "gross violation" of human rights, which unifies different legal regimes, such as international law, international humanitarian law, and international criminal law.[21] But that definition is unclear as to what the terms

17. Definition of Gross and Large-scale Violations of Human Rights as an International Crime, Comm. on Human Rights, Prevention of Discrimination and Protection of Minorities, Working paper submitted by Mr. Stanislav Chernichenko in accordance with Sub-Comm. decision 1992/109, 14, U.N. Doc. E/CN.4/Sub.2/1993/10 (June 8, 1993).

18. According to Theo Van Boven, gross violations of human rights and fundamental freedoms include at least the following: genocide, slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular on race or gender. *See,* Theo Van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by M. Theo van Boven, Special Rapporteur, 7-8, U.N. Doc No. E/CN4/Sub2/1993/8, (July 2, 1993). *See also,* MAX DU PLESIS & STEPHEN PETE, REPAIRING THE PAST?: INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES 18 (2007).

19. Karimova, *supra* note 3, at 19.

20. *Id.* at 34.

21. *Id.* at 14. *See also* U.N. Secretary-General, Letter dated February 25, 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, A/67/775 (Mar. 5, 2013) [hereinafter the Human Rights Due Policy]. Paragraph 12 of the Human Rights Due Policy stipulates:

> "Grave violations" mean, for the purposes of the present policy:
>
> (a) In the case of a unit:
>
> (i) Commission of 'war crimes' or of 'crimes against humanity', as defined in the Rome Statute of the International Criminal Court, or 'gross violations' of human rights, including summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence of a comparable serious nature, or acts of refoulement

"significant degree of frequency" or "significant scale" would actually mean in practice.[22] In light of the difficulty of defining the concept "gross violation" of human rights, a more comprehensive definition should not only enumerate the wrongful acts comprising "gross violations" of human rights, but also reflects some standard so as to evaluate how a given wrongful act can be qualified as a "gross violation." Accordingly, a more holistic definition can be formulated as follows:

> "Gross violation" of human rights comprises at least one the following acts, when committed repetitively or non-repetitively against any individual as part of a planned action by State actor(s) or non-state actor(s), or committed without effective judicial measure(s) of the State government to investigate and prosecute the perpetrator(s):
>
> - Torture and cruel, inhuman, and degrading treatment or punishment;
> - Summary or arbitrary execution;
> - Forced or involuntary disappearance, or arbitrary and prolonged detention;
> - Apartheid, discrimination based on gender, race, nationality, ethnicity, language, culture, or religion;
> - Human trafficking, slavery, or slavery-like practice;
> - Foreign occupation or alien domination;
> - Terrorism;
> - Lack of the rule of law;
> - Denial of access to education, food, or other socio-economic rights;
> - Denial of access to free expression, public affairs, and services of the country; and

---

under refugee law that are committed on a significant scale or with a significant degree of frequency (that is, they are more than isolated or merely sporadic phenomena); or
(ii) A pattern of repeated violations of international humanitarian, human rights or refugee law committed by a significant number of members of the unit; or
(iii) The presence in a senior command position of the unit of one or more officers about whom there are substantial grounds to suspect:
• Direct responsibility for the commission of 'war crimes', 'gross violations' of human rights or acts of refoulement; or
• Command responsibility, as defined in the Rome Statute of the International Criminal Court, for the commission of such crimes, violations or acts by those under their command; or
• Failure to take effective measures to prevent, repress, investigate or prosecute other violations of international humanitarian, human rights or refugee law committed on a significant scale by those under their command;
(b) In the case of civilian or military authorities that are directly responsible for the management, administration or command of non-United Nations security forces:
(i) Commission of grave violations by one or more units under their command;
(ii) Combined with a failure to take effective measures to investigate and prosecute the violators.

22. Karimova, *supra* note 3, at 14; Human Rights Due Policy, *supra* note 21, ¶ 12 (a)(i), (a)(iii).

- Destruction of properties or looting of a community's natural resources.[23]

So what are the components that a wrongful act should have in order to rise to the level of "gross violation" of human rights?

III. CRITERIA OF CLASSIFICATION OF GROSS HUMAN RIGHTS VIOLATIONS

Before answering the above question, it should be noted that as there is no unanimous definition of "gross violation" of human rights under international law, and there is no universally accepted method to assess whether or not a given act should be evaluated as a "gross violation" of human rights. According to the International Law Commission ("ILC")'s Commentary on Article 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, there are two criteria in assessing whether the gravity of a given violation amounts to a "gross violation" of human rights: the first concerns "the character of the obligation breached," which derives from a peremptory norm of general international law; the second involves "the intensity of the breach."[24] In reality, the ILC's two-criteria tests can be regrouped into one criterion test: "the qualitative criterion," which is subdivided into two segments: the nature of rights violated (peremptory rights), and the character of the violation (cruelty of the breach). However, this paper agrees with M. E. Tardu and Cecilia Medina Quiroga that four elements should be present in order for a violation to be identified as a "gross violation" of human rights,[25] including: (1) the qualitative element, (2) the

---

23. This definition is suggested as a summary of all the above definitions, and it intends to fill the gaps in terms of the criteria of evaluation of gross human rights violations.

24. Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 282 (2001). Article 40 of the ILC's report to the General Assembly, which adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts, provides:

> 1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation.

Id. at art. 40.

Commenting on the above provision, the ILC noted that:

> Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfill both criteria. The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with Article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is one which is . . . "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Id. at 282 (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter VCLT]).

25. QUIROGA, *supra* note 4, at 11. *See* Tardu, *supra* note 4, at 583-84.

quantitative element, (3) the time element and (4) the planning element.[26] These are the criteria that are also reflected in the definition suggested above.

A. Qualitative Element

The qualitative criterion of "gross violation" of human rights has two segments, namely (1) the type of the rights violated, and (2) the character of the violation itself.[27] First, concerning the type of the rights violated: to be considered as "gross violation," a given violation should be assessed as to if or if not it breaches a derogable right or non-derogable right.[28] The general understanding is that a wrongful act can amount to a "gross violation of human rights" only if it violates a non-derogable right.[29] Of course, this test raises another debate on the hierarchy of human rights, which will not be discussed in this paper. Yet, even if human rights are indivisible and interdependent, some rights are part of *jus cogens* and can therefore be subjected to no derogation in terms of their protection.[30] In light of the provisions of the International Covenant on Civil and Political Rights (Article 4(2))[31], the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15(2))[32] and the American Convention on Human Rights (Article 27(2))[33], the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws are non-derogable. This means that those rights have to be protected in any circumstances during times of peace and war. But under international and regional jurisprudence, there are instances where tribunals have also upheld that some

---

26. QUIROGA, *supra* note 4, at 11.

27. QUIROGA, *supra* note 4, at 13; Karimova, *supra* note 3, at 16; Tardu, *supra* note 4, at 583-84.

28. Unlike the derogable rights, the non-derogable rights are the rights that cannot be theoretically taken away or compromised. In light of most international and regional treaties, the non-derogable rights include:

> the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws. These rights are also known as peremptory norms of international law or jus cogens norms.

See U.N. TERMS, http://unterm.un.org/dgaacs/unterm.nsf/8fa942046ff7601c85256983007ca4d8/d4dbb9694e5b40da8525751b0077e882?OpenDocument (last visited June 24, 2015).

29. QUIROGA, *supra* note 4, at 13; Karimova, *supra* note 3, at 16.

30. Koji Teraya, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 EJIL 917, 918-20 (2001). *See* RULE OF LAW IN ARMED CONFLICTS PROJECT, *Derogation From Human Rights Treaties in Situations of Emergency*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php (last visited Oct. 13, 2015).

31. International Covenant on Civil and Political Rights art. 4, ¶ 2, Dec. 16, 1966, 999 U.N.T.S. 171.

32. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221.

33. American Convention on Human Rights art. 27, ¶ 2, Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123.

violations of derogable rights (such as the right to education, right to housing, right to properties, or right to healthcare service) may amount to "gross violations" of human rights. For instance, in the case on Armed Activities in the Territory of the Congo (*DRC v. Uganda*), the ICJ ruled that acts of torture and other forms of inhuman treatment (non-derogable rights), as well as the destruction of civilian houses (derogable right), constituted massive violations of human rights of the Congolese population.[34] Similarly in *World Organization against Torture v. Zaire*, the African Commission also concluded that the violation of the right to education (due to the closure of universities and secondary schools during two years) amounted to "gross violations" of human rights.[35]

Second, in regards to the character of the violation, it is required that a given violation must have a certain degree of seriousness or cruelty in order to be described as a "gross violation" of human rights.[36] Dinah Shelton noted that acts of "gross violations" of human rights are "those that are particularly serious in nature because of their cruelty or depravity."[37] In *DRC v. Burundi, Rwanda and Uganda*, the African Commission also assessed the cruel nature of the violation by considering that:

> The indiscriminate dumping of and mass burial of victims of the series of massacres and killings perpetrated against the peoples of the eastern province of the Complainant State. . .The [African] Commission further finds these acts barbaric and in reckless violation of Congolese peoples' rights to cultural development guaranteed by Article 22 of the African Charter, and an affront on the noble virtues of the African historical tradition and values enunciated in the preamble to the African Charter.[38]

The African Commission made a similar assessment in its preceding ruling in *World Organization against Torture v. Zaire*,[39] where it had evaluated the seriousness of the violation based on "[t]he failure of the government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine" to the victims. [40]

---

34. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. at ¶ 206-07.

35. World Organization against Torture v. Zaire, Decision on Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 48 (Mar. 26–Apr. 4, 1996).

36. QUIROGA, *supra* note 4, at 15; Karimova, *supra* note 3, at 17.

37. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 390 (2006).

38. Democratic Republic of Cong v. Burundi, Rwanda and Uganda, Decision 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 87.

39. World Organization against Torture v. Zaire, Decision on Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 47 (March 26-Apr. 4, 1996).

40. *Id.*

B. Quantitative Element

The qualitative element is not the only factor for a violation to amount to "gross violation" of human rights; there is also the quantitative component that relates to the quantity of violations (or rights or victims).[41] The analysis of the quantitative element leads to questions as to: How many wrongful acts are required for violation(s) to be described as "gross violations"? Or, how many victims or violated rights are required for violations to amount to "gross violations" of human rights? And, can a single violation of a single right against an individual amount to a "gross violation" of human rights? There is no international or regional legal document that provides clear answers to these questions. But scholars agree that the use of epithets such as "gross," "grave," "flagrant," "serious," "massive," "systematic," or "large-scale" by international legal documents and judicial bodies may insinuate that there should be more than one violation (or individual) for a given violation to equal a "gross violation" of human rights.[42] For instance, in its ruling on the occurrence of "massive human rights violations" in the case concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*), the ICJ also took into account the large number of victims and various rights violated. The Court held that:

> [T]he armed conflict between Ugandan and Rwandan forces in Kisangani led to
>
> "fighting spreading into residential areas and indiscriminate shelling occurring for 6 days . . .
>
> Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests."[43]

In *Sudan Human Rights Organization and Centre on Housing Rights and Evictions v. Sudan*, the African Commission also observed that "[s]uch is the case with the situation in the Darfur region, where tens of thousands of people have allegedly been forcibly evicted and their properties destroyed. It is impracticable and undesirable to expect these victims to exhaust the remedies claimed by the State to be available."[44] The African Commission considered that the alleged violations *prima facie* constituted "serious and massive violations . . . ."[45]

From the above, it appears that the magnitude of the violations in terms of the

41. QUIROGA, *supra* note 4, at 12.

42. *Id.*

43. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 208.

44. Sudan Human Rights Organization and Centre on Housing Rights and Evictions / Sudan, Decision 279/03 – 297/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 101.

45. *Id.* ¶ 102.

large number of victims and rights violated is an important factor in determining whether or not the given violations amount to "gross violations" of human rights. Yet the existence of more than one victim and violated right may not be the only factor to examine when assessing the gravity of violations. This viewpoint seems to be shared by the European Commission on Human Rights (European Commission). Indeed, in *Ireland v. United Kingdom*, the European Commission upheld that: "Although one single act contrary to the Convention is sufficient to establish a violation, it is evidence that the violation can be regarded as being *more* serious if it is not simply one outstanding event but forms part of a number of similar events which might even form a pattern."[46] In light of the European Commission's ruling, a single violation may also be enough to constitute a "gross violation" of human rights,[47] and the existence of numerous violations is not a condition *sine qua non* for establishing "gross violations" of human rights.[48]

Cecilia Medina Quiroga has also noted that the quantitative element of "gross violations" of human rights can have a link with the status of victim(s). She writes: "it is possible that a smaller number of victims is required to arrive at a situation of gross, systematic violations of human rights, when the violation of human rights is committed against certain individuals important to the national community or to a specific section of the population."[49]

A situation where the existence of one violation or victim is enough to amount to a "gross violation" of human rights can also be illustrated through the following hypothetical example: Assume that a Mr. X is a community leader in the region Z where he often campaigns against the enlistment of the youths of his community into jihadist groups and that the members of a jihadist group Y have publically decapitated Mr. X because of his opposition to their movement. In this hypothesis, there is "gross violation" of human rights even if one is in the presence of a single violation (decapitation of an individual impeding the right to life) committed against one victim (who is a community leader). In this example, there would still be "gross violation" of human rights even if Mr. X were regular citizen rather than a community leader. This is because of not only the nature of the right violated but also the brutality of the act itself which reflects a higher degree of cruelty aiming to terrorize the entire community rather than ending the life of an opponent. In the same context, the U.N. and Lebanon established in 2006 the Special Tribunal for Lebanon to specially adjudicate the act of terrorism (which is one of the acts constituting "gross violations" of human rights) committed against the former Lebanese Prime Minister Rafiq Hariri in particular, and twenty-one other people in a single event.[50]

---

46. Karimova, *supra* note 3, at 17 (quoting *Ireland v. UK*, 1977 Y.B. Eur. Conv. on H. R. 762 (Eur. Comm'n on H.R.)(emphasis added)).

47. *Id.* at 18.

48. *Id.* at 18.

49. QUIROGA, *supra* note 4, at 15.

50. *See* S.C. Res. 1757, annex, Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon (May 30, 2007).

C. *Element of Time*

The element of time is another essential component to evaluate the seriousness of a violation. According to the U.N. Economic and Social Council ("ECOSOC") Resolution 1503(XLVIII), a given violation should have a "consistent pattern."[51] This idea of pattern seems also to run through the provisions of the Rome Statute of the International Criminal Court[52] and the United States Foreign Relations regulations.[53] The term "consistent pattern" implies a certain repetition of the violation's occurrence over a period of time.[54] In the case concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*), the ICJ also examined the repeated occurrence of violations against the DRC's population by observing that: "The armed conflict between Ugandan and Rwandan forces in [the DRC's province of] Kisangani led to 'fighting spreading into residential areas and indiscriminate shelling occurring for 6 days' . . . ."[55] The Uganda People's Defense Forces ("UPDF") also carried out widespread bombing and destruction of hundreds of villages from 2000 to 2002.[56]

In its judgment in *Ireland v. United Kingdom*, the ECtHR considered the repetitive nature of the violations by upholding that: "A practice incompatible with

---

51. Economic and Social Council Res. 1503(XLVIII), ¶¶ 1, 5 (May 27, 1970) (requesting that the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider communications and replies of governments that "appear to reveal a consistent pattern of gross and reliably attested violations of human rights. . .")

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

> "[C]rimes against humanity" means any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender. . .;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Id. at art. 7.

53. *See* 22 U.S.C. § 2304(a)(2) (2012) ("Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.").

54. Tardu, *supra* note 4, at 583; QUIROGA, *supra* note 4, at 12, Karimova, *supra* note 3, at 15.

55. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 208. *See also id.* ¶ 204-207.

56. *Id.* ¶ 206.

the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches."[57]

In view of the above rulings, one may wonder if a one-time, unrepeated violation could also be qualified as a "gross violation" of human rights. This is a pertinent question. Despite the fact that many cases of "gross violations" of human rights happened to be repetitively committed during a certain period of time, some scholars have commented that the international quasi-judicial bodies have never concluded that there should be a systematic occurrence of a violation in order for it to be perceived as a "gross violation" of human rights.[58] In *Prosecutor v. Salim Jamil Ayyash and others*, the Trial Chamber of Special Tribunal for Lebanon issued a warrant of arrest against the accused persons for perpetrating a terrorist act committed as a single violation on a single day (14 February 2005) against the former Lebanese Prime Minister Rafiq Hariri and others.[59] Likewise, the hypothetical example posited above also demonstrates how an unrepeated violation can also meet the definition of "gross violation" of human rights.

In light of this, the assessment of the gravity of violations should therefore depend on the particularity of each case no matter whether or not the wrongful act was committed repetitively.[60]

D. Element of Planning

The term "consistent pattern," which was used through the ECOSOC Resolution 1503 to establish a violation as a "gross violation" of human rights, can also imply the existence of an element of planning.[61] Accordingly, E.M. Tardu notes that acts of "gross violations" of human rights have "an element of planning or of sustained will on the part of the perpetrators."[62] For Cecilia Medina Quiroga, the term "gross violation" or "systematic violation" also suggests an element of planning.[63] In the *Blaskic case*, the International Tribunal for Former Yugoslavia (ITFY) ruled that the term "systematic" refers to "the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community."[64] In the case concerning Armed Activities on the Territory of the Congo (*DRC v.*

57. Ireland v. United Kingdom, 1977 Y.B. Eur. Conv. on H. R. ¶ 159.

58. QUIROGA, *supra* note 4, at 12. *See also* Karimova, *supra* note 3, at 6.

59. *E.g., Prosecutor* v. Ayyash, STL-11-01/T/TC, Warrant For The Arrest Of Hussein Hassan Oneissi, (April 17, 2014).

60. QUIROGA, *supra* note 4, at 12.

61. *Id.* at 15. *See also* Rome Statute, *supra* note 51 at art. 8, ¶. 1 ("The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.").

62. Tardu, *supra* note 4, at 583.

63. QUIROGA, *supra* note 4, at 15.

64. Prosecutor v. Bla[ki], IT-95-14-T, Judgment, ¶ 203 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

Uganda), the ICJ observed that Uganda began providing military supports to the DRC's rebel groups in January 1999 and March 1999,[65] and that "the UPDF [Uganda People's Defense Forces] incited ethnic conflicts and took no action to prevent such conflicts in Ituri district . . . . [t]he confrontations . . . resulted in some 10,000 deaths and the displacement of some 50,000 people . . ."[66]

In other words, Uganda's incitement of ethnic violence and supplying of the DRC's armed groups with weapons, coupled with its inaction to stop ethnic conflicts, may denote the existence of a plan intended to destroy and destabilize the DRC's community.

E. Failure of Undertaking Judiciary and other Actions

Besides the presence of elements of quality, quantity, time, and planning, the seriousness of a violation can also be assessed in considering the failure of the government to implement judiciary actions to prosecute the perpetrators of the violation and/or to take other measures to prevent the continual occurrence of atrocities. As discussed above in the case concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*), Uganda's behaviour was also ascertained as a "gross violation" of human rights due to its failure to take appropriate actions to prevent the killings and massacres of the DRC's population.[67] Prior to that ICJ decision, the ECtHR had adopted a similar position. In *Velikova v. Bulgaria*, the ECtHR considered that Bulgaria's:

> [U]nexplained failure to undertake indispensable and obvious investigative steps is to be treated with particular vigilance. In such a case, failing a plausible explanation by the Government as to the reasons why indispensable acts of investigation have not been performed, the State's responsibility is engaged for a particularly serious violation of its obligation under Article 2 of the Convention [to protect the right to life].[68]

With regards to the above ruling, it also seems that it is not necessary that a violation be committed by the state's organs in order for it to amount to a "gross violation" of human rights. This means that acts of "gross violations" which are committed even by non-state actors (such as ISIS or Boko Haram) can be attributed to the government if it negligently failed to prosecute and prevent the occurrence of these wrongful acts.

In conclusion, the terms "gross," "grave," "flagrant," "serious," or "massive" are used interchangeably and even cumulatively by international legal documents and quasi-judicial bodies. There is no unanimously accepted definition of "gross violations" of human rights, which consist of the violations of civil rights, political

---

65. Armed Activities on the Territory of the Congo (Dem. Rep. Congo), Judgment, 2005 I.C.J. Rep. 168 ¶ 41.

66. *Id.* ¶ 209.

67. *See id.* ¶ 211.

68. Velikova v. Bulgaria, 2000-VI Eur. Ct. H.R. at 20. *See also* Eremiasova v. Czech Republic, 2012 Eur. Ct. H.R. ¶ 132.

rights, and socio-economic rights. And, the seriousness of violations is assessed on the basis of several factors, including: the type of violated rights and the character of the violation, the quantity of victims, the repeated occurrence of the violation and its planning, and the failure of the government to appropriate measures to prevent and punish the violation. In view of this, the cases on armed conflicts in the DRC can be perceived as meeting all the suggested criteria of "gross violations" of human rights.

Denver Journal
of International Law and Policy

VOLUME 44 NUMBER 2 WINTER-2016

2015-2016
University of Denver
Administration

Rebecca Chopp, *Chancellor*
Gregg Kvistad, *Provost*
Craig W. Woody, *Vice Chancellor for Business and Financial Affairs*
Kevin A. Carroll, *Vice Chancellor of Marketing and Communications*
Thomas Willoughby, *Vice Chancellor of Enrollment*
Armin Afsahi, *Vice Chancellor for Advancement*
Peg Bradley-Doppes, *Vice Chancellor for Athletics and Recreation*
David Greenberg, *Vice Chancellor of Institutional Partnerships*
Amy King, *Vice Chancellor of Human Resources*
Liliana Rodriguez, *Vice Chancellor of Campus Life and Inclusive Excellence*
Barbara J. Wilcots, *Associate Provost for Graduate Studies*
Paul H. Chan, *University General Counsel*
Martin J. Katz, *Dean of the Sturm College of Law and Professor of Law*
Viva Moffat, *Associate Dean of Academic Affairs and Professor of Law*
Joyce Sterling, *Associate Dean for Faculty Scholarship and Professor of Law*
Jessica Boynton, *Associate Dean of Student Affairs*
Catherine E. Smith, *Associate Dean for Institutional Diversity and Inclusiveness and Associate Professor of Law*
Eric Bono, *Assistant Dean for Career Opportunities*
Iain Davis, *Assistant Dean of Student Financial Management and Admissions*
Laura E. Dean, *Assistant Dean of Alumni Relations*
Clint Emmerich, *Assistant Dean of Budget and Planning*
Meghan S. Howes, *Assistant Dean of the Office of Communications*
Daniel A. Vigil, *Assistant Dean of External Relations and Adjunct Professor*
Susan D. Daggett, *Executive Director of the Rocky Mountain Land Use Institute and Lecturer*
Ricki Kelly, *Executive Director of Development*
John Wilson, *Director of the Graduate Program in Taxation and Associate Professor of Taxation*
Julie Gordon, *Registrar*
Molly Rossi, *Human Resources Manager*
Lauri Mlinar, *Director of Events*

Sturm College of Law
Faculty List

Robert Anderson
Rachel Arnow-Richman
Debra Austin
Rebecca Aviel
Tanya Bartholomew
Brad Bartlett
Arthur Best
Jerome Borison
Stacey Bowers
Kelly Brewer
J. Robert Brown, Jr.
Teresa M. Bruce
Phoenix Cai
John Campbell
Bernard Chao
Fred Cheever
Allen Chen
Roberto Corrada
Patience Crowder
Courtney Cross
Stephen Daniels
Susan Daggett
K.K. DuVivier
Nancy Ehrenreich
Ian Farrell
Alexi Freeman
César Cuauhtémoc García Hernández
Rashmi Goel
Robert M. Hardaway
Jeffrey H. Hartje
Mark Hughes
Timothy Hurley
Sheila K. Hyatt
Scott Johns
José R. (Beto) Juárez, Jr.
Sam Kamin
Hope Kentnor
Tamara L. Kuennen
Margaret Kwoka
Jan G. Laitos
CJ Larkin
Christopher Lasch
Nancy Leong
Kevin Lynch
Justin Marceau
Lucy A. Marsh
G. Kristian McDaniel-Miccio
Michael G. Massey
Kris McDaniel-Miccio
Suzanna K. Moran
Ved P. Nanda
Stephen L. Pepper
Justin Pidot
Raja Raghunath
Paula Rhodes
Edward J. Roche
Tom I. Romero, II
Laura Rovner
Nantiya Ruan
Thomas D. Russell
Ann C. Scales (1952–2012)
David C. Schott
Michael R. Siebecker
Don C. Smith
John T. Soma
Michael D. Sousa
Mary A. Steefel
Robin Walker Sterling
Kate Stoker
Celia Taylor
David Thomson
Komal Vaidya
Kyle C. Velte
Ann S. Vessels
Robin Walker Sterling
Eli Wald
Lindsey Webb
Annecoos Wiersema
John R. Wilson