

**“THE OVERLAP OF JURISDICTION IN INTERNATIONAL DISPUTES
RESOLUTION FORUMS AND THE EFFECT ON INTERNATIONAL RELATIONS OF
STATES”**

**A Thesis Submitted for the Partial Fulfillment of the Requirements for the Master of Arts
Degree (M.A.) in International Studies of the University of Nairobi.**

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Table of Contents

DECLARATION	i
ACKNOWLEDGEMENT	ii
DEDICATION	iii
LIST OF INTERNATIONAL INSTRUMENTS.....	iv
LIST OF CASES.....	v
LIST OF ABBREVIATIONS.....	vi
Abstract.	viii
1 CHAPTER ONE: INTRODUCTION.....	1
1.1 BACKGROUND.	1
1.2 STATEMENT OF THE PROBLEM.	4
1.3 RESEARCH QUESTIONS.	5
1.4 OBJECTIVES OF THE STUDY.....	5
1.5 JUSTIFICATION OF THE STUDY.	6
1.6 LITERATURE REVIEW.	7
1.6.1 Causes of Proliferation of IDRFs.....	7
1.6.2 Effects of Proliferation of IDRFs.....	10
1.7 THEORETICAL FRAMEWORK.....	12
1.8 HYPOTHESIS.....	16
1.9 RESEARCH METHODOLOGY.....	17
1.9.1 Library Research.....	17
1.9.2 Online/Internet Research.	17
1.9.3 Use of Interviews as a Methodology.	18
1.10 LIMITATION OF THE RESEARCH METHODOLOGY.....	18
1.11 CHAPTER BREAKDOWN.	18
1.11.1 Chapter 1.....	19
1.11.2 Chapter 2.....	19
1.11.3 Chapter 3.....	19
1.11.4 Chapter 4.....	20
2.0 CHAPTER TWO	21
2.1 Establishment and Nature of IDRFs.	21
2.2 LaGrand (Germany v. United States of America) and Mexico vs USA.....	24

2.3 Democratic Republic of the Congo vs Uganda.....	26
2.5 Belgium V. Senegal.	28
2.6 Nicaragua v. United States of Americaand Prosecutor v. Tadic.....	30
2.7 Prosecutor v. Tadic	31
CHAPTER 3	33
3.1 Advantages.....	33
3.2 Promotes Global Peace and Security.	33
3.3 Ensures Amicable Settlement of Disputes.....	35
3.4 Creation of Job Opportunities.	36
3.5 Growth of International Jurisprudence.	36
3.6 Enhance and Promote International Regimes.	37
3.7 Disadvantages.	38
3.8 Conflicting Opinions.....	39
3.9 Forum Shopping.....	40
3.10 Fragmentation of International Law.	42
3.11 Risk of Double Jeopardy or Double Compensation.	44
CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSION	46
4.1 Summary and Conclusion.	46
4.2 Recommendations.....	47
4.3 Encourage and Enhance Judicial Dialogue.....	47
4.4 Conflict Clauses.....	48
4.5 Jadhav Case (India v. Pakistan).	49
4.6 Referral of Cases to Other Dispute Resolution Processes.	50
4.7 Exclusive and Non-Exclusive Jurisdictions.....	52
4.6 BIBLIOGRAPHY.....	55

DECLARATION

I, Charles Mahianyu Thuku, solemnly declare and affirm that this thesis is my original work and has not been presented for any degree or examination in the University of Nairobi or any other university.

I further declare and affirm that all resources and information used and cited have been duly acknowledged.

.....

Charles Mahianyu Thuku.

R50/88204/2016

Date:

This thesis has been submitted for examination with my approval as the supervisor.

.....

Dr. Felix Odimmasi.

Date

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DEDICATION

Dedicated to my mother Elena Thuku and my father Stephen Thuku for all that you have been to me.

LIST OF INTERNATIONAL INSTRUMENTS

1. Agreement on consular access Between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India, 2008
2. Charter of the United Nations, 1945
3. Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), 1992
4. General Act (Pacific Settlement of International Disputes), 1928
5. Hague Convention for the Pacific Settlement of International Disputes, 1899
6. Hague Convention for the Pacific Settlement of International Disputes, 1907
7. International Covenant on Civil and Political Rights, 1966
8. Montevideo Convention on the Rights and Duties of 1933
9. Optional Protocol Concerning the Compulsory Settlement of Disputes, 1963
10. Rome Statute of the International Criminal Court, 1998
11. Statute of the International Court of Justice, 1945
12. Treaty on the Functioning of the European Union, 2007
13. United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984
14. United Nations Convention on the Law of the Sea 1982
15. Vienna Convention on Consular Relations, 1963
16. Vienna Convention on the Law of Treaties, 1969

LIST OF CASES

Short Title

1. Belgium V. Senegal
2. Bosnia and Herzegovina v. Serbia
3. Democratic Republic of the Congo v. Uganda
4. Germany v. United States of America
5. India v. Pakistan.
6. Mexico v. United States of America
7. MOX Plant Ireland v (United Kingdom)
8. Nicaragua v. United States of America
9. Somalia v. Kenya
10. Southern Bluefin Tuna Case
11. The Prosecutor v. Tadic
12. United Kingdom v. Iceland

LIST OF ABBREVIATIONS

1. ACHPR African Court on Human and Peoples' Rights
2. AU African Union
3. CJEU Court of Justice of the European Union
4. CLCS Commission on the Limits of the Continental Shelf
5. DRC Democratic Republic of Congo
6. ECOWAS Economic Community of West African States
7. EU European Union
8. IACHR Inter-American Court of Human Rights
9. ICC International Criminal Court
10. ICCPR International Covenant on Civil and Political Rights
11. ICESCR International Covenant on Economic Social and Cultural Rights
12. ICJ International Court of Justice
13. ICTY International Criminal Tribunal for Former Yugoslavia
14. IDRF International Dispute Resolution Forum
15. IGO(s) Intergovernmental Organization(s)
16. ILO International Labour Organization
17. IO(s) International Organization(s)
18. ITLOS International Tribunal for the Law of the Sea
19. MNC Multinational Corporation
20. NGO Non-Governmental Organization
21. PCA Permanent Court of Arbitration
22. OAU Organization of African Unity
23. TFEU Treaty on the Functioning of the European Union

24. UDHR	Universal Declaration of Human Rights
25. UN	United Nations
26. USA	United States of America
27. VCCR	Vienna Convention on Consular Relations
28. VCCR Optional Protocol	Optional Protocol concerning the Compulsory Settlement of Disputes, 1963
29. VCLT	Vienna Convention on the Law of Treaties
30. WTO	World Trade Organization

Abstract.

This study aims at investigating the causes as well as the consequences of similar or conflicting mandates of various international courts and tribunals and the effect that the phenomenon has on the relations of States at the international spectrum. While the study acknowledges that these effects may, similarly, be felt by non-state actors such as international organizations and multinational corporations, the study limits itself to the effects on States. The paper traces the historical development and significance of the international courts and tribunals and their multiplication or proliferation in modern times. In so doing, I analyze the phenomenon of duplicated or replicated mandates of these courts, their salient nature, the extents and limits of these mandates or jurisdictions and the overall effects to the international system. The study achieves this through the aid of real cases decided by various courts and tribunals as well as an in-depth literature review of other scholars and writers.

My findings suggest that overlap of jurisdiction amongst IDRFs is caused, primarily, by globalization and regional integration of States and therefore impossible to completely eradicate. The study also advances the argument that there is need to address this growing pattern as it also poses certain challenges in how international law is interpreted, applied and enforced thereby affecting the international relations of States. The study, therefore, proposes some measures and recommendations that may be used to avert the dangers of the phenomenon.

1 CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND.

Traditionally, international law was perceived as the fabric generally recognized and accepted as binding in inter-States relations.¹ Today, international law has widely and rapidly developed to apply to non-state actors such as individuals with international personalities and international organizations (IOs). Examples include international and domestic nongovernmental organizations (NGOs) and multinational corporations (MNCs).² International law, therefore, regulates the various forms of interactions between such states and non-state actors including politics and warfare, economics and general relations.³ The source of these set of rules, collectively known as international law, are provided for under Article 38 of the Statute of the International Court of Justice.⁴ They are international conventions and custom, general principles of law recognized by civilized nations and case law and the academic writings of the most prominently qualified authors of the various States, as subsidiary source of international law.

However, this research is not dedicated to discussing the substance of international law but its enforcement through the various set up international dispute resolution courts and tribunals - in this paper collectively referred to as international dispute resolution forums (“IDRFs”), their advantages and shortcomings and the effect on international relations between states. Similarly, while acknowledging that international law also applies to non-state actors such as international

¹Theodore D. Woolsey, *Introduction to the Study of International Law: Designed as an Aid in Teaching and in Historical Studies* (Cambridge Thurston & Miles Printers 1860) pg. 3.

² Suzannah Linton and Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, (Chicago Journal of International Law 2009 Volume 9 Number 2 Article 4) pg. 1

³Malcom N. Shaw, *International Law 6th Edition*, (Cambridge University Press 2008) pg. 2.

⁴ The Statute which is Chapter XIV of the Charter of the United Nations establishes the International Court of Justice as the primary judicial body of the United Nations.

institutions, this research paper will largely focus on states. With the rapid growth of international law so has there developed challenges. This paper discusses one such challenge being the highly increasing overlap of jurisdiction amongst the various IDRFs established under international law. Jurisdiction entails the legal power or authority of a court or tribunal to preside and determine over a dispute. The authority can be as to nature of issue or issues a court or a tribunal could possibly determine, the scope of affairs a court or tribunal may seek to regulate and control or the extent of territory within which it may exercise that power or authority.⁵

Within an individual state, this jurisdiction will likely be conferred under the constitution of that state and other municipal laws enacted by the state through its legislative processes. In the absence of this jurisdiction, then by principal of law the particular court or tribunal concerned ought not to preside over the dispute and if it does determine and render a decision in the disputes, its decision is amenable to challenge at a higher judicial forum. Similarly, under those municipal laws, there normally exist rules of judicial hierarchy in which the decisions of the highest judicial forum in the hierarchy bind all other lower courts and tribunals. This concept is known as *stare decisis*.⁶ All courts deciding a matter previously decided by such a higher judicial forum are obligated to ensure consistency and uniformity of decision made with the previous pronouncement of court. This concept creates a fair degree of predictability, uniformity and objectivity in the making, interpretation and enforcement of the law.

internationally, the forum for dispute resolution in most of the statutes and conventions between State parties to the statute or convention will normally be specifically identified in the principal

⁵ Rain Liivoja, *'the criminal jurisdiction of states A theoretical primer'*, (2010 Journal of Extreme Legal Positivism) pg. 24.

⁶Thomas Burns, *'The Doctrine of Stare Decisis,'* (Cornell Law Library 1893). Historical Theses and Dissertations Collection. pg. 2.

statute or convention or in the rules and regulations made thereunder. Though a rare scenario, the problem is a bit evident where the statute or convention does not specifically identify the dispute resolution forum and the parties are left to select from the general IDRFs available such as the International Court of Justice. The constitutive statute or convention will outline the extent and limit of the jurisdiction donated on the subject international judicial body. The statute will also dictate the composition of the court and the she seat or location of the court.

An IDRF can simply be defined as an international judicial body governed by international law and mandated to interpret and apply international law to particular cases referred to them.⁷ As will be elaborated in this study, this body of international law governing IDRFs is, normally, codified or written. The sporadic establishment and development of international judicial bodies has been higher post the World War II and the Cold War.⁸ This may have been largely inspired by increased international consciousness and growth in international human rights leading to international law seeking to enforce and protect the basic human rights of citizens against their own states or governments. The growth of IDRFs can further be traced to increasing interactions by states through trade related activities including products and services exports, migration and tourism. As such, IDRFs represent a valid position that with the increase of interactions amongst states, there is need for dispute resolution mechanisms given that, invariably, differences between such states do and will arise. However, it is possible and in most cases do arise situations where more than one IDRF has jurisdiction over the same dispute. This problem, in this paper referred to as overlap or conflict of jurisdiction, poses various challenges to the legitimacy and enforceability of the decisions and opinions emanating from the courts and tribunals. Equally, the lack of an

⁷ Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, (Cambridge University Press) the American Journal of International Law Vol. 106, No. 2 (April 2012), pp. 225-270.

⁸ Anne Peters, *The refinement of international law: From fragmentation to regime interaction and politicization*, (Oxford University Press 2017), International Journal of Constitutional Law Volume 15, Issue 3, 30th October, 2017, Pages 671-704.

international coordinative fabric of relationship amongst the various IDRFs means that one judicial body need not consider the decision of another body given that there is no binding relationship between them.⁹

1.2 STATEMENT OF THE PROBLEM.

Increased interactions amongst states have led to the creation and development of different IDRFs to resolve disputes as and when they arise between states. While increase of international judicial institutions, on the face of it, presents positive signs of the resolve by states to settle disputes in pacific amicable means, the development - in this paper considered as proliferation has resulted to IDRFs with similar jurisdictions or with competing jurisdictions. The problem is not so much the proliferation of IDRFs – which is a result of the growing nature of international law - but the existence of similar, competing or conflicting jurisdictions between them. This phenomenon creates fragmentation of international law and lack of cohesiveness thereby undermining its enforceability. This is because different IDRFs are likely to reach to varying decisions or opinions over the same subject matter or related set of facts. The inconsistency also threatens the legitimacy of the wider international system within which such IDRFs operate.¹⁰ The third problem created by this overlap of jurisdiction is “forum shopping” where a given State has the luxury to select the best desired IDRF amongst IDRFs of similar jurisdiction over the subject dispute. Therefore, a state will want to select an IDRF that it can influence to its advantage. This may undermine judicial autonomy which is a vital factor for sustaining a trustworthy and licit international judicial system.¹¹

⁹ Karin Oellers-Frahm, ‘*Multiplication of International Courts and Tribunals and Conflicting Jurisdiction - Problems and Possible Solutions*’, in Joachem A. Frowein and Rudiger Wolfrum (eds) Max Planck Yearbook of United Nations Law, Vol. 5 (Kluwer Law International 2001) pg. 67-73.

¹⁰ Pauwelyn Joost and Salles Luiz Eduardo (2009), ‘*Forum Shopping before International Tribunals: (Real) Concerns, (Im) Possible Solutions*’, Cornell International Law Journal: Vol. 42: Iss. 1, Article 4.

¹¹Ruth Mackenzie and Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 2003 44, Harvard International Law Journal J 1Int’L 271.

1.3 RESEARCH QUESTIONS.

- (1) What is the extent of overlap of jurisdiction in IDRFs in the modern world?
- (2) What challenges are created or manifest as a result of overlap of jurisdiction of the various IDRFs?
- (3) What protective measures or guarantees does international law provide against overlap of jurisdiction of the various IDRFs?
- (4) Is the protection offered by international law against overlap of jurisdiction of the various IDRFs adequate?
- (5) What measures may be recommended to address the overlap of jurisdiction in IDRFs and the effect on international relations?

1.4 OBJECTIVES OF THE STUDY.

There are specific and general objectives the thesis intends to achieve. The broad purpose of the research is to increase emphasis and awareness about increasing overlap of jurisdiction of various IDRFs and the negative attributes or consequences created by this overlap. This will inform the various policy makers, decision makers, and states representatives that there is need for paradigm shift in the ideological and textual enactment of international law for creation of IDRFs. Another objective is to contribute to the existing literature on international justice mechanisms and framework. The specific objectives are:

- (1) To assess whether there is overlap and conflict of jurisdiction of the various IDRFs.
- (2) To provide an overview of the international justice system under various IDRFs as established in international.
- (3) To assess whether the existing international justice framework is implemented uniformly or effectively.

- (4) To provide recommendations for addressing the problem of overlap of jurisdiction of the various IDRFs.

1.5 JUSTIFICATION OF THE STUDY.

A research on challenges created or evident in the international justice system through overlap of jurisdiction of the various established IDRFs offers an important and unique focus on the uniformity, effectiveness, legitimacy of the international justice system. This is because overlap of jurisdiction of the various IDRFs in modern world creates one of the biggest challenges to the enforcement of international law and hence threatens the faith of states in the international system. The study also reveals that the growing tendencies of replication of IDRFs amongst states create unnecessary confusion in the resolution and determination of international disputes. The thesis will further present and analyze the existing international legal and institutional drawbacks in created by overlap of jurisdiction of IDRFs and the overall effects on the international relations of states. In doing this, this research will provide useful knowledge and insight in the arena of international justice system and the possible areas for reforms. It will add on to the existing literature on international justice system and hence be a possible benchmark tool for creation of reforms in the international justice system. The essay offers a descriptive analysis of overlap of jurisdiction of IDRFs as a contemporary international system development problem. It raises vital questions for further research, discussions and debate not just by the international scholars and analysts of the international justice system, but also state representatives, international policy makers, practitioners, international law enforcement agencies and judicial officers engaged by the various IDRFs. This research embodies the hope that the study may be used as a reference point by states, international law and policy makers and scholars in future researches and reevaluation of the international justice system. It will therefore be useful to the government, policy makers and analysts, researchers and students and the larger international public in general. The study may

serve as a springboard for other researchers and scholars who might be intent on making further research in this area of international justice system.

1.6 LITERATURE REVIEW.

The literature review is split into two parts. To begin with the literature review examines the works of other scholars, writers or authors and others on the rise of IDRFs. These include timelines and causes. This part focuses on historical timelines and causes of the multiplication of IDRFs. Part two focuses on scholarly writings on the effects created by the proliferation of IDRFs. This part focuses on the positive and negative aspects of many IDRFs with overlapping jurisdictions.

1.6.1 Causes of Proliferation of IDRFs.

Over the last two centuries, the number of the IDRFs has rapidly increased. John Yoo and Eric Posner trace the multiplication of IDRFs to the end of the Cold War and the early 1990s.¹² Posner further suggests that the end of the last century saw the initial deliberate steps towards the institutionalization of formal international adjudication an example being the Hague Conferences of 1899 and 1907 which led to establishment of a permanent arbitral body, the Permanent Court of Arbitration (PCA).¹³ Indeed, Karen J. writes that by the year 2006, there were less than thirty permanent international courts, with some of these courts being global such as the ICJ and the International Tribunal of the Law of the Seas (ITLOS) and the rest being regional judicial institutions spread across various continents.¹⁴ She goes on to write that overtime these IDRFs have determined disputes arising in varied fields such as economics, human rights and war crimes.

¹² John C. Yoo & Eric Posner, *'A Theory of International Adjudication'* (John M. Olin Program in Law and Economics Working Paper No. 206, 2004).

¹³ Eric A. Posner, *'Judicial Independence in International Tribunals'*, 93 California Law Review 1 (2005).

¹⁴ Alter, Karen J., *'the Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review'* (2012). Faculty Working Papers Paper 212.

Barbara Stark traces the origin of multiplication of IDRFs to the concurrent growth of human rights and fundamental freedoms. She argues that the phenomenon greatly became evident after World War II which saw introduction of the international bill of rights under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) and the decolonization of States previously under colonial rule.¹⁵ These conventions contain very progressive human rights clauses which are reference models for regional laws as well as municipal constitutions and Acts of Parliaments across the globe. For some writers like Barbara Stark, the growth in these fields of trade, economics, environment, human rights, war and diplomacy are the very essence of the growth and multiplication of the IDRFs. Tullio Trevez adds that these specialized fields operate on their distinct rules, structures and judicial systems with rules and regulations different from those of general international law.¹⁶

Globalization has been the key driving force as well as a consequence of increased relations of States. The increasing need for interdependency and cooperation between and amongst States has resulted into a closely knit States together under a system in which they surrender some of their inherent rights and powers for the cordial maintenance and sustainability of this international system but reserving some of their powers, privileges and rights as states. It is no wonder, then, that some of the earliest and most crucial international laws and principles that enumerates the rights as well as responsibilities of States such as the Montevideo Convention on the Rights and Duties of States (the “Montevideo Convention”) historically precede conventions forums and

¹⁵ Barbara Stark, *International Law from the Bottom Up: Fragmentation and Transformation*, University of Pennsylvania Journal of International Law, Vol. 34, 2013.

¹⁶ Tullio Treves, *Fragmentation of International Law: The Judicial Perspective*, (Agenda International) Vol. 16, 27 (2009).

regimes such as the UN and the World Trade Organization (WTO) under which the principles of interdependency and cooperation amongst States are deeply rooted.

Suzannah Linton and Firew Kebede Tiba on the other hand put the number of IDRFs by the year 2004 to be about 125.¹⁷ While scholars may disagree on the number of the judicial and quasi-judicial IDRFs what is not in doubt is that their numbers have been growing steadily since the eighteenth century to date with their respective jurisdictions being either widened, differentiated or replicated to other IDRFs. Agnieszka Szpak partly traces this multiplication to increased international relations amongst states.¹⁸ As interactions between human beings and States increase, various organizations have sprouted out to either facilitate these interactions or solve differences emanating between and amongst the people and States. This is the basic concept and philosophy through which IDRFs are created. Indeed, all human interactions in the modern world have been subjected to some kind of an institution whether bearing formal or informal structures. The IDRFs like many other international organizations (IOs) exist to conventionalize States activities and maintain the peaceful existence of the international system of States. The peaceful resolution of differences amongst human beings and States is at the very foundation of these IDRFs. According to Anne Peters, Another cause of the steady increase of IDRFs has is the entry into the international system of non-state actors such as IOs, IGOs and NGO as well as the end of the cold war era.¹⁹

¹⁷ Supra note 2.

¹⁸ Agnieszka Szpak, *'Proliferation of International Courts and Tribunals, and its Impact on the Fragmentation of International Law'*, (The International Law Annual 2014).

¹⁹ Supra note 8 pg. 3.

1.6.2 Effects of Proliferation of IDRFs.

Suzannah Linton and Firew Kebede Tibashopping advance the argument that existence and growth of IDRFs encourages litigation as opposed to warfare in disputes resolution.²⁰ They therefore differ with the notion of "proliferation" of IDRFs, suggesting that this is a negative perception of the effect. However, the writers do concur that many IDRFs afford States the liberty to "forum shop". In reaching this conclusion, they are in agreement that overlap of jurisdiction amongst the various IDRFs pose challenges of enforcing international law. Therefore, the writers opine that IDRFs present both positive as well as negative challenges in the world. Peaceful resolution of disputes amongst States tends to result to more sustainable relations amongst them and, therefore, in theory the more IDRFs there are the more the world is expected to be peaceful. In addition, more IDRFs represent the picture that most, if not all, aspects of interactions amongst States and human beings have been institutionalized creating more sustainable system of societal co-existence both at the municipal and international levels. Multiple IDRFs therefore, represent the vitality and versatility nature of international law in a modern world where States' interests are numerous and divergent and the levels of power and might amongst the State to enforce such interests also different.

Indeed, some scholars have argued that the phenomenon of plurality of IDRFs is a deliberate step by States to allow various dispute resolution mechanisms and not merely a historical accident.²¹ In this context, the growth IDRFs to respond to the growing and divergent interests of States as opposed to resulting to power and force. Andreas Fischer also holds the multiplicity of IDRFs with overlapping jurisdictions merely represents the multidimensional fragmentation of

²⁰ Supra note 2.

²¹ Bruno Simma, *'Fragmentation in a Positive Light'*, 25 Mich. J. Int'l L. 845 (2004).

international community itself and hence attempts to have unified international judicial structure are doomed and elusive as the phenomenon of legal fragmentation cannot itself be averted.²²

Some writers, on the contrary, see this plurality of IDRFs as a negative byproduct of the globalization which needs to be trimmed if not eradicated. To these writers, there are more dangers than there are advantages of the proliferation. Fausto Pocar questions the role of the various IDRFs in the shaping of a coherent international legal order.²³ He suggests that the phenomenon poses the risk of fragmentation of international law. He goes on to emphasize that there exists a possibility of divergent interpretations by the various IDRF interpreting and applying the same substantive law. Indeed, legitimacy of any law is predicated, partly, on the reasonable and relative predictability of its application amongst human beings. Therefore, any human being or a State operating within such a system of codified laws and legal principles would reasonably expect that failure to comply with a certain law or principle is likely to draw certain effects or consequences. However, in a system of plurality of IDRFs, it is possible that the similar facts or legal principle may receive varying substantive interpretations by different IDRFs. Fausto Pocar argues that this may cause international law to considerably fragment. The ultimate effect is that international law would lose a strong grip of credence and legitimacy amongst the States. Luis Barrionuevo Arivalo also argues that the plurality of international judicial institutions undermines the unity and coherence of international law which is likely to lead to competition of jurisdiction amongst the IDRFs as well as encouraging forum shopping allowing – bringing cases before one or more different IDRFs – amongst States each seeking for an IDRF that is best placed or likely to rule in

²² Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Mich. J. Int'l L. 999 (2004).pg. 1004.

²³ Fausto Pocar, *the Authority of International Courts and Tribunals: Challenges and Prospects*, Brandeis Institute for International Judges (2016 BIIJ Brandeis Institute for International Judges).

its favour.²⁴ It has also been argued that the proliferation of international IDRFs has brought changes to the rules of international diplomacy have changed.²⁵

This research studies the unregulated growth of international judicial system and analyzes one of the effects of this growth being the overlap of jurisdictions of the IDRFs. The research, therefore, adopts the position that in the long-run, plurality of IDRFs is counterproductive as it undermines the very international law it seeks to interpret and enforce.

1.7 THEORETICAL FRAMEWORK.

This research will utilize various ideological concepts, theories or schools of thought underpinning the necessity, development and existence of the international justice system. The theories employed in the creation of the present day international justice system offers useful insights on the need for uniformity and clarity in the international justice system so as to achieve the original intentions of the international law and creation of the IDRFs.

The first theory backing up this study is the social contract theory and the interdependence theory. Social contract theory itself relates to individual states and explains a situation where the subjects of a given state or society donate most of their privileges and liberties to a common entity known as the common-wealth. This common wealth also called the state or sovereign embodies this collective and mutual resolve for an organized society.²⁶ The sovereign then holds those privileges to their order and advantage and is placed at a point of trust under the mutual contract created

²⁴ Arevalo, Luis Barrionuevo (2008) *'The Multiplication of International Jurisdictions and the Integrity of International Law'*, ILSA Journal of International & Comparative Law: Vol. 15: Iss. 1, Article 5.

²⁵ Roger P. Alford, *'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance'*, (2009 Notre Dame Law School) paper 9.

²⁶ Dr. G. Sadanandan, *'Modern Political Thought'*, University of Calicut School of Distance Education (2011) pg. 7.

between it and the subjects. This enables them to adopt a common enforceable stance on their interactions promoting order and sobriety amongst them. The rationale for this social contract is the ‘*Hobbesian*’²⁷ realization that man is bound to pursue individual interests and war is caused by the fact that people, invariably, have equal needs, scarce resources and opportunities and low selflessness²⁸ Hobbes argues that in nature human beings are selfish and life in the state of such nature is brings war between and amongst men thereby creating a condition of unending struggle. In this condition, the lives of human beings are reduced into the state of being, “solitary, poor, nasty, brutish and short.”²⁹ Every man seeks to achieve self-interests. Therefore, self-interest is paramount in every society. Consequently, there must be some basic guarantees or minimums that people will not injure one another as they interact in the ordinary course of their businesses. The compromise is laws and governments as vital tools of promoting order, peace, harmony and tranquility in the society. The individuals of a given society give their express or implied consent to surrender some of their rights and freedoms to the authority of the ruler who enjoys popular support, in exchange to having their remaining rights and freedoms protected. There lays the social contract. Therefore, necessity of an absolute authority, in the form of a sovereign, results from the utter cruelty of the state of nature (anarchy). Through the social contract system judicial institutions are set up for resolving disputes as between the citizens or between a citizen and the sovereign.

Taken to the international context, this theory posits that states are bound to go after their own needs, sometimes even at the detriment of other States. The ensuing effect would be anarchy and conflict amongst the States. This research paper emphasizes that, going by this social contract

²⁷ Alubabari Desmond Nbeta, ‘*The Social Contract Theory: A Model for Reconstructing a True Nigerian Nation State*’, International Journal of Humanities and Social Science Vol. 2 No. 15; August 2012.

²⁸ Ibid

²⁹ Cindy and Reidy David, ‘*Human Rights: The Hard Questions*’, New York: Cambridge University Press, 2013. Pg. 403.

theory, the necessity for IDRFs arises from the unregulated competition of states. This rational competition of interests by states makes the international system anarchic making survival as the most basic motive driving the states at the international level. To prevent this, states collect themselves under one umbrella and surrender some of their rights and privileges of sovereignty for the common good of all states.

A good example of the resolve by the States to establish as amongst themselves an organized international judicial system of accountability of States' actions is the legal and institutional structure established under the umbrella of the UN. The UN, established at the backdrop of the end of the Second World War, is primarily required to maintain and enforce international harmony and safety and enhance cordial or affable relations amongst the member States. Further, the UN is obligated to foster global peace and promote States' regard to human rights and freedoms.³⁰ The failures of states during the 1st and 2nd world wars and the massive human rights atrocities experienced in the wars necessitated the creation of a collective universal body that would neutralize individual state's powers and actions for the benefit of the wider community of states. The compromise entity was the UN with various roles delegated to it by member states under its constitutive Charter amounting all to checks and balances on the states. The UN was therefore a protest to the deplorable state of mankind during the 1st and 2nd World Wars and in realization that unfettered individual state power and interests were prone to abuse and hence a threat to international order. The UN was designated and obligated to be the regime clothed with moral right and legal capacity to discuss and judge how States use force in order to ensure that global security and peace is maintained. In this respect the UN represents the clearest and most formal, organized and integral IO to fulfill the desire by States to surrender some of their rights to a universal body with the mandate of perfecting them. It is an IO regulating state conduct as well as

³⁰ Article 1 of the Charter of the United Nations.

a regime or forum through which states occasionally meet and deliberate on global affairs and matters.

Chief, amongst its roles, the UN is tasked to sustain global security and tranquility. The UN is able to achieve this through, amongst others, the judicial institutional framework under the auspices of the UN. While a bulk of the current IDRFs are formed under the umbrella of the UN, there are other independent and semi-independent IDRFs created under independent regimes. The international judicial system under the UN, hence, presents this social contract resolve by states to exist harmoniously and pursue their interests in tandem with international law. Indeed, the preamble of the Charter of the UN states that the purpose of the Member States of the UN is to ensure States live harmoniously and peacefully through mutual respect. The major IDRFs under the umbrella of UN include the International Court of Justice (ICJ), and the International Criminal Court (ICC). The international civil and criminal judicial system under the ICC, the ICJ and other tribunals ensures that there is organized, peaceful and pacific dispute of settlements in tandem with the goals of the UN Charter.³¹

Closely related to this theory is the interdependence theory. Interdependence of states increases their domestic output, leverages their shortfalls and opens them up to new technologies through global trade.³² Global trade and the structures set up to facilitate that trade such as IDRFs, therefore, reduce the incentive for military conquest.³³ Therefore, IDRFs created under the auspices of the UN, reduces conflicts by between States and promotes international amity and

³¹ Article 1 of the Charter.

³² Toni Ann Pazienza, *'Challenging the Democratic Peace Theory - The Role of US-China Relationship'*, University of South Florida Scholar Commons Graduate Theses and Dissertations, May 2014.

³³ Supra note 11.

safety. Some authors contend that the need for interdependence of States in modern times stems from the realization that States at the international setup have obligations *a priori* to pursue ideals beyond their own national interests as they are mutually embedded in the same aim of surviving and prospering.³⁴ Interdependence of States in modern times is rooted and engraved in almost all statutes and conventions whether bilateral or multilateral. The statutes stress on the need for cooperation in achieving their objects. As States formulate rules and structures of their engagements, they likely to set up dispute resolution fora to handle their differences and conflicts arising from their relations.

These theories are important to this study as they help to identify legitimacy and necessity of IDRFs in the modern world. The theories also illustrate why there is need for uniformity and objectivity of justice rendered by the IDRFs as, failure to abide by these tenets, would awaken or accelerate the very problem of anarchy that the IDRFs are set up to resolve.

1.8 HYPOTHESIS.

The study will put into test the following assumptions:

- (1) Overlap of jurisdiction amongst IDRFs is rife and a rampant in the modern world.
- (2) The overlap of jurisdiction amongst IDRFs creates various challenges in the international justice system.
- (3) The present textual and ideological approach to international law is weak and ineffective in eliminating overlap of jurisdiction in IDRFs.

³⁴ Fernando R. Teson, *International Obligation and the Theory of Hypothetical Consent*, Yale Journal of International Law Volume 15 Issue 1 (1990) pg. 91.

1.9 RESEARCH METHODOLOGY.

This research contains information from divergent sources. The study employs primary along with secondary data. It includes primary documents such as treaties, charters, conventions, protocols and declarations adopted by and amongst states. Secondary sources used in this research include international cases resolved or pending resolution in different IDRFs, reports and resolutions of UN, books, journal articles, newspapers, magazines and internet sources. The study will be descriptive, analytical and prescriptive. It will involve a descriptive look at the phenomenon of overlap of jurisdiction in international dispute resolution. The study will analyze the existing IDRFs, the nature and extents of their jurisdictions and endeavor at prescribing solutions to the phenomenon. The research methods will primarily include:

1.9.1 Library Research.

The study will be aided mainly by materials from the University of Nairobi Jomo Kenyatta Memorial Library. The option of this source is grounded on the reason that public international law, international relations as well as international studies are some of the core course units offered by the Law Faculty, Department of Political Science and Public Administration and Institute of Diplomacy and International Studies of the University respectively. Similarly, as will be discussed later in this study, international courts and tribunals are creations and facets of international law, international relations and politics. Relevant materials are provided in the form of books, journal articles and dissertations.

1.9.2 Online/Internet Research.

This is provided at the University of Nairobi as well as personal work and home-based internet. The University of Nairobi offers resourceful database of online resources such as online books, journal articles, catalogues, policies, reports, newsletters, lectures and speeches. These materials

will provide a lot of up to date information on types and performance of IDRFs. The material from the internet is also cheaper to access as compared to other sources. The researcher will also use materials from websites of institutions and organizations that deal with observation, audit and enforcement of international law. These for example include the UN, International Labour Organization (ILO) and the Human Rights Watch.

1.9.3 Use of Interviews as a Methodology.

Another methodology that will be applied in this research is interviewing various stakeholders concerned with the establishment, enforcement of international law particularly from Kenya. These, for example, include the International Law Department within the Office of the Attorney General and Department of Justice. This data collected from the interviews will enhance and add more insight to the research.

1.10 LIMITATION OF THE RESEARCH METHODOLOGY.

This study encountered various hurdles in terms of research techniques which include;

- (1) Limited existing literature in the area of overlap of jurisdictions amongst various IDRFs.
- (2) Lack of proper or sufficient resources to travel and link up with agencies and government institutions from other states and other resourceful individuals specifically dealing with interpretation and enforcement of international law, for further, better and more insightful information on the issue.

1.11 CHAPTER BREAKDOWN.

The dissertation will contain four chapters, which will be broken down as detailed below.

1.11.1 Chapter 1.

The first chapter of the thesis will be an introduction to the research, which will contain the research proposal: a background to the study, the problem being addressed by the paper, the aims of the paper and relevant questions the study seeks to answer. The Chapter also include the methodology and theories employed in the research. The chapter will introduce the problem of jurisdictional overlap created by proliferation of international disputes resolution tribunals and briefly assess the advantages and disadvantages of the overlap to international law and and States' relations. This is by giving a background history of the origin or creation of IDRFs and their significance in international law. The topic will define international jurisdiction, how it is created or established and its significance.

1.11.2 Chapter 2.

The second chapter will discuss the establishment and extents of jurisdiction of some of the major IDRFs and some of the most remarkable decisions from the forums which have substantially shaped international law or international relations of states. This chapter will, therefore, identify specific IDRFs that were originally intended to interpret or enforce international law, the extent or limits of their jurisdictions and how those jurisdictions have been altered, amended or otherwise affected by proliferation of IDRFs with similar or closely related jurisdictions. This chapter will discuss this overlap or conflict be giving examples of decided international cases showing the lack of a properly defined judicial institutional hierarchy at the international level.

1.11.3 Chapter 3.

Chapter three will assess the advantages and/or disadvantages of the proliferation or plurality of IDRFs having overlapping or conflicting jurisdictions and the overall effect to international law.

The Chapter also assesses the effects of the phenomenon to States' relations. This chapter will show how the effects of overlap or conflict of jurisdictions amongst IDRFs on the fabric of international law.

1.11.4 Chapter 4.

The fourth chapter gives general summary, observations, recommendations and conclusions. This chapter concludes by discussing recommendations to prevent overlap or conflict of jurisdictions of IDRFs. This chapter thus contends that there is a need for reforms and textual and ideological shift at the international level to deal effectively with this problem.

2.0 CHAPTER TWO

2.1 Establishment and Nature of IDRFs.

As discussed earlier in this paper, IDRFs primarily emanate from Treaties or Conventions and could be as many as there are international relations issues amongst States: migration, religion and trade. Yet while some IDRFs adopt international arbitral setups, others take more formal in-court proceedings. Most IDRFs by nature are treaty-specific in that they only apply in respect to implementation and enforcement of the subject treaty and only as between or amongst the States that are party to the treaty. As such, they are meant to address specifically identified issues under the treaty such as sharing of trans-boundary natural resources. Other IDRFs are regional in nature applying to a specific region that share certain attributes, for example geographical proximity, to the exclusion of the wider community of States. An example of such an IDRF is the African Court on Human and Peoples' Rights (the ACHPR). The ACHPR is a continental judicial organ created by African States to ensure protection of the rights and freedoms of Africans.

However, some IDRFs take somewhat a universal jurisdiction/application nature such as the ICJ and the ICC. Although the universal jurisdiction of the ICC is not specifically stated in the Rome Statute, its extent can be argued to be universal given that the court is capable of prosecuting international crimes committed by persons coming from States that have not subscribed to the Rome Statute.³⁵ In addition, some of the crimes to which the ICC has jurisdiction over such as genocide overtime have been elevated to fall under the umbrella of non-derogable principles of international law and hence their punishment draws the support of States globally. Similarly, the ICJ has jurisdiction to make an opinion rendering its judicial advice on any legal issue at the instance of an entity allowed by the Charter of the UN to request for such an opinion.³⁶ The ICJ

³⁵ Article 13 of the Rome Statute.

³⁶ Article 65 (1).

further has the general jurisdiction to in every legal dispute that involves how a treaty is interpreted or any issue of international law or issues of breach of international obligations.³⁷ States' obligations within the Charter of the UN under which the ICJ is established through its constitutive Statute annexed to the Charter are also given superiority ranking above all other obligations under any other international agreement.³⁸ This can be argued to place the ICJ at a status higher than other IDRFs. Apart from the ICC and the ICJ, almost all other IDRFs have been established within a particular context limited as to the subject matter of application as well as the regional geographical area of coverage.³⁹

Some IDRFs such as the ICC have relatively more established binding force of their decisions given that the decisions are usually declaratory of the issues brought before the court as well as the punishments given to the accused person(s) while other IDRFs merely issue advisory opinions whose binding power is weak. The decisions of other IDRFs only bind States that are parties in the disputes and only as far as the determined issues are concerned. A good example of such an IDRF is the ICJ.⁴⁰ In addition, some IDRFs like the ICC exercise criminal jurisdiction while others such as the ICJ, invariably, exercises civil jurisdiction. In addition, the ICJ only has States as possible parties before the Court⁴¹ while only individuals have standing before the ICC.⁴² Therefore, there exists similarities as well as differences amongst IDRFs both as to their philosophical underpinnings as well as the nature and extents of the jurisdictions.

³⁷ Article 36 (2).

³⁸ Article 103.

³⁹ Supra note 9 pg. 75.

⁴⁰ Article 59 of the Statute of the ICJ.

⁴¹ Article 34(1) and 35(1) of the Statute of the ICJ.

⁴² Article 20 and 22 of the Rome Statute.

What is common across all IDRFs is that unlike in municipal courts and tribunals that often have the backing of the local police systems to enforce arrests and observance of the courts' decisions and orders, almost all the IDRFs lack a properly established enforcement mechanism of their decisions, judgments or advisory opinions due to lack of an international police system. This has, partly, crippled the credence of states and people on the international justice system.⁴³ The observance and respect of such decisions is usually left to the mercy of the states' goodwill – which is entrenched in international law as *pact sunt servanda* under the Charter of the United Nations⁴⁴ and the Vienna Convention on the Law of Treaties 1969 (VCLT).⁴⁵

Secondly, the IDRFs operate autonomously of each other with no real or documented organized relationship of normative or institutional coordination such as hierarchy of authority which is often the case in common law countries. This is because, invariably, treaties and conventions are equal with none being superior to the other unless explicitly contained in the text of a treaty that it is either superior or subject to another treaty. The lack of an international judicial appellate system is also common with IDRFs. In addition, apart from a limited number of IDRFs, in most cases the jurisdiction of IDRFs is consensual in that States submit willingly and deliberately to the jurisdiction of a particular IDRF either at the point of signing, ratifying or accession of the constitutive treaty or convention.

This paper appreciates that today there are many IDRFs and, hence, impossible to exhaust the nature and extent of jurisdiction of each one of them in this paper. The paper, therefore, will assess the jurisdiction of selected IDRFs such as the ICJ, the Inter-American Court on Human Rights

⁴³ Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, Georgia Journal of International and Comparative Law Volume 35 2006 Number 1, pg. 5.

⁴⁴ Article 2(2).

⁴⁵ Article 26.

(IACHR) and the African Court on Human and People's Rights (ACHPR) and how the jurisdiction has been encroached or replicated to other IDRFs such as the regional judicial organs. This will be done by aid of decided cases.

2.2 LaGrand (Germany v. United States of America)⁴⁶ and Mexico vs USA.⁴⁷

An analysis of these two cases reveals the likelihood of an overlap of jurisdiction between two IDRFs. Both cases concerned the interpretation and enforcement of Article 36 of the Vienna Convention on Consular Relations (VCCR). At the ICJ, the case was that Article 36 of the VCCR had been, allegedly, breached by the United States of America (USA) in its arrest, conviction and execution of German citizens, Karl and Walter LaGrand (the "LaGrands"), for the offence of first-degree murder in Arizona, USA, in 1987. Section 36 paragraph 1 (b) of the VCCR, to which both USA and Germany are parties to, required USA to inform both the LaGrands of their right to consular assistance under the VCCR as well as the German consulate in USA of their National's arrest. USA did not oblige to this requirement. Meanwhile, the LaGrands informed the German authorities of their predicaments. USA proceeded to execute Karl LaGrand on 24th February, 1999 prompting Germany to file an application before the ICJ on 2nd March, 1999 against USA for violations of the requirements and principles of VCCR.

Pending full hearing and determination of the application, Germany relying on Article 5 (1) of the VCCR and Article 41 of the Statute of the ICJ requested for a provisional measures order to protect its diplomatic rights as well as stay the intended execution of Walter LaGrand. The ICJ directed USA to undertake that he was not killed before the final determination in the proceedings. Still, USA, did not comply with this stay order and the ICJ upheld all claims by Germany holding that

⁴⁶ Judgment, I.C.J. Reports 2001, p. 466.

⁴⁷ Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16.

USA had violated its duties owed to Germany and the LaGrands under the VCCR in addition to breaching its obligation under the Provisional Measures Order by allowing the execution of Walter LaGrand.

Parallel to this interpretation of Article 36 of the VCCR by the ICJ, a similar application for interpretation of the same provision was pending before the IACHR. The application for advisory opinion on Article 36 of the VCCR had been sought by Mexico on 9th December, 1997. Mexico sought to get an interpretation, among others, of the Court's rendition on the rights and fundamental freedoms given to foreigners under Article 36 of the Convention. Mexico further sought to have the Court hold that USA was obligated to notify any foreign nationals put in detention for crimes to which the penalty was death of their rights under Article 36(1)(b). Mexico advanced the argument that such foreign detainees are entitled to the rights during the arrests and before they record any confession to the police or the foreign Courts.

It may be argued academically that the IACHR was called upon to merely render its opinion on Article 36 of the VCCR while the ICJ had been called to make definitive determinations of the same provision between Germany and USA. However, it cannot be gainsaid that the two IDRFs were interpreting the same international law and international principle on consular relations of States. Similarly, while the two IDRFs reached fairly the same position, it would have left the international standing of Article 36 of the VCCR in a legal quagmire had the two 'judgments' - which were only months apart - reached parallel or varying findings. Even though none of the findings by either Court would have been binding to other States, contradictory opinions could, arguably, have dented the import and credibility of Article 36 of the VCCR to the other States. Indeed, given USA was the respondent in both matters filed at the ICJ and the IACHR, different findings by the two Courts on Article 36 of the VCCR would have left USA at crossroads of which

opinion to follow in future cases. These cases demonstrates a clear overlap of jurisdiction between the ICJ and the IACHR on the interpretation and enforcement of the same provisions of VCCR. The Courts are established under distinct laws and are autonomous with no legal or institutional frameworks linking them.

The danger presented by this scenario is that a State party to both the UN as well as the American Convention on Human Rights has liberty to approach either of the two Courts for a determination of a dispute relating to Article 36 of the VCCR. Such a State is likely to select the forum it most feels comfortable that it will get a favourable outcome. This encourages forum shopping by States. It is also an unnecessary duplication of roles for the courts. Equally, a party may institute parallel proceedings in order to compare the resultant decisions of the two tribunals.

2.3 Democratic Republic of the Congo vs Uganda.⁴⁸

The case was filed by the Democratic Republic of Congo (DRC) at the ICJ on 23rd June, 1999 in which the DRC accused the Republic of Uganda of, among others, acts of armed aggression, by way of military and para military activities on DRC's territory and illegal occupation of DRC's territory all in contravention to the UN Charter and the Charter of the Organization of African Unity. DRC further accused the Republic Uganda of arming rebel groups in the DRC through provision of military arms and logistics and financial assistance in addition to mining of DRC's natural resources. The DRC, therefore, sought remedies against the Republic of Uganda including the termination of the wrongful acts and reparations for the breaches.

In addition to presenting its grievances before the ICJ, the DRC simultaneously filed a complaint against Uganda, alongside Rwanda and Burundi, to the African Commission on Human and

⁴⁸Judgment, I.C.J. Reports 2005, p. 168.

People's Rights (the "Commission") on 8th March, 1999. The main roles of the Commission are to protect human rights and basic freedoms.

During the proceedings of the matter before the Commission, Uganda accused the DRC of forum shopping as it had presented the same grievance before other international fora namely the ICJ and the UN Security Council. Uganda insisted that this multiple litigation by the DRC would present hinder the performance of international affairs and adjudication thereby eroding the integrity of the IDRFs involved as they were likely to reach to divergent opinions. The Commission, either disregarding these submissions by Uganda or stamping its authority and jurisdiction, asserted that it had the jurisdiction and obligation of determining the matter since the matter involved humanitarian law and the objects of the , but also within the mandate of the Commission." Its decision delivered in May, 2003 the Commission found the Republic of Uganda in violation of various Articles of the Banjul Charter and recommended that Uganda make reparations to the DRC in addition to withdrawing its troops immediately from DRC's territory. On the other hand, the ICJ found Uganda in contravention of international law for engaging in military activities in DRC's territory, occupying the territory as well as actively arming and aiding rebel groups within the DRC. The ICJ, therefore, called upon the Republic of Uganda to make reparations for the harm caused to the DRC and its citizens.

Had Uganda to obey both decisions by the Commission and the ICJ, then it would have made double reparations to the DRC. This case clearly presents the dilemma of having multiple international judicial fora that have jurisdiction over the same matter. The dangers of such a scenario are not just presented by the likelihood of conflicting decisions from the fora but also the wastage of resources and time during the forum shopping. Litigation both at the Commission and the ICJ only went to compounding the costs incurred or spent by the DRC and the Republic of

Uganda in the resolution of the matter. In addition, the case reflects the lacuna in international law of lack of a documented or structured system of coordination amongst IDRFs. Another possibility is that the DRC may have been shopping for the most suitable forum from which it would obtain the best favourable decision or outcome. This is because its complaints or cases both before the Commission and the ICJ were similar; based on the same set of facts, against the same parties and premised on the same international laws or principles. As such, this paper argues that the claim by Uganda that the dilemma created by plurality of the IDRFs may lead to dilution of the credibility of international law and jurisprudence is valid. Although the Commission is, strictly, not a court its *modus operandi* as well as its procedures represent fairly formal adjudication process as are available in ordinary courts of law. Similarly, even though the Commission is a regional (African) entity unlike the ICJ that draws international membership of States, it nevertheless qualifies as an IDRF given its stature as an IGO.

2.5 Belgium V. Senegal.⁴⁹

The case concerned deposed Chadian president Hissène Habré who governed Chad between the years 1982 and 1990. Upon being overthrown his regime was accused of massive human rights violations amounting to including crimes against humanity, murders, tortures, cruelty and forced disappearances of Chadian citizens. He fled to Cameroon where he lived shortly before successfully seeking and obtaining asylum in Senegal. While in Senegal, various attempts between 2000 and 2005 were made to try him for the atrocities committed in Senegal, albeit, unsuccessfully. The suits in Senegal were based on United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 which outlawed the atrocities. In 2009, Belgium brought the suit before the ICJ against Senegal accusing the latter of contravening Article

⁴⁹I.C.J. Reports 2012, p. 422.

7(1) of the 1984 Convention under which Senegal was obligated to either extradite Hissene Habre or to have an alternative competent body take up the matter for prosecution.

Even before that Belgium had unsuccessfully sought his extradition to Belgium where warrants for criminal charges had been issued. Senegal, opposed to the extradition, had referred the issue to the AU which had mandated Senegal to try Hissene Habre through a competent court that would guarantee his right to a fair trial. Senegal had, in light of AU's directions, amended its penal laws appropriately in order to bring Hissene Habre under the net of the provisions of the amended laws. Hissene Habre on the other hand challenged his prosecution by Senegalese authorities both at the ACHPR as well as the Economic Community of West African States (ECOWAS) Court of Justice citing his civil-political rights under the ICCPR. Under its Article 15(1), a party cannot be tried for any criminal offence through an act or omission which was not outlawed in his or her State of origin or international law when it was committed.

His case before the ACHPR was dismissed while ECOWAS Court of Justice proceeded to hold in 2010 that any trial in a Senegalese court under the amended criminal law would infringe his rights. However, the Court also held that Senegal could prosecute him under an expedient special procedure of global character. Meanwhile in the year 2012, the ICJ in its judgment found Senegal in breach of its obligations under the 1984 United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment and directed Senegal to forward the case to qualified authorities to prosecute the case or alternatively extradite him. The compromise judicial body was an AU-Senegal hybrid tribunal dubbed the African Extraordinary Chamber which convicted Hissene Habre in 2016 and sentenced him to life imprisonment.⁵⁰

⁵⁰ African Union Executive Council Report of the Commission on the Hissene Habre Case Twenty-Ninth Ordinary Session 10 – 15 July 2016 Kigali, Rwanda.

The case represents yet another intriguing web of overlap and competition of jurisdiction amongst IDRFs coming into contact with at least four international judicial bodies or fora. Senegal was faced with the risk of contradictory demands from the ICJ, the AU and the ECOWAS Court in relation to the same person and the set of facts. The case demonstrates the inability and unwillingness of IDRFs to work harmoniously towards achieving a common goal. It also demonstrates the decentralization of international law, which can partly be blamed on the absence of an international legislative organ, which may result to confusion on the proper forum of interpretation or enforcement. The paper does not make an argument in favour of either the ICJ, AU or the ECOWAS Court. Rather it demonstrates how two or more IDRFs faced with analogous set of facts or while interpreting the same international law or principle are likely to reach to divergent opinions. Again the problem is not so much with having multiple international judicial institutions clothed with jurisdiction over the same issue or matter but the effect differing opinions on such a principle would have on the integrity and efficacy of international law.

2.6 Nicaragua v. United States of America⁵¹ and Prosecutor v. Tadic.⁵²

The two cases also clearly illustrate two IDRFs interpreting the same international law but reaching to different conclusions. In *Nicaragua v. USA* (the “Nicaragua case”), Nicaragua had brought an application before the ICJ on 9th April, 1984, accusing USA of engaging in adverse activities in its territory and also against it in violation international law. Nicaragua accused USA of funding, in arms as well as logistics and financially, paramilitary rebel and militia groups in Nicaragua called

⁵¹ I.C.J. Reports 1986, p. 14.

⁵² Tadić (IT-94-1-A), Appeals Chamber, 15 July 1999.

Contras. These military and paramilitary activities had led to massive infringement of human rights in Nicaragua including murder, torture and forced disappearances.

The ICJ in its judgment of 27th June, 1986 held that, although USA had breached international law, the actions of *contras* could not be directly attributed to the USA even if the unlawful actions of USA were “preponderant or decisive” towards the activities of the *contras*. ICJ’s opinion was that the actions of training, funding and equipping the *contras* by USA were in themselves insufficient to be attributed the atrocities by the *contras* in Nicaragua. The illegal actions of USA would be said to have a bearing on the actions of the *contras* only if it could be succinctly demonstrated that USA exhibited “effective control” of the *contras*’ activities in Nicaragua that led to the atrocities.⁵³ According to the ICJ, it had not been satisfactorily demonstrated that all the atrocities, strategies and tactics of the *contras* at every level of the conflict were orchestrated by the USA.

2.7 Prosecutor v. Tadic

A decade later after the ICJ’s decision in the Nicaragua case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) while convicting Dusko Tadic of having violated certain international conventions and general provisions of international law with regards to the 1992 attacks against the non-Serb civilians in Bosnia and Herzegovina made an entirely different interpretation. The ICTY held that in an instance where the subject entity has organized or hierarchical structures, for example a military unit or an armed gang (not an individual acting on his/her own), then a third State having the overall control of the entity is directly liable the unlawful acts or omissions of such an entity as the atrocities would be of international magnitude.⁵⁴ The ICTY further proceeded to question the reasoning behind the Nicaragua case

⁵³ Supra note 51 paras 110, 115 and 116.

⁵⁴ Paragraphs 120, 130 and 131.

which clearly demonstrates that IDRFs may sometimes compete to outdo each other or stamp their positions.

The above cases portray a growing trend, with the proliferation of IDRFs, of possible conflicts and overlaps of jurisdictions of the international judicial organs. This paper argues that there is need to harmonize the operations of the IDRFs to avoid competing or contradictory judgments or opinions as demonstrated in the Tadic and Nicaragua cases. Indeed, in *Bosnia and Herzegovina vs. Serbia and Montenegro*⁵⁵ the ICJ responded to the ICTY's indictment of its reasoning stating that the ICTY had allocated itself jurisdiction over issues not submitted to it as the jurisdiction of the ICTY is criminal in nature extending to natural persons only and not States. To the ICJ, therefore, the ICTY had no business discussing States' responsibilities under international law. Such a competition between the IDRFs should not be encouraged within the legal frameworks of international law as it would lower the integrity of such institutions.

⁵⁵ I.C.J. Reports 2007, paras 403 and 404.

CHAPTER 3

Advantages and Disadvantages of the Proliferation or Plurality of IDRFs with Overlapping or Conflicting Jurisdictions and Effect on International Law and International Relations of States.

3.1 Advantages.

The overlap of jurisdiction created by plurality of IDRFs has both positive and negative consequences and attributes. This paper appreciates that, expectedly, in the course of disputes resolution and interpretation of international, two or more IDRFs may be faced with the interpreting or rendering an opinion on the same principle of international law. Therefore, overlap of mandates amongst IDRFs is a direct consequence of their proliferation. This reality has been acknowledged by ITLOS in the Southern Bluefin case.⁵⁶ Overlap of jurisdiction amongst IDRFs has its own share of advantages to the international system of States and non-state actors and their relations. It also presents certain opportunities to other professionals and players involved at the international system such as scholars and policy makers.

3.2 Promotes Global Peace and Security.

On one hand the overlap evidences the resolve by States to surrender some of their sovereign powers and rights towards achieving common goals such the ones embodied in the UN Charter. These purposes include the achievement and maintenance of global peace and security through joint measures, development and maintenance of friendly relations among States and solving international problems of all nature. This mutual resolve by States, as discussed in this paper, can be argued to have support of both the natural and interdependence theories of international relations.

⁵⁶ Australia and New Zealand v Japan, ITLOS Award of 4. August 2000.

This willingness of States to work together ensures improved peace and security as the IDRFs are equipped to deal with any differences or disputes arising between two or more States. In that regard, States do not need to resort to force and warfare to advance their national and international interests. IDRFs therefore promote amicable international relations, cooperation and peaceful co-existence of States. It has been argued that the plurality of IDRFs is a necessity committed to the collective cause of the international community and is a sign of continued realization of the vital role of rule of law in States' relations.⁵⁷ The IDRFs choke arbitrariness and power plays by States in their international relations and promote the respect for international respect of law.⁵⁸

Cooperation is advocated for both internationally and globally. The international legal and institutional framework designed under regional and international statutes and conventions, therefore, ensures a system of checks and balances on individual State's power. Indeed, almost all statutes and conventions codify some obligations on member States either sanctioning or prohibiting certain acts and omissions. These obligations shape a State's conduct in its relations with other states. Proliferation of IDRFs is a welcome step in global governance and democratization. Increased international dispute resolution fora is a blessing to complainants. This is because it gives reasonable confidence to the States and non-state actors that there are multiple avenues to determine their disputes. Similarly, some reasonable levels of competition and criticism among IDRFs may improve the quality of judgments and opinions by IDRFs in addition to increasing swift or expedient resolution of disputes.

⁵⁷ Pemmaraju S. Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?* 25 Mich. J. Int'l L. 929 (2004).

⁵⁸ Ibid.

3.3 Ensures Amicable Settlement of Disputes.

Article 2(3) of the UN Charter tasks member States to solve their differences peacefully without creating threats to global tranquility and justice. Most IDRFs are formed in spirit of these goals of the UN. The concept of peaceful settlement of disputes is, nonetheless, not new in international justice as prior to the UN Charter it had been advocated for under the Montevideo Convention. Article 10 tasked States to settle their differences whatsoever by recognized amicable methods in order to promote peace. Similar calls were made under the 1899 Hague Convention for the Pacific Settlement of International Disputes, the revised 1907 Hague Convention for the Pacific Settlement of International Disputes (the “Hague Conventions”) and the 1928 General Act (Pacific Settlement of International Disputes) concluded under the umbrella of the League of Nations – the predecessor to the UN. These laws advocated for friendly settlement of disputes through methods such as diplomacy, arbitration, negotiation, reconciliation, mediation and commissions of inquiries. In this regard, both formal and informal institutions and procedures such as Good Offices and the Permanent Court of Arbitration were highlighted as forums for peaceful dispute resolution. The forums were established to reduce or neutralize habit of States employing force in their relations and to strengthen the global justice.⁵⁹ Plurality of IDRFs is hence in tandem with the goals and purposes of the UN and the international community. However, this is not to mean that the UN strictly demands disputes must be resolved through IDRFs. Actually, Article 33 of the UN Charter itself allows States to solve differences in whichever means of their own choice as long as such means are peaceful. It is not a mandatory requirement to result to structured judicial forums. Multiple IDRFs whether with conflicting or overlapping jurisdictions or not are one of the means to achieve the obligations and aspirations of the UN. This is because they offer avenues for disputes resolution for States and non-state actors, which would have been achieved through recourse to force and war.

⁵⁹ Preambles of the Hague Conventions.

3.4 Creation of Job Opportunities.

Even at the basic level plurality of IDRFs increase employment opportunities for lawyers, judges, scholars, researchers, policy makers as well as support staff. Different or multiple international judicial fora translate to increased platforms for these professionals to practice in. While the ratio of judges and other professionals and employees serving or deriving employment directly or indirectly from the IDRFs may be substantially low compared to the total global population, the contribution however minimal the IDRFs play in reducing unemployment and in creation of wealth and improvement of living standards is worthwhile.

3.5 Growth of International Jurisprudence.

Thirdly, multiple IDRFs with overlapping jurisdictions lead to widened and increased international jurisprudence that help to interpret various facets of international law. As discussed in this paper the wide and diverse nature of international law would require IDRFs of different nature and specializations in order to resolve disputes emanating from any principle of international law. These facets of international law which include global trade and commerce, criminal law, human rights, environment and space law and trans-boundary natural resources cannot possibly be handled by a single international judicial organization. To this end, it may be validly argued that plurality of IDRFs not only promote faster resolutions of disputes between States but promote growth of the fabric of international law. As judges in IDRFs interpret international law, they establish new principles of law.

Although under the constitutive treaties and conventions of most IDRFs, decisions do not bind other States not party to the dispute(s) those decisions remain persuasive sources of law relied upon in subsequent disputes either at the international level or in municipal jurisdiction of States. Recognizing this important role played by judges in interpreting international law the Statute of

the ICJ makes the judicial decisions, alongside writings of eminent scholars, as subsidiary source of international law.⁶⁰ The judges and scholars working at or affiliated with IDRFs when interpreting international law or giving their opinions help to seal any gaps left when the law(s) were being drafted and formulated.

3.6 Enhance and Promote International Regimes.

IDRFs greatly develop and promote international regimes within which they operate in the framework of the constitutive statute or convention.⁶¹ As discussed in this paper, most IDRFs operate within a certain legal regime such as under the auspices of the UN, WTO or regional frameworks for instance the AU or the European Union (EU). These regimes in their founding statutes and conventions embody certain aspirations, goals or purposes. The IDRFs play a major role to the attainment of those aspirations because they are part of the institutional springboard that aid in the enforcing the duties, obligations and goals of the regimes amongst the respective member States and determine any disputes arising between the States. A good example is the Court of Justice of the European Union (CJEU) which is one of the institutions of the Treaty of the European Union. It is tasked with the responsibility of promoting and advancing the values, interests and objectives of the Treaty and of member States.⁶² Just as the CJEU exists not only to solve disputes between or among EU states and to champion the wider collective interests of the EU, IDRFs advance the goals and purposes of the regimes within which they are founded and operate. In the course of promoting the purposes of these regimes, IDRFs also perfect and check compliance of States with the normative obligations and duties laid down under the regimes.

⁶⁰ Article 38 of the Statute of the ICJ.

⁶¹ Supra note 7.

⁶² Article 13 of the Consolidated Version of the Treaty on European Union.

Viewed in this context, then plurality of IDRFs with overlapping jurisdictions can be argued to be a blessing in the international system through enhancing States' peaceful co-existence and cooperation in their international relations and compliance with international law. Multiple IDRFs with overlapping jurisdictions in areas such as human rights, democracy and governance thus contribute to the improved systems of States' accountability. They check whether a state is observing and promoting human rights and basic freedoms. They also enforce international law through of non-compliant States or non-state actors.

3.7 Disadvantages.

On the other hand, overlap of jurisdictions in the international justice system due to proliferation of IDRFs present some salient challenges to the international system. While some of the challenges are mild and their adverse effects may not be felt immediately, in the long run the challenges dilute the very international law and international system that they are initially founded to protect and enhance. Such mild challenges include increased duplication of financial resources and personnel, wastage of resources and the institutional infrastructure. However, some problems of the phenomenon have a more immediate and intensified impact to the development and maintenance of the international system. For instance, divergent opinions on the same set of facts or the same principle of international law may encourage non-compliance by the States concerned where a State may cite the different opinions as an excuse not to abide by the opinion that is adverse to that State's interests. This would reduce States' faith, and hence their probabilities of recourse, to the international judicial forums as mechanisms for resolving their disputes and differences between them encouraging warfare and force instead. The problems created by overlapping jurisdictions due to plurality of IDRFs undermine the efficacy of international law.

3.8 Conflicting Opinions.

Overlap of jurisdictions amongst IDRFs cannot be eradicated or wished away completely. As stated earlier in the paper, there are certain positive attributes of the overlap. However, this overlap can sometimes lead to contradicting or divergent opinions. Overlapping of jurisdiction arises where two or more IDRFs have jurisdiction or power to determine the same dispute or interpret the same principle of international law. For instance, in the case of Germany vs. USA and Mexico vs. USA, the ICJ and IACHR respectively interpreted the same provisions of the VCCR although their jurisdictions emanated from different laws. Conflicting opinions arises where two international courts faced with the same set of facts or interpreting the same principle of law reach to different conclusions. Divergent opinions by judges on the same principle of international law may undermines the reliability on the jurisprudence so created. Conflicting opinions leads to uncertainty of the law applicable since it loses its predictability and reliability. For example, the creation of the ITLOS has been described as a move parallel to the ICJ and which is likely to undermine the uniform growth of jurisprudence within the international system.⁶³ The various IDRFs as well as the international regimes are likely to be drawn into judicial or scholarly competitions leading their actions or decisions to enter into conflict. These conflicts, especially in the absence of an international appellate judicial organ, may render the jurisprudence of international unpredictable and a poor recourse and source of law. This would negatively affect the international relations of States as the fabric of international law which harmonizes these relations as well as their peaceful co-existence becomes pricked. Similarly, inconsistent rulings may fail to exhaustively resolve the subject dispute and in some instances lead to the creation of new disputes. Law is expected to have some considerable degree of predictability, uniformity and impersonality in order to be said to accord consistent fairness and equality.

⁶³ Supra note 57 pg. 961.

Overlapping or concurrent jurisdictions amongst IDRFs may also create a conflict where different treaties, each with its own inbuilt judicial mechanism, govern the same specialized subject matter. This is especially so where the treaties have non-identical State parties. The conflict is likely to arise where the treaties, though governing the same subject matter, contain in their texts different norms of substantive and procedural international law of governing the subject matter.

3.9 Forum Shopping.

This entails where a State has the unrestricted liberty to choose one of the IDRFs amongst IDRFs with overlapping or concurrent jurisdictions. The particular State is bound to select the forum that it best considers favourable to its case and may consider factors such as location or the seat of the court or tribunal, composition of the bench of judges of the tribunal, previous decisions of the IDRF in a related matter and sentiments of the judges available in the public domain over a particular issue or international principle of law. This therefore creates bias of States either against or in favour of certain IDRFs. Overlapping or concurrent jurisdictions may also be argued to allow a State to file multiple proceedings before different IDRFs over the same issue in order to compare decisions. Examples are the case of the DRC vs. Uganda⁶⁴ and the MOX Plant case.⁶⁵ In the former case, the DRC commenced parallel proceedings against Uganda at the UN Security Council, the Commission and the ICJ over the same dispute.

Similarly, in the MOX Plant case Ireland instituted multiple proceedings against the United Kingdom (UK) objecting to the construction and use of the MOX plant in Sellafield England that produced oxide fuels during the recycling of plutonium and uranium to process nuclear fuel. Ireland and UK were State parties to the two treaties then addressing the issue of environmental

⁶⁴ Supra note 48.

⁶⁵ Ireland v United Kingdom ITLOS Case No 10, ICGJ 343 (ITLOS 2001).

degradation being UNCLOS and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). Ireland claimed that the MOX plant presented adverse trans-boundary environmental effects emanating from the radioactive wastes of the Plant. Ireland, hence, instituted the proceedings against UK before the OSPAR arbitral tribunal relying on Article 32 of the OSPAR Convention, before the ITLOS in accordance with Article 287 of UNCLOS and also before the European Court of Justice (ECJ). The concurrent jurisdictions of all the forums in the dispute gave Ireland the luxury to file multiple and parallel proceedings before them while the issue could have been dealt with at the instance of one forum.

According to some writers forum shopping arises in three scenarios namely, sequential proceedings, parallel proceedings and alternative proceedings.⁶⁶ According to the two scholars, in sequential proceedings, a court or tribunal is called upon to determine a dispute which another tribunal has already decided earlier. In parallel proceedings a court of tribunal is seized of a dispute which is concurrently pending before another court. Alternative proceedings, on the other hand, entail a situation where a court is requested or called upon to decide a dispute or issue over which another tribunal also has jurisdiction to determine but the matter has not yet been brought in the latter court. In domestic courts the three scenarios are countered by various principles and doctrines including *res judicata*, *sub judice*, *lis pendens*, judicial recusal, joinder and consolidation of matters and preclusion, which unfortunately are not readily available to litigants in IDRFs.

Res judicata prohibits a court from determining the merits of a matter between specified parties that has already been determined by another court with finality. *Sub judice* and *lis pendens* entail a situation where a dispute or matter is already before a competent court or tribunal and hence bars the same matter from being discussed or determined in another tribunal. Judicial recusal and

⁶⁶ Supra note 10 pg. 85.

preclusion doctrines require a tribunal or judicial officer to absorb himself off a matter where, for instance, the conduct or action of the judge creates bias or reasonable doubt as to his or her objectivity to determine the matter. An example is where the judge has expressly made sentiments or opinions in the public domain that expresses his bias in favour of or against a particular issue. Similarly related matters borne out of the same set of facts and falling between the same parties may also be consolidated or joined to avoid duplicity of suits, contradictory opinions or judgments, double jeopardy as well as wastage of time and resources.

One of the reasons why these principles and doctrines are not readily available in the realm of international law is because each IDRF, even though interpreting the same set of facts or principles of law, is operating within a defined textual and jurisdictional boundary in accordance with the constitutive treaty or convention or the respective regime, if any, under which it operates under. Therefore a tribunal such as ITLOS may be interpreting or determining the same international law principle as a tribunal established specifically to handle human rights such as the ICC. The two judicial organs are likely to make relatively distinct findings based on the jurisprudential umbrellas they operate under. Yet again, these principles at the domestic level apply to a well constitutional and statutory synthesized judicial system of hierarchy and coordination whereas IDRFs operate autonomously of each other.

3.10 Fragmentation of International Law.

According to the UN overlap of jurisdiction amongst IDRFs is also likely to result to fragmentation of international law caused by conflicting jurisprudence.⁶⁷ By fragmentation is meant the erosion of general international law leading to loss of coherence, certainty, and predictability as there are

⁶⁷ Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, 81, pg.12 [ILC Report] pg. 12.

no reliable mechanisms to deal with the inconsistencies.⁶⁸ Although there lacks a unified definition of this phenomenon, it has been defined as the development of highly esoteric areas of international law.⁶⁹ The argument of the ILC is that new sets of international law which are either functionally limited in context of area of application or geographically limited to certain regional blocks end up diluting coherence of general international law. The ILC argues that these laws seek to create deviations from the original fabric of international law which represents the divergent interests of States and non-state actors.⁷⁰ For instance, States within a particular geographical area may elect to create amongst themselves a statute or convention providing for rights and obligations in a certain area previously governed by general international law. The biggest distress is that the multiplicity of IDRFs that have similar mandates makes the IDRFs uncoordinated. In the adjudication realm, this promotes fragmentation of the law and undermines its legitimacy and authority.

This drift or departure results in to two competing international law norms or principles applicable to the States. Equally, States sharing common interests such as common natural resources may adopt a treaty governing their interests in the particular resource and, in so doing, create rights and obligations not previously provided for under general international law. This affords States the opportunity to ‘customize’ international law to suit their interests or peculiar circumstances. Anne Peters argues that this may bring about conflicts and incompatibilities of legal obligations of States under international law.⁷¹ This conflict results from a competition of diverging obligations emanating from diverging rules. For instance in the case of Congo vs Uganda, the latter would

⁶⁸ Barbara Stark ‘*International Law and Its Discontents: Confronting Crises*’, (Cambridge University Press, 2015). pg. 306.

⁶⁹ Rossana Deplano, *Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry*, (European Journal of Legal Studies), Volume 6, Issue 1 (Spring/Summer 2013), p 67-89.

⁷⁰ Supra note 67 pg. 15.

⁷¹ Supra note 8 pg. 678.

have had to make reparations twice to Congo as both the Commission as well as the ICJ found Uganda of having violated various sovereignty rights of the DRC. As argued in this paper, the proliferation of IDRFs with overlapping or conflicting mandates is not in itself a bad thing and neither is it disappearing soon. The problem emanates from fragmentation of international law ensuing.⁷²

This fragmentation may be classified into two categories. The first category called normative fragmentation which entails fragmentation of international norms due to regional or economic integration of states and the creation of specialized international laws that are subject matter-limited. Examples are special-treaty regimes such as environmental law or maritime law. The special international principles established under these laws may override or displace previously existing international law on such areas. The second classification of fragmentation is the plurality of the international judicial system devoid of rules of hierarchy and cooperation between the IDRFs.⁷³

3.11 Risk of Double Jeopardy or Double Compensation.

Double jeopardy entails a situation where a party is compelled to suffer punishment twice for the same offence or fault. The rule against double jeopardy, expressed in Roman law maxim, *ne bis in idem*, is traditionally and commonly applied in private international criminal law and domestic law and is entrenched in numerous human rights laws such as the ICCPR.⁷⁴ The purpose of the principle was expressed in the case of *Crist v. Bretz*⁷⁵ as ensuring the finality and conclusiveness

⁷² Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 Mich. J. Int'l L. 903 (2004). Pg. 904.

⁷³ Eva Kassoti, '*Fragmentation and Inter-Judicial Dialogue: the CJEU and the ICJ at the Interface*,' Journal of European Legal. Studies, Vol. 8, No. 2 (2015), pp. 22-49. Pp. 35.

⁷⁴ Article 14(7) of the ICCPR.

⁷⁵ 437 U.S. 28 (1978).

of judgments on merits is upheld, the accused party does not continue to suffer embarrassment at the hands of the state, preventing the possibility of an innocent accused person being declared guilty and fair trial in an impartial court or tribunal.

Whilst the principle is not very prevalent in international public law in adjudication of disputes between States, its significance can be applied in the context of this paper to make an argument against multiple tribunals with overlapping jurisdictions over the same set of facts or subject matter. As discussed in the case of the DRC vs Uganda⁷⁶ and the Mox Plant case,⁷⁷ the possibility of a State being held accountable twice by different international courts or tribunals for the same offence or violation(s) of international law is real and prejudicial to such a State. In addition to being punished twice, the State is forced to incur hefty resources and spend a lot of time defending itself in parallel courts or tribunals.

⁷⁶ Supra note 48.

⁷⁷ Supra note 65.

CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSION

4.1 Summary and Conclusion.

Over time international law has developed and expanded to regulate wide range of issues resulting to creation of more international courts and tribunals than ever before thereby shaping the course of inter-States relations.⁷⁸ The pluralist system so developed appreciates and thrives on the diversity of the international system.⁷⁹ This pluralist system has developed to respond to the ever-growing needs of the international system and divergent interests of States and non-state actors. These IDRFs sometimes have jurisdictions or powers that either overlap or conflict. The overlap or conflict has numerous benefits to offer to the international legal system. It contributes to amicable and expeditious settlement of disputes between States, growth of the normative and procedural principles of international law, job creation, enhancement and growth of human rights and sound governance. The multiplication of international judicial bodies is both a consequence as well as evidence of globalization. It is therefore rooted in globalization and cannot be easily eradicated. Trends such as regional integrations have also contributed to growth of the international judicial system with concurrent or overlapping mandates and powers.

On the face of it, this phenomenon appears to be a very progressive addition to international law. However, it poses certain risks to the same international law. These problems include fragmentation and dilution of the norms of international law, conflicting or divergent interpretations of the same treaties and conventions, unhealthy competition between the various IDRFs, wastage of time and resources and duplication of roles, possibilities of double jeopardy or retributions on a state for the same offence or violation, and the overall inconsistency of the international law.

⁷⁸ William W. Burke-White, *International Legal Pluralism*, 25 Mich. J. Int'l L. 963 (2004) pg. 965.

⁷⁹ Ibid.

4.2 Recommendations.

Appreciating that globalization is a reality and hence it's many forms such as growth and development of IDRFs is the first step towards making viable solutions to the problem of overlap of jurisdiction amongst IDRFs. The solutions are therefore to be found not in the eradication or reducing of IDRFs but in the creation of sustainable structures of relations and harmonious cooperation between them. As earlier discussed in this paper, common law domestic courts' principles and doctrines such as *lis pendens*, *sub judice* and *res judicata* which help counter overlap and conflict of jurisdictions in those courts may find no application to IDRFs owing to the peculiar nature of international law. Equally, it is virtually impossible to create a hierarchical international judicial system due to the fact that every IDRF is created under a distinct treaty or convention independent and autonomous to other treaties. Indeed, apart from the UN Charter which declares upon itself supremacy over all other treaties and conventions between the members of the UN,⁸⁰ all other treaties may be argued to embody similar force of the law and enforcement with neither being superior to the other. In fact, some authors have argued that. The decisions of most IDRFs are final and conclusive between the subject States involved and on those particular issues. The courts and tribunals lack an appeal system where decisions can further be reviewed by other courts. Charles H. Koch argues that any attempts to impose such a judicial hierarchy would create frictions within the global community.⁸¹

4.3 Encourage and Enhance Judicial Dialogue.

This solution of dialogue for courts and tribunals with equal jurisdictions is advocated for scholars such as Charles Koch.⁸² Dialogue, in this context, means judicial and scholarly exchanges and

⁸⁰ Supra note 38.

⁸¹ Charles H. Koch Jr., *Judicial Dialogue for Legal Multiculturalism*, 25 Mich. J. Int'l L. 879 (2004). Pg. 898

⁸² Ibid pg. 899.

comparison of notes between lawyers and judges of various IDRFs. The judges and lawyers are able to build each other's knowledge on similar or related issues. One way that this can be achieved through direct interaction between judges or through the use of the internet. Marie Slaughter calls this cross-fertilization and cross-pollination of jurisprudence by international judges.⁸³ She advocates for debates and deliberations among judges in the international judicial system in order to harmonize their opinions and ideas on common problems or issues in order to create a global community of courts. This method may prove to be of vital importance as it ensures that judges are consciously alert of what is transpiring in other courts and tribunals across the globe and hence give some levels, however little, of consideration of those 'foreign' events to their own decisions and opinions. Furthermore, the judges may cite the sentiments, opinions or decisions of other courts and tribunals and the works of scholars in their own opinions and judgments. This promotes jurisprudential and adjudicative coherence of international law.⁸⁴

4.4 Conflict Clauses.

Another solution proposed by scholars is the inclusion conflict and overlap clauses in the relevant treaties and conventions.⁸⁵ The proponents of this practice argue that it should be encouraged until such a time that international will develop its own general principles dealing with forum shopping. Conflict clauses guide the judges in interpreting treaties and conventions. They help give superiority to certain provisions of the treaty over others in the same treaty or convention or declare either explicitly or impliedly superiority of treaty or genre of international law over another. As earlier highlighted in this study, Article 113 of the UN Charter may be argued to amount to a conflict clause as it expressly gives prominence to the provisions of the Charter over other international

⁸³ Anne-Marie Slaughter, '*A Global Community of Courts*', Harvard International Law Journal Volume 44, Number 1, Winter 2003 pg. 9.

⁸⁴ Supra note 73 Pg. 36.

⁸⁵ Supra note 10 pg. 85.

laws. Conflict and overlap clauses, in addition to preventing unnecessary fragmentation of international law, reduces the possibility of an international court or tribunal reaching to an absurd conclusion.

4.5 Jadhav Case (India v. Pakistan).⁸⁶

A good example of a case in which conflict clauses have been raised in international court is the Jadhav case. The case was instituted at the ICJ on 8th May, 2017 by India against Pakistan claiming that it has egregiously violated Article 36 of the VCCR. India alleges that Pakistan has subjected Mr. Kulbhushan Sudhir Jadhav an Indian national and retired navy officer to an unfair trial in disregard of the provision of Article 36 of the VCCR which mandated Pakistan authorities to inform the Indian consular office in Pakistan of the predicaments of Jadhav and allow him to freely communicate to the consular office. Indeed, India's consular requests had been ignored by Pakistan or made unreasonably conditional on numerous occasions before institution of the proceedings. The case against Jadhav, who was arrested on 25th March, 2016 and sentenced by a military tribunal of Pakistan on 10th April, 2017, is that he has engaged in espionage and sabotage activities against Pakistan. Pending hearing and determination of the matter, India also sought provisional orders to the effect that Jadhav should not be executed. These interim orders were granted by the ICJ on 18th May, 2017. Pakistan's response is that India is using the ICJ for "political theatre" as the matter is removed from the jurisdiction of the ICJ vide the States' bilateral 2008 Agreement on Consular Access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India. Pakistan argues that Clause VI of the Agreement gives an exception to the right to consular access in case of arrests and detention on account of political or security grounds. India on the other side may advance the argument that only ICJ has jurisdiction

⁸⁶ Case Concerning the Vienna Convention on Consular Relations (India vs. Pakistan) Request for the Indication of Provisional Measures of Protection.

over the matter due to the provision of Article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes Done at Vienna on 24th April, 1963 (the “VCCR Optional Protocol”). This Article gives ICJ compulsory jurisdiction to determine disputes that arise why applying or interpreting the VCCR. Such disputes may be instituted at the ICJ by any party in the dispute it is also a member of the VCCR Optional Protocol. India and Pakistan are bound by the VCCR Optional Protocol. While this case has not yet been conclusively determined at the time of making this study, it bears evidence that treaties can provide conflict clauses for allocating superiority of treaties and, consequently, jurisdiction of tribunals. In this case both Clause VI of the 2008 Agreement on Consular Access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India and Article 1 of the VCCR Optional Protocol have been argued to contain conflict clauses. Similarly, Article 73(1) of the VCCR may be argued to be a conflict provision. The Article provides that the VCCR does not limit other international agreements between States Parties to the VCCR. Furthermore, Article 30 of the VCLT gives a guidance of interpretation of treaties adopted after a given treaty if they to the same subject-matter.

4.6 Referral of Cases to Other Dispute Resolution Processes.

International courts and tribunals play a critical role in adjudication of international differences. Their mandates are, often, embodied in the treaties or conventions establishing the courts and tribunals as well as general international law. If a State refers a dispute to an international court or tribunal for resolution or refers a point of law for interpretation it is, essentially, acknowledging and submitting that the particular court has the legal capacity and mandate to hear that matter. In most of such cases whether initiated through a complaint or a referral, the submitting State occasionally as a matter of practice does indicate in the complaint the provisions of the law under which the Court’s jurisdiction over the issue is concerned is founded. Nevertheless, the Court will still have to make its own determination whether it has jurisdiction over the issue or not. This does

not mean an IDRF must determine a matter merely because it has jurisdiction over it. The paper argues that the particular court or tribunal may exercise its judicial assessment of the situation referred to it in order to invite other players into the dispute resolution process, either working in tandem with the Court or entirely exclusively even to the Court itself.

There are instances where the mandate of an IDRF is strictly dictated by the treaty or convention and hence the Court may not have much say in declining to hear parties seeking its intervention. However, the jurisdiction to give advisory opinions is usually discretionary. In such an instance, this paper proposes that, the IDRF in question should take steps to establish whether there are other established parallel dispute resolution mechanism for the parties over the same dispute. These may include adjudication methods provided for under different regimes such as regional treaties between those parties. Establishing that position as a condition precedent to determining the merits of the case would put the IDRF at an informed position to decide whether it is the best placed forum to determine the matter or if it should have the dispute refereed to the alternative mechanism. In *United Kingdom and Northern Ireland vs Iceland* case⁸⁷ the ICJ in considering a dispute involving the increase of Iceland's fishing rights to the detriment of UK directed the two parties to negotiate in good faith and reach at an equitable solution.⁸⁸ This method may substantially contribute to 'avoidance' of more than two IDRFs having jurisdiction over the same matter. The IDRFs may direct parties coming before them to first exhaust localized mechanisms, if any, of solving their disputes at the first instance. The method should only applied where it is appropriate to do so in order to retain the integrity of IDRFs and maintain the faith and support of States on them. Some rules should therefore be put in place to guide the application of this method and its

⁸⁷ UK vs. Ice. I.C.J., 1973 I.C.J. 3

⁸⁸ Ibid para 79.

integration into the judicial function of IDRFs.⁸⁹ In the case of Somalia vs. Kenya⁹⁰ in an application presented before the ICJ on 28th August, 2014, Somalia sought the ICJ's determination of the maritime boundaries of the two States in the Indian Ocean. Kenya brought preliminary objections opposing ICJ's handling of the matter claiming, among others, that there existed a memorandum of understanding that such disputes would be referred first to the Commission on the Limits of the Continental Shelf (CLCS) and to negotiations between the States and, therefore, ICJ was not the default judicial organ in the matter. Even though the ICJ concluded it had jurisdiction over the matter, the sentiments of the dissenting opinions of judges Bennouna, Robinson and Ad Hoc Guillaume were to the effect that the ICJ had given its jurisdiction preeminence in the matter and failed to appreciate or ignored that under the UNCLOS system ICJ was only one of the multiple forums highlighted for dispute resolution of that nature.⁹¹

While this paper does not seek to review or critique the judgment of the ICJ, the scenario does present a possibility where an IDRF may be called upon to find itself without jurisdiction over a matter in order to allow the dispute be resolved by an alternative IDRF or adjudication mechanism.

4.7 Exclusive and Non-Exclusive Jurisdictions.

Another possible solution to overlapping jurisdictions amongst IDRFs is to create provisions of exclusivity of jurisdictions in treaties and conventions. Exclusive jurisdiction clauses bars the litigation or resolution of a matter in a forum other the one already specified or designated under the respective treaty. This diminishes the luxury of forum shopping as it addresses the problem of

⁸⁹ Anna Spain, *Examining the International Judicial Function: International Courts as Dispute Resolvers*, 34 Loy. L.A. Int'l & Comp. L. Rev. 5 (2011). pg. 30.

⁹⁰ Somalia v. Kenya) Judgment, I.C.J. Reports 2017, p. 3.

⁹¹ Para 10 of the Dissenting Holding of Judge Guillaume that "By agreeing to it (MoU), the Parties determined the method of settlement for their dispute, namely negotiation, which is one of the possible methods of settlement provided for by Article 33, paragraph 1, of the United Nations Charter and by Kenya's reservation."

overlap of jurisdiction amongst IDRF at the treaty-convention level. An example of jurisdiction exclusion law is Article 344 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU) which restricts Member States from submitting a dispute on how the EU should be applied or interpreted only to the methods contained under the TFEU.

On the other hand, Article 95 of the Charter of the UN opens the resolution of differences by member States to the various IDRFs applicable to them under their various agreements current or future. This provision allows for several IDRFs or several international adjudication processes to have jurisdiction over the same matter. Article 287 of UNCLOS is also a partial limitation of the choices of disputes resolution emanating within the convention. It lists the forums that may be resorted to. The paper considers the limitation partial because the same convention allows states to agree whenever to settle their differences by any method they chose. To reiterate this autonomy of States in selecting a dispute resolution mechanism of their own choice, UNCLOS further provides that States Parties should settle disputes emanating between them under UNCLOS peacefully and in tandem with Articles 2 paragraph 3 and Article 33 paragraph 1 of the UN Charter. As discussed earlier Article 33 of the UN Charter itself allows States to solve their differences in whichever means of their own choice as long as such means are peaceful.

The solutions to the problem of overlap of jurisdictions amongst IDRFs are not cast in stone. The possible solutions suggested in this paper are not exhaustive and there is room for judges, lawyers, scholars as well as policy makers and governments to design additional methods. Overlap of jurisdiction amongst IDRFs is a creation of globalization which has led to increase of IDRFs to address the diverse spectrum of issues or fields of interactions between states. Globalization has increased international relations of States. An example given in this paper is the rapid growth of regional integrations through which States bind themselves under regional regimes and treaties, invariably, with own disputes adjudication processes. The proliferation of IDRFs is both a creation

of modernization as well as its evidence. This phenomenon has its share of advantages to the international system. It promotes human rights and freedoms, develops domestic democracies and good governance and enhance global peace and security. It also breathe in States' relations. The phenomenon also poses certain salient challenges to the international system and order. An example is fragmentation of international law. In the long-run, the challenges created by overlap of jurisdiction of IDRFs undermine the efficacy, coherence, predictability and credibility of international law and therefore hamper its enforceability. The challenges also interfere with the international relations of States such as where States result to use of force, power or warfare to advance their interest due to factors such lack of trust and faith with the multiple IDRFs, the confusion ensuing therefrom or conflicting judgments or opinions by IDRFs. This study therefore concludes that it is crucial for the international community to re-look treaties and conventions making and the creation of IDRFs to ensure that international law lives up to its purposes.

4.6 BIBLIOGRAPHY

Reports.

Human Rights Watch, Options for Hissène Habré to Face Justice. Submission to the Committee of Eminent African Jurists Submission to the Committee of Eminent African Jurists: Options for Hissène Habré to Face Justice April, 2006.

International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006.

Books.

Byrnes A., Hayashi M., and Michaelsen C., International Law in the New Age of Globalization (Martinus Nijhoff Publishers).

Dorr O. and Schmalenbach K., ‘Vienna Convention on the Law of Treaties: A Commentary’, Springer Science & Business Media, 2011, 2012th Edition.

Fitzmaurice M., and Elias O., ‘Contemporary Issues in the Law of Treaties’, Eleven International Publishing, 2005.

Schabas W.A. and Murphy S., ‘Research Handbook on International Courts and Tribunals (Research Handbooks in International Law series’ (Edward Elgar Publishing Limited 2017).

Journal Articles

Avidan K., (2016), ‘the EU Commission and the Fragmentation of International Law: Speaking European in a Foreign Land.’ Goettingen Journal of International Law, 7 (2).

David P.F., 'Caught Between Traditions: The Security Council in Philosophical Conundrum', 17 Mich. J. Int'l L. 411.

Joost P., and Luiz S.E., (2009) 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions,' Cornell International Law Journal: Vol. 42: No. 1, Article 4.

Karel Wellens, Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap, 25 Mich. J. Int'l L. 1159 (2004).

Meléndez O.R., Bellmann C. and Miguel R.M., 'the Future and the WTO: Confronting the Challenges', International Centre for Trade and Sustainable Development (ICTSD) Programme on Global Economic Policy and Institutions July 2012.

Nasu and Hitoshi, 'the Expanded Conception of Security and International Law: Challenges to the UN Collective Security System, (2011). Amsterdam Law Forum, Vol. 3, No. 3.

Nicolaïdis K., and Tong J.L., 'Diversity or Cacophony? The Continuing Debate Over New Sources of International Law', 25 Mich. J. Int'l L. 1349 (2004).

Pauwelyn J., 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', 25 Mich. J. Int'l L. 903 (2004).

Rao P.S., 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?' 25 Mich. J. Int'l L. 929 (2004).

Samoulla F, Calliope C, 'Consent and the Basis of Political Obligation with Reference Made to Thomas Hobbes and John Locke.' (2002) London School of Economics and Political Science (United Kingdom).

Sarooshi D., 'the Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government', 25 Mich. J. Int'l L. 1107 (2004).

Schabas W.A., and Murphy S, 'Research Handbook on International Courts and Tribunals (Research Handbooks in International Law series,' (Edward Elgar Publishing Limited 2017).

Shany Y., 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', (Cambridge University Press) the American Journal of International Law Vol. 106, No. 2 (April 2012), pp. 225-270.

Specker, 'Remedying the Normative Impacts of Forum Shopping in International Human Rights Tribunals', the New Zealand Postgraduate Law E-Journal Issue 2 / 2005.

Stark B., 'International Law from the Bottom Up: Fragmentation and Transformation', University of Pennsylvania Journal of International Law, Vol. 34, 2013.

Stephen D., 'the Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law', 25 Mich. J. Int'l L. 1075 (2004).

Tanaka M., 'Lessons from the Protracted Mox Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea', 25 Mich. J. Int'l L. 337 (2004).