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On the Topic of

INTERNATIONAL CRIMINAL LAW AFFECTING THE RULE OF LAW IN LIGHT OF THE LATEST ICC RULINGS

The notion of "fairness" is central to the principle of Rule of Law. It underlines, among other elements, the equality of all persons before the law, various elements of due process, and the basic tenets of democratic governance. The purpose of the present lecture is to explore into the role and responsibility of the international criminal law to make the content and application of international law, as a whole, fairer - being mindful of the latest rulings of the International Criminal Court.

I will begin this lecture with describing the nature and functioning of the International Criminal Court (ICC), which is the most important entity in international criminal field today; emphasizing on how the international legal contours have changed, making the role of the ICC even more significant and varied.

Next, I go on to point out the procedural and substantive lapses in the functioning of ICC, which have led the Asian and especially African regions to grow increasingly critical and skeptical of it.

Thereafter, I deal specifically with the implications of the latest rulings of the ICC - all of which have been pertaining to the African Continent, and which has resulted in the development of a strong feeling of resentment of the African Union (AU) against the ICC. Herein I will particularly discuss what affect the AU's contention is likely to have on ICC's credibility, especially in the South; and on the AU, if its member-States who are also parties to the ICC, do decide to exit the treaty.

Finally, I will analyze the tenability and legal feasibility of the African Court of Justice and Human Rights (ACJHR), the independent African court the AU is trying to establish - as an African alternative to the ICC.

I. THE OUTREACH OF INTERNATIONAL CRIMINAL LAW TODAY: THE ROLE OF ICC

We stand at cross-roads in international criminal law today. The extent to which international criminal law affects the Rule of Law can be judged primarily from the fact that although international criminal trials principally and appropriately focus on fairly trying the accused individuals; such processes have a wider impact on public perceptions of justice, and can influence a society's ability to embrace rule of law norms. The qualities of outreach and capacity-building of these trials have a decisive effect on whether these proceedings strengthen or undermine public confidence in justice and justice-institutions in societies.

THE INTERNATIONAL CRIMINAL COURT (ICC)

Over the last twenty two years international and hybrid criminal courts have produced dramatic developments, changing the landscape of international justice. They have indicted and tried high-level political and military figures – including former Heads of State for egregious crimes, eroding the prospect of impunity for such offenses. The trials have set some groundbreaking legal precedents and have played an educative role in focusing world attention on fundamental rules of international law that prohibit genocide, crimes against humanity, and war crimes. Of all the myriad international criminal courts and tribunals - it is the comparatively recent International Criminal Court or the ICC that has become the focus of most discussions on international criminal law today. Amongst other reasons, it is more importantly because it is the first and only permanent institution that ascertains individual responsibility and can pass judgments that would be binding on such individuals.

At the end of World War II the victorious Allied Powers created the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal (IMT). The IMT prosecuted soldiers and commanders who committed crimes in World War II and contained the first definition of crimes against humanity, which would later be included in the Rome Statute and fall under the jurisdiction of the ICC. Thereafter, a similar tribunal was created, called the International Military Tribunal for the Far East. The importance of these tribunals comes in their containment of definitions of crimes against humanity and war crimes, and their early identification and acknowledgment of the need

of a global criminal system. By incriminating senior and low level officials on charges of having committed heinous crimes, these tribunals laid the foundations of the need of establishment of a permanent international criminal court.

Shortly thereafter, the 1948 Genocide Convention and then the four 1949 Geneva Conventions came to be enacted and enforced. The Genocide convention, laid the groundwork for the incrimination of the 'most heinous international crime'. The four Geneva Conventions and their additional protocols dealt with all the three categories of offences that are tried by the ICC today, genocide, war crimes and crimes against humanity. Yet, there was no court that could uphold these laws or prosecute the perpetrators; and thus, in spite of these treaties the world struggled with tackling the menace of impunity.

This struggle took place in four phases:

First phase – took place largely in Latin America, driven by civil society organizations, to guarantee the rights of political prisoners suffering at the hands of repressive regimes.

Second Phase - took place in the 1980s, when States began granting sweeping amnesties to prevent prosecutions, and victims' organizations became increasingly organized and vocal in response.

Third phase – was when peace deals and democratization processes ruled the day, triggered by the end of the Cold War, where questions of impunity were raised and encountered.

Last phase – symbolized maturity of regional human rights courts and international systems of human rights protection, and witnessed a series of decisions that outlawed amnesty provisions and insisted on serious crimes being prosecuted. This was the phase when the UN Security Council created the ad hoc tribunals for the former Yugoslavia and Rwanda, in 1993 and 1994, respectively. This phase signaled an important shift at the highest political level; in the sense that States had caught up with civil society and human rights bodies around the world in recognizing that impunity for serious crimes was unacceptable. It is in this context that negotiations for the creation of a permanent international criminal court began in the mid-1990s.

Finally in 1998, a Conference was called in Rome to discuss the possibility of a permanent International Criminal Court. Many struggles and oppositions had to be overcome and ultimately the Rome Statue was successfully adopted, and the ICC was created. It was signed by 120 States in July 1998 and came into effect four years later, in 2002. The treaty created the ICC and, in effect, a new system to deal with the world's most egregious crimes: war crimes, crimes against humanity, and genocide.

The first and foremost principle on which the court is established is that the courts at the national level should deal with cases of serious crimes; and that the ICC will intervene and interfere only

in the event the States are unwilling and unable to do so. This is the principle of **complementarity**; and is one of the most important and foundational principle on which the Rome Statute is based. It is complementary in the sense that the jurisdiction of the ICC is not primary but complementary to the nation's sovereign right to try heinous crimes that have been committed on their soils or by their nationals.

The second important aspect of the ICC is that, though it is basically a treaty made court and so no country can be forced to be a part of its proceedings; yet, in certain circumstances it can deal with alleged crimes that have been committed in or by nationals of States not parties to the statute, if the UN Security Council refers the situation to ICC.

The ICC does not allow for the death penalty, and has a maximum period of imprisonment of 30 years. It can also order fines and forfeiture of property. The Rome Statute provisions do not affect national provisions on punishment; thus, States parties can impose penalties for international crimes according to their own laws; which includes penalties that may be more severe or lenient than the ICC's. Moreover, the ICC does not have its own police force, and relies on a system of cooperation set up in Part IX of the Rome Statute that requires States parties to assist the court, especially in facilitating investigations and arresting and transferring suspects.

The three core jurisdictional areas of the ICC, which the Rome Statute mandates for it are: **genocide**, **war crimes** and **crimes against humanity**.

The ICC has not just tried perpetrators of crimes, but also taken innovative steps like allowing victims to participate in the proceedings, and providing reparations; thus, making a significant advancement in the direction of development of transitional justice system. Another big achievement of the Rome Statute has been the creation of the Trust Fund for Victims, which has a dual mandate of implementing court ordered reparations, as well as to provide assistance to victims and their families irrespective of judicial decisions. The ICC is, in effect, not just a court but an international legal system that works in tandem with domestic legal courts. The role of the ICC is to act as a catalyst, with the States having the primary responsibility to investigate and prosecute the Rome Statute crimes[1].

The ICC became operational in 2002; issued its first warrant of arrest in 2005, for the arrest of the Commander-in-chief, Joseph Kony, and others of the Lord Resistance Army in Northern Uganda[2]; and its first trial began in 2009, that resulted in the conviction of Thomas Lubanga

[1] Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Centre for Transitional Justice, 2016) at 1-15, *available at*: https://www.ictj.org/sites/default/.../ICTJ_**Handbook_ICC_Complementarity_2016**.pdf (Last visited on: 24 Jul, 2016).

[2] The case is still at pre-trial stage as the suspects are yet absconding.

Dyilo, founder and leader of the organized armed group, Union des Patriotes Congolais ("UPC"), who was involved in an internal armed conflict in the Democratic Republic of Congo, in 2012.

However, in spite of the tremendous work that the court has done in curbing impunity and developing international criminal jurisprudence globally over the last 14 years, there has been a growing discontent within the Asian and African continents regarding the ICC's functioning and jurisprudence. Whereas most of the member States of the African Union that are parties to the Rome Statute have grown critical of it, Asia continues to be under-represented on the Statute itself. The two proclaimed reasons why States choose not to join the ICC are:

1) Some governments and academics are of the view that the essential elements of criminal due-process are missing in the design of the ICC; and

2) Some States doubt the integrity of the practices of following the principle of complementarity, seeming to believe that the ICC in reality undermines the nations' sovereign right to exercise jurisdiction over their own nationals[3].

II. PROCEDURAL LAPSES UNDER ICC

In order to ensure fairness and to follow the rule of law, there are a few essential characteristics which must define an international court of law, like judges having sufficient control over the conduct of their proceedings in order to ensure fairness, them having the discretion to adopt rules that fill gaps or can ensure more fairness to the proceedings, them having the power to modify the rules they believe to be unfair, etc. The ICJ, for instance, although relatively conservative in its approach towards changes in procedure, has had occasion to revise both the rules and practices of the court in order to improve efficiency and fairness. Judges of the International Criminal Tribunals of Yugoslavia and Rwanda similarly have had the authority to revise their institutions' rules of procedure and, more surprisingly, their rules of evidence. The ICC's practice, however, contrasts with such other international and specifically criminal courts of law, in that there have been restrictions put on its judges in the area of rules revision.

The Rome Statute itself placed restrictions and limits on the ICC, and especially its judges. Judges participating in the relatively recent seventh Brandeis Institute for International Judges, 2010, and who had also been in attendance at the 1998 Conference in Rome, remarked that the process that established the ICC was "highly politicized," with the result that "the Rome Statute

[3] Rahmat bin Mohamad, "Asian-African Perspectives on ICC" in Report of the Seminar on 'The International Criminal Court: Emerging Issues and Future Challenges', *The AALCO Secretariat, New Delhi*, 2009 at 55.

is full of safeguard clauses to ensure that the Court would not be too big of a threat to the sovereignty of States" Moreover, the Assembly of States Parties (ASP) that promulgates the rules of procedure and evidence holds the unusual power to change the rules of the court; the judges can only propose changes[4].

On the issue of peace versus justice, it is agreed that once the matter is before the court the judicial process takes precedence and runs its course; otherwise the international criminal justice would be severely compromised. But the ICC's case is unique in that its statute explicitly states that the Security Council may temporarily suspend an investigation or prosecution in the interest of peace[5]. Lastly, the supervisory role played by the Security Council in referring cases and deciding the capacity of the court to try cases has further allegedly undermined the independence of the ICC. The aforementioned factors have, therefore, arguably contributed to compromise the credibility of the ICC to a significant extent.

III. THE TREND OF RECENT ICC RULINGS AND THE QUESTION OF THE RULE OF LAW

ICC AND THE AFRICAN UNION – CORDIAL BEGININGS

In February 1998 representatives of 25 African States met in Dakar, Senegal, where the '*Dakar Declaration for the Establishment of the International Court'* was adopted. It was noted in the said declaration that national legal systems have generally failed to hold perpetrators accountable for gross violations of international law. The vast majority of African States later voted in favor of adopting the Rome Statute. Thus, the relationship between Africa and the ICC had bright beginnings with a common goal of ending impunity for international crimes. That is the reason why as many as 34 States of the African Continent became members of the ICC.

SELECTIVITY OF CASES IN ICC AND SUBSEQUENT SOURING OF RELATIONS

The most serious criticism that is said to be directed at the International Criminal Court (ICC) in the first decade of its existence has been the selection of 'situations'. Of particular interest to the

[4] Brandeis Institute for International Judges, "Towards an International Rule of Law", *The International Center for Ethics, Justice and Public Life*, Brandeis University, 2010 at 42-46.
[5] *Ibid*.

world community has been the failure of successive ICC Prosecutors to investigate crimes committed by Israel and Hamas in the course of Operation Cast Lead 2008-2009. Initially, this was justified on the ground that Palestine was not a state; but is no longer so with the recognition of the statehood of Palestine by the General Assembly in November 2012. All of the cases that the ICC is currently investigating and prosecuting have to do with crimes allegedly committed in countries in the African continent. Even the Security Council referred some cases – Libya and the Sudanese region of Darfur– but omitted to refer others, such as Israel and Syria. This has raised questions as to whether this is an example of the selectivity of international criminal law[6].

Several of these situations have been referred to the ICC by State parties themselves, notably the Democratic Republic of the Congo, Uganda, the Central African Republic and, most recently, Mali. However, critics suggest that as the Prosecutor is under no obligation to accede to a self-referrals, such situations are as much selected by the Prosecutor for investigation as the situation in Kenya which was chosen *proprio motu* by the Prosecutor[7]. The power of the Prosecutor to select situations for prosecution is new, as prior to this the States and international political organizations decided on the territorial and temporal reach of the situations such as those addressed by tribunals at Nuremberg and Tokyo, and in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon. This means that the ICC Prosecutor's choice of 'situation' is a heavy responsibility and one that is to be exercised independently and without fear or favor. The selection of cases by the ICC Prosecutors till now have raised doubts about the independence of the Prosecutors, and whether they have indeed displayed an anti-African bias, as claimed by the African Union.

LAPSES IN THE SUBSTANTIVE PROVISIONS OF THE ROME STATUTE

One of the most controversial provisions in the Rome Statute that has been a part of many debates lately is Article 16, which came into the limelight mainly after the Darfur situation. It is the 'deferral' power of the UN Security Council in which as per a resolution adopted under Chapter VII of the Charter the Security Council may require the ICC to suspend its proceedings when the demands of peace so requires[8]. The UN Security Council, which is the quintessential

[6] John Dugard, "Palestine and the International Criminal Court: Institutional Failure or bias?", *Journal of International Criminal Justice*, 11(3), 2013 at 563–70.
[7] *Ibid*.
[8] UNSC Resolution 1422 remains one of the most controversial Resolutions pertaining to Art 16 of the Rome Statute, as per which the ICC has to refrain from initiating investigations or proceedings relating to peacekeeping forces of non-state parties to the statute (UN Doc S/RES/1422, 12 July 2002). This Resolution was procured after the US threatened to veto the renewal of the mandate of the UN mission in Bosnia-Herzegovina (UNMIBH) as well as other future peacekeeping operations. This Resolution made non-state parties more equal in law than state-parties to the statute, and broke from the essentially non-discriminatory character of international criminal law, and also the treaty regime of the ICC that has jurisdiction over nationals of third states.

political body of the UN, the primary custodian of peace and security, and the ICC, which is widely considered to be the most important development by far in international criminal law, are the two major players in the very important act of balancing peace and justice. So the purpose of Art 16 of the Statute was that if demands of justice so require for the smooth running of peace negotiations, the UNSC in its best judgment should have the power to suspend the proceedings of the ICC in favor of peace processes. This exceptional power, however, was to be 'strictly construed' and 'restrictively applied' to ensure that it did not succumb to any political abuse. Yet, the Security Council's practice in employing Article 16 since that time has not only arisen fears that this fragile compromise may be dismantled but it has also brought into question the independence and consequently the legitimacy of the ICC.

The Darfur crisis may be mentioned here, as an example. In 2003, the Darfur region in the western part of Sudan faced a sudden explosion of violence. The UN Security Council intervened and passed a Resolution referring the Darfur situation to the ICC. Subsequently an arrest warrant was issued against President Omar Al Bashir; the first ever issued by the ICC for a sitting President, causing a lot of controversy in many different circles. What followed was the second deferral request to the UNSC, this time from African States under the umbrella of the African Union (AU), to consider suspending proceedings in the Darfur situation (particularly with respect to the arrest warrant for President Omar Al Bashir). In contrast with the pre-emptive adoption of Resolutions in favor of the US, the UNSC responded unenthusiastically to the AU request. The arrest warrant for President Bashir was objected to by the Sudanese government itself, the Arab League, the Organization for Islamic Conference, and especially the AU which represented the concerns of African States, that the action would have damaging effects. It was especially feared that the prosecution of the incumbent President could impede the measures aimed at a peaceful resolution of the crisis in Darfur. The Council only really considered the AU request for deferral once, and even so, this was done during its 5947th meeting where this issue was not the item on the agenda but only came up as an inevitable consequence of a discussion on the extension of the mandate of the African Union- United Nations Hybrid Operation in Darfur (UNAMID). The dismissive attitude of the Council and their reluctance to respond to the AU request was understandably not taken well. This marked the beginning of a quickly deteriorating relationship between Africa (in particular the AU) and the ICC. In response to the UNSC's failure to act on its request, the AU at its Assembly of Heads of States 13th Summit in Sirte, Libya, July 2009 directed all AU member States to withhold cooperation from the ICC in respect of the arrest and surrender of President Bashir. The AU went further to present a proposal for the amendment of Article 16 to allow the United Nations General Assembly (UNGA) to act in case the UNSC fails to do so within a certain period of time[9].

[9] The AU proposed amendment to Article 16 of the Rome Statute was tabled in 2010 before the ASP, but received insufficient support to make it onto the agenda of the Kampala Review Conference.

Another controversial concept found in the Rome Statute has become the 'principle of complementarity'. The principle of complementarity that has its roots in Art 17 of the Rome Statute was inserted with the expectation that the jurisdictional regime of the ICC would have a catalyzing effect, in that it would encourage the national judicial systems to participate in the ICC's struggle against impunity. Statutorily and practically it means that ICC will exercise jurisdiction if and only when national jurisdictions fail to exercise their obligation and power to try offenders who have perpetrated genocide, war crimes and other crimes against humanity, unlike the ad hoc tribunals that enjoy primacy of jurisdiction. So it was expected that ICC's shadow would have a catalyzing effect on States, who would proactively investigate international crimes, in order to avoid ICC's intervention. However, as has been seen there has been no such catalyzing effects on States in practice. Most notably, in Uganda and Sudan the involvement of ICC has triggered interest in transitional justice, influenced the passage of domestic legislations, and led to the establishment of domestic judicial institutions; however, none of the courts in neither Uganda nor Sudan have tried perpetrators of international crimes. Thus, counter-intuitively, complementarity has not catalyzed competition between ICC and national judicial authorities with respect to the same cases.

Further in this regard, Dr. Sarah Nouwen, Deputy Director of the Lauterpacht Centre for International Law argues that the principle lives a double life, where its legal life differs remarkably from its life as a rhetoric big idea. She suggests that most practitioners, ICC activists, scholars, and even courts fail to appreciate the technical meaning of complementarity as embodied in the Rome Statute. According to her the ICC gives the States and not the Court the primary right to adjudicate international crimes. This has been mostly misconstrued by various actors associated with the ICC, whereby the jurisdictional balance is recalibrated in favor of the ICC, changing the normative contours of complementarity. The most popular 'unable and unwilling' test of complementarity is a misconstruction of the normative reality, under which ICC's intervention is legitimate only if national proceedings are underway, and thereafter the State concerned fails to conduct it genuinely. Different actors associated with the ICC stress different meanings of the term complementarity. Dr Nouwen points out that the ICC Prosecutor's prosecutorial strategy reflects an assumption that there is a division of labor between the ICC and national courts, wherein the ICC is to pursue the gravest human rights violation cases and the national courts are only supposed to deal with the less important cases. Thus, these pro-ICC ideologies bear little resemblance to the admissibility rule prescribed under Art 17 of the Rome Statute. The ICC has over a period of time avoided States where complementarity could result in producing catalyzing effects, such as domestic prosecution of international crimes[10].

[10] Patryk L. Labuda, Book Review of Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, CUP, 2013.

IV. WILL AU MEMBER-STATES EXIT THE ICC TREATY?

Indictments of Heads of State of Sudan and Kenya, Al-Bashir and Uhuru Kenyatta, with the subsequent non-response of the UNSC on repeated AU requests for deferring the cases for 12 months as per Articles 16 and 98 of the Statute were responsible to a great extent in souring the relations between the AU and the ICC. African leaders are increasingly viewing the institution as an imperial one, created for controlling the poor African States, and are seriously considering to review their membership of the ICC Treaty. In the Decision adopted at the Fifteenth Ordinary Session of the Assembly of the African Union, in Uganda in 2010, the AU reaffirmed its earlier decision of 2009 made in Sirte, Libya, not to cooperate with the ICC in the arrest of President Al-Bashir. In the same session it further rejected the opening of the ICC liaison office in the Ethiopian capital, Addis Ababa and criticized the conduct of the ICC Prosecutor on the basis that he had been making egregiously unacceptable, rude and condescending statements in the Bashir and other ICC cases. The latest in line to contribute to the already widening rift between the ICC and the AU is the sentencing of the military commander of Congo, Jean-Pierre Bemba Gombo, on accounts of murder and rape by the ICC.

On the 1st of July, 2008 at Sharm-El-Sheikh, Egypt a Protocol was adopted by the AU for the establishment of African Court of Justice and Human Rights (ACJHR). The ACJHR would be a merger of the African Court on Human and People's Rights and the Court of Justice of the African Union. The court would in addition have international criminal jurisdiction[11]. The court is basically a reaction to the apparent discriminatory behavior shown towards it by the ICC by taking up and trying cases originating solely in the continent of Africa, in the 14 years of its existence.

SENTENCING OF HISSÈNE HABRÉ IN SENEGAL

Trial and indictment of the former President of Chad, Hissène Habré, has also had a lot to contribute to origin of the idea of prosecuting international crimes originating in Africa, primarily in Africa. After eight years of a dictatorial rule in Chad when Hissène Habré was overthrown, proceedings began at Dakar, Senegal. It is interesting to note here that Chadian victims who had acquired Belgian nationality filed a criminal complaint against Habré with the District Court of Brussels under Belgium's universal jurisdiction law for crimes against humanity, torture, arbitrary arrests, and abduction. After four years of investigation the Belgian court issued an arrest warrant against the President and requested for an extradition. Instead, the African Union set up a "Committee of Eminent African Jurists" in order "to consider all aspects

[11] Malabo Protocol on the Statute of the African Court of Justice and Human Rights.

and implications of the Hissène Habré case as well as the options available for his trial". As per the report it asked Senegal to prosecute Habré "on behalf of Africa". Habré was finally tried in Senegal in 'Extraordinary African Chambers' presided over by African judges appointed by the African Union. Finally, on May 30, 2016 Hissène Habré was convicted for crimes against humanity, war crimes and torture, including sexual violence and rape by the Extraordinary African Chambers and sentenced to imprisonment for life. The Human Rights conscience keepers all over the globe did not shy away from lauding this case as being a milestone for justice in Africa.

V. TENABILITY OF THE ACJHR

Currently the two African judicial entities are, the African Court on Human and People's Rights (the African Human Right Court), which mainly deals with cases relating to the interpretation and application of the African Charter on Human and Peoples' Rights; and the African Court of Justice that has jurisdiction over disputes relating to the interpretation and application of the Constitutive Act of the Union, Union treaties, acts of the organs of the Union. The African Court of Justice and Human Rights is going to be a merger of the above two courts, and additionally having an 'International Criminal Law Section'.

The viability and legality of the merged court is a matter of a huge debate, especially since it will have concurrent jurisdiction with the ICC with respect to international crimes. The Protocols as well as the amendments to them nowhere speak about the relationship of the ACJHR with the ICC. Moreover, most fear that the court is likely to be overburdened as it had previously combined both State-level human rights violations and interpretations of treaty law, and has recently added individual-level criminal accountability for both individuals as well as legal persons.

The envisaged International Criminal Law Section of the African Court will have jurisdiction with respect to crimes committed after the entry into force of the Draft Protocol and the Statute. The said crimes are to be within the purview of the said Section when the State on the territory of which the conduct in question occurred or the State of which the person accused of the crime is a national, are parties to the Statute. In addition, it may also exercise its jurisdiction when the victim of the crime is a national of a State Party, or for extraterritorial acts by non-nationals which threaten a vital interest of a State Party. The last two admissibility criteria differ from the wording of the Rome Statute.

According to Article 14 of the Draft Protocol, the new Section will have power to try persons for a list of 14 crimes including: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money

laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression. According to academicians this list of crimes is very ambitious, as it is not limited to known international crimes but also includes 'a raft of other social ills that plague the continent'. In addition to that the Draft Protocol gives the opportunity to the Assembly to extend the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law. Comparison herein can be made to ICC's jurisdictional scope, which is limited to three core international crimes, genocide, war crimes, and crimes against humanity; and yet, it needs much more expertise, resources, and capacity to function in an ideal manner. In spite of having four organs, each with a number of sub-divisions, and the Registry which has numerous supporting offices, the ICC in 2016 will likely still only carry out four or five active investigations and conduct hearings into four cases[12]. Thus, in short ACJHR will serve as an African regional criminal court, operating in a manner akin to the International Criminal Court (ICC) but within a narrowly defined geographical scope, and over a massively expanded and over-ambitious list of crimes.[13]

SHARING OF LEGAL SPACE WITH ICC

At least with regards to three categories of crimes, namely:

a) Genocide;

b) War Crimes; and

c) Crimes Against Humanity;

-committed after the entry into force of the Protocol (and, *a fortiori*, after the entry into force of the Rome Statute in 2002), which are of sufficient gravity and which are not being dealt with by national jurisdictions (as per the principle of complementarity included in both the statutes), the ACJHR and the ICC would have overlapping jurisdictions, of course for States that have ratified both the Rome Statute and the Malabo Protocol.

[12] Proposed Program Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, available at https://www.icccpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-10-ENG.pdf at p. 8.

[13] 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court', Amnesty International, 2016 at 22-26, *available at*: https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwiX4pnj7pDOAhUgR48KHaoiDh8QFggkMAE&url=https%3A%2F%2Fwww.amnesty.org%2Fdownload%2FDocuments%2FAFR0130632016ENGLISH.PDF&usg=AFQjCNGciJtWCQHYrQXEA5yq10uRFpitZg&sig2=7d5FTZN1du0up8bcWQKQBA&cad=rja (Last Visited on: Jul 22, 2016).

The Malabo Protocol envisages well the complementary relationship between ACJHR on the one hand, and the national courts and courts of regional economic communities on the other. However, the Protocol nowhere foresees a similar relationship between the ACJHR and the ICC; despite an obviously necessary and desirable requirement of the same. It is of significance to note here the provisions of the 'Draft Decision on Africa's Relationship with the International Criminal Court (ICC)' emanating from the Extraordinary AU Session of 12 October 2013, wherein it was stated that the AU 'proposes that African States Parties to the Rome Statute introduce amendments to the Rome Statute to recognize African regional judicial mechanisms dealing with international crimes in accordance with the principles of Complementarity'. This provision with modifications in the final resolution became 'African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute'. Acting on it, Kenya even proposed an amendment to the Rome Statute[14].

INTER-RELATIONSHIP BETWEEN THE ICC AND THE ACJHR

With regard to the inter-relationship between the two treaty-based courts, there are two basic points of reflection:

a) When the jurisdictions of the two courts coincide absolutely with regards to any particular set of cases, how will it be ascertained as to which court will have the authority to decide?

b) Since both the courts will occupy the same legal space, will there be any scope of real co-operation between the two courts?

With regard to the first issue, at the outset I would like to state that both the courts being a result of treaties between sovereign nations, there cannot be any hierarchy between the two; and further the Rome Statute does not contain any provision restricting or prohibiting the creation of any other court with identical jurisdiction. Yet, a court with similar jurisdiction is most likely to create problems for States who are parties to both the statutes. Of the 54 member States comprising the AU, 34 are also state parties to the ICC. These States will encounter issues relating to overlapping jurisdiction and competing obligations, owed to both the ACJHR as well as ICC. For example, in the event that the ACJHR and the ICC indict the same person and order his or her surrender, state parties to both the Rome Statute and the Malabo Protocol will be a in a complicated legal situation to choose which obligation to fulfill and which one to breach. Such

[14] *Id* at 22.

competing obligations may also arise in case of overlapping cooperation requests. The Malabo Protocol is silent on this issue.

With regard to the second issue, on a positive note since both the courts are working on the same platform, it is expected that both the courts will co-operate in dealing with heinous crimes of the gravest nature falling within their common jurisdiction. The Rome Statute provides for cooperation between the ICC and 'regional organizations'; and therefore, at least in theory it is possible for the Prosecutor or the Court to seek information or cooperation from the ACJHR. Even Article 46L(3) of the Amended ACJHR Statute also permits the ACJHR to 'seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose'. However, looking at the present status of relationship between the two entities, the prospects of such a co-operation seems to be dim[15].

VI. CONCLUSION

There is no doubt that international criminal law under the aegis of the United Nations has contributed significantly to the jurisprudence as well as in terms of practical achievements of public international law. The ICC in particular, in the relatively short period of its existence has without question offered a new hope for a permanent reduction in the phenomenon of impunity, and is thus, the most significant recent development in the international community's long struggle to advance the cause of justice and the Rule of Law. Up till now it has seized a total of nineteen cases, involving heinous crimes against humanity, and has made particular advances in ending impunity in relation to crimes against women and children.

However, certain lapses in the procedural as well as substantive aspects of this court have brought it into the line of fire. Especially the past rulings being made only on situations that have arisen in the African continent have attenuated the credibility of the court, especially in the eyes of the Asia-Africa region. The situation has, in fact, deteriorated so much that the African Union is taking striking steps to isolate its member-States from the statute, and is on its way to create an independent court having co-extensive and competing jurisdiction with the ICC over international crimes. This court, however, is also debated upon owing to some of its controversial aspects. Most countries in the Asian continent are still not a part of the Rome Statute, doubting its impartiality, fairness and credibility.

In conclusion it can be said that firstly, as against the allegation of selectivity, a lot of cases from the African continent that have been tried by the ICC, were referred to it by the States themselves. Secondly, reasonably speaking, the ICC in terms of infrastructure, manpower as well as resources is better equipped than any other court to try heinous crimes of a reasonably large

[15] *Id* at 23.

scale nature. Of late, as per its Report on Preliminary Examination Activities, 2015, the ICC will be investigating the alleged responsibility of the United Kingdom officials for the war crimes involving systematic detainee abuse in Iraq from 2003 until 2008, especially since the UK has ratified the Rome Statute as on July 1st, 2002. And lastly, an international rule of law can in reality truly be established if the international legal activities are carried on an international platform with cohesive co-operation from regional entities. Therefore, it is required that the ICC receives active co-operation from national and regional courts. The ACJHR, hence, as the first truly big regional court, shall better be made to function in co-operation with the ICC, and not in confrontation with it.