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# THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS

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**CONTENTS**
**(Deliberated)**


| | | Pages |
|---|---|---|
| **I.** | **Introduction** | **1-3** |
| | A. Background | |
| | B. Issued for focused discussion at the Fifty-Fist Session | |
| **II.** | **AALCO's Work Programme on the International Criminal Court** | **4-15** |
| | A. Overview | |
| | B. Meeting of Legal Experts on the Rome Statue of the International Criminal Court: Issues and Challenges (19th and 20th July 2011, Putrajaya, Malaysia) | |
| **III.** | **Assembly of the States Parties of the ICC (ASP)** | **16-19** |
| | A. Report of the Tenth Session of ASP | |
| **IV.** | **Consideration of the Item during the Year 2011 at the Sixth-Sixth Session of the General Assembly of the United Nations** | **20-23** |
| | A. ICC President's Report to the Sixty-Fifth Session of the United Nations | |
| | **B.** Judicial Proceedings | |
| **V.** | **Comments and Observations of the AALCO Secretariat** | **24-27** |
| **VI.** | **Annex: Draft Resolution of the Fifty-First Session** | **28-28** |

# THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS

## I. INTRODUCTION

### A. Background

1. The International Criminal Court (ICC), governed by the "Rome Statute"[1], is the first permanent; treaty based international criminal court established to end impunity for the perpetrators of the most serious crimes of international concern: the Crimes of Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression.[2] The Court may exercise jurisdiction over such international crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions however do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, or if a State makes a declaration accepting the jurisdiction of the Court. The Prosecutor can initiate an investigation on the basis of a referral from the Security Council or from a State Party. In addition, investigations may also be initiated *propio motu* on the basis of information on crimes within the jurisdiction of the court, received from individuals or organizations.

2. After ten years of its establishment, on 14 March 2012, Trial Chamber I of the International Criminal Court (ICC) decided unanimously that Thomas Lubanga Dyilo is guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities from 1 September 2002 to 13 August 2003. It is the first verdict issued by an ICC Trial Chamber. At present, 14 other cases are before the Court, three of which are at the final stage of trial.

3. The present war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities were committed in the context of an internal armed conflict that took place in the Ituri (the Democratic Republic of the Congo) and involved the *Force patriotique pour la libération du Congo* (Patriotic Force for the Liberation of the Congo) (FPLC), led by Thomas Lubanga Dyilo, against the *Armée Populaire Congolaise* and other militias, including the Force de résistance patriotique en Ituri. A common plan was agreed by Mr Lubanga Dyilo and his co-perpetrators to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted in boys and girls under the age of 15 being conscripted and enlisted, and used to participate actively in hostilities.

4. Mr Lubanga Dyilo was the President of the *Union des patriotes* congolais (Union of Congolese Patriots) (UPC), the Commander-in-Chief of its military wing, the FPLC, and its

[1]Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by proces-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

[2]The definition of crime of aggression and the conditions under which the court could exercise jurisdiction with respect to that crime was included in the Rome Statute by way of its amendment at the first review conference of the Statute, held between 31 May and 11 June 2010.

political leader. He exercised an overall coordinating role regarding the activities of the UPC/FPLC and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15. The Chamber, comprising Judge Adrian Fulford (presiding judge), Judge Elizabeth Odio Benito and Judge René Blattmann, found that the evidence presented by the Prosecutor establishes beyond reasonable doubt that Mr Lubanga Dyilo's contribution was essential to the common plan.

5. The President of the Assembly of States Parties to the Rome Statute, Ambassador Tiina Intelmann (Estonia) welcomed the rendering of the verdict of Trial Chamber I in the above mentioned case and stated that "this verdict, which completes the trial phase of the first-ever case before the International Criminal Court, demonstrates that the ICC works: the system set up by the Rome Statute to bring an end to impunity for the worst crimes under international law is an operational reality. We have left the age of impunity behind us and entered the age of accountability".

6. The Rome Statute was adopted on 17 July 1998 and it entered into force on 1 July 2002. As on 1 February 2012, 120 countries are States Parties to the Rome Statute.[3] Out of this 32 Countries are African States[4] and 16 are from Asia – Pacific Region.[5] As on 1 February 2012 120 States have ratified the Rome Statute.[6] The ICC is an independent judicial body and is not a part of the United Nations Organizations. Although, the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organizations, individuals, corporations and other entities. As on 24 July 2012, 71 States have ratified/acceded and 62 States have signed the Agreement on the Privileges and Immunities of the International Criminal Court.[7]

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[3] <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> Accessed 21 February 2012

[4] **Burkina Faso**, 30 November 1998; **Senegal**, 2 February 1999; **Ghana**, 20 December 1999; **Mali**, 16 August 2000; **Lesotho**, 6 September 2000; **Botswana**, 8 September 2000; **Sierra Leone**, 15 September 2000; **Gabon**, 20 September 2000; **South Africa**, 27 November 2000; **Nigeria**, 27 September 2001; **Central African Republic**, 3 October 2001; **Benin**, 22 January 2002; **Mauritius**, 5 March 2002; **Democratic Republic of the Congo**, 11 April 2002; **Niger**, 11 April 2002; **Uganda**, 14 June 2002; **Namibia**, 20 June 2002; **Gambia**, 28 June 2002; **United Republic of Tanzania**, 20 August 2002; **Malawi**, 9 September 2002; **Djibouti**, 5 November 2002; **Zambia**, 13 November 2002; **Guinea**, 14 July 2003; **Congo**, 3 May 2004; **Burundi**, 21 September 2004; **Liberia**, 22 September 2004; **Kenya**, 15 March 2005; **Comoros**, 18 August 2006; **Chad**, 1 January 2007 and **Madagascar,** 14 March 2008;**Seychelles**, 10 August 2010

[5] **Fiji**, 29 November 1999; **Marshall Islands**, 7 December 2000; **Nauru**, 12 November 2001; **Cyprus**, March 2002; **Cambodia**, 11 April 2002; **Mongolia**, 11 April 2002; **Jordan**, 11 April 2002; **Tajikistan**, 5 May 2002; **Timor-Leste**, 6 September 2002; **Samoa**, 16 September 2002; **Republic of Korea**, 13 November 2002; **Afghanistan**, 10 February 2003; **Japan**, 17 July 2007 **Cook Island**, 18 July 2008 **Bangladesh**, 23 March 2010 and **Maldives** on 21 September 2011

[6] <http://www.iccnow.org/documents/RATIFICATIONSbyRegion_December2011_eng.pdf> Accessed 21 February 2012

[7] <http://www.iccnow.org/documents/APIC_EN_chart_updated_January_2012.pdf> Accessed 21 February 2012

7. The Statute places the primary responsibility on States for the investigation and prosecution of the crimes. The Court works on the principle of complementarity to the efforts of the States in investigating and prosecuting international crimes. The Court is the focal point of an emerging system of international criminal justice which includes national courts, international courts and tribunals with both national and international components (hybrid tribunals). The implementation of the Rome Statute in domestic legal systems also has positive effects on wider aspects of the national justice system, such as offering greater access to justice for all and setting higher standards of due process for the accused. And the powerful deterrent effect of the Statute may increasingly help safeguard the rights and dignity of future generations.

8. 14 cases in 7 situations have been brought before the ICC. So far, Uganda, the Democratic Republic of Congo and the Central African Republic have referred situations that occurred or are occurring in their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan and the one in Libya. The prosecutor has opened and is conducting investigations in all of the above mentioned cases. On 31 March 2010, a Pre-Trial Chamber granted the Prosecution authorization to open investigations *popio motu* into the situation in Côte d'Ivoire.

9. This Secretariat Report prepared for the **Fifty First Annual Session of AALCO** seeks to highlight the developments that have taken place after the Fiftieth Annual Session of the Organization. This Report briefly highlights AALCO's Work Program on the International Criminal Court in the previous year particularly the Developments at the "Meeting of Legal Experts on the Rome Statue of the International Criminal Court: Issues and Challenges" (Putrajaya-July, 2011); Report on the Tenth Session of the Assembly of States Parties, Consideration of the item during the Sixty-Sixth Session of the United Nations General Assembly (2011), some recent developments and Comments and Observations of the AALCO Secretariat.

**B.** ***The issues for focused deliberation at the Fifty-First Annual Session could be the following***: (i) the relationship between the ICC and the UN Security Council; (ii) the principle of complementarity in light of the post ICC Review Conference developments; (iii) why Asian states are hesitant to ratify the Rome Statute; (iv) the immunity of Heads of States; (v) it is critical that States Parties and non-state parties to the Rome Statute strengthen their domestic legal institutions; (vi) domestication of the provisions of the Rome Statute into the domestic legislations and (vii) imparting proper training to Prosecutors and Judges (State parties and non State-Parties) about the provisions of the Rome Statute.

## II. AALCO's Work Programme on the International Criminal Court

### A. Overview

10. The AALCO has been following the developments relating to the work of the ICC since its Thirty Fifth Session at Manila (1996). The initial discussions relating to the establishment of the ICC were held at the two Special Meetings convened within the framework of the Thirty Fifth and the Thirty Sixth Annual Sessions. Thereafter, the agenda has been successively deliberated in almost all the Annual Sessions.

11. Apart from this, AALCO has conducted numerous Seminars and Work Shops on specific thematic concerns relating to the ICC. In 2009, a seminar on "International Criminal Court: Emerging issues and Challenges" was successfully conducted in collaboration with the Government of Japan. In 2010, prior to the Kampala Review Conference, a Round Table Meeting of Legal Experts was organized jointly by The AALCO and the Governments of Malaysia and Japan with a view to consolidate the position of the Member States. The Reports of these meetings have thereafter been published and circulated among the Member States.

12. Since review and analysis of the developments at the Kampala Review Conference is an important part of the work programme of AALCO, a three member delegation, led by Prof. Dr. Rahmat Mohamad, the Secretary General and comprising of Dr. Yuichi Inouye, Deputy Secretary General and Mr. Shikhar Ranjan, Senior Legal Officer participated at the Review Conference. Addressing the General debate on 1 June 2010, the Secretary General highlighted the specific concerns of the Member States of AALCO, which emerged at the Putrajaya Round Table Meeting. He emphasized that expanding on the principles of universality, sustainability and complementarily were the major challenges that the ICC would have to face and look for solutions. The need for a clear and broadly accepted definition for 'aggression', the relationship between peace and justice, issues on cooperation with the ICC and the principle of complementarity were the other topics that he reflected on. On 2 June 2010, the Secretary General hosted an informal Networking Meeting of the AALCO. During the course of this meeting, the "Report of the Round Table Meeting of Legal Experts on the Review Conference of the Rome Statute of the ICC" was also launched. The meeting was well attended and several high-level representatives of Members States, non-Member States and representatives of civil society organizations attended it.

13. In 2011, the AALCO had also organized, in collaboration with the Government of Malaysia and the ICC, a 2 day Meeting of Legal Experts on the topic "Rome Statute of the International Criminal Court: Issues an Challenges". The Next part of this report highlights the discussions that took place and the concerns that were raised at that event.

**B. Meeting of Legal Experts on the Rome Statue of the International Criminal Court: Issues and Challenges (19th and 20th July 2011, Putrajaya, Malaysia)**

14. With the aim of providing its Members States a platform to share their concerns and experiences with each other regarding the International Criminal Court, AALCO in collaboration with the Government of Malaysia and the ICC organized a two day Meeting of Legal Experts on the Rome Statue of the ICC at Putrajaya, Malaysia on 19th and 20th July, 2011. Thirteen Member States of AALCO participated in the event, namely: Brunei Darussalam, People's Republic of China, Republic of Ghana, Republic of Iraq, Japan, Republic of Kenya, Great Socialist Peoples Libyan Arab Jamahiriya, Malaysia, Kingdom of Saudi Arabia, Singapore, Kingdom of Thailand, Republic of Uganda and the United Arab Emirates.

15. The meeting consisted of 3 working sessions, where the topics 'preconditions for the exercise of jurisdiction' & 'bilateral immunity agreements' (Working Session I); 'the principle of complementarity'& 'Criteria for selection of situations and the opening of investigations' & 'relationship between peace and justice' (Working Session II); 'Post Kampala review conference: An update' & 'implications of Ratification of Rome Statue' (Working Session III) were discussed and deliberated on.

16. Welcoming the delegation, **Prof. Dr. Rahmat Mohamad**, Secretary-General of AALCO, stressed on the importance with which AALCO has been pursuing the topic ICC and explained the previous work done by the Organization. Noting that despite repeated calls from the Secretary General of the United Nations for universalization of the Rome Statue, it has evoked lesser participation, particularly by the Asian States. H.E. Tan Sri Abdul Ghani Patail, the Attorney General of Malaysia delivering the inaugural address mentioned that the aim of the meeting was to look at the implementation and practical issues pertaining to the Rome Statute as well as to enhance understanding of the issues concerned. Noting that out of the 81 Member countries of the UN which had not ratified the ICC Rome Statute, 30 were AALCO Member States, which roughly formed about 40% of the total number, recalled the important role AALCO has to play in the universalisation of the Rome Statue in working out areas of concern such as the principle of complementarity and the relationship between the crimes listed in the statue and the Security Council.

17. **H.E. Judge Sang-Hyun Song**, President of the International Criminal Court, in his keynote address made a brief outline of the present work of the Court and encouraged Member States who are not party to the Rome Statute to do so and overcome the common misconceptions and prejudices held about the Court. He said that it is a misconception to hold that the ICC would be a tool of the Western States, noting that the court belonged to its States Parties among which the Western States were a minority. Noting that the Prosecutor and Judges of the Court were elected by Member States, it was also pointed out that irrespective of the financial contribution, every Member State had equal voting rights. Refuting the allegations that the ICC "targeted" only the African Countries, he pointed out that the court was providing justice to the African victims and that the first three situations were brought to the ICC by the Countries themselves and two were referred by the Security Council. The fears

of the court 'digging' into Countries or subjugation by the big powers were also explained to be common misconceptions. Ending the speech, he called for more participation and better implementation of the Rome Statute into the Domestic Laws.

***Working session I***

18. Chaired by **Judge Motoo Noguchi,** at the first session, the topics (i) Preconditions for the Exercise of Jurisdiction; and (ii) Bilateral Immunity Agreements was discussed.

19. Introducing the first issue, '**the preconditions for the exercise of Jurisdiction',** the Chair, referring to Article 12 of the Statute said that once a State becomes a party to the Statute, it accepts the Court's jurisdiction with respect to the crimes listed therein. The Court may exercise jurisdiction if one or more of the Sates where the conduct in question occurred or the person accused of the conduct holds nationality is a party to the Rome Statute or has accepted the jurisdiction of the Court. Thus, a national of a non-State party can also be tried by the ICC if the crime was committed on the territory of a State Party, providing a cause of concern for some of the non State-Parties to the ICC. Referring to Article 13 of the Statute that enumerates the exercise of jurisdiction by the Court, the chair explained that the court may exercise its jurisdiction with respect to the crimes of genocide, crimes against humanity and war crimes when the situation is referred to the prosecutor by a state party, the security council or the prosecutor initiating a *proprio motu* investigation. However, in the last case, the Prosecutor has to seek the authorization of the Pre-Trial Chamber before proceeding with the investigation. When the reference to the Prosecutor is by the Security Council, further stipulations in Article 12(2) are not necessary. The prosecutor pointed out that the works taken up by the Court presently is a result of all these three methods of initiation. The subject matter jurisdiction of the Court is also limited to the most serious crimes of concern to the International Community as a whole: the crimes of genocide, crimes against humanity an war crimes – all of which have been defined in the original statute and further elaborated in the Elements of Crimes Annex. The crime of Aggression has also been defined and incorporated into the Statute. The temporal jurisdiction of the court is limited to acts committed after 1 July 2002 and hence the misconception that the Court would dig into the pasts of Member States is also unfounded. However, the Court is a novel endeavor in that it has jurisdiction over both present and future acts, as opposed to the limited temporal, material and geographical jurisdiction of Tribunals right from Nuremburg to ICTR and other hybrid tribunals. Judge Noguchi also mentioned that the principle of complementarity was another important principle of the ICC, as the Court could only intervene when a country was unwilling or unable genuinely to carry out the investigation or prosecution at the national level.

20. Introducing the second issue relating to **Bilateral Immunity Agreements**, Judge Noguchi stated that Article 98 of the Rome Statute deals with so-called Bilateral Immunity Agreements (BIAs). These agreements were designed by the United States of America to immune its military personnel and civilians from the jurisdiction of the ICC. Till date a total of 102 BIAs have been known as signed. The last BIA was allegedly concluded in 2007. It has been said there is no indication that the current administration will pursue more BIAs.

21. **Mr. David Koller, Legal Officer, ICC,** the lead discussant briefly highlighted certain aspects relating to both the above mentioned issues. After reviewing those provisions of the Rome Statue that are germane to the discussion, Mr. Koller then gave a brief outline of the matters presently under the consideration of the ICC, the conditions for prosecution and investigation and immunities available under the Statute. Noting that that there is no immunity based on official capacity from prosecution, the chair briefly described that there are however state/diplomatic immunity of 3rd states and immunity from surrender under certain international agreements. The immunity envisaged in Article 98 is from surrender/assistance and not from jurisdiction and The Court may obtain waiver of immunity/consent to surrender. In conclusion, Mr. Koller emphasized once again that jurisdiction depends on either State consent or Security Council authorization. Once jurisdiction was triggered, investigations would be carried out independently; there was no immunity from jurisdiction and finally in case of difficulty in operations, there was an obligation for States to cooperate with the ICC.

22. After the presentations, the delegations of **People's Republic of China**, **Great Socialist People's Libyan Arab Jamahiriya, Malaysia, and Kingdom of Thailand** expressed their comments and observations.

23. The delegate of **People's Republic of China** expressed concerns over the interpretation of Article 98 of the ICC that relates to the BIAs signed by USA with over 102 States. He noted that any apparent shift in the policy of USA in favour of the ICC is incomprehensible with this state of affairs as presently no US military personal could be handed over to the Court under this set up. Reservations were also expressed on the interpretation of Article 26 and Article 98 and pointed out that it is not as simple as it appeared to be. As regards the exercise of jurisdiction *propio motu*, the delegate called for clarity on how to interpret and regulate the powers of the prosecutor. In response the Chair pointed out that the USA has gone on record officially and stated that it does not oppose any State joining the ICC and that the attitude is changing on all such matters of dispute.

24. The delegate from **Great Socialist People's Libyan Arab Jamahiriya** shared concerns about the status of BIAs and pointed out the prevailing view that the ICC seemed to be targeting only African countries and was ignoring situations elsewhere. In response, Mr. Rastan pointed out that the jurisdiction of the ICC is not affected by BIAs and that agreements under Article 98 affects only Cooperation by the requested State. As regards the other situations pointed out by the delegate, it was said that there were disputes whether the declaration accepting the Court's jurisdiction was valid as per the Statute of the Court. It was also pointed out that the jurisdiction of the ICC could be facilitated if the States become parties to the Rome Convention rather than await a UNSC referral or make an ad hoc acceptance of jurisdiction.

25. The delegate from **Malaysia** called for more transparency and clarity on how the ICC picks and chooses situations or internalize information that comes to the office of the prosecutor. The delegation also expressed concern over the political flavor of the decisions of the UNSC and the consequent concerns that several states have towards joining the ICC. The

delegation from **Thailand** pointed out that nationality was not properly defined under the ICC and in reply it was stated that there existed relevant State practice in relation to the exercise of criminal jurisdiction by States over persons who, nonetheless, possessed two different nationalities. However, no such situation had arisen before the ICC yet and as and when it arises, the Court would decide it.

***Working Session II***

26. The second working session was chaired by Prof. Dr. Rahmat Mohamad, Secretary General, AALCO. The discussions in the session centered around: (i) the Principle of Complementarity; (ii) the Criteria for the Selection of Situations and the Opening of Investigations; and (iii) the Relationship between Peace and Justice.

27. Prof. Dr. Mohamad described the ***principle of complementarity*** to be a cornerstone of the architecture of the Statute. The principle denoted that the ICC would assert its jurisdiction only when States are genuinely unwilling or unable to carry out investigations and prosecutions. The primary duty to investigate and prosecute thus lay on the States. According to the chair, the principle shaped various dimensions of ICC and domestic practice such as prosecutorial strategy, criminal policy, statutory implementation and compliance. He described the principle and its application to be of paramount importance to the operation and survival of ICCs work and national juridical systems, social tradition and culture. Pointing out that though the word complementarity is not used by the Statute, the principle could be traced to paragraph 10 of the Preamble and Article 1 referred to the principle and its legal contours have been set out by Article 17 – leaving considerable ambiguity and room for creativity to interpret the provision.

28. Noting that the practical application of the principle is bound to create difficulties. The Chair called for adoption of a strategy which he described as positive complementarity – connoting that the Court and the Office of the Prosecutor (OTP) should engage with national jurisdictions prosecutions, encouraging domestic prosecutions wherever possible. Such an approach would strengthen and build national capacities. While traditional complementarity was to work by forcing national prosecutions with the threat of international intervention in the event of inaction, positive complementarity envisages a more dynamic and engaging role for the ICC by fostering a cooperative relationship with national jurisdictions. The chair also cautioned about the relative lack of development of the theoretical underpinnings of the principle, noting that some of the conceptions deviated from the classical understandings of the principle. Notions such ‘gravity’, ‘inability’, ‘case’ and key concepts like ‘self-referrals’, ‘primacy of domestic jurisdictions’, ‘positive complementarity’ were at the heart of judicial and policy debate. The Chair contended that further clarifications on the principle by the Court in future would help build confidence of the international community and encourage active response from the States. The chair also stated the importance of the need for attention from States Parties regarding certain measures to be taken, particularly the adoption of effective national legislation.

29. The chair described ‘***Criteria for the Selection of Situations and the Opening of Investigations***’ to be the most controversial aspect of the Work of the ICC. Every decision to

intervene has been scrutinized by the court and has been the subject matter of strong reactions. It was pointed out that the leaders of some of the African States who were once the most supportive constituencies of the Court had begun to object to the ICC's exclusive focus on prosecuting the African defendants.

30. On the ***Relationship between Peace and Justice***, Prof. Dr. Rahmat pointed out that the debate was a contested and controversial once owing to its political nature. Noting the paradigm shift from peace versus justice to a positive relation between peace and justice, the Chair observed that the international community has agreed that there is no more any impunity for the most serious crimes – a fact that has changed the World. The Chair stressed on the importance of a holistic approach to the problem and not a narrow approach that confine to pursuing criminal charges alone. Reminding that no formal outcome on this debate at the Kampala Review Conference in 2010, the Chair presented the summary of discussions, which according to him was an important component on the subject:

1) With the establishment of the court there occurred a **paradigm shift** – a positive relation between peace and justice – though there were tensions between the two remaining. When in the past this was done in an unbalanced way, through amnesty laws which had varying degrees of effectiveness, amnesty is presently no longer an option for the most serious crimes under the Rome Statute.

2) **International justice** could result in the marginalization of those of fomented war and encouraged justice efforts at the national level. However the potential deterrent effect of justice would come into play only if justice is perceived to be norm and not an exceptional measure. There is also some dilemma about whether in the short run does justice prolong war. However, it is clear that in the long run, justice does prevent war.

3) **Non- judicial mechanisms** are very useful in themselves. It must not be seen as an alternative to, but rather supplementary to the criminal justice process, with the court concentrating on those responsible for the most serious crimes.

4) It was also noted that the there has been a shift in the views of the **victim** with an immediate goal for peace followed by a quest for justice. Question has also arisen over how to educate the victims about the option of pursuing justice without unduly raising their expectations.

5) In Conclusion it was also observed that the establishment of the Court constitutes a development as momentous as the adoption of the UDHR. At the Kampala Review Conference States were urged to translate their commitments into actions, particularly through the execution of arrest warrants and helping to reinforce rule of law across the globe, building new institutions – social and economic to achieve in the long run, justice in a broader sense.

31. **Dr. Rod Rastan, Legal Advisor, ICC Office of the Prosecutor**, the lead discussant for Working Group II, stated that the preambular paragraphs of the Rome Statute affirmed the obligations of States Parties to uphold the principles of International law and the Charter of the UN, thus indicating that the States already had an indication in this area. He stated that the principle of complementarity affirmed national sovereignty and reiterated the advantages of having justice locally. According to him international intervention was to be limited to

exceptional circumstances when there is a total collapse of the national judicial system as that happened in Rwanda. He also noted that the Rome Statute focuses primarily on national systems and only on crimes of massive atrocities and those bearing the greatest responsibility for the most serious crimes. Explaining the near impossibility of prosecuting all the agents involved in crimes of massive proportions, it was pointed out that the strategy of the OTP is to concentrate on those bearing the greatest responsibility for the most serious crimes. The other perpetrators are envisaged to be brought to justice using the mechanisms at the domestic levels .The Rome statue, is thus an instrument that envisages combined responses to serious crimes, involving both the national and international judicial systems and other transitional justice approaches.

32. Making the distinction between the situations which were within and outside the ICC treaty jurisdiction, he pointed out that in the latter case, the Court could act only if a non-state party voluntarily went to court on an ad hoc basis or the UNSC gets involved. He pointed out that difficulties arise when the UNSC has to choose between setting up more ad hoc tribunals like ICTY or the ICTR (which would be more costly) or refer the matter to the ICC, as it is already existing. However, the ICC is an institution independent of the UNSC and it could decline a referral if the criteria prescribed by the Statute have not been met. This was the reason, according to him why the ICC declined to take up certain situations like that of in Sri Lanka or Darfur. The matter then related to the political decisions made by the UNSC and the ICC itself was not involved in such decisions and exercises jurisdiction only where it possesses it. The issue of selectivity can be resolved only when there is universal adherence to the Rome Statute and there would be expansion of the Courts Treaty based jurisdiction.

33. After the presentations, the following Member states presented their comments and observations: **People's Republic of China, Republic of Kenya, Malaysia,** and **Uganda.**

34. The delegate from the **People's Republic of China** noted the relationship between the ICC and UNSC. Referring to the situation in Darfur and Libya, he inquired that was the legal authority and criteria for the ICC to investigate situations in non State Parties. In response, the official from the ICC replied that by virtue of the fact that these States are members of the UN has responsibilities under the UN charter are bound by the UNSC resolutions under Chapter VII. It was also said that upon reference, the ICC would seek cooperation of those States under the terms of the relevant resolutions of the UNSC that imposes obligations to cooperate with the Court. The delegate from **Kenya** explained the situation in that Country and their experience with the ICC. The official from the ICC touched upon the principle of complementarity and showed that the national courts and the ICC could take up different cases at the same time. The delegate from the **People's Republic of China** however pointed out that the principle was in excess of this formulation. According to him, the principle must mean that the national judicial systems must play a primary role in prosecution and the explanation of positive complementarity concerned with cooperation between the State Parties and the ICC. He said that rather that the Court deciding whether a State was unable or unwilling to prosecute, it should be the States who should make that decision. In response MR. Rastan said that Article 19 gave a procedure where States could seek judicial review of this issue by the judges of the ICC. Theoretically then the cases could be referred back to the

national level and of if the case proceeds genuinely this was fine. However, if the Prosecution could prove that there was something wrong, then the Court could be asked to revisit its decision. It was also pointed out that the Rome Statue does not aim at ensuring the trial of cases necessarily at the ICC, but to create an end to impunity through genuine proceedings – whether at national levels or at the ICC.

35. The delegate of **Malaysia** asked whether there were any guidelines for the prosecutor before the initiation of any investigations *proprio motu*. Issues on the difficulties of complementarity when complementary legislation that criminalize the ICC offences had to be internalized, especially when Countries have systems that criminalize a particular crime under specific legislation, which may not be the same crime as enlisted in the Rome Statute was also raised. It was pointed out that some countries have said that their respective penal laws were sufficient to address the ICC offences, Ex: Genocide v. Multiple counts of Murder. The sufficiency of this approach was questioned. In response, Mr. Rastan pointed referred to the OTPs *Draft Policy Paper on Preliminary Examinations*[8] on this matter. **Judge Noguchi** pointed out that as regards the internalization of the ICC offences, there was no common practice and the approach would depend on the penal laws of each State. However it was also pointed out that for certain offences like a certain type of incitement to commit genocide, which did not result in any actual causalities might not be prosecutable under existing national laws. However, these were not substantive barriers for accession to the Treaty as the ICC must also consider the factor of gravity of crimes in relation to the admissibility question. Thus the approach of internalization would depend greatly on the domestic situation. Mr. Rastan added that despite the obligations on state parties to adopt implementing legislation, it was the States discretion and decision whether and how to internalize the ICC's penal provisions. He also pointed out that complementarity as envisaged under the Statute refers to proceeding against the same person for the same conduct and some States have decided to exhaustively domesticate all ICC crimes. He maintained that if the cases were in fact different or the national prosecutions were for a different conduct, it related to the question of sequencing and prosecutorial discretion (i.e. whether as a policy matter the same person must be charged both at the ICC and the national level)

36. The delegate of the **People's Republic of China** inquired further about the implications of the ICC Rome Statute on universal jurisdiction – whether ratification would promote the State parties to enact universal jurisdiction legislation to fulfill the complementarity requirement. Referring to some of the decisions of the ICTY and the ICTR that referred cases back to national systems and showed that these tribunals have looked into the degree of discrepancy between international law and national legislation and their effect on the case before deciding to refer the cases back. It was pointed out that the ICC may or may not follow a similar approach and has yet to decide on such admissibility issues to date

37. The delegate of **Uganda**, referring to the immunity and bilateral agreements between State Parties and Non State Parties**,** said that that there was a contradiction to the concept of

[8]<http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> accessed 22 February 2012.

lack immunity all by itself. In response it was said that the Court could examine the scope of such agreements or interpret the extent of the applicable immunities in the context of the specific case in which it arose. **Mr. Koller,** added that the first question was "is there a prosecution or investigation or not" and if the answer was in the negative, there was no need to proceed with asking questions on inability or unwillingness.

***Working Session III***

38 The third working session was chaired by **Judge Noguchi.** The Session dealt with two issues: (i) Post Kampala Review Conference Developments and (ii) Implications of ratification to the Rome Statute. Mr. David Koller was the lead discussant. Mr. Koller gave an overview of the First Review Conference, where the following points were noted:

**(i) Amendments to the Rome Statute.**

a. The Rome Statute was amended so was to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to that crime. However, the actual exercise of jurisdiction was subject to a decision to be taken after 1 January 2017 by the same majority of State Parties required for an amendment of the Statute. The definition of the crime of aggression was based on United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974. A crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter was also made a part of aggression. A situation in which an act of aggression appeared to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involved States Parties or non-States Parties. The Conference also agreed to authorize the Prosecutor, in the absence of such determination, to initiate an investigation on his own initiative or upon request from a State Party after obtaining prior authorization from t he Pre-Trial Division of the Court. The Court would not have jurisdiction in respect to crimes of aggression committed on the territory of non-States Parties or by their nationals or with regard to States Parties that had declared that they did not accept the Court's jurisdiction over the crime of aggression.

b. Article 8 of the Rome Statute was amended to bring under the jurisdiction of the Court the war crime of employing certain poisonous weapons and expanding bullets, asphyxiating or poisonous gases, and all analogous liquids, materials and devices, when committed in armed conflicts not of an international character.

c. Article 124 was retained in its current form and it was agreed to again review its provisions during the fourteenth session of the Assembly of States Parties, in 2015. Article 124 allows new States Parties to opt for excluding from the Court's jurisdiction war crimes allegedly committed by its nationals or on its territory for a period of seven years.

**(ii) Stocktaking of international criminal justice**

a. The resolution on the impact of the Rome Statute system on victims and affected communities, inter alia, recognized, as essential components of justice, the right of victims to

equal and effective access to justice, support and protection, adequate and prompt reparation for harm suffered and access to information concerning violations and redress mechanisms.

b. The Conference also adopted a resolution on the issue of complementarity, wherein it recognized the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level.

c. In the Declaration on Cooperation, the Conference emphasized that all States under an obligation to cooperate with the Court must do so. Particular reference was made to the crucial role that the execution of arrest warrants played in ensuring the effectiveness of the jurisdiction of the Court.

d. The Conference further took note of the moderator's summary of the panel discussion held on the issue of "peace and justice". The panel highlighted the paradigm shift the Court had brought about; there was now a positive relation between peace and justice. Although tension between the two continued to exist and had to be addressed, amnesties were no longer an option for the most serious crimes under the Rome Statute.

**(iii) Enforcement of sentences**

a. In its resolution on strengthening the enforcement of sentences, the Conference called upon States to indicate to the Court their willingness to accept sentenced persons in their prison facilities and confirmed that a sentence of imprisonment may be served in prison facilities made available through an international or regional organization, mechanism or agency.

39. On the ***Implications of Ratification to the Rome Statute***, the chair highlighted the need to take such decision after weighing all the pros and cons of ratification. He said that while it was in its entirety a sovereign function, States also need to see the benefits of becoming a state party. Even as the ICC is not a perfect institution and was facing numerous challenges, States could become a part of the universal system to fight against impunity. He also said that the issues that merited consideration are: (i) the possible conflict of the ICC jurisdiction with the domestic legal system; (ii) the relationship between the ICC and the Security Council; and (iii) the financial implications which arises by becoming a State Party.

40. After the presentations, **Kenya, Kingdom of Thailand, and People's Republic of China** presented their comments and observations.

41. The delegate from **Kenya** commenting on the positive role envisaged to be played by the principle of complementarity inquired about the procedure for capacity building and technical assistance to be followed. Mr. Koller, referring to Article 93 (10) pointed out that the ICC played the role of facilitators by training legal counsel etc. Though there was no specific mandate in assistance measures, informally the court would provide assistance in any manner useful to the States.

42. The delegate of the **Kingdom of Thailand** pointed out that one of the reasons for Asian states to be hesitant to ratify the statute is the issue of non-international armed conflicts being enlisted under war crimes, which in turn was based on Additional Protocol II to the Geneva Conventions – incidentally the least ratified of Geneva Instruments. The delegate pointed this out to be a matter concerning internal security and protection of military personal engaged in those operations. Concerns were also expressed on the financial implications and issues relating to immunity. The issue of States with constitutional monarchies or presidential immunities facing difficulty accepting the Rome Statute was also highlighted – with the differences in practices followed by such states. In reply it was pointed out that the Statue leaves outside its ambit internal disturbances and presupposed a certain scale of conflict for the application of the instruments. Moreover, the non-international elements contained in article 8 derive from Common Article 3 of the Geneva Convention, which enjoy universal adherence. The remaining offences related to non-international armed conflict largely reflect those that are part of customary international law. Finally, the principle of complementarity holds that as long as a State genuinely addresses such situations, there would is no need for the ICC to intervene.

43. The delegate of the **People's Republic of China** inquired about the criteria to be applied by the ICC while adjudicating on "Crimes against Humanity" and the definition of attacks. The chair responded that the criteria for "Crimes against Humanity" had been developed under the Nuremberg Charter. Mr. Koller replied that presently the ICC did not have any jurisprudence on this issue however the definition of crimes against humanity was set out in further detail in article 7 of the Rome Statute. Mr. Rod Rastan said that the ICC has provisionally examined the definition of crimes against humanity in some cases; however, the jurisprudence would become more elaborated in the final judgments in those cases. It was noted that it would be instructive to also examine the jurisprudence of the ICTY and ICTR in this regard.

***Concluding Session.***

44. At the concluding session, Member States made their concluding and pointed out the issues that merited consideration.

45. The delegate of **Brunei Darussalam** noted that her country was not a Party to the Rome Statute for both legal and political reasons the primary one being the sovereignty of the nation. The primary concern was the application of Article 27, which was in contradiction with the Constitution of Brunei, according to which the Sulatan was immune. Similarly, internalization of the Rome Statute was also an issue as terms such as genocide and crimes against humanity were not defined in penal law of the country.

46. The delegate of the **People's Republic of China** said that his country had principle reservations to the Rome Statute since 1998 and subsequently to the working of the ICC, especially on its jurisdiction. The delegate also pointed out that it was not clear whether the international community was ready as a community of sovereign states to accept the idea of international law to have a permanent court against crimes for all humanity.

47. The **delegate of Kenya** said that even though Kenya was a State Party to the Rome Statute, she was not sure whether she wanted other countries to follow suit. She maintained that Kenya being a situation country, its experience with the court had been quite challenging. According to her it was critical for States Parties to strengthen their domestic institutions so that in case of need they could avoid going to the ICC.

48. The **delegate of Malaysia** stated that there was need to have the suitable legal framework in place, before proceeding to ratifying the Rome Statute. Concern was expressed regarding monarchy and the provisions in the Rome Statute.

49. The **delegate of Uganda** pointed out challenges to be faced by that country pertaining to immunity as well as the age of the criminal responsibility (Uganda-12 years and the issue of sentencing since Uganda has death penalty.

50. **Judge Noguchi** from Japan maintained that Japan was willing to share its experience of ratification with countries that are considering the accession. It would also be willing to cooperate with AALCO as well as the ICC in future activities.

51. **Mr. David Koller** maintained that the ICC would benefit from universal ratification. He referred to the discussion on the role of the UNSC and felt that once ICC attained universality this role would diminish. He noted that, while ratification and implementation were linked issues, there were only a few direct obligations under the Rome Statute in terms of specific implementation requirements. On the question of punishment he said that it was entirely up to State on what kind of punishment to impose and they did not necessarily have to apply the ICC punishment. He maintained that the officials from the ICC would be glad to engage further with States irrespective of the fact whether they were States Parties or non-States parties to the Rome Statute. **Mr. Rod Rastan** also echoed Mr. Koller and said that that the OTP would be willing to assist States with matters pertaining to the ICC, whether in the areas of exchanging lessons learned and best practices, participating in trainings or lending other forms of assistance.

52. **Prof. Dr. Rahmat Mohamad, Secretary-General** envisaged three further activities: (i) Conduct a training/capacity building workshop for Judges and Prosecutors from AALCO Member States to acquaint them with the Rome Statute; (ii) to co-host a conference with the ICC for greater in-depth consideration of significant issues arising out of the present Meeting of Legal Experts and (iii) conduct research on some of the key areas pertaining to the ICC.

## III. Assembly of States Parties of the ICC

53. Part 11 of the Rome Statute provides for the Assembly of States Parties (ASP), which is the management oversight and legislative body of the International Criminal Court. It comprises of representatives of the States that have ratified and has acceded to the Rome Statute. Each State Party is represented by a representative who is proposed to the Credential Committee by the Head of the State of the Government or the Minister of Foreign Affairs. Each State Party has one vote, however every effort must be taken to reach decisions by consensus and votes are taken only in the absence of that. Other States, which have either signed the Statute or signed the Final Act of the Rome Diplomatic Conference, may sit in the Assembly as Observers. The Bureau of Assembly of States Parties consisting of a President, two Vice Presidents and 18 members are elected by the Assembly for a term of three years. The election is based on the principles of equitable geographic distribution and adequate representation of the principal legal systems of the world. The Assembly is responsible for the adoption of the normative texts, the budget and the election of the Judges and of the Prosecutor and the Deputy Prosecutor. It meets at least once in a year.

### A. The Tenth Session of Assembly of States Parties (ASP X)

54. The tenth session of the ASP was held at New York from 12 to 21 December, 2011. The Assembly adopted six resolutions: on cooperation, amendment to the rule 4 of the Rules of Procedure and Evidence, reparations, permanent premises, the "omnibus" resolution and the 2012 budget. The Assembly elected Fatou Bensouda (The Gambia) to be the next ICC prosecutor for a nine-year term beginning on 16 June 2012. Six new judges were elected in 16 rounds, representing a third of the Court's full slate of 18 judges. Tiina Intelmann (Estonia) was elected as the new ASP president for a three-year term. Markus Börlin (Switzerland) and Ken Kanda (Ghana) were elected as vice-presidents. The Assembly also elected the 18 members of the ASP Bureau —the ASP's executive committee—for three-year terms.

55. The general debates of the ASP were held on 14 and 15 December, 2011. The Representatives of the Member States, Non Governmental Organizations and an observer mission from the United States of America participated in the General Debates. 11 Member States who are members of AALCO participated in the debate.

56. The representative of **Botswana** described the ICC to be the only hope for redress for the numerous victims of atrocities which are committed by callous regimes all over the world. The accession to the court was necessary as the victims of heinous crimes have a right to protection even where the perpetrator of the crime is a State and to dispel the notion that governments and their leaders can do as they please. The ICC was described as the only effective International check against unbridled abuses if the states are unable or unwilling to do so themselves. Describing the limitations of the Court's jurisdiction over non state parties as undermining its ability to pursue justice in all situations, the ASP was called upon to address this matter with urgency. The Member States were also called upon to publicly defend the credibility and integrity of the Court. About the perception that the ICC unfairly targets African States, it was pointed out that human rights abuse and mass atrocities are prevalent in the region and that in majority of the situations, African Governments themselves have

invited the intervention of the Court. The need for political will and the moral courage to bring the guilty to accountability was also called for. Noting that actions from the UNSC are heavily dependent on political configurations, the need for cooperation between Member States to work the Rome Statue was also called for.

57. The representative from **Bangladesh** noted that the uneven responses to atrocious acts around the world would be minimized in the long run with a larger number of cases being dealt with in an objective and fair manner by the Court. The representative of **Ghana** appealed to the States Parties to show support for the principle of responsibility to protect, adopted by the World Leaders at the 2005 summit of the UN General Assembly as the preventive side of the Rome Statue system. He described the principle and the Rome Statue to be complementary in nature. The representative of **Japan** noted that adding more politically sensitive crimes to the Rome Statue may undermine its very effectiveness and the quest towards universality. Highlighting the concerns over the legal ambiguities created as a result of the political compromise on the crime of aggression, the delegate called for a quite dialogue among interested parties to narrow the gaps. Further efforts to discuss future amendments over both substantive and procedural issues in the Working Group on amendments were also called for. Emphasizing on the need for the best efforts at national prosecution, assistance to developing and post conflict countries to build an effective criminal justice system was called for as it meaningfully promotes the principle of complementarity. The representative from **Jordan** highlighted the need to do away with the system of 'reciprocal arrangements' to ensure that the most competent persons get elected to the Court.

58. The representative from **Kenya** pointed out that the burden of ensuring fairness and legitimacy to the Court is presently disproportionally placed on the Office of The Prosecutor and that the other organs of the Court – the Presidency of the Court, the Judicial divisions and the Registrar must carry an equitable burden and responsibility in legitimizing and giving popular credibility to the ICC. The delegation also called on those members of the UNSC who are not States Parties to the Rome Statue to do the same so that they are also bound by the same principles over which they wish to adjudicate and pronounce themselves with the UNSC. This is imperative to prevent impunity and high handedness at the international level by selective and prejudicial application of the Rome Statute, especially by non-signatory actors. Regarding the engagement of the ICC with the African region, the delegation called for making a clear distinction in approaching situations in non-functional democracies with functional ones, albeit with weak and evolving political and judicial institutions. It was also pointed out that in the face of competition for power in complex political scenarios, the sourcing, collection analysis and use of evidence must be rigorous and must represent the full spectrum of forces at play. State evidence, should receive equal credence to all other evidence brought to bear on the prosecution as well as the adjudication.

59. The representative of **Nigeria** highlighted the importance of strengthening the public information and outreach activities of the court as essential in promoting understanding of the international criminal justice process. The delegation also called for sustained attention of the Court to victims, survivors and affected communities to ensure healing and reconciliation.

The representative of **Uganda** also emphasized on the need for paying more attention to framing outreach programs to improve the visibility and global acceptance of the Court.

60. Taking note of the report prepared by the court on the issue of cooperation[9], the ASP adopted a resolution[10] emphasizing the importance of cooperation with the court, especially in the execution of warrants and acknowledged this to be a matter of fundamental importance that affects the efficiency and the working of the Court. Further emphasizing the need for States parties to cooperate with the court in areas such as preserving and providing evidence, sharing of information and protection of victims and witnesses, the member states were called upon to consider the strengthening of cooperation with the Court by way of agreements and arrangements with the court or such other means. The ASP also urged the States Parties to adopt such legislative and other measures to fulfill their obligations under the Rome Statute. The ASP also requested the bureau to establish a facilitation of the ASP for cooperation, to consult with States Parties, the Court and NGOs as well as other interested States and relevant organizations to further strengthen cooperation with the court.

61. Reparations to the victims are a critical component of the Rome Statute. However there are no fixed principles yet for the determination of the extent and scope of any damage, loss and injury to, or in respect of, victims. Noting that this can result in practical inconsistency and unequal treatment of the victims, the ASP requested the court for the establishment of such principles relating to reparations accordance with article 75, paragraph 1, based on which the Court may issue individual orders for reparations. The ASP also noted that liability for reparations is exclusively based on the individual criminal responsibility and hence under no circumstances shall States be ordered to utilize their properties or assets, including the assessed contributions of the States parties towards funding reparations, including in those situations where the individual holds or has held an official position. The ASP also emphasized on the importance of identifying and freezing the assets of the convicted persons for the purposes of funding reparations and the Court was called upon to take all measures for that purpose. The need for cooperation and information sharing between States towards that end was also stressed. The ASP also resolved that as adjudication of individual criminal liability is the mandate of the court, evidence concerning reparations may also be taken during the trial hearings so as to avoid delays and ensure streamlining of the judicial phase of the reparation proceedings.[11]

62. At the 9th plenary meeting on 21st December, 2011, the ASP, by Consensus adopted the resolution[12] on "**Strengthening the International Criminal Court and the Assembly of States Parties".** Considering the report of the Bureau on potential Assembly procedures relating to non-cooperation,[13] the ASP resolved to adopt the procedures annexed to resolution ICC-ASP/10/Res.5 as "Assembly Procedures Relating to Non-Cooperation" .The ASP also called on Member States and non-Member States to be parties to the Agreement on the

[9] ICC-ASP/10/40.
[10] ICC-ASP/10/Res.5
[11] ICC-ASP/10/Res.3
[12] ICC-ASP/10/Res.5
[13] ICC-ASP/10/37

Privileges and Immunities of the International Criminal Court as a matter of priority and to incorporate the same into their national legislations. The ASP also noted the need for improvement in the victim participation system to ensure its sustainability and effectiveness. Further, States, intergovernmental organizations, individuals, corporations and other entities were called upon to voluntarily contribute to the Trust Fund for victims in view of the imminently possible reparations. It was also resolved to continue and strengthen effective domestic implementation of the Statute so as to enhance the capacity of national jurisdictions with international recognized fair trial standards, pursuant to the principle of complementarity. The ASP also recognized importance of a fully operational Independent Oversight Mechanism, in accordance with ICC-ASP/8/Res.1 and ICC-ASP/9/Res.5, to the efficient and effective operation of the Court. Taking note of the report[14] of the Bureau on this subject, it was decided to continue discussions with a view for the Bureau to submit, to the eleventh session of the Assembly, a comprehensive proposal that would make possible the full operationalization of the Independent Oversight Mechanism. The development of an anti-retaliation/whistleblower policy was also invited. Welcoming the Bureau report on the Working Group on Amendments,[15] the Working Group was requested to continue its consideration of amendment proposals and of its own procedural rules or guidelines, and submit a report for the consideration of the Assembly at its eleventh session.

63. As part of the ASP X, on 19 December 2011, a side event was also organized on the topic "Universality of the Rome Statute and implementing legislation: developments and resources", in furtherance of the Plan of Action adopted by the ASP.[16] The presidency of the Court, addressing the session, highlighted the need to step up the efforts to achieve universality for which fresh thinking and a more robust and more strategic approach was necessary. Noting that it is sheer lack of knowledge about the benefits of ratification that is one of the main obstacles to universality, the President noted that increasing ratifications in the Asian region and the events following the 'Arab Spring' highlights the importance of ratification and grants momentum to that direction. While obstacles to ratification or accession are often due to lack of political will, it was noted that the obstacles in terms of implementing legislation are more often resource related – which highlights the need for capacity building and assistance in implementation. Representing the Commonwealth Secretariat its Director of Legal and Constitutional Affairs drew attention to the model law on the implementation of the Rome Statute, which he described to be an invaluable tool for Member States. Attention was also drawn to the fact that despite increasing number of ratifications, implementing legislations have not been enacted in most of these States. Being a Treaty that requires specific incorporation, the lack of such legislation was pointed out to be striking at the very effectiveness of the Treaty.

[14] ICC-ASP/10/27.
[15] ICC-ASP/10/32.
[16] ICC-ASP/5/Res.3 (1 December 2006)

## IV. Consideration of the item during the year 2011 at the Sixty-Sixth Session of the General Assembly of the United Nations

### A. ICC President's Report to the Sixth-Fifth Session of the United Nations General Assembly: 19 August 2011

64. The Seventh Annual report[17] of the ICC governing the period 1 August 2010 to 31 July 2011 was submitted to the United Nations, in accordance with Article 6 of the Relationship Agreement between the International Criminal Court and the United Nations. The report covers the main developments and activities of the Court and other developments relevant to the relationship between the Court and the UN since the last report.

65. In carrying out its functions, the Court relies on the cooperation of States, international organizations and civil society in accordance with the Rome Statute and international agreements concluded by the Court. Areas where the Court requires cooperation from States include analysis, investigations, the arrest and surrender of accused persons, asset tracking and freezing, victim and witness protection, provisional release, the enforcement of sentences and the execution of the Court's decisions and orders.

66. The Court is independent from, but has close historical, legal and operational ties to, the United Nations. The relationship between the Court and the United Nations is governed by the relevant provisions of the Rome Statute and by the Relationship Agreement and other subsidiary agreements.

### B. Judicial Proceedings

67. During the reporting period, the Court continued to be seized of the five situations already opened: the situations in Uganda; The Democratic Republic of Congo; The Central African Republic; Darfur, Sudan; and Kenya in March 2011, the Prosecutor opened a sixth investigation into the situation in Libiyan Arab Jamahiriya following a referral by Security Council Resolution 1970 (2011) adopted on 26 February 2011. The prosecutor has also requested authorization from the Pre-Trial Chamber to open investigations into a seventh situation, in Côte d'Ivoire. In relation to each of the six investigations judicial proceedings have also taken place, resulting in 13 cases involving 26 persons, all accused to have committed crimes that fall within the jurisdiction of the Court. Out of these, 1 person has been official declared to be dead and proceedings as against him have been terminated. The judicial developments during the reporting period and till January 2012 are:

***Situation in the Democratic Republic of the Congo***

68. In this situation, four cases have been brought before the court. The accused Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui and the suspect Callixte

[17] A/66/309

Mbarushimana are currently in the custody of the ICC. The suspect Bosco Ntaganda remains at large.

69. The trial in the case of Thomas Lubanga started in 2009 and after a series of appeals and orders of stay by both the Trial and Appeal Chambers, the trial has been completed. Closing oral statements was scheduled to take place on 25 and 26 August 2011.

70. The trial of Germain Katanga and Mathieu Ngudjolo started in November 2009. The presentation of live evidence by the prosecution concluded in December 2010. The first defendant, Mr. Katanga, presented his case between 24 March 2011 and 12 July 2011. The defense case of Mr. Ngudjolo is scheduled to commence on 15 August 2011. A total of 366 victims are participating through their legal representatives, 2 having testified at trial.

71. In the case of Callixte Mbarushimana, On 15 July 2010, the prosecution filed the document containing the charges and list of evidence. The charges contain 13 counts of war crimes and crimes against humanity. The confirmation of charges hearing in the case took place from 16 to 21 September 2011. On 16 December 2011, Pre-Trial Chamber I decided by Majority to decline to confirm the charges against Mr. Mbarushimana and to release him from the custody of the Court, on the completion of the necessary arrangements.

***Situation in Central African Republic***

72. The situation reached the Court pursuant to a reference by the Central African Republic in 2004. In the only case in this situation, ***The Prosecutor v. Jean-Pierre Bemba Gombo,*** the trial commenced on 22 November 2010 before the Trial Chamber.To date, 1,619 victims have been admitted to participate in the trial proceedings through their legal representatives. As on 31 July 2011, the prosecution had presented 25 of its 40 planned witnesses.

***Situation in Darfur, Sudan***

73. There are four cases involved in this situation, namely, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*; *The Prosecutor v. Bahar Idriss Abu Garda*; and *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.

74. Warrants of arrest have been issued by Pre-Trial Chamber I for Messrs Harun, Kushayb and Al Bashir. The three suspects remain at large. Pursuant to the summons issued, Mr. Abu Garda had voluntarily appeared before the chamber in 2009. In February, 2010, after the hearing of confirmation of charges, the pre trial chamber declined to confirm the charges and Mr. Garda is no longer in the custody of the ICC. Pursuant to the summons, Mr. Banda and Mr. Jerbo had also appeared voluntarily in 2010. On March 7, 2011, the Pre-Trial Chamber decided to confirm the charges of war crimes brought against them and committed them to trial. Mr. Bashir remains at large and in May 2011, the Pre- Trial Chamber issued a

decision informing the State Parties to the Rome Statue of Mr. Bashir's visit to Djibouti, in order for them to take any action that may be appropriate. A total of 12 victims have been admitted to participate in this case through their legal representatives.

75. Abdallah Banda Abakaer Nourain is alleged to be the Commander-in-Chief of the Justice and Equality Movement and Mohammed Jerbo Jamus is alleged to be the former Chief-of-Staff of the Sudan Liberation Army-Unity. On 7 March 2011, Pre-Trial Chamber I confirmed three charges of war crimes against these persons. On 16 May 2011, the parties filed a joint submission stating that the accused would contest only certain specified issues at their trial. The agreement reached by the parties would shorten the trial by focusing on only those issues that are contested between the parties, This is expected to promote an efficient and cost-effective trial while preserving the rights of victims to participate in the proceedings and protecting the rights of the accused persons to a fair and expeditious trial. As on 31 May 2011, a total of 89 victims had been authorized to participate through their legal representatives in the proceedings. The date of the commencement of trial will be set in due course.

***Situation in the Republic of Kenya***

76. Pursuant to the permission granted by the Pre-Trial Chamber, the Prosecutor initiated investigations *propio motu* into the situation in Kenya. Following summonses to appear issued on 8 March 2011, six Kenyan citizens voluntarily appeared before Pre-Trial Chamber II on 7 and 8 April 2011. he confirmation of charges hearing in the case *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* were held from 1 to 8 September 2011. The confirmation of charges hearing in the case *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* took place from 21 September to 5 October 2011.

77. On 31 March 2011, the Government of Kenya filed an application challenging the admissibility of the case before the Court. Pre-Trial Chamber II rejected the application on 30 May 2011, holding that the application did not provide concrete evidence of ongoing national proceedings with respect to the persons subject of the proceedings at the Court. The Government's appeal against the decision is pending before the Appeals Chamber.

***Situation in Libya***

78. The OTP commenced investigation into the situation in Libiya pursuant to Security Council Resolution 1970 (2011), by which the situation was referred to the Prosecutor.On 27 June 2011, Pre-Trial Chamber I issued warrants of arrest against Libyan leader Muammar Mohammed Abu Minyar Gaddafi, his son Saif Al-Islam Gaddafi, Libyan Government Spokesman, and Abdullah Al-Senussi, Director of Military Intelligence, for two counts of crimes against humanity. The Pre-Trial Chamber found that there was reasonable grounds to believe that Muammar Gaddafi, in coordination with his inner circle, conceived and orchestrated a plan to deter and quell, by all means, civilian demonstrations against the regime.

***Situation in Uganda***

79. The case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard by the Pre-Trial Chamber. Five warrants of arrest have been issued against the five top members of the Lords Resistance Army. Following the confirmation of death of Mr. Lukwiya, the proceedings against him have been terminated. The remaining suspects are yet to be arrested and remain at large. The Office of the Prosecutor continued to gather information on crimes allegedly committed by the Lord's Resistance Army (LRA) and to promote action to implement warrants against the top LRA leadership, carrying out three missions to three countries in relation to the situation in Uganda. As part of its policy of positive complementarity, the Office has provided assistance to Ugandan authorities to investigate and prosecute individuals.

***Situation in Côte d'Ivoire***

80. Côte d'Ivoire is not a party to the Rome Statute and had accepted the jurisdiction of the Court in 2003, which was reconfirmed by the Countries' Presidency in 2011. The Pre-Trial Chamber granted the Prosecutor authorization to open investigations *propia motu* in the situation. On 23 November 2011, the Pre-Trial Chamber issued warrant of arrest in the case of Laurent Gbagbo for four counts of crimes against humanity. The arrest warrant was unsealed on 30 November 2011 when the suspect was transferred to the ICC detention centre. On 5 December 2011, the Pre Trial Chamber held an initial appearance hearing and set the date for the hearing of confirmation of charges to start on 18 June 2012.

***Outstanding Warrants of Arrest***

81. At the time of the submission of the present report, 12 warrants of arrest were pending:

(a) Uganda: Mr. Joseph Kony, Mr. Vincent Otti, Mr. Okot Odhiambo and Mr. Dominic Ongwen, outstanding since 2005;
(b) Democratic Republic of the Congo: Mr. Bosco Ntaganda, outstanding since 2006;
(c) Darfur, Sudan: Mr. Ahmad Harun and Mr. Ali Kushayb, outstanding since 2007 and, in the case of Mr. Omar Al Bashir, two warrants outstanding since 2009 and 2010;
(d) Libyan Arab Jamahiriya: Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, outstanding since 27 June 2011.

82. The Court has issued requests for cooperation in the arrest and surrender of each of these individuals and notified these requests to the relevant States. In respect of the situations in Darfur, Sudan, and the Libyan Arab Jamahiriya, all parties, including the respective States, are obliged to cooperate fully with the Court and the Prosecutor pursuant to Security Council resolutions 1593 (2005) and 1970 (2011), respectively.

## V. Comments and Observations of the AALCO Secretariat

83. The first conviction at the International Criminal Court in the tenth year of its functioning is a good time to take stock of how well an institution that was designed to counter war crimes and crimes against humanity around the world has performed so far. The guilty verdict on the democratic republic of Congo rebel warlord, Thomas Lubanga, for conscripting children under 15 is a welcome sign that individuals can be brought to justice for grave violations of human rights even if "their" governments lack the will or capacity to prosecute them.

84. The ICC has a mandate to probe atrocities and prosecute individuals up and down the official chain of command in 120 countries that have ratified the Rome Statute. Despite its global mandate, however, all prosecution cases in its ten year history come from Africa: Uganda, the DCR, Sudan, the Central African republic, Kenya, Libya and Cote d' Ivoire. The silence of the Court on the territory of some state-parties needs explanation. There are some grave violations in other territories which the ICC chooses to ignore. In January 2009, after suffering heavy Israeli bombing in civilian areas in Gaza, the Palestinian National Authority lodged a declaration with the ICC under a provision of the Court's statute allowing states voluntarily to accept its jurisdiction.

85. Despite hundreds of civilian deaths and a UN report which spoke of Israeli war crimes. Unfortunately, on 7 April 2012, the Prosecutor of the ICC has stalled the bid by the Palestinian Authority for an investigation into Israel's conduct during the Gaza war of 2008 because Palestine does not have the required legal status of an internationally recognized independent State. "The office (of the prosecutor) has assessed that it is for the relevant bodies at the UN or the Assembly of State Parties to make a legal determination whether Palestine qualifies as a state for the purpose of acceding to the Rome Statute", the Prosecutor's office said in a statement. The statement however also said that the court's reach was not based on a principle of universal jurisdiction and it could open investigations only if asked to do so by either the UN Security Council or by a recognized State. Many Human Rights groups criticized the decision and it was said that "This dangerous decision opens the ICC to accusations of political bias and is inconsistent with the independence of the ICC". "It also breaches the Rome Statute which clearly states that such matters should be considered by the institution's judges,[18]" Such willful disregard of its mandate only ends up undermining the credibility of a court that is potentially one of the most noteworthy product of international law in the 21st century.

86. Having said that, the establishment of the International Criminal Court capped the efforts of the international community to enforce the applicability of international humanitarian law, and advance the cause of justice and the rule of law on a universal scale. Today the Court is an independent, fully functional Organization, based in The Hague. One of

[18] Marek Marczynski, Head of Amnesty International's International Justice campaign. AFP. Available at http://www.google.com/hostednews/afp/article/ALeqM5hFJ8u4_AtgkP2Kpy_BXg_ETV7N-g?docId=CNG.117b9d2e24e98f4d9cc4a11a230c357d.221, accessed on 8 April 2012.

the pillars of the Rome Statute is the principle of complementarity. Thus, there is the fundamental principle that persons who committed the most serious crimes underlined in the Rome Statute would, first of all, be punished by a national court in the State Party itself, and if this can be done there is no obligation to hand over a suspect to the ICC. In other words the ICC is the Court of last resort.

87. In order to carry out its functions effectively the Court has to cooperate with both the United Nations and other International Organizations as well as with States. The significance of the Rome Statute is building a network of cooperation between the States Parties and the ICC, in order to ensure that there is no safe haven anywhere in the world for persons who committed serious crimes such as war crimes, crimes against humanity and genocide. As Judge Saiga of the ICC[19] said "Setting up a network in the international community for preventing these suspects from going unpunished will serve as the greatest deterrent for these horrendous crimes".

88. The drafters of the Rome Statute planned the first Review Conference as the first opportunity to consider amendments. They were of the view that seven years of the functional Court operations should enable States to make informed decisions on whether changes to the Rome Statute were needed.

89. In June 2010 and at the very beginning of the Review Conference, the international community had already answered that question: the Rome Statute was a very substantial treaty, which equipped the Court with all the tools necessary to carry out its mandate, and there was no need for significant changes to the treaty.

90. The discussions on amendments during the Conference focused on issues mandated by the Rome Conference itself. No proposals for institutional changes were tabled and the fundamentals principles, on which the Rome Statute was based, were firmly supported.

91. During the Conference many speakers expressed the view that impunity implied achieving universality of the Rome Statute, however, there was still a long way to go before the Rome Statute becomes a truly universal instrument as it was not an easy process.

92. At the same time, it should be remembered that ratifying the Statute was far from being enough. A genuine commitment to the Court required the adoption of necessary implementing legislation. The outcome of the Review Conference has clearly demonstrated that the principle of complementarity would remain as one of the pillars for the effective functioning of the Court, and to be used as the Court of last resort. This principle needs to be further strengthened.

93. In this regard, it is pertinent to mention that despite, the repeated calls from the Secretary-General of the United Nations for universalization of the Rome Statute; it has

[19] Inaugural address of Judge Saiga of the ICC "The ICC Today: Activities and Challenges" delivered at the seminar on International Criminal Court: Emerging Issues and Future Challenges", jointly organized by AALCO and the Government of Japan, held in New Delhi on 18th March 2009.

evoked lesser participation particularly from the Asian States. Towards addressing this issue the AALCO has held a series of Seminars and Expert Group Meetings over the past three years, so that Member States can table and discuss their concerns regarding the functioning of the ICC.

94. It may be noted that as of 1 March 2012, 120 countries have ratified the Rome Statute, as a result there are approximately 83 non-Party States among them three Permanent Members of the Security Council (United States, Russian Federation and the People's Republic of China) and several other large and influential States including India, Indonesia, Malaysia, Turkey, Arab Republic of Egypt, Pakistan and the Islamic Republic of Iran.

95. Generally speaking the situation of non-party States is governed by article 34 of the V*ienna Convention on the Law of Treaties*, which states that: "A treaty does not create either obligations or rights for a third State without its consent." Nevertheless, significant legal issues arise concerning the relationship between non-party States and the *Rome Statute.* These issues, can be broadly divided into questions of jurisdiction of the Court and cooperation with the Court. Many of these concerns were expressed by the Member States of AALCO during the recent Expert Group Meeting on the Rome Statute of the ICC: Issues and Challenges, which was held in Putrajaya, Malaysia and has been, discussed in Part IV of this document. Besides, some non-State Parties have expressed concern regarding the immunities of Heads of States particularly if it is a Monarch. Some other States are also apprehensive of the cost that would entail in becoming a Party i.e. the annual contribution to the ICC, which would be an additional burden on their economies.

96. The other major challenges before the ICC are mainly universality, sustainability and complementarity. In order to achieve the universality of membership of the Rome Statute, it should be recognized that each country has its own legal culture and ratification of the Statute that which has different political implications on the home front of each State. Therefore, sustainable efforts should be taken on the part of international community to iron out the differences, misconceptions revolving around the Rome Statute of the ICC and thereby accommodate the non-States parties in to the system to attain the universality of the international criminal justice system.

97. Regarding the Principle of Complementarity, generally, the AALCO Member States are of the opinion that the role of the ICC, in accordance with the Rome Statute, shall be complementary to the national criminal jurisdiction. Investigation and prosecution of serious international crimes should in the first place be handled by national judicial systems rather than by the ICC. It is vital to understand the role and the effectiveness of the Court, but its actual character would be further clarified through its application.

98. International justice is complementary to national justice, and the international community must contribute more to positive complementarity and to filling the impunity gap. As the International Criminal Court operates on the basis of the principle of complementarity, it should also contribute to the development of national capacities to handle international crimes. States parties to the Rome Statute have recognized the desirability of assisting each other in strengthening domestic capacity. The United Nations should further enhance its

support to Member States in reinforcing or developing their capacity in that regard. Success in those efforts requires coordination and coherence that effectively links international criminal justice to support for the development of the rule of law in appropriate countries.

99. These concerns of the States shed light over their individual and collective concerns, and though repeated calls for universalization have been made by the Secretary-General of the United Nations, ultimately ratifying the Rome Statute depends on the sovereign decision of the States.

## VI. ANNEX

**SECRETARIAT'S DRAFT**
**AALCO/RES/DFT/51/S 9**
**22 JUNE 2012**

### INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS
**(*Deliberated*)**

***The Asian-African Legal Consultative Organization at its Fifty-First Session,***

**Considering** the Secretariat Document No. AALCO/51/ABUJA/2012/S 9;

**Taking note** of the deliberations and decisions of the Review Conference of the Rome Statute of the International Criminal Court, and noting the progress in cases before the International Criminal Court (ICC);

**Also taking note** of the deliberations and decisions of the Tenth Session of the Assembly of States Parties to the Rome Statute of the ICC;

**Being aware** of the importance of the universal acceptance of the Rome Statute of the ICC and in particular, the principle of complementarity;

**Taking note** of the outcome of the Review Conference of the Rome Statute of the International Criminal Court held at Kampala, Uganda;

**Also Taking Note with appreciation** the convening and outcome of the "Meeting of Legal Experts on the Rome Statute of the International Criminal Court: Issues and Challenges" held on 19 and 20 July, in Putrajaya, Malaysia,

1. **Encourages** Member States which are not yet party to consider ratifying/acceding to the Rome Statute and upon ratification/accession consider adopting necessary implementing legislation.

2. **Further encourages** Member States that have ratified the Rome Statute to consider becoming party to the Agreement on the Privileges and Immunities of the ICC.

3. **Directs** the Secretariat to follow up the deliberations in the forthcoming Eleventh Session of the Assembly of States Parties and its meetings, and follow the developments regarding cases taken up by the ICC, and present a report at the Fifty-Second Annual Session,

4. **Requests** the Secretary-General to explore the possibility of convening a workshop in collaboration with the ICC, in a Member State of AALCO, for Prosecutors and Judges from AALCO Member States, aimed at capacity building and familiarizing them with the working of the ICC, and

5. **Decides** to place this item on the provisional agenda of the Fifty-Second Annual Session.