6. THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS

I. INTRODUCTION

1. On 17 July 2008 the world witnessed a turning point in the growing movement to end the culture of impunity and bring forth an era of accountability. The adoption that day of the Rome Statute\(^1\), the founding treaty of the International Criminal Court (ICC), is now celebrated as International Justice Day. The year 2008 marks the tenth anniversary of the most significant advances in international law since the Universal Declaration of Human Rights and the affirmation of “never again” that followed the Nuremberg trials. The International Criminal Court is the world’s first permanent, independent court to try crimes against humanity, genocide and war crimes (the Court will also have jurisdiction over the Crime of Aggression once a definition has been adopted by the Assembly of States Parties\(^2\)). Currently, as of 18 July 2008, 108 countries are States Parties to the Rome Statute of the ICC\(^3\). More than 40 States have adopted implementing legislation that enables their national courts to try the grave crimes outlined in the Rome Statute.

2. The Statute recognizes that the States shall have the primary responsibility for investigating and punishing the above mentioned crimes and also the Court is complementary to the efforts of 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. 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 Rome Statute may increasingly help safeguard the rights and dignity of future generations. The relentless work of committed individuals everywhere has given rise to a worldwide demand for justice.

3. Today, ten years later, this permanent court has been able to come a long way. There are currently four situations, which are under investigation by the Office of the Prosecutor of the ICC. Three States Parties have referred situations on their territories to the Prosecutor, and the Security Council has referred one situation to Prosecutor for investigation. The mere existence of the Court and the activities of the Prosecutor and the Court create a legal and political incentive that cannot be underestimated; especially in the long run. Although everyone is not fully satisfied with all the areas that it seeks to encompass, the Court surely is a strong manifest for the conviction that perpetrators of


\(^{3}\) Out of the 108 States Parties to the ICC there are, 30 African States, 14 Asian States, 16 Eastern Europe, 23 Latin American and Caribbean States, 25 Western Europe and other States. An Annex to this document enlists the 108 States Parties and highlights Member States of AALCO in bold.
grave crimes can also be held responsible at an international level. It is certainly not easy to point to particular cases where the Court’s mere existence has prevented the perpetration of severe crimes. But the attention that the Court receives on the international level, even (or in particular) by its critics and opponents, seems to suggest that committing an international crime and/or getting away with it has become somewhat more difficult.

4. The Asian-African Legal Consultative Organization has always believed that cooperation with other international organizations is a very effective tool of promoting and conducting research on any topic. Within the framework of cooperation agreements or memorandum of understanding seminars/workshops can be held on a particular topic and this generates huge interest towards that subject within the Member States of AALCO. Bearing this objective in mind on 5th February 2008, the Secretary-General of AALCO and the President of the ICC signed a Memorandum of Understanding. It is pertinent to note that AALCO has entered into such agreements with several other international and regional organizations as well.

5. The present Secretariat Report seeks to highlight the developments that have taken place after the 62nd Session of the General Assembly of the United Nations. The Report refers to: The Sixth Session of the ICC Assembly of States Parties; a Report on the Special Working Group on the Crime of Aggression; Some recent Developments; Deliberations on the topic during the Forty-Seventh Annual Session of AALCO; Recent Developments and finally AALCO Secretariat Comments.

II. ASSEMBLY OF STATES PARTIES

6. The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court and Part 11 of the Rome Statute provides for the Assembly of States Parties(ASP). It is composed of representatives of the States that have ratified and 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 Ministry of Foreign Affairs. Moreover, each State Party has one vote and every effort has to be made to reach decisions by consensus. If consensus cannot be reached then decisions are taken by vote. 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. On the basis of the principles of equitable geographic distribution and the adequate representation of the principal legal systems of the world, the Bureau of the Assembly of States Parties consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for a three year term. The Assembly is responsible for the adoption of the normative texts and of the budget, the election of the Judges and of the Prosecutor and the Deputy Prosecutor. It meets at least once every year.

5 Rome Statute Article 112 (7).
7. The AALCO Secretariat has in the past extensively covered the proceedings of the Five Sessions of the ASP, that held its first Session in 2002, second Session in 2003, third Session in 2004, fourth Session in 2005 and fifth Session in 2006. It may be mentioned that the resumed Sessions of all these Sessions took place in the following year.

A. Sixth Session and Resumed Sixth Session of the Assembly of States Parties

8. The Regular Sixth Session of the Assembly of States Parties (ASP) was held in New York, at the UN Headquarters, from 30th November to 14th December 2007. The Resumed Sixth Session of the ASP was held in New York, at the UN Headquarters, from 2nd to 6th June 2008. The report given herein below has covered both the Sessions together, highlighting appropriately wherever a particular topic was discussed.

9. The Seventh Session will take place in The Hague from 14th to 22nd November 2008.

10. The Assembly of States Parties met for the Sixth Session in an atmosphere of anticipation and intense activity at the Court on its first cases and against a background of the advanced maturation of the ICC. The date for the confirmation of charges hearing for the second detainee, Germain Katanga had been set for February. While it was clear at the Sixth and the resumed Session that the ICC has become a truly established International Organization, many issues remain for the Court and the ASP to work on: much more has still to be done to ensure effective and sustained cooperation and support; the process towards the building of the permanent premises for the Court has only started; the ASP had yet to organize itself fully and to decide on its subordinate bodies; and preparations for the Review Conference are underway.

11. During the regular and resumed session, the Prosecutor reported for the sixth and seventh time to the UN Security Council on his investigations in the Darfur situation. During the resumed session, the Prosecutor updated the Council on the progress of his second and third cases in Darfur, and explored possible Council reactions to the Sudan’s non cooperation with the Court and non compliance with UN Security Council Resolution 1593. In this respect, a civil society campaign called the Justice for Darfur developed during this time period to advocate for the arrest of the two Sudanese individuals, Ahmed Harun and Ali Kushayb, under ICC arrest warrant.

12. The Sixth Session continued to demonstrate a readiness of States Parties to engage in issues beyond the Court’s most urgent operational issues, as well as a willingness to think more long-term and to accept the responsibility of the ASP and States Parties for the implementation of the Rome Statute in general. This was a trend set by the Fourth and Fifth Sessions. As will be demonstrated below in this report, the ASP

also indicated its commitment to remain seized of a number of strategic issues of key concern both to the Court and to the Rome Statute system. Such issues include Cooperation, Review Conference, Legal Aid, Strategic Planning and Outreach. Some of this progress was however somewhat clouded by the hesitant approach of States regarding concrete commitments, e.g. on cooperation, and the inability of the UN Security Council to take action in response to the Prosecutor’s report on the Sudan situation.

13. The Bureau of the Assembly consists of a President (Mr. Bruno Stagno Ugarte, Costa Rica)\(^7\), two Vice-Presidents (Mr. Erwin Kubesch, Austria and Ms. Hlengiwe Mkhize, South Africa) and 18 members elected by the Assembly for three-year terms. The President of the Assembly in accordance with Rule 92 of the Rules of Procedure\(^8\) invited all States Parties to the Rome Statute to participate in the Session and other States that had signed the Statute were also invited to participate as observers. At the meeting, the Assembly adopted the following agenda\(^9\) for the discussion: States in arrears; Credentials of representatives of States Parties at the Sixth Session; Organization of Work; General debate; Election of the President of the Assembly for the Seventh to Ninth Sessions; Election of Members of the Committee on Budget and Finance; Election to fill judicial vacancies; Report on the activities of the Bureau; Report on the activities of the Court; Consideration and adoption of the budget for the Sixth financial year; Consideration of the audit reports; Report of the Board of Directors of the Trust Fund for Victims; Election of the members of the Board of Directors of the Trust Fund for Victims; Report of the Special Working Group on the Crime of Aggression; Premises of the Court; Recommendations concerning the Election of the Registrar; Review Conference; Decisions concerning dates of the next session of the Assembly of States Parties; Decisions concerning dates and venue of the next session of the Committee on Budget and Finance; and Other matters.

i. **Election of the President of the Assembly for the seventh to ninth Sessions**

14. The Assembly, pursuant to Rule 29 of the Rules of Procedure of the Assembly, as amended by resolution ICC-ASP/3/Res.2, elected by acclamation Ambassador Christian Wenaweser (Liechtenstein), as the President of the Assembly for the Seventh to Ninth sessions.

ii. **Election of Members of the Committee on Budget and Finance**

15. In a note dated 11th September 2007, the Secretariat submitted a list of nine candidates nominated by States Parties for election to the Committee on Budget and Finance\(^10\) to the Assembly. On 30\(^{th}\) October and 26\(^{th}\) November 2007 the Secretariat was informed of the withdrawal of the candidatures of Mr. Rodrigo Yáñez Pilgrim

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\(^7\) The President had been elected, by acclamation, for the fourth to sixth sessions during the third session of the Assembly.


\(^9\) ICC-ASP/6/1/Add.1/Rev.1

\(^10\) ICC-ASP/6/9.
(Bolivarian Republic of Venezuela) and Mr. Peter Lovell (United Kingdom of Great Britain and Northern Ireland), respectively. Furthermore, on 7 December 2007, the Assembly was informed of the withdrawal of the candidature of Ms. Rossette Nyirinkindi Katungye (Uganda). In accordance with resolution ICC-SP/1/Res.5 of 12 September 2003, at its 4th meeting, on 7 December 2007, the Assembly proceeded to elect the six members (Mr. David Banyanka (Burundi); Ms. Carolina María Fernández Opazo (Mexico) Mr. Gilles Finkelstein (France); Mr. Juhani Lemmik (Estonia) Mr. Gerd Saupe (Germany) Mr. Ugo Sessi (Italy)) of the Committee on Budget and Finance. In accordance with paragraph 11 of resolution ICC-ASP/1/Res.5, the Assembly dispensed with a secret ballot and elected the six members of the Committee on Budget and Finance by acclamation. The term of office of the six members shall begin to run on 21 April 2008.

iii. Election to fill judicial vacancies

16. On the recommendation of the Bureau, the Assembly decided that for the purposes of electing judges of the International Criminal Court, any meeting of the Assembly should continue until as many candidates as were required for all seats to be filled had obtained, in one or more ballots, the highest number of votes and a two-thirds majority of the States Parties present and voting. Consequently, all candidates elected as judges should be considered as having been elected at the same meeting irrespective of whether or not the ballot continued for one or more days. On 30th November, and 3rd December 2007, the Assembly proceeded to elect three judges of the International Criminal Court to fill judicial vacancies in accordance with the relevant provisions of the Rome Statute, as well as resolution ICC-ASP/3/Res.6, as amended by resolution ICC-ASP/5/Res.5. The elected judges are Mr. Bruno Cotte (France); Mr. Daniel David Ntanda Nsereko (Uganda) and Ms. Fumiko Saiga, (Japan).

iv. Report on the activities of the Bureau

17. At its 1st meeting, on 30th November 2007, the Assembly took note of the oral report of its President, Mr. Bruno Stagno Ugarte (Costa Rica), on the activities of the Bureau. In his report, the President noted that during the period between the end of the resumed fifth session of the Assembly in January and 30 November 2007, the Bureau had held 11 meetings in order to assist the Assembly in carrying out its activities under the Rome Statute.

18. As regards the Secretariat of the Assembly, the Bureau proceeded to fill the post of Director. In order to ensure an open, fair and transparent selection process, the Bureau established a pre-selection committee in The Hague, composed by one representative of each regional group, which was in charge of reviewing the 59 applications received, as well as preparing a first short-list. The pre-selection committee short-listed ten candidates and conducted telephone interviews. The pre-selection committee was later transformed into a selection panel in New York and entrusted by the Bureau with preparing a second short-list. The selection panel held personal interviews with the four candidates that were short-listed. The candidates were evaluated on the basis of a fixed set of criteria, were given an equal opportunity to present there candidature and met with the Bureau to make a presentation. The Bureau then appointed, by consensus, Mr. Renan Villacis (Ecuador)
as Director of the Secretariat of the Assembly.

19. The Working Group in The Hague had made considerable progress on the issues such as the implementation of the strategic planning process of the Court, the equitable geographical representation and gender balance in the recruitment of staff members, the permanent premises of the International Criminal Court and the budget of the Court, while respecting the special role of the Committee on Budget and Finance.

20. The Working Group in New York has been particularly engaged with the implementation of the plan of action for achieving universality and full implementation of the Rome Statute, the issue of arrears, including suggestions to promote timely payment; the proposals for an independent oversight mechanism; and in advance preparations for the Review Conference, in particular as regards the applicable rules of procedure and practical and organizational issues.

21. The issue of cooperation was considered in both Working Groups. While the dual facilitation of the issue of cooperation has worked well, the Bureau noted that the facilitators had to overcome a range of organizational and procedural difficulties, caused by the fact that the issue was being dealt with in New York and The Hague.

22. The Secretariat of the Assembly had provided The Hague Working Group and the Committee on Budget and Finance with independent substantive servicing, had assisted in organizing the inter-sessional meeting of the Special Working Group on the Crime of Aggression held in Princeton, New Jersey, United States of America, and had organized the resumed fifth session of the Assembly at United Nations Headquarters at the end of January 2007 devoted to the Special Working Group on the Crime of Aggression.

v. Report on the activities of the Court

23. This report provides an overview of the activities of the International Criminal Court\(^1\) since the fifth session of the Assembly of States Parties to the Rome Statute in 2006.

a. Judicial Proceedings

24. During the reporting period, the Office of the Prosecutor analyzed information on alleged crimes within the jurisdiction of the Court in many countries on different continents. He informed that between the different situations and cases, the Court handled approximately 1,400 filings. He also informed that proceedings before the Court are, in principle, public and this report covers only public matters. Decisions of the Chambers and filings of participants are published on the Court’s web site. But in certain circumstances, proceedings or decisions may be kept confidential for a period of time, for example to protect the security of victims and witnesses.

\(^{11}\) ICC-ASP/6/18.
25. The Office continued investigations, including field operations, into the situations in the Democratic Republic of the Congo, Uganda and Darfur, Sudan. The Prosecutor opened an investigation into the situation in the Central African Republic.

26. In the situation in the Democratic Republic of the Congo, Pre-Trial Chamber I confirmed charges of war crimes against Mr. Thomas Lubanga Dyilo. The Presidency constituted Trial Chamber I and referred the case of Mr. Lubanga Dyilo to that Chamber for Trial. Trial Chamber I and the participants in proceedings began preparations for the trial. The Appeals Chamber issued 14 decisions or judgments in the case of Mr. Lubanga Dyilo related to, inter alia, the participation of victims in proceedings and the confirmation of charges.

27. In the situation in Uganda, judicial proceedings in the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen continued on issues related to the participation of victims in proceedings and the protection of victims or witnesses. Proceedings against Mr. Lukwiya were terminated due to his death. The warrants of arrest for Mr. Kony, Mr. Otti, Mr. Odhiambo and Mr. Ongwen have been outstanding since July 2005. The Court unsealed requests for arrest and surrender for each of these individuals made to Uganda, the Democratic Republic of the Congo and Sudan. At the time of submission of this report, none of the outstanding warrants had been executed.

28. In the situation in Darfur, Sudan, the Court issued warrants of arrest for Mr. Ahmad Muhammad Harun (“Ahmad Harun”) and Mr. Ali Muhammad Ali Abd-al-Rahman (“Ali Kushayb”) on counts of crimes against humanity and war crimes. The Court issued requests for their arrest and surrender to Sudan, all States Parties, all United Nations Security Council members, Egypt, Eritrea, Ethiopia and the Libyan Arab Jamahiriya. At the time of submission of this report, neither warrant of arrest had been executed.

b. Outreach

29. Following the presentation of the Strategic Plan on outreach12 to the Assembly at its fifth session (2006), the Court proceeded to implement the Plan in the different situations in 2007. Implementation of the Plan, including use of the Plan in preparing the proposed 2008 programme budget, helped to strengthen coordination between the organs and the internal administration of the Court.

30. The Court undertook outreach to raise awareness and understanding of the Court and its activities in three of the four situations under investigation (Democratic Republic of the Congo, Uganda and Darfur, Sudan). Following the opening of the investigation into the situation in the Central African Republic, the Court assessed opportunities for outreach there, identified target audiences, established contact with local media and began development of a country-specific outreach strategy.

12 ICC-ASP/5/12.
c. Enhancing international cooperation

31. The Court’s contributions to achieving the aims of the Rome Statute depend not only on the activities of the Court itself but also on the extent of international cooperation provided by States and others, in particular in the arrest and surrender of persons. The Court does not have the mandate to arrest persons. In the Rome Statute, States Parties reserved both the obligation and the power to do so to States. Throughout the reporting period, the Court’s experience reconfirmed the necessity of effective international cooperation, especially with respect to arrests. The Court continued to devote considerable efforts to securing the cooperation of States, in particular for the execution of arrest warrants.

32. In relation to the investigations and proceedings of the Court, the Rome Statute imposes specific obligations on States Parties to cooperate with and provide support to the Court. Part 9 of the Statute in particular provides the legal framework for international cooperation and judicial assistance and requires all States Parties, in accordance with the provisions of the Statute, to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. States may also conclude supplementary arrangements to provide specific support to the Court and can offer more general support in creating an environment which encourages cooperation by other States or by international organizations. Throughout the reporting period, the Court continuously sought to increase the cooperation received from States and international organizations.

33. In accordance with article 87, most of the Court’s requests for cooperation are kept confidential. The Court made requests for and received cooperation or judicial assistance from many States and international organizations. However, significant requests for cooperation, in particular requests for arrest and surrender, were not fulfilled. Of the seven public warrants of arrest outstanding at the beginning of the reporting period, none was executed (one was rendered without effect due to the subject’s death). The lack of arrests prevented the Court from materially advancing proceedings in these cases.

34. The Court continued negotiations with States Parties to conclude supplementary arrangements on specific issues of cooperation, primarily the protection and relocation of witnesses and the enforcement of sentences. At the time of submission of this report, the Court had concluded seven agreements with States Parties on the protection and relocation of witnesses, the details of which are kept confidential for security reasons. More such agreements are urgently needed. Since 17 October 2006, the number of individuals requesting protection has increased threefold and the number of individuals admitted into the Court’s Protection Programme sevenfold, primarily due to developments in the situations in the Democratic Republic of the Congo and Darfur, Sudan. The fact that individuals subject to warrants of arrest remain at large makes it all the more important to ensure adequate protection measures.

35. No agreements on the enforcement of sentences were concluded although
negotiations continued with several States. At the time of submission of this report only one agreement had been concluded between the Court and a State Party in relation to the enforcement of sentences.

36. The Court continued to work with States Parties to increase understanding and awareness of the needs of the Court and of how States Parties can provide additional support. At the request of the Bureau of the Assembly, the Court prepared a consolidated report on the issue of cooperation which identifies the priorities of the Court. The Court engaged in a positive dialogue on the issue of cooperation with the Bureau through its Working Groups in The Hague and New York.

37. The Court continued to develop its cooperation with the United Nations in accordance with the provisions of the Rome Statute and the Relationship Agreement between the International Criminal Court and the United Nations. The Court received support from the United Nations Secretariat and from numerous United Nations funds, programmes and other bodies in the field. The Court submitted its third annual report to the United Nations on 31 August 2007. Following the visit of the Secretary-General to the Court on 1 February 2007, the Prosecutor, Mr. Luis Moreno-Ocampo, met with the Secretary-General on 2 April and 28 August 2007. Other Court officials held frequent meetings with high-level United Nations officials to discuss issues of cooperation, including possible support in relation to arrests.

38. The Court worked to further enhance its cooperation with regional organizations. The President, First Vice-President, Prosecutor, Deputy Prosecutor (Prosecutions) and Registrar briefed the Permanent Representatives Committee of the African Union on 1 March 2007. In June 2007, the same officials visited Ghana, where they met with the President of Ghana and Chairperson of the African Union, H.E. John Kufuor. Conclusion of a memorandum of understanding between the Court and the African Union is pending. As indicated above, the Prosecutor also met with the Secretary-General, H.E. Amr Musa, of the League of Arab States in February, July and September 2007.

39. On 7 June 2007, the Court signed the Headquarters Agreement with the host State, the Netherlands. The agreement will enter into force upon its adoption by the Dutch Parliament. The Headquarters Agreement regulates the relationship between the Court and the host State including, inter alia, cooperation between the Court and the host State, the transfer of information, potential evidence and evidence into and out of the host State and the privileges, immunities and facilities of the Court, its staff, its elected officials, victims, witnesses and other persons required to be present at the seat of the Court.

vi. Recommendation concerning the election of the Registrar

40. On 13 December 2007, the Assembly recalled that a list of candidates for the post of Registrar (ICC-ASP/6/16/Add.1) had been received from the Presidency. On 14 December 2007, the Assembly, on the recommendation of the Bureau, adopted by consensus recommendation ICC-ASP/6/Recommendation 1.

41. Moreover, the Assembly also noted that, in explanation of position after adoption of the recommendation, some delegations were of the view that the judges should first proceed to appoint the Registrar, taking into account the recommendations made by the Assembly, and subsequently proceed with the election of the Deputy Registrar, since to do so in the reverse order may result, by virtue of the recommendations formulated by the Assembly, in disqualifying the best candidate for the post of Registrar. Moreover, it was suggested that the newly elected Registrar play an active role in the election of the Deputy Registrar.

vii. Decisions concerning dates and venues of the next sessions of the Assembly of States Parties

42. On 14 December 2007, the Assembly recalled its decision to hold its seventh session from 14 to 22 November 2008 in The Hague and not less than 2 days in 2009 in New York for a resumed session for elections, the dates of which shall be fixed by the Bureau. Moreover, the Assembly also decided to hold its eighth, ninth and tenth sessions in The Hague, New York and in The Hague, respectively.

viii. Decisions concerning dates and venue of the next sessions of the Committee on Budget and Finance

43. On 14 December 2007, the Assembly decided that the Committee on Budget and Finance would hold its tenth session in The Hague from 21 to 25 April 2008, and a further eight-day session on dates to be determined by the Committee.

xi. Trust Fund for the participation of the least developed countries and other developing States in the work of the Assembly

44. The Assembly expressed its appreciation to Belgium, Canada, Finland, Germany, Greece, Ireland, Montenegro, Netherlands, Switzerland and the United Kingdom of Great Britain and Northern Ireland for their contributions to the Trust Fund for the participation of the least developed countries and other developing States in the work of the Assembly. The Assembly noted with satisfaction that 13 delegations had made use of the Trust Fund to attend the sixth session of the Assembly.

B. ICC Prosecutor’s Report to ASP VI

45. On 30th November 2007, the ICC Prosecutor presented a Report of the Prosecutor’s office at the Assembly of States Parties. His report included the detailed update of the situations and cases in Democratic Republic of Congo; Central African Republic; Northern Uganda; Darfur; and finally the analysis and activities of the Prosecutor’s office.

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14 For detailed information see Resolution ICC-ASP/6/Res.2, paragraph 64.
15 ICC-ASP/6/Res. 2, paragraph 63.
16 Resolution ICC-ASP/6/Res.2, paragraph 61.
i. The Situation in the Democratic Republic of the Congo

46. The Prosecutor informed that his office is preparing to go to trial on 31st March 2008 and demonstrate that Thomas Lubanga Dyilo, a leader of a militia in Ituri is criminally responsible for a policy of enlisting and conscripting children under the age of 15 and using them actively in hostilities. The Prosecutor also informed that his office presented evidence to the Judges on a second case against Germain Katanga, leader of another armed group, the “Force de resistance patriotique en Ituri” and a sealed arrest warrant was issued. On 17 October 2007, the Congolese authorities surrendered him to the Court. The evidence shows that Germain Katanga, using child soldiers, led a brutal attack against the village of Borogo, killing hundreds of civilians, forcing women into sexual slavery. His arrest demonstrated DRC commitment to the Court. The Prosecutor thanked the support of the UN Secretary-General and his team, both in New York and Kinshasa, and of the EU Special Representative for the Great Lakes.

ii. The Situation in the Central African Republic

47. The Prosecutor informed that the office has started an investigation in the Central African Republic on 22nd May 2007. The investigation focuses on the most serious crimes which were mainly committed during a peak of violence in 2002-2003 and with a particularly high number of allegations of rapes and other acts of sexual violence. He also mentioned that there are preparations for a conciliation process, the National Dialogue. It is an opportunity to ensure that such a process is, since the beginning, made fully compatible with the Rome Statute.

iii. The Situation in the Northern Uganda

48. The Prosecutor informed that warrant of arrest for Joseph Kony and senior leaders of the LRA were issued on 8th July 2005. They abducted young children and transformed them into killers and sexual slaves; they slaughtered entire communities and forced the displacement of 1.3 million persons. He stressed for the enforcement of the arrest warrants and urged the support from the Member States for the same. He said that Joseph Kony and other indicted commanders must not be allowed to gain strength and financial means. There are indications that the assistance the LRA is receiving for strictly humanitarian purpose could be diverted to buy supplies or weapons. He requested States Parties and international actors to monitor with utmost vigilance such possible diversion of aid and funds to the benefit of the sought individuals.

iv. The Situation in Darfur

49. The Prosecutor informed that on 27 April 2007, the ICC Judges issued arrest warrants against Ahmad Harun, former Minister of State for the Interior and Ali Kushayb, a Janjaweed/militia leader incorporated to the Popular Defence Forces. The Prosecution demonstrated that Ahmad Harun coordinated a criminal system; he recruited, funded and armed Militia/Janjaweed to supplement the Sudanese Armed Forces, and incited them to commit massive crimes against the civilian populations in Darfur. He did
it based on the rationale that those civilians could be rebel supporters. Ali Kushayb personally leading such attacks.

50. The Prosecutor recalled his brief to the UN Security Council on 7 June 2007, in that he described how Ahmad Harun responsible for the forced displacement of millions into camps, was now controlling his victims, in his new position as Minister for Humanitarian affairs. He emphasized that the territorial State, the Sudan, had the legal obligation and the ability to arrest Ahmad Harun and Ali Kushayb and surrender them to the Court. He also urged key partners – the African Union, the League of Arab States, the United Nations and the European Union – to call on the Sudan to arrest and surrender the sought individuals. He informed that the Sudanese failure to comply with their legal obligation to arrest was not included in the agenda of relevant international meetings.

51. He also informed that his office would start investigations into a second and a third case in Darfur in 2008 and try to identify which individuals bear the greatest responsibility for the ongoing crimes committed against the persons displaced; and also seek to identify which individuals bear the greatest responsibility for attacks against peacekeepers.

v. Analysis Activities

52. Among the Characteristics that make the ICC so distinctive, the proprio motu power of the Prosecutor to select situations to investigate, subject to judicial review as established by Art. 15 of the Statute is a defining provision. Based on Art. 15, the Prosecutor informed that his office proactively collects information about alleged crimes falling under the Court jurisdiction. He informed that his office currently analyzing situations on three continents.

53. In Colombia, upon the invitation of the Government, his team visited from 17 to 24 October 2007 and met with victims, General Prosecutor, Supreme Court Judges in charge of cases against the paramilitary. He informed that extensive information received on crimes uncovered in particular by confessions. In that visit the prosecutor also explained that the Court would look into whether there were genuine investigations and prosecutions against the most serious perpetrators of crimes within the jurisdiction of the Court.

54. The Prosecutor informed that the situation in Cote D’Ivoire remains under analysis. A planned mission to Cote d’Ivoire for the purposes of preliminary examination has not yet been made possible.

55. In conclusion the Prosecutor praised the new system of justice through the International Criminal Court where the worst criminals would not be allowed in the sharing of power any longer; where the use of massive violence against civilians would neither be rewarded nor forgotten. He recalled that the Rome system was built upon the lessons learned from the last century when the international community failed to protect entire populations. The Rome system was meant to address the conflicts of 21st century,
where no State has sufficient power or legitimacy to protect their own citizens if the international community does not uphold the rule of law.

III. REPORT OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION

56. At its 7th meeting, on 14 December 2007, the Assembly took note of the report of the Special Working Group on the Crime of Aggression (ICC-ASP/6/SWGCA/1) and decided that the report of the inter-sessional meeting contained in document ICC-ASP/6/SWGCA/INF.1 should be annexed to the proceedings of the sixth session of the Assembly. As this is one of the most important issues for the international community as well as for the Asian and African States, it has been dealt with elaborately in this report.

57. As one of the crimes listed in Article 5 of the Rome Statute, the Crime of Aggression is under the jurisdiction of the Court but the exercise of jurisdiction remains suspended because the Rome Diplomatic Conference did not reach an agreement on a definition and jurisdictional conditions. Instead, Resolution F of the Final Act requested that the subsequent Preparatory Commission prepare proposals to be presented to the ASP for consideration at a Review Conference. The Preparatory Commission concluded its work in 2002 in the form of a coordinator’s discussion paper, merging various options, although not reflecting complete agreement.

58. At its first session in September 2002, the ASP established a Special Working Group on the Crime of Aggression to continue the work and to meet during ASP sessions or at any other time that the Assembly deems appropriate and feasible. The ASP Bureau appointed Ambassador Christian Wenaweser (Liechtenstein) to chair the Working Group. The Working Group is open to States Parties and non-States Parties on an equal footing.

A. Substantive Issues

59. During the Sixth Session of the Assembly of States Parties, the Special Working Group held seven meetings on the 4-7 and 12 December 2007. At the sixth resumed session the Group met also in seven meetings on the 2-4 and on 6 June 2008.

60. During the sixth session, the discussion paper proposed by the Chairman in January 2007 remained the formal basis for the negotiations but the Special Working Group concentrated in particular on three non-papers proposed by the Chairman. One non-paper on the definition of the state act of aggression and another on the exercise of jurisdiction, both presented in May 2007, had been already the focus of the informal inter-sessional meeting at Princeton University, 11-14 June 2007, and a further non-

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17 For detailed information see title number IV of this Report.
18 For detailed information see Annex II of the Report of the Assembly of States Parties (VI).
paper on the definition of the conduct of the individual was circulated before the sixth session and reflected the result of the Princeton meeting on that subject.

61. During the resumed sixth session, negotiations proceeded on the basis of a revised discussion paper proposed by the Chairman which contains the definition of the crime of aggression in a new Article 8 bis and the conditions for the exercise of jurisdiction in a new Article 15 bis. The “revision June 2008” reflects the development since the 2007 version and adds technical instructions relevant for the incorporation of the provisions on the Crime of Aggression into the Statute. Prior to the resumed sixth session, the Chairman circulated also an informal note which highlighted those technical instructions and issues which had not been thoroughly addressed during recent sessions. These items included the procedure for entry into force of amendments on aggression; deletion of article 5, paragraph 2; application of article 28 to the crime of aggression; inclusion of the text of GA resolution 3314 as an annex to the Rome Statute; and the Elements of Crimes. In addition, the note indicated that the Working Group would continue to discuss the definition of the Crime and Act of Aggression, the conditions for the exercise of jurisdiction, as well as the future work of the Working Group.

B. Modalities for Entry into Force and Deletion of Article 5(2)

62. During the resumed sixth session, the Chairman held a substantive discussion on the procedure for entry into force of an amendment on the Crime of Aggression. The Group had addressed this subject during the 2004 and 2005 intersessional meetings at Princeton University but the evaluation had not been conclusive.

63. At the resumed sixth session, delegates argued whether Article 121 paragraph (4) or paragraph (5), would govern the amendment on Aggression. Under paragraph 4 an amendment enters into force for all States Parties after ratification or acceptance by seven eighths of them. A State Party which does not accept the amendment may only withdraw from the Statute as a whole. Under paragraph 5, entry into force is only possible with regard to States Parties which ratify or accept the amendment. The Court may not exercise its jurisdiction with regard to the crime covered by the amendment when committed by a national or on the territory of a non-accepting State Party. A number of countries expressed support for Article 121 (4). They noted in particular that the provision on aggression was not an amendment of Articles 5, 6, 7, and 8, and did not create a new crime under the Rome Statute because aggression was already included under Article 5(1) and State Parties had therefore already accepted it.

64. A number of other States argued that paragraph (5) would be applicable because it was intended for amendments concerning the substance of the crimes within the Court’s jurisdiction and because it would respect the sovereignty of States Parties which have chosen not to accept the amendment. In light of the division of opinions, the Chairman acknowledged that it would be necessary to continue the discussion in the future.
65. In addition, during the resumed sixth session, a brief discussion was held on the question of deleting Article 5(2). While some States recognized that Article 5(2) would become redundant once there has been an agreement on aggression, a number of delegations expressed the view that the discussion was premature at this stage.

C. Crime of Aggression – Defining the Individual’s Conduct

66. On the Crime of Aggression- defining the individual’s conduct- discussions had advanced during Princeton 2007 and resulted in a second revision of variant (a) of paragraph 1 of the Chairman’s paper of 2007. The first revision at the resumed fifth session had tested a jurisdictional wording for the leadership clause, the second returned to a definitional wording. The basic approach of variant (a), as well as of the revisions allows for the application of the general principles on participation in article 25(3) of the Statute (the “differentiated” approach), with the leadership requirement reflected both in the definition and in a new article 25(3) bis. The discussions at the sixth session centered on the non-paper reflecting the second revision from Princeton and replacing both variants (a) and (b) of the first part of paragraph 1 of the Chairman’s paper of January 2007. Similarly, the revised discussion paper at the resumed session did not include variants and reflected only the “differentiated” approach.

67. The proposed language of the non-paper for the first part of paragraph 1 read: “For the purpose of this Statute, “Crime of Aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression/armed attack, [which, by its character, gravity and scale…]”. The conduct clause met with general support at the sixth session. With regard to the choice between a reference to “act of aggression” and “armed attack” in the first part of paragraph 1, all who spoke on this point agreed on using “act of aggression” as the focus of the individual conduct. A reexamination of the leadership clause suggested by one delegate, and supported by others, was shifted to the discussion of the proposed new article 25(3)bis. (See below.)

68. The first paragraph of Article 8 bis in the revised discussion paper uses largely the same language for the definition of the crime as in the prior non-paper, except that the focus of the conduct is now clearly specified as “act of aggression.” During the resumed sixth session, a large number of countries reaffirmed their general support for this definition of the individual criminal conduct. The only remaining disagreement with regard to the first paragraph concerned the threshold requiring an act of aggression “which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. While the threshold maintained strong support, it also raised again a number of concerns. Thus, it was argued in particular that the threshold was unnecessary and that all acts of aggression constituted manifest violations. In addition, some states thought that the requirement of a “manifest violation of the Charter of the United Nations” was not consistent with the definition of the State act in article 8 bis paragraph 2 which requires the use of armed force “inconsistent with the UN Charter”. For others the two phrases were compatible, since they relate to different aspects of the
definition. Still others called for the harmonization of the two phrases or for shifting the threshold into paragraph 2.

69. An alternative or additional qualification or reference point for the act of aggression which would add “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof” had only varied support during the sixth session. In the Chairman’s revised discussion paper presented at the resumed session, the phrase was placed in a footnote with the understanding that it remained on the table. While some argued that the phrase should be maintained, others pointed out that it was superfluous in light of the definition of the act in Article 8 bis paragraph 2.

70. A reexamination of the leadership clause during the sixth session took largely place in the context of the proposed new article 25(3)bis which clarifies that the leadership requirement does not only apply to the principal perpetrators, but to all relevant forms of participation in article 25: “With respect to the crime of aggression, the provisions of the present article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.” Many delegations expressed support or flexibility. At the same time, drafting suggestions were made and delegates considered the question if the clause covered the intended leadership level, including leadership involving more than a single person and reaching outside the formal government. A number of States expressed their understanding that the clause was sufficiently broad in that regard. At the resumed session, article 25(3bis) was again shortly considered. Delegations spoke either in favor or expressed again flexibility.

71. During the resumed session, the Special Working Group took up the question regarding the applicability of article 28 to the Crime of Aggression, which provides for criminal responsibility of military commanders or other superiors for crimes committed by their subordinates. The question raised was whether article 28 should be excluded explicitly with regard to the crime of aggression. Many delegations noted that although article 28 did not apply to the crime of aggression, it would be wiser to leave it as it is. A few delegations expressed the view that in certain circumstances article 28 could apply to the crime of aggression and therefore the article should not be explicitly excluded. The Chairman recognized a general trend among countries’ positions that there was no need for an explicit exclusion.

D. The Act of Aggression – Defining the Conduct of the State

72. During the sixth session, discussions on the definition of the State act of aggression centered on Article 8bis paragraph 2 as contained in the non-paper introduced before Princeton 2007 (Annex IV of the Princeton report). The non-paper illustrated a definition which would incorporate relevant text of UN General Assembly resolution 3314 (XXIX) of 14 December 1974. It consisted of a generic part and a specific part listing particular acts of aggression. Both parts referred to the resolution.
73. While broad support was given to using resolution 3314 as the basis of the definition of an act of aggression in paragraph 2, views continued to diverge on the extent of incorporation and/or form of reference. In particular, the Special Working Group considered whether the definition should merely refer to the resolution or incorporate relevant text from it or do both. With regards to the first and last option, delegates debated if a documentary reference should cite the resolution as a whole or only articles 1 and 3. In this regard, a number of States were opposed to any partial reference. At the same time, serious objections were raised to references to the resolution as a whole as far as such a reference could tie the definition to article 4 of the resolution and thus to a determination by the Security Council. Since such a link could entail an open-ended and possibly retroactive definition, it was of concern to many states in light of the principle of legality. In general, discussions with regards to the definition of the act followed similar lines as in Princeton 2007.

74. There was wide support for the inclusion of the list of acts taken from article 3 of resolution 3314, but views continued to differ on whether the acts should be exhaustive (closed) or non-exhaustive (open) and on the nature of the list in this regard. The chapeau preceding the list of acts reads: “Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression...”. Different delegations expressed conflicting views as to whether this language introduced an open or closed list. Some states explicitly requested clarification on the intended nature.

75. At the resumed sixth session, delegates debated the definition of the state act of aggression as contained in the revised discussion paper of the Chairman. The definition continues a two part structure with a generic definition and a specific list. The specific list and the chapeau immediately preceding the list remained the same as in the non-paper. In contrast, the generic part of the definition does no longer refer to resolution 3314. Many states considered the new version of the definition a good solution. At the same time, the remaining reference to resolution 3314 in the specific part and the closed or open nature of the list continued to be a matter of debate, while the interplay with the new generic definition required at the same time new evaluations. The discussions on the definition of the act of aggression were burdened by the different approaches to the threshold in paragraph 1 of Article 8bis (see above) which in turn led even to proposals that would reintroduce references to resolution 3314 in the generic part of paragraph 2.

76. During the regular and resumed sixth session, some States continued to object to the requirement of “armed force” in the general part of the definition. They asked instead for terminology which would include economic, financial and political sanctions, as well as future forms of warfare such as cyber attacks. One delegation repeated its concern that the right to self-determination required an express reference to Art.7 of resolution 3314.

77. With regard to the suggestion in the Chairman’s revised discussion paper to annex resolution 3314 to the Statute, the vast majority of states either spoke against such an annex or indicated that it would not bring any added value. Following the discussion, the Chairman concluded that agreement had been reached against the annex.
E. Conditions for the Exercise of Jurisdiction

78. At the sixth session, discussions focused in particular on two elements from the non-paper on the exercise of jurisdiction (Annex III of the Princeton report): 1) the suggested role of the Pre-Trial Chamber and 2) the so-called “green light” option for the Security Council.

79. The non-paper was welcomed for separating jurisdictional issues from the definition of aggression by creating a separate provision in the Statute (article 15 bis). A new structural non-paper by Belgium suggested further placement and additional separation ideas.

80. On the role of the Pre-Trial Chamber (PTC), paragraphs 2, 3 and 5 of article 15 bis in the Chair’s non-paper elaborate that the PTC would act as a judicial filter and provide checks and balances to the Prosecutor’s activities. Under paragraph 4 of article 15 bis, the PTC would be responsible for the notification of the Secretary General of the United Nations in the absence of a determination or decision by one of the United Nations organs as set out in paragraph 3. The discussions on the filter and communication roles of the PTC remained inconclusive.

81. Under the “green light” option elaborated in paragraph 3(b) of article 15 bis in the non-paper, the Security Council would make a decision not to object to the investigation of the crime of aggression instead of making a determination of an act of aggression. The provision attempts to offer a compromise idea by lowering in this way the jurisdictional threshold of paragraph 3(a). As in Princeton, the language found only limited support. Delegates asked especially for more procedural and substantive clarity. But new drafting and timing ideas for the notifications between the Court and the Security Council were also offered. With regard to the idea of dialogue between the Security Council and the Prosecutor or Pre-Trial Chamber of the Court, the need for transparency was emphasized.

82. Views continued to diverge on the role of the General Assembly or International Court of Justice in the determination of an act of aggression (paragraph 3(c) of article 15 bis in the non-paper).

83. For the resumed session, the Chairman’s revised discussion paper offered a new version of the jurisdictional conditions which tries to present the alternatives and options in a clearer manner. During the resumed session, the Chairman circulated in addition a flow chart with the various conditions. Delegations continued to seek a compromise solution that would be consistent with the role of the Security Council under the UN Charter and the independence of the Court. The revised discussion paper was generally welcomed for its clarity. Discussions focused mainly on the role of the Security Council and more specifically on the situation when the Council has not made a determination of aggression. Under alternative 1 of the revised discussion paper, the Special Working Group considered two options. Under the first option the Prosecutor may not proceed. Under the second option the Prosecutor is blocked as well unless the Security Council
makes a request to proceed. The second option represents a revised formulation of the ‘green light’ (see above). Alternative 2 sets out four options enabling the Prosecutor to proceed. All options require a waiting period. Under the first option, the waiting period is the only requirement. Under the second option, the Prosecutor may proceed provided the Pre-trial Chamber has authorized the commencement of the investigation in accordance with the procedure contained in Art.15 of the Statute. Option 3 requires a determination of an act of aggression by the General Assembly. Option 4 requires a determination of an act of aggression by the International Court of Justice.

84. States offered again their different positions. Among the States which expressed support for alternative 2, several argued that a six-month waiting period would be too long and proposed various shorter time frames.

85. Three States made new proposals changing or adding to the language of the revised discussion paper of the Chairman: A written informal proposal by Columbia would amend alternative 2 option 2 permitting the Prosecutor to proceed “in accordance with Article15”. The proposal appeared to be intended as a simplification of the wording concerning authorization by the Pre-Trial Chamber. The Netherlands offered a written informal proposal with additional language to clarify that the Prosecutor may proceed when the Security Council has made a determination of an act of aggression. Several States, as well as the Chairman, concurred that the proposal would add clarity. Belgium presented a non-paper suggesting a “red light” approach. The proposal builds on article 2 of resolution 3314 which recognizes the right of the Security Council to conclude that a determination of an act of aggression would not be justified, including due to insufficient gravity. Under the proposal, an investigation could not proceed if the Security Council made such a conclusion by adoption of a resolution. Unlike the mechanism used in article 16 of the Rome Statute, a resolution under the “red light” approach would be definitive unless succeeded by a different Security Council resolution. A number of delegations expressed interest in this proposal. Other delegations reacted more negatively. In general, the responses were preliminary and subject to further study of the proposal. Belgium offered that the language might be adjusted.

F. Roadmap

86. During the sixth session, the future roadmap of the SWGCA was discussed. The ASP took note of the report of the Special Working Group and again recognized that the Special Working Group must conclude its work at least 12 months prior to the Review Conference in order to be in a position to submit proposals for a provision on aggression.

87. The ASP also reiterated its decision to devote at least two days of the seventh session to the Special Working Group.
88. The ASP also decided to hold a resumed seventh session of five days (as necessary) in 2009 in New York to conclude the work of the Special Working Group. The date will be determined by the Bureau and be approximately 12 months before the Review Conference.

G. Elements of Crime

89. In the January 2007 discussion paper, the Elements proposed in 2002 at the end of the Preparatory Commission had been included as a placeholder to make clear that they still needed to be discussed. The Chairman’s revised discussion paper from June 2008 did not reproduce the Elements as they were likely to create more confusion than clarity in light of the progress made in other parts of the discussion.

90. During the sixth session, a consideration of the timing of the drafting of the Elements of Crimes for the crime of aggression resulted in an agreement for postponement.

91. During the resumed session, the question of the timing of the drafting of the Elements was again considered. A brief discussion was held whether to commence work on their drafting in parallel with the other substantive discussions or to postpone discussions either until the Special Working Group concludes its work on the proposals for the definition and the jurisdictional conditions twelve months prior to the Review Conference or until an agreement has been reached at the Review Conference. Some delegations questioned the need for the Elements since the definition appears to become fairly detailed. Others reiterated the importance of drafting the Elements to clarify the scope of the leadership clause and the nature of the specific acts under the list included in the definition. Overall, more states spoke in favor of postponing the drafting, with several seeing a possibility to start in the twelve months period prior to the Review Conference.

IV. REVIEW CONFERENCE

92. As the date for the first Review Conference of the Rome Statute approaches, both substantive and procedural issues are of key concern. Following a decision made by the ASP at its fifth session, the Bureau Working Group, under the facilitation of Mr. Sabelo Sivuyile Maqungo (South Africa) submitted a Report to the ASP dealing with issues such as rules of procedure, financial matters, timing, venue and scope.

A. Key Issues at the Regular Session

93. During the regular session, the ASP Focal Point for the Review Conference, Mr. Rolf Fife (Norway), summarised the main points of the progress report presented to the ASP. This report details the consultations held on issues such as the scope, duration, timing and the venue of the Conference. Mr. Fife acknowledged that there was broad agreement on a number of issues and on certain goals, one of which being the deep commitment by states parties to protect the integrity of the Rome Statute.
94. Furthermore, the Minister of Justice and Constitutional Affairs, and Attorney General of Uganda, Mr. Khiddu Makubuya, presented a detailed slideshow to advocate for Uganda’s bid to host the Review Conference in 2010.

95. In accordance with the recommendations contained in the Bureau’s report on the Review Conference, the Assembly resolved to hold the Review Conference for five to ten working days during the first semester of 2010 on the basis of invitations to be sent by the Secretary-General of the United Nations in 2009.

96. Regarding the scope of the Conference, it was agreed by the Assembly that in addition to those amendments that command very broad (preferably consensual) support, the Review Conference should include a stocktaking process of international criminal justice.

97. Furthermore, the draft rules of procedures, which were extensively discussed within the Working Group in New York, were endorsed by the ASP and will have to be adopted by the Review Conference.

98. The issue of venue was one of the main focuses of the discussions at the Working Group. Delegations expressed appreciation for Uganda’s offer to host the Review Conference and some delegations felt that having the Review Conference in Africa would bring the Court closer to the region where it currently carries out investigations. Other delegations, however, expressed some concern regarding the principle of hosting the Conference were investigations that could involve government officials are being conducted, where there are outstanding arrest warrants and where there is an ongoing peace process.

99. The Assembly requested the Bureau to continue consultations on the venue taking into account a non-exhaustive list of objective criteria contained in the Working Group’s report, with a view of submitting proposals regarding the venue of the Review Conference to the resumed sixth session of the ASP in June 2008. As a result, the Working Group, chaired by the ASP Focal Point - Mr. Rolf Fife (Norway) - met to discuss the issue of venue.

100. Following a request of the Bureau, a site-visit to Uganda was carried out from 13 to 15 May 2008 to compile information on the practical and logistic matters pertaining to the conference. The meetings focused on a wide range of issues, such as Uganda’s political commitment to facilitate the hosting of the conference, the legal framework required to ensure that all conference participants would be accorded the requisite privileges and immunities, the logistic capacity to accommodate all participants, the relevant budgetary issues, the impact on the country and the region of holding the conference, and also the steps taken by the host State in support of the ICC.
B. Resumed Session

101. At the resumed session, the Ugandan Attorney General and Minister of Justice and Constitutional Affairs, Dr. Khiddu Makubuya, outlined to the Working Group on the Review Conference a number of issues in relation to Uganda’s bid to host the Review Conference. Dr. Makabuya reiterated Uganda’s commitment to cooperate with the ICC and its offer to host the ICC Review Conference in 2010.

102. The Attorney General argued that Uganda, as a situation country and the first country to refer a situation to the ICC, has a legitimate claim to host the Review Conference. Such an early referral was said to be a testament to Uganda’s confidence in the Court, and hosting the Conference would serve as an opportunity for Uganda and the central African region to appreciate and identify with the Court. As regards the current lack of national implementing legislation for the Rome Statute, the Ugandan government promised that it will be expedited before the end of 2008.

103. Also at the resumed session, the Argentinean delegation made a proposal to host the Review Conference in the city of Buenos Aires. In their proposal, Argentina established that although they acknowledged that Uganda had already made an earlier proposal, their offer was made in a good and proper manner. They emphasised that Argentina has implemented nationally the Rome Statute, has ratified the Agreement on Privileges and Immunities, and referred to the active support of the Latin American region to the Court.

104. In its resumed session resolution, the ASP took note of the Ugandan site-visit report and welcomed Dr. Makabuya’s statement on behalf of Uganda. Furthermore, The Assembly took note of Argentina’s offer to host the Review Conference as a possible alternative to Kampala, should Uganda’s bid not be adopted, and requested that additional information concerning the offer be provided as soon as possible, prior to the next ASP session.

105. The Assembly also mandated the Bureau to continue its preparations taking into account the report on the Ugandan site-visit, the broad support for the offered made by Uganda expressed in the debate held by the Working Group as well as the availability of facilities in The Hague and New York.

106. Lastly, the Assembly emphasized the need to reach a final decision on the venue at the seventh session of the Assembly, and that an appropriate consideration of any additional offers to host the conference would thus be difficult.

V. SOME RECENT DEVELOPMENTS

A. Situation in Darfur

107. On 14 July 2008, following an investigation into crimes over the last five years in Darfur, the Office of the Prosecutor requested the issuance from Pre-Trial Chamber I of
the ICC of an arrest warrant against President Al-Bashir for allegedly committing war
crimes, crimes against humanity and genocide in Darfur.

108. Pre-Trial Chamber I\(^{21}\) is reviewing evidence submitted by the Office of the
Prosecutor and will determine if there are reasonable grounds to believe that the named
individual committed the alleged crimes. The Prosecution has requested an arrest
warrant\(^{22}\).

B. Situation in South Ossetia

109. On 14 August 2008, the ICC Prosecutor was contacted about the conflict in
Georgia’s breakaway province of South Ossetia. He acknowledged that he had been
contacted about the situation in South Ossetia and that “it is a possibility” he will open
an investigation into the situation there.

VI. DELIBERATIONS DURING THE FORTY-SIXTH ANNUAL SESSION OF
AALCO, 30\(^{th}\) JUNE TO 4\(^{th}\) JULY 2008, NEW DELHI (HQ)

110. Amb. S.R. Tabatabaei, DSG of AALCO informed the Session that the
Secretariat had been following the developments related to the International Criminal
Court since its Thirty-Fifth Session, held in Manila (Philippines) in 1996. The DSG
informed that as of 1\(^{st}\) June 2008, 106 States Parties had ratified the Rome Statute. The
Statute recognized that States had the primary responsibility for investigating and
prosecuting international crimes, guaranteeing fair public trials consistent with
internationally recognized human rights principles.

111. He noted the importance of cooperation between the Court and the United
Nations; States; International and Regional Organizations as essential to an effective and
efficient functioning of the Court. In this regard he mentioned that a Memorandum of
Understanding between the AALCO and ICC was signed on 5 February 2008.

112. Thereafter, he briefly enumerated the discussion during the Sixth Session of the
Assembly of States Parties on a non-paper by the Chairman of the Special Working
Group on the Crime of Aggression, on defining the individual’s conduct in relation to the
Crime of Aggression. The non-paper met with broad agreement among delegations.
Strong support was expressed for using United Nations General Assembly resolution
3314, adopted at the 29\(^{th}\) Session of the UNGA on 14 December 1974, as a basis in
defining an act of aggression. As regards the conditions for the exercise of jurisdiction,
consideration was given to two new elements concerning the crime of aggression, namely
1) the suggested role of the Pre-Trial Chamber and 2) the so-called 'green light' option
with regard to the Security Council's role. Discussions in the resumed Sixth Session of
ASP held from 2-6 June 2008 also made headway on a revised paper presented by the

\(^{21}\) Pre-Trial Chamber I – Judge Akua Kuenyehia, Presiding Judge, Judge Anita Usacka, and Judge Sylvia
Steiner.

\(^{22}\) http://www.icc-cpi.int/press
Chairman covering the definition of the crime of aggression and jurisdiction of the Court in respect of that crime. However, despite all these efforts the definition of the crime of aggression still remained elusive.

113. Several delegations presented their views on the topic. Some delegations pointed out that the Court’s activities should be conducted in strict compliance with the “principle of complementarity” set forth in the Statute.

114. All the delegations made observations regarding the “Definition of the Crime of Aggression”. Some noted that the ICC should have the widest possible reach in terms of providing for various acts defining the crime of aggression. They gave their views on the individual responsibility and command responsibility.

115. One delegation noted that despite the efforts of the international community over the past sixty years it was regrettable that such a definition still remained elusive, and that the international community continued to struggle with a non-paper by the Chairman of the Working Group on the Crime of Aggression, instead of formulated articles that could be considered in the Review Conference scheduled to be held in Rome in 2010. He said that if this opportunity was not availed this matter would be further postponed by another 10 years.

116. Many delegations wanted a clearly defined role for the Security Council in case of failure or declining to determine the acts of Aggression to the effect that independent judicial bodies such as ICC should not be impeded.

117. One delegation noted from its experience that ratification to the Statue was an arduous process. He noted with satisfaction that 16 Member States of AALCO are parties to the Statute and encouraged others to do so.

118. One delegate informed that his country had taken steps towards the ratification of the Statute, by promulgating normative and institutional infrastructure.

119. In relation to the issue of prosecutorial discretion and victims rights highlighted by the Secretariat, one delegation noted that since this matter was not under discussion in the Special Working Group, clarification was required on what, if any, additional proposals AALCO or its Member States may have on this matter.

120. The proposal of holding an “Inter-Sessional Meeting of Experts on International Criminal Law from the Asian-African Region” to formulate a definition of the Crime of Aggression by AALCO Member States, was put forward.

VII. GENERAL COMMENTS

121. 2008 marks the Tenth Anniversary of the adoption of the Rome Statue that established the International Criminal Court (ICC). Ten years later the Court is an independent, fully functional Organization, based in The Hague. Recent developments in the functioning of the ICC evoke mixed reactions from the world community. While on
the one hand it seems the Court is making strides towards realizing its goals, in the form of indicting persons responsible for committing the gravest crimes, on the other hand one of the most important task of defining the mother of all crimes the “Crime of Aggression”, despite all efforts, remains elusive. As the Review Conference of the ICC is fast approaching, there are many tasks that need to be accomplished, including the “Definition of the Crime of Aggression”, and as a serious concern raised by one of the AALCO Member State “if we miss this opportunity in 2010, we might have to wait another ten years in fulfilling that mandate”.

122. The Review Conference is scheduled to be held in the year 2010. It is felt that the success of the Review Conference should not solely rely on amendments and that it should also be an opportunity for stocktaking, benchmarking and evaluating the work of the international criminal justice system established by the Rome Statute. Furthermore the choice of location could have a significant impact on the scope, influence and results of the Review Conference.

123. There is a possibility that the venue is likely to have implications on the substantive work at the conference and in shaping perceptions on the ICC, particularly those on its effectiveness and legitimacy. These implications may also have further effects on the future success of the Court with regard to potential ratifications of the Rome Statute and cooperation with the ICC.

124. In view of the serious nature of the crimes committed in Darfur, and the reluctance or inability of the Sudanese government to bring perpetrators to justice, the ICC provides a suitable forum for the final determination of guilt or innocence of any individuals currently suspected of involvement in these atrocities. In light of these circumstances, the international community has little option but to steadfastly support the ongoing work of the ICC to investigate and bring to trial all those suspected of serious violations of international law. Anything short of that would be to endorse impunity and give further momentum to Africa’s enduring complex emergencies.23

125. On 14 July 2008 the ICC Prosecutor filed an Application under Article 58 of the Rome Statute, requesting the Pre-Trial Chamber I to issue a Warrant of Arrest for Mr. Omar Hassan Al Bashir, the President of Sudan. The ICC advocates applaud the precedent-setting charge against a sitting head of State; critics warn of over-reach and serious collateral damage.24


24 Ramesh Thakur, “Do Law and Politics interest or collide in the ICC?”, “The Hindu”, dated 21.7.08 also available at website http://www.thehindu.com/2008/21/stories:
Ramesh Thakur in a recent write up, is of the view that as the ICC was not embedded in a broader system of democratic policymaking, there were no political checks on it. In a national system, the office of the prosecutor functions within a well-established structure of state governance, while the ICC, in the words of Judge Hisashi Owada of the World Court, “is not established as part of a centralized system of international governance that can govern the entire international community.” In claiming jurisdiction over nationals of countries that are not members of the court, it displaces the state as the conduit of democratic representation without providing an alternative. Its authority to overturn policy established by national democracies is questionable. Why should it have authority over constitutionally legitimated democracies such as Australia, Britain, Canada, India and the U.S? And if not over them, can it fairly claim jurisdiction over non-democracies like Sudan?

In view of the fact that all the four cases currently pending before the ICC are from the African Continent, a perception is firming up that the ICC is becoming Afro-centric. In this regard, the international community needs to remain vigilant against the possible misuse of indictment against African leaders.