XIII. VERBATIM RECORD OF THE HALF-DAY SPECIAL MEETING ON "THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS"

XIII. VERBATIM RECORD OF THE SECOND HALF DAY SPECIAL MEETING ON "THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS", HELD ON THURSDAY, 4 MAY 2017 AT 2.40 PM

His Excellency, Prof. Dr. Kennedy Gastorn, Secretary General of AALCO, on behalf of the President of the Fifty-Sixth Annual Session, in the Chair

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: Distinguished Delegates, Ladies and Gentlemen, Let me begin by warmly welcoming you to this Special Half-day Meeting on the agenda item—"International Criminal Court: Recent Developments". AALCO has been following the developments relating to the work of the ICC since its Thirty-Fifth Session held in Manila in 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 many Annual Sessions, the last being 2012 Session held in Lagos, Nigeria.

In addition, AALCO has also organized many seminars and workshops 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. 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 then Secretary General participated at the Review Conference. In 2011, AALCO also organized, in collaboration with the Government of Malaysia and the ICC, a two day meeting of legal experts on the topic "Rome Statute of the International Criminal Court: Issues and Challenges".

Excellencies, Ladies and Gentlemen, It has been 15 years since the establishment of the Court. This occasion provides an opportune moment for AALCO Member States to retrospectively evaluate its successes and failures and deliberate some of the topical issues that directly concern the international community. The regional imbalance in prosecutions has become one of the major challenges for the Court to address. Nine of 10 active court investigations are in Africa with the one exception of Georgia. The court has "preliminary examinations" ongoing in non-African countries, but several of them pose daunting political and investigative complications of their own. Not surprisingly, the Court's exclusive focus on Africa is often criticized. In fact, the open bureau meeting on the 'ICC-Africa Relationship' convened by the ICC's Assembly of State Parties (ASP) in November 2016 clearly indicated that some States in Africa are increasingly disheartened by the gratuitous focus of the Court on their continent.

Another issue relates to the referral and deferral powers of the United Nations Security Council under the Rome Statute. Article 13(b) of the court's Rome Statute vests the UN Security Council, acting under Chapter VII of the UN Charter, with the authority to refer situations to the ICC, including those where crimes were committed on the territory of non-states parties or by nationals thereof. The Member States which drafted the Rome Statute granted this role to the Security Council primarily to save it from the need of creating ad hoc tribunals which not only is costly but also takes several years to bring a tribunal into operation. In practice, the decisions of the Security Council are often affected less by considerations of judicial purity and coherence

than by factors relating to the conflict at hand. While selectivity may be a justifiable or inevitable stance from the point of view of the Security Council, this provision that stands codified in Article 13 of the Rome Statute has serious implications for the perceptions of legitimacy and the integrity of the ICC.

Powers of deferral enshrined in Article 16 of the Rome Statute has also caused a great deal of discomfort to many States over the years. As is well known, Article 16 of the Rome Statute provides that the UN Security Council may, in a resolution adopted under Chapter VII of the Charter, request the Court to defer (namely not commence or proceed with) an investigation or prosecution for a renewable period of twelve months. As such it recognizes the ability of the Security Council to suspend the activities with regard to a specific situation or case, when it is considered that the suspension is necessary for the maintenance of international peace and security.

Both the powers of referral and deferral present a critical dilemma: they should not be seen to be governed by political motives, in which case the legitimacy of ICC would be seriously undermined in the eyes of the international community. In this regard the need to ascertain certain parameters that could potentially guide the actions of UNSC could hardly be exaggerated.

Excellencies, Ladies and Gentlemen, Further, principle of complementarity—embodied in the Preamble and article 17 of the Rome Statute— which stipulates that the Court will supplement but not supersede national jurisdictions is a hotly debated issue. The basic idea behind the complementarity is to maintain State sovereignty, under which "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", to enhance the national jurisdiction over the core crimes prohibited in the Statute, and to perfect a national legal system so as to meet the needs of investigating and prosecuting persons who committed the international crimes listed in the Statute.

However, the difficult aspect of the negotiations at Rome was to develop the criteria setting out the circumstances when the Court should assume jurisdiction even where national investigations or prosecutions had occurred. Two broad concepts emerged: Unwillingness and Inability. As provided in Article 17 of the Rome Statute, where national criminal jurisdictions are unwilling or unable genuinely to carry out investigations and prosecutions of the most serious crimes of international concern, the ICC will instead investigate and prosecute those allegations. But this formulation left several questions unanswered (particularly with regard to the terms "unwilling and unable") as to the meaning, scope and extent of control to be exercised by the international judges over domestic proceedings. The problems arising out of this principle were starkly witnessed in certain African situations recently.

Another problem that has arisen for African States that are parties to ICC relates to the principle of competing obligations flowing from the Rome Statute as well as their membership in the African Union. When a particular course of action is dictated by the ICC it becomes mandatory on the part of all State Parties to ICC to adhere to that. This is because State parties to ICC are under an obligation to cooperate with ICC in relation to a number of issues. However, when contrary decisions are taken by regional organizations, the members of these organizations despite being a member of them are faced with a dilemma: whether to give priority to their status as State Parties to ICC or whether to abide by and implement the decisions taken by the regional

institutions of which they are members. Is this issue amenable to legal interpretation or does it require a political solution. This remains the crux of the problem.

Excellencies, there is a growing consensus that impunity in the face of atrocity crimes is no longer acceptable and that leaders who are responsible for these crimes get punished accordingly. Ending impunity must, and does, rest upon the complementary efforts of national and international criminal accountability systems, the existence of the rule of law within nations and among nations, and the unwavering commitment of the international community to maintain conditions under which justice and peace prevail. But the International Criminal Court, which fundamentally reforms and complements core tenets of international criminal law regime and established paradigms, is not uniformly welcome across the international community. Its exclusive focus on Africa largely reflects current limits on the reach of international justice. The ICC needs to continue playing an impartial role in the fight against impunity in Africa and the rest of the world and proactively follow up situations in other jurisdictions where crimes have been committed.

Today, we have with us, Mr. Dan Ochieng, Foreign Service Officer I, Ministry of Foreign Affairs, Kenya, to give us his insights on this topic. Sir, you have the floor.

Mr. Dan Ochieng, Foreign Service Officer, Ministry of Foreign Affairs, Republic of Kenya: Excellencies, Distinguished Delegates, Ladies and Gentlemen, Today, I am asked to discuss this topic—International Criminal Court: Recent Developments. Allow me to say that there is varied opinion on what the discussion on this topic will undertake. There can be two perspectives in this regard. Because of the term 'development', it may be construed to be positive or negative. The important task before me, hence, is to identify what kind of developments has taken place.

I will begin by stressing the fact that as it stands now, the 124 Member States which have ratified the Rome Statute all agree in one voice—that the matters to do with international justice are imperative and the fight against impunity must continue. The Rome Statute, which created the ICC, introduced the first permanent criminal court that was supposed to conform to several standards—independence, impartiality and the ability to deal with heinous crimes.

Now, the first aspect I am going to touch upon is to consider several perspectives of developments that have taken place in the ICC. Let me first talk about the Assembly of State Parties (ASP). The ASP, being the principal organ of the Court, has recently witnessed various developments. Here, I would like to point out discussions regarding how States could go about dealing with Art. 17 to request for cooperation. This is an example of continuous discussions in the ICC that might lead to a positive development.

The second thing that we foresee in relation to the ASP is the ongoing agitation by States and civil society to enhance or achieve the principle of universality, urging non-state parties to ratify the Rome Statute. This can also be seen as a positive development. The third aspect I identified in this subtopic is the issue relating to cooperation. States are now asking the ASP questions on what kind of cooperation is expected of them and what such cooperation entails and how in conformity with their national legislations, they can achieve this cooperation. And in this case, last year, you all remember, this agenda item was specifically discussed in the side events during the ASP.

What is the end product of all these developments I briefly spoke about? It is to enhance what we call comprehensive and honest discussions between the State Parties and arrive at consensus as to how to move forward—what we call the Rome Agenda.

Now, the second development which we have seen in the recent days is the problematic relationship between the African States and the Court. I would like to qualify it no as "problematic" relationship rather as positive engagement with the Court. For the first time, we have seen States raising questions on the compatibility of Rome Statute with their national laws. In this case, as you know, several amendments have been proposed and some of them are contentious. Again, we have seen courts efforts to explain the geographical distribution of these cases.

Another important question that arise vis-à-vis the ability of States, as given in the law of treaties, that allows States, under Art. 54, to withdraw from a treaty. As such, these discussions should be seen as positive developments as they help to resolve issues amicably in the interest of ensuring international criminal justice.

Now, let me turn to the next development—this is related to the budgetary constraints of the Court. States, for various, reasons, are limiting their financial contributions to the Court. Is this a hindrance in the delivery of international criminal justice? It can be answered in affirmative or negative depending on how one looks at the issue. It is believed that international criminal justice is very expensive in nature. The Court can only function effectively if its finances are satisfactory. States should engage in dialogue with the Court to ensure that the cases before the Court are effectively decided upon.

Next point I have identified related to the jurisprudential developments in the ICC. Let me give you a few examples that contributed towards development of International Criminal Law. I will start with the case of Prosecutor v. Bemba. This case is based on Arts. 28 and 70. Its decision has enhanced jurisprudence on prosecution of sexual offences as a tool used in perpetrating heinous crimes. For the first time, the Court used the principle of "command responsibility", whereby commanders were held responsible for the crimes committed by soldiers under them.

The second example I want to cite is the case of Prosecutor v. Katanga. This was mainly in relation to murder, attacking civilians, destruction of property and pillaging. In its judgment, the Court stressed that pillaging was fully proved, and in the process, created robust jurisprudence on crimes associated with pillaging.

Lubanga case is another case involving enlisting and conscription of children in hostilities. In this case, the Court drew connection between obligations under International Criminal Law and International Humanitarian Law. For the first time, the Court identified that there is a clear distinction between what is allowed in an armed conflict and the use of children, in this case, led to enhanced sentence.

The last case I want to cite is the case of Prosecutor v. Ahmed Al Faqi, the court's first prosecution of the destruction of cultural heritage as a war crime. In this case for the first time, the ICC had a guilty plea without undergoing full trial.

Now, let me quickly point out some of the current challenges that the Court face. The first challenge relates to the divided nature of the ASP. The Court now is being faced with this question—how do you deal with the dissenting voices? Another challenge is the modalities of reparations. How does the Court decide on what context does it offer reparations? Finally, the last challenge is the challenge of sentencing. The international criminal justice system is time-consuming and involves long processes. Further, does the quantum of punishment justify this longer trial process and investments put in. How do you go about when State Parties do not agree to enter into sentencing agreements?

Excellencies, Ladies and Gentlemen, the issue of recent developments can be tackled in various perspectives. In this context, in my lecture, I have tried to explain both positive developments and challenges to the Court. And I tend to think that it is for the benefit of the Court to embrace both positive and negative developments. I thank you.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: Thank you, Sir, for that insightful presentation. Now, I invite the distinguished delegate of Sudan. Sir, you have the floor.

The Delegate of Sudan: Excellencies, Ladies and Gentlemen, This presentation focuses on the UNSC Resolution 1593, which was adopted on 31 March 2005, after receiving a report by the International Commission of Inquiry on Darfur. The UNSC, through the said resolution, referred the situation in the Darfur region of Sudan to the International Criminal Court (ICC), and required all states to co-operate fully. The said resolution stands in history as the first time ever that the UNSC resolution refers a situation to the ICC and compels a country to co-operate with it.

Acting under Chapter VII of the United Nations Charter, the UNSC referred the situation in Darfur of the Sudan, since 1 July 2002 to the ICC and urged all states to co-operate with the Court, whether or not it was party to the Rome Statute. The resolution was adopted by 11 votes to none against, and four abstentions from Algeria, Brazil, China and the United States.

During the deliberations on Res. 1593, the Algerian representative preferred an African Union-devised solution to the problem, Brazil agreed with the resolution but objected to the U.S. view on selective jurisdiction of the Court, the Chinese representative disagreed with some elements of the ICC Statute and argued for the perpetrators to be tried in Sudanese courts, and the United States objected to some provisions of the Court but overall supported humanitarian interests and the fight against impunity. None of the UNSC members, then present, raised any legal objections to Res. 1593. However, the Sudan, which is not a party to the ICC Rome Statute, refused to recognize the court's jurisdiction, and stated that "the International Criminal Court has no place in this crisis at all."

The International Criminal Court is a treaty body now comprising 123 States of which 34 are African, 19 Asian, 18 Eastern European, 27 Latin American and 27 European & other States, established by the Rome Statute 1997 which entered into force on 1stJuly 2002. This treaty body represents 61.5% of all countries of the world. However, the ICC Statute did not yet become universal as still nearly 40% of the countries of the world are not yet parties to the ICC Statute.

It is doubtful that the ICC Statute will one day attain universality. Many of the signatories of the ICC Statute, especially in Africa, are now uneasy about the trends and attitudes of the ICC. Recent developments indicate that there are even serious attempts, on part of some African State Parties such as Burundi, South Africa and others, to withdraw from the ICC Rome Statute for multiplicity of reasons.

Article 13(b) of the ICC Statute on the exercise of jurisdiction provides that:

"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;". There are two other instances in which the ICC will assume jurisdiction in accordance with the said Article 13, that is if a State Party referred a situation to the ICC Prosecutor in accordance with Article 14 of the Statute or if the Prosecutor has initiated an investigation in respect of a crime mentioned in Article 5 of the Statute, in accordance with article 15 thereof.

The Republic of the Sudan is not a party to the Statute of the International Criminal Court (ICC) done at Rome 17 July 1998 (the Rome Statute), which entered force on 1st July 2002. Now, the question that should be answered is how could the Sudan be made bound by the provisions of the Rome Statute 1999 even though it is not a party thereto? and whether the UNSC has violated International Law in that respect? Accordingly, the purpose of this presentation is to focus, from a purely legal perspective, on the adverse situation created by article 13 (b) of the ICC Statute which gave the UNSC the authority, acting under chapter 7 of the UN Charter, to refer a situation to the ICC Prosecutor even though the ICC is not one of the United Nations organs.

This authority is given regardless whether the referred situation is occurring in a State Party to the ICC Statute or not. It is argued that it would have sounded very legal under international law if the situation to be referred by the UNSC has occurred in a State Party to the ICC, and that the drafters of the ICC Convention have originally intended to refer a situation in a State Party to the ICC not the contrary; but that was over looked.

The foregoing argument is solidly based on the Vienna Convention on the Law of Treaties which stipulates in several articles that an international agreement is non-committal except to its parties. Even if acting under Chapter 7 of the UN Charter the UNSC cannot, change the *established jus cogens* of international law nor can the UN General Assembly do that by asking a State not party to the ICC Statute to submit to the jurisdiction of the ICC.

Under the UN Charter all organs of the United Nations are expected to act and behave in accordance with international law, not to contradict the very existing norms and principles of international law. The agreement concluded between the United Nations and the ICC cannot either legalize an action that contradicts a universal convention on the law of treaties, or a sacred principle of international law. All organs of the United Nations system cannot authorize any action, by any of its organs, that is essentially contradictory to the established norms and principles of international law.

The ICC was originally designed to perform in accordance with the fundamental standards of due process, and to pursue its entrusted duties with impartiality and effectiveness. It is important for the ICC as a nascent legal forum to independently apply justice in a fair and even-handed manner, thereby contributing to the creation of a solid International Criminal Justice System. The *traveaux preparetoire* (preparatory works) of the ICC Preparatory Commission revealed that many have cautioned against giving a political entity the ability to influence the Court in a manner that would affect its independence.

Unfortunately, the United Nations Security Council gave the first blow to the impartiality of the ICC. It's Resolution 1422(2002), adopted on 12 July 2002 stands as a clear manifestation of this serious flaw. Acting under Chapter VII of the Charter of the United Nations, the Security Council requested that: "consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise". This attitude is completely negating the position taken by the UNSC when invoked section 13(b) of the Rome Statute.

The foregoing operative paragraph of resolution 1422 undoubtedly attests to the role undertaken by the UNSC to override an international treaty. It literally means that peace keeping forces, to which the United States is the largest contributor, shall not be subject to the immediate jurisdiction of the then newly established ICC. Not only that, but the five permanent members of the United Nations Security Council have already developed, within the ICC Statute, other means by which they can influence the work of the ICC. It is the mechanism by which the UNSC has the right to subject States, which are not parties to the ICC Statute, to the jurisdiction of the ICC by way of referral to the ICC.

Against this background, the United Nations Security resolution 1593(2004) referring the situation in Darfur of the Sudan to the International Criminal Court was, by and large, influenced by political considerations. The flawed resolution came within a series of resolutions aiming at putting pressure on Government of the Sudan for various reasons. Some powers that were campaigning against the Sudan in the Council, were not genuinely interested in bringing about justice. To the contrary, they were known for their firm opposition to the Court.

The process of dragging the Sudan to the ICC began with the mandate given by the Security Council to the International Commission of Inquiry led by the late Italian Jurist Antonio Cassese. Antonio Cassese and his team visited the Sudan for a short period of time and came out with the desired political prescription that the judiciary in the Sudan is unable and unwilling to prosecute the perpetrators of the crimes alleged to have been committed in Darfur. This statement was then, the only prescription by which the Security Council could, acting under Chapter 7 of the UN Charter, put pressure on the Sudan and refer the situation in Darfur to the jurisdiction of the ICC.

The political considerations shadowing the UNSC resolution 1593 cannot be over-emphasized. There was a lot of controversy about what happened in Darfur. Different views were expressed and voiced about whether genocide took place or not. Even the Antonio Cassese Commission of Inquiry was not sure, obviously, for lack of evidence or out of the feeling of guilt, whether genocide has ever taken place in Darfur. Even the ICC Prosecutor has casted doubt about the results of his own investigations when he admitted that he has to investigate the situation in Darfur without going to Darfur for security reasons. As such, it is permissible to ask ourselves the question: Why would it be easily possible for the UNSC to refer the situation in Darfur, for example, for consideration by the Court, while the same UNSC finds it almost totally impossible to condemn *pari passu* the grave massive crimes against humanity committed elsewhere in many parts of the world.

On March 4, 2009 the Pre-trial Chamber of the ICC had issued a decision confirming the demand of its Prosecutor General for an arrest warrant against His Excellency, President Omar Elbashir for allegations in Darfur. This decision culminated a political and psychological campaign led by the Prosecutor General in such a manner that seemed improper for this office. The Sudan Government, which lamented the irresponsible behavior of the ICC Prosecutor, had rejected outright this unfounded and horrible assault on peace, law and justice. The arrest warrant for His Excellency, President Elbashir which is also one of the repercussions of the flawed UNSC Resolution 1593 represented a flagrant violation of established principles and precedents relating to the immunity of sitting heads of state and government.

If the UNSC can have attributions beyond the United Nations Charter under which it is established, the correct legal interpretation of Article 13 (b) of the ICC Statute shall apply only to the States Parties to the ICC Statute, or the states accepting the jurisdiction of the ICC under a special agreement in accordance with article 4/2 of the ICC Statute. Any interpretation otherwise will be a compulsory accession of a sovereign state to the membership of a treaty to which it did not agree, in flagrant violation of the Vienna Convention on the Law of Treaties 1969.

Therefore, it is a pertinent sensitive issue to raise questions about the authority of the UNSC to make a member state of the United Nations bound by and subject to the provisions of an international treaty to which that member state is not a party. It is true that Member States are bound to obey the Security Council resolutions in accordance with Article 25 of the Charter. But a member state has the right to make its reservations if the decision taken by the UNSC is contradicting the fundamental principles of international law.

In our view, the UNSC resolution 1593 (2005) by which the Security Council had referred the case in Darfur seems illegal, self-defeating and compromising dubious motivations for the following reasons:

(a) It violated the Rome Statute which firmly made the distinction between the parties and non-parties, and addressed Sudan, a non-party to the Statute. This attitude had also violated article 34 of the Vienna Convention of the Law of Treaties which stipulates that an international treaty applies only to its parties. Implicating Sudan is a brutal violation of the principal of consent, a cardinal principal of international law.

(b) It created a confusion in reading the powers of the Security Council in Chapter Seven of the UN Charter, and the limited and procedural power of the council to refer a case to the ICC. The criminal legislator and the ICC Statute drafter were clear in giving an equal power of referral, in addition to the Council, to State Parties and to the ICC Prosecutor himself (proprio motu).

(c) The referral is purely procedural so as to leave to the ICC the full power to decide its own competence. However, the Security Council is given a sole power to defer the case in a binding way for the ICC. It is to be reminded that referral in the article 13 and deferral in article 16 by the Security Council were inserted in Rome Statute by some states which remain extremely hostile to the ICC.

(d) The UNSC 1953 resolution had defeated the ICC ultimate function in combating impunity. It had referred the Sudanese, while guaranteed absolute immunity from the ICC Competence for nationals of States non-parties other than Sudan. This discrimination against Sudan nationals had seriously undermined the integrity and validity of this resolution.

(e) Furthermore, this resolution, dedicated to referring the Sudanese to the ICC, was used to extend the immunity privilege for other nationals of other States. It was a fraudulent instrument to continue that immunity, previously guaranteed by resolutions 1422 (2002) and 1487 (2003), and to surmount any opposition to such immunity in a separate resolution.

The ICC decision of March 4, 2009 added more violations by assuming competence by the ICC over a non-State Party, including the application of article 27 regarding the principle that immunity is no bar for justice. This may be true for a Party that adjusts its legal system to conform to that principle. Ignoring this reality led the ICC Court to inadvertently trespass on the President's immunity while in office, and to commit an assault on the sovereignty of the Sudan, contrary to the ICJ precedents regarding immunity of Heads of State.[See Annex (1): BRIEF ON IMMUNITY OF HEADS OF STATE AND GOVERNMENT OFFICIALS Prepared by: Sir Geoffrey Nice, QC and Rodney Dixon]

In the abstract, the real question now is whether the UNSC has violated international law, and the Vienna Convention on the law of treaties 1969 when adopted the flawed UNSC Resolution 1593 which referred the situation in Darfur of Sudan to the ICC Prosecutor. Does the UNSC have the power to bind a UN member State, which is not Party to the ICC Rome Statute 1997, with the provisions of that Statute and make it subject to the jurisdiction of the ICC. Based on the foregoing background and analysis AALCO is invited to use it consultative powers and capabilities to lend a hand in support and preservation of the rule of international law in international relations by providing legal answers to the following fundamental questions:

Does the UNSC have the authority, under international law, to make a State, which is a party to UN Charter, subject to and bound by treaties to which that State is not party?

Does the UN Security Council have the power, under Chapter 7 of the UN Charter, to alter the jus cogens of international law as contained in international conventions and treaties?

Is the UNSC Resolution 1593 sufficiently justified under the existing norms and principles of international law? Is it within the reach of the UNSC to equally refer all and every State to the ICC under the same article 13(b)?

On conclusion, my delegation moves to propose that the 56th Session of AALCO takes note of the above presentation and decides to keep the captioned issue in the agenda for discussion during the 57th Session of AALCO and thereafter, until a conclusive consultative opinion and/or decision on the issue is reached. Thank You.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: I thank the distinguished delegate of Sudan for his presentation. Now, I invite Malaysia to take the floor. Sir, you have the floor.

The Delegate of Malaysia: Mr. Secretary-General, Malaysia wishes to express its appreciation and gratitude to the Secretariat for preparing the comprehensive Report on this topic AALCO/56/NAIROBI/2017/SD/S10 and for the inclusion of this item as a Half Day Special Meeting of the Fifty-Sixth AALCO Annual Session. Malaysia notes that this item stems from the proposal by the Republic of Sudan vide a *note verbale* (SED/6/2/AALCO) dated 24 October 2016, which proposed the topic "*The Legality, under International Law, of the UNSC Authority to refer cases and/or situations to the ICC under Article 13(b) of the Rome Statute, 1998*". This topic is to be included as a provisional agenda item to be deliberated during the Fifty-Sixth Annual Session of AALCO.

With regard to the issue on the relationship between the International Criminal Court ("ICC") with the United Nations Security Council ("UNSC") which emanates from the referral powers granted to the UNSC *via* Article 13(b) of the Rome Statute, and in view of the previous referral situations such as Sudan (Darfur) in 2005 and in Libya in 2011, Malaysia notes that the UNSC has also made use of its powers to refer situations in non-party States to the ICC. Malaysia is of the view that the UNSC has the legal basis to do so as provided under the Rome Statute but whether the situations it chooses to refer to the ICC is fair and impartial, is a subjective issue. In choosing a situation to be referred to the ICC, the UNSC shall first determine the existence of any threat to the peace, breach of the peace, or act of aggression to the international peace and security, as required under Article 39 of the UN Charter.

Nonetheless, it is undeniable that this referral power can always be seen to be influenced by political motives, which will result to the legitimacy of the ICC being questioned. Although it may be argued that States which are not parties to the Rome Statute shall not be imposed and be bound by the Statute as it will be a violation to the principle stipulated under Article 34 of the Vienna Convention on Law of Treaties, we shall look at this referral power from a wider perspective. This power should be seen as a necessary medium to end impunity in situations where international crimes take place beyond the Rome Statute regime and no domestic investigation of these crimes has taken place.

Malaysia is of the view that every power provided to a particular body must have the element of check and balance. In this regard, it is important to note that a referral made by the UNSC is still subject to the assessment of the ICC Prosecutor who, under Article 53 of the Rome Statute, has the responsibility to evaluate the information available before him and may decide not to initiate

an investigation if there is no reasonable basis to proceed or an investigation would not serve the interest of justice.

Further, Malaysia is of the view that the principle of complementarity should be applicable even in situations of Security Council referrals. Malaysia recalls that the principle of complementarity under the Rome Statute recognizes that States have the first responsibility and right to prosecute international crimes. Articles 17 and 19 of the Rome Statute do not indicate any exception to such referral.

Mr. Secretary-General, as regards to the principle of complementarity, Malaysia agrees with this foundational principle of the Rome Statute whereby the role of the ICC shall be complementary to the national criminal jurisdictions. This principle aims to maintain State's sovereignty whereby the ICC will supplement and not supersede national jurisdictions unless, the State is unwilling or genuinely unable to carry out the investigation or prosecution, or the proceedings are being undertaken in a manner, which in the circumstances is inconsistent with the intent to bring the person to justice.

Among the issues that arise out of this principle is the ICC's role in determining the criterias that amount to "unwillingness" such as the attempt to protect a criminal from criminal conviction, the unnecessary deferment of particular case, or any biasness which potrays the national authority's unwillingness to bring the accused person to the domestic court. Hence, the ICC's involvement in a State's justice process is undeniable as it will set the precedent on whether a domestic criminal trial is effective or ineffective, as what has happened in the Sudan case.

Further, the ICC will also determine a particular State's "inability" factor by considering whether the State is unable to obtain the accused or the necessary evidence and testimony, or otherwise unable to carry out its proceedings. The concept of "unwillingness" or "inability" are subjective in nature and might compromise a State's sovereignty in the event the ICC is of the view that the particular State is not willing or unable to institute the prosecution, regardless of the State's justification.

Mr. Secretary-General, Malaysia is committed to work together with the other Member States on this issue and to follow the developments regarding cases taken up by the ICC, as proposed in the draft AALCO/RES/DFT/56/SP2. As regards to this, Malaysia is of the view that further discussion and continuing effort to conduct dialogue sessions involving all stakeholders is necessary to improve the relationship between the ICC and the UNSC, as discussed in this Report. The issues concerning the relationship between the ICC and the UNSC shall be addressed accordingly and as a way forward, perhaps a more clear strategy on UNSC's responsibilities need to be shared from time to time to clarify the justifications and the reasons under which the UNSC refers situations to the ICC. Thank you.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: I thank the distinguished delegate of Malaysia. Now, I invite China to take the floor.

The Delegate of People's Republic of China: Mr. Secretary-General, the Chinese delegation would like to thank the AALCO for organizing the special meeting. We also appreciate the report on the work of the International Criminal Court (ICC) prepared by the Secretariat.

China always values the role played by international criminal judicial bodies in promoting international rule of law and punishing serious international crimes. China has been dedicated to the joint effort in building the international system on criminal justice in a constructive manner. China also follows each session of Assembly of States Parties to Rome Statute and pays close attention to the work of the ICC. China firmly believes that punishing serious international crimes, eliminating impunity and pursuing justice are of relevance to realizing international peace and security, in which the States should bear main responsibility. The establishment of the ICC is purported to supplement rather than to substitute domestic jurisdictions.

Last year, the ICC came at a critical moment in its development. The successive declaration of some States to withdraw from the Rome Statute drew worldwide attention. These changes certainly deserve our profound reflection. The Court has since its establishment carried the good wish of pursuing justice from the international community including vast developing countries in Asia and Africa. It has been fifteen years since the Court started to operate, yet a long journey still lies ahead to improve its efficiency and universality. It largely depends on whether the Court could carry out its functions enshrined in Rome Statute with prudence and properly balance its goals of upholding justice and promoting peace process as well as balance the goals of respecting State sovereignty and fighting impunity. It also depends on whether the Court could respect immunity and other general principles of international law, respect the rights and obligations of non-State parties according to international law and treaties, regain trust and respect by acting in an objective and impartial manner.

In addition, the Chinese delegation would like to highlight the issue relating to the right of observer States to participate in informal consultations of the Assembly of States Parties. During the 15th Assembly last year, the Chinese delegation attempted to join the informal consultation on the omnibus resolution but was refused by the coordinator with the argument that the consultation is only open to States Parties and civil society excluding observer States Parties which also concurs with "previous practice". The Chinese delegation is of view that, excluding the observer States from the informal consultations is a clear deviation from the Rules of Procedures of the Assembly, which is neither consistent with the principle of transparency nor international practice. Furthermore, it is not in the interest of promoting universality of the Court. The Chinese perspective was supported by quite a few States at the Assembly. China hopes that members of Rome Statute in AALCO would play an active role in this regard.

Mr. Secretary-General, the Chinese delegation would like to reiterate its commitment to the joint endeavour in preventing and publishing atrocity as well as pursuing justice. We hope that the Court will adhere to the international law regime based on the Charter of the United Nations, ensure its efforts in safeguarding justice will truly be conducive to promoting peace, stability and national reconciliation, and therefore contribute to the cause of peace and justice.

Thank you, Mr. Secretary-General.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: I thank the distinguished delegate of China. Now, I invite Islamic Republic of Iran to take the floor. Sir, you have the floor.

The Delegate of Islamic Republic of Iran: "In the name of God, the Compassionate, the Merciful". Mr. Secretary-General, at the outset, I would like to thank the Secretariat for the preparation of the report contained in the document AALCO/56/NAIROBI/2017/SD/S10.

Mr. Secretary-General, The Islamic Republic of Iran, as a signatory to the Statute of the International Criminal Court, considers the establishment of ICC as a milestone towards achieving peace and justice. It is the first permanent international criminal court set up to bring to justice perpetrators of the most serious crimes of concern to the international community, namely genocide, war crimes, crimes against humanity and crime of aggression. Iran was one of the active participants in the negotiations and preparation of Rome Statute and its procedure and also other international meetings regarding the ICC. Taking into account the principle of complementarity and the fact that the main responsibility rests on the shoulders of the national criminal jurisdictions, the Islamic Republic of Iran, in parallel with international efforts to strengthen criminal justice, has taken certain measures at the national level with a view to upholding the tenets underlying the international criminal justice system to ensure an effective fight against impunity.

Accordingly, during the last decade the International Criminal Court was being subjected to intensive discussion inside the country by different academic, executive, legislative and judicial entities. We are also planning to take some further steps to promote our domestic judicial capacities for prosecuting the crimes which are criminalized under ICC.

Mr. Secretary-General, The Islamic Republic of Iran has always been supporting the idea of inclusion of the Crime of Aggression in the Court's Statute and has actively participated in the related discussions in the Rome Conference and also the Review Conference of the Rome Statute in Kampala. The criminalization of the act of aggression is an important step; and I hope the sufficient number of instruments of ratification of Kampala amendments will put the crime of aggression on the agenda of the Prosecutor's office like other crimes. We believe that the Court should exercise its jurisdiction over the crime of aggression without any restrictions based on the requirements provided for in the Rome Statute for other crimes within the Court's jurisdiction. It is also important for the court to avoid a politically-oriented approach in prosecution and investigation of the crime of aggression.

Mr. Secretary-General, Withdrawal of some countries from the International Criminal Court is not a good signal for the international community and the Court itself and is a clear sign of dissatisfaction with the practice and performance of the Court. In this regard, the court and the Assembly of the State Parties should consider and study the causes leading to their recent reaction. In order for the ICC to overcome the trend of withdrawals by these States and with a view to encouraging non-parties towards accession to the Rome Statute, we believe that the ICC should listen to voices and concerns of all countries and attempt to make the best choice in this regard.

Mr. Secretary-General, The Islamic Republic of Iran expresses its deep concern over the grave situation in our region and the serious crimes of genocide, war crimes and crimes against humanity being committed on a daily basis. Thousands of civilians including women and

children have been brutally killed, injured and displaced by terrorist groups and heinous atrocities have been, and are being, committed against religious minorities. We call upon the international community to help bring to justice the perpetrators of the said crimes and to further prevent future instances of impunity.

This, coupled with the long-lasting impunity so far witnessed in the case of the Israeli regime in the occupied Palestinian territories whose long list of crimes against humanity continues to shock the conscience of humanity, should not let criminals escape justice.

Mr. Secretary-General, It is our conviction that should the ICC wish to accomplish its mandate efficiently and effectively, it needs to remain impartial, independent and apolitical, and avoid double-standards, as was intended by its creators. The Islamic Republic of Iran regards the Court and its organs as a judicial body bound to respect the principles and rules of international law without any outside manipulations of any kind. As a purely judicial entity empowered to investigate the most serious crimes of concern to the international community and to bring to justice those responsible for the commission of those crimes, the ICC needs to use and apply legal criteria with utmost objectivity and precision in all phases of proceedings from crime investigation up to trial, victim participation and reparations. This could help ensure, in the long term, effective prevention of impunity and put an end thereto. Thank you, Mr. Secretary-General.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: I thank the distinguished delegate of Iran. Now, I invite Japan to take the floor.

The Delegate of Japan: Thank you, Mr. Secretary-General. The Government of Japan ratified the Rome Statute in 2007 but our support for the ICC goes back to the time even prior to the establishment of the Court as Japan actively participated in the UN diplomatic conference in Rome in 1998. Japan has consistently supported the work of the ICC to strengthen rule of law in the international community and thereby put an end to impunity, thereby contributing to the prevention of most serious crimes.

Japan has worked with AALCO over the years, mostly in the Asian region, to raise awareness about the ICC in the region and share our experience in ratifying the Rome Statute and preparing domestic legislation with non-State Parties. As noted in the briefing paper prepared by the AALCO Secretariat, Japan and AALCO co-organized seminars on issues relating to the ICC in 2009 and 2010, and also contributed to the discussion among States Parties and non-States Parties on enhancing universality of the Rome Statute and promoting cooperation with the ICC.

As the ICC enters into its 15th year of its existence, the Court as well as States Parties faces challenge of enhancing universality of the Rome Statute. To ensure that the ICC effectively promotes rule of law over the world, Japan strongly believes that the ICC should aim at becoming a truly universal criminal court so that it can gain strong support for its work. To represent the largest number of states parties in terms of region at the Assembly of States parties (ASP).

It is in this vein that Japan actively took part in the dialogue held during the ASP in November last year specifically focused on the relationship between Africa and the ICC. It is encouraging

that States Parties came out of the meeting agreeing on the importance of continued dialogue on this matter.

As regards the situations referred to the ICC by the United Nations Security Council, efforts have been made to have dialogues between the Council and the African Union and also enhance communication between the Council and the ICC. Japan remains engaged in dialogues with States concerned and working towards enhancing the Universality of the Court.

At the same time of enhancing universality, we would like to point out the importance of the principle of complementarity enshrined in the Rome Statute. This principle requires that the individuals who committed the most serious crimes under the Rome Statute should, first and foremost, be tried and punished by a national court of the State that has jurisdiction over the crimes.

In this regard, Japan has contributed to strengthening national judicial systems and building capacity of legal practitioners around the world, most notably through the Asian and Far East Institute for the Prevention of Crime and the Treatment of Offenders affiliated with the United Nations. We believe the development of sound criminal justice systems of individual States is not only important for the States themselves but also for the ICC and the International Community as a whole, thereby fulfilling the universality and complementarity in a true sense.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: I thank the distinguished delegate of Japan. Now, I invite Kenya to take the floor.

The Delegate of Republic of Kenya: Mr. President thank you for the floor. Mr. President, Kenya wishes from the outset to reiterate her unwavering commitment to combating impunity, promoting democracy, the rule of law and good governance which are all essential elements to prevent and deter occurrences leading to the commission of international crimes. Kenya appreciates the goodwill of the negotiating members of the Rome Statute of the ICC whose objective was to establish a court which would assist the Member States bring to justice the perpetrators of international crimes. This objective remains valid to date and the question that has to be answered is whether the Court has indeed achieved it.

Mr. Secretary-General, it is not in dispute that there are challenges which have been identified in the manner in which the Court has executed its mandate. There has been a lot of debate and discussion in various fora on these challenges which include:

I. The principle of complimentarity which is embodied in the Rome Statute;

II. Bilateral Immunity Agreements;

III. The immunity of sitting Heads of States;

IV. The importance of strengthening the domestic legal institutions of both parties and non-parties to the Rome Statute;

V. Domestication of the provisions of the Rome Statute into the domestic legislations;

VI. Proprio motu powers of the Prosecutor of the ICC;

VIl. The exclusive focus of ICC's prosecutorial interventions in Africa while numerous alleged violations under the Court's jurisdiction occur elsewhere; and last but not least

VIlI. The Courts' approach to conflict solution.

Mr. Secretary-General, Kenya associates herself with these challenges and reaffirms that in order for the Court to rule of law, respect of sovereignty, democracy, good governance and impartiality, discussions on the above concerns should be concluded. Kenya thus urges AALCO Member States to continue engaging at every level with the Court with a view of exploring possible solutions to the above concerns. Kenya continues to agitate for an impartial universal court that realizes the realities of the modern times and which is considerate of all the views of the State Parties, independent of their economic, social and political status. Kenya believes that the concerns raised will be ultimately resolved.

Mr. Secretary-General, thank you for the floor once more.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: I thank the distinguished delegate of Kenya. Now, I invite the last speaker, Republic of Korea, to take the floor.

The Delegate of Republic of Korea: Thank you. Mr. Secretary-General, the International Criminal Court is continuing in its noble efforts to put an end to the impunity of perpetrators of serious crimes against humanity. It is worthy of special note that, even with limited resources, the ICC has made precedent-setting decisions in recent years, such as those on intentional attacks on religious and historic buildings, command responsibility, sexual violence, and witness tampering.

In spite of its significant achievements, however, the ICC is also facing a number of challenges, including the promotion of universality and the full implementation of the Rome Statute. We must be keenly aware that more than 70 Member States of the United Nations are still outside the Rome Statute. In this regard, it is of utmost importance to enhance understanding about the work of the ICC through active dialogue with, and outreach to, those countries. Furthermore, my delegation is concerned over recent discussions regarding withdrawal from the ICC by some States Parties. It is true that there have been differing views on the interpretation and application of the Rome Statute. However, we should resolve these differences through dialogue, while respecting the independence of the Court and its core goal of ending impunity.

My delegation firmly believes that the on-going cooperation of all the stakeholders in the international community-the State Parties and non-State Parties, as well as international organizations-is necessary for the Court to fulfill its mandate. The foremost international organization, - the United Nations, shares the ICC’s values of peace and justice, as envisioned in the UN Charter and the Rome Statute. Given that the Rome Statute recognizes specific roles for the UN Security Council, the Court Statute recognizes specific roles for the UN Security Council, the Court and the Council need to explore ways to complement each other’s work, from prevention to enforcement, as former Secretary-General Ban Ki-moon pointed out a few years ago.

Furthermore, the ICC needs to encourage States to shoulder their primary responsibility to prosecute serious crimes in their own countries. Based upon the principle of complementarily, the ICC may serve as an even more robust and responsive court of last resort, by demonstrating that those who commit atrocities will be held accountable, either in their own countries or at the Court.

Mr. Secretary-General, I am confident that this special session will be valuable forum for in-depth discussions which will lead to further understanding of the work of the ICC and thus to the universality of the Rome Statute.

Thank you, Mr. Secretary-General.

Prof. Dr. Kennedy Gastorn, Secretary General of AALCO: Excellencies, Ladies and Gentlemen, this was the last intervention. I thank the distinguished delegate of Republic of Korea and all other delegates for their interventions. This session has come to an end.

The Meeting was thereafter adjourned.