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THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS

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THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS

I. INTRODUCTION

A. Background

1. The International Criminal Court (ICC), governed by the “Rome Statute”,¹ is the first permanent, treaty based court established to help end impunity for the perpetrators of the most serious crimes of international concern namely, the Crimes of Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression². The Court may exercise jurisdiction over such international crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions however do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, or if a State makes a declaration accepting the jurisdiction of the Court.

2. The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002³. As of 15th June 2010, 111 countries are States Parties to the Rome Statute⁴. Out of 111 countries⁵ 30 are African States,⁶ 15 are Asian States,⁷ 17 are from Eastern Europe, 24 are from Latin America and the Caribbean, and 25 are from Western Europe and other States. The ICC is an independent, permanent judicial institution and not part of the United Nations.⁸ Although, the Court’s expenses are funded primarily by States Parties,

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

² The first Review Conference of the Rome Statute of the ICC held in Kampala, Uganda from 31 May to 11 June 2010 amended the Rome Statute so as to include the definition of the Crime of Aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime.

³ Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, vol. I; Final documents (United Nations publication, Sales No. E. 02.I.5), sect. A.

⁴ <http://www.icc-cpi.int/asp/statesparties.html>

⁵ This information based on ICC website as of 15th June 2010.

⁶ Burkina Faso, 30 November 1998; **Senegal**, 2 February 1999; **Ghana**, 20 December 1999; Mali, 16 August 2000; Lesotho, 6 September 2000; **Botswana**, 8 September 2000; **Sierra Leone**, 15 September 2000; Gabon, 20 September 2000; **South Africa**, 27 November 2000; **Nigeria**, 27 September 2001; Central African Republic, 3 October 2001; Benin, 22 January 2002; **Mauritius**, 5 March 2002; Democratic Republic of the Congo, 11 April 2002; Niger, 11 April 2002; **Uganda**, 14 June 2002; Namibia, 20 June 2002; **Gambia**, 28 June 2002; **United Republic of Tanzania**, 20 August 2002; Malawi, 9 September 2002; Djibouti, 5 November 2002; Zambia, 13 November 2002; Guinea, 14 July 2003; Congo, 3 May 2004; Burundi, 21 September 2004; Liberia, 22 September 2004; **Kenya**, 15 March 2005; Comoros, 18 August 2006; Chad, 1 January 2007 and Madagascar, 14 March 2008. More information see <http://www.icc-cpi.int/region&id=3.html>

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

For more information see <http://www.icc-cpi.int/region&id=4.html>

⁸ http://www.icc-cpi.int/library/about/ata glance/ICC-Ata glance_en.pdf

it also receives voluntary contributions from governments, international organizations, individuals, corporations and other entities.⁹ Sixty-three States, including one State not Party to the Rome Statute, have ratified or acceded to the Agreement on the Privileges and Immunities of the International Criminal Court¹⁰.

3. The Statute recognizes that States have the primary responsibility for investigating and punishing these crimes and also the Court is complementary to the efforts of States to 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. There are currently four situations (Uganda, the Democratic Republic of Congo, the Central African Republic and Darfur, Sudan), which are under investigation by the Office of the Prosecutor of the ICC. In addition, Pre-Trial Chamber II granted the Prosecutor, on 31 March 2010, authorization to open an investigation in the situation in Kenya. Three States Parties have referred situations on their territories to the Prosecutor, and also the Security Council has referred one situation to the Prosecutor for investigation. Preliminary investigations are by the Prosecutor are currently underway in a number of situations. On 16 October 2009 a Palestinian National Authority delegation submitted a preliminary report presenting its legal arguments in support of the declaration lodged on 22 January 2009, accepting the jurisdiction of the Court over the crimes committed by Israel in Palestine. The Prosecutor of the ICC is presently analyzing the situation.

4. This Secretariat Report prepared for the **Forty-Ninth Annual Session of AALCO** seeks to highlight the developments that have taken place after the Forty-Eighth Annual Session of the Organization. This Report briefly highlights the Issues for focused consideration during the Forty-Ninth Annual Session; AALCO's Work Programme on the International Criminal Court in the previous years; Report on the Eighth and Resumed Eighth Session of the Assembly of States Parties, Consideration of the item during the Sixty-Fourth Session of the United Nations General Assembly (2009), Summary Report of the Round Table Meeting of Legal Experts on the Review Conference of the ICC, jointly organized by AALCO and the Governments of Japan and Malaysia, held on 30-31 March 2010, in Putrajaya, Malaysia, The Kampala Review Conference and its outcome and Comments and Observations of the AALCO Secretariat.

B. Deliberations during the Forty-Eighth Annual Session of AALCO (17th – 20th August, 2009, Putrajaya, Malaysia)

5. **Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO** in his introductory statement said that AALCO had been following developments related to the International Criminal Court since its Thirty-Fifth Session held in Manila in 1996. He informed that as of 31st July 2009, 110 State 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

⁹ http://www.icc-cpi.int/library/about/ata glance/ICC-Ata glance_en.pdf

¹⁰ <http://www.treaties.un.org>

internationally recognized human rights principles. He briefly enumerated the discussion during the Seventh Session (November 2008) and the First and Second Resumptions of the Assembly of States Parties (ASP VII) (January-February 2009) whereat discussions focused on a non-paper by the Chairman on the crime of aggression, reflecting a new structure based on the understanding that the Review Conference would adopt the amendments on aggression as an annex to the enabling resolution. At the June 2009 Inter-sessional meeting, discussions were held on the basis of two papers submitted by the Chairman: a non-paper on the Elements of Crimes, as well as a non-paper on the conditions for the exercise of jurisdiction. He underlined that the future work on aggression should focus on the outstanding issues left over from the Group, as well as the Elements of Crimes. He also enumerated the main issues to be addressed during the Rome Statute Review Conference, to be held in Kampala, Uganda in May and June 2010, were the crime of aggression and Article 124 of the Statute, a provision granting States exemption from jurisdiction over war crimes for a period of seven years. In addition, the Governments of Belgium and Mexico had circulated informal proposals to expand the list of weapons banned under the Statute.

6. The SG recalled that Resolution RES/47/S 9, adopted at the Forty-Seventh Session 2008 had in Operative Paragraph 6 “Requested the Secretary-General to explore the feasibility of convening an inter-sessional meeting, *inter alia*, for promotion of human rights in the backdrop of the Rome Statute of the International Criminal Court. In partial fulfillment of that mandate and with the objective of pondering over legal issues relating to the Rome Statute of the International Criminal Court and its contemporary relevance to the AALCO Member States, a One-Day Seminar, jointly organized by the Government of Japan and the AALCO on “The International Criminal Court: Emerging Issues and Future Challenges” was held on 18th March 2009, in New Delhi. For that he thanked the Government of Japan for support rendered in convening the Seminar. The Report of the Seminar was thereafter released.

7. The delegates from the Member States of the Sultanate of Oman, Japan, Islamic Republic of Iran, Malaysia, People’s Republic of China, Republic of Korea, State of Kuwait, Arab Republic of Egypt and Indonesia presented their comments and observations. All the delegations emphasized that it was important to arrive at a definition of the Crime of Aggression before the 8th Session of Assembly of States Parties scheduled to be held in November 2009. They also touched upon the possible issues to be discussed during the Review Conference of the Rome Statute in 2010 at Uganda. Regarding, inclusion of the crimes of terrorism and drug trafficking, they were of the opinion that legal mechanisms already existed. It was also suggested that AALCO should host an inter-sessional meeting to gather all Member States of AALCO to discuss issues of common concern.

C. Issues for focussed Consideration during the Forty-Ninth Session

8. *The Special Meeting to be organized in conjunction with the Forty-Ninth Session on this topic could focus primarily on two issues (1) The Principle of Complementarity and (2) The Crime of Aggression*, in the background that one of the

most significant developments in the year 2010 was the convening of the first Review Conference (hereinafter Conference) of the Rome Statute of the International Criminal Court in Kampala, Uganda, from 31 May to 11 June 2010. The Conference *inter alia* adopted a resolution by which it amended the Rome Statute so as to include a definition of the Crime of Aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. The Conference also adopted a resolution on the issue of complementarity, wherein it recognized the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level.

II. AALCO'S WORK PROGRAMME ON THE INTERNATIONAL CRIMINAL COURT

9. The AALCO has been following the developments relating to the establishment of the ICC since its **Thirty-Fifth Session** (Manila, 1996). The initial discussions in the AALCO relating to the establishment of the International Criminal Court were first held at two Special Meetings convened within the framework of the Thirty-Fifth (Manila, 1996) and Thirty-Sixth (Tehran, 1997) Sessions of the AALCO.

10. The Organization at its **Thirty-Seventh Session** (New Delhi, 1998) noted that a Conference of Plenipotentiaries was to be held in Rome from 15th June to 17th July, 1998 and directed the Secretariat to participate at the Conference and report on its outcome at the next session. Accordingly, the then Deputy Secretary General represented the AALCO at the said conference. Two meetings were organized by the AALCO parallel to the Rome Conference with the aim to collate the views of the AALCO's Member States on the contentious issues before the Conference. The views expressed at those two meetings were then forwarded to the Chairman of the Committee of the Whole.

11. At the **Thirty-Eighth Session** (Accra, 1999) the outcome of the Rome Conference was duly reported and the Secretariat was directed to monitor and report on the developments in the Preparatory Commission established pursuant to Resolution F adopted in the Rome Conference.

12. At the **Thirty-Ninth Session** (Cairo, 2000) the Secretariat reported on the developments in the First and Second sessions of the Preparatory Commission held during the year 1999. After detailed discussions the Organization in its resolution AALCO/39/7/(2000) requested the Secretariat to continue monitoring the work of the Preparatory Commission and report to the Fortieth Session.

13. At the **Fortieth Session** (New Delhi, HQ, 2001) the Secretariat reported on the developments in the Sixth and Seventh Sessions of the Preparatory Commission held during the years 2000 and 2001. After detailed deliberations, the Secretariat was directed

to monitor the work of the Preparatory Commission vide resolution 40/7 and present a substantive report to its 41st Session.

14. At the **Forty-First Session** (Abuja, 2002) Deputy Secretary-General reported on the developments in the Eighth, Ninth and Tenth sessions of the Preparatory Commission, held during the years 2001 and 2002. After intensive deliberations, the Secretariat was directed to monitor the deliberations of the First Assembly of States Parties and in the subsequent meetings and present a substantive report on the developments at its Forty-Second Session.

15. In the rationalization of agenda at the **Forty-Second Session** (Seoul, 2003), the item was considered as a deliberated item and the Deputy Secretary-General reported on the progress achieved on the item pertaining to the International Criminal Court after the entry into force of the Rome Statute. After intensive deliberations, the Secretariat *vide* AALCO/Res/42/10/2003 was directed to “follow-up the deliberations in the Second Meeting of the Assembly of States Parties and its subsequent meetings, and in the Working Group on the Crime of Aggression, and present a report at its forty-third session”.

16. At the **Forty-Third Session** (Bali, 2004), the Deputy Secretary-General *inter alia* reported upon the work of the Second Session of the Assembly of States Parties, facts pertaining to the first possible cases before the ICC, the extension of UN peacekeepers immunity from the ICC’s jurisdiction by the Security Council, as well as the bilateral immunity agreements entered into by the United States of America with other states. He also suggested for an exchange of views on AALCO’s role in the context of the ICC, as he believed that exchange of information would definitely contribute to a better understanding of Rome Statute and its importance in the process of achieving international criminal justice against perpetrators of serious crimes against humanity, war crimes, genocide and in future crime of aggression.

17. At the **Forty-Fourth Session** (Nairobi, 2005) the agenda item on “The International Criminal Court: Recent Developments” was considered as a deliberated item. The Vice President of ICC Her Excellency Judge Akua Kuenyehia had appreciated Asian and African states for playing an important role in the Rome Conference. Her presentation focused on: the need for an ICC; the role of States and inter-governmental organization. The delegations from the different member states expressed their views on Definition of Aggression, Special working group on the Crime of Aggression and questioned Darfur issue to the ICC.

18. At the Forty-Fourth Session Resolution AALCO/Res/44/S10/ (2005) adopted *inter alia* directed the Secretariat to follow-up the deliberations in the “Special Working Group on the Crime of Aggression” with a view to expediting the elaboration of the definition of the crime of aggression, and the conditions under which the ICC can exercise its jurisdiction with regard to this crime. It also directed the Secretariat to follow-up the deliberations in the Fourth Session of the Assembly of the States Parties and its subsequent meetings, in the Special Working Group on the Crime of Aggression, and present a report in the Forty Fifth Session. The Secretary General was requested to “explore the feasibility of convening an inter-sessional meeting, *inter alia*, for promotion of human rights in the backdrop of the Rome Statute of ICC; the implementation of the

Rome Statute through national legislative mechanisms; and the ways and means through which the AALCO Member States can contribute to the process of elaboration of the definition of the crime of aggression, and the conditions under which the ICC can exercise its jurisdiction with regard to this crime. The topic was not considered at the Forty-Fifth Golden Jubilee Session (New Delhi) as it was a non-deliberated item.

19. At the **Forty-Sixth Session** (Cape Town, 2007) the agenda item on “The International Criminal Court: Recent Developments” was considered as a deliberated item. In that Session deliberations mainly focused on the “definition of aggression” and delegations expressed their views on it. Moreover, the deliberations also included the work done by Special working group on the Crime of Aggression and the Darfur issue. Resolution AALCO/RES/46/S9 adopted at the Forty-Sixth Session *inter alia* directed the Secretariat to follow-up the deliberations in the “Special Working Group on the Crime of Aggression” with a view to expediting the elaboration of the definition of the crime of aggression, and the conditions under which the ICC can exercise its jurisdiction with regard to this crime. It also directed the Secretariat to follow-up the deliberations in the Sixth Session of the Assembly of the States Parties and its subsequent meetings, in the Special Working Group on the Crime of Aggression, and present a report in the Forty-seventh Session.

20. At the **Forty-Seventh Session** (New Delhi (HQ), 2008) the agenda item on “The International Criminal Court: Recent Developments” was considered as a deliberated items. Resolution AALCO/RES/47/S 9 adopted on 4th July 2008 directed the Secretariat to follow-up the deliberations in the Special Working Group on the Crime of Aggression, Seventh Session of the Assembly of States Parties, developments regarding the cases in the ICC and present a report at the Forty-Eighth Session.

21. At the **Forty-Eighth Session** (Putrajaya, Malaysia, 2009) the agenda item on “The International Criminal Court: Recent Developments” was considered as a deliberated item. The deliberations at that Session have been mentioned in the Introduction, part B of this document. Resolution AALCO/RES/48/S 9 adopted on 20th August 2009 directed the Secretariat to follow the deliberations regarding the crime of aggression with a view to expediting the elaboration of the definition of the “Crime of Aggression”, and the conditions under which the ICC can exercise jurisdiction with regard to this crime; Eighth Session of the Assembly of States Parties and present a report at the Forty-Ninth Session. The Secretary-General was also requested to explore the possibility of convening an Expert Group before the Eighth Assembly of States Parties to formulate a consolidated approach on the substantive proposals; and to explore the possibility of the Secretariat’s participation in the Review Conference.

III. REPORT OF THE ASSEMBLY OF STATES PARTIES OF THE ICC

22. 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 Minister of Foreign Affairs.¹¹ 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.¹² 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 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 in a year. The reports of the previous Sessions of the Assembly of States Parties (ASP-I to ASP VII) were reported in the earlier reports of AALCO.¹³ It may be mentioned that the resumed sessions of all these sessions took place in the following year.

A. Eighth Session of the Assembly of States Parties (ASP VIII)

23. At its **Eighth Session**, held from 18 to 26 November 2009 in The Hague, the Assembly of States Parties (“the Assembly”) *inter alia* filled two judicial vacancies, Ms. Silvia A. Fernandez De Gurmendi (Argentina, List A) and Ms. Kuniko Ozaki (Japan, List B). The Assembly elected five members of the Board of Directors of the Trust Fund for Victims, Mr. Bulgaa Altangerel (Mongolia); Ms. Betty Kaari Murungi (Kenya); Mr. Eduardo Pizarro Leongomez (Colombia); Ms. Elisabeth Rehn (Finland) and Ms. Vaira Vike Freiberga (Latvia). It also adopted resolutions on several issues highlighted below. In addition, there were numerous side-events organized by States Parties, the Secretariat of the Assembly, the Court and non-governmental organizations¹⁴.

24. At its Eighth Session a total of 49 States (43 of them States Parties, six as Observers) addressed the Assembly in the general debate segment. The statements focused, *inter alia*, on issues to be dealt with at the Review Conference, cooperation of States and regional organizations with the Court, including the need for enhancing domestic judicial systems so as to ensure such cooperation. Reference was also made to advancing towards universality of the Statute and supporting the participation of victims in the proceedings, as well as the work carried out by the Trust Fund for Victims.

25. For the first time, a delegation of the United States participated in the Assembly as an Observer. In his statement to the Assembly, Ambassador at Large for War Crimes Issues, Mr. Stephen J. Rapp, highlighted President Obama’s Administration’s

¹¹ According to the Chapter IV of the Rules of Procedure of the Assembly of States Parties.

¹² Rome Statute article 112 (7).

¹³ Refer AALCO Report on “International Criminal Court: Recent Developments” 2003/SD/S 10; 2004/SD/S 10; 2005/SD/S 10; 2006/SD/S 10; 2007/SD/S 9, AALCO/47th HEADQUARTERS (NEW DELHI) SESSION/2008/S 9 and AALCO/48/PUTRAJAYA/2009/S 9. For more information regarding the ASP-I to ASP VII refer www.icc.cpi.int.

¹⁴ Further information on the session, including the documentation and statements delivered during he general debate segment are available on the website of the Court ([http:// www.icc.cpi.int/menus/asp](http://www.icc.cpi.int/menus/asp))

commitment to the rule of law and the principle of accountability in line with the United States' tradition of support for international criminal justice.

Following are the summaries of the resolutions adopted at the eighth session:

(1) ***Independent oversight mechanism*** (resolution ICC-ASP/8/Res.1)

26. The Assembly established an independent oversight mechanism, pursuant to article 112, paragraph 4 of the Rome Statute, with an initial mandate to provide an investigative capacity for the Court to address alleged misconduct of elected officials and staff. Further elements of oversight envisaged in the Statute, including inspection and evaluation are expected to be considered by the Assembly at its ninth session. The Facilitator appointed for this mechanism was: Mr. Akbar Khan (United Kingdom).

(2) ***Cooperation*** (resolution ICC-ASP/8/Res.2)

27. The Assembly requested the Bureau to appoint a facilitator and recommended that, in close consultation with States Parties, the Court and NGOs, the issues identified in the resolution, including ways to continue enhancing public and diplomatic support for the Court, be dealt with as a matter of priority. The Focal point for this issue was: Ambassador Yves Haesendonck (Belgium).

(3) ***Strengthening the Court and the Assembly*** (resolution ICC-ASP/8/Res.3)

28. The provisions of this “omnibus” resolution contain steps to enhance the Plan of action for achieving universality and full implementation of the Rome Statute, continue the work of the Assembly on equitable geographical representation and gender balance in the recruitment of staff, further address the issue of the arrears of States Parties. The Assembly also established a liaison office at the headquarters of the African Union in Addis Ababa. The Facilitator nominated for this task was: Mr. Emmanuel Bichet (Switzerland)

(4) ***Legal aid*** (resolution ICC-ASP/8/Res.3)

29. As regards the assessment of indigence, the Assembly invited the Court to report to the Assembly at its tenth session on the desirability of introducing absolute thresholds of asset holdings beyond which legal aid would not be provided. Two Facilitators were appointed for this purpose (i) legal aid-victims: Ms. Yolande Dwarika (South Africa) and Facilitator for legal aid-defense: Ms. Marie-Charlotte McKenna (Australia).

(5) ***Family visits for indigent detainees*** (resolution ICC-ASP/8/Res.4)

30. The Assembly decided that the Court may, on a temporary basis, partly or fully subsidize family visits for indigent detainees up to an amount to be determined by the Assembly in the context of the approval of the programme budget, pending the establishment of a voluntary system of funding family visits. The Facilitator for this purpose is: Ms. Miia Aro-Sánchez (Finland)

(6) *Permanent premises of the Court* (resolution ICC-ASP/8/Res.5)

31. The Assembly took note of the decision of the Oversight Committee on permanent premises that the architectural design contract should be awarded to Schmidt Hammer Lassen Architects, subject to satisfactory negotiations on the terms and conditions of the contract with the selected design team. The Chairperson appointed is : Ambassador Lyn Parker (United Kingdom).

(7) *Review Conference* (resolution ICC-ASP/8/Res.6)

32. The Assembly decided that the Review Conference would be held in Kampala, Uganda, from 31 May to 11 June 2010, for a period of ten working days to consider two main items:

a) Amendments to the Rome Statute

- The possible deletion of article 124 of the Statute, which allows a new State Party to opt for excluding from the Court’s jurisdiction war crimes allegedly committed by its nationals or on its territory for a period of seven years;
- The definition of the crime of aggression, the conditions for the exercise of jurisdiction by the Court, as well as draft elements of the crime;
- The inclusion of the employment of certain poisonous weapons and expanding bullets in the definition of war crimes in article 8 of the Statute.

b) A stocktaking of international criminal justice focusing on four topics:

- Complementarity (Denmark and South Africa);
- Cooperation (Ireland and Costa Rica);
- The impact of the Rome Statute system on victims and affected communities (Chile and Finland);
- Peace and justice (Argentina, Democratic Republic of the Congo and Switzerland).

i) *ASP Plan of Action*

33. In 2006, the Assembly adopted a Plan an of action for achieving universality and full implementation of the Rome Statute (resolution ICC-ASP/5/Res.3, annex I). The Plan which sets out measures to be taken by the States Parties, the Secretariat of the Assembly and the Court, is updated on an annual basis through the New York Working Group of the Bureau. The main focus of the Plan of action is to, inter alia, promote:

- the universality of the Rome Statute;
- the implementation of the relevant provisions of the Statute in the respective national legislation;
- full cooperation with the Court;

- the ratification and implementation of the Agreement on the Privileges and Immunities of the ICC;
- the Court via regional and sub-regional organizations;

34. The Plan also calls for convening and supporting conferences and seminars to these effects and to identify national contact points for such purposes.

ii) Plan of action panel

35. At the Eighth Session, a panel organized by the Secretariat of the Assembly addressed the successful ratification experience of Chile; the technical assistance and capacity building, including legislative draftsmen, that can be provided by the Commonwealth Secretariat; the Model Law on implementing legislation which has been widely used throughout the Commonwealth States; the assistance that can be provided by the International Committee of the Red Cross on the definition of crimes at the national level and the implementation of international obligations with regard to international humanitarian law. NGO representatives on the panel provided recommendations regarding the national implementation processes, including the removal of the distinction between international and non-international armed conflict; the importance of the inclusion of individual criminal responsibility irrespective of official capacity; as well as the need to follow-up on those countries where a strong political motivation to adopt implementing legislation has been identified.

iii) Informal consultations on the contribution paper by Japan to the Review Conference

36. On 20 November 2009, the Government of Japan hosted an event related to its contribution paper to the Review Conference on a list of items intended for enhancing the universality, effectiveness and sustainability of the Court's future activities.

37. The informal consultations, which attracted more than 100 representatives from States, international organizations and civil society participating in the eighth session, provided an opportunity to identify issues to be addressed at the Review Conference, in particular promoting the universalization of the Rome Statute, the principle of complementarity, making the Court's procedures and proceedings more effective, efficient and accountable through, *inter alia*, expeditious trials and adopting procedures to ensure that budgetary implications of judicial decisions are identified to Chambers, and improving the governance and structure of the Court.

38. The way forward to "Kampala" would be used for further and more focused consultations on stock-taking issues through the work of the New York and Hague Working Groups.

B. Resumed Eighth Session of the Assembly of States Parties

39. The resumed Eighth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (“the Assembly”) was held from 22 to 25 March 2010 at United Nations Headquarters in New York.

40. The UN Deputy-Secretary General, Ms. Asha-Rose Migiro, delivered the opening remarks to the Assembly wherein she reiterated the importance of the forthcoming Review Conference: “The International Criminal Court is the centerpiece of our system of international criminal justice. So it is not only the foundations of the Court that will be under review. It is the future of international criminal justice.”

41. The Assembly continued its discussions on the crime of aggression, in particular by addressing two issues: firstly, whether an alleged aggressor State would have to accept the jurisdiction of the Court over the crime and secondly whether the United Nations Security Council would have to determine the existence of an act of aggression before the Court could exercise its jurisdiction and the possible judicial filters that could be applied in the absence of such a determination by the Council, prior to the Court pursuing the matter further.

42. The Bureau of the Assembly will also be preparing a high-level ministerial declaration, as well as preparing for States Parties and observers to make pledges on a wide range of matters which include, *inter alia*, pledges to ratify the Rome Statute or the Agreement on the Privileges and Immunities of the ICC, adopt implementing legislation, provide cooperation to the Court via enforcement of sentences agreements, assistance with the protection of witnesses, contributions to the Trust Fund for victims, etc.

43. In addition, two draft resolutions, one on the impact of the Rome Statute system on victims and affected communities, and another on complementarity, were also prepared for consideration by the Conference.

44. On 23 March 2010 Bangladesh deposited its instrument of ratification, whereby taking the total number of States Parties to the Rome Statute to 111.

45. On specific issues under the broad heading “Stocktaking of the international justice system” four areas were identified.

(1) The impact of the Rome Statute system on victims and affected communities

46. It was decided that the discussions on the impact of the Rome Statute system on victims and affected communities should take place in the format of a panel to be followed by a round table.

47. The discussions should not only address victims’ expectations in relation to the Court and the international justice system and the experiences and perceptions of Court’s work among them, but also to identify, through dialogue, those areas in which the

positive impact of the Rome Statute system and the way it is experienced by them could be enhanced.

49. The following outcomes are expected:

- a) A high-level declaration, possibly as a part of a wider declaration on the Review Conference;
- b) A draft resolution on the impact of the Rome Statute system on Victims and affected communities;
- c) Pledges, implementing national measures and legislation relevant to victims and witnesses;
- d) Increased financial support for the Trust Fund for Victims; and
- e) A final report with compilation of conclusions, contributions and relevant documentation.

(2) Peace and Justice

50. Discussions of this topic at the Review Conference shall also be conducted in the format of a panel. The panel discussions will be divided into following four sub-topics for which various experts have been invited to write a specific background paper on:

- a) The importance of justice in securing peace: the role that international justice mechanisms can play in facilitating peace processes and transitions.
- b) Managing the challenges of integrating justice efforts and peace processes: ways in which accountability and peace efforts can be integrated, and challenges involved.
- c) Truth and reconciliation processes as a complement to criminal justice: role that truth-telling and reconciliation processes can play in complementing formal criminal justice mechanisms and helping to secure peace.
- d) Safeguarding the interests of victims: challenges involved in safeguarding the interests of victims in any post-conflict situation.

It was agreed that the outcome of the panels would adopt the format of a summary by the moderator. A publication of the background papers, prepared by the experts, the presentations of the keynote speakers and the panelists was foreseen as well.

(3) Complementarity

51. A panel discussion, entitled “Taking stock of the principle of complementarity: bridging the impunity gap”, is proposed to be held, inter alia, to:

- a) elaborate on the principle of complementarity;
- b) consider the practical application of complementarity and the Rome Statute system;

- c) define the meaning of and establish the necessity of “positive complementarity”; and
- d) explore the practical implementation of positive complementarity and enabling national jurisdictions.

A draft resolution on the topic had been forwarded to the Review Conference.

(4) **Cooperation**

52. During the Review Conference, two round table discussions will be held to consider the issue of cooperation, in particular the following elements thereof:

a) Implementing legislation: specific issues encountered by States Parties and good practices in this area.

b) Supplementary agreements and arrangements and other forms of cooperation and assistance: experiences in relation to the Court and other international judicial bodies – a consideration of the challenges and how these might be overcome.

c) Challenges encountered by States Parties in relation to requests for cooperation: how these might be overcome.

d) Cooperation with the United Nations and other intergovernmental bodies, including regional bodies: consideration of the present situation and ways in which it can be developed.

e) Enhancing knowledge, awareness and support for the Court.

54. The outcome of the round table discussions, including the main conclusions, would be reflected in a summary or report.

(5) **Crime of Aggression**

55. Proposals of the Special Working Group on the Crime of Aggression would be discussed at the Review Conference.

C. Situations before the ICC

56. The Office of the Prosecutor has been conducting investigations in four situations: Uganda; the Democratic Republic of Congo, the Central African Republic and Darfur, Sudan. In addition, Pre Trial Chamber II granted the Prosecutor, on 31 March 2010, authorization to open an investigation in the situation in Kenya.

57. The Office of the Prosecutor is conducting examinations in Afghanistan; Columbia; Cote d’Ivoire; Georgia; Palestine and Guinea.

58. (1) The situation in **Central African Republic (CAR)** was the third referral to be submitted to the Prosecutor by a State Party, following referrals from Uganda and the Democratic Republic of the Congo. The CAR Government referred the situation to the International Criminal Court (ICC) on 22 December 2004 and the Prosecution's investigations were opened on 22 May 2007. The first person who will face trial in the Court's investigation in CAR crimes is former DRC Vice-President Jean-Pierre Bemba Gombo. His trial is set to start on 14 July 2010.

Opening of the investigation

59. On 7 January 2005, the Prosecutor received a letter from the CAR government referring the "situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002..." In response to this letter, the Prosecutor announced that he was carrying out an analysis in order to determine whether to initiate an investigation.

60. In a decision of 11 April 2006, the Cour de Cassation (highest criminal court) of the CAR partly rejected an appeal against a decision of the Bangui Court of Appeal of 16 December 2004, which held that only the ICC was able to try the serious crimes committed in the CAR since 1 July 2002. The Cour de Cassation held that CAR justice system was unable to carry out effective investigations and prosecutions. The Office of the Prosecutor of the ICC had previously stated that it was waiting for the decision of the Cour de Cassation to decide whether to open an investigation in CAR, on the basis of the complementarity principle contained in the Statute of Rome.

61. On 22 May 2007, ICC Prosecutor Luis Moreno-Ocampo announced the opening of the investigation into grave crimes allegedly committed in the CAR, with the peak of violence occurred in 2002 and 2003. The prosecutor's announcement pointed to a focus on sexual violence, referring to hundreds of victims telling of rapes and other abuses committed "with particular cruelty." He also explained that was the first time he was "opening an investigation in which allegations of sexual crimes far outnumber alleged killings."

Bemba case

62. Jean-Pierre Bemba Gombo is the first suspect and the first detainee in the situation of the CAR. Bemba was the President and Commander in chief of the "Mouvement de Libération du Congo" (MLC). He is the former Vice-President of the Democratic Republic of Congo and a Senator in the Parliament of the DRC.

63. On 23 May 2008, ICC Pre-Trial Chamber III issued a sealed warrant of arrest for war crimes and crimes against humanity for Jean-Pierre Bemba Gombo, which was unsealed on 24 May 2008. On 24 May 2008, Bemba was arrested by the Belgian authorities and transferred to the ICC's detention centre in The Hague on 3 July 2008.

Bemba appeared for the first time before the judges of Pre-Trial Chamber III on the following day.

64. On 12 January 2009, a three days confirmation of charges hearing was held. As a consequence, ICC Pre-Trial Chamber II decided on 15 June 2009 that Bemba would face trial. It confirmed two counts of crimes against humanity (rape and murder) and three counts of war crimes (rape, murder and pillaging) against Jean Pierre Bemba Gombo, sending his case to trial. The crimes were allegedly committed in the CAR from 26 October 2002 to 15 March 2003.

65. On 25 June 2010, ICC Trial Chamber III decided to postpone the opening of the Bemba trial, initially scheduled for 5 July, to 14 July 2010. The postponement is due to administrative reasons, in particular the likely change in the composition of the Bench, and to facilitate necessary preparation for the commencement of the trial. The Chamber will hold hearings on 14 and 15 July 2010, to hear the opening speeches of the parties and participants and to address any necessary trial and case-management issues. The hearings will resume on 30 August 2010, after the judicial recess.

Pre-Trial Chamber

66. On 19 March 2009, the ICC Presidency assigned the situation in the CAR to Pre-Trial Chamber II, which is composed of Judge Hans-Peter Kaul, Second Vice-President of the Court Judge Ekaterina Trendafilova and Judge Cuno Tarfusser. The CAR was previously assigned to Pre-Trial Chamber III which is now dissolved.

67. (2) The Democratic Republic of Congo (DRC) Four arrest warrants have been issued for the DRC situation.

68. The situation of DRC has been assigned to Pre-Trial Chamber I which is composed Presiding Judge Sylvia Steiner, Judge Sanji Mmasenono Monageng and Judge Cuno Tarfusser.

69. The ICC has set up a field office in Kinshasa, which has representatives from the Public Information and Documentation Section of the Registry.

DRC Investigation

70. The situation was formally referred by the DRC government on 19 April 2004, requesting that the Prosecutor investigate if crimes under the Court's jurisdiction were committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. In this letter, the government also committed to cooperate with the ICC in its work.

71. On 23 June 2004, after thorough analysis of the situation in the DRC, especially in the eastern region of Ituri, the Prosecutor announced his decision to open the first investigation of the ICC.

Lubanga Case

72. On 17 March 2006, a first arrest warrant was publicly announced and unsealed concerning the situation in DRC for the leader of a political and military movement, the Union of Congolese Patriots (UPC), Thomas Lubanga Dyilo. Lubanga was arrested and transferred to The Hague. On 20 March 2006, Thomas Lubanga Dyilo first appeared in Court before ICC Pre-Trial Chamber I. A three-week confirmation of Charges hearing in the Lubanga case was held in November 2006. On 29 January 2007, ICC Pre-Trial Chamber I confirmed the charges against Thomas Lubanga Dyilo, sending the case against him to trial. The Chamber found sufficient evidence to establish substantial grounds to believe that Lubanga is criminally responsible as a co-perpetrator for all three charges made against him for the period beginning September 2002, when the Force Patriotiques pour la Liberation du Congo (FPLC) was founded, and ending 13 August 2003. The Prosecutor of the ICC has charged Lubanga with three war crimes: 1) enlisting children under the age of fifteen; 2) conscripting children under the age of fifteen; and 3) using children under the age of fifteen to participate actively in hostilities.

73. From September 2007 to January 2008, ICC Trial Chamber I (composed of by Presiding Judge Adrian Fulford, Judge Elizabeth Odio Benito, Judge René Blattmann) held hearings in the Lubanga case in order to facilitate the preparation of the trial. On 13 March 2008, Trial Chamber I decided that the trial in the case of Thomas Lubanga Dyilo would begin on 23 June 2008.

74. On 16 June 2008, the Court announced a stay of the proceedings in the Lubanga case because the Prosecution was unable to make available potentially exculpatory materials. On 2 July 2008, Trial Chamber I issued an order granting unconditional release to Thomas Lubanga Dyilo. The Prosecution appealed the order and such appeal was given suspensive effect meaning that the accused shall not leave detention until the Appeals Chamber has resolved the issue.

75. On 21 October 2008, the Appeals Chamber of the International Criminal Court (ICC) ordered the Trial Chamber to reconsider its decision to release Thomas Lubanga Dyilo taking into account all relevant factors. The Appeals Chamber did agree with the Trial Chamber's June decision to stay the trial because of the inability, at that time, of the prosecutor to disclose certain information due to confidentiality agreements with the UN and other information providers. The Appeals Chamber confirmed that it is up to the Trial Chamber to resume the trial whenever it considers that a fair trial is possible

76. On 18 November 2008, Trial Chamber I of the International Criminal Court announced its decision to lift the stay of the proceedings in the Lubanga case as the reasons for imposing the stay "have fallen away". The Judges announced the trial would start on 26 January 2009. Trial Chamber I also decided not to grant the release nor provisional release of Mr Thomas Lubanga Dyilo.

77. On 26 January 2009, the trial in the case against Thomas Lubanga Dyilo opened in The Hague. The leader of the Union of Congolese Patriots (UPC) is accused of

enlisting and conscripting child soldiers to participate actively in hostilities. The Prosecution, the Defence, the Registry and 8 Legal Representatives of Victims representing 93 victims are participating in trial hearings.

Katanga – Ngudjolo Chui Case

78. The trial against Congolese warlords Germain Katanga and Matthieu Ngudjolo Chui which opened on 24 November 2009 is ICC's second trial. Katanga and Ngudjolo are accused of war crimes and crimes against humanity allegedly committed in the village of Bogoro in the Ituri district of eastern DRC from January to March 2003.

79. On 18 October 2007, a warrant of arrest listing nine counts of war crimes and four counts of crimes against humanity in the Ituri district of eastern DRC was unsealed for Germain Katanga, alleged commander of the Force de résistance patriotique en Ituri (FRPI). Alleged acts include murder or wilful killing, Inhumane Acts, Sexual Slavery, rape, cruel or inhuman treatment, using children to participate actively in hostilities, outrages upon personal dignity, intentional attack against the civilian population, pillaging and destruction of property. The warrant of arrest had been issued on 2 July but made public on 18 October 2008. Katanga was surrendered by the DRC authorities and transferred to the ICC on 17 October 2007. The Initial appearance of Germain Katanga took place on 22 October 2007 at the ICC premises in The Hague.

80. On 7 February 2008, a warrant of arrest listing similar war crimes and crimes against humanity was unsealed for Mathieu Ngudjolo Chui, a Congolese national and alleged former leader of the National integrationist Front (FNI) and a Colonel in the National Army of the government of the Democratic Republic of the Congo [Forces armées de la RDC/ Armed Forces of the DRC] (FARDC). The warrant had been issued on 6 July 2007 but made public on 7 February 2008. Ngudjolo Chui was surrendered by the DRC authorities and transferred to The Hague on 7 February 2008. Mathieu Ngudjolo Chui appeared for the first time before ICC Pre-Trial Chamber I on 11 February 2008.

81. On 10 March 2008 Pre-Trial Chamber I decided to join the Katanga and the Ngudjolo Chui cases as the two defendants were prosecuted for the same crimes initially scheduled on 28 February 2008 and then on 21 May 2008, the hearing was postponed twice by the Chamber to afford more preparation time to the parties involved. From 27 June to 16 July 2008, ICC Pre-Trial Chamber I held a confirmation of charges hearing in the case against Germain Katanga and Matthieu Ngudjolo Chui. Germain Katanga was represented by David Hooper and Matthieu Ngudjolo Chui by Jean Pierre Kilenda Kakengi Basila. Fifty-seven victims participated in the hearing through their legal representatives, Carine Bapita Buyagandu, Joseph Keta, Jean Louis Gilissen, Franck Mulenda and Hervé Diakiese.

82. On 26 September 2008, ICC Pre-Trial Chamber I sent the case against Germain Katanga and Matthieu Ngudjolo Chui to trial, by confirming all but three of the alleged charges. Pre-trial judges confirmed seven counts of war crimes and three counts of crimes against humanity. They found insufficient evidence to try Katanga and Ngudjolo for

inhuman treatment, outrages upon personal dignity and inhumane acts. In a decision issued on March 27, 2009 the Trial Chamber II set the commencement of the trial in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* for Thursday, 24 September 2009. On 31st August 2009, ICC Trial Chamber II decided to postpone the commencement of the trial to 24 November 2009.

Ntaganda Case

83. On 29 April 2008, Pre-Trial Chamber I unsealed a warrant of arrest against Mr. Bosco Ntaganda, alleged former Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC), and alleged current Chief of Staff of the Congrès national pour la défense du peuple (CNDP) armed group, active in North Kivu in the DRC. The warrant of arrest lists three war crimes: 1) the enlistment of children under the age of fifteen; 2) the conscription of children under the age of fifteen; and 3) using children under the age of fifteen to participate actively in hostilities. This is the fourth arrest warrant unsealed within the context of the DRC situation.

84. (3) On 29 July 2004, ICC Prosecutor determined that there is a reasonable basis to open an investigation into the situation concerning **Northern Uganda**, following the referral of the situation by Uganda in December 2003. The decision to open an investigation was reportedly taken after thorough analysis of available information in order to ensure that requirements of the Rome Statute are satisfied.

85. On 14 October 2005, arrest warrants for crimes against humanity and war crimes were publicly announced and unsealed and were issued on 8 July 2005 by Pre-Trial Chamber II for the five senior leaders of the Lord's Resistance Army (LRA), Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya.

86. On 30 September 2005, media reports indicated that Dominic Ongwen had been killed. On 6 July 2006, ICC Pre-Trial Chamber II unsealed results of DNA tests conducted on the corpse reported to be that of Dominic Ongwen, indicating that the body was not that of Dominic Ongwen.

87. On 11 July 2007, the proceedings against Raska Lukwiya were terminated following his death. Media have also reported LRA leader Vincent Otti's alleged death.

88. The situation of Uganda has been assigned to Pre-Trial Chamber II which is composed of Judge Hans-Peter Kaul, Judge Ekaterina Trendafilova and Judge Cuno Tarfusser.

89. The ICC has established a field office in Kampala, Uganda, to support the operation in Uganda.

90. (4) ICC's investigation into the situation in **Darfur, Sudan** was officially opened by the prosecutor on 6 June 2005 after being referred to the Court by the United Nations Security Council. Since the referral, three public arrest warrants have been issued against Ahmad Harun, Ali Kushayb and Omar Hassan Ahmad Al-Bashir. None of the

three outstanding arrest warrants have been executed as the Sudanese government has openly defied and consistently refused to cooperate with the Court and the international community. A summons to appear was also issued for Bahr Idriss Abu Garda but Judges recently decided that his case would not go to trial at this stage. On 16 June, 2010, suspects Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus arrived voluntarily at The Hague in response to summons to appear before the Court. Their confirmation of charges hearing is set for 20 November 2010.

Cases before the ICC

91. There are four ongoing cases in the Court's Darfur investigation. Three of the suspects have still not been arrested, but two others voluntarily responded to summons to appear before the Court on 16 June 2010.

Case The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"):

92. On 2 May 2007, Pre-Trial Chamber I issued arrest warrants for State Minister for Humanitarian Affairs Ahmad Muhammad Harun and Janjaweed militia leader Ali Kushayb for war crimes and crimes against humanity allegedly committed in Darfur in 2003 and 2004.

Case The Prosecutor v. Omar Hassan Ahmad Al Bashir:

93. On 4 March 2009, Pre-Trial Chamber I issued an arrest warrant for Sudanese President Omar Hassan Ahmad al-Bashir for crimes against humanity and war crimes allegedly committed in Darfur in the past five years. The warrant of arrest for Al-Bashir is the first ever issued for a sitting head of state by the ICC. On 3 February 2010, the ICC Appeals Chamber unanimously reversed Pre-Trial Chamber I's decision not to include the crime of genocide in the arrest warrant against President Bashir of Sudan. The Pre-Trial Chamber was directed to decide anew whether a warrant of arrest should be extended to cover the crime of genocide based on the correct standard of proof.

Case The Prosecutor v. Bahar Idriss Abu Garda:

94. On 17 May 2009, the ICC announced that Pre-Trial Chamber I had issued a summons to appear for rebel leader Bahr Idriss Abu Garda, for war crimes allegedly committed during attacks against African Union peacekeepers at the Haskanita military base in Darfur, Sudan in September 2007. It was the first time ICC Judges issued a summons to appear instead of an arrest warrant as they considered it a sufficient measure to ensure that the suspect would appear before the Court. Abu Garda appeared before the ICC on 18 May 2009. On 19-29 October 2009, ICC Pre-Trial Chamber I held a public hearing to examine the available evidence against Abu Garda. On 8 February 2010, the Chamber declined to confirm the charges against Abu Garda, hence refusing to move his case forward to trial. Although Judges insisted that the case was of sufficient gravity, the Chamber established that it lacked evidence that Abu Garda participated in the common plan to attack the Haskanita base. The Prosecution is likely to seek to appeal the decision

or could again request the Chamber to confirm the charges against Abu Garda if supported by additional evidence.

Case The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

95. On 17 August 2009, the ICC announced that Pre-Trial Chamber I had issued summons to appear for Abdallah Banda Abakaer Nourain (Banda) and Saleg Mohammed Jerbo Jamus (Jerbo). Banda and Jerbo are charged with three counts of war crimes allegedly committed during an attack carried out on 29 September 2007, against the African Union Mission in Sudan (AMIS), a peace-keeping mission stationed at the Haskanita Military Group Site (MGS Haskanita) in the locality of Umm Kadada, North Darfur. On 16 June 2010, the ICC announced the arrival of Banda and Jerbo at The Hague. Pre-Trial Chamber I set the date of the confirmation of charges hearing in the case of The Prosecutor v. Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo) for 22 November 2010.

96. Judges are also examining the Prosecutor's application of 20 November 2008, for the issuance of warrant of arrest or, alternatively, summonses to appear for two other individuals who allegedly participated in the Haskanita attack.

Opening of the investigation

97. On 31 March 2005, the situation in Darfur, Sudan was referred to the ICC prosecutor by the United Nations Security Council Resolution 1593 (2005), "determining that the situation in Sudan continues to constitute a threat to international peace and security."

98. The prosecutor subsequently received the document archives of the UN International Commission of Inquiry on Darfur, as well as a sealed list of individuals named by the Commission as suspects of grave international crimes in Darfur, Sudan.

99. Following careful examination of thousands of documents from a variety of sources and interviews with over 50 independent experts, the prosecutor officially opened his investigation into the situation in Darfur on 6 June 2005. As required under resolution 1593, the ICC Prosecutor has been reporting to the Council every six months on the progress of his investigation in Darfur.

Pre-Trial Chamber

100. The situation of Darfur, Sudan has been assigned to Pre-Trial Chamber I, which is composed of Presiding Judge Sylvia Steiner, Judge Sanji Mmasenono Monageng and Judge Cuno Tarfusser.

101. (5) The situation in **Kenya** is the International Criminal Court's fifth investigation. On 31 March 2010, Judges of ICC Pre-Trial Chamber II authorized the ICC Prosecutor to open an investigation into crimes against humanity allegedly committed in Kenya in relation to the post-election violence of 2007-2008. It was the first

time that the Prosecutor used his “*propriu motu*” powers to initiate an investigation without first having received a referral from governments or by the UN Security Council in the situation of Kenya.

Opening of the investigation:

102. On 26 November 2009, ICC Chief Prosecutor Luis Moreno-Ocampo sought authorization from Pre-trial Chamber II to open an investigation in relation to the crimes allegedly committed during the 2007-2008 post-election violence in Kenya.

103. On 18 February 2010, Pre-trial Judges requested clarification and additional information from the Prosecutor in order to decide whether to open an investigation. On 3 March 2010, the Prosecution filed its response to this clarification request.

104. On 31 March 2010, in a majority decision, Judges of Pre-Trial Chamber II held that there was a reasonable basis to proceed with an investigation and that the situation appears to fall within the jurisdiction of the Court.

Background:

105. Kenya signed and ratified the Rome Statute and hence is a State Party to the ICC. By becoming a State Party, Kenya accepted the jurisdiction of the Court over war crimes, crimes against humanity, and genocide committed on its territory or by one of its nationals, thereby opening the door for the Prosecutor’s investigation into acts which are not being investigated and prosecuted by national authorities.

On 16 July 2009, the Prosecutor received six boxes containing documents and supporting material compiled by the Waki Commission, an international commission of inquiry established by the Government of Kenya to investigate the violence that occurred between December 2007 and February 2008, following the presidential elections. The documentation included a sealed envelope containing a list of suspects identified by the Waki Commission as those most responsible for the violence.

106. The Prosecutor also received information from Kenyan authorities on witness protection measures and on the status of legal proceedings carried out by national authorities. So far, national attempts at addressing the post-election violence have resulted in the establishment of the Kenyan Truth, Justice and Reconciliation Commission and discussions in the government to use the regular judicial apparatus instead of a specially constituted tribunal. Constitutional amendments that would have established a special tribunal, as recommended by the Waki Commission, failed to get the requisite consensus in parliament, which meant that the Kenyan Government missed the deadline for initiating prosecutions by the end of September 2009, a deadline agreed upon by both the ICC Prosecutor and the Kenyan Government delegation which visited the ICC on 3 July 2009.

Pre-Trial Chamber:

107. On 6 November 2009, the ICC Presidency assigned the Kenya situation to Pre-Trial Chamber II, which is composed of Judge Hans-Peter Kaul, Second Vice-President of the Court Judge Ekaterina Trendafilova and Judge Cuno Tarfusser.

IV. CONSIDERATION OF THE ITEM DURING THE YEAR 2009 AT THE UNITED NATION'S GENERAL ASSEMBLY

A. ICC President's Report to the 64th Session of the United Nations General Assembly: 17 September 2009

108. The fifth annual report of the International Criminal Court hereinafter “the Court”) was submitted to the Sixty-Third Session of the General Assembly (A/64/356), in accordance with article 6 of the Relationship Agreement between the United Nations and the International Criminal Court¹⁵. It covers the main developments in the activities of the Court and other developments of relevance to the relationship between the Court and the United Nations.

109. A brief report on the situations before the Court has been given as Situations before the Court above.

110. In carrying out its functions, the Court relies on the cooperation of States, international organizations and civil society, in accordance with the Rome Statute and international agreements concluded by the Court. Areas where the Court requires cooperation from States include analysis, investigation, the arrest and surrender of persons, witness protection and the enforcement of sentences.

111. The Court is independent from but has close historical, legal and operational ties to the United Nations. The relationship between the Court and the United Nations is governed by the relevant provisions of the Rome Statute and by the Relationship Agreement between the United Nations and the International Criminal Court. During the reporting period, the Court continued to develop its cooperation with the United Nations. Logistical support from the United Nations greatly facilitated the work of the Court in the field. The Office of Legal Affairs continued to play the leading role in facilitating cooperation. Regular, close contact between the Court and United Nations Headquarters was instrumental in facilitating cooperation. In this regard, the Court's New York liaison office, as the primary interlocutor for the United Nations Secretariat, played an essential role in dealing with cooperation issues.

112. The Court made numerous requests to States parties, other States and international organizations for cooperation or assistance. Pursuant to article 87 of the Rome Statute, the content of such requests and related communications is often confidential in nature.

¹⁵ See A/58/874, annex, and A/58/874/Add.1) and paragraph 17 of Assembly resolution 63/21.

113. Efforts to finalize a memorandum of understanding between the African Union and the Court continued, and discussions continued on a possible cooperation agreement with the Organization of American States. In 2009, following the request of the Assembly of States Parties to the Rome Statute, the Court sent a mission to Addis Ababa to explore the desirability and feasibility of establishing an African Union liaison office. The Court reported on this matter to the Assembly of States Parties to the Rome Statute and is awaiting the decision of the Assembly during its forthcoming eighth session, in November 2009.

114. Six judges were elected by the Assembly of States Parties to the Rome Statute. On 11 March 2009, Judges Joyce Aluoch, Sanji Mmasenono Monageng, Christine van den Wyngaert and Cuno Tarfusser took up office, while Judge Fumiko Saiga, initially elected in 2007 to finish an unexpired term of a previous judge, began a new term of office. On 24 April 2009, Judge Saiga passed away. An election to fill two judicial vacancies will be held in November 2009.

115. On 11 March, following the solemn undertaking of the elected judges, the judges, meeting in plenary session, elected the Presidency of the Court. Judge Sang-Hyun Song was elected President, Judge Fatoumata Dembele Diarra was elected First Vice-President and Judge Hans-Peter Kaul was elected Second Vice-President. They would serve in those roles for a period of three years.

116. On 9 September 2008, the judges of the Court, meeting in plenary session, elected Didier Daniel Preira as the first Deputy Registrar of the Court. He began his five-year term of office on 17 October.

117. On 26 November 2008, the Office of the Prosecutor announced the appointment of Professor Catharine MacKinnon as Special Gender Adviser to the Prosecutor. On 19 June 2009, the Office announced the designation of Juan Méndez as Special Adviser to the Prosecutor on crime prevention. Both individuals are working *ad honorem*.

118. The Court experienced considerable developments during the reporting period, with the commencement of the first trial, the confirmation of charges against three individuals, the first voluntary appearance of a suspect pursuant to a summons to appear and the issuance of a warrant of arrest against a Head of State. The judges issued decisions on fundamental aspects of the Rome Statute, such as the principle of complementarity and the rights of the accused. The system set up by States in the Rome Statute continued to operate effectively in practice. Challenges nevertheless remained, none more evident than the execution of the eight outstanding warrants of arrest.

V. Summary Report of the Round Table Meeting of Legal Experts on the Review Conference of the Rome Statute of the International Criminal Court, jointly organized by the Government of Malaysia, government of Japan and AALCO on 30-31 March 2010, Putrajaya, Malaysia.

119. Consideration of developments pertaining to the International Criminal Court, since 1996, constitutes an important element of the work programme of the Asian-African Legal Consultative Organization. The very successful seminar jointly organized by the Government of Japan and the AALCO Secretariat on the topic “The International Criminal Court: Emerging Issues and Future Challenges” on 18 March 2009, in New Delhi bore testimony to this fact.

120. Towards furtherance of the mandate received from the Forty-Eighth Session of AALCO, held in Putrajaya, Malaysia from 17-20 August 2009, and being very much aware of the importance and issues to be discussed at the Review Conference, the Secretariat of AALCO with active financial and technical support from the Governments of Japan and Malaysia organized a two day” Round Table Meeting of Legal Experts to discuss Issues to be tabled at the “First Review Conference of the ICC in Kampala” on 30th and 31st March 2010, in Putrajaya, Malaysia. The objective of this meeting was that it afforded the Legal Experts from the participating States to discuss in a candid manner the issues to be taken up at the Review Conference.

121. The Round Table Meeting was inaugurated by Honourable Tan Sri Abdul Gani Patail, the Attorney General of Malaysia and Current President of AALCO. In addition to the address made by Tan Sri Abdul Gani Patail, the meeting was also addressed by Amb. Yasuji Ishigaki, Special Assistant to the Minister of Foreign Affairs of Japan, and the Secretary-General. A lucid presentation on the topic “Universalization of the Rome International Justice System: The Role of the ICC” was made by Judge Kuniko Ozaki of the ICC.

122. The discussions in the meeting took place in Three Working Groups and were centered on the themes: (1) Consideration of progress in International Criminal Justice, (2) Consideration for proposals for amending the Rome Statute: Crime of Aggression and (3) Review of Article 124 of the Rome Statute and other proposals.

123. The first Working Group on “**Consideration of progress in International Criminal Justice**” was chaired by **Amb. Yasuji Ishigaki, Special Assistant to the Foreign Minister of Japan**. In the discussions that followed, all the delegates agreed that the principle of complementarity was the core principle of ICC, which needed to be further strengthened. The delegates cautioned against taking the principle of complementarity too far and using the concept of ‘positive complementarity’ which may cause confusion with the concept of ‘complementarity’ as stipulated in the Rome Statute. Most of the delegates expressed a desire to have a common position regarding this principle at the Review Conference. One delegate shared her country’s experience and stated that it was important to learn from the experiences of countries that had ratified the Rome Statute and had implementing national legislation to that effect. She wanted to

know how countries that did not have specific legislations incorporating the crimes enlisted in the Rome Statute criminalize those crimes. The legal experts who shared their country experiences on ratification of the Rome Statute also answered questions raised by non-party States on specific legal issues on national legislation to implement the Rome Statute.

124. One delegation stated that some Member States of AALCO including the Islamic Republic of Iran, People's Republic of China, Indonesia, Pakistan and Arab Republic of Egypt in the Resumed Eighth Session of the Assembly of States Parties to the Rome Statute (22-25 March 2010, New York) took a position regarding the issue of Complementarity in the Background Paper and Panel Template. They declared that the Background Paper should not exceed the parameters of the Rome Statute in defining the inability and unwillingness of States. And also as the term "Positive Complementarity" may raise confusion with complementarity in its original literal meaning that is stated in the Preamble and Article 1 of the Rome Statute, so the said term should be deleted.

125. On the issue of cooperation, most of the delegates agreed that it was important for States Parties, to cooperate with the ICC so that it could function properly. However, one delegate mentioned that her country believed in traditional cooperation, and thus did not enter into cooperation agreements with international organizations. One delegate also cautioned that within the concept of cooperation with the ICC, State Parties should not try and influence third parties to cooperate with the ICC, and it was important to respect the rights of those countries. Thus, it was necessary to maintain a balanced approach in application of this principle. In the framework of the issue of cooperation, the Bilateral Agreement concluded between United States with some other States which undermine the integrity of the Statute, should be considered in the Review Conference. Also there seemed to be a need to consider the relationship between Article 27, para 2, and Article 98, para 1, of the Rome Statute.

126. With regard to the topic peace and justice, the delegates maintained that it was an important aspect to be discussed at the Review Conference, and as a resolution on it would not be adopted it was necessary that the final outcome should be precise factual reflection of the discussions on that topic. One delegate said that "Peace is what we perceive in the end, and justice is a way to peace". The Chairman in his remarks stated there had been active exchange of views in the Working Session. The matter had been discussed in a positive manner with free, frank and candid expression of challenges on issues to be tabled at the review Conference.

127. The second Working Group on the "**The Crime of Aggression**". Chaired by **Mr. John Patrick Okoth, Senior State Counsel, Ministry of Justice, Kenya**. There was intensive discussion on all the three major issues related to the crime of aggression, that is, the definition of the crime, conditions for the exercise of jurisdiction by the ICC over the crime, and the amendment clause applicable to the crime. One delegate mentioned that in light of the definition of the crime of aggression as proposed by the Special Working Group on the crime of aggression, to be tabled at the Kampala Conference, the two main issues to be taken up at the Review Conference were (i) conditions for the exercise of

jurisdiction and (ii) amendments under Article 121 (4) or (5). Issues concerning the definition of the crime of aggression to be placed before the Review Conference were passionately discussed. The elements of the crime of aggression were discussed at length.

128. The jurisdiction of the ICC and the role of the Security Council were also discussed in great detail. The possibility of the ICC to investigate the crimes where the Security Council does not decide on a particular situation was also discussed. Also discussed was the issue whether the aggressor State would have to accept the jurisdiction of the Court over the crime of aggression and whether the Security Council would have to determine the existence of an act of aggression before the Court could exercise its jurisdiction and the possible judicial filters that could be applied in the absence of such a determination by the Security Council, prior to the Court pursuing the matter further.

129. In view of some delegations the real controversy was regarding the definition of the crime of aggression and the role of the Security Council under the UN Charter. There were some concerns that, as the Security Council were a political body, its role and functions could hamper the situations that could be taken up by the ICC. The view was also expressed that while discussing the crime of aggression, the different nature between the crime of aggression and the other three crimes within the Rome Statute should be borne in mind, and the relevant provisions of the UN Charter should be followed, especially those provisions empowering the Security Council to determine the existence of the act of aggression. Particular emphasis was placed on the threshold clause of “a manifest violations of the UN Charter”.

130. The threshold clause means that the International Criminal Court would only investigate and prosecute certain crimes of aggression which have such qualification as to *'... by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (Charter), is not acceptable, since all acts of aggression, whatever their character, gravity and scale might be, constitute a manifest violation of the Charter of the United Nations, so the said threshold should be deleted. One could hardly imagine that an act of aggression would occur without manifestly violating the Charter. And also no one can deny that any unlawful use of force (as set forth in the Article 2(4) of the Charter) is a manifest violation of the Charter, let alone the acts of aggression which are the gravest demonstration of unlawful use of force.*

131. The amendment clauses stipulated in the Rome Statute, Article 121 (4) and (5) were intensely debated, and finally the role of the Security Council in determining an act of aggression, and referrals by the Security Council to the ICC were hotly debated. The delegations cautioned that on this thorny issue some States have their own positions, while others are still reviewing theirs.

132. The third Working Group which was on “**Consideration of proposals for Amending the Rome Statute**”, was chaired by **Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO**. In the discussions that followed, the delegate of Japan recalled that during the Rome Conference in 1998, the Japanese delegation had suggested the inclusion of this Article as a transitional provision which would enable States to see

how the ICC exercises jurisdiction over war crimes at its early stage. In relation to the proposed amendment of Article 124, most of the Member States were in favour of retaining it, as this article would be useful in encouraging universalisation of the Rome Statute. It would also encourage prospective States to consider ratifying the ICC and give equal treatment to the existing States Parties and new States Party. One delegate mentioned that as the number of ratifications from the Asian region was small, retaining this provision might encourage more AALCO Member States to become parties to the ICC.

133. The delegate of the Republic of Korea suggested that the delegates at the Round Table meeting could consider that the idea of Article 124 could be used to facilitate States Parties or non-party States to accept the amendment of the crime of aggression. However, another delegation cautioned against the use of such an idea.

134. In relation to the proposal of Belgium one delegate expressed the view that the focus of ICC at present should be to establish its authority and gain confidence of the international community, for this it was important that at this stage it should not enlarge its jurisdiction. Some States were flexible to this proposal provided other States supported its inclusion.

135. The Norwegian proposal was not discussed in detail since most States had not made their positions clear yet.

136. More than 50 participants from the fourteen Member States of the AALCO namely: Brunei Darussalam, People's Republic of China, India, Indonesia, Islamic Republic of Iran, Japan, Kenya, Republic of Korea, Malaysia, Qatar, Singapore, Sultanate of Oman, Tanzania, and Thailand. Observers from non- Member States Philippines and Canada and ICC and EU participated in the Round Table Meeting.

137. In conclusion the Secretary-General thanked the Governments of Japan and Malaysia for their support and all the Member States who had actively participated in the Meeting. A comprehensive publication of the proceedings has been published by the AALCO Secretariat. It was distributed to all the Member States as well as at the Review Conference in Kampala. It is available on AALCO's website www.aalco.int.

VI. Short Report of the Outcome of the Review Conference held in Kampala, 31 May to 11 June 2010

138. On 11 June 2010, the Review Conference of the Rome Statute concluded in Kampala, Uganda, after meeting for two weeks. Around 4600 representatives of States, and intergovernmental and non-governmental organizations attended the Conference. The Secretary-General of AALCO made a general statement on 1st June 2010.¹⁶

¹⁶ For text of the statement see AALCO website: www.aalco.int

A. Amendments to the Rome Statute

139. The Conference adopted a resolution¹⁷ by which it amended the Rome Statute so as to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

140. The Conference based the definition of the crime of aggression on United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, and in this context agreed to qualify as aggression, a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter.

141. As regards the Court's exercise of jurisdiction, the Conference agreed that a situation in which an act of aggression appeared to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involved States Parties or non-States Parties.

142. Moreover, while acknowledging the Security Council's role in determining the existence of an act of aggression, the Conference agreed to authorize the Prosecutor, in the absence of such determination, to initiate an investigation on his own initiative or upon request from a State Party. In order to do so, however, the Prosecutor would have to obtain prior authorization from the Pre-Trial Division of the Court. Also, under these circumstances, the Court would not have jurisdiction in respect to crimes of aggression committed on the territory of non-States Parties or by their nationals or with regard to States Parties that had declared that they did not accept the Court's jurisdiction over the crime of aggression.

143. Furthermore, the Conference adopted a resolution by which it decided to retain article 124¹⁸ in its current form and agreed to again review its provisions during the fourteenth session of the Assembly of States Parties, in 2015. Article 124 allows new States Parties to opt for excluding from the Court's jurisdiction war crimes allegedly committed by its nationals or on its territory for a period of seven years.

B. Stocktaking of international criminal justice

144. The Conference concluded its stocktaking exercise on international criminal justice with the adoption of two resolutions, a declaration and summaries of discussions.

145. The resolution on the impact of the Rome Statute system on victims and affected communities¹⁹, *inter alia*, recognized, as essential components of justice, the right of victims to equal and effective access to justice, support and protection, adequate and

¹⁷ Resolution RC/Res.4. This resolution is annexed to this report as it would be discussed at the First Special Meeting to be held in conjunction with the Forty-Ninth Annual Session.

¹⁸ Resolution RC/Res. 4 adopted on 14 June 2010

¹⁹ Resolution RC/Res.2 adopted on 14 June 2010

prompt reparation for harm suffered and access to information concerning violations and redress mechanisms. Moreover, the Conference underlined the need to optimize outreach activities and called for contributions for the Trust Fund for Victims.

146. The Conference also adopted a resolution on the issue of complementarity²⁰, wherein it recognized the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level.

147. In the Declaration on Cooperation²¹, the Conference emphasized that all States under an obligation to cooperate with the Court must do so. Particular reference was made to the crucial role that the execution of arrest warrants played in ensuring the effectiveness of the jurisdiction of the Court. Moreover, the Review Conference encouraged States Parties to continue to enhance their voluntary cooperation and to provide assistance to other States seeking to enhance their cooperation with the Court. In addition, the Conference took note of the summary of the roundtable discussion on cooperation.

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

C. Enforcement of sentences

149. In its resolution on strengthening the enforcement of sentences²², the Conference called upon States to indicate to the Court their willingness to accept sentenced persons in their prison facilities and confirmed that a sentence of imprisonment may be served in prison facilities made available through an international or regional organization, mechanism or agency.

VII. Consideration of the aspects pertaining to the Principle of Complementarity at the Kampala Review Conference

*Taking stock of the principle of complementarity: bridging the impunity gap: Informal summary by the focal points*²³.

150. The co-focal points, Denmark and South Africa²⁴ in their opening remarks, recalled that the Court was complementary to national jurisdictions and would operate

²⁰ Resolution RC/Res. 1 adopted on 14 June 2010

²¹ Declaration RC/Decl.2 adopted on 11 June 2010

²² Resolution RC/Res. 3 dated 14 June 2010.

²³ RC/ST/CM/1 dated 22 June 2010.

only where a State was unable or unwilling to carry out investigations and prosecutions. They noted that the global challenge was for States to assist each other to fight impunity where it began, i.e. at the national level. Although having primary jurisdiction to investigate and prosecute the crimes within the jurisdiction of the Court, some States did not have the capacity to do so, which could lead to an impunity gap. They noted that the role that the Court could play in positive complementarity was limited by the nature of the institution and its resources. All efforts at bridging the impunity gap should be done with sensitivity to context and environment. It was thus of utmost importance for States and organizations to work together to close the impunity gap and ensure that domestic systems were prepared to deal with the crimes in the jurisdiction of the Court. It was key that national jurisdictions be provided with the tools to deal with these crimes.

151. Six panellists had been invited to address the Conference. The panel was moderated by Professor William A. Schabas. The **United Nations High Commissioner for Human rights, Ms. Navanethem Pillay**, noted that in the traditional understanding of the hierarchy of international tribunals, the ad hoc tribunals established by the United Nations Security Council took precedence over national jurisdictions. The new approach of complementarity was not hierarchical and she viewed as positive the fact that States had the primary responsibility to investigate and prosecute the crimes within the jurisdiction of the Court.

152. Where States took a deliberate decision not to investigate or prosecute because of unwillingness, she would intercede directly to encourage them to assume their international responsibilities.

153. While the term “complementarity” was not defined in the Statute, the Statute did not, however, suggest the Court may never exercise jurisdiction unless a State had proved unwilling or unable to do so. She also referred to the jurisprudence of the Appeals Chamber of the Court that where a State took no action, there was nothing to prevent the Prosecutor from commencing an investigation.

154. As regards how her Office could assist States to fulfil their obligations under the principle of complementarity, it had committed to judicial capacity building in States, helped in monitoring violations, facilitated commissions of inquiry into violations. It had also established a mapping project which enabled it to maintain a clear picture of the incidence, patterns and frequency of human rights violations.

155. The second panelist **Mr. Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia** stated that in the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY), the completion strategy had not been the main focus at the inception and, in fact, after the Balkans war, cooperation with national jurisdictions had been difficult. The tribunal began to focus on complementarity only after the adoption of the relevant Security Council resolutions on

²⁴ Amb Thomas Winkler, Under-Secretary for Legal Affairs, spoke on behalf of Denmark and H.E. Mr. Andries Carl Nel, Deputy Minister of Justice and Constitutional development, spoke on behalf of South Africa.

the completion strategy. Cases were then transferred to national jurisdictions in the region. He recalled that, at the inception of the ad hoc tribunals, complementarity was a “side-product” while today it had become a main priority.

156. Hon. Justice Akiiki Kiiza, High Court of Uganda, Head of the Special War Crimes Division addressed the experience of the relationship with the Court from the perspective of the national level, in particular the establishment of the War Crimes Division of the High Court of Uganda. He noted that the national courts were ready and willing to try anyone brought before them, and had the competence and the capacity to try everyone, including the indictees before the Court. It had not yet heard cases but might soon do so in respect of lieutenants and other military personnel who had not been indicted by the Court.

157. Colonel Toussaint Muntazini Mukimapa, Deputy Auditor General, Kinshasa, democratic Republic of Congo, the fourth panelist addressed the experience of complementarity in Democratic Republic of the Congo. He stated that Democratic Republic of the Congo had referred three nationals to the Court, and was a model for cooperation with the Court.

158. At the national level, Democratic Republic of the Congo had put in place arrangements to prosecute persons who committed serious crimes under the Rome Statute. After ratifying the Rome Statute in 2002, Democratic Republic of the Congo had established a military court in November 2002 with jurisdiction over Rome Statute crimes. The first sentence had been delivered in February 2006 and marked the first time that a national jurisdiction had condemned the Congolese State with respect to civil responsibility for sexual violence.

159. Among the key challenges for the principle of complementarity in Democratic Republic of the Congo were: a lack of implementing legislation; a lack of human resources; raining and a lack of know-how in the protection of victims, sexual violence, serious crimes, exhumations; infrastructure, e.g. prison facilities, as there was no functioning military prison for the completion of the judicial process; operational capacity, i.e. a lack of matériel, since Democratic Republic of the Congo was emerging from war; the need for restructuring of the army; training of army personnel; localization of the army and those who can investigate; the identification of suspects, since most military persons bore assumed names, making investigation of someone with a pseudonym difficult; access to displaced populations; and infrastructure, e.g. security, bad roads.

160. Ms. Geraldine Fraser-Moleketi, Director, Democratic Group in the Bureau for Development Policy, United Nations Development Programme stated that UNDP had adopted an integrated approach to transitional justice and rule of law. It had been noted that international assistance for transitional justice mechanisms was of limited impact if wider rule of law and peace building efforts were not taken into account. Among the actions that UNDP could take were to inform the judiciary about international law and promote its use in domestic practice; help develop legislation and implement

witness protection programmes; develop communication strategies with the public for cases of gender-based violence and organized crime. She noted that building capacity in the justice sector, e.g. for drafting and enacting legislation, increasing the number of executions of court decisions, building outreach and legal awareness, providing for broad-based free legal aid programmes could reciprocally increase the effectiveness of processing cases of serious crimes.

161. **Mr. Karel Kovanda, Deputy Director General for External Relations, European Commission** suggested that it might be useful to translate a common understanding of what is encompassed by complementarity into a tool kit of complementarity that would incorporate accountability into assistance and cooperation projects; guidelines; lessons learned; and what should be avoided future. The tool kit could be developed jointly with States, the United Nations Office on Drugs and Crime (UNODC), the Office of the High Commissioner for Human Rights (OHCHR), the Commonwealth Secretariat, the Court, civil society, the EU. The tool kit would facilitate those involved in the rule of law programmes, post conflict etc.

VIII. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

162. The drafters of the Rome Statute designed the first Review Conference (hereinafter “Conference”) as the first opportunity to consider amendments. They were of the view that seven years of Court operations should enable States to make informed decisions on whether changes to the Rome Statute were needed. Almost eight years after the entry into force of the Statute, and at the very beginning of this conference, the international community had already answered that question: The Rome Statute was a very solid treaty, which equipped the Court with all the tools necessary to carry out its mandate, and there was no need for significant changes to the treaty. The discussions on amendments during the Conference focused on issues mandated by the Rome Conference itself. No proposals for institutional changes were tabled and the fundamentals of the Statute enjoyed firm support.

163. During the Conference many speakers expressed the view that impunity implied achieving universality of the Rome Statute and welcomed Bangladesh also a Member State of AALCO as the 111th State Party to the Statute. However, there was still a long way to go before the Rome Statute becomes a truly universal instrument as it was not an easy process.

164. At the same time it should be remembered that ratifying the Statute was far from being enough. A genuine commitment to the Court required the adoption of necessary implementing legislation. The outcome of the Review Conference has clearly demonstrated that the principle of complementarity would remain as one of the pillars for the effective functioning of the Court, and to be used as the Court of last resort. This principle needs to be further strengthened. The Kampala Declaration (RC/Decl.1) adopted at the Review Conference in operative paragraph 5 states “Determine to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of

international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity”.

165. The amendments to the Rome Statute, especially those related to Article 8 and the Crime of Aggression present an opportunity to make a step further in the development of international criminal law. Defining the Crime of Aggression would allow the International Criminal Court to exercise jurisdiction with respect to all crimes listed in Article 5 of the Statute, and would allow ending impunity for the most serious international crimes. However, the provision on the actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. This is welcome step which would give all the States enough time to consider all the proposals threadbare and is a welcome step.

166. The retention of Article 124 in the Statute is also to be welcomed. This view was expressed by many Asian-African Member States during the pre conference Round Table Meeting of Legal Experts, organized in Putrajaya, Malaysia on 30-31 March 2010.

167. Another important feature for the proper functioning of the Court would be the cooperation it receives from the United Nations, States, International Organizations and other actors.

168. In view of the foregoing it could be said that the International Criminal Court is a fully functional international institution that needs to be further strengthened.

16 June 2010 12:00

Resolution RC/Res.6

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

RC/Res.6
The Crime of Aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;
2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;
3. *Also decides* to adopt the understandings regarding the interpretation of the abovementioned amendments contained in annex III of the present resolution;
4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;
5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

Annex I

Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

1. Article 5, paragraph 2, of the Statute is deleted.

2. The following text is inserted after article 8 of the Statute:

Article 8 bis

Crime of aggression

1. 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 which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. 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:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

c) The blockade of the ports or coasts of a State by the armed forces of another State;

d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. *The following text is inserted after article 15 of the Statute:*

Article 15 bis

**Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 15 bis of the Statute:

Article 15 ter

**Exercise of jurisdiction over the crime of aggression
(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. The following text is inserted after article 25, paragraph 3 of the Statute:

3 bis In respect of the crime of aggression, the provisions of this 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.

6. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.

7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

Annex II

Amendments to the Elements of Crimes

Article 8 bis

Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person¹ in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

¹ With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Annex III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.