

6. Urges Member States to consider ratifying the Rome Statute;
7. Also urges Member States to actively participate in the work of the Preparatory Commission which has the mandate to prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the finalization before 30 June, 2000 of the draft texts of the rules of procedure and evidence and of the elements of crimes;
8. Requests the Secretary General of the AALCC to monitor and report the developments in the Preparatory Commission;
9. Also request the Secretary General to explore the possibilities of convening a seminar or workshop in 1999 before the August meeting of the PREPCOM, if feasible, with the view to present the consensus stance of AALCC Member States on the issues to be discussed by the PREPCOM during the said meeting; and
10. Decides to place the item "Establishment of an International Criminal Court" on the agenda of its Thirty-ninth Session.

(iii) Secretariat Study: Report on the United Nations Diplomatic Conference of Plenipotentiaries on the Establishing of an International Criminal Court 15 June-17 July 1998

AALCC's Participation During the Rome Conference

The Deputy Secretary General, Ambassador Dr. W.Z. Kamil represented the AALCC at the Rome Conference. The AALCC organized two meetings parallel to the Rome Conference which were Chaired by Dr. P.S. Rao. Dr. Kamil and Mr. Bhagwat Singh AALCC's Permanent Observer in New York represented the AALCC during these meetings. In his opening statement, the Deputy Secretary General stated that the aim of these meetings was to collate the views of the Member States and to present a collective view regarding the contentious issues to the Committee of the Whole. The meetings were attended by most of the Member States of the AALCC present at the Conference and were appreciated to the extent that some non-member States also requested to attend these meeting as Observers. Prior to the meetings an overview of the Draft Statute, prepared by the Secretariat was circulated among the Member States, and this document was considered useful by them.

The meetings discussed *inter alia* the following issues which were to be settled during the Conference:

- (i) Principle of Complementarity: It was emphasized that one of the fundamental features of the future Court will be its complementary status; it must only institute proceedings when national Courts fail to act, or fail to act effectively. For the Permanent Court is not intended to replace national courts, but to work by their side and resorted to only in the event of the national courts' unwillingness or inability to prosecute. Several delegates observed that a mere reference to the principle in the Preamble was insufficient and had emphasized on the drawing up of clear jurisdictional boundaries between

the jurisdiction of the Court's functioning within the criminal legal systems of the States and the Court so as to avoid overlapping of jurisdiction in the administration of justice over serious international crimes.

(ii) Jurisdiction of the Court: The issues relating to the exercise of jurisdiction *ratione temporis* were central to the effective application of the Statute. The Conference had to decide as to which crimes would come within the jurisdiction of the Court. These would be crimes against general international law ("core crimes") such as war crimes, crimes against humanity and crimes against peace. Defining war crimes would raise particular difficulties because no common agreement exists and some States wanted the inclusion of "weapons of mass destruction i.e. nuclear, chemical and biological weapons, in the provision and some others wanted to know whether or not local/internal conflicts qualified for inclusion in "war crimes". Another sensitive aspect considered by the delegates was whether to include the crime of aggression among the core crimes, and if so, how to define it, coinciding as it does with aggression which is defined as a State crime for which the United Nations Security Council already has jurisdiction under Chapter VII of the United Nations Charter. Besides any attempt to elaborate a definition of the crime of aggression one must take into account the fact that most of the time it was not an individual act, instead wars of aggression existed.

(iii) Role of the Security Council: Another very crucial aspect which was discussed during the two meetings was the "role of the Security Council". It was felt that the Court would enjoy a close relationship with the United Nations. This was necessary for bringing universality and standing of the Court. This would also relate to the invocation of the substantive jurisdiction or *rationae materiae* of the Court by the Security Council acting under chapter VII of the Charter of the United Nations. Referral by the Security Council could cloud the

objectivity and independence of the Court and would not therefore be conducive to the establishment and independent functioning of a uniform, non-discriminatory, and impartial criminal system.

At the end of these two meetings, the President of the AALCC, communicated the views of the member States, to the Chairman of the Committee of the Whole, Mr. Philippe Kirsch, who welcomed the views and appreciated the efforts of the States which had whole heartedly participated in this endeavour.

Dr. Kamil also attended all Regional Group Meetings i.e. (NAM, Arabic Group, African Group etc.) and actively participated in them on the various conflicting items discussions. He participated in informal consultations among some delegations of AALCC and expressed his legal point of view to the questions raised.

1. Overview of the Rome Statute for an International Criminal Court

The UN Diplomatic Conference of Plenipotentiaries on Establishment of International Criminal Court elected Mr. Giovanni Conso (Italy) as President. It elected as Vice-Presidents the representatives of 32 States.³ In addition four Committees were set up by the Conference: (i) General Committee;⁴ (ii) Committee of the Whole;⁵ (iii) Drafting Committee;⁶ and (iv) Credentials Committee.⁷

³ Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Somoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

⁴ Comprising of the President of the Conference and members i.e. the President and Vice-Presidents of the Conference, the Chairman

Participating in the Conference were delegations from 160 countries, 17 Inter-governmental organizations, 14 specialized agencies and funds of the United Nations and 124 organizations. The Statute of the Court was adopted by a non-recorded vote which was requested by the United States, 120 in favour to 7 against with 21 abstentions.

Salient Features of the Statute

The "Rome Statute for the Establishment of an International Criminal Court", comprising of a Preamble, 128 articles, is substantially longer than the ILC Draft Statute of 60 articles⁸ that was the starting point for the *ad hoc* Committee's and Preparatory Committee's work. The Preamble to the Statute sets out the main purpose of the Court and refers to "common bonds" that unite peoples and to a "shared heritage"

of the Committee of the Whole and the Chairman of the Drafting Committee.

- ⁵ Chairman Mr. Philippe Kirsch from Canada and 4 Vice-Presidents i.e. Ms. Silvia Fernandez de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho) and a Rapporteur, Mr. Yasumasa Nagamine (Japan).
- ⁶ The Drafting Committee was chaired by Mr. M. Cherif Bassiouni (Egypt) and 24 members from Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela. The Rapporteur of the Committee of the Whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference; and
- ⁷ The Credentials Committee was chaired by Ms. Hannelore Benjamin (Dominica) and its Members were from Argentina, China, Cote d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia.
- ⁸ Report of the International Law Commission UN, GAOR, 49 Session, Suppl. No. 10 (A/49/10) 1994.

formed by their cultures; recalls the millions of children, women and men who, during the twentieth century, "have been victims of unimaginable atrocities that have deeply shocked the conscience of humanity" and recognizes that such grave crimes threaten the peace, security and well being of the mankind. The Preamble also affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished", and their effective prosecution must be insured by measures at the national level and by enhancing international co-operation. The determination to put an end to impunity for the perpetrators of these crimes thus contributing to their prevention is set forth and the duty of states to exercise their criminal jurisdiction over those responsible for international crimes is recalled.

It further continues, that for the sake of present and future generations an independent permanent International Criminal Court is established, in relationship with the United Nations system, "with jurisdiction over the most serious crimes of concern to the international community as a whole". The Preamble states that the court shall be complementary to national criminal jurisdictions and expresses its resolve to guarantee lasting respect for and the enforcement of international justice.

The 128 Articles are grouped together in 13 parts viz. *Part 1* Establishment of the Court (Articles 1-4); *Part 2* Jurisdiction, Admissibility and Applicable Law (Articles 5-21); *Part 3* General Principles of Criminal Law (Articles 22-33); *Part 4* Composition and Administration of the Court (Articles 34-52); *Part 5* Investigation (Articles 53-61); *Part 6* The Trial (Articles 62-76); *Part 7* Penalties (Articles 77-80); *Part 8* Appeal and Review (Articles 81-85); *Part 9* International Cooperation and Judicial Assistance (Articles 86-102); *Part 10* Enforcement (Articles 103-111); *Part 11* Assembly of States Parties (Articles 112); *Part 12* Financing of the Court (Articles 113-118); *Part 13* Final Clauses (Articles 119-128); The text of these provisions along with their alternative formulations, (the draft provided by the Preparatory Commission) constituted the basic

working document for the Conference of Plenipotentiaries convened at Rome. Following are the salient features of the Statute:

(i) Establishment and Structure of the Court

The Statute establishes an International Criminal Court as a permanent institution with power to exercise jurisdiction over persons for the most serious crimes of international concern and which is complementary to national criminal jurisdiction.⁹ Besides providing for the institutional structure, it lays down the general principles of criminal law¹⁰ to be applied by the Court and hence is both a constituent instrument as well as a codification treaty.

The Statute establishes the following organs of the Court: the Presidency, an Appeals Division, a Trial Division, and a Pre-Trial Division; the office of the Prosecutor and the Registry.¹¹ The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties,¹² with functions such as (i) providing management oversight to the principal organs i.e. the Presidency, Prosecutor and Registrar regarding the administration of the Court; (ii) considering and approving the budget of the Court; (iii) determining whether to alter the number of judges serving on a full or part time basis and (iv) perform any other function or take any other action as specified in the Statute of the rules of Procedure and Evidence. The Assembly of States Parties can, upon the recommendation of the Court or its own Bureau, consider any question relating to non-cooperation by States parties and take appropriate

⁹ See Part 1, Article 1 of the Rome Statute of the International Criminal Court Doc. A/CONF/183/9 dated 17 July 1998.

¹⁰ See Part 3 (Articles 22-33) of the above stated document.

¹¹ See Part 4 Composition and Administration of the Court of the Rome Statute A/CONF/183/9.

¹² See Article 112 in part 11 of the Statute, see also Part 13 on final Clauses A/CONF/183/9.

measures. The Seat of the Court shall be established in Hague in the Netherlands.¹³ According to the Statute, the Court may sit elsewhere, whenever it considers it desirable.

It may be mentioned that the two *ad hoc* Tribunals for the former Yugoslavia and Rwanda were created by the UN Security Council after shocking crimes had been committed. The jurisdiction of these tribunals is limited to the time and territories concerned and were not intended to address violations that occurred elsewhere or to prevent future violations. The International Criminal Court will be a permanent institution not constrained by these limitations of time and place, as a permanent entity its very existence will be a deterrent to would be perpetrators of heinous crimes.

It may be recalled that during the Special Meeting on International Aspects Between the International Criminal Court and International Humanitarian Law held during the 36th Session of the AALCC held in Tehran in May 1997, delegates had unanimously favoured the establishment of an independent and impartial international criminal court, free from political pressures and tendencies. Preference was for the establishment of the Court by a multilateral treaty.

(ii) Material Jurisdiction of the Court

The Court would be competent to adjudicate upon the core-crimes i.e. the most serious crimes of concern to the international community as a whole, including genocide; crime against humanity; war crimes and the crime of aggression.¹⁴

Article 6 of the Statute deals with Genocide and covers those specifically listed prohibited acts such as killing, causing serious harm committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Article 7 covers crimes against humanity as those specifically listed

¹³ See Art. 3, Part I, Doc A/CONF/183/9.

¹⁴ Part 2, Arts 5-8 of the Statute Doc.A/CONF/183/9.

prohibited acts when committed as part of a wide spread or systematic attack directed against any civilian population. Such acts include murder, extermination, rape, sexual slavery, the enforced disappearance of persons and the crime of apartheid. Genocide and crimes against humanity are punishable irrespective of whether they are committed in time of peace or war. Article 8 enlists war crimes, it covers grave breaches of the Geneva Conventions of 1949 and other serious violations, as listed in the Statute, committed on a large scale in international armed conflict. In the past fifty years, the most serious violations of human rights have occurred, not in international conflicts, but within States. Therefore the Court's Statute incorporates contemporary international humanitarian law standards that criminalize, as war crimes, serious violations committed in internal armed conflicts, excluding internal disturbances or riots.

The Preparatory Commission¹⁵ shall *inter alia* determine the definition and elements of crimes of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime. In one of the six resolutions adopted at the Conference, it was recognized that terrorist acts were serious crimes of concern to the international community, and that the international trafficking of illicit drugs was a very serious crime, sometimes destabilizing the political, social and economic order in States. It was regretted that no generally acceptable definition of the crimes could be agreed upon for inclusion within the jurisdiction of the Court. It was recommended that the Review Conference provided for in Article 123 of the Statute should consider them, to arrive at an acceptable definition and their inclusion in the list of crimes within the court's jurisdiction.

Article 24 of the Statute deals with non-retroactivity *ratione personae* and emphasizes that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute it states that "no person shall be

¹⁵ See Art 121 and 123 of the Statute Doc. A/CONF/183/9.

criminally responsible under this Statute for conduct committed prior to its entry into force". An article concerning preconditions to the exercise of jurisdiction provides that a State, by becoming a party to the Statute, accepts the jurisdiction of the Court with respect to crimes mentioned in its provisions.

With regard to *rationae personae* it may be stated that the statute contemplates jurisdiction of the court over legal persons, with the exception of States,¹⁶ Article 25 of the Statute deals with individual criminal responsibility and clearly states that the court is primarily to have jurisdiction over natural persons. It may be mentioned here that in the context of applicable penalties, that the Court shall have no jurisdiction over persons under 18 years of age.¹⁷ As to the jurisdiction *rationae temporis* of the court paragraph 1 of Article 8 of the Statute states that the "Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute".

(iii) Complementarity

The third preambulatory paragraph provides that the principle of jurisdiction of the International Criminal Court is to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. Besides the preambulatory paragraph the principle of Complementarity involves issues of admissibility; *ne bis in idem*; initiation of an investigation; general obligation to cooperate and surrender of a person to the Court. More specifically attention needs to be drawn to the vague formulations involved in determination of the actions of a State or its legal system as regards unwillingness or inability to prosecute, doubts on the independence or impartiality of proceedings, etc. These issues involve subjective element of determination and the real implications of the Complementarity principle could be known only when the Court starts applying a set of identifiable criteria to decide

¹⁶ Art. 25 of the Statute.

¹⁷ Art. 26 of the Statute.

when the national legal systems are ineffective or unavailable. The views as expressed by the AALCC Member States are still valid as regards the drawing up of clear jurisdictional boundaries between the jurisdiction of the Courts functioning with the criminal legal systems of States and the Court so as to avoid overlapping of jurisdictions in the administration of justice.

(iv) Trigger Mechanism

Although the consent of the State is primary in deciding the extent of jurisdiction of the Court the "trigger mechanism" was carefully considered by the Conference of Plenipotentiaries. This mechanism touches upon two main clusters of issues (i) acceptance of the Court's jurisdiction, State consent requirements and conditions for the exercise of jurisdiction and (ii) who can trigger the system and the role of the Prosecutor.¹⁸

The jurisdiction of the Court over a person with respect to a crime referred to in the Statute of the Court may be invoked by either (i) a State Party; (ii) the Prosecutor or (iii) the Security Council.

(v) Role of the Security Council

Under the Charter of the United Nations the Security Council is entrusted with the task of maintaining international peace and security. Article 39 of the UN Charter confers on the Council the power to determine an act constituting aggression or threat to international peace. Besides enabling the Security Council to refer a matter to the Court for its exercise of jurisdiction, the Statute empowers the Security Council to seek a deferral of any investigation or prosecution for a period of 12 months from the date of its request.¹⁹ Article 16 of the Statute states that no investigation or prosecution may be

¹⁸ Articles 13 (Exercise of Jurisdiction) 14 (Referral of a Situation by a State Party and 15 (Prosecutor) Doc No. A/CONF/183/9.

¹⁹ See Article 16 referral of investigation or prosecution.

commenced or proceeded with for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect. Serious apprehensions have been raised as to the potential for mischief inherent in the provision. The propensity to abuse the power to seek deferral and use it selectively to block investigation or prosecution cannot be ruled out. Hence it was felt that the Security Council should have a minimum role to play in the functioning of the Court or else it could cloud the independent functioning of the Court.

(vi) Principles of Criminal Law

Although there were different views on many aspects of the Court, there was a broad agreement that the fundamental principles of criminal law be applied to the crimes punishable under the Statute of the Court be clearly pronounced in accordance with the principle of legality, *nullum crimen sine lege; nulla poena sine lege*. Accordingly part 3 of the Statute (Articles 22-33) addresses the General principles of Criminal Law. The principles of criminal law identified in this Part of the Statute include: (i) *nullum crimen sine lege*; (ii) non-retroactivity; (iii) individual criminal responsibility; (iv) irrelevance of official capacity; (v) exclusion of jurisdiction over persons under eighteen; (vi) responsibility of commanders and other superiors; (vii) non-applicability of statute of limitations; (viii) mental element; (ix) grounds for excluding criminal responsibility; (x) mistake of fact or law; (xi) superior orders and prescription of law; and (xii) applicable Law.

The General Principles of Criminal Law are to be supplemented by Rules of Procedure and Evidence to be prepared by the Preparatory Commission established by the Rome Conference. The draft text of the Rules and Procedures and Evidence would thereafter be approved and adopted by the States Parties to the Statute.

The Statute incorporates fairly detailed and elaborate provisions for conducting investigations and prosecution of cases (part 5- Art.53-61); The Trial (Part 6-Art. 62-76);

Penalties (Part 7-Art. 77-80); Appeal and Review (part 8 art. 80-84); and Enforcement (Part 10-Art. 103-111). It also stipulates the Court's organizational law, by specifying the required qualification of judges etc. (Part 4).

The Statute does away with death penalty and instead allows imprisonment for maximum of 25 years; a term of life imprisonment in addition of fines which can be imposed which are provided under the Rules of Procedure and Evidence.

(vii) Preparatory Commission

A Preparatory Commission has been established by Resolution F of the Final Act adopted at the Conference of Plenipotentiaries, which shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, it shall *inter alia*, prepare draft texts of:

- (i) Rules of Procedure and Evidence to be finalized before 30 June 2000;
- (ii) Elements of Crimes including the definition and elements of crimes of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime;
- (iii) A relationship agreement between the Court and the UN;
- (iv) basic provisions governing a headquarters agreement to be negotiated between the Court and the host country;
- (v) Financial regulations and rules;
- (vi) a budget for the first financial year; and
- (vii) Rules of Procedure of the Assembly of States Parties.

The Commission shall prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the ICC which exercise its jurisdiction with regard to this crime. It shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable

provision relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties,²⁰ Part 11, Article 115 of the Statute establishes the Assembly of States parties, on which other States which have signed the Statute or the Final Act may take part as observers. Among other functions, the Assembly shall consider and adopt recommendations of the Preparatory Commission; provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court; consider and decide the budget for the Court; decide whether to alter the number of judges; and consider any question relating to non-cooperation; it shall prepare a report on all matters within its mandate and submit it to the Assembly of States Parties and shall meet at the Headquarters of the United Nations.

(viii) Financing of the Court

Part 12 of the Statute comprising of 6 articles (113-118) concerns financing of the Court, Article 115 of the Statute states that expenses of the Court and of the Assembly of States Parties shall be provided by mainly two sources i.e. assessed contributions made by States Parties, and funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. It also provides that the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties. This was an issue where there was divergence

²⁰ See Article 115 of the Statute.