

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**THE INTERNATIONAL CRIMINAL COURT:
RECENT DEVELOPMENTS**

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CONTENTS

	Page No.
I. Introduction	
II. AALCO's Work Programme on the International Criminal Court	1-1
III. Inter-sessional Meeting of the Special Working Group on the Crime of Aggression, 13 -15 June 2005 – Liechtenstein Institute on Self Determination, Woodrow Wilson School, Princeton University, Princeton, United States	2-3
IV. Assembly of States Parties (ASP)	4-18
A. First Session of the Assembly of States Parties	
B. Second Session of the Assembly of States Parties	
C. Third Session of the Assembly of States Parties	
D. Fourth Session of the Assembly of States Parties	
V. Consideration of the item at the Forty Fourth Session of AALCO (27 June -1 July 2005, Nairobi, Kenya)	19-20
VI. Consideration of the item during the year 2005 at the United Nations	21-25
A. Debate on ICC in the Plenary Meeting of the General Assembly	
B. President's Report to General Assembly	
VII. Concluding Observations	26-27
VIII. Annex	
Table I: Participation of AALCO Member States in the Rome Statute of ICC	28-29
Table II: Parties/Signatory to Rome Statute	30-33

I. INTRODUCTION

1. The International Criminal Court was established by the Rome Statute which was adopted on 17 July 1998 and entered into force on 1 July 2002,¹ is now a fully functional judicial institution. As of 1 December 2005, 100 States had ratified or acceded to the Statute which is a significant milestone in the long march of international law and justice. The Court is an independent, permanent judicial institution with jurisdiction over persons for the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.

2. 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 prosecutes international crimes. It may only exercise its jurisdiction over cases where national systems do not conduct proceedings or where they are unwilling or genuinely unable to carry out such proceedings. 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, which are under investigation by the Office of the Prosecutor of the ICC. Three States Parties have referred situations on their territories to the Prosecutor, and also the Security Council has referred one situation to Prosecutor for investigation.

3. It may be recalled that the Secretariat Report submitted for the consideration of the Forty-Fourth Session of the Organization, held at Nairobi, Republic of Kenya (27 June - 01 July 2005) elucidated upon the following²: AALCO's work programme on the ICC; Third Session of the Assembly of States Parties (ASP-III); Facts pertaining to the first possible cases, namely the situation in the Ituri province of the Democratic Republic of Congo and the reference of the Government of Uganda to the ICC; consideration of the item at the Forty Third Session of the Organization, as well as at the United Nations (General Assembly and Security Council) in the year 2004; Bilateral immunity agreements entered into by the United States of America with several countries.

4. This Secretariat Report seeks to highlight the developments that have taken place after the Forty-Fourth Session of the Organization. The Report briefly explains the Inter-sessional meeting of the Special Working Group on the Crime of Aggression that took place from 13 - 15 June 2005, at Princeton University, New Jersey, United States of America. The Fourth Session of the Assembly of States Parties (ASP-IV) took place from 28 November - 03 December 2005 at The Hague, the Netherlands. Moreover, it also includes the consideration of the agenda item at the Forty-Fourth Session of the Organization. Apart from this an attempt has also been made to highlight the first time address of ICC President's to UN General Assembly and UN Secretary General's Report of the ICC in the Sixtieth Session of the General Assembly.

¹ 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.

² AALCO/44/NAIROBI/2005/SD/S 10.

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

5. 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.

6. The Organization at its Thirty-Seventh Session (New Delhi, 1998) noting that a Conference of Plenipotentiaries was to be held in Rome from 15th June to 17th July, 1998 directed the Secretariat to participate at the Conference and report on its outcome at the next session. Accordingly, the then Deputy Secretary General, Ambassador Dr. Wafik Zaher Kamil 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, Mr. Philippe Kirsch.

7. 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.

8. 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 39/7 requested the Secretariat to continue monitoring the work of the Preparatory Commission and report to the Fortieth Session.

9. 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.

10. At the Forty-First Session (Abuja, 2002) Deputy Secretary-General Amb. Dr. Ali Reza Deihim 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.

11. 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 Amb. Dr. Ali Reza Deihim 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*

Res/42/10 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”.

12. At the Forty-Third Session (Bali, 2004), the Deputy Secretary-General Amb. Dr. Ali Reza Deihim 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.

13. 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.

14. At the Forty-Fourth Session Resolution 44/S10 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 directs 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.

15. The Secretariat report prepared for the Forty-Fifth session of the organization will briefly elucidate upon the following: AALCO’s work programme on the ICC; International meeting of the Special Working Group on the Crime of Aggression, 13-15 June 2005 held at Princeton University, United States of America; Fourth Session of the Assembly of States Parties (ASP IV); consideration of the item during the year 2005 at the United Nations. Finally, it attempts to identify some issues for focused deliberations at the forthcoming Forty-Fifth Session of the organization scheduled to be held in the headquarters (New Delhi), India.

III. INTER-SESSIONAL MEETING OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 13-15 JUNE 2005, LIECHTENSTEIN ON SELF-DETERMINATION, WOODROW WILSON SCHOOL, PRINCETON UNIVERSITY, PRINCETON, UNITED STATES OF AMERICA.

16. At the invitation of the Government of Liechtenstein and pursuant to a recommendation by the Assembly of States Parties, an informal inter-sessional meeting of the Special Working Group on the Crime of Aggression was held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005. Invitations to participate in the meeting had been sent to all States as well as to representatives of civil society. Ambassador Christian Wenaweser (Liechtenstein) chaired the meeting. The agenda of the meeting is contained in annex II and the list of participants in annex III.

17. The participants in the informal inter-sessional meeting expressed their appreciation to the Governments of Germany, Finland, Liechtenstein, the Netherlands and Switzerland for the financial support they had provided for the meeting and to the Liechtenstein Institute on Self-Determination at Princeton University for hosting the event.

18. It seeks to reflect conclusions and opinions regarding different issues pertaining to the crime of aggression presented at that meeting did not necessarily represent the views of the Governments of the participants and it is understood that these issues will have to be reassessed in light of further work on the crime of aggression.

19. While discussing the following issues the participants are expressed different views on different matters. The below mentioned note is extracted from the Report,³ for the purpose of better understanding of the issues raised in the above-said meeting. They are as follows:

A. Issues related to the crime of aggression requiring further discussion

20. With regard to the list of issues to be addressed in developing proposals for a provision on aggression in accordance with article 5, paragraph 2, of the Rome Statute and pursuant to resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, it was decided that there was no need to add issues to the list contained in the report of the 2004 inter-sessional meeting.⁴

B. Issues discussed at the 2004 inter-sessional meeting requiring further consideration

1. Possibility for a State to “opt out” of the Court’s jurisdiction

21. The focal point of the discussion in the inter-sessional meeting was how to proceed once agreement was reached on the definition of the crime of aggression and the exercise of the

³ . ICC-ASP/3/SWGCA/INF.1

⁴ . ASP/3/25, annex II, appendix.

Court's jurisdiction. Reference was made to the fact that the provisions of the Rome Statute regarding aggression were not necessarily clear because they had been incorporated in the text at a late phase of the 1998 Diplomatic Conference and were not the result of specific negotiations. It was also noted that article 121 had been drafted prior to the inclusion of the crime of aggression within the crimes falling under the jurisdiction of the Court and that consequently article 121 had not been drafted against the background of the specific problems posed by the crime of aggression. Different views are expressed in the meeting and it was noted that there were mainly three approaches to this particular point. They are as follows:

- The first approach posited that article 121, paragraph 4, would be applicable and that it was of the essence to maintain a unified legal regime with regard to the crimes over which the Court had jurisdiction. According to this approach, once seven eighths of the States Parties had ratified or accepted an amendment to the Statute, the announcement would become binding on all States Parties, including States that subsequently became parties.
- The second approach was based on the premise that that article 121, paragraph 5, would be applicable. It was argued that a State would have to “opt in” before recognizing the Court's jurisdiction over the crime of aggression.
- The third approach considered that article 5, paragraph 2, required only the “adoption” of the provision for the exercise of the Court's jurisdiction and noted that no reference to “amendment” was contained in that provision. According to this view, adoption by the Assembly of States Parties would suffice for entry into force so that only article 121, paragraph 3, would apply. However, others were of the view that the Vienna Convention on the Law of Treaties⁵ made a distinction between the adoption of the text of an amendment and the consent of a State to be bound by it.

Conclusions:

- An “opt out” approach was preferable to the “opt in” approach reflected in article 121, paragraph 5. It also expressed that an “opt out” provision would provide for a more unified legal regime than an “opt in” approach.
- The incorporation of the Crime of Aggression would automatically entail an amendment to article 5. Since article 121, paragraph 5, made reference to article 5, it was clear that article 121, paragraph 5, was automatically applicable.
- It was held that the applicability of article 121, paragraph 5, was doubtful in as much as the completion of discussions on the crime of aggression would not necessarily entail an amendment of article 5. Structurally, the crime of aggression would not be accommodated under article 5 but in all likelihood as a new article 8 *bis*.

⁵ . United Nations, Treaty Series, vol. 1155, p. 331.

- It was suggested that the focus of the discussion should be on the defining of the crime of aggression and on conditions for the exercise of jurisdiction. If consensus was attained on those issues, the answer to the question as to whether paragraph 4 or 5 of article 121 was applicable would probably become self-evident.

2. Retention, exclusion or adaptation of article 25, paragraph 3, of the Rome Statute

(a) Participation by an individual in the criminal act

22. The discussion focused on participation by an individual in the criminal act and it had to be decided whether the fact that aggression was a leadership crime needed to be reflected in article 25, paragraph 3, or whether parts thereof had to be executed from application to the crime of aggression. The participants were expressed different views on this issue. They are:

- Article 25, paragraph 3, would reflect the leadership nature of the crime through the insertion of a new subparagraph (e) *bis* modeled on subparagraph (e), which dealt with genocide.
- Possible exclusion of the applicability of article 25, paragraph 3, it was noted that there was a potential risk of excluding a group of perpetrators.
- The exclusion of article 25, paragraph 3, would be justified only in light of the argument reflected in paragraph 39 of the 2004 report.
- It was suggested that the issue could be dealt with by: (i) Elaborating a concise definition of aggression, leaving the relevant general principles of criminal law to be covered by other parts of the Statute, in particular article 25; (ii) Refining the definition of aggression contained in the Coordinator's paper by aligning the general principles of criminal law with other provisions of the Statute; or (iii) Inserting a new subparagraph (e) *bis* to clarify the specific relationship between the crime of aggression and article 25, paragraph 3.
- It was suggested that instead of including the conditions for individual criminal responsibility within the definition of the crime, it might be preferable to keep the definition of the crime rather narrow.
- More clarity was needed as regards the meaning of leadership as well as the scope of its application.

Conclusion:

- It was agreed that article 25, paragraph 3, of the Rome Statute contained two concepts that potentially had a bearing on aggression: participation by an individual in the criminal act and an attempt to commit a crime.

- On the base of the discussion on article 25, a proposal⁶ was introduced to insert a new paragraph 3 *bis* which would read: “In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment”.
- This proposal assumed that article 25, paragraph 3, would be applicable to the crime of aggression and sought to ensure that only leaders would be held liable for that crime. The new provision was proposed as a separate paragraph because the leadership requirement needed to be fulfilled in all cases, whereas paragraph 3 contained alternative requirements, set forth in subparagraphs (a) to (d).

(b) Attempt to commit the crime of aggression⁷

23. The attention was drawn to make a distinction between: (a) the collective act of aggression, which would be carried out by a State; and (b) the individual act of participation in the collective act. In relation to the collective act, the question was raised whether it was necessary for the collective act to have been completed or whether an attempt to carry out the collective act sufficed. As regards the individual act of participation in the collective act, the question was raised whether actual participation in the collective act was needed or whether an attempt at participating in the collective act sufficed.

- It was suggested that the issue pertaining to the collective act should be dealt within the definition of aggression.
- It was stated that the individual act of participation in the collective act would fall within the scope of article 25 if that provision was applicable to the crime of aggression.
- One of the purposes of including the crime of aggression in the Statute was to deter its commission, there was also need to deter the attempt to commit it.
- It was observed that the concept of attempt was common to many legal systems, and support was voiced for leaving the issue of differentiating between preparation, planning and attempt to the Court on the basis of article 25, paragraph 3(f).

Conclusion:

- It was agreed and stressed that the crime of aggression was inextricably linked with the commission of an act of aggression and that although from a legal perspective an attempt could be penalized, considerable difficulties could arise in the application of such a concept.

⁶ . See proposal B in annex I

⁷ . See also paragraph 82.

- It also concluded that it was difficult to discuss attempt before settling on a definition of the crime of aggression.

3. Retention, exclusion or adaptation of article 33 of the Rome Statute

24. The discussion focused on retention, exclusion or adaptation of article 33 of the Statute and views were expressed that, this article was applicable to the crime of aggression and favoured its retention in order to allay the concern that some perpetrators might evade prosecution. This would not, however, affect the leadership trait inherent in the crime of aggression. Another view is that article 33 would not be applicable to the crime of aggression, which was a leadership crime and hence not applicable to mid-or lower level individuals.

Conclusion:

- It was suggested that the crime of aggression should be incorporated in paragraph 2. On the other hand, some caution was urged in light of the fact that paragraph 2 referred to acts that were clearly directed against the civilian population, which was not necessarily the case when a crime of aggression was committed.

4. Retention, exclusion or adaptation of article 28 of the Rome Statute

25. The discussion on this article replicated the logic of the arguments voiced during the consideration of article 33. Most participants shared the view that article 28 was not applicable by virtue of both the essence and the nature of the crime; aggression as reflected in the Statute was a leadership crime. However, there was no agreement as to whether non-applicability needed to be reflected in the Statute.

26. The question was raised as to whether the provision might be applicable in the event of omission by a leader who might have been able to impede the commission of the crime. In reply, it was suggested that the situation described might be dealt with by amending the chapeau of the Coordinator's proposal, for instance by deleting the word "actively".

27. It was also suggested that the wording of article 16 of the draft Code of Crimes against the Peace and Security of Mankind should be incorporated.⁸

5. Retention, exclusion or adaptation of article 30 of the Rome Statute

28. After recalling the discussion on the use of "intentionally and knowingly" in the preliminary definition, as reflected in paragraph 55 of the 2004 report, the participants agreed that article 30 was a default rule which should apply unless otherwise stated.

⁸ . Article 16 reads: An individual who, as a leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression. □ Yearbook of the International Law Commission, 1996, vol. II (2).

Consequently, the relevant phrase in the chapeau of the Coordinator's proposal could be deleted.

C. Preliminary discussions on other issues relating to the Rome Statute

1. Part 5. Investigation and prosecution

29. It was agreed that Part 5 of the Statute did not, at the present time, require any modification for the crime of aggression. It was noted in this regard that there was no need for different treatment of this crime in comparison to the other crimes within the Court's jurisdiction.

2. Provisions on national security information

30. It was agreed that there was no reason to look at the articles on national security information, in particular as regards article 57, paragraph 3, article 72, article 93, paragraph 4, and article 99, paragraph 5 again in light of the definition of crimes of aggression.

D. Definition and conditions for the exercise of jurisdiction

31. The discussion raised the question whether it was preferable to start with the discussion of the 'elements of crime' before any discussion of the 'definition of the crime of aggression'.

32. There was broad recognition that the two issues were interrelated and could not be neatly separated, there was agreement with the Chair's suggestion that the discussion should be structured around the following questions:

- (a) The rights of the accused with respect to the determination of an act of aggression by an outside organ;
- (b) Whether there should be prior determination of the act of aggression before the Court can exercise jurisdiction, and if so, what is the appropriate body to make that determination;
- (c) Whether the definition of aggression should be specific or generic.

1. The rights of the accused during the predetermination

33. The discussion regarding predetermination pointed out that whether an act of aggression had been committed must be guided by considerations of due process. It was argued that a predetermination of an act of aggression should respect the rights of the accused.

Conclusion:

It was agreed that the rights of the defendant as foreseen in the Statute must be safeguarded under all circumstances, including in connection with prior determination by a body other than the Court.

2. Prior determination of the act of aggression before the Court can exercise jurisdiction and the appropriate body to make that determination

34. The discussion focused on the issue of whether there had to be a prior determination of the act of aggression and whether such determination fell within the exclusive competence of the Security Council. It was suggested that determination of the existence of an act of aggression by an appropriate organ should be made a precondition for the exercise of the Court's jurisdiction in addition to the preconditions contained in article 12 of the Statute.

35. The discussion also raised the question that if the prior determination of the act of aggression is allowed which body should make the prior determination? Whether it is only Security Council or other bodies such as ICJ, UN General Assembly or Assembly of State Parties can also make it?

36. The view expressed by the participants were, the Security Council under article 39 of the Charter has the exclusive competence to determine "the existence of any threat to the peace, breach of the peace or act of aggression" and said that this exclusive competence must be respected in the provisions on the crime of aggression.

37. The view also expressed that even if it were conceded that there should be a predetermination by another body, there was nothing in existing international law which gave the Security Council the exclusive right to make such determination. It was also noted that article 5, paragraph 2, of the Statute did not make reference to Article 39 of the Charter. Moreover, Article 39 of the Charter was confined to determining whether an act of aggression had taken place for the purpose of taking action and maintaining peace and security, and not for the purpose of authorizing judicial action. Also pointed out the General Assembly had been able to adopt resolution 3314 (XXIX) notwithstanding Article 39 of the Charter.

Conclusion:

No agreement was reached on the ideal course of action to be followed in such situations, it was argued that such a development would undermine the effectiveness and independence of the Court. In this regard the view was expressed that the Court already had jurisdiction over the crime of aggression pursuant to article 5 of the Statute. Thus, the Prosecutor had the competence either to seize the Security Council or another competent body with the question or to proceed with the investigation, except where this option was excluded under the procedure envisaged under article 16 of the Statute. The Security Council could thus always invoke article 16 of the Statute in connection with a determination of an act of aggression.

3. Definition of the crime of aggression: generic or specific:

38. There was extensive discussion of whether the definition of the crime of aggression should be generic or specific (i.e. accompanied by a list such as that contained in United Nations General Assembly resolution 3314 (XXIX)). There was a considerable preference for a generic approach.

IV. ASSEMBLY OF STATES PARTIES (ASP)

39. Part 11 of the Rome Statute provides for the Assembly of States Parties (ASP). It is the management oversight and legislative body of the ICC and is composed of one representative per State Party. Each State Party has one vote and every effort has to be made to reach decisions by consensus. Other States, which have either signed the Statute or signed the Final Act of the Rome Diplomatic Conference, may sit in the Assembly as Observers. The 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 a year. The Assembly has a Bureau, consisting of a President, two Vice-Presidents, and eighteen members.

A. First Session of the Assembly of States Parties (ASP-I)

40. ASP-I took place from 3-10 September 2002 at the UN Headquarters in New York.⁹ Later its first and second resumed meetings took place respectively from 3 to 7 February 2003 and 21 to 23 April 2003 at New York.¹⁰ It adopted a number of important instruments providing for practical arrangements and coming into operation of the Court.¹¹ Among the important matters addressed during the two resumptions¹² was the election of 18 judges of the International Criminal Court. The ASP also elected Mr. Luis Moreno Ocampo (Argentina) as the Prosecutor of the ICC and he gave his solemn undertaking at The Hague on 16 June 2003. It also elected 10 of the 12 members of the Committee on Budget and Finance and decided that the Committee would commence functions as partially constituted. It also made recommendations concerning the election of the Registrar and fixed the nomination period for members of the Board of

⁹ See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002*. ICC-ASP/1/3 and Corr.1. Also see AALCO, *The International Criminal Court: Recent Developments*, AALCO/XLII/Seoul/2003/S 10 and Add. 1.

¹⁰ See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session (First and Second Resumptions), New York, 3-7 February and 21-23 April 2003*. ICC-ASP/1/3/Add.1.

¹¹ Rules of Procedure and Evidence; Elements of Crimes; rules of procedure of the Assembly of States Parties; financial regulations and rules; Agreement on the Privileges and Immunities of the International Criminal Court; basic principles governing a headquarters agreement to be negotiated between the Court and the host country; a draft relationship agreement between the Court and the United Nations; budget for the first financial period of the Court; resolution on continuity of work in respect of the crime of aggression; resolution on the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court; resolution on the procedure for election of the judges for the International Criminal Court; resolution on the establishment of the Committee on Budget and Finance; resolution on the procedure for the nomination and election of members of the Committee on Budget and finance; resolution on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims; resolution on the procedure for the nomination and election of members of the Board of directors of the Trust Fund for the benefit of victims; resolution on provisional arrangements for the secretariat of the Assembly of States Parties; resolution on a permanent secretariat of the Assembly of States Parties; resolution on the selection of the staff of the International Criminal Court; resolution on relevant criteria for voluntary contributions to the International Criminal Court; resolution on budget appropriations for the first financial period and financing of appropriations for the first financial period; resolution on the Working Capital Fund for the first financial period; resolution on scales of assessments for the apportionment of the expenses of the International Criminal Court; resolution on crediting contributions to the United Nations Trust Fund to Support the Establishment of the International Criminal Court; decision on provision of funds for the Court; decision on interim arrangements for the exercise of authority pending the assumption of office by the Registrar; decision on the participation of the International Criminal Court in the United Nations Joint Staff Pension fund; and decision on seating arrangements for States Parties.

¹² Note 4.

Directors of the Victims Trust Fund. The Assembly also considered the Bureau's proposal for the meetings of the Special Working Group on the Crime of Aggression.

B. Second Session of the Assembly of States Parties (ASP-II)

41. ASP-II took place at the UN Headquarters in New York from 8-12 September 2003. Amongst the important decisions taken by the meeting were the election of Mr. Serge Brammertz¹³ of Belgium as Deputy Prosecutor for Investigations and the election of five members of the Board of Directors of the Victims Trust Fund: Her Excellency Ms. Raina Al-Abdullah (Queen of Jordan); Mr. Oscar Arias Sanchez (former President of Costa Rica and Nobel Peace Prize Laureate); Tadeusz Mazowiecki (former Prime Minister of Poland and Chairman of that country's Robert Schuman Foundation); Desmond Tutu (South Africa, Archbishop Emeritus and Nobel Peace Prize Laureate); and Simone Veil (France, former Minister of State and former President of the European Parliament).

C. Third Session of the Assembly of States Parties (ASP-III)

42. ASP-III took place at the seat of the Court at The Hague in the Netherlands from 6 to 10 September 2004¹⁴ and it was the first Session of the Assembly held in The Hague. ASP-III elected by an absolute majority (58 of the 78 votes cast) Ms. Fatou Bensouda of the Gambia to the office of Deputy Prosecutor (Prosecutions). Ms. Bensouda has to carry the responsibility of the management, supervision and direction of the Prosecution Division of the Office of the Prosecutor, which consists of a Prosecution Section and an Appeal section.¹⁵ ASP-III re-elected six members to the Budget and Finance Committee. They are: Mr. John F. S. Muwanga (**Uganda**) from the African States group; Mr. Eduardo Gallardo Aparicio (Bolivia from the Latin American and Caribbean States Group); Dr. Inna Steinbuka (Latvia from the Eastern European States Group); and Mr. Michel Etienne Tilemans (Belgium), Mr. Karl Paschke (Germany) and Mr. Peter Lovell (United Kingdom of Great Britain and Northern Ireland) from the Western European and other States group. The term of office of the members of the Committee on Budget and Finance, who are experts of recognized standing and experience in international financial matters, runs for three calendar years.¹⁶

D. Fourth Session of the Assembly of States Parties (ASP-IV)

43. The Fourth Session of the Assembly of States Parties took place at the World Forum Centre The Hague in the Netherlands from 28th November to 3rd December 2005 and its resumed Session will take place in New York on 26-27 January 2006. The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court. It

¹³ Mr. Brammertz has earlier served as a Federal Prosecutor of Belgium and Deputy to the Prosecutor-General at the Liege Court of Appeal. He was also a Professor at the University of Liege, in Belgium.

¹⁴ Details regarding ASP-III mentioned herein are drawn from the Press Releases relating to it available on the website of the Court: www.icc-cpi/int and *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third Session, The Hague, 6-10 September 2004*.

¹⁵ ICC-ASP III Press Release, "States Parties to the International Criminal Court Elect Ms. Fatou Bensouda of The Gambia Deputy Prosecutor (Prosecutions), 8 September 2004.

¹⁶ ICC Press Release, "States Parties to International Criminal Court elect Budget Committee Members", 8 September 2004.

is composed of representatives of the States that have ratified or acceded to the Rome Statute. The new Assembly President, H.E. Mr. Bruno Stagno Ugarte, Permanent Representative of Costa Rica to the United Nations, opened the session. Reminding those present of the Assembly's role as custodian of the International Criminal Court, the President spoke of the "promise of universality" that the Court had held since its inception as an institution of unique neutrality and impartiality. Mr. Stagno Ugarte welcomed the ratification of the Rome Statute by Mexico - the one hundredth State Party - as a significant milestone.

44. **Agenda of ASP IV:** The Assembly adopted the agenda¹⁷ for the session and elected a new Bureau and two Vice Presidents, Ambassador Erwin Kubesch of Austria and Ambassador Hlengiwe B. Mkhize of South Africa. The agenda of the meeting *inter alia* included: Election of two Vice-Presidents and 18 members of the Bureau; Credentials of representatives of States at the fourth session ((a) Appointment of the Credentials Committee and its nine members; (b) Report of the Credentials Committee. Organization of work); Report on the activities of the Bureau; Report on the activities of the Court. Consideration and adoption of the budget for the fourth financial year; Consideration of the audit reports; Term of office of the members of the Board of Directors of the Trust Fund for Victims; Report of the Board of Directors of the Trust Fund for Victims; Report of the Special Working Group on the Crime of Aggression. Draft Code of Professional Conduct for counsel; Trust Fund for Victims; Draft Regulations of the Trust Fund for Victims; Criteria for the management of the Trust Fund for Victims; Long term budgetary consequences of the pension scheme regulations for judges; Conditions of service and compensation of the Prosecutor and Deputy Prosecutors. Draft guidelines on gratis personnel; New York Liaison Office of the International Criminal Court; Permanent premises; Decisions concerning dates and venue of the next session of the Assembly of States Parties; Decisions concerning dates and venue of the next session of the Committee on Budget and Finance.

The following Six Working Groups met during the session:

- The Working Group on the proposed Programme Budget;
- The Working Group for the Trust Fund for Victims;
- The Working Group on Permanent Premises of the Court;
- The Working Group for the Draft Code of Professional Conduct for Counsel;
- The Special Working Group on the Crime of Aggression;
- The Working Group for the New York Liaison Office.

Organization of work of the Assembly:

45. The Assembly adopted the organization of its work and appointed the following working groups: the special working group on the crime of aggression, chaired by Ambassador Christian Wenaweser (Liechtenstein), will meet in accordance with the rules set out in a resolution adopted by the Assembly in 2002; the working group for the proposed programme budget for 2006, chaired by Ambassador Richard Ryan (Ireland); the

¹⁷ Document ICC-ASP/4/18

draft Code of Professional Conduct for Counsel will be finalized by a working group chaired by Ms. Michelle Dubrocard (France); working groups to consider the establishment of a New York Liaison Office, chaired by Mr. Sivu Maqungo (South Africa), as well as of permanent premises for the Court, to be chaired by Ambassador Gilberto Vergne Saboia (Brazil). The Bureau also recommended the establishment of a working group for the Trust Fund for Victims that will be chaired by Mr. Juan Manuel Gomez Robledo (Mexico). Mr. Rolf Fife (Norway) agreed to continue as focal point for another year on issues related to the Review Conference. Mr. Jurg Lauber (Switzerland) was requested to continue his role as Chair of the Group of Friends of the Court in New York working to coordinate the informal consultations on the omnibus resolution.

Report of the Bureau for the Triennium 2002-2005:

46. The outgoing President of the Assembly, H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein, gave a report on the activities of the Bureau for the triennium 2002-2005. Several proposals for improving the work of the Assembly were examined. A key point of Prince Zeid's speech was the spirit of cooperation that would allow the Assembly delegates to achieve these aims.

47. The President of the International Criminal Court, Judge Philippe Kirsch, delivered a general report on the Court's activities during the past year. In it he drew particular attention to the extension of the Court's operations in Kinshasa, Democratic Republic of the Congo, and Kampala, Uganda, and to the field offices which had been opened to aid the Court with investigations, witnesses, victims and outreach.

48. Mr. Luis Moreno-Ocampo, Prosecutor made clear that as investigations progressed, further individuals would be indicted in 2006. Prosecutor said that "It's a learning process", that needed the help of all States Parties to make the Court work better. Speaking on behalf of the Board of Directors of the Trust Fund for Victims, Madame Minister Simone Veil also addressed the Assembly and suggested the possibility of trying to initiate extra funding for the proposed increase in activities and projects.

49. Statements were also delivered by the Director of the ICC Task Force of the Ministry of Foreign Affairs of the Netherlands, Mr. Edmond Wellenstein; Mr. Bruno Cathala, Registrar of the International Criminal Court; and Ambassador Karl Paschke, Chair of the Committee on Budget and Finance. Ambassador Paschke outlined proposals for a new programme budget and spoke of the Committee's review of the status of contributions from States Parties. He gave an overview of the programme performance of the Court and emphasized the necessity of an annual report. Mr. Cathala presented the draft programme budget for 2006 and explained how the increases over the previous year were a general reflection of the challenges ahead, both in the field and at headquarters, as the Court began a new phase.

Report on the activities of the Court:

50. The present report, submitted on 2 September 2005, provides a general overview of developments at the International Criminal Court since the third session of the Assembly of States Parties. It outlines the activities of the Court as a whole and those of the individual organs.

51. Ninety-nine States have ratified or acceded to the Rome Statute (now it is 100) and Twenty-six States have ratified or acceded to the Agreement on the Privileges and Immunities of the Court. Four situations have now been referred to the Prosecutor – three by States Parties and one by the United Nations Security Council. The Court has entered the judicial phase of its operations. The Pre-Trial Chambers held several hearings and issued a number of decisions.

52. Significant developments at the Court since the third session of the Assembly include the following:

- Referral to the Prosecutor by the Central African Republic of the situation on its territory;
- Continuation of investigations in the situations in the Democratic Republic of the Congo and Uganda, including over fifty missions to the field;
- Commencement of Pre-Trial proceedings, including several hearings and decisions;
- Establishment of joint field presences by the Office of the Prosecutor and the Registry;
- Conclusion of the Relationship Agreement between the Court and the United Nations, as well as other agreements of the Court or the Office of the Prosecutor;
- Inauguration of the Deputy Prosecutor (Prosecutions);
- Acceptance of the Regulations of the Court by States Parties;
- Adoption of the Code of Judicial Ethics;
- Implementation of policies and rules, including the Staff Rules;
- Initiation of the strategic planning process of the Court; and
- Preparation of an integrated strategy on external relations, public information and outreach.

Election of members of the Committee on Budget and Finance:

53. The financial, budgetary and administrative operations of the Court is supervised by The Committee on Budget and Finance. At its 6th meeting, held on 10 September 2004, the Assembly of States Parties (the Assembly) decided that the election of six members of the Committee on Budget and Finance (the Committee) would take place at the resumed fourth session of the Assembly, to be held in New York. On 23 February 2005, the Bureau decided that the elections would be held on 26 and 27 January 2006 and that the nomination period would run from 18 July to 9 October 2005. By the closing date of the nominations period six nominations had been received. They are Dah-Kindji, Lambert (Benin); Dutton, David (Australia); Gharaibeh, Fawzi (Jordan); Hahn, Myung-jae (Republic of Korea); Sopková, Elena (Slovakia); and Wins Arnábal, Santiago (Uruguay).

Report on the Future Permanent Premises of the International Criminal Court:

54. The financial comparison of the three options over a period of 25 years, under equal conditions, shows slight cost advantages for the existing interim premises, the Arc. - New purpose-built premises on the site of the Alexanderkaserne would be approximately 6.3% more expensive than the Arc. Reuse and extension of the ICTY would be approximately 8% more expensive than the Arc. Reuse and extension of the ICTY would be approximately 1.7% more expensive than the new purpose-built premises on the Alexanderkaserne site. The new premises on the site of the Alexanderkaserne may, as assumed in this report, be fully owned by the Court, which would mean that after the pay-back period the premises would be free of rent. This possibility does not seem likely for the other two options, because the buildings are privately owned and currently not for sale.

Report of the Committee on Budget and Finance on the work of its fourth session:

55. The fourth session of the Committee on Budget and Finance (the Committee) was convened in accordance with a decision of the Assembly of States Parties (the Assembly) taken at the 6th plenary meeting of its third session on 10 September 2004. The Committee held its fourth session, comprising six meetings, at the seat of the Court in The Hague from 4 to 6 April 2005. The President of the Court, Mr. Philippe Kirsch, delivered welcoming remarks at the opening of the session. The session was presided over by the Chairperson, Mr. Karl Paschke (Germany). Mr. John F. S. Muwanga (Uganda) served as Vice-Chairperson. The Committee appointed Mr. David Dutton (Australia) as Rapporteur for the session. The Secretariat of the Assembly of States Parties (the Secretariat) provided the substantive servicing for the Committee, and its Director, Mr. Medard Rwelamira, acted as Secretary of the Committee.

Report on Permanent premises:

56. At its fourth session, the Committee recommended that the Court prepare a report, to be submitted to the Assembly through the Committee, containing estimates of the possible range of costs for each of the three options, including maintenance and energy costs, over a period of 25 years from 2012, setting out the net present value of each option. The Committee also requested the Court to provide more detailed information on the composition of its staffing estimates at the fifth session of the Committee. Furthermore, the Committee recommended that the Court prepare a report on financing methods used for the new premises of other major international organizations, including comparable international judicial institutions. The Committee requested that the Court also consider creative financing options such as the possibility of inviting States Parties to consider individual donations for the construction of the premises (for instance particular courtrooms or conference rooms). At its fifth session, the Committee decided to forward the reports¹⁸ to the Assembly.

¹⁸ Report on the future permanent premises of the International Criminal Court: Project Presentation (ICC-ASP/4/22); Report to the Assembly of States Parties on the Future Permanent Premises of the International Criminal Court: Housing Options (ICC-ASP/4/1); Report on the Future Permanent Premises of the International Criminal Court: Financial Comparison of Housing Options (ICC-ASP/4/23); Report on the Future Permanent Premises of the International Criminal Court:

Report of the Bureau on the draft Regulations of the Trust Fund for Victims:

57. The Working Group held meetings on 4 and 5 May and on 3 and 4 August 2005, carrying out its mandate, the Working Group relied on the written observations submitted to the Bureau by States Parties, written proposals submitted informally to the Working Group and the oral interventions of the various participants in the meetings. Issues still under consideration or those agreed to provisionally have been retained in the text of the draft Regulations as proposed amendments or options. Although the desirability for some re-structuring of the draft Regulations in order to group related issues was discussed, the Working Group agreed to defer consideration of the structure until the major outstanding issues are resolved. These issues on which States hold divergent views include, inter alia, the possibility of earmarking funds contributed to the Trust Fund (draft regulations 30 and 31), as well as on the use of funds and the trigger of the Trust Fund (draft regulations 51 and 53), including the role to be assigned to the Board of Directors and the Court in this regard.

Report on the establishment of a New York Liaison Office for the Court:

58. The creation of a New York liaison office is aimed at providing support to the Court's investigations, field operations and general functions through facilitating interaction between the organs of the Court and the Secretariat of the Assembly of State Parties on the one hand and the United Nations and its agencies on the other. A New York liaison office would also help to ensure the successful implementation of the Relationship Agreement between the International Criminal Court and the United Nations and the requisite operational cooperation between the two institutions. Furthermore, a permanent New York presence would allow sustained dialogue on matters of ongoing concern to the Court. A New York office would enable the Court to react promptly to emergencies involving issues of cooperation with the United Nations.

59. The Committee considered a report prepared by the Bureau of the Assembly, entitled "Option paper by the Bureau on the establishment of a New York Liaison Office" (ICC-ASP/4/6) and had an exchange of views with Court officials, both on the need for such an office and on some of the modalities whereby it would be established. The Committee was of the view that the proposal was modest and generally acceptable. The Committee noted that the establishment of such an office would assist in responding to genuine needs of the Court and the cost associated with its establishment appeared reasonable.

Report on Human Resources of the Court:

60. The Court made a presentation on its human resources management policies, which included information on: comparative indicators of staff growth between 2004 and 2005;

Interim Report on the Composition of Estimated Staffing Levels (ICC-ASP/4/24); Report on the Future Permanent Premises of the International Criminal Court: Financing Methods Used for the Premises of Other International Organizations (ICC-ASP/4/25); Report of the Committee on Budget and Finance on the work of its fourth session (ICC-ASP/4/2); Report of the Committee on Budget and Finance on the work of its fifth session (ICC-ASP/4/27 and Corr. 1 (English only), Corr.2 and Add.1);

geographical distribution among the different regions; gender balance; the process of recruitment; staff requirements to manage the recruitment process; and the Internship and Visiting Professionals Programmes. The Committee was informed that, as of 1 April 2005, the Court employed 299 staff members (152 in the Professional category and 147 in the General Service category) against 489 established budgeted posts. Furthermore, there were 97 staff members employed under general temporary assistance (26 in the Professional category, 65 in the General Service category and 6 as interpreters), 61 interns and 4 visiting professionals. Accordingly, a total of 461 persons were attached to the Court. In addition, there were 18 judges and 4 elected officials (Prosecutor, 2 Deputy Prosecutors, Registrar).

Report on the relationship between the Secretariat of the Trust Fund for Victims and the Victims Participation and Reparations Section of the Court:

61. The Committee heard a presentation by the Court of the “Report on the relationship between the Secretariat of the Board of Directors of the Trust Fund for Victims and the Victims Participation and Reparations Section of the Registry and their respective responsibilities pursuant to paragraph 29 of the Report of the Committee on Budget and Finance on the work of its third session”¹⁹ The report set out the different nature of the responsibilities of the Victims Participation and Reparations Section and those of the Secretariat of the Board of the Trust Fund for Victims, while at the same time outlining some areas of commonality or convergence of responsibilities between the Section and the Board, entailing coordination and cooperation. The Committee took note of the report.

Fifth Session of ASP: The Committee decided to hold its sixth session in The Hague from 24 to 26 April 2006.

¹⁹ (ICC-ASP/4/CBF.2/8).

**V. CONSIDERATION OF ITEM DURING AALCO'S FORTY-FOURTH SESSION
(27 JUNE -1 JULY 2005, NAIROBI, KENYA)**

62. The Vice-President of the International Criminal Court Her Excellency Judge Akua Kuenyehia in her address at the Session stated that both African and Asian States had played an important role in the Rome Conference, which drafted the Statute. Africa was the most represented continent in the Assembly of States Parties. She observed that the ICC while an independent judicial institution operated within a context of interdependence and held a unique position which was at the crossroads of international relations and international law. Her elaborate presentation was structured around: (i) the need for an International Criminal Court; (ii) the features which made the ICC particularly well-suited to fill this role; and (iii) the role of States and inter-governmental organizations in ensuring the success of the ICC. She stressed that the Court cannot end impunity for horrific crimes by itself. It was but one part of a larger system of international law and justice. It therefore needed the cooperation and support of States and other international institutions. The more support that the Court had, the more it could aid the cause of international justice.

63. The delegations from People's Republic of China, Indonesia, Malaysia, Arab Republic of Egypt and Kuwait participated in the discussions and generally viewed the establishment of the ICC as impartial, independent, effective and universal court to which they attached importance for its positive role in punishing the gravest international crimes. They hoped that the first ever treaty based international criminal court would promote the rule of law and abolish impunity of the gravest international crimes.

64. A delegation stated that the concept of complementarity constituted a key principle for work of the Court and had become one of the most important principles of the emerging international criminal law. It was vital in order to understand the role and the effectiveness of the Court but its actual character would be further clarified through its application. The said principle defined the relationship between the ICC and the National Courts and determined who should have jurisdiction in a particular case. Under this principle, the ICC was complementary to national criminal jurisdiction over international crimes. Another delegation was of the view that there were certain legal and administrative aspects of the Statute, which were of concern to it, particularly the implementation of the principle of complementarity.

65. The referral of the situation in Darfur region of Sudan by the UN Security Council to the Prosecutor of the International Criminal Court was questioned by a delegation. It expressed its support to the position of Sudan which had opposed such referral as it was not a State Party and furthermore was dealing the matters through its national courts. Another delegation expressing its support to the Sudanese position and stated that it was important to understand the relationship between the ICC and the United Nations, particularly the Security Council. The Court cannot, in his view remain isolated from the international political system.

66. Delegations also took note of the work being carried out by the Special Working Group on the Crime of Aggression. They stated that they were closely following the progress of the work in the Special Working Group in trying to define this crime a delegation was of the view that the proposed definition of crime of aggression should be more specific, that was possible by

adopting a listing approach as opposed to a general definition. The latter approach would give rise to contentious interpretations that would ultimately be detrimental. As noted from the definitions created for the purposes of the military tribunals in Germany and Japan, the definitions were drafted to deal with the exigencies of the prevailing circumstances. In this regard, the Special Working Group should be guided by the modern forms and guises in which this crime was perpetrated.

67. Another delegation underscored the importance of Resolution 3314 (XXIX) on Definition of Aggression. The definition as spelled out by the Resolution would be a sound basis and point of departure for both creating a general definition and for the selection of acts included in that definition. It stressed that the definition should be specific and not give rise to any contentious interpretation as well as making it difficult to classify the elements of the offence. Moreover, it was of the view that the lack of a determination by the Security Council as to the existence of an act of aggression committed by the State concerned shall not impede the exercise of the Court's jurisdiction with respect to referral to it.

68. Some delegations expressed their concern over the non-surrender agreements entered into by the United States of America. In the view of one delegation, it undermined the effectiveness and credibility of the Court. The exemption of a certain class of nationals from the jurisdiction of the Court would cause a serious breach in the regime of international criminal responsibility envisioned by the Rome Statute and could also serve as a dangerous precedent to encourage other States to seek similar immunity for their citizens. Another delegation stated that although it may arguably be legally permissible to undertake such arrangements pursuant to Article 98 (2) of the Statute, the States should not use the Article 98 Agreement to undermine the integrity of the ICC or weaken the spirit of the Rome Statute itself. Article 98 Agreements in their view should not derogate from the minimum mandatory obligations imposed on States Parties by the Rome Statute.

69. Resolution 44/S 10 adopted by the Nairobi Session inter alia directed the Secretariat to follow-up the deliberations in the Special Working Group on the Crime of Aggression. It also directed the Secretariat to follow-up the deliberations in the Fourth Session of the Assembly of States Parties as well as follow-up the developments regarding cases taken up by the International Criminal Court and present a report at 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 the International Criminal Court; 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.

VI. CONSIDERATION OF THE ITEM DURING THE YEAR 2005 AT THE UNITED NATIONS

A. Debate on ICC in the Plenary Meeting of the General Assembly²⁰:

70. The report of the International Criminal Court (document A/60/L.25), had debated in plenary meetings of the Assembly on 8 and 9 November 2005. The representative of the Netherlands, introducing the text, recalled that the Court's first annual report had been presented to the Assembly during its current session, and that the debate on the Court had underlined its important role in the common multilateral system aimed at ending impunity and establishing the rule of law. The Court's establishment was the most significant recent development in the long struggle to eradicate impunity. Already, at the start of the judicial phase of operations, in both the field and the court room, significant successes included the issuance of arrest warrants against five leaders of Uganda's Lord's Resistance Army and the referral of the situation in Darfur to the Court by the Security Council last spring. The direct or indirect support of all Council members had been welcome proof of growing support for the Court.

71. He said the draft resolution served three objectives: first, it indicated political support for the Court, its aims and its work; second, it underlined the importance of the Court's relationship agreement with the United Nations that served as a framework for close cooperation; and third, it reminded States of the need to cooperate with the Court in carrying out its work. Adoption of the text should lead to even greater support for the Court and for its work in fighting impunity and holding accountable for their actions all those accused of very serious crimes.

72. The General Assembly adopted a resolution welcoming the 100th ratification of the Rome Statute of the International Criminal Court, by Mexico on 28 October 2005. That text also encouraged State parties to the Statute to adopt national legislation to implement obligations and to cooperate with the Court in the exercise of its functions, recalling the provision of technical assistance in that respect.²¹

B. President's Report to General Assembly²² on Significant Developments in the International Criminal Court and Appraisal of the Court by the States:

73. The Assembly took up the report of the International Criminal Court, the world's only permanent, treaty-based criminal tribunal established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.

74. Judge Philippe Kirsch, the Court's President, told the Assembly that during the past year, there had been two significant developments. First, Mexico had deposited its instrument of ratification, becoming the 100th State party to the Rome Statute. The second important event was that the Court had issued its first arrest warrants this year, for five members of the Lord's

²⁰ GA10423/23/11/2005

²¹ Sixtieth General Assembly Plenary 53rd Meeting (AM)

²² GA 10417/08/11/2005

Resistance Army for alleged crimes against humanity and war crimes. Subject to the necessary cooperation in the arrest and surrender of persons, the first trials were expected to begin next year.

75. Highlighting some significant aspects of the judicial phase of the Court's activities, he said that four situations had been referred to the Prosecutor: three States parties had referred situations in their territories, and the Security Council, acting under Chapter VII of the Charter, had referred the situation in Darfur, Sudan. In addition, Cote d'Ivoire, a non-State party, had declared its acceptance of the Court's jurisdiction over crimes on its territory.

76. He said that on 8 July 2005, Pre-trial Chamber II issued the warrants, pertaining to the situation in Uganda, for five members of the Lord's Resistance Army for alleged crimes against humanity and war crimes. Subject to the necessary cooperation in the arrest and surrender of persons, the first trials were expected to begin next year. Cote d'Ivoire, a non-State party, had declared its acceptance of the Court's jurisdiction over crimes on its territory. He said that the Prosecutor had opened and was conducting investigations into the grave situations in Uganda, the Democratic Republic of the Congo and Darfur.

77. In conclusion, he said that the United Nations had first taken up the issue of a permanent international court in the wake of the Holocaust. The 1948 Anti-Genocide Convention envisioned that that "crime of crimes" could one day be punished by an international penal tribunal. "The dream of a permanent international court was deferred for too long." Now, however, there was an opportunity to ensure the perpetrators of the worst atrocities no longer benefited from impunity, to deter perpetrators and to build a culture of accountability.

78. Some of the nations expressed their views upon the development of the International Criminal Court and all of them praised the court's achievements within the short span of time. For the purpose of clarity few countries views are expressed below: Nigeria's representative, speaking on behalf of the African States parties to the Rome Statute, said the Court should be guided by a strategic vision to assure its future relevance. The benefits and obligations of all stakeholders should be spelled out. Strategic goals based on a five-year cycle should be defined according to a resource-based strategy rather than a demand-based one.

79. The indictment of the perpetrators of crimes against Ugandans would serve as a strong deterrent and would strengthen the Court, said Uganda's representative. It was clear that the Court was gaining increasing credibility and respect in the international community. But, it was important for it to adhere to the principle of fair geographical distribution in the hiring of top- and mid-level managers. Currently, the West was overly represented and Africa and Asia were underrepresented.

80. Stressing that States had nothing to fear from the Court, Canada's representative said the body had rigorous safeguards against frivolous investigations and prosecutions. States had a right to choose not to be members, but equal respect should be accorded to States which had chosen to nurture the Court and ensure it continued to be a responsible and effective judicial mechanism. All States should help strengthen the institution at the forefront of the campaign

against impunity, to entrench a culture of accountability for the world's most serious crimes, along with universal respect for the common humanity of all, he said.

81. Huw Llewellyn (United Kingdom), on behalf of the European Union and associated States, said the European Union was a strong supporter of the Court and was a staunch defender of the Rome Statute. The establishment of the Court had been the most significant development recently in the struggle to eradicate impunity for the most serious international crimes and in the advancement of justice and the rule of law. The Court was also a vital instrument for the prevention of genocide, crimes against humanity and war crimes. The European Union continued to seek the widest possible support for the Court, and, consequently, urged all States that had not yet done so to accede to the Rome Statute as soon as possible. It also urged States to become parties to the Agreement on the Privileges and Immunities of the Court.

82. Aminu Bashir Wali (Nigeria), speaking on behalf of the African States parties to the Rome Statute, said the Court's history made it remarkable that the number of States parties to the Rome Statute had risen to 100 in such a short time. It was also encouraging that five warrants of arrests had been issued and that Austria had concluded an agreement to effect the Court's judgment.

83. Diego Malpede (Argentina) said that the Court was the most appropriate body to combat impunity and to judge those who committed the most serious crimes against humanity. Argentina opposed any agreement that, in general terms, excluded the nationals of a State from the jurisdiction of the Court. The word and spirit of the Rome Statute must be respected and equilibrium among its provisions preserved.

84. Peter Maurer (Switzerland) said the fact that three States parties had referred situations to the International Criminal Court demonstrated that it was an institution that met a real need. Switzerland welcomed the strategy of the Prosecutor, which aimed to identify those people at the highest levels responsible for the worst crimes. Concerning the relationship between the United Nations and the International Criminal Court, it seemed to be of paramount importance that the agreement that came into effect last year, between the two bodies, was fully implemented in the mutual interests of both institutions.

85. Francis K. Butagira (Uganda) said one could only recoil from the horrible crimes committed against humanity, particularly against children, who were kidnapped, witnessed gruesome killings, mutilated, raped, and forced to take part in killings themselves. It was to redress some of those despicable human acts that the International Criminal Court was established. He congratulated the Court on behalf of all the victims of the Lord's Resistance Army, for its issuance of arrest warrants for five members of the Army's leadership. He called upon his country's neighbours to help apprehend the indictees. His country rejected notions that the arrest warrants would hamper peace prospects in Northern Uganda. It was clear that the Lord's Resistance Army had no intention to give up its heinous war and crimes against humanity.

86. Toshiro Ozawa (Japan) said that in order for the Court to win the trust of the international community, it was essential that the body demonstrate fairness, efficiency and impartiality. The

Court's activities were drawing increased international attention, particularly as the body shifted from investigations into the judicial phase. Although Japan had yet to accede to the Rome Statute, it had actively participated as an observer in all Court-related meetings. Japan was also taking part in activities such as the discussion on drafting regulations for the Victims Trust Fund and the task force for the draft code of professional conduct of counsel.

87. Shin Kak-Soo (Republic of Korea) welcomed the fact that there were now 100 States parties to the Court. However, there were only 12 States parties to the Rome Statute from Asia. He hoped that the Court and other States Parties would assist Asian States in acceding to the Statute. His country would do its part to accomplish that objective. He welcomed the beginning of the Court's operations and said the investigations underway and the issuance of arrest warrants for alleged perpetrators of crimes against humanity would not only bring justice to perpetrators, but would also serve as a deterrent to future atrocities. The future of the Court would be determined by its performance, which in turn was dependent on the provision of adequate financial, logistical and political support for the Court.

88. Juan Manuel Gómez Robledo (Mexico) said his country had deposited its instrument of ratification to the Rome Statute on 28 October 2005, becoming the 100th State party to do so. The process leading to that point had not been easy. Constitutional reforms had to be instituted. Many people had not wanted Mexico to become a State party. But the debate brought out the fact that national judicial systems must be improved to let the Court carry out its role of dealing with the worst crimes against humanity.

89. Zénon Mukongo Ngay (Democratic Republic of the Congo) said that, after a more than five-year occupation of the eastern part of his country that was marked by systematic violations of human rights and the deaths of more than four million of his compatriots, the strength of the rule of law remained vital for his country. With the imminent end of the political transition underway, the Democratic Republic of the Congo had seen its age-old dream of justice realized. Since the decision to open an inquiry into the situation there, initiatives to help restore law and State authority had constantly increased. The Court represented the first audience in history devoted to the contents of the case. The deterrent effect had been felt with the announcement of the first Court inquiry on its territory. It reassured people traumatized by war, who were convinced that massive violations of human rights would no longer go unpunished.

90. Allan Rock (Canada) said it was heartening that the Court had made so much progress in just a few years of operation. The three States of Uganda, Democratic Republic of the Congo and Central African Republic had referred situations to the Court. Cote d'Ivoire was not yet a State party but had declared its acceptance of the Court's jurisdiction in respect of crimes that might have occurred on its territory following a coup attempt in September 2002. The Security Council's referral to the Court of the situation in Darfur was another critical landmark. Investigations had been launched in each of those situations and five arrest warrants had been issued against senior members of the Lord's Resistance Army in Northern Uganda.

91. Ben Playle (Australia) said his country welcomed the progress the Court had made in beginning its operations. It also congratulated Mexico on becoming the 100th party to the Rome Statute, and to the Dominican Republic and Kenya for becoming parties in the past year.

Australia commended the Court for the investigative work it had been doing in relation to the Democratic Republic of the Congo, Uganda and the Sudan. It particularly welcomed the Court's issuance of indictments against five people suspected of serious crimes in Northern Uganda, and it looked forward to further action on those indictments in the future.

92. Thomas B. Amolo (Kenya) said his delegation believed that the Court's success depended on the support of a vast majority of United Nations members. Though the pace of ratification of the Rome Statute had been slow, Kenya was confident that as the Court entered its judicial phase, there would be not only wider appreciation of the body's work, but also wider participation. He added that Kenya itself had become the ninety-eighth State party and had embarked on a series of national consultations with relevant stakeholders to speed up the integration of the Statute into domestic legislation.

VII. CONCLUDING OBSERVATIONS

93. The international community's efforts to strengthen the international legal order and respect for the rule of law in the globe were finally realized after the establishment of the ICC. Within a short span of time four cases were referred to the ICC and, the Prosecutor with the co-operation of States Parties has succeeded in effectively collecting the necessary information and taking all necessary measures to provide justice to the victims. A progressive development in the prosecution side has provided optimism to the supporters of the Court.

94. More than three years have passed since the entry into force of the Rome Statute took place in a record time, yet the number of 100 State Parties to the Rome Statute of the International Criminal Court reflects that it is far from the desired goal of universal participation. In this context, it may be recalled that presently 191 countries are members of the United Nations Organization. There were several reasons behind non-participation by the States, prominent among them being²³:

- a. role of the Security Council, the principal organ of the UN entrusted with the responsibility of maintenance of international peace and security, in determining that aggression has been committed;
- b. subordination of the Court to the Security Council renders it ineffective;
- c. grant of *proprio motu* powers to the Prosecutor;
- d. non-acceptance of universal jurisdiction over core crimes;
- e. exclusion of weapons of mass destruction-nuclear, chemical and biological weapons, drug-trafficking and terrorism from the Rome Statute;
- f. disagreement on the definition of the crime of aggression;
- g. clearer definition of the principle of complementarity lacking;

95. It may be noted that certain important countries of the world, namely Arab Republic of Egypt, India, Indonesia, Islamic Republic of Iran, Japan, People's Republic of China, Malaysia,

²³ For details see "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court: Statute of Court Adopted by Non-Recorded Vote of 120 in Favour, 7 Against, 21 Abstentions", *UN Press Release L/ROM/22* dated 17 July 1998.

Russian Federation, Saudi Arabia and the United States of America are still not parties to the Rome Statute.

96. An unresolved issue so far is the definition of the crime of aggression. This is one of the most important unresolved issues for developing countries. Though the Rome Statute is supposed to have jurisdiction over the crime of aggression, it has not been defined yet. Work on elaborating an acceptable definition of the Crime of Aggression is in progress in the Special Working Group on the subject constituted by the Assembly of States Parties. The informal meeting of this group and later deliberations at ASP-IV are important developments and further work of this requires a careful follow-up.

97. The non-renewal of UN Peacekeepers Immunity Agreement despite strong pressure of the United States represents a significant contribution to the efforts of the UN to promote justice and the rule of law in international affairs.

98. The on-going investigation by the Prosecutor in the Democratic Republic of Congo and Uganda and later trial by the Court would bring the performance of ICC under intense scrutiny of international community. It is hoped that the ICC would make every effort to conduct the most fair, impartial, effective and efficient trials possible so that the Court gains legitimacy and credibility.

99. The Court has considered the “complementarity to the national jurisdictions” is the key principle for work of the Court and its Statute and Rules of Procedure and Evidence guarantee fair, public trials consistent with internationally recognized human rights. But in the case of Darfur, Sudan the Court has violated the basic principle of “complementarity”.

100. The entry into force of the Agreement on the Privileges and Immunities of the International Criminal Court and the Relationship Agreement between the International Criminal Court and the United Nations are noteworthy developments.

VII. Annex

Table I
Status of the ratification of Rome Statute of the International Criminal Court by AALCO
Member States*

S. No	Member State	Status	
		Signature	Ratification Acceptance (A) Approval (AA) Accession (a)
1.	Arab Republic of Egypt	26 December 2000	—
2.	Bahrain	11 December 2000	—
3.	Bangladesh	16 September 1999	—
4.	Botswana	8 September 2000	8 September 2000
5.	Brunei Darussalam	—	—
6.	Cyprus	15 October 1998	7 March 2002
7.	Democratic Peoples' Republic of Korea	—	—
8.	Federal Republic of Nigeria	1 June 2000	27 September 2001
9.	Gambia	4 December 1998	28 June 2002
10.	Ghana	18 July 1998	15 May 2002
11.	Hashemite Kingdom of Jordan	7 October 1998	11 April 2002
12.	India	—	—
13.	Indonesia	—	—
14.	Islamic Republic of Iran	31 December 2000	—
15.	Japan	—	—
16.	Kenya	11 August 1999	15 March 2005
17.	Lebanon	—	—
18.	Libyan Arab Jamahriya	—	—
19.	Malaysia	—	—
20.	Mauritius	11 November 1998	5 March 2002
21.	Mongolian Peoples' Republic	29 December 2000	11 April 2002
22.	Myanmar	—	—

* The information stated in the above table is compiled from the following website: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> visited 06 December 2005. Also see States Parties at the website of the International Criminal Court: <http://www.icc-cpi.int>.

23.	Nepal	—	—
24.	Pakistan	—	—
25.	Palestine	—	—
26.	Peoples' Republic of China	—	—
27.	Philippines	28 December 2000	—
28.	Republic of Iraq		
29.	Republic of Korea	8 March 2000	13 November 2002
30.	Republic of Singapore	—	—
31.	Republic of Uganda	17 March 1999	14 June 2002
32.	Republic of Yemen	28 December 2000	—
33.	Saudi Arabia		—
34.	Senegal	18 July 1998	2 February 1999
35.	Sierra Leone	17 October 1998	15 September 2000
36.	Somalia	—	—
37.	Sri Lanka	—	—
38.	State of Kuwait	8 September 2000	—
39.	State of Qatar	—	—
40.	Sudan	8 September 2000	—
41.	Sultanate of Oman	—	—
42.	Syrian Arab Republic	29 November 2000	—
43.	Thailand	2 October 2000	—
44.	Turkey	—	—
45.	United Arab Emirates	27 November 2000	—
46.	United Republic of Tanzania	29 December 2000	20 August 2002
47.	South Africa	17 July 1998	27 November 2000

Inferences from the above table: Following inferences as regards the participation of the AALCO Member States in the International Criminal Court may be drawn:

- ❖ Twenty-six AALCO Member States are Signatories to the Rome Statute.
- ❖ Fifteen Member States have ratified the Statute. Thus, less than one-third AALCO Member States have ratified the Rome Statute.
- ❖ Out of these Fifteen Member States, eleven Member States, namely Botswana, Federal Republic of Nigeria, Gambia, Ghana, Kenya, Mauritius, Republic of Uganda, Senegal, Sierra Leone, South Africa and United Republic of Tanzania are from Africa. The four Member States from Asia are: Cyprus, Hashemite Kingdom of Jordan, Mongolian People's Republic and Republic of Yemen.
- ❖ Arab Republic of Egypt had made upon signature a Declaration.
- ❖ Blank column indicates that the concerned Member State has not taken the requisite treaty action (i.e. signature or ratification).

Table II**Status of the ratification of the Rome Statute of the International Criminal Court***

S. No.	Member State	Status	
		Signature	Ratification Acceptance (A) Approval (AA) Accession (a)
1	Afghanistan		10 Feb 2003 a
2	Albania	18 July 1998	31 Jan 2003
3	Algeria	28 Dec 2000	
4	Andorra	18 July 1998	30 Apr 2001
5	Angola	7 Oct 1998	
6	Antigua and Barbuda	23 Oct 1998	18 June 2001
7	Argentina	8 Jan 1999	8 Feb 2001
8	Armenia	1 Oct 1999	
9	Australia	9 Dec 1998	1 July 2002
10	Austria	7 Oct 1998	28 Dec 2000
11	Bahamas	29 Dec 2000	
12	Bahrain	11 Dec 2000	
13	Bangladesh	16 Sep 1999	
14	Barbados	8 sep 1999	10 Dec 2002
15	Belgium	10 Sep 1998	28 June 2000
16	Belize	5Apr 2000	5 Apr 2000
17	Benin	24 Sep 1999	22 Jan 2002
18	Bolivia	17 Jul 1998	27 Jun 2002
19	Bosnia and Herzegovina	17 Jul 2000	11 Apr 2002
20	Botswana	8 Sep 2000	8 Sep 2000
21	Brazil	7 Feb 2000	20 Jun 2002
22	Bulgaria	11 Feb 1999	11 Apr 2002
23	Burkina Faso	30 Nov 1998	
24	Burundi	13 Jan1999	21 Sept 2004
25	Cambodia	23 Oct 2000	11 Apr2002
26	Cameroon	17 Jul1998	
27	Canada	18 Dec 1998	7 Jul 2000
28	Cape Verde	28 Dec 2000	
29	Central African Republic	7 Dec 1999	3 Oct 2001
30	Chad	20 Oct 1999	
31	Chile	11 Sep 1998	

* Article 126 paragraph 13 of the Statute deals with Entry into force. It states that the Statute shall enter into force on the first day of the month after the 60th day following the deposit of the 60th instrument of ratifications, acceptance, approval or accession with the Secretary General of the United Nations. The Statute entered into force on 1 July 2002. As at 06 December 2005, the number of States Parties to the Rome Statute is 100.

32	Colombia	10 Dec 1998	5 Aug 2002
33	Comoros	22 Sep 2000	
34	Congo	17 Jul 1998	3 May 2004
35	Costa Rica	7 Oct 1998	7 Jun 2001
36	Cote d' Ivoire	30 Nov 1998	
37	Croatia	12 Oct1998	21 May 2001
38	Cyprus	15 Oct 1998	7 Mar 2002
39	Czech Republic	13 Apr 1999	
40	Democratic Republic of the Congo	8 Sep 2000	11 Apr 2002
41	Denmark	25 Sep 1998	21 Jun 2001
42	Djibouti	7 Oct 1998	5 Nov 2002
43	Dominica		12 Feb 2001 a
44	Dominican Republic	8 Sep 2000	12 May 2005
45	Ecuador	7 Oct 1998	5 Feb 2002
46	Egypt	26 Dec 2000	
47	Eritrea	7 Oct 1998	
48	Estonia	27 Dec 1999	30 Jan 2002
49	Fiji	29 Nov 1999	29 Nov 1999
50	Finland	7 Oct 1998	29 Dec 2000
51	France	18 Jul 1998	9 Jun 2000
52	Gabon	22 Dec 1998	20 Sep 2000
53	Gambia	4 Dec 1998	28 Jun 2002
54	Georgia	18 Jul 1998	5 Sep 2003
56	Germany	10 Dec 1998	11 Dec 2000
57	Ghana	18 Jul 1998	20 Dec 1999
58	Greece	18 Jul1998	15 May 2002
59	Guinea	7 Sep 2000	14 July 2003
60	Guinea-Bissau	12 Sep 2000	
61	Guyana	28 Dec 2000	24 Sept 2004
62	Haiti	26 Feb 1999	
63	Honduras	7 Oct 1998	1 Jul 2002
64	Hungary	15 Jan 1999	30 Nov 2001
65	Iceland	26 Aug 1998	25 May 2000
66	Iran (Islamic Republic of)	31 Dec 2000	
67	Ireland	7 Oct 1998	11 Apr 2002
68	Israel	31 Dec 2000	
69	Italy	18 Jul 1998	26 Jul1999
70	Jamaica	8 Sep 2000	
71	Jordan	7 Oct 1998	11 Apr 2002
72	Kenya	11 Aug 1999	15 March 2005
73	Kuwait	8 Sep 2000	
74	Kyrgyzstan	8 Dec 1998	
75	Latvia	22 Apr 1999	28 Jun 2002
76	Lesotho	30 Nov 1998	6 Sep 2000
77	Liberia	17 Jul 1998	22 Sept 2004

78	Liechtenstein	18 Jul1998	2 Oct 2001
79	Lithuania	10 Dec 1998	12 May 2003
80	Luxembourg	13 Oct 1998	8 Sep 2000
81	Madagascar	18 Jul 1998	
82	Malawi	2 Mar 1999	19 Sep 2002
83	Mali	17 Jul 1998	16 Aug 2000
84	Malta	17 Jul 1998	29 Nov 2002
85	Marshall Islands	6 Sep 2000	7 Dec 2000
86	Mauritius	11 Nov 1998	5 Mar 2002
87	Mexico	7 Sep 2000	28 Oct 2005
88	Monaco	18 Jul 1998	
89	Mongolia	29 Dec 2000	11 Apr 2002
90	Morocco	8 Sep 2000	
91	Mozambique	28 Dec 2000	
92	Namibia	27 Oct 1998	25 Jun 2002
93	Nauru	13 Dec 2000	12 Nov 2001
94	Netherlands	18 Jul 1998	17 Jul 2001 A
95	New Zealand	7 Oct 1998	7 Sep 2000
96	Niger	17 July 1998	11 Apr 2002
97	Nigeria	1 Jun 2000	27 Sep 2001
98	Norway	28 Aug 1998	16 Feb 2000
99	Oman	20 Dec 2000	
100	Panama	18 Jul 1998	21 Mar 2002
101	Paraguay	7 Oct 1998	14 May 2001
102	Peru	7 Dec 2000	10 Nov 2001
103	Philippines	28 Dec 2000	
104	Poland	9 Apr 1999	12 Nov 2001
105	Portugal	7 Oct 1998	5 Feb 2002
106	Republic of Korea	8 Mar 2000	13 Nov 2002
107	Republic of Moldova	8 Sep 2000	
108	Romania	7 Jul 1999	11 Apr 2002
109	Russian Federation	13 Sep 2000	
110	Saint Lucia	27 Aug 1999	
111	Saint Vincent and the Grenadines		3 Dec 2002 a
112	Samoa	17 Jul 1998	16 Sep 2002
113	San Marino	18 Jul 1998	13 May 1999
114	Sao Tome and Principe	28 Dec 2000	
115	Senegal	18 Jul 1998	2 Feb1999
116	Serbia and Montenegro	19 Dec 2000	6 Sep 2001
117	Seychelles	28 Dec 2000	
118	Sierra Leone	17 Oct 1998	15 Sep 2000
119	Slovakia	23 Dec 1998	11 Apr 2002
120	Slovenia	7 Oct 1998	31 Dec 2001
121	Solomon Islands	3 Dec 1998	
122	South Africa	17 Jul 1998	27 Nov 2002

123	Spain	18 Jul 1998	24 Oct 2000
124	Sudan	8 Sep 2000	
125	Sweden	7 Oct 1998	28 Jun 2001
126	Switzerland	18 Jul 1998	12 Oct 2001
127	Syrian Arab Republic	29 Nov 2000	
128	Tajikistan	30 Nov 1998	5 May 2000
129	Thailand	2 Oct 2000	
130	The Former Yugoslav Republic of Macedonia	7 Oct 1998	6 Mar 2002
131	Timor-Leste		6 Sep 2002 a
132	Trinidad and Tobago	23 Mar 1999	6 Apr 1999
133	Uganda	17 Mar 1999	14 Jun 2002
134	Ukraine	20 Jan 2000	
135	United Arab Emirates	27 Nov 2000	
136	United Kingdom of Great Britain and Northern Ireland	30 Nov 1998	4 Oct 2001
137	United Republic of Tanzania	29 Dec 2000	20 Aug 2002
138	United States of America	31 Dec 2000	
139	Uruguay	19 Dec 2000	28 Jun 2002
140	Uzbekistan	29 Dec 2000	
141	Venezuela	14 Oct 1998	7 Jun 2000
142	Yemen	28 Dec 2000	
143	Zambia	17 Jul 1998	13 Nov 2002
144	Zimbabwe	17 Jul 1998	