SUMMARY RECORD OF THE FIFTH GENERAL MEETING HELD ON FRIDAY, 4TH JULY 2008, AT 9:10 AM

His Excellency Mr. Narinder Singh, President of the Forty-Seventh Session in the Chair.

A. The International Criminal Court: Recent Developments

1. **Amb. Tabatabaei Shafiei, Deputy Secretary-General** introduced the Secretariat's Report on the International Criminal Court: Recent Developments contained in Document AALCO/47th/HEADQUARTERS (NEW DELHI) SESSION/2008/S 9. He recalled that the Secretariat had been following with keen interest the developments relating to the adoption of the Rome Statute of the International Criminal Court, since its Thirty-Fifth Session, held in Manila (Philippines) in 1996.

2. He underlined the fact that the establishment of the Court was the most significant development in recent years in the international community's ongoing struggle to eradicate impunity. He said that the Court has at present four cases, one Security Council and three State referrals, before it. However, much remained to be done to guarantee its success.

3. Amb. Tabatabaei mentioned that in its steady march towards universal acceptance as of 1st June 2008, 106 States Parties had ratified the Rome Statute. The Statute recognizes that States have the primary responsibility for investigating and prosecuting international crimes, guaranteeing fair public trials consistent with internationally recognized human rights principles.

4. He pointed out that the cooperation between the Court and the United Nations, States, international and regional organizations are essential to an effective and efficient functioning of the Court. In this regard he mentioned that a Memorandum of Understanding between the AALCO and ICC was signed on 5 February 2008. The Court also expects active cooperation from the civil society.

5. Amb. Tabatabaei stated that at the Sixth Session of the Assembly of States Parties the discussions focused on a non-paper by the Chairman, on defining the individual's conduct in relation to the Crime of Aggression. The non-paper met with broad agreement among delegations. Strong support was expressed for using United Nations General Assembly resolution 3314, adopted at the 29th Session of the UNGA on 14 December 1974, as a basis in defining an act of aggression. As regards the conditions for the exercise of jurisdiction, consideration was given to two new elements concerning the crime of aggression, namely, (1) the suggested role of the Pre-Trial Chamber and (2) the so-called 'green light' option with regard to the Security Council's role. Discussions in the resumed Sixth Session of ASP held from 2-6 June 2008 also made headway on a revised paper presented by the Chairman covering the definition of the Crime of Aggression and jurisdiction of the Court in respect of that crime. However, despite all these efforts the definition of the Crime of Aggression still remained elusive.

6. Finally he said that keeping in view the future "Review Conference" the Secretariat report had identified some of the issues for focused consideration at the Forty-Seventh Session , namely, (1) Crime of aggression – defining the individual's conduct. (2) Conditions for the exercise of jurisdiction. (3) Act of aggression – defining the conduct of the State. (4) Security Council referral and the practice of self-referral. (5) Questions of jurisdiction and admissibility; and (6) Prosecutional discretion and victim's rights.

7. The Deputy Secretary-General made a proposal to explore the possibility of holding an "Inter-Sessional Meeting of

Experts on International Criminal Law from the Asian-African Region" to formulate a definition of the Crime of Aggression by AALCO Member States, which could be placed for the consideration of the Special Working Group on the Crime of Aggression.

8. The **Delegate of the Islamic Republic of Iran** with reference to the Definition of the Crime of Aggression said that the Court's jurisdiction in relation to that crime was deferred till the Review Conference, which would either be held in 2009 or latest in 2010. The Preparatory Committee before 1998 and the Preparatory Commission after 1998 and the Special Working Group established thereafter and working until now, had been mandated to define the Crime of Aggression, and even after ten years the definition remained elusive. The delegate wondered how it would be possible to accomplish that objective before the Review Conference. Therefore, his delegation fully supported the convening of an "Inter-Sessional Meeting of Experts on International Criminal Law from the Asian-African Region" with the objective of trying to have a concrete proposal taking into consideration the views and approaches of the Member States.

9. The Delegate divided his statement into two parts aimed at sharing his views with the Delegations present. First, the proposed definition of the "Crime of Aggression" has two approaches "generic" and "enumerative" or specific approach and a combination, which is the consensus General Assembly Resolution 3314 of 19 December 1974. The enumerative approach is not the exhaustive list and is non-binding. If there are different views on whether it should be annexed or not his delegation proposed that the main articles of this consensus resolution by three groups, namely, European, Non-Aligned and at that time the Eastern Group to be enlisted in the definition, as it has been done with regard to Article 6 to the effect of the definition of "Genocide", in the Statute of the International Criminal Court.

10. Coming to the other elements namely to choose between "differentiated" or "monastic" approaches, which could mean differentiating between State's acts of aggression and individual conduct and responsibility, his delegation did not see too much substantive differences between these two approaches, although Article 25 of the Statute covers all forms of participation namely abetting, facilitating and other forms which could bring the responsibilities of the perpetrators or facilitating the conduct of such crime.

11. The Delegate noted that it was a matter of regret that the "non-paper" prepared by the Chairman of the Special Working Group (SWG) on the Crime of Aggression, even after ten years of debate had not crystallized into any concrete proposal for a consolidated text. Recently the Chairman of the SWG gave a new proposal in the form of a new article with regard to "leadership" clause. The Iranian delegation believed that the responsibility derived from an act of aggression as a conduct of individual's or State's aggression all have been covered by the Statute and all these matters are procedural and *mutatis mutandis* could be accepted and regarded if there was some need for more clarification. Those matters could be actually decided by the Court at different stages. His delegation welcomed the deletion, which has been supported by many States. However he maintained that it was unfortunate that only two Member States of AALCO had participated in the Princeton University Working Group on the Definition of the Crime of Aggression.

12. Regarding the "threshold clause" namely another element, which has been mentioned by its gravity, character and scale, consists of a manifest violation of the Charter of the United Nations. According to his delegation it was not an acceptable

proposal, it is a matter of decision by the Court and by the Judge in the circumstances surrounding the acts committed or decided. Further commenting on the other proposal regarding the "object" and the result of the act of aggression, his delegation believed that there was no need to formulate very detailed elements for a decision that would be a judicial decision.

13. Regarding the other points namely the conditions for the exercise of jurisdiction, and the role of the Security Council in that regard, the Delegate mentioned that Article 39 of the UN Charter refers to the responsibility of the Security Council for determination of the Crime of Aggression, but as had been confirmed by the Members of the Non-Aligned Movement as well as by many delegations in AALCO's Annual Session, it was not an exclusive mandate. He maintained that, on the one hand, the Security Council was a political organ, and the ICC was a judicial body, and so far the Security Council had been able to confirm only one act of aggression after more than sixty years of functioning. Therefore in case of failure or decline by the Security Council to determine the acts of aggression, the Court which is an independent judicial body should not be handcuffed to follow its mandate, particularly in relation to the crime of aggression, which is the mother of all crimes.

14. Referring to Paragraph 4 of the non-paper his delegation believed that although six months would not be a very long period in order to decide as a matter of deliberation by the Pre-trial Chamber and then be followed by the Prosecutor and then be submitted to the Chambers, however, he felt that the six months period could be shortened.

15. The Delegate thereafter, mentioned some other conditions for exercise of the Court over the Crime of Aggression, the non-paper had placed a number of conditions which his delegation believed that to have separate rules of procedure, a separate definition for the individual responsibility, and command responsibility with regard to the leadership clauses and with the threshold clause, it would take too much time and it could be ascertained that the Review Conference would not be able to achieve all these goals, and these issues would be postponed by yet another ten years. Therefore, it seemed to be a murky and gloomy picture for exercise of jurisdiction by the Court over the crime of aggression. Unfortunately, it had been a major concern since the Nuremberg trials in 1945, when it was decided that it was time to go forward with finding a definition of the Crime of Aggression, and not move backward. However, even after sixty years the international community had been unable to formulate an acceptable definition of that crime. This aim could only be achieved if there is determination, or else it would be further postponed.

16. The **Delegate of the Republic of Indonesia** extended his profound appreciation to the President, Officials and Staff of the ICC for their dedication and strong efforts to make ICC as a functioning institution able to meet the challenges set by international community. As a first ever permanent, treaty-based International Criminal Court, it was obvious that this institution shall promote the rule of law and abolish impunity of the gravest international crimes. In a very real sense, it serves as the main instrument of the international community for upholding the dignity and the rights of the people, and for enforcing the accountability of the wielders of State powers.

17. According to him, Indonesia attached great importance to the existence of an International Criminal Court. For Indonesia, the international community could derive many benefits from the existence of a just, fair and effective International Criminal Court. It would not

only put an end impunity towards perpetrators of the most serious crimes of concern to the international community as a whole, but also, the presence of the threat of prosecution would deter the perpetration of such despicable acts in the future. Furthermore, the Delegate noted that the nature of the permanency of the Court would act as a catalyst, hastening the replacement of the rule of force with the rule of law which in turn would contribute to the maintenance of peace and advancement of justice, humanity and democracy at national, as well as the international levels.

18. Thereafter, he made some observations on the recent developments of the ICC, particularly the question of defining the individual's conduct in the Crime of Aggression. On December 2007, the Special Working Group on the Crime of Aggression of the Assembly of States Parties to the Rome Statute of the International Criminal Court was held to address the issue of the definition of the individual's conduct in the Crime of Aggression. In furtherance of that objective, i.e. to define individual's conduct in the crime of aggression, he expressed active support regarding the inclusion of a new paragraph 3 bis in article 25 of the Rome Statute. The paragraph would clarify that the leadership requirement would not only apply to the principal perpetrator to be tried by the Court, but to all forms of participation referred to in Article 2 of the Statute, such as aiding and abetting. Indonesia believed that such a provision would be indispensable in ensuring that only leaders were tried, and not ordinary soldiers.

19. In the light of conditions for the exercise of jurisdiction by the ICC over the crime of aggression, his Delegation attached much significance to the fact that the ICC shall exercise its jurisdiction in a manner consistent with the provisions of the United Nations Charter. For that reason, determination of an act of aggression by the Security Council, as stipulated in Article 39 of the Charter of the United Nations, should be a precondition for the ICC to exercise its jurisdiction over the crime of aggression. In that context, his Delegation reemphasized the importance of the General Assembly Resolution on Definition of Aggression. The consensus definition, which is acceptable to most countries, should be taken into account by the Security Council as guidance in determining the existence of an act of aggression.

20. Referring to the ICC Prosecutor's Report presented at the Assembly of States Parties on November 30th 2007, the Delegate noted that the report included the detailed update of the situations and cases in Democratic Republic of Congo, Central African Republic, Northern Uganda, and the situation in Darfur, Sudan. His Delegation noted and appreciated the Prosecutor's effort to pursue and continue to investigate the situation and cases that took place in each of those situations.

21. The Indonesian Delegation condemned the continued gross violations of human rights and international humanitarian law that took place in each of those situations. The crimes committed were egregious affronts to the norms, rules and collective conscience of the international community. Thus, the perpetrators of those acts must be brought to justice. The Delegate extended deepest sympathies and solidarity to the victims and their suffering, and the people of those pertinent countries, who continued to face the impact of conflicts. He noted that, in the interest to humanity for the victims and the community as a whole, justice must be served without unnecessary delay.

22. However, his Delegation reiterated the principle of complementarity. The role of the ICC, in accordance with the Rome Statute, shall be complementary to the national criminal jurisdiction. Towards this end he believed that the conduct of the ICC Prosecutor should neither nullify the

principle of complementarity nor prevent the national court of pertinent countries to invoke its jurisdiction against the perpetrators.

23. He highlighted the steps that the Government of the Republic of Indonesia had taken towards ratifying the Rome Statute, including steps to build and develop both normative and institutional infrastructure. By the promulgation of the Presidential Decree No. 40 Year 2004 on the National Plan of Action on Human Rights 2004-2009.

24. In this regard, the first step taken was improving the existing laws and regulations through incorporating detailed provisions on human rights. Secondly, the Government of the Republic of Indonesia built all necessary institutional infrastructures by establishing human rights-related institutions to monitor the implementation of all human rights-related legislation, such as the establishment of a robust National Commission on Human Rights. Thirdly, the Government of the Republic of Indonesia also established a special court, the Human Rights Ad Hoc Court, within the Central Jakarta District Court, that has authority to examine and to pass a decision on grave human rights violations.

25. Finally, the Delegate noted that these actions reflected that the Government of the Republic of Indonesia was performing its human rights obligations as mandated by the 1945 State Constitution, whereby the Government of the Republic of Indonesia is obliged to uphold the value of humanity and justice in order to protect its citizens and to further promote the world order based on freedom, eternal peace and social justice.

26. The **Delegate of Malaysia** noted that one of the major issues under consideration in the "non-paper" was the formulation of a definition for the "crime of aggression" as provided under Article 5(2) of the Rome Statute. The Delegate noted the progress of the deliberations in the Special Working Group on the Crime of Aggression (SWG), especially the work of the Inter-sessional Meetings in Princeton. The Delegate also noted that the principal proposals contained in the 2002 Co-ordinator's Paper, the 2007 Chairman's Paper and the Chairman's Non-Papers and that the Chairman was continuing to provide redrafts of provisions based on the views advanced by the participants. The Delegate understood that work had also begun on the elaboration of the Elements of Crime as required under Articles 121 and 123 of the Rome Statute if the proposed definition is to be considered by the Review Conference. He also understood that failing consensus on the proposed definition, the SWG would table a definition with all the variants for the further consideration of the Review Conference.

27. With reference to the issues highlighted by the AALCO Secretariat at paragraph 14 of its paper on this agenda item, Malaysia stated its views as follows:

28. The Delegation supported the separation of the definition issue (Article 8bis) and the jurisdiction issue (Article 15bis). In relation to the definition of the "Crime of aggression, the Delegate reiterated its preference for variant (a) as it provides the Court with the widest possible reach in terms of providing for various acts that would enable the ICC to have jurisdiction against different categories of individuals committing such offences. Further, it also appeared to give more flexibility to the Prosecutor in determining whether such crime had been committed and individual responsibility for it. In this regard, the Delegate was of the view that the law of attempt as stated in Article 25(3)(f) of the Statute should be applicable to the crime of aggression, similar to other crimes that come under the purview or jurisdiction of the ICC.

29. In respect of the leadership clause and Article 25 of the Statute, the Delegate was of the view that it should not be applicable to the crime of aggression because the wording of paragraph 1 of Art. 8bis already focused the crime on the individual committing the crime; the *actus reus*, being to lead or direct, and the defined roles being the planning, initiation or execution of the proscribed acts. Further, the construction of the words in Article 8bis totally differs from the construction of the words under Articles 6, 7 and 8 of the Statute, which require the applicability of Article 25(3).

30. On the issues of attempt and command responsibility under Articles 25(3)(f) and 28 in relation to the crime of aggression, the Delegate was of the view that in determining individual responsibility, Article 28 is not applicable because it provides for vicarious liability of the commanders in respect of the crime committed by their subordinates within their control. However, reference to Article 28 in Article 8bis paragraph 3 should still be retained because responsibility for the commission of a crime of aggression can be attributed to the actions taken solely by the commanders in their capacity as leader of an operation.

31. On the conditions for the exercise of jurisdiction, the Delegate noted that his country had consistently opposed conferring precedence in the determination of an act of aggression to the Security Council. The ICC should be conferred inherent and independent jurisdiction to determine the situation and its jurisdiction over this particular crime, much in the same way as the other three crimes. He was further of the view that, by virtue of Article 16 of the Statute, the Security Council had been conferred a wide power to order the ICC to defer or stop any investigation or prosecution. Thus, any objection from the Security Council, if it so requires, should be under Article 16.

32. Nevertheless, if it was decided that the Security Council should be given a role in determining the existence of a State act of aggression, in the context of an investigation of an individual's crime of aggression, the proposed green-light procedure in Article 15bis of the Chairman's Non-Paper may be further considered. On the issue of the duration period for determination of an act of aggression by the Security Council, the General Assembly or the International Court of Justice, one month should be sufficient as the ICC was not seeking their determination in exercising its jurisdiction but only notifying the said bodies of the matter before the ICC.

33. On the issue of defining the conduct of the State, the Delegate was of the view that the phrase "act of aggression" was more appropriate than "armed attack" because of the existence of General Assembly Resolution 3314, which defines, acts of aggression. It was noted that not all acts of aggression necessarily involved an armed attack. With reference to the Non-Paper by the Chairman, which proposed the incorporation of the terms stated in Article 3 of that Resolution into paragraph 2, his Delegation was agreeable to this proposal. Regarding the issue of formulation, his Delegation prefered to adopt the wording in General Assembly Resolution 3314 as a whole and not be limited to Article 1 and 3 only. It should be adopted in full because the provisions need to be read together as a whole as they are inter-related.

34. Finally, in relation to the trigger mechanism and the issue of the Security Council referral and the practice of self-referral, the delegate noted that not all the grounds in Article 13 of the Rome Statute would be fully applicable to the "crime of aggression" as it is proposed to be defined. Nor would Article 15bis procedure be strictly relevant in these cases. These issues merit further study before any decisions on modification of the existing formulations are made.

35. On the issue of prosecutorial discretion and victims rights, the Delegate noted that the general provisions in Articles 54(b), 68 and 75 of the Statute would be generally applicable. Since that matter was not under discussion in the SWG, Malaysia sought clarification on what, if any, additional proposal AALCO or its Member States may have on these matters.

36. The **Delegate of the People's Republic of China** extended appreciation and gratitude to the Asian-African Legal Consultative Organization (AALCO) for its efforts to promote international criminal justice. The consideration of the ICC issue by this Organization is conducive to updating the knowledge of all Member States in relation to the recent developments of the Court in a timely manner and to enhancing the communication and cooperation among all Member States with a view to effectively bolstering criminal justice on both national and international levels.

37. The delegate stated that China had always supported the establishment of an independent, just, efficient and universal international criminal court for the purpose of combating and punishing the most serious international crimes. Since the beginning of the negotiation of the Rome Statute, China had been making constructive contribution to the whole process of establishing the ICC. Through tackling some very important cases, the Court had entered its operational phase, striving to vindicate its authority and achieve its universality. The Delegate believed that the ICC would fully comply with the relevant provisions of the UN Charter, carry out its functions in an objective and just manner and contribute to international peace and security.

38. The delegate reiterated two points: First, the Court's activities should be conducted in strict compliance with the principle of complementarity set forth in the Rome Statute and be a true complement to national judicial systems. Serious international crimes should in the first place be handled and punished by national judicial systems. The Court should not take the place of a State in the exercise of its inherent power and functions.

39. Second, as far as the definition of Crime of Aggression is concerned, his country had been actively participating in the consideration of the definition by the Special Working Group on the Crime of Aggression set up by the Assembly of States Parties to the Rome Statute. There are still different views on a couple of issues at this moment. He hoped that this problem would be properly resolved within the framework of the UN Charter, as had been duly reflected in Article 5, paragraph 2 of the Rome Statute, providing that "such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

40. The **Delegate of Japan** recalled that in October 2007, Japan had acceded to the Rome Statute of the International Criminal Court. The delegate pointed out that the ratification process was not an easy task. As he was personally involved in the negotiation of the Rome Statute in the capacity of rapporteur to the Preparatory Committee of the ICC. At the end of the Rome Conference, it was the Japanese Government's view that although it supported the cause of the ICC, Japan's ratification seemed a tall order since the gap between the obligations provided in the Statute and the existing domestic legal mechanisms of Japan was too wide to surmount.

41. The Delegate mentioned that in practice, usually a treaty is not concluded without introducing the relevant domestic laws and regulations necessary to honor the obligations of the treaty. As the Japanese Government tends to stick to this practice rigidly, therefore, Japan did not even become a signatory to the Statute.

42. The Delegate also mentioned that since that time the Government of Japan had done enormous work to overcome this difficulty. Introducing a comprehensive law criminalizing all the crimes of the ICC in the Japanese domestic legal order was a theoretical option but seemed unrealistic. In the end they solved this issue by introducing a domestic law that focused on cooperation with the ICC.

43. The Delegate noted with satisfaction that 16 Member States of the AALCO had ratified the Statute, and especially that some African countries are proactively engaged in the process of the ICC. He invited other members of the AALCO to join the Court and to that end was ready to share the know-how regarding the ratification process with those countries that are interested.

44. As for the debate on the Crime of Aggression, the Delegate attached great importance to having a clear definition, which may be broadly accepted by the international community. He felt that this is indispensable to developing rule of law in the world. Although the challenge seemed to be enormous, Japan would spare no efforts to work with other countries to come up with a consensus on the definition.

45. Regarding the definition of an act of aggression by a State, Japan was hesitant to use the language of the United Nations General Assembly Resolution 3314 as it was not purported to be a legally binding text. However, if the language of the Resolution were to be used, the international community should refer to the entire text of the Resolution since that text was produced by a delicate balance through negotiation.

46. The **Delegate of the Republic of South Africa** stated that the year 2008 marked the tenth anniversary of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Since the adoption of the Rome Statute of the International Criminal Court a decade ago, a number of important milestones had been reached. The Rome Statute entered into force, and subsequently the Court was established and operationalised.

47. The delegate mentioned that the Court was seized with the situations in the Democratic Republic of Congo, Uganda, the Central African Republic and Darfur, Sudan. The Court's caseload has therefore been steadily rising, and cases against four suspects who had been arrested, were proceeding.

48. The Delegate said that for the first time in history the world has a judicial institution aimed at terminating impunity for the perpetrators of the most serious crimes of concern to the international community, and it is proving to be effective. However, as had been said before, the Court would only be able to sustain its present momentum if it obtains the support from all States, and called on States that had not ratified the Rome Statute, to do so expeditiously and on States that had done so, to provide all possible cooperation to the Court.

49. However, he highlighted that the Rome Statute was not yet complete: Article 5(2) required that the crime of aggression should be defined, and only once defined, could the Court exercise jurisdiction over the ultimate international crime. This crime, already identified in the Nuremberg Charter, and widely regarded as a crime under international customary law, is now the subject of intense deliberations in the Special Working Group on the Crime of Aggression, established by the Assembly of States Parties. The process, ably chaired by Liechtenstein, is based on a draft text proposed by the Chair.

50. He recalled that the latest meeting of the Special Working Group had taken place in New York during the Resumed Sixth Session of the Assembly of States Parties, from 2 – 6 June 2008. He was pleased to

note that with regard to the definition of the individual's conduct, broad consensus had been reached, also with regard to the leadership nature of the crime of aggression, limited to persons controlling the military and political action of a State.

51. As regards the definition of the State act of aggression, broad consensus was also emerging, as the outstanding issues, especially the place of and reference to General Assembly Resolution 3314 (XXIX) on the definition of aggression, were being considered, studied and analysed. The major definitional issue that remained were the conditions for the exercise of jurisdiction, and especially the role of the Security Council in that regard. The Delegate called on all States Parties and States participating in the proceedings of the Special Working Group to work towards an acceptable and workable compromise in this regard, taking the important principle of equality before the law duly into account, in order to ensure that the mandate of the Special Working Group could be successfully completed well in advance of the Review Conference scheduled for 2010.

52. While referring to another important issue he said that the modalities for the entry into force of any amendments to the Statute pursuant to defining the act of aggression, was an important issue that would henceforth require attention of the Special Working Group, and the deliberations on that important issue required the active participation of all States Parties.

53. The Delegate welcomed the positive recommendations in the report of the Facilitator of the Review Conference on the offer by Uganda to host the 2010 Review Conference. South Africa's support for the Ugandan bid had been placed on record before, but he wished to repeat it. He was convinced that Uganda would meet all the required criteria for the Review Conference and looked forward to a positive decision in that regard by the Assembly of States Parties during its upcoming Seventh Session. He understood that the offer by Argentina made during the Resumed Sixth Session, was an alternative one, to be considered in case Uganda's bid was not adopted.

54. Finally, he also welcomed the decision by the Coalition for the International Criminal Court to host a conference commemorating the tenth anniversary of the adoption of the Rome Statute next month in Johannesburg, South Africa. The Delegate commended all the civil society initiatives aimed at disseminating information about the Court and its activities, assisting the Court in various ways, enhancing the implementation of the Rome Statute in domestic jurisdictions and training lawyers and government officials.

55. **The Observer Delegate of Greece** informed AALCO about a Conference that was organized by the Greek Ministry of Foreign Affairs, on the International Criminal Court, which took place on the island of Santoini, two weeks ago, a few days after the Sixth Resumed Session of the Assembly of States Parties. The Conference was entitled: "The International Criminal Court and the dynamics of its evolution – Ten years after the Rome Conference".

56. The Conference was attended by about 30 participants from all geographical regions, and included several participants from AALCO States. From the office of the prosecutor there was the Deputy Prosecutor, while other officials and judges from the ICC and the ICTY also participated.

57. The Observer mentioned that the purpose of the Conference was to provide, in accordance with a wish many times expressed in the Assembly of States Parties, a forum for discussion and brainstorming, in view and anticipation of the Review Conference to be held in 2010. Participants spoke in their personal capacity, so as to promote frank and open expression of views

and putting forward of suggestions. The topics covered were, "The ICC, so far", a topic which took stock of the evolution of the ICC up to now, including the most recent developments. Another one was the very hotly debated issue, that of "Peace and Justice" which was unavoidably pertinent given the fact that the ICC may be called to act and is in fact called to act and judge in the context of an ongoing conflict, i.e. not necessarily ex post facto.

58. Yet another topic discussed was, definition of the Crime of Aggression, where the international community stood now and what are the prospects of success until the Review Conference as well as at the Review Conference itself.

59. She informed that there was also discussion regarding the question of the venue for the Conference as well as, mainly, regarding its substantive content, i.e., the possibilities for amendment proposals apart from aggression.

60. The Observer mentioned that in order to keep the brainstorming and unofficial character of the Conference, there would be no formal conclusions. There would however be a resume, which would be reported to the Assembly of States Parties.

61. Finally, she hoped that, together with similar initiatives around the world, the momentum for the ICC and to further development would be kept alive and vibrant into the future, particularly as the Review Conference was nearing.

B. Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties

62. **Amb. Tabatabaei Shafiei, Deputy Secretary-General of AALCO** in his introductory remarks recalled that the topic was introduced at the Thirty-Sixth Session of AALCO (Tehran), upon a proposal made by the Government of Islamic Republic of Iran, in 1997. He stated that since then, the topic had been considered at successive Sessions of the Organization. Some of the important conclusions reached on the basis of the discussions at the Annual Sessions of the AALCO were: (1) Extraterritorial measures or the promulgation of the domestic laws having extraterritorial effects with the imposition of unilateral attributions and objectives, namely secondary boycotts, where violation to the sovereign rights and economic interests of a State; (2) they violated the core principles of territorial sovereignty, as well as political integrity of other States and principles of non-interference in internal affairs of other countries which had been enshrined and rejected by the Charter of the United Nations; and (3) lastly, they were a major constraint in the way of trade and economic cooperation between States.

63. He highlighted that in the response submitted to the United Nations Secretary-General by 86 UN Member States, out of which 23 were AALCO Member States, as to whether they had laws and measures that had extraterritorial effect, it was clearly demonstrated that there was a crystallization of State practice which considered extraterritorial application of national legislation as violation to the core principles of the Charter of the United Nations. While all the States have the right to development, application of these measures was detrimental to that right of the targeted States and victimized the most disadvantaged sections of society in those States.

64. Condemning the recent additional and new sanctions imposed against the AALCO Member States, Myanmar, Islamic Republic of Iran, Syrian Arab Republic and the Republic of Sudan on baseless grounds by the United States of America, the DSG urged the Member States to strongly disapprove these sanctions.

65. The DSG noted that the Secretariat in preparation of the study on the agenda item relied largely upon the views, materials and other relevant information provided and furnished by the AALCO Member States. In this regard, he reiterated the Secretariat's request to the Member States to provide it with relevant legislation and other related information on this topic.

66. In conclusion, the DSG urged all the Member States not to recognize and to reject the promulgation and application of unilateral extraterritorial coercive economic measures imposed by any State against any third party.

67. The **Delegate of the Islamic Republic of Iran** expressed his sincere appreciation to the Secretariat of the AALCO for preparing the report on the agenda item. The delegate expressed that in an era of rapid and unprecedented changes, the world needed peace, security and stability, which could be strengthened through the collective responsibility of countries and also through, *inter alia*, respect for sovereignty, rejection of interference in the internal affairs of other States, refraining from compulsion and intimidation, as well as the creation of an enabling environment for replacing conflict and unequal relations with dialogue and negotiations.

68. His delegation was of the view that the unilateral sanctions and extraterritorial measures against other countries were not admissible under international law and flagrantly constituted a direct interference with the ability of the third States to cooperate with others and carried out their foreign trade. From legal point of view, he noted that, it violated various principles of international law, *inter alia*, non-interference in internal affairs, sovereign equality, freedom of trade, and peaceful settlement of disputes, and presented a serious threat to world peace and security. This fact had been repeatedly reflected in the numerous resolutions of the different organs of the international community, particularly in the resolutions adopted by the UN General Assembly and ECOSOC.

69. The delegation further highlighted that the unilateral sanctions were in contradiction with the Charter of the United Nations. Article 2, Paragraph 4 obliges all UN Members to refrain in their international relations from the threat or use of force. The notion of "force" encompassed all aspects including military, economic forces and other forms.

70. Moreover, the delegation was of the belief that such measures reduced existing actual and potential capacities of targeted countries in the very important areas of health and education, which were the basic elements in every social welfare programme. This in itself delayed the development of their economic infrastructure and resulted in further exacerbation of regional social and economic outlook. Enforcement of unilateral coercive economic measures, in defiance of the Charter, had inflicted grave and irreparable losses, including a heavy financial and human toll, on the targeted countries. Coercive economic measures as a means of political and economic compulsion, in particular through the enactment of extraterritorial legislation, were not only against the well-recognized provisions and principles of international law and the Charter of the United Nations, but also threatened the basic fabric of international peace, security and stability and violated the sovereignty of States. They also impeded and constrained settlement of disputes through the promotion of mutual dialogue understanding and peaceful means.

71. As a legal basis, the delegation opined that the proponents of unilateral sanctions mostly refer to the notion of countermeasures. However it was not justifiable, in particular with respect to extraterritorial sanctions on that basis. Countermeasure was a tool that enabled an

injured State to take measures against a State which was responsible for an internationally wrongful act in order to induce that State to comply with its obligations. There were some pre-requisites. Countermeasure should not affect the basic principles of international law, in particular human rights law and international humanitarian law. Furthermore, countermeasures must be proportional and such conditions were not available in extraterritorial sanctions.

72. Considering the above-mentioned facts and reasoning, his country was of the view that such coercive measures had a serious adverse impact on the overall economic, commercial, political, social and cultural life of the targeted countries.

73. To this effect, the delegate noted that his country, as one of the affected countries, reserved its right to lodge its complaint against Governments enacting those measures, through the adoption of concrete actions. He urged all the countries should, in the true spirit of multilateralism and sincere observance of international laws and regulations, avoid resorting to and enacting such measures.

74. At the end, the delegate appreciated the efforts by the AALCO in this respect and desired that the Secretariat retains this item on the agenda of the future Session of the Organization with the view to carry on and to enrich the already-conducted extensive study of the subject.

75. The **Delegate of the Republic of Indonesia** conveyed her profound appreciation to the Secretariat for its hard work to provide comprehensive information on the background of this issue and its development, as well as for providing clear and firm observation and comments on the particular issue.

76. The delegate stated that her country strongly rejected and refused any form of extraterritorial application of any kind of national legislation, either in the form of legislative acts or executive orders, whose effect had an impact on the sovereignty of other States and the legitimate interest of their entities and individuals in violation of norms of international law. Promulgation of domestic laws having extraterritorial effect could violate the core principles of territorial sovereignty and political integrity and therefore constituted a violation of cardinal principles of international law.

77. The delegate observed that in international community, State was the highest source of authority. Thus, States were sovereign, equal and have the same rights and obligations in international community. This principle was clearly enshrined in Article 2 paragraph (1) of the Charter of the United Nations.

78. The delegate further noted that the international legal system was different from the domestic legal system. Domestic legal system, in nature, was characterized by its vertical system where the States' authority was controlled and commanded by its central authority or the administration-in-power. States' authority was carried out by the three branches of the States, namely, the executive, legislative, and judicature. There was a separation of powers for preventing the arbitrary exercise of powers by States and for checks and balances, on the other hand, international legal system was characterized by its horizontal relationship, where there was no central government and no separation of powers. Thus, no enforcement bodies existed in international law. International law norms were enforced because States enforced it within its authority.

79. Against that backdrop, her delegation maintained its position that the promulgation or application by any State of any law affecting the sovereignty of other States should be rejected. Apart from violating the principle of sovereignty and

territorial integrity, the exercise of the extraterritorial application of national legislation could pose a serious challenge to the efforts of the international community to establish an equitable, multilateral, non-discriminatory, rule-based trading system and question the very basis of the primacy of international law.

80. The delegate observed that the extraterritorial measure was a tool for developed countries to put political or economic pressure against any country. Thus, it was distressing to note the fact that the target of sanctions imposed by a State through its national legislation always addressed to the developing countries. Asian and African countries had been and were the prime targets of such unilateral imposition of sanctions having extraterritorial effects.

81. The delegate cited the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, *inter alia*, which states that no State may use or encourage the use of unilateral economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights. The said norms were also contained in the general principles governing the international trading system and trade policies for development contained in relevant resolutions, rules and provisions of the United Nations and the World Trade Organization.

82. Therefore, her country was of the view that the use of unilateral coercive economic measures adversely affected the economy and development efforts of developing countries in particular and had a general negative impact on international economic cooperation and on worldwide efforts to move towards a non-discriminatory and open multilateral trading system.

83. The delegate also drew the attention to the UN General Assembly Resolution No. A/RES/56/179, dated 24 January 2002. Her delegation once again reiterated the need to effectively implement that resolution, where it was urged to the international community to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that were not authorized by relevant organs of the United Nations or were inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravened the basic principles of the multilateral trading system.

84. The **Delegate of Malaysia** stated that the continued extraterritorial application of national legislation by certain countries as well as unilateral imposition of targeted sanctions against sovereign foreign nations and their citizens seriously undermined the primacy of the rule of law in the governance of inter-state relations. Such actions were also a blatant disregard of the strictures of the Charter of the United Nations and international law and ignored the repeated condemnation of the UN General Assembly through its resolutions.

85. The delegate also emphasized that the extraterritorial measures disregard agreed dispute settlement mechanisms, be it for the maintenance of international peace and security as enshrined in Chapter VII of the Charter of the UN, or for trade and economic purposes in the World Trade Organization ('WTO') Agreements. In that regard, the humanitarian hardships of innocent civilians caused by unilateral targeted sanctions, by executive orders or otherwise should also not be forgotten.

86. Expressing the events of 2006 – 2008 which also caused grave concern, the delegate stated that despite the express objections of the vast majority of the global community, certain States continued to invoke national laws to impose unilateral

sanctions against other States or their nationals, particularly where the first-mentioned States had failed to convince the Security Council to invoke its powers under Articles 40 and 41. These incidences had been clearly enumerated at paragraphs 20 – 29 of the Secretariat study and did not require further elaboration.

87. The delegate expressed that his country reiterated its views that national laws that have extraterritorial application contrary to the norms of international law were a clear violation of international law. They also contravened the principles of sovereignty, equality of States, non-intervention and non-interference in the internal affairs and freedom of trade and navigation. In addition, they carried serious implications for the well-being and socio-economic development of innocent peoples.

88. His country further reiterated that the impact of the implementation of sanctions against targeted States and third States needed careful consideration to avoid unintended consequences and implementation difficulties. Based on the most recent outcomes of unilateral targeted sanctions, it was clear that such sanctions could be counter-productive. Instead of forcing the submission of the targeted States, the delegate reinforced their commitment to resolve the offending policies or actions which could cause detriment of all parties. As generally, acknowledged targeted States always be able to find willing investors and entities, other than those from the sanctioning State, to carry out their business and other activities.

89. To reject the application of such unilateral measures as tools for political or economic pressure, the delegate stressed the need to consider the negative impact that they have on the realization of the human rights of all peoples, and on the right of peoples to self-determination.

90. The **Delegate of the People's Republic of China** stated that the Charter of the United Nations had established sovereign equality as one of the basic principles of international law. Under this principle, no country should infringe upon the sovereignty of other countries on the ground of domestic legislation. Imposing arbitrary sanctions on extraterritorial entities or actions on the strength of domestic legislation violated the basic principles of international law, gravely undermined the authority of international law, infringed upon the sovereignty of other countries, and eroded the peaceful coexistence of the international community.

91. His country was of the belief that all countries should develop friendly relations on the basis of the UN Charter and equality, and all countries have the right to make independent decisions on its political, economic and social system and development path. His country always stood for resolving international conflicts through dialogue and cooperation, and opposed all forms of hegemony and power politics and any move of imposing sanctions against others by abusing domestic legislation.

92. The delegate observed that as globalization gained momentum, more and more issues needed to be addressed by the whole world. No country could resolve all the issues in the world by itself and no single system could suit the needs of all countries in the world. All countries should stick to the principles of peace, development and cooperation, pursue mutual trust on the basis of equality, seek common ground while shelving differences and properly resolve their conflicts and differences on the basis of respecting the basic principles of *interdomestic* law. His country was ready to work with other countries to build a harmonious world, enjoy lasting peace and common prosperity.

93. The **Delegate of Democratic People's Republic of Korea** stated that the issue had been drawing growing concern of the international community daily due to the negative nature, consequences and the number of countries suffering had increased.

94. Reacting to the unilateral sanctions and executive orders by the United States against other countries including his country, the delegate opined that the very acts were gravely violative of the UN Charter and international law, particularly, the international humanitarian law and human rights law, undermining national sovereignty and adversely affecting the lives of the people as well as the sustainable development of the developing countries.

95. The delegate said that although countries in the past refuted and rejected the imposition of laws with extraterritorial impact, the US practice of applying its national legislation had been unheeded and continuing. The US unilateral economic and financial sanctions continued to strain the countries commercial and financial transactions with trading partners and affected with people's lives and in all socio-economic developments. Further, his country had been victimized and was suffering for over half a century. This has caused immeasurable political and economic damage and loss due to the unjustifiable US sanctions and embargo.

96. In that regard, the delegate noted that the Economic and Social Commission for Asia and the Pacific in its on report wherein the application and impact of unilateral coercive economic measures against his country was cited, had mentioned that the trade and investment restrictions imposed by the US since 1950s, and modified on numerous occasions, had adversely affected activities which were necessary for economic growth and development in his country.

97. The delegate drew attention that application of unilateral sanctions by the individual country to other countries brought serious negative consequences in their efforts to establish an equitable international order and to international peace and security. Therefore, he emphasized that it was imperative and urgent to find a legal mechanism that could check, question and ask accountability for all forms of sanctions and executive orders imposed by an individual country applying its national legislation to the third parties especially to other countries.

98. In that regard, his delegation was of the view that AALCO Member States should look at the nature and consequences of the issue in a more and deeper legal perspective and join efforts in finding out a way that could practically prevent those acts of extraterritorial application of national legislation by instituting a legal mechanism that questions and asks accountability and cares for the compensation of affected parties and countries.

99. The **Delegate of Japan** stated that his delegation wished to touch very briefly upon Japan's attitude concerning the measures applied by the United States toward Cuba.

100. The delegate explained that his country considered that the economic policy of the United States toward Cuba was a matter of bilateral nature. However, his country shared concerns that the two US legislations enacted in1996 and 1992 respectively could cause the extraterritorial application of domestic law, not allowed under international law, in the event that they affect the economic activities of the companies and nationals of third countries. From that standpoint, his country had consistently voted in favor of the UN General Assembly resolutions which took up such concerns. On the other hand, his country had also a deep interest in the situation relating to human rights and

democracy in Cuba and appealed to find the ways to improve the situation.

101. The **Delegate of Myanmar** stated that his country had been experiencing this problem as a target State. All those sanctions and the executive orders were not only illegal and contrary to international law but also pre-empted by federal legislations. He further explained that under the foreign commerce clause of the Constitution of the United States, which constituted an impermissible intrusion into an area reserved for the federal government, and these local measures were an impermissible usurpation of federal authority under the Supremacy Clause of the Constitution of the United States of America.

102. Thus, his delegation was of the belief that the agenda should be studied not only in the area of international law but also with the constitutional law approach, because these laws were local measures which has effects on the sovereignty of other States by USA. Therefore, the delegate emphasized to study the agenda item following a Constitutional law approach.

103. In that regard, he referred to the Article VI of the United States Constitution that provided the laws and treaties of the US were "the Supreme Law of the Land" and prevail over, or pre-empt, state and local enactments. Thus, any local law that purports or regulates or governs a matter explicitly or implicitly covered by federal legislation was pre-empted even if it is in any area.

104. The delegate noted that the principal US trade measures that could be objected under the WTO systems were: first, prohibition of any importation into US of products of Myanmar origins; second, prohibition on imports from certain companies; third, freezing assets; fourth, prohibition of the exportation or re-exportation directly or indirectly, to Myanmar of any financial services from the US or by a US person, wherever located; and fifth, denial of visa.

105. His delegation observed that the US restrictive trade measures were inconsistent with various WTO provisions, in particular with: (1) Articles I-XI and XII of the GATT 1994, and (2). Articles II, III, VI, XI, XVI and XVII of the GATS.

106. The delegate stated that even if the measures were wholly or partly in conflict with the above-mentioned provisions, these measures impeded the attainment of the objective of GATT 1994. The objectives which were being impeded, notably, were: the expansion of production of trade, the overall balance of rights and obligations between WTO members, and the principles recognized in GATT Jurisprudence, that WTO member should not try to force other WTO members to change their sovereign policies through trade sanctions.

107. His delegation observed that the promulgation of domestic laws having transnational or extraterritorial coercive measures effect on the sovereignty of other States and legitimate interest of their entities and individuals in violation of norms of international law, also impeded the attainment of the objective of GATT 1994, and was against the development process and enhancement of human rights in developing countries.

108. The delegate appealed to the Forty-Seventh Annual Session that this item should be kept in the agenda of next Forty-Eighth Session and continued to be studied, not only in the area of international law but also with Constitutional law approach for more elaborations.

109. In conclusion, the delegate reaffirmed that his country was strongly opposed to bad laws having transnational coercive measures effect on the sovereignty of other States.

110. The **Delegation of Republic of South Africa**[1] noted with appreciation the United Nations Secretary-General's Report A/62/124 of the Repertory of Practice of United Nations Organs and the Repertoire of the Practice of the Security Council and commended the work that had been achieved until then in that regard on the measures that should be taken in the improvement of the working methods of the Security Council and its Sanctions Committees, as well as the assistance that should be accorded to third States affected by the imposition/application of sanctions.

111. In particular, their delegation took cognizance of the following when any study of sanctions was done, namely, the rule of law and the strengthening of the United Nations to make it more effective. They observed that any imposition of sanctions should be done in accordance with the rule of law as well as the principles of the Charter of the United Nations. Such sanctions should be used only when all other remedies as provided for in the Charter have been exhausted, and no other option existed for bringing a recalcitrant State into line. In the imposition of sanctions, proper care should be taken that they should be reasonable and proportionate and not unfairly prejudicial in their scope, and should be lifted as soon as the objectives were achieved. They should be non-selective with a clear purpose and targeted to mitigate their humanitarian effects. Furthermore, care must be taken to ensure that sanctions does not cripple the economy and infrastructure thus precipitating poverty, bearing in mind the debilitating effect sanctions had on the most vulnerable of communities and people within a society.

112. The delegation remained concern at how easily some countries resorted to the imposition of unilateral economic sanctions against developing countries. These unilateral sanctions caused tremendous loss in export earnings to already fragile economies thus exacerbating the problem of a country's weak economic foundation and high dependence on trade. They believed that the imposition of unilateral sanctions lack legitimacy.

113. Finally, the delegation recalled the General Assembly resolution A/RES/60/23 and the provisions for assisting third States affected by the imposition of sanctions, as well as the work done by the Working Group on general issues on sanctions and the informal Working Group set up by the Security Council. They called upon the implementation of all General Assembly resolutions aimed at extending assistance to third States affected by sanctions.

The Meeting was thereafter adjourned.

[1] The Statement was not delivered by the Republic of South Africa. It was submitted to the Secretariat for inclusion in the Official Records.