



**INTRODUCTORY STATEMENT BY PROF. DR. RAHMAT MOHAMED,
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'INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS'**

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**Mr. President, Hon'ble Ministers, Attornies-General, Excellencies,
Distinguished Delegates, Ladies and Gentlemen,**

It is indeed an honour and privilege to introduce to this august gathering the agenda item "International Criminal Court: Recent Developments" contained in Secretariat Document AALCO/51/ ABUJA/ 2012/ S 9.

The International Criminal Court (ICC), established by the Rome Statute in 1998 filled in the gaps left by ad- hoc tribunals (Nuremburg and Tokyo established by the Allied powers and tribunals at Rwanda and Yugoslavia established by the United Nations Security Council), previously established to deal with criminal breaches of international peace.¹ The Rome Statute and the ICC came into force in 2002.

The ICC's mandate is to dispense justice without undermining ongoing peace processes. The endeavor is always to make the perpetrator of international crimes accountable; however, attempts are made to bolster reconciliation and negotiation efforts as well.

After ten years of its establishment, on 14 March 2012, in the first verdict issued by an ICC Trial Chamber I of the International Criminal Court (ICC) decided unanimously that Thomas Lubanga Dyilo is guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities from 1 September 2002 to 13 August 2003. At present, 14 other cases are before the Court, three of which are at the final stage of trial.

¹ Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22(4) AM. U. INT'L L. REV. 54 – 541 (2007); *see also*, Song, *infra* note 27 at 4.

The President of the Assembly of States Parties to the Rome Statute, Ambassador Tiina Intelmann (Estonia) welcomed the rendering of the verdict of Trial Chamber I in the above mentioned case and stated that “this verdict, which completes the trial phase of the first-ever case before the International Criminal Court, demonstrates that the ICC works: the system set up by the Rome Statute to bring an end to impunity for the worst crimes under international law is an operational reality. We have left the age of impunity behind us and entered the age of accountability”.

Mr. President, Excellencies, Ladies and Gentlemen, it may be recalled that AALCO has been following the developments relating to the work of the ICC since its Thirty Fifth Session at Manila (1996). Apart from this, AALCO has also conducted Seminars and Work Shops on specific thematic concerns relating to the ICC. For three consecutive years in 2009, 2010 and 2011 AALCO in collaboration with the Governments of Japan and Malaysia and the ICC Secretariat convened three Expert Group Meetings on various issues and challenges facing the ICC in New Delhi and Putrajaya. Subsequently, reports of these meetings were disseminated to the Member States. I thank the Governments of Japan and Malaysia as well as the ICC for rendering technical and financial support in hosting these events.

The issues for focused deliberation at the Fifty-First Annual Session could be the following: (i) the relationship between the ICC and the UN Security Council; (ii) the principle of complementarity in light of the post ICC Review Conference developments; (iii) why Asian states are hesitant to ratify the Rome Statute; (iv) the immunity of Heads of States; (v) it is critical that States Parties and non-state parties to the Rome Statute strengthen their domestic legal institutions; (vi) domestication of the provisions of the Rome Statute into the domestic legislations and (vii) imparting proper training to Prosecutors and Judges (State parties and non State-Parties) about the provisions of the Rome Statute.

Mr. President, Excellencies, Ladies and Gentlemen, having said that, I would like to draw your attention to some more pertinent information relating to the ICC.

The ICC has a more global outreach than ad- hoc tribunals, given that such tribunals were geographic and situation specific and their creation depended

on the political will of the international community at that time.² A permanent court, founded by an international treaty and achieving near-universal acceptance, the ICC is truly an advancement in the sphere of international criminal justice. Some of the core features that enhance its achievements are encapsulated below:

1. **Jurisdiction:** The ICC's jurisdiction is limited to crimes committed by nationals of or in the territory of States that voluntarily submit to its jurisdiction. It does not exercise retroactive jurisdiction, limited to events taking place after the Rome Statute came into force in 2002. With respect to subject-matter jurisdiction, it has the authority to try war crimes, crimes against humanity as well as genocide.³ Further, its ability to exercise jurisdiction over the crime of aggression, the definition of which was adopted at the 2010 Kampala Conference, will depend on a final decision that will be taken in 2017⁴. Therefore, one may note that the ICC has an expansive jurisdiction, both territorially, given that it has 121 States Parties⁵ and covers by subject-matter most of the serious international crimes witnessed by the world today.
2. **Complementarity:** The ICC is a court of last resort and the notion of complementarity under the Rome Statute is premised on the basis that a case before that Court is only admissible when national courts are 'unwilling or unable' to investigate or prosecute the statutory crimes concerned⁶. Complementarity can be brought up as a challenge to the admissibility of a case by the accused, *suo motu* by the ICC or by a State with national jurisdiction⁷. Also, a State which has referred a matter to the Court may regain jurisdiction under Article 17 and 19 by a judicial submission to the Court⁸. Thus, the State needs to have put in place a

² Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22(4) AM. U. INT'L L. REV. 54–541 (2007)

³ *Id.* at 542-543

⁴ Song, *Infra* note 27.

⁵ States Parties, International Criminal Court, available at <http://www.icc-cpi.int/Menus/ASP/states+parties/>

⁶ Patricia O'Brien, *The Role of the International Criminal Court*, Seminar on International Criminal Justice, Trusteeship Council, 19th May, 2011 at 5, available at http://untreaty.un.org/ola/media/info_from_lc/seminar_int_criminal_justice.pdf

⁷ *Id.*

⁸ *Id.* at 6

credible national accountability mechanism, going further than legislative sanctions or arrest warrants. Under Article 16 of the Statute, by a Chapter VII resolution, may request the Court to suspend any investigation or prosecution for a one- year period⁹. Article 95 also allows for postponement of the execution of cooperation requests, without affecting the State's obligation to cooperate¹⁰. The ICC through this flexibility may ensure that it may not be seen as a stumbling block to peace processes that may gather momentum. (In 2007, when peace processes gathered momentum in Uganda, the ICC arrest warrants were seen as an obstacle, however, such negotiations finally broke down, after which an ICC prosecution, was an aid to bringing the perpetrators to justice¹¹)

3. **UN-ICC cooperation:** Another highlight of the position of the ICC in the international sphere may be adjudged through its close cooperation with the United Nations, bringing to it the paramount legitimacy of a near- universal criminal court. This partnership, solidified by a Relationship Agreement in 2004, has only been progressively evolving and expanding¹². Cooperation requests are now standard procedure, such as the highly publicized issue of confidential information in connection with the Lubanga case¹³.
4. **Victim Outreach:** This particular feature of the ICC which is different again from the ad hoc tribunals, allows for the participation of victims in international proceedings, beyond being witnesses for the prosecution¹⁴. The ICC may also order reparation for victims including restitution, compensation, and rehabilitation¹⁵. The ICC has the obligation to take into account the particular interests of victims of violence against women and children. The Trust Fund for Victims also has a mandate to assist victims outside the context of the court proceedings, and it has already supported tens of thousands of beneficiaries¹⁶.

⁹ *Id.* at 8

¹⁰ *Id.* at 8

¹¹ *Id.* at 5

¹² *Id.* at 9

¹³ *Id.* at 9

¹⁴ Song, *infra* note 27 at 6

¹⁵ *Id.*

¹⁶ *Id.*

The establishment of the ICC signaled the conviction of the international community that justice is an intrinsic component of durable peace. Therefore, the objective of the ICC is to find a solution which is compatible with the Rome Statute and, to the greatest extent possible, with local and traditional cultures and national laws so that accountability is ensured and justice and peace work effectively together. With respect to reconciliation efforts, since amnesties and impunity for those bearing the greatest responsibility for serious crimes is not consistent with the Statute, it is argued that the ICC is an obstacle to peace¹⁷. However, the ICC, besides its efforts to prosecute serious crime, creates conditions conducive to reconciliation and negotiation processes.

By ensuring that the most responsible people are held individually responsible for the atrocities they committed, the ICC can prevent entire groups -national, ethnic or religious groups from being stigmatized by the rest of society¹⁸. By neutralizing major players in the perpetration of serious crimes, and providing the victims an objective forum, the ICC facilitates the creation of new, violence- free environment and society¹⁹.

The Court's intervention aids in focusing international attention towards these horrific crimes²⁰. International attention contributes in building up international pressure to deliver justice to the victims by punishing the perpetrators. This also helps in the cohesion of the world in matters relating to international criminal justice. The threat of the Court's intervention can help to bring the belligerents to the negotiating table²¹.

In N. Uganda, for instance, as a result of the warrants issued against the LRA's senior commanders, the LRA felt able to take part in the peace process²². Finally, the Court can help to marginalize those who bear the greatest responsibility for serious crimes and exclude them from the negotiating frame²³. This occurred in the International Criminal Tribunal for

¹⁷ Fatou Bensouda, *Justice, Reconciliation and the Role of the International Criminal Court*, 6 February, 2008, Brussel at 7, available at http://www.idea.int/resources/analysis/upload/080204_Final_version_re-Justice_-reconciliation_Fatou_Brussels_Feb_08.pdf

¹⁸ *Id.* at 8

¹⁹ *Id.*

²⁰ *Id.* at 9

²¹ *Id.*

²² *Id.* at 10

²³ *Id.*

the former Yugoslavia where two of the accused Generals Mladic and Karadzic were marginalized in the peace process which resulted in the Dayton Peace Accords, therefore enhancing the legitimacy of the negotiations²⁴.

The ICC has been referred situations by three State parties to the Rome Statute (Uganda, Democratic Republic of Congo and the Central African Republic) and by the Security Council (situation in Darfur, Sudan and situation in Libya, both non- State parties).²⁵ In March 2010 and October 2011, the Pre- Trial Chamber II and III respectively, granted the Prosecution the authorization to open an investigation *proprio motu* in the situation in Kenya and Côte d'Ivoire.²⁶

All these developments show that the ICC is playing an increasingly active and central role in the global struggle against impunity. But to achieve a truly global reach, the ICC requires as many States to ratify the Rome Statute as possible.²⁷

Mr. President, Excellencies, Ladies and Gentlemen, at the same time, it should be remembered that ratifying the Statute was far from being enough. A genuine commitment to the Court required the adoption of necessary implementing legislation. The outcome of the Review Conference has clearly demonstrated that the principle of complementarity would remain as one of the pillars for the effective functioning of the Court, and to be used as the Court of last resort. This principle needs to be further strengthened.

In this regard, it is pertinent to mention that despite, the repeated calls from the Secretary-General of the United Nations for universalization of the Rome Statute; it has evoked lesser participation particularly from the Asian States.

²⁴ *Id.*

²⁵International Criminal Court, Situations and Cases, available at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/>

²⁶ *Id.*

²⁷ Judge Sang-Hyun Song, *The Role of the International Criminal Court*, Speech to the Committee on Foreign Relations, Senate of the Republic of Philippines, Manila 2011 at 8, available at <http://212.159.242.181/NR/rdonlyres/98C0610D-26E2-4921-8248>

AF4B436C6916/283073/110307ICCPresidentspeechtoPhilippineSenateForeignR.pdf

Mr. President, Excellencies, Ladies and Gentlemen, generally speaking the situation of non-party States is governed by article 34 of the *Vienna Convention on the Law of Treaties*, which states that: “A treaty does not create either obligations or rights for a third State without its consent.” Nevertheless, significant legal issues arise concerning the relationship between non-party States and the *Rome Statute*. These issues, can be broadly divided into questions of jurisdiction of the Court and cooperation with the Court. Many of these concerns were expressed by the Member States of AALCO during the recent Expert Group Meeting on the Rome Statute of the ICC: Issues and Challenges, which was held in Putrajaya, Malaysia and has been, discussed in Part IV of the AALCO Secretariat document. Besides, some non-State Parties have expressed concern regarding the immunities of Heads of States particularly if it is a Monarch. Some other States are also apprehensive of the cost that would entail in becoming a Party i.e. the annual contribution to the ICC, which would be an additional burden on their economies.

The other major challenges before the ICC are mainly universality, sustainability and complementarity. In order to achieve the universality of membership of the Rome Statute, it should be recognized that each country has its own legal culture and ratification of the Statute that which has different political implications on the home front of each State. Therefore, sustainable efforts should be taken on the part of international community to iron out the differences, misconceptions revolving around the Rome Statute of the ICC and thereby accommodate the non-States parties in to the system to attain the universality of the international criminal justice system.

Mr. President, Excellencies, Ladies and Gentlemen, I thank you all for a patient hearing, and open the floor for discussions.