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**ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION**



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**THE INTERNATIONAL CRIMINAL COURT: RECENT  
DEVELOPMENTS**

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## **INTERNATIONAL CRIMINAL COURT: BASIC FACTS**

### **Introduction**

The International Criminal Court (ICC) is a permanent tribunal that will investigate and try individuals-not States for the most serious international crimes: genocide, crimes against humanity and war crimes. The Court was established by the Rome Statute of the International Criminal Court on 17 July 1998, when 120 States participating in the “United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court” adopted the Statute. This is the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.

The Statute sets out the Court's jurisdiction, structure, and functions and it provides for its entry into force 60 days after 60 States have ratified or acceded to it. The 60th instrument of ratification was deposited with the UN Secretary-General on 11 April 2002. Accordingly, the Statute entered into force on 1 July 2002. As of now, there are 139 signatories and 89 Parties to the Rome Statute. The ICC has jurisdiction over crimes committed in the territories of States Parties and over crimes committed by nationals of States Parties. States that do not ratify the Statute can, however, chose to accept the Court’s jurisdiction in particular cases. This means that crimes committed before this date cannot be brought to the Court –this is known as non-retroactivity.

### **Invoking of Jurisdiction**

Cases can be brought to the ICC in three ways. Both a State Party and the Security Council of the United Nations can refer a situation to the Court for investigation. In addition, the ICC Prosecutor can start an investigation based on information that is received from victims, non-governmental organizations, or any other reliable source. The ICC will rely on State co-operation in its investigation and prosecution of cases. The ICC will not have its own police force and will work side by side with national authorities.

### **Seat**

The seat of the Court is The Hague in The Netherlands. The Court was inaugurated on 11 March 2003 at its seat.

### **Organs of the Court**

The Court is composed of the Presidency; the Chambers; the Office of the Prosecutor; the Registry.

Eighteen judges are permanent members of the Court and are elected by secret ballot at a Meeting of the Assembly of the States Parties. Only the nationals of States Parties can be nominated and elected for the position of Judges and Prosecutor.

The Presidency composed of the President (Mr. Philippe Kirsch) First (Ms. Elizabeth Odio Benito) and the Second (Ms. Akua Kuenyehia) Vice-Presidents is elected by the Judges.

The Appeals Division is composed of the President and four other judges; the Trial and the Pre-Trial Division of not less than six judges each.

The Office of the Prosecutor acts independently as a separate organ of the Court. It is headed by the Prosecutor, who is elected by secret ballot by an absolute majority of the Assembly of the States Parties.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the function of the Prosecutor. It is headed by the Registrar, who is elected by an absolute majority of the judges.

### **The Presidency**

The Presidency is composed of the President and First and Second Vice-Presidents all of whom are elected by an absolute majority of Judges for a three year renewable term. The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. However, the Presidency will coordinate and seek the concurrence of the Prosecutor on all matters of mutual concern.

### **Chambers**

The judiciary of the Court is composed of three divisions: (i) Appeals Division; (ii) Trial Division; and (iii) Pre-Trial Division.

Each division is responsible for carrying out the judicial functions of the Court. The Appeals Division is composed of the President and four other judges, the Trial Division and the Pre-Trial Divisions of not less than six judges each.

### **The Office of the Prosecutor**

The Office of the Prosecutor is an independent organ of the Court responsible for receiving referrals of situations and information on crimes within the jurisdiction of the Court.

The mandate of the Office is to conduct investigations and prosecutions of crimes that fall within the jurisdiction of the Court. The Prosecutor may start an investigation upon referral (by a State Party or by the Security Council, acting under Chapter VII of the Charter of the United Nations) of situations in which there is a reasonable basis to believe that such crimes have been or are being committed.

The Prosecutor may also receive information on such crimes provided by other sources, and, after a preliminary examination of the material received and following an authorization by the Pre-Trial Chamber, may start investigations.

**The Registry** The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. It is headed by the Registrar, who is the principal administrative officer of the Court and exercises his/her functions under the authority of the President of the Court.

The Registrar is elected by the judges in plenary session, taking into account any recommendation by the Assembly of the States Parties.

# **THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS**

# THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS

## I. INTRODUCTION

1. The Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, sets out the Court's jurisdiction, structure and functions. With the election of judges and the Prosecutor and the appointment of the Registrar, the International Criminal Court (hereinafter the "Court" or "ICC") is fully constituted and is now a functioning judicial institution.

2. It is nearly two years after the entry into force of the Rome Statute and in this period two sessions of the management oversight and legislative body of the ICC-the Assembly of States Parties (ASP) has taken place. ASP-I took place from 3-10 September 2002, later its first and second resumed meetings took place respectively from 3 to 7 February 2003 and 21 to 23 April 2003. The Second Session of the Assembly of States Parties (ASP-II) took place from 8-12 September 2003. All these meetings took place at the UN Headquarters in New York.

3. The Secretariat Report<sup>1</sup> prepared for the 42<sup>nd</sup> Session of the Organization *inter alia* focused upon the First Session of the Assembly of States Parties, its two resumptions; the inauguration of the Court on 11 March 2003; follow-up of developments on the crime of aggression; and bilateral agreements of the United States of America granting immunity to US citizens from prosecution before International Courts.

4. The First Session of the Assembly of States Parties (ASP-I)<sup>2</sup> adopted a number of important instruments providing for practical arrangements and coming into operation of the Court.<sup>3</sup> Among the important matters addressed during the two resumptions<sup>4</sup> was the

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<sup>1</sup> AALCO, *The International Criminal Court: Recent Developments*, AALCO/XLII/Seoul/2003/ S 10 and Add. 1.

<sup>2</sup> For details 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.

<sup>3</sup> 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

election of 18 judges of the International Criminal Court. The inaugural meeting of the judges was held at The Hague on 11 March 2003, on which occasion the elected judges gave their solemn undertakings under Article 45 of the Rome Statute. The judges elected Judge Philippe Kirsch (Canada) as the first President of the 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 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. On 24 June 2003, the Judges elected Mr. Bruno Cathala (France) as the Registrar of the Court.

5. The Secretariat Report prepared for the consideration of the 43<sup>rd</sup> Session of the Organization will briefly elucidate upon the following: AALCO's work programme on the ICC; Second Session of the Assembly of States Parties (ASP-II); 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 42<sup>nd</sup> Session of the Organization, as well as at the United Nations (General Assembly and Security Council) in year 2003; bilateral immunity agreements entered into by the United States of America with several countries. Finally, it attempts to identify some issues for focused deliberations at the forthcoming 43<sup>rd</sup> Session of the Organization at Bali, Indonesia.

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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.

<sup>4</sup> *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.*

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

6. The AALCO has been following the developments relating to the establishment of the ICC since its 35<sup>th</sup> 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 35<sup>th</sup> (Manila, 1996) and 36<sup>th</sup> (Tehran, 1997) Sessions of the AALCO.

7. The Organization at its 37<sup>th</sup> Session (New Delhi, 1998) noting that a Conference of Plenipotentiaries was to be held in Rome from 15<sup>th</sup> June to 17<sup>th</sup> 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.

8. At the 38<sup>th</sup> 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.

9. At the 39<sup>th</sup> 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 40<sup>th</sup> Session.

10. At the 40<sup>th</sup> 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 41<sup>st</sup> Session.

11. At the 41<sup>st</sup> 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 42<sup>nd</sup> Session.

12. In the rationalization of agenda at the 42<sup>nd</sup> 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”.

13. At the 43<sup>rd</sup> Session (Bali, 2004), the agenda item on “The International Criminal Court: Recent Developments” is being considered as a deliberated item.

### III. SECOND SESSION OF THE ASSEMBLY OF STATES PARTIES (ASP II, NEW YORK, 8-12 SEPTEMBER 2003)

14. The agenda for the Second Session of the Assembly of States Parties (ASP-II) *inter alia* was<sup>5</sup>: (a) Report on the activities of the Bureau; (b) Report on the activities of the Court; (c) Establishment of the Secretariat of the Assembly of States Parties; (d) Consideration and adoption of the budget for the second financial year; (e) Adoption of scale of assessments; (f) Consideration of audit report; (g) Election of Deputy Prosecutor; (h) Election of members of the Committee on Budget and Finance; (i) Election of members of the Board of Directors of the Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and families of such victims; (j) Report of the Special Working Group on the crime of aggression; and (k) Establishment of an International Criminal Bar.<sup>6</sup>

15. *Report of the International Criminal Court:* The ASP considered the Report submitted by the ICC. The Report provides a general overview of the specific steps that have been taken over the past year (September 2002-September 2003) to conduct efficient, transparent and fair investigations and prosecutions. It contains an overview of the activities of (I) The Court: (a) Presidency Chambers; (b) Office of the Prosecutor; (c) Registry; and (II) External Relations: (a) Relations with States Parties; and (b) Relations with the Host State.

16. *Election of Deputy Prosecutor:* Mr. Serge Brammertz<sup>7</sup> of Belgium was elected as Deputy Prosecutor for Investigations by an absolute majority in the first and only round of a secret ballot (receiving 65 of 87 votes). The Assembly decided that the term of the office of the Deputy Prosecutor would be six years and that it should begin to run from 3 November 2003 following the date of election. In a ceremony held at the Court, in The Hague, on 3 November 2003, Mr. Brammertz made his solemn undertaking as Deputy Prosecutor (Investigations) of the ICC.

In the selection process, the Prosecutor, after scrutinizing one-hundred and thirty applications, invited fourteen candidates for interview and thereafter nominated Mr. Serge Brammertz (Belgium); Mr. Hassan Bubbacarr Jallow (The Gambia) and Vladimir Tochilovsky (Ukraine). Mr. Hassan Bubbacarr Jallow later withdrew his candidature.<sup>8</sup>

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<sup>5</sup> For details see *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second Session, New York, 8-12 September 2003*, ICC-ASP/2/10. Also see following *UN Press Releases*: “Assembly of States Parties to Rome Statute of International Criminal Court to meet 8-12 September, L/3046 dated 5 September 2003; “International Criminal Court Now a Functioning Judicial Institution: Assembly of States Parties told, as it Begins One-Week Session”, L/3047 dated 8 September 2003; “States Parties to International Criminal Court Elect Serge Brammertz of Belgium Deputy Prosecutor”, L/3048 dated 9 September 2003 and States Parties to International Criminal Court End Session by Approving 2004 Budget, Fund for Poorest Countries”, L/3051 dated 12 September 2003.

<sup>6</sup> *Official Records*, note 5, pp. 3-4.

<sup>7</sup> 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.

<sup>8</sup> Mr. Jallow has been appointed new Prosecutor of the International Criminal Tribunal for Rwanda on 4 September 2003 through a resolution adopted by the United Nations Security Council.

17. *Election of the members of the Board of Directors of the Victims Trust Fund:* The Assembly elected by acclamation five prestigious individuals as 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); Mr. Tadeusz Mazowiecki (former Prime Minister of Poland and Chairman of that country's Robert Schuman Foundation); Mr. Desmond Tutu (South Africa, Archbishop Emeritus and Nobel Peace Prize Laureate); and Ms. Simone Veil (France, former Minister of State and former President of the European Parliament). The Fund's Board would be responsible for the disbursement of funds to individuals the ICC finds to have been victims of genocide, crimes against humanity and war crimes. They will serve a three-year term, commencing from 12 September 2003, during which they will be responsible for setting up the structure and management criteria for the effective operation of the Trust Fund.

18. *Establishment of the Secretariat of the Assembly of States Parties:* The Assembly also agreed to the establishment of a permanent Secretariat of the Assembly of States Parties.<sup>9</sup> The Secretariat, part of the Registry of the ICC, but under the authority of a Director who reports directly to the Assembly, will be based in The Hague and begin its work in January 2004.<sup>10</sup> The Secretariat would provide the ASP, the Bureau and its subsidiary bodies with independent substantive servicing as well as administrative and technical assistance and it will take over the responsibility that the UN so far has had vis-à-vis the meetings of the Preparatory Commission and the ASP.

19. *Special Working Group on the Crime of Aggression:* The President, following consultations with the Bureau, appointed Ambassador Christian Wenaweser (Liechtenstein) to chair the Special Working Group. In his oral report to the Assembly, Ambassador Wenaweser said that the Group was only able to consider the definition of the "crime of aggression" and the "act of aggression". Further discussions were hampered by the complexity of the issues and the limited time for discussion. Several delegations stressed the need, at the present stage of deliberations, to focus on the legal aspects of the issue, rather than get bogged down with the political factors. The Assembly decided to annex the discussion paper on the definition and elements of the crime of aggression prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the International Criminal Court<sup>11</sup> to the Report of the Assembly.

20. *Recognition of the coordinating and facilitating role of the NGO Coalition for the International Criminal Court:* The States Parties acknowledged the important contribution of non-governmental organizations to establishment of the ICC. In a resolution, presented by the Government of Sierra Leone, the Assembly expressed its appreciation of the coordinating and facilitating role that the Coalition for the

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<sup>9</sup> ICC-ASP/2/Res. 3.

<sup>10</sup> Since 1 January 2004, the Secretariat of the Assembly of States Parties has offices in The Hague. Mr. Medard Rwelamira from South Africa, who was selected by the Bureau of the Assembly, heads the Secretariat.

<sup>11</sup> PCNICC/2002/2/Add.2. See Annex II of this Report pp. 28-30 for the Discussion Paper.

International Criminal Court (CICC) performs between NGOs, on the one hand, and the Assembly and the Court, on the other hand.<sup>12</sup>

21. *Approval of Budget:* The Assembly, through its Working Group, considered the budget for 2004 on the basis of the draft proposal submitted by the Registrar, the report of the Committee on Budget and Finance, the initial report of the External Auditor and the preliminary comments made by the Court on the External Auditors' Report. It approved appropriations totaling euros 53, 071, 846<sup>13</sup> for the Court's expenses, including euro 5.78 million for the Judiciary; euro 14.04 for the Office of the Prosecutor; euro 30.65 million for the Registry; and euro 2.6 million for the Assembly's Secretariat. It resolved that the Working Capital Fund for 2004 would be established in the amount of euro 4.43 million. The Court's Budget is almost double the budget for the first financial period reflecting the expansion of the Court towards becoming fully functional.

22. *Other Matters:* The Assembly *inter alia* adopted resolutions pertaining to (a) *Staff Regulations of the International Criminal Court which cover: staff duties, obligations and privileges; classification of posts and staff; salaries and related allowances; and promotion;*<sup>14</sup> (b) *Travel and subsistence expenses of members of the Committee on Budget and Finance;*<sup>15</sup> (c) *Term of the office of the members of the Committee on Budget and Finance;*<sup>16</sup> (d) *Establishment of a Trust fund for the participation of least developed countries in the activities of the Assembly of States Parties;*<sup>17</sup> (e) *Strengthening the International Criminal Court and the Assembly of States Parties;*<sup>18</sup> and (f) *Role of the United Nations in the Establishment of the International Criminal Court.*<sup>19</sup>

23. *Venue and dates of next Session:* The Assembly decided to hold its next ordinary session from 6 to 10 September 2004, in The Hague. It also decided that the Committee of the Budget and Finance would hold two sessions in 2004, both in The Hague, from 29 to 31 March 2004 and from 2 to 6 August 2004.

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<sup>12</sup> ICC-ASP/2/Res.8.

<sup>13</sup> On the basis of exchange rate of 1 EUR = 1.19 US\$, it amounts to US \$ 63, 247, 225.74.

<sup>14</sup> ICC-ASP/2/Res. 2.

<sup>15</sup> ICC-ASP/2/Res. 4.

<sup>16</sup> ICC-ASP/2/Res. 5.

<sup>17</sup> ICC-ASP/2/Res. 6.

<sup>18</sup> ICC-ASP/2/Res. 7.

<sup>19</sup> ICC-ASP/2/Res. 9.

#### **IV. FACTS PERTAINING TO THE FIRST POSSIBLE CASES BEFORE THE INTERNATIONAL CRIMINAL COURT**

24. The ICC has jurisdiction over the most serious crimes of concern to the international community as a whole committed after the 1<sup>st</sup> July 2002; genocide, crimes against humanity and war crimes, all of which are defined in the Rome Statute. States Parties as well as the Security Council can refer situations to the Prosecutor for investigation. The Prosecutor also has the power to initiate investigations on his or her own on the basis of information received from reliable sources with the authorization of the Pre-Trial Chamber.

25. The Office of the Prosecutor of the International Criminal Court had till date not received any referral from the UN Security Council. However, between July 2002 and July 2003, it had received 499 communications sent by non-governmental organizations and individuals from 66 countries.<sup>20</sup> The Prosecutor has announced that he was following two situations very closely. In September 2003, he said that the situation in the province Ituri in the Democratic Republic of Congo (DRC) was urgent and seemed to have been the subject of many crimes and he had selected the situation in Ituri as the first situation, which merits to be closely followed by the Office of Prosecutor.<sup>21</sup> Later, the Government of Uganda, in January 2004, referred to the Court the situation with the Lord's Resistance Army (LRA), which involves crimes apparently committed against many children. The Prosecutor has determined that there was sufficient basis to start planning for the first investigation of the International Criminal Court. Determination to initiate the investigations will take place in coming months<sup>22</sup> and "to start the investigations of two situations in 2004" is one of the priorities of the Office of Prosecutor.<sup>23</sup>

26. Brief details pertaining to these two cases are mentioned herein below.

##### **A. Situation in the Ituri Province of the Democratic Republic of Congo**

27. Speaking at the Second Session of the Assembly of States Parties, the Prosecutor of the ICC Mr. Luis Moreno-Ocampo drew attention to the distressing situation in the Democratic Republic of Congo. He said that detailed reports from several civil society organizations estimated that at least 5, 000 civilians had died as a direct consequence of violence in Ituri since 1 July 2002. The estimated total number of deaths since the beginning of the conflict ranged from 2.5 million to 3.3 million. He said that the crimes reportedly taking place there potentially constituted genocide, crimes against humanity, or war crimes- all of which fell within the Court's jurisdiction. He hoped that the national system could be reinvigorated, with the assistance of the international community, in

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<sup>20</sup> Statement of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo to the Second Assembly of States Parties, 8 September 2003, available at URL: [http://www.icc-cpi.int/otp/030909\\_prosecutor\\_speech.pdf](http://www.icc-cpi.int/otp/030909_prosecutor_speech.pdf).

<sup>21</sup> *Ibid.*

<sup>22</sup> ICC Press Release, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC", 29 January 2004. The above Press release is available on the website of the ICC at URL: [http://www.icc-cpi.international/php/news/persbericht\\_details.php?id=16](http://www.icc-cpi.international/php/news/persbericht_details.php?id=16).

<sup>23</sup> Statement of the Prosecutor Mr. Luis Moreno-Ocampo to Diplomatic Corps, The Hague, The Netherlands, 12 February 2004, available at URL: [http://www.icc-cpi.int/otp/OTP.SM20040212\\_EN.pdf](http://www.icc-cpi.int/otp/OTP.SM20040212_EN.pdf).

order to enable the Congolese, themselves, to investigate and prosecute those responsible. In case, this was not possible he was ready to take authorization from a pre-trial chamber to start an investigation. In case, the latter happens then the Congolese case could become the first case before the International Criminal Court.

28. The Prosecutor has sought the assistance of African countries in finding African solutions for the problems of the region. He has sought cooperation of States parties, as well as the Government of the Democratic Republic of Congo in his on-going analysis of the situation in Ituri. The Deputy Prosecutor (Investigations) Mr. Serge Brammertz is in charge of the work of the office regarding the situation in Ituri.

## **B. Reference of the Government of Uganda**

29. The President of Uganda Mr. Yoweri Museveni has referred the situation concerning the Lord's Resistance Army (LRA) to the Prosecutor of the International Criminal Court. President Museveni met with the Prosecutor in London to establish the basis for future cooperation between Uganda and the ICC. A key issue will be locating and arresting the LRA leadership.

30. According to different reports given to the Office of the Prosecutor, the situation has resulted in a pattern of serious human rights abuses against civilians in the region, including summary executions, torture and mutilation, recruitment of child soldiers, child social abuse, rape, forcible displacement, and looting and destruction of civilian property. The current conflict has persisted for seventeen years, during which time civilians in northern Uganda have been subjected to regular attacks.

31. The reference by the Government of Uganda is the first such referral by any State Party and could start a process that could lead to the first ever trial before the ICC.

## **V. CONSIDERATION OF ITEM DURING AALCO'S 42<sup>ND</sup> SESSION (SEOUL, REPUBLIC OF KOREA, 2003)**

32. At the AALCO's 42<sup>nd</sup> Session (16 to 20 June) held in Seoul, Republic of Korea views were expressed by AALCO Member States on the ICC. During deliberations of this item, apart from the **Legal Adviser of the International Criminal Court Mr. Phakiso Mochochoko**, delegates from Member States, namely the **Arab Republic of Egypt, Indonesia, Republic of Korea, Nigeria, People's Republic of China, Japan, and Malaysia** participated in the discussion. An overview of the discussion is as follows:

33. The Legal Adviser of the International Criminal Court called upon the lawyers from Africa and Asia, the two regions that had contributed immensely in the establishment of the ICC, to explore mechanisms for supporting the crucial work of the first ever-permanent international criminal judicial institution. He said they were uniquely placed for making the ICC a truly universal institution, not only through sharing of information and ideas, but more importantly by fostering a better understanding of the work of the Court, in its efforts to bring to justice those responsible for the most serious crimes of concern to the international community.

34. He said that the creation of the Court represented the realization of a strong consensus amongst States which was a remarkable achievement given the various interests and legal systems that contributed to the process of establishing the ICC. Once operational the Court would not only be a principal means of combating impunity, but would also contribute to international peace and security, thus filling a significant void in the current international legal system.

35. Thereafter, he mentioned about the way in which the work was proceeding at The Hague in making the Court operational and putting it's various offices and the Court in place. He highlighted the fact that the Court has progressively continued recruiting highly qualified personnel ensuring equitable geographic distribution, a fair gender balance, and representation of the principal legal systems of the world. The principle of universality, he said, was reflected in the composition of the Court, as there were 27 different nationalities in the Staff. Further, the ICC was making every effort to give representation to all States Parties in the recruitment process.

36. Thereafter, he proceeded to identify the main challenges that were inter-connected but could be grouped into (a) Strategic challenges; (b) Institutional challenges and (c) Operational challenges.

(A) Strategic Challenges: He said that making the ICC manageable and thus credible represented a significant challenge. Rendering international criminal justice involved investigation, prosecution, and a trial. All prosecutorial action had to comply with the law set out in the Statute and the Rules of Procedure and Evidence. At the most general level this would mean that any investigation/prosecution must fully respect the core notion of the Statute: complementarity. In terms of this fundamental principle underlying the operation of the Court, primary responsibility for punishing crimes under the jurisdiction

of the Court remained first and foremost with States. Only if States were either unwilling or unable to prosecute would the ICC assume jurisdiction.

He stressed that clear criteria must be developed which distinguished unwillingness and/or lack of ability to prosecute, and those criteria must become part of international diplomacy and legal language. It must be understood in each specific case that trials at the national levels would not provide an adequate response to clear violations of the Statute perceived by the Prosecutor.

However, if there are prosecutions, they must be done on the basis of a well thought thorough prosecution strategy. Within the limits of the independence of the Office of the Prosecutor and without giving the game away to the criminals that are to be prosecuted, that strategy must be communicated.

As regards the principle of complementarity, the Court's decisions on the application of that principle would be an important test of its independence. It has to be seen how the Court handles matters of judicial cooperation as the ICC lacks the wide enforcement powers, which the Ad hoc Tribunals had under Chapter VII of the UN Charter. Most of the work of the ICC would be done through judicial cooperation mechanisms, which were not very different than those at the national level.

As regards trial, they must be fair, public and must take place before a competent, independent, and impartial Tribunal without undue delay.

(B) Institutional Challenges: One of the major institutional challenges that were before the Court was the effective management by its troika-Presidency, Prosecutor and Registrar. Another institutional challenge concerned the working relationship with the Victim's Trust Fund and Counsel.

(C) Operational Challenges: As regards operational challenges before the ICC, he said that since the early days of the Advance Team, the ICC had been flooded with numerous communications from all parts of the world alleging violations of the Rome Statute. To deal with such a situation capacity would have to be created with latest information technology system, which should lead to creation of a comprehensive case management system.

37. To ensure efficiencies in trial, he suggested it would be better if the pre-trial chamber could fly to the region as compared to flying hundreds of witnesses to The Hague.

38. Finally, he emphasized that the legitimacy and independence of the ICC were very closely connected to it being perceived as an efficient and well-run organization based on principles of flexibility and scalability which meant having in place effective strategies, sound institutional structure and operational support systems, as well as a steady budget drawing on all strategic planning capability and maturity of both – the Court's and State Parties will be the guarantor of the independence of the Court.



39. The delegates generally stated that the ratification of the Rome Statute in less than four years time was a historic milestone achieved in the international justice system. They welcomed the election of the judges to ICC and its inauguration on 11 March 2003. They expressed their concern over pending issues like the elaboration of the definition of the crime of aggression, as well as the relationship between the Court and the Security Council.

40. As regards, the crime of aggression a delegate observed that an overwhelming majority considered the crime of aggression as a serious international crime and incorporation of the same to the jurisdiction of the ICC would be very significant to its credibility and would ensure a balanced and realistic approach to ending the most serious international crimes. He opined that the definition of aggression adopted by the UN General Assembly Resolution 3314 of 1974 could be a sound basis and a point of departure for both general definitions as well as for the selection of acts for inclusion in the definition. He also emphasized that the definition should be specific so as not to give rise to contentious interpretation and difficulties in proving the elements of the offence.

41. The delegate further emphasized the AALCO's determination to uphold the principle of complementarity in the strongest sense and in line with the decision made by the Heads of States or Governments of the Non-Aligned Movement (NAM), in Kuala Lumpur, in 2003. He reemphasized the importance of safeguarding the integrity of the Rome Statute and the need to ensure the impartiality and independence of the ICC.

42. Another delegate stressed that there were two pending tasks to be accomplished at the initial stage of the Court to make it successful, first, the ICC should achieve universality of jurisdiction and for that he urged upon the AALCO Member States to be more responsive towards the future of the Court; and second AALCO should contribute to reaching an agreement on the crime of aggression, for which it was imperative that the issue be discussed and a proposal on its definition be presented to the Assembly of States Parties of the ICC.

43. A delegate expressed his concern regarding the issue of immunities of some governmental personalities, which appeared unresolved by some States and stated that this was one of the reasons why some States had not yet ratified the Rome Statute.

44. Another delegate emphasized that the key to survival of the ICC would be the observance by it of the principle of complementarity in prosecuting for international crimes.

45. A delegate explaining his country's non-accession to the Rome Statute stated that it had inter alia concerns relating to (a) Effect on national sovereignty by virtue of principle of complementarity; and (b) Effect on the national legal system. On the definition of the crime of aggression, he said that the definition must be so specific that it did not give rise to contentious interpretation and difficulties in proving the offence. Therefore, he suggested an illustrative or definitive list of acts of aggression was better than generic approach as it would ensure certainty in the elements of crime to be proven.

## **VI. CONSIDERATION OF THE ITEM DURING THE YEAR 2003 AT THE UNITED NATIONS**

46. During the year 2003, the International Criminal Court has been high on the agenda of both the UN Security Council and the 58<sup>th</sup> Session of the General Assembly. While the debate in the Security Council pertained to the extension of United Nations Peacekeepers immunity, the Sixth (Legal) Committee of the General Assembly considered a resolution on the International Criminal Court, which was later adopted by the General Assembly.

### **A. Extension of UN Peacekeepers Immunity by the Security Council**

47. It may be recalled that on 12<sup>th</sup> July 2002, the UN Security Council unanimously adopted resolution 1422, consistent with Article 16 of the Rome Statute, which requested the International Criminal Court not to commence a case against any personnel in a United Nations Peacekeeping operations from a State not Party to the Statute for a twelve month period beginning 1<sup>st</sup> July 2002. The Council also expressed its intent to renew its requests for further twelve month periods for as long as might be necessary and decided that Member States should take no action inconsistent with the above mentioned provision and with their international obligations.

48. The United Nations Security Council, on 12 June 2003, vide Resolution 1487, approved a 12 month extension of immunity that effectively shields UN peacekeepers from potential prosecution by the International Criminal Court. The resolution, unless the Council decides otherwise, provides immunity from investigation or prosecution to members of UN peacekeeping missions from nations that have not ratified the Rome Statute of the ICC.<sup>24</sup> The Resolution was adopted by vote of 12-0, with France, Syria and Germany abstaining.

49. Similarly, while authorizing the establishment of a Multinational Force for Liberia vide Resolution 1497 dated 1 August 2003, the Security Council included in it a provision that gives the peacekeepers and current or former officials from a contributing State immunity from prosecution by anyone- including the newly established ICC- but their own government.<sup>25</sup> The resolution was adopted by a 12-0 vote with France, Germany and Mexico abstaining from voting as they viewed the provision granting

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<sup>24</sup> Operative Paragraph (1) of the Resolution reads as follows: “*Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise”.

<sup>25</sup> Operative Paragraph 7 in relation to the ICC of the Resolution reads: “*Decides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State”.

immunity to peacekeepers as not being in conformity with international law and their national laws.

50. The objective behind these resolutions was primarily to meet the concerns of the United States of America as regards the Rome Statute of the ICC.<sup>26</sup>

## **B. Consideration of the item at the 58<sup>th</sup> Session of the General Assembly**

51. The item “International Criminal Court” was considered by the Sixth Committee<sup>27</sup> during the 58<sup>th</sup> Session of the General Assembly. Delegations welcomed the significant progress made in the establishment of the ICC since the entry into force of the Rome Statute. They pledged their continuing support for the Court, as a vital instrument to fight impunity and reaffirmed the need to ensure the universality of the Statute. In this connection, States that had not yet done so were encouraged to become parties to the Statute.

52. Some delegations expressed regret over efforts to obtain exceptions from prosecutions through adoption of Security Council resolutions or bilateral agreements. Some delegations alluded to Security Council resolutions 1422 (2002) and 1487 (2003) and expressed the hope that they were only transitional measures, since the Court would soon demonstrate that it was an independent and impartial institution. However, the point was made doubting that the Rome Statute had fully overcome the potential of being used as a political tool to serve the interests of the powerful States. A point was also made that due to difficulties the Security Council has recently been reluctant to establish Ad hoc Tribunals, therefore it was felt that the ICC was an appropriate forum for referral of situations where crimes under the jurisdiction of the Court is believed to have been committed.

53. Delegations also welcomed the operational progress made by the various organs of Court. In particular, they were encouraged by the Prosecutor’s efforts to formulate a prosecutorial policy in a transparent manner as well as its emphasis on the principle of complementarity. While the efforts to interpret and implement the principle was welcomed, the point was also made that further work was required to clarify how it

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<sup>26</sup> For American concerns see Section VII of this Report on p. 15-16.

<sup>27</sup> The Sixth Committee considered the items at its 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> meetings, held on 20, 21 and 23 October 2003. Details of the work undertaken at the Fifty-eighth session are drawn from the Summary of deliberations available at URL: <http://www.un.org/law/cod/sixth/58/summary.htm>. The President of the Assembly of States Parties made a statement. Statements were also made by the representatives of Norway, Italy (on behalf of European Union and acceding countries-Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, the associated countries-Bulgaria and Romania, and the EFTA country, member of the European Economic Area-Iceland), **China**, Liechtenstein, **United Republic of Tanzania**, Cuba, **Republic of Korea**, **Uganda**, Trinidad and Tobago (on behalf of CARICOM), Democratic Republic of Congo, Peru (on behalf of Rio Group), Switzerland, Canada, Brazil, Gabon, Argentina, Australia, San Marino, **Japan**, **Sierra Leone**, New Zealand, **Jordan**, Ukraine, **Senegal**, Lesotho, **Nigeria**, Netherlands and observer representative of the International Committee of the Red Cross.

would be effected in practice. Some delegations also noted with interest the indication that the Prosecutor intended to focus first on the situation in Ituri.

54. Concerning issues that required follow-up, support was expressed for the continuing relationship between the ICC and the United Nations. In this regard, delegations stressed the need to conclude the relationship agreement and for the Secretary-General to be given the necessary authority to negotiate it on behalf of the United Nations. States were also encouraged to become Party to the Agreement on Privileges and Immunities. Delegations also expressed their gratitude to the Secretary-General for the assistance of the United Nations Secretariat in its capacity as temporary Secretariat of the Assembly of States Parties. Moreover, delegations welcomed the cooperation between the host country and urged the early conclusion of the headquarters Agreement. Delegations also highlighted the importance of domestic implementation of the Rome Statute. In this regard, some delegations emphasized the need for technical assistance. Delegations also expressed the need to secure the ICC financially. In this regard, States were encouraged to pay up their assessed contributions on time.

55. Delegations also stressed the importance of the work of the Special Working Group on the Crime of Aggression.

56. A number of speakers emphasized the need to respect geographical distribution of the officials of the Court, and urged that the second deputy prosecutor be elected from among candidates of the African region.

57. On the recommendation of the Sixth Committee, the General Assembly adopted on 9<sup>th</sup> December 2003, resolution 58/79 entitled “International Criminal Court”. The resolution reiterates the historical significance of the adoption of the Rome Statute of the International Criminal Court and encourages States that were not Parties to it to consider ratifying it or acceding to it without delay. It also called upon all States to consider becoming parties to the Agreement on the Privileges and Immunities of the International Criminal Court without delay. The resolution took note of the establishment of the Special Working Group on the Crime of Aggression by the Assembly of States Parties. It welcomed the establishment of the Permanent Secretariat of the ASP and called upon the Secretary-General to take steps to conclude a relationship agreement between the United Nations and the International Criminal Court and to submit the negotiated draft agreement to the General Assembly for approval. Finally, it decided to include in the provisional agenda of its fifty-ninth session the item entitled “International Criminal Court.”

### **C. Bilateral Agreements of United States of America granting Immunity to US Citizens from Prosecution before International Courts**

58. It may be recalled that after the assumption of the office of the President of the United States of America, President George Bush withdrew the American signature to the Rome Statute of the International Criminal Court. On 6 May 2002, Bush administration sent a notice to the United Nations Secretary-General (the depository) that the “United

States does not intend to become a Party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31<sup>st</sup> 2000.”<sup>28</sup>

59. The United States of America, shortly before the entry into force of the Rome Statute in July 2002, embarked on a worldwide campaign to sign bilateral agreements with individual States ensuring immunity for American citizens and those who worked under contract for the US Government. These agreements prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and US employees and nationals. These agreements, which are generally reciprocal, do not include an obligation by the US to subject those persons to investigation and/ or prosecution.

60. The concerns of United States of America, in relation to the Rome Statute, as stated by a senior US State Department Official are: (i) it undermined the role of the UN Security Council in maintaining international peace and security; (ii) it created a prosecutorial system that is an unchecked power; (iii) it purports to assert jurisdiction over nationals of states that have not ratified the treaty; and (iv) it is therefore built on a “flawed foundation”. He stated that “the United States respects the decision of those nations who have chosen to join the ICC, but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the Court” The US Administration has taken the position that the Americans, including military personnel serving as peacekeepers could become pawns in the settling of political scores by the countries enemies.<sup>29</sup>

61. A list of such “bilateral immunity agreements” commonly referred to, as “Article 98” Agreements is included as Annex IV to this Report.

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<sup>28</sup> Sean D. Murphy (ed.), “Contemporary Practice of the United States Relating to International Law”, (section on International Criminal Law), *American Journal of International Law*, vol. 96 (2002), pp. 724-29 at p. 724.

<sup>29</sup> Statement by Mr. Marc Grossman, US Under Secretary of State for Political Affairs, American Foreign Policy and International Criminal Court, remarks to the Centre for Strategic and International Studies (6 May 2002); in Murphy, *ibid.* For an exposition of the US position see Jennifer Elsea, *US Policy Regarding the International Criminal Court* (Updated September 3, 2002), Report for the Congress, Congressional Research Service, The Library of US Congress. See for a critique of the US Policy C. Jayaraj, “The International Criminal Court and the United States: Recent Legal and Policy Issues”, *Indian Journal of International Law*, vol. 42 (2002), pp. 489-511.

## **VII. GENERAL COMMENTS**

62. As of 5 September 2003, 92 States have ratified the Rome Statute of the International Criminal Court. In view of the universal nature of the Rome Statute, non-party States may examine the rationale for their becoming Party to the Statute. Since, the entry into force of the Rome Statute marks a new epoch in international justice, universalization of the Rome Statute would promote the quest of international community for a fair, effective, impartial and independent International Criminal Court.

63. The ICC will only realize its potential with concerted assistance of States, intergovernmental organizations, and non-governmental organizations. States Parties need to strengthen and defend the integrity of the ICC Statute. They should continue to provide additional financial and diplomatic support for the Court. States Parties must also adopt strong legislation implementing the provisions of the Rome Statute into national law.

64. National Implementation of the Rome Statute by including the crimes under the Statute in the national laws is required for giving effect to the provisions of the Statute. States Parties to the Statute may take the necessary steps in this direction.

65. Political differences have prevented the States from agreeing upon a consensus definition of the crime of aggression. Although work on this issue is continuing in the Special Working Group on the Crime of Aggression, its early adoption becomes important in the light of recent developments, such as the invasion of Iraq and Afghanistan by USA led Coalition Forces, without any authorization/mandate from the United Nations.

66. Prosecution by the ICC would be a very complex and expensive task. These prosecutions, as evident from the experience of ICTR and ICTY involve massive amounts of evidence that must be analyzed and classified by crime scene, type of crime, and alleged perpetrator. Such cases require a sophisticated prosecution strategy. Trials must comply with international human rights standards to ensure their legitimacy and credibility.

67. As of now in the two cases, namely the situation in Ituri and the reference by the Government of Uganda, under consideration by the Prosecutor there is likelihood of the above mentioned difficulties. The Prosecutor would require various forms of practical and logistical support in gathering information, protecting witnesses, or ensuring a secure environment for investigation. It would also require active cooperation of States and organizations for locating suspects and carrying out arrests.

68. Further, there would be intense scrutiny of ICC's performance. 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. Justice should not only be done but seem to be done.

## **VIII. ISSUES FOR FOCUSED DELIBERATIONS**

69. Resolution RES/42/10 adopted at the Seoul Session of AALCO encouraged the “Member States to consider ratifying/acceding to the (Rome) Statute”. In the light of this mandate, the reasons for lesser participation of the AALCO Member States in the ICC may be considered as one of the issues for focused deliberation at the 43<sup>rd</sup> Session of AALCO

70. The two situations being considered by the Prosecutor of the International Criminal Court needs to be closely observed as investigation and if required subsequent trial by the International Criminal Court would determine the course of international criminal justice system in future.

71. Member States may deliberate upon in the manner, in which the Organization could contribute in evolving a consensus definition of the mother of all international crimes i.e., the crime of aggression.

72. Whether the US practice of entering into bilateral agreements to secure immunity for its citizens undermines effectively the jurisdiction of the ICC and could be examined.

## Annex I

**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	—
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	—	—
23.	Nepal	—	—
24.	Pakistan	—	—

\* 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 on 13 February 2004. Also see States Parties at the website of the International Criminal Court: <http://www.icc-cpi.int>. Reference was also made to the *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2002* (UN, New York, 2003).



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

**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-five AALCO Member States are Signatories to the Rome Statute.
- ❖ Thirteen Member States have ratified the Statute. Thus, less than one-third AALCO Member States have ratified the Rome Statute.
- ❖ Out of these thirteen Member States, nine Member States, namely Botswana, Federal Republic of Nigeria, Gambia, Ghana, Mauritius, Republic of Uganda, Senegal, Sierra Leone 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 Korea.
- ❖ 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).
- ❖ Resolution RES/42/10 adopted at the Seoul Session of AALCO encouraged the "Member States to consider ratifying/acceding to the Statute". In the light of this mandate, the reasons for lesser participation of the AALCO Member States in the ICC may be considered as one of the issues for focused deliberation at the 43<sup>rd</sup> Session of AALCO.

**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	
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	
32	Colombia	10 Dec 1998	5 Aug 2002
33	Comoros	22 Sep 2000	

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\* Article 126 in para 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 60<sup>th</sup> day following the deposit of the 60<sup>th</sup> 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 13 February 2004, the number of States Parties to the Rome Statute is 92.

34	Congo	17 Jul 1998	
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	
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	
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	
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	
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	
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	

**Table III**  
**Status of the signature/ratification of the Agreement on Privileges and Immunities**  
**of the International Criminal Court\***

S. No	Member State	Status	
		Signature	Ratification
1.	Argentina	7 October 2002	—
2.	Austria	10 September 2002	17 December 2003
3.	Belgium	11 September 2002	—
4.	Belize	26 September 2003	—
5.	Benin	10 September 2002	—
6.	Bulgaria	2 May 2003	—
7.	Colombia	18 December 2003	—
8.	Costa Rica	16 September 2002	—
9.	Croatia	23 September 2003	—
10.	Cyprus	10 June 2003	—
11.	Denmark	13 September 2002	—
12.	Ecuador	26 September 2002	—
13.	Estonia	27 June 2003	—
14.	Finland	10 September 2002	—
15.	France	10 September 2002	17 February 2004
16.	Germany	14 July 2003	
17.	Ghana	12 September 2003	
18.	Greece	25 September 2003	
19.	Hungary	10 September 2002	—
20.	Iceland	10 September 2002	1 December 2003
21.	Ireland	9 September 2003	
22.	Italy	10 September 2002	—
23.	Luxembourg	10 September 2002	—
24.	Madagascar	12 September 2002	—
25.	Mali	20 September 2002	—
26.	Mongolia	4 February 2003	—
27.	Namibia	10 September 2002	29 January 2004
28.	Netherlands	11 September 2003	
29.	New Zealand	22 October 2002	
30.	Norway	10 September 2002	10 September 2002
31.	Panama	14 April 2003	—

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\* The information stated in the above table is compiled from the following website:  
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty17.asp> visited on 13 February 2004. This puts the number of signatories as 45 and Parties as 5. The Agreement would enter into force thirty days after the date of deposit with the Secretary-General of the tenth instrument of ratification, acceptance, approval or accession. In addition, France has ratified on 17 February 2004 and Sweden has signed on 19 February 2004. This is reflected in the above table and it makes the number of signatories as 46 and Parties 6.

32.	Paraguay	11 February 2004	
33.	Peru	10 September 2002	—
34.	Portugal	10 December 2003	—
35.	Senegal	19 September 2002	—
36.	Serbia and Montenegro	18 July 2003	—
37.	Sierra Leone	26 September 2003	
38.	Slovakia	19 December 2003	
39.	Slovenia	25 September 2003	
40.	Spain	21 April 2003	—
41.	Sweden	19 February 2004	
41.	Switzerland	10 September 2002	—
42.	Trinidad and Tobago	10 September 2002	6 February 2003
43.	United Kingdom of Great Britain and Northern Ireland	10 September 2002	—
44.	United Republic of Tanzania	27 January 2004	
45.	Venezuela	16 July 2003	

**Table IV : List of Bilateral Immunity Agreements of the United States of America\***

**STATUS OF US BILATERAL IMMUNITY AGREEMENTS (BIAs)**

*As of February 6, 2004, the State Department reported 75 agreements; 71 are listed here.*

**OVERVIEW**

Signatures of BIAs to-date: 71	- 45 countries have publicly refused signing
States Parties to have signed: 32	- 60 of 92 States Parties have <b>not</b> signed
States to receive permanent waivers: 27	- 22 States Parties have <b>not</b> signed despite loss of US aid
Ratifications of BIAs: 13	

<b>AFRICA – 22</b> Botswana + Democratic Republic of the Congo + Djibouti Gabon Gambia * Ghana * Guinea (unconfirmed) Ivory Coast/Cote D'Ivoire Liberia Madagascar Malawi + Mauritania * Mauritius Mozambique Nigeria + (unconfirmed) Rwanda Senegal Seychelles Sierra Leone * Togo Uganda + Zambia  <b>THE AMERICAS – 10</b> Antigua and Barbuda + Belize Bolivia Colombia + Dominican Republic El Salvador Guyana Honduras * Nicaragua * Panama *  <b>NORTH AFRICA AND MIDDLE EAST – 6</b> Bahrain Egypt (unconfirmed) Israel + Kuwait (unconfirmed) Morocco (unconfirmed) Tunisia (unconfirmed)	<b>ASIA – 15</b> Afghanistan + Bangladesh Bhutan Cambodia East Timor * Fiji India + Laos Maldives Mongolia Nepal Pakistan Philippines + Sri Lanka Thailand  <b>EUROPE/CIS – 11</b> Albania * Azerbaijan Bosnia-Herzegovina * Georgia * Kazakhstan Kyrgyzstan Macedonia, FYR * Romania Tajikistan * Turkmenistan Uzbekistan  <b>OCEANIA – 7</b> Marshall Islands Micronesia Nauru Palau Solomon Islands Tuvalu Tonga
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\* indicates ratification of BIA

+ indicates signature of executive agreement

Updated: January 16, 2004

\* The above list of Bilateral Agreements is taken from the website of the Non-governmental Coalition for



## Annex II

The Discussion Paper of the Coordinator Working Group on the Crime of Aggression deals with the Definition of the Crime of aggression and conditions for exercise of jurisdiction over the crime of aggression. Important aspects extracted from this discussion paper are enumerated herein below:

### Discussion paper proposed by the Coordinator

#### **i. Definition of the crime of aggression and conditions for the exercise of jurisdiction**

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

**Option 1:** Add “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

**Option 2:** Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

**Option 3:** Neither of the above.

2. For the purpose of paragraph 1, “act of aggression” means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

**Option 1:** Add “in accordance with paragraphs 4 and 5”.

**Option 2:** Add “subject to a prior determination by the Security Council of the United Nations”.

3. The provisions of articles 25 paragraph 3, 28 and 33 of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate:

**Option 1:** under Article 39 of the Charter of the United Nations.

**Option 2:** in accordance with the relevant provisions of the Charter of the United Nations.

5. Where the Security Council does not make a determination as to the existence of an act of aggression by a State:

*Variant ( a )* or invoke article 16 of the Statute within six months from the date of notification.

*Variant ( b )* [Remove variant a.]

**Option 1:** the Court may proceed with the case.

**Option 2:** the Court shall dismiss the case.

**Option 3:** the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

**Option 4:** the Court may request

*Variant ( a )* the General Assembly

*Variant ( b )* the Security Council, acting on the vote of any nine members, to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

**Option 5:** the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

## **ii. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)<sup>30</sup>**

### **Precondition**

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ<sup>31</sup> has determined the existence of the act of aggression required by element 5 of the following Elements.

### **Elements**

1: The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State, which committed an act of aggression as defined in element 5 of these Elements.

2: The perpetrator was knowingly in that position.

3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.

4: The perpetrator committed element 3 with intent and knowledge.

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<sup>30</sup> The elements in Part II are drawn from a proposal by Samoa and were not thoroughly discussed.

<sup>31</sup> See options 1 and 2 of paragraph 2 of Part I. The right of the accused should be considered in connection with this precondition.

5: An “act of aggression”, that is to say, an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.

6: The perpetrator knew that the actions of the State amounted to an act of aggression.

7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

**Option 1:** Add “such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof”.

**Option 2:** Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

**Option 3:** Neither of the above.

8: The perpetrator had intent and knowledge with respect to element 7.

**Note:**

Elements 2, 4, 6 and 8 are included out of an abundance of caution. The “default rule” of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.