ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT OF THE SEMINAR

ON

"THE INTERNATIONAL CRIMINAL COURT: EMERGING ISSUES AND FUTURE CHALLENGES"

JOINTLY ORGANIZED BY THE GOVERNMENT OF JAPAN AND AALCO

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PREFACE

The AALCO Secretariat has been following the developments relating to the establishment of the ICC since its Thirty-Fifth Session held in Manila in 1996. Since then, the Organization has continuously reported the developments in the ICC at its successive Annual Sessions, and most of the Member States are keenly interested in the deliberations relating to this topic during the Annual Sessions.

The year 2008 marked the completion of ten years of the adoption of the Rome Statute. Currently there are 108 States Parties to the Rome Statute; which is progressing towards universalization. This fact bears a testimony for its significance to the States Parties and towards its commitment of ensuring fair and impartial justice based on principles of international law. Out of 108 countries, 30 are African States and 14 are Asian States. Thus, this situation tends to create general interest and awareness among the Member States towards the ICC and its activities. Further, having keen interest and firm commitment towards promoting justice and the rule of law through International Criminal Law and other issues of mutual interest, AALCO had signed a Cooperation Agreement with ICC in February 2008.

Furthermore, the Forty-Seventh Annual Session held from 30th June to 4th July 2008, in New Delhi (HQ), vide Resolution RES/47/S 9, adopted on 4th July 2008 had in Operative Paragraph 6 "Requested the Secretary-General to explore the feasibility of convening an inter-sessional meeting, *inter alia*, for promotion of human rights in the backdrop of the Rome Statute of the International Criminal Court; the implementation of the Rome Statute through national legislative mechanisms; and the ways and means through which the AALCO Member States can contribute to the process of elaboration of the definition of the Crime of Aggression; and the conditions under which the ICC can exercise its jurisdiction with regard to this crime".

With the objective of pondering over legal issues relating to the Rome Statute of the International Criminal Court and its contemporary relevance to the AALCO Member States, a One-Day Seminar jointly

organized by the Government of Japan and the AALCO on "The International Criminal Court: Emerging Issues and Future Challenges" was held on 18th March 2009, in New Delhi. I wish to profoundly thank the Government of Japan for rendering financial and technical support towards the convening of the Seminar. Nearly 100 Delegates from 20 Member States, 17 Non-Member States, 4 International Organizations and several academic experts based in New Delhi participated in the highly successful day-long deliberations.

The first Review Conference of the Rome Statute is scheduled to be held in Uganda in 2010. Thus proceedings of the seminar could provide useful input to Member States participation at the Conference.

In the Inaugural Session a presentation on the topic "The ICC Today: Activities and Challenges" was made by Judge Fumiko Saiga of the ICC. The untimely demise of Judge Fumiko Saiga, shortly thereafter was a great loss to the international community as also to the people and the Government of Japan.

The discussions in the meeting were centered on the themes: "Progressive Development of International Criminal Jurisprudence: An Overview"- "Contribution of International Criminal Tribunals to the Development of International Criminal Law" - "Principles of International Humanitarian and Human Rights Law in the Rome Statute" and "ICC: Current Developments and Contemporary Challenges"- "Asian-African Perspectives on ICC" – "Issues before the First Review Conference of the Rome Statute to be held in 2010". This publication brings together the report of the proceedings of the meeting as well as the following debate. The debate in the course of the seminar was informal in nature, wherein all the participants spoke in their informal capacities and no formal resolutions or conclusions were adopted. However, in view of the forthcoming Review Conference in 2010 at Kampala, Uganda, the issues raised at the seminar would be helpful to delegates of the Member States who would attend it, in understanding some of the issues before the Review Conference.

I wish to express my profound thanks to the Chairpersons and Panelists of the three sessions of the Meeting, namely – H.E. Mr. Narinder Singh, Joint Secretary and Legal Adviser, Ministry of External Affairs, Government of India and President of AALCO; H. E. Mr. Hideaki Domichi, Ambassador of Japan in New Delhi; H. E. Mr. Ichiro Komatsu, the Ambassador of Japan to Switzerland; Ms. Dora Kutesa, Acting High Commissioner of Uganda to India; Prof. V.S. Mani, Director, School of Law and Governance, Jaipur National University; Mr. Christopher Harland, Regional Legal Adviser, ICRC; Mr. Y.S.R. Murthy, Director, National Human Rights Commission of India; and Mr. C. Jayaraj, Advocate, Supreme Court of India.

I also wish to place on record my appreciation to all my colleagues in the Secretariat, especially Dr. Yuichi Inouye, Deputy Secretary-General; Mrs. Anuradha Bakshi, Assistant Principal Legal Officer; and Mr. S. Senthil Kumar, Legal Officer for their efforts in convening the seminar as well as ensuring the publication of this Report of the proceedings.

Prof. Dr. Rahmat Bin Mohamad
Secretary-General

New Delhi
20 July 2009

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I. INAUGURAL SESSION
(9.30 A.M. – 10.45 A.M.)

1. Opening Remarks by Dr. Yuichi Inouye, Deputy Secretary-General of AALCO

Good Morning everybody. It is my pleasure to welcome all the distinguished participants to the one day Seminar on the "International Criminal Court: Emerging Issues and Future Challenges". I would like to introduce the distinguished guests of the Inaugural Session. The first is H. E. Mr. Narinder Singh who is a Joint Secretary, Legal and Treaties Division, Ministry of External Affairs, Government of India and currently, the President of AALCO. Secondly, H.E. Prof. Dr. Rahmat bin Mohamad, Secretary-General of AALCO. It is my honour to introduce H.E. Ms. Fumiko Saiga, Judge, International Criminal Court (ICC) and she will deliver the inaugural address on the today's Seminar, undoubtedly she has the first hand experiences with the ICC. I also take this opportunity to welcome H. E. Amb. Hideaki Domichi, Japanese Ambassador to India. I would also like to welcome H. E. Ichiro Komatsu, the Japanese Ambassador to Switzerland. He was also the Ex-Director General of Bureau of Treaties and International Law, Ministry of Foreign Affairs of Japan, when Japan joined the ICC.

The Seminar is divided into three Sessions. The first is the inaugural session from 9.30 AM to 10.45 AM. After the inaugural session, the working session will start at 11.15 AM which is chaired by Mr. Narinder Singh. After the lunch break at 2.30 PM, the afternoon session will be chaired by the Ms. Dora Kutesa, Acting High Commissioner of Uganda to India. The reason why we requested the Uganda High Commissioner to chair the session is because the Review Conference of the Rome Statute establishing the ICC will be held in Uganda early next year. I also

thank the Acting High Commissioner of Uganda for accepting our invitation to chair the Session in less than 48 hours in the absence of H. E. Ms. Nimisha Madhvani, High Commissioner of Uganda, who could not come back from Uganda for the Seminar. After the Seminar is over at 6.30 in the evening, the Secretary-General of AALCO is hosting the reception at the same venue and all the participants are requested to attend the function as well.

I call upon H. E. Prof. Rahmat bin Mohamad, Secretary-General of AALCO for the welcome address. Thank you very much.

2. Welcome Address by H. E. Prof. Dr. Rahmat Bin Mohamad, Secretary-General of AALCO

Good Morning everybody. H. E. Mr. Narinder Singh, Joint Secretary and Legal Adviser, Ministry of External Affairs, Govt. of India, President of the AALCO and Member, International Law Commission; Her Excellency Ms. Fumiko Saiga, Judge, International Criminal Court; H. E. Mr. Hideaki Domichi, Ambassador of Japan to India; H.E. Mr. Ichiro Komatsu, Ambassador of Japan to Switzerland, Ex-Director General of the Bureau Division and International Law, Ministry of Foreign Affairs, Government of Japan, Excellencies, Eminent Panelists of today's Seminar, Distinguished participants, Ladies and Gentlemen,

On behalf of the Asian-African Legal Consultative Organization and on my own behalf, it is my privilege and honour to welcome the Chief Guest, Her Excellency Fumiko Saiga, Judge ICC, and this distinguished gathering on the occasion of the one day Seminar on the "International Criminal Court: Emerging Issues and Future Challenges".

Let me say a few words about AALCO and its predominant role in advancing the Asian-African interest in its work and approach.

Excellencies, The Asian-African Legal Consultative Organization is a unique Organization, as perhaps, it is the only legal consultative body of its kind in the family of inter-governmental organizations. It has a rich

history of 52 years behind it in addressing the international law concerns of Asian-African States and promoting the realization of Afro-Asian perspective in the progressive development and codification of international law.

Its Membership comprises of 47 States of Asia and Africa and nearly all-important countries of the two continents are members of AALCO. A tremendous potential, particularly in Africa, exists of expanding our membership base and earnest steps are in place in this regard.

AALCO is considered to be the tangible outcome of the historic Bandung Conference of Asian-African States of the year 1955. Based upon the core principles of solidarity, friendship and cooperation amongst Asian-African States, the AALCO as a dynamic body has been providing an opportunity to a large number of Asian and African countries to actively contribute to the prevalence of rule of law in international relations. It performs a systematic and consistent analysis of the items on the agenda of the Sixth Committee of the UN General Assembly, International Law Commission and other international-law-making fora, from an Asian-African perspective. In view of the significant contribution made by the AALCO, the UN General Assembly in 1980 conferred the Permanent Observer Status to the Organization.

Excellencies, AALCO has been closely following the developments related to the International Criminal Court, since its Thirty-Fifth Session, held in Manila (Philippines) in 1996. From then onwards, the agenda has been deliberated in the ensuing Sessions of the Organization.

It is pertinent to mention at this juncture that the highest plenary organ of the Organization, the Annual Session at its Forty-Seventh Session held in New Delhi (India) in 2008 mandated me to look into prospects on this agenda item. With a view to further continuing and enriching the work of the Organization, the Annual Session requested me to explore the feasibility of convening an inter-Sessional Meeting, *inter alia*, for promotion of the human rights in the backdrop of the Rome Statute through national legislative mechanisms; and the ways and means through

which the AALCO Member States can contribute to the process of elaboration of the definition of the Crime of Aggression, and the conditions under which the ICC can exercise its jurisdiction with regard to this crime. The Government of Japan has kindly agreed to generously fund towards convening such a Seminar in New Delhi despite economic recession and on behalf of the Secretariat, I profoundly thank the Government of Japan for both financial and technical assistance.

I take this opportunity to welcome H.E. Mr. Hideaki Domichi, Ambassador of Japan to India for accepting the invitation to make introductory remarks at the Seminar.

Excellencies, the discussion in the Seminar is structured in an academic setting and the four broad topics are proposed to be addressed in two Sessions today.

It is indeed a great privilege for me to introduce Hon'ble Judge Ms. Saiga of the ICC to this illustrious gathering. She would be delivering the Inaugural address of today's Seminar. Judge Saiga had a long and successful career as a competent career diplomat with an expertise in international law. Judge Saiga was engaged in treaty negotiations and the process of ratification, as an official-in-charge of the Conventions such as: Convention on the Elimination of All forms of Discrimination against Women (CEDAW); Convention relating to the Status of Refugees and its Protocol; International Convention on Economic, Social and Cultural Rights (ICESCR) and International Convention on Civil and Political Rights (ICCPR). In 2007, Judge Saiga was elected to the ICC and re-elected in January 2009 for the next nine years. On behalf of the Organization and my own behalf, I thank you Madam, for your presence and very graciously agreeing to deliver the inaugural address.

It is also an honour for me to welcome H. E. Amb. Ichiro Komatsu to deliver the keynote address. Mr. Komatsu has a long diplomatic career with vast experience in international law issues. It is pertinent to note that Japan has joined ICC when he was heading the International Legal Affairs Bureau of Japan. Presently, he is Ambassador of Japan to Switzerland. I

am certainly confident that both your addresses would set the tone for the Seminar today for productive deliberations.

Prof. V.S. Mani, Director of Jaipur National University and Mr. Christopher Harland, the Regional Legal Adviser for South Asia, ICRC would provide their views and expertise on the theme, "Progressive Development of International Criminal Jurisprudence: An Overview". Both these distinguished personalities have been specialized in these areas and would give deep insights about the contribution of international criminal tribunals to the development of international criminal law and the principles of international humanitarian and human rights law in the Rome statute.

In the second Session, Mr. Murthy, Director (Research), National Human Rights Commission of India; Mr. C. Jayaraj, Advocate, Supreme Court of India and former Secretary-General, Indian Society of International Law; and I would be presenting our views on the theme, "ICC: Current Developments and Contemporary Challenges". Mr. Murthy would speak on the "Issues before the First Review Conference of the Rome Statute" to be held in 2010 in Kampala, Uganda and my topic of presentation would be on the "Asian –African Perspectives on ICC". We would try to consolidate the position of Asian-African Member States on the various issues which are expected to come before the Review Conference in 2010.

To chair both the Sessions, we have two eminent personalities. They are: H. E. Mr. Narinder Singh, President of AALCO, International Law Commission Member and Joint Secretary, Legal and Treaties Division, Ministry of Legal Affairs, Government of India and the other is Ms. Dora Kutesa, Acting High Commissioner of Uganda to India who represents the host country for the Review Conference of the Rome Statute in 2010. I certainly hope with their vast experience in the subject matter would guide us to conduct the Seminar in a more meaningful manner.

Excellencies, with these words, I would like to once again very warmly and cordially welcome you all to this Seminar. Thank you very much.

3. Introductory Remarks by H.E. Mr. Hideaki Domichi, Ambassador of Japan to India

Excellencies, Ladies and Gentlemen,

First of all, I would like to express my sincere gratitude to all participants gathered here today, representatives from AALCO Member States as well as members of the diplomatic missions in New Delhi, officials of international organizations, and representatives from academic circle for international law, prominent persons from the mass-media and others.

I have also the honour to attend this commemorative seminar co-hosted by the Government of Japan and the AALCO which is aimed at enhancing the coherent comprehension of the activities of the International Criminal Court.

As you all know, the AALCO has been successfully maintaining its influence over Asian-African regions for more than 50 years. Japan is one of the 7 founding members of the AALCO and its Member States have consistently been taking substantial interest in the activities of the AALCO. As the only legal consultative forum in Asia and African regions, the AALCO has been playing a vital role in the field of international law.

We think highly of the AALCO in providing support and promoting cooperation among us for international legal affairs. One of the various legal contributions by the AALCO is to constantly participate in the negotiation process of the Rome Statute since 1996. After its adoption at the Rome Diplomatic Conference in 1998 and subsequent to the entry into force of the Rome Statute in 2002, the AALCO has been tackling the agenda from the viewpoint of how to develop its relations with the International Criminal Court.

In this regard, we are quite delighted to hear that the AALCO and the ICC have concluded a Memorandum of Understanding in February 2008, with a view to elevating mutual interest and cooperation in the field of

international criminal law. Under such circumstances, the holding of the seminar is extremely timely so as to discuss emerging issues on the ICC and strengthen the cooperation between the AALCO and the ICC.

We recall that the Government of Japan deposited with the UN Secretary-General its instrument of accession to the Rome Statute in July 2007. Therefore, Japan officially became the 105th State Party to the ICC from the 1st of October in the same year. I would like to emphasize that the Government of Japan has devoted considerable efforts to enhance the rule of law so as to realize peace through justice in the international community.

At the Rome Diplomatic Conference in July 1998, Japanese delegation made a great contribution to both the formation and adoption of the Rome Statute. During the period of the preparation for the Rome Statute and even subsequent to its adoption, Japan has never weakened its commitment to the ICC and actively participated in the deliberation at its various meetings.

Today, Japan is aware of its obligations and willingness, as a State Party, to make its maximum effort to actively support the work of the ICC. As you know, the ICC was established as the first permanent international criminal court based on a treaty of which the mandate is to put an end to impunity for "the most serious crimes of concern to the international community as a whole".

This notion was certainly reflected in the hope of the international community which has been attempting to prevent and put an end to the most serious crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression. We appreciate the steady progress of the work of the ICC in recent years. This court still needs to move forward step by step, so that it can strengthen its position in the international community.

In order to make the ICC successful, we consider that cooperation at international, regional and national levels, including the cooperation

between the ICC and the AALCO is extremely important. In line with this, more contributions to the ICC not only in its substantive work, but also in the fields of finance and human resources are required. In particular, Japan is becoming more and more important and responsible for these services.

Taking this opportunity, I would like to announce that Hon'ble Judge Fumiko Saiga, who is here, was re-elected for the 9 year term at the Assembly of State Parties in January 2009. Japan deeply trusts her competence and extensive experiences in the fields of international human rights law and gender issues.

So far, the ICC counts 108 State Parties, but out of these, there are only 14 Member States from the Asian region. Therefore, the participation of Asian countries in the court is still very limited. We think that it is really crucial to strengthen the ICC's work by a wider participation and stronger presence of States from the currently under-represented areas. We hope that the accession of Japan to the ICC will encourage other States, in particular, Asian countries, to join the ICC. We also hope that this seminar will provide a good opportunity for understanding the ICC's work and lead to more accessions of Asian and African countries to the ICC.

To conclude my statement, I sincerely express my wish that today's seminar will be fruitful for all the participants here. Thank you.

4. Inaugural Address by Hon'ble Judge Fumiko Saiga on "The ICC Today: Activities and Challenges"

Introduction

Thank you, Dr. Rahmat Mohamad, for the kind introduction, and for inviting me to give this presentation. It is a very interesting time to be speaking about the international criminal court. Last year (2008) marked the tenth anniversary of the adoption of the Rome Statute, and it is clear that the Court has come a long way since its inception. Although much

of the Court's work over the past six years has gone unnoticed by the outside world-either because it was internal to the court or because it was of a confidential nature, today and especially the past few months, we see much more judicial activity. There was the start of the first ever trial in the case against Mr. Thomas Lubanga Dyilo, the confirmation hearing in the case against Mr. Jean-Pierre Bemba Gombo and the issuance of the arrest warrant against Mr. Omar Hassan Ahmad Al-Bashir.

Of course, the Court is doing much more that what you read about in the press. And what I would like to do in the next half an hour is to tell you a bit about how we have reached the point where we stand today, and, more broadly, what the ICC has to offer as a permanent international criminal court.

I look forward to your questions and comments following this address. But before I start, I would like to emphasize that all of the views and opinions I am about the express during this address are my own, and do not express the position of the Court. I also would like to ask for your understanding that I am not in a position to comment on any specific questions related to any of the pending proceedings.

I. Background of the Court

To set the present context, I would like to provide you with some brief background remarks on the legal framework of the Court. If we ask ourselves why the ICC was created, we need only to look to history. The need for the rule of law is often most dire in those situations in which national courts are unable or unwilling to exercise their function. This absence of any judicial redress is felt most strongly when there is no court that can take on cases involving core international crimes, such as war crimes or crimes against humanity. It was probably this consideration, more than anything else, which led to the wise adoption of the Rome Statute, the Court's founding legal document, in 1998. It also explains why the Rome Statute entered into force in near record time, less than four years after its adoption in Rome. States realized that there was a void that needed to be filled and that a permanent international criminal court

was not a luxury but a necessity, if the 21st century was to be any different from the preceding one.

The fact that the ICC was created to fill in the gaps left by national jurisdictions also explains the most fundamental aspect of the Court's jurisdiction, namely the principles of complementarity. Unlike some of the other international criminal tribunals, the ICC does not assert primacy over national legal systems. It was considered that there only is a need for an international court to step in if domestic justice is not forthcoming. This is why the ICC has often been described as a court of last resort. Only when domestic courts are, for a multitude of possible reasons, unable or unwilling to prosecute crimes themselves, the ICC will be allowed to step in.

And to demonstrate to you that is not a hollow principle, I can tell you that my own Chamber is currently considering a request by one of the accused exactly on this point. I can, for obvious reasons, not say much about this request, as it is still *sub judice,* but I thought I should mention it to you so that you may follow the matter if you are interested. Moreover, I think it is a prime example of one of the ICC's main characteristics – all issues, no matter how difficult or politically sensitive, are subject to clear legal principles and we judges, who are bound to uphold the law – and only the law – are responsible to make sure that the ICC sticks to its legal mandate and does not mutate into something the States Parties had never intended it to be.

This however, does not mean that the ICC's role within the international legal system is not an important one. Indeed, I believe that the States Parties want the Court to play its part on the international stage. In situations of ongoing conflict and strife, an independent external judicial institution can be a way – sometimes the only way - to ensure that the deterrent aspect of justice and the rule of law is preserved. It would perhaps be presumptuous to think that the existence of the ICC in itself will be enough to prevent conflict or at least the barbarities that so often come with it, but I think it is fair to say that the fact that the ICC exists and it is permanent, will be a civilizing factor for those who, until now,

thought they were beyond the reach of the law. Because, unlike its predecessors, the ICC is a permanent court. This means that those who are called to stand trial for alleged war crimes will not be able to just go into hiding and hope that the court will at some point cease to exist, as we are seeing in the former Yugoslavia. The fact that the ICC is here to stay means that suspects will not have peace of mind for the rest of their lives – unless they come to respond to the charges against them in open court.

The ICC's existence also sends a signal of hope to the victims of the most horrible crimes that they are not forgotten by the law. I do not like to speak in grand terms, but the promise of justice, no matter how hard or impossible it may seem to deliver sometimes, is the ultimate *raison d'etre* of the ICC.

II. The Court's Proceedings

Of course, this desire to do justice must also extend to our judicial proceedings. The ICC was created with certain core values in mind – values which are common not only to the State Parties of the Rome Statute, but to all those who are concerned with upholding human rights and the laws of humanity. In fact, Article 21 paragraph 3 of the Statute explicitly requires that the Court must act consistently with internationally recognized human rights standards in all of its activities. This translates into a very high standard of fairness and due process in our proceedings and it is the job of the judges to ensure utmost respect for the rights of the accused and the dignity of victims. This is not just our legal obligation; it is also the only way in which the ICC can maintain its credibility as an independent judicial body.

In this regard, it is important to take note of the role of the judges under the Rome Statute. Unlike judges from other international tribunals, the ICC judges have a distinctly managerial task. We are responsible for overseeing proceedings, ensuring that these are as expedient as possible and guaranteeing the rights of the Defence. Both the Rome Statute and the Rules of Procedure and Evidence provide for extensive judicial powers, such as ordering the parties to produce more evidence or

ordering for the protection of confidential information, which allow the judges to play an important role in the proceedings. Although the Office of the Prosecutor is independent and works completely autonomously, the judges are incharge of the way in which the hearings are to be conducted. In other words, although the Prosecutor remains the engine of the criminal process, the Chambers must steer it in the right direction.

Importantly, judges also act as a 'check' on the Office of Prosecutor, ensuring that only those cases that are soundly entrenched in law and supported by sufficient evidence, are brought before the ICC. In fact, when you analyse the Statute carefully, you will see that there are judicial checks on the Prosecutor at every important step along the way, from the start of the investigation until the conclusion of the trial.

One such important check is, of course, the Pre-Trial Chamber's power to issue warrants of arrest. This is a very important guarantee against so-called politically motivated prosecutions. The recent decision of Pre-Trial Chamber I, to issue an arrest warrant for Sudanese President Omar al-Bashir, but to reject some of the charges, is a case in point. I am obviously not going to comment upon this decision, but I would just like to invoke it as an example of a decision being made exclusively on the basis of the law and strict legal analysis of the evidence.

To give another recent example, the Office of the Prosecutor has received applications both from the Palestinian Authority and many NGOs, to investigate whether crimes has been committed under the Statute during the recent Israeli incursion into the Gaza. The Minister of Justice of the Palestinian National Authority came to the Court and lodged a declaration pursuant to Article 12, paragraph 3, accepting the jurisdiction of the ICC. Before the Prosecutor can proceed to seize the Court of any related matter, he must act according to statutory requirements, and issues of jurisdiction must be independently assessed by a Chamber before any investigation may begin.

I just give you this as an example to demonstrate that, while the cases before the ICC could potentially be dealing with controversial and

unpopular issues in certain corners, the procedures which the Prosecutor must follow before he is able to bring such cases leave little or no room for anything other than strictly legal considerations.

However, the Court's focus on applying the law also entails limitations, which are not always appreciated by outside observers.

III. The Court's Limited Jurisdiction

A first important limitation is the ICC's scope of jurisdiction. As most of you here will probably be aware of this, I will not dwell on this point, but just for the sake of clarity, I would like to stress that the Court's jurisdiction is limited in three ways. First, the ICC only has jurisdiction over three categories of crimes: genocide; crimes against humanity and war crimes. These crimes have been defined in great detail by the States Parties and the Court cannot hear cases that do not fall within these definitions, no matter how deserving. Second, the ICC can only look at events occurring after the 1st of July 2002, when the Rome Statute entered into force, meaning there can be no trials for events that occurred before that date. Third, and perhaps most importantly, the ICC's jurisdiction is limited geographically. The Court can only examine cases occurring on the territory of a State Party or involving the nationals thereof, unless the Court receives a mandate from the UN Security Council. You are all aware of the political nature of this body and the implications this has. In other words, although the ICC clearly is international, it is not yet a truly universal court. This means that we cannot hear all cases which fall within our substantial jurisdiction (genocide, war crimes or crimes against humanity), simply because they occurred outside the geographical scope of our jurisdiction.

The cases with which the ICC is currently seized are grouped within four different situations, namely, the situation in Uganda, the situation in the Democratic Republic of Congo, the situation in Darfur, and lastly, the situation in the Central African Republic. Apart from Darfur, all situations were referred to the Court by the respective incumbent Heads of State. Once a situation is referred as such by a State Party, it is the task

of the Prosecution to initiate an investigation against individuals which it deems may be guilty under the Statute.

Recently, there has been abundant press coverage of the activities of the Court, but there remain many misconceptions, often based in misunderstandings about the legal framework of the ICC. A common feature of many reports is the Court's perceived focus on African countries. I will not comment on some of the more acidic accusations that the ICC is a neo-colonial institution, because in my view such remarks are due to a misapprehension of the mechanism by which the Court takes on cases. Although the Prosecutor can, under the Statute, ask permission from the judges to start an investigation on his own initiative, until today all situations were referred to the Court, either by the interested State Parties themselves, or, as was the case with Darfur, by the UN Security Council acting under Chapter VII of the UN Charter. It is thus certainly not correct to think that the Court is only interested in cases from the African continent.

The fact that the situations currently occupying the Court's docket do all involve occurrences in Africa is not complete reflection of its work. The Office of the Prosecutor has carried out analysis activities on three continents and is currently examining events in Colombia, Georgia and Afghanistan, among others. This leads me to the second limitation the ICC is facing; the difficult circumstances in which the Court operates.

IV. The Conditions under which the ICC Must Exercise its Mandate

When you visit the seat of the Court in The Hague and attend a hearing in courtroom-I, it is easy to forget that the cases we are dealing with originate from some of the world's most dangerous conflict zones. This has immediate and very important consequences for the way in which our investigators can do their job. But it also has an enormous impact on the way in which we conduct our trials, because most witnesses and victims still live in those dangerous areas. Indeed, because most cases take place whilst in the state from which emanate there is still ongoing conflict,

revealing the identity of witnesses may lead to very real situations of endangerment.

Yet, at the same time, the judges must ensure that the rights of the Defence and the equality of arms principle are fully maintained. The accused have a fundamental right to know who makes accusations against them and the principle that our trial proceedings are public is a fundamental one. There is thus very obvious tension between the rights of the accused and the safety and security of the victims and witnesses who take part in our proceedings.

The judges are responsible for maintaining the right balance between these competing interests. This sometimes requires delicate balancing acts, whereby we have to engage in complex evaluations of risk and the relative importance of certain information for the Defence. For example, it may be necessary to withhold certain information from the accused in order to protect family members of a certain witness.

On a different level, it is sometimes very difficult for persons, who have gone through the worst ordeals and have been displaced from their homes and have lost almost everything; to come to The Hague and testify. For most of these individuals, it will be the first time they have left their country and you can imagine the shock they experience when they have to appear in a high-tech courtroom and confront the ones that are allegedly responsible for their suffering.

The need to provide protection and to avoid retraumatisation is obvious, but it is not always possible to find perfect solutions – mainly because the defendants also have rights which need to be protected. This is a challenge that will probably stay with us forever, and it is incumbent on the court to find ways and means to deal with the protection and wellbeing of our witnesses and the victims who wish to participate in our proceedings whilst at the same time ensuring that our trials are absolutely fair to the accused.

Although the ICC certainly bears the main responsibility in this respect, it should not be forgotten that the State Parties also have an important role to play. Without the support of States, the Court is not able to provide protection for our witnesses, who must sometimes be relocated for their security. It is therefore crucial that States are willing to accept a number of witnesses into their territory. In fact, without the support of our States Parties, the ICC could not function at all.

V. The ICC and the States

The Court does not have its own enforcement organ and therefore it does not have the possibility to arrest persons on its own. The Court also needs the support of States to collect information and to provide protection for the victims and the witnesses who are involved with the ICC.

However, sometimes local authorities are as powerless as the Court is – sometimes local authorities will even actively oppose the ICC and try to prevent us from doing our legal duty. This has led some to speak about the "complementary paradox". In a few words, this phrase highlights that there is some kind of contradiction between the ICC's function as a Court of last resort (cases are only admissible when local authorities are unable and unwilling to prosecute) and the Court's almost total dependence on the cooperation of States to carry out its mandate. And there should be no misunderstanding about this: without the cooperation of states, the ICC is very limited in what it can achieve. So, if the ICC has to operate in a region where there is a little or no support from the host State, it is absolutely crucial that other States provide cooperation.

And if it can be said that we have already achieved anything, this is to a large extent due to the support we have received from some States. The fact that we have, at the time of speaking, four persons in detention at the Schevenigen detention centre, is thanks to the cooperation of our State Parties. The most recently executed arrest warrant was in the situation of the Central African Republic; Mr. Jean-Pierre Bemba Gombo was taken into custody on Belgian territory by Belgian authorities in the month of

May this year. But there are eight outstanding warrants of arrest; four in the situation in Uganda, one in the situation in the DRC, and three in the situation in the Sudan. It is important that these arrest warrants are carried out and we rely entirely on the cooperation of States Parties to honour their obligations under the Statute in cases where a suspect for whom an arrest warrant has been issued travels within their territory.

Today, there are 108 States Parties to the Rome Statute. That is a good number, considering the short existence of the Court, but it is obviously not enough for a court with universal aspirants. We need more States to join and – very importantly – to take ownership of our institution by providing assistance and support.

There is also a natural connection with the United Nations, with which the Court has a Relationship Agreement. We continue to receive operational and other support from UN field missions and through our Liaison Office in New York. This special relationship will hopefully foster confidence in the Court's work and improve cooperation with other actors. But this is a process that will take a while. The ICC is still very new and the other players must get used to us and develop a better understanding of what we do and how we do it. This sometimes requires some time and a lot of patience, but with some goodwill solutions are always possible.

For example, on January 26th of this year, Trial Chamber-I opened the first trial, the case against Mr. Thomas Lubanga Dyilo, a national of the DRC charged with enlisting and conscripting children under the age of 15 to participate actively in hostilities. As you may be aware, this trial almost never took place. The reason for this was that there were serious problems with the disclosure of potentially exculpatory evidence. This was because the Office of the Prosecutor scrupulously honoured his obligations under article 54 (3) (e) to keep confidential information that was given to him on the basis of confidentiality agreements he had concluded with information-providers. There was an impasse: the Prosecutor had information which could be important for the defence,

but he was not allowed to share it with them because he had obtained it on strict condition of confidentiality.

However, the main problem was that the confidentiality agreements were so restrictive that not even the Chamber was allowed to see the documents to determine whether the information they contained was really important for the accused. Trial Chamber-I considered that this violated the rights of the accused and on 13th June 2008, it stayed the proceedings. In the end, the issue was resolved through negotiation between the Prosecutor's office and the information providers, who allowed the Chamber to see the materials.

What is important to note here is that Appeals Chamber agreed with the underlying principle that confidentiality agreements between the Office of the Prosecutor and information providers are binding on the Court as a whole, including the Chambers. The judges therefore have to find alternative solutions, which may include providing the information in a different form or with certain reactions. It is interesting and encouraging to note here that what seemed an intractable problem at the time now appears more like just a hiccup; part of the normal growing pains of the Court. Now that the ground rules are clear to everyone, problems such as experienced with by Trial Chamber I will probably be largely avoided in the future. And, most importantly from a legal perspective, the solution did not require the changing of or the deviation from the texts of the Statute or the Rules.

Conclusion

What can we conclude from all this? First and foremost, there is still a lot of work to be done before the ICC will become a fully mature judicial institution. I remind you, for those who do not follow the Court closely, that the first trial only started in January 2009 and that until today no case has completed the entire procedural cycle yet. This means that an important number of legal and procedural questions still remain to be addressed, which does explain why the first cases take a little longer. However, there is no reason to fear that this is not an issue that will

resolve itself over time. We are learning from our first experiences and the appropriate lessons will be incorporated in our future cases.

A second conclusion, which can safely be drawn from the past years, is the great importance of international cooperation to the work of the Court. In many of the pending cases, continued and increased cooperation is absolutely necessary. Without an arrest there can be no trial.

Third, in order to secure the legitimacy and efficacy of the ICC proper communication channels must be developed which do away with some of the mystery that currently surrounds the operations of the Court and its jurisdiction. There is hope that this will be made possible through a shift in the attitude of those countries which are still reticent towards the Court and its activities. But a lot of work still needs to be done. This is why it is so important for the Court to be able to communicate with the world. And this is why it is so important that you have given me the opportunity to address you here today. I thank the organizers for this opportunity and I thank you all for your attention.

1. Statement by H. E. Mr. Ichiro Komatsu, Ambassador of Japan to Switzerland, Ex-Director General of Bureau of Treaties and International Law

H. E. Prof. Dr. Rahmat Bin Mohamad, Secretary-General of the AALCO, H. E. Mr. Narinder Singh, President of the AALCO, Hon'ble Judge Fumiko Saiga of the ICC, Excellencies, Ladies and Gentlemen,

I am honoured to be here with you today at this seminar on the International Criminal Court jointly organized by the Government of Japan and the AALCO. It is a great privilege to have this opportunity to speak about Japan's accession to the ICC. Japan's contributions to the ICC, and other experiences from the view point of the Government of Japan.

The AALCO is a permanent international organization which was established in New Delhi in 1956 as an outcome of the Bandung Conference held in Indonesia in 1955. It has had a significant influence in the Asia-African region. In February 2008, the AALCO had signed a Memorandum of Understanding with the ICC with the objective of promoting mutual interests. It thus seems to be timely that this seminar led by the AALCO is being held in New Delhi.

In my former carnation as Director-General of the International Legal Affairs Bureau at the Ministry of Foreign Affairs, I was in charge of the AALCO, and it was during this time that Japan acceded to the ICC. From this perspective as well, it is a great pleasure for me to be able to attend and to speak in today's seminar.

1. Significance of the Establishment of the ICC

The International Criminal Court, the first permanent international criminal court on criminal matters, was established in 2002 with the objective of prosecuting and punishing individuals who committed the most serious crimes of concern to the international community, such as genocide and crimes against humanity. Since World War II, a number of international courts have been created to prosecute and punish individuals. These include, firstly, military tribunals such as the Nuremberg Tribunal (1945) and the Tokyo Tribunal (1945); secondly, special tribunals based on UN resolutions, such as the International Criminal Tribunal for the former Yugoslavia (1993) and the International Criminal Tribunal for the Rwanda (1994); thirdly, special tribunals based on agreements between the United Nations and interested countries, such as the special tribunals for East Timor (2000); Sierra Leone (2002), Cambodia (2006) and Lebanon (2007). All of these, however, were *ad hoc* tribunals. The establishment of the ICC as a permanent court is aimed at directly prosecuting and punishing individuals who committed the most serious crimes of concern to the international community as a whole in accordance with international law, and doing so without going through special procedures such as UN resolutions or concluding agreements between the United Nations and interested countries. This is a positive

step by the international community toward putting an end to impunity for the most serious crimes in accordance with the universal value of the rule of law. I heard that members of the Indian Society of International Law and other international law scholars would be in attendance today. Universalization of the Rome Statute will encourage certain new changes to the traditional perspective of international law, which fundamentally considers states and international organizations as main legal personalities, and in this regard, I hope that this seminar will offer some interesting insights from an academic perspective as well.

2. Japan's Accession to the ICC

The Government of Japan deposited its instrument of accession to the Rome Statute to the UN Secretary-General on July 17, 2007, and Japan officially became a state party to the ICC on October 1 of the same year. July 17 has been made "World Day for International Justice" in commemoration of the adoption of the Rome Statute at the UN Diplomatic Conference in Rome on that day in 1998. The Government of Japan, even prior to the establishment of the ICC, has consistently supported the idea to strengthen the rule of law in the international community in order to eradicate and prevent serious criminal acts such as genocide, crimes against humanity, and war crimes, which are of concern to the international community as a whole.

Japan's consistent cooperative approach to the ICC is based on the three major objectives: (1) preventing the most serious crimes which are of concern to the international community as a whole, (2) strengthening the rule of law in the international community, and (3) achieving more universality of the ICC.

I would first like to talk about Japan's cooperation in preventing serious crimes which are of concern to the international community as a whole. It is extremely important that we establish an international judicial system that ensures punishment for persons who committed genocide and other serious crimes which are of significant concern to the international community as a whole. Currently 108 states have concluded the Rome

Statute. Although major countries such as the United States, Russia and China have not yet concluded the Statute, the number of states parties to the ICC has been increasing in Europe and Africa. I hope the number of states parties will rapidly grow in the Asian region as well. Since the end of the World War II, Japan has concluded the Geneva Conventions, Additional Protocols to the Geneva Conventions, and so forth. It seems that Japan's accession to the ICC was a sort of culmination of the series of steps. Japan's accession enables us to support ICC activities from within and to promote further international cooperation in the area of international justice.

Secondly, since the end of World War II, Japan has consistently sought the peaceful settlement of disputes from the perspective of the rule of law in the international community in the field of international law, which is premised on a horizontal structure of sovereign states, there are difficulties in discussing "the enforcement of law" in the same sense as that in domestic law, which is premised on the existence of the central authority. Thus, it is more realistic to discuss "compliance with law" in terms of ensuring that the legal norms are being observed. Based on this perspective, Japan made a declaration to accept the mandatory jurisdiction of the International Court of Justice in 1958, the principal judicial organ of the UN, and has supported the judicial activities of the ICJ. Japan also has utilized the International Tribunal for the Law of the Sea (ITLOS) and the World Trade Organization (WTO) as the dispute settlement bodies in order to seek a peaceful solution for international disputes. The dispute settlement systems for resolving disputes between States such as the ICJ, ITLOS, and WTO, are to use the objective criteria, namely international law, render decisions or reports, and implement them with the compelling force stipulated in the respective legal system. These dispute settlement systems are different from the system of the ICC where individuals would be tried if they committed serious crimes. Nevertheless, these courts play a similar role in that they solve disputes and legal questions that occur in the international community by objectively applying the legal norm that are widely accepted in the international community. Japan's accession to the ICC, once again, both

internally and externally, demonstrated its consistent approach of aiming to strengthen the rule of law in the international community.

Thirdly, I will touch upon achieving more universality of the ICC. The accession to the ICC by more countries would undoubtedly enhance the role of the ICC as an important guardian of international humanitarian law and the law of international human rights. It seems that the universality of ICC will be enhanced by more countries joining the ICC and by supporting the ICC in terms of both financial and human resources.

3. Steps Leading toward Japan's Accession to the ICC

In July 2002, the Rome Statute entered into force and the ICC was thus established. Since Japan became an official member of the ICC in October 2007, Japan's accession to the ICC was realized about five years after the Rome Statute entered into force. During this time, the Government of Japan examined the need to join the ICC and the issues to be overcome from various angles at the practical level. Specifically, the major issues for examination involved: (1) the relationship between serious crimes in the Rome Statute and national law, (2) the necessary legislative proceedings for cooperating with the ICC, and (3) financial issues.

The most important issue for examination was the relationship between the obligations under the Rome Statute related to the most serious crimes and the obligations under the national laws to ensure the implementation of treaty obligations. Immediately after the Rome Statute was adopted, deliberations began on whether it would be necessary to make some adjustments to national laws in order to fulfill the obligations of the Rome Statute. In joining the ICC, the United Kingdom, Germany, the Netherlands, Canada, and other countries made new legislations by which all the types of serious crimes stipulated in the Rome Statute are criminalized. Meanwhile, France, Italy, and other countries did not make new legislation for criminalizing those crimes under national law as their existing laws were considered sufficient. The understanding of the

Government of Japan was that criminalization under national law of each and every type of crime under the Rome Statute is not an obligation under the Rome Statute, and thus it is left to each state party to decide on whether new legislation for criminalizing those crimes is required. As all of you know, the principle of complementarity is an important pillar of the Rome Statute. First of all, there is a broad principle that states parties themselves should first and foremost endeavour to investigate and prosecute individuals who committed the most serious crimes in the Rome Statute. Only if this is not possible, does the ICC intervene in order to ensure that the crimes do not go unpunished. Under this basic premise, the Government of Japan closely studied and examined the types of core serious crimes included in the Rome Statute and the types of crimes stipulated in Japan's existing Penal Code and so forth. It was found that the serious crimes targeted by the ICC could be punished by Japan itself with its existing Penal Code and relevant codes, with the exception of some extremely peripheral acts. These remaining peripheral acts will in any way fall under the jurisdiction of the ICC in accordance with the principle of complementarity, and therefore, it was concluded that there would not be a need for new legislation criminalizing those acts to ensure that the crimes do not go unpunished.

The second issue for examination was whether new legislation would be necessary in order to cooperate with the ICC by executing the obligations under the Rome Statute (This concerns cooperating such as arresting and surrendering suspects, providing evidence to the ICC and so on). In this regard, although these are not the "core" serious crimes of the Rome Statute, the Statute sets forth "offenses against the administration of justice": for example, destruction of evidence, perjury, threatening or bribing witnesses, bribing officials, etc. (I refer you to Article 70) of the Rome Statute. These crimes were not covered in Japan's Penal Code at the time, so it was decided that a new legislation should be made to newly criminalize them. The Rome Statute obliges state parties to cooperate when the ICC is investigating and prosecuting crimes within its jurisdiction (Article 86). As a result, it was decided that a bill for cooperation with the ICC would be enacted to include the provisions on both the punishment of acts that hinder court operation of

the ICC (related to Article 70) and the necessary cooperation with the ICC by the Government of Japan. It took nearly five years to enact the ICC Cooperation Bill, but in February 2007, in conjunction with the Diet's approval of the Rome Statute, the bill was adopted into law by the Diet.

Although it is not a legal issue, the third issue of finances posed an enormous challenge for the Government of Japan. As for contributions by States parties, the Rome Statute stipulated that it adopts the scale of assessments for the UN regular budget as the basis for that of the ICC but the Statute does not specifically stipulate a ceiling as applied to the regular budget of the UN. With the United States not expected to join the ICC for the foreseeable future, a simple calculation of Japan's scale of assessments would run up to 28% of the total contributions, which would be well over the 22% ceiling of UN scale of assessments. With tight fiscal conditions faced by the Government of Japan, this element could be a major impediment to gaining broad understanding in Japan regarding its accession to the ICC. The Government of Japan sought the understanding of relevant countries so that the same 22% ceiling as in the UN would be applied to the scale of assessments for the ICC. Following difficult negotiations, a resolution was adopted at a session of the ICC's Assembly of States Parties (ASP) in November 2006, partly thanks to the joint initiative of the so-called CANZ States, namely Canada, Australia and New Zealand, confirming that the ceiling for the UN scale of assessments would also be applied to ICC contributions. In order to push forward this type of effort by the Government, a group of parliamentarians supporting the ICC was formed in the ruling party at the Diet. There were an increasing number of calls for its swift accession to the ICC from opposition parties as well. Public relations efforts by the Ministry of Foreign Affairs and so forth were effective, and an understanding of the ICC activities deepened in the media from a humanitarian aspect. Therefore, the domestic public opinion became increasingly supportive and editorials were released in influential newspapers in favor of accession to the ICC. As a result of these various kinds of support, Japan was finally able to join the ICC in October 2007.

4. Japan's Contributions to the ICC

Since its establishment in 2002, the ICC has played an important role in eradicating and preventing the most serious crimes of concern to the international community as a whole and establishing the rule of law in the international community. In light of this important role of the ICC, Japan since its accession, has been making significant contributions to the ICC in terms of finance and human resources, in addition to playing a constructive role in the development of international criminal law.

I have already talked about Japan's financial contributions, so to avoid repeating myself, I will now speak about Japan's contributions in terms of human resources. Immediately after joining the ICC, Japan nominated Ambassador Saiga, who is present here today, as a candidate for by-election to fill three casual vacancies of ICC judge, which took place in November 2007. Furthermore, at the election of members of the ICC Committee on Budget and Finance (CBF) which also took place in January this year, Japan nominated as a candidate Mr. Lida, an expert in the administration and finance of international institutions. He will take up the position in the CBF and participate in the efficient operation of the ICC. The number of the Japanese professional staff at the ICC is currently five. This is still insufficient compared to "33 to 45", which would be the appropriate number of staff based on Japan's contribution ratio. However, Japan intends to work to provide human resources for the ICC with a view to increasing the number of the Japanese staff.

5. Membership of Asian countries in ICC

Finally, I would like to touch upon the importance of the accession by Asian countries to the ICC. The current situation is that, compared to Europe, Latin America, and Africa, the number of ICC member states is still small in the Middle East and Asia. The reasons for this may be concerns that by joining the ICC, their nationals would be surrendered to the ICC, or sovereignty such as the country's criminal jurisdiction would be restricted, and worries regarding the administrative burden, including making adjustments to national laws.

Nevertheless, as Judge Saiga and I have emphasized in my talk today, one of the pillars of the Rome Statute is the Principle of Complementarity. In other words, there is the fundamental principle that persons who committed the most serious crimes in the Rome Statute will, first of all, be punished by a national court in the state party itself, and if this can be done, there is no obligation to hand over a suspect to the ICC. The significance of the Rome Statute, as Judge Saiga has emphasized, is building a network of cooperation between the States parties and the ICC, in order to ensure that there is no safe haven anywhere in the world for persons who committed serious crimes such as genocide. Setting up a network in the international community for preventing these suspects from going unpunished will serve as the greatest deterrent for these horrendous crimes. Thank you for your attention.

Dr. Yuichi Inouye, Deputy Secretary-General, AALCO: Thank you very much Excellency. This is the end of the inaugural session. I would like to inform you all that the morning session will be start at 11.35 AM. The afternoon session would start at 2.30 P.M as per our schedule. Thank you.

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II. MORNING SESSION

Theme I: "Progressive Development of International Criminal Jurisprudence: An Overview" (11.15 A.M. – 1.00 P.M.)

1. Chair: Mr. Narinder Singh, President of AALCO

We begin our first substantive session now and the topic for the session is "Progressive Development of International Criminal Jurisprudence: An Overview". First of all, I would like to welcome two distinguished speakers: Prof. V.S. Mani, Director, Jaipur National University and secondly, we have Mr. Christopher Harland, who is the Regional Delegate of South Asia, ICRC. Prof. Mani is a distinguished Professor of International Law. He has started his career at the Jawaharlal Nehru University, New Delhi and was Director of the Gujarat National Law University. He has written extensively in prestigious international and national journals. He is author/editor of a number of books and research papers. Prof. Mani was a visiting Professor at the Faculty of Law and Politics at Tokyo and a Visiting Fellow at the Max Planck Institute of Comparative Public Law and International Law, Germany. He has lectured at the Hague Academy of International Law and has also appeared before the International Court of Justice in two cases, including one on behalf of India against Pakistan. Today, he would be sharing his views on the topic, "Contribution of International Criminal Tribunals to the Development of International Criminal Law".

Mr. Christopher Harland is the Regional Legal Adviser for South Asia, International Committee of the Red Cross (ICRC), New Delhi. Before coming to New Delhi, he was with the Legal Division of the ICRC at its Headquarters in Geneva. He has an extensive experience in conflict and post-conflict environments in Africa, Europe and Asia and his first hand experiences on the subject matter would be more useful for the today's deliberations and he is going to speak to us on the topic, "Principles of International Humanitarian and Human Rights Law in the Rome Statute".

Excellencies, in the Inaugural Session, we had heard details about the adoption of the Rome Statute by the Diplomatic Conference held at Rome in 1998. The adoption of the Rome Statute was one of the very important developments in international law that have taken place in the 20th century. The 20th century was one in which international law made great developments in a number of areas. Firstly, by setting out several international organizations such as the League of Nations and later succeeded by the United Nations, and a host of intergovernmental organizations in different areas. This was followed by the establishment of international courts as well as regional courts in number of fields for settling disputes between states. However, most of these courts only dealt with questions of public international law and disputes between States. Although, there were some regional courts dealing with human rights issues starting with European Court of Human Rights which could adjudicate on violations of human rights by individuals, and by the States. The ICC is the first permanent institution which not only adjudicates upon the gross violations of human rights, gross violations of humanitarian law, but it can ascertain the individual responsibility and can pass judgment on individuals which would be binding on the individuals. So, in this context, the ICC is the first permanent institution which has been set up to enforce the criminal responsibility of States and individuals. It is in this respect that, it is a major development in the field of international law. Reference was made to the earlier tribunals, starting from Nuremberg, Tokyo and then the Yugoslavia, Rwanda and some tribunals which were set up for specific situations. But, being the most important, ICC is the one which is now a permanent institution.

In a short period, since 1998, it already has more than 100 States Parties. Reference was made that the State Parties of ICC are 108 and Asia is not adequately represented among the States Parties. I am sure that at the Review Conference which is coming up next year some of the issues would be considered, especially the issue of the definition of aggression. As you are aware, while the ICC has the jurisdiction over the crimes of aggression as incorporated in the Statute, the definition of aggression has still not been adopted and although the Working Group which was initially set up by the Preparatory Commission and has now again been established by the Assembly of States Parties which is considering this issue for over several years and there is still no agreement on this.

Another issue which has raised some cause of concern is the attempt made by some individual countries to seek to enforce their own domestic laws and to claim universal jurisdiction. This issue came up before the ICJ also and I am sure this aspect will also consider in the Review Conference. Now, so far as India is concerned, India always supported the Universal Court having jurisdiction over serious violations of concern to the international community in the area of international humanitarian law and gross violations of human rights and crime of genocide. India participated in the process of the Rome Conference and the earlier General Assembly and also by commenting on the Work of the International Law Commission (ILC) when the draft Statute was drawn up.

Here in AALCO, we have devoted attention to the topic both during the process of adoption of Statute through its different stages and also after the adoption of the Statute at the Annual Sessions this has been one of the important topics which we have considered. Now coming back to the question of India and the Rome Statute. At the Rome Conference, one of the major concerns which we expressed was that the Court which emerged from the Conference was not the kind of Court which we had envisaged. What we had strived for truly independent international court which should have jurisdiction over the most serious violations. The role of Security Council in referring cases and its deciding capacity whether the

case is kept pending or cases should not to be heard by the ICC was one factor which in our view seriously undermines the judicial independence of the ICC and the main reason for this is the nature or the manner in which the Security Council takes its decisions. We all know, it is a political body and decisions are taken based on political considerations and Member States who participate in the decision making in the Security Council as well as those States which exercises veto to prevent any decision being taken. We now have a judicial body which is constrained by the political decision making process of another body. Apart from this, we have other concerns also that were expressed in the Rome Conference, mainly on the definition of the Complementarity. It was our view that this has not been sufficiently clear in the Statute and we look forward to see the practice of the court and that would clarify how it would deal with the issue of Complementarity and whether States concerns would be adequately addressed. Well, we look forward now to some interesting presentations by our distinguished panelists and also the discussions which would follow the presentations. I now invite Prof. V.S. Mani to make his presentation.

2. "Contributions of International Criminal Tribunals to the Development of International Criminal Law": Prof. V.S. Mani, Director, School of Law and Governance, Jaipur National University

Thank you Mr. Chairman. Mr. Chairman, President of AALCO; Madam Judge of International Criminal Court; Secretary-General of AALCO; Amb. Komatsu; and My colleague on the dias Mr. Christopher Harland; Your Excellencies, Ladies and Gentlemen,

I feel it is a great privilege to be invited by the Secretary-General of AALCO to make this presentation on a subject of great importance, but I am not very sure that how much I know about the subject. Only yesterday, International Criminal Tribunal for Yugoslavia (ICTY), the Appellate Chamber of this Tribunal gave an important judgment. Indian news media, of course, are worried about other things. So are many other news media. I had a fleeting report in BBC last night saying that Krisnic,

who was a war criminal from Bosnia, appeal had been rejected but his 27 years of prison sentence had been reduced to 20 years. The reason why I highlight this is because, domestic society generally does not follow what is happening at the international level, and it is a pity. May be, this gentlemen would be important for Bosnia and Herzegovina, even Serbia and Montenegro. Similar have been the experiences by the various important judgments given by International Criminal Tribunal for Rwanda (ICTR). Although, we the Asian-African community should closely feel for Rwanda rather than to Europe. I have seen much reference except perhaps in Hindu newspaper about some other decisions given by the ICTR. This is by way of credential. This is not only as an academic, I think we in general don't follow things which are on the international arena, but that should not be the case. The development of the concept of international crime has been rather old; it has in fact been older than the development of the concept of international jurisdiction. I make this difference, international crime and international criminal jurisdiction. The reason, why I make this difference is that the concept of international crime must have a reason probably to being with piracy then slave trade, slavery became a crime. Then nations began using their national domestic criminal jurisdiction to punish the culprits.

Normally, State jurisdiction is based on three principles, now it has become four. A) principle of territoriality; b) principle of nationality; c) protective principle; and now d) the principle of universality, i.e., international crimes committed at anywhere by anybody can be or should be tried by a State. The concept of international tribunal to do this job came up only later, that is why the principle of Complementarity in the ICC statute. The principle of Complementarity merely recognizes the traditional sovereign State jurisdiction to try universal crimes under the principle of universality. I just wanted to clarify this point before I get into this. I have been asked to speak on contribution of the jurisprudence of the International Criminal Tribunals (ICTs).

The ICTs is of recent origin. The international community tried to establish an international tribunal after the end of World War I. But then, the great German Emperor went scot free, in spite of Article 227 of

Treaty of Versailles. Article 228 of treaty of Versailles also provided for trial and punishment of others who had violated laws and customs of war. A few trials took place, not many. So, on the whole it was not successful in 1919. By 1920, aggression became a crime under international law. There was a failed protocol of the League of Nations which characterized aggression as a crime in 1920. In 1923, again another failed draft treaty of mutual assistance by the League of Nations spoke of aggression as a crime. In 1924, the Geneva Protocol II attached to the League of Nations spoke about aggression being a crime under international law. Then came the turn of terrorism in 1928, 1934, 1937, the League of Nations produced two Conventions, one Convention on Suppression of International Terrorism and the other for establishment of a International Penal Tribunal to try those who had committed the crime of international terrorism. But there were no takers, not a single country ratified the statute of the international penal tribunal of 1937.

The year 1933 is an important year to my mind. A man who was not so much known at that time, Raphael Lemkin started talking about a particular kind of crime against humanity, genocide. He started talking about in 1933. Then came the "war with all the atrocities which shook upon the whims of mankind", said Justice Jackson, while arguing the case before the Nuremberg International Tribunal. So, in 1944, the countries which were victorious produced two tribunals, one in Nuremberg and other in Tokyo. Although, technically, Tokyo Tribunal established from a McArthur Decree, but, effectively it was the same. It was an ad hoc Tribunal created to punish three sets of crimes, crimes against peace, basically, the crime of aggression, planning, preparation, perpetration of aggression. Then, war crimes and crimes against humanity, that was something new.

How did the London Charter, 1944 keep this term crime against humanity, was it a new crime?. They would have argued, no, it was not a new crime. Crime was there as a part of international customary law as part of laws and customs of warfare, so there was an offshoot of laws and customs of warfare. There were critics of these Tribunals as well. Our own Justice Radha Vinod Pal was an outstanding critic of this victor's

justice. Not that he was against bringing culprits to the justice. He was a justice himself from Calcutta High Court. But he did not like the way it was done, it was one-sided. There was one problem with the ad hoc tribunals.

In terms of jurisprudence, I think the tribunals did a lot of good work. In one single sentence, the Tribunal could summarise its own jurisprudence. Crimes against international law are committed by men not by abstract entities said the Nuremberg Tribunal. From now then, it was individual responsibility. Every person who was in power could be brought to book under individual criminal responsibility that caught on, and we had the Genocide Convention, it spoke about an international penal tribunal. Article 6 of the Genocide Convention again spoke of Complementary jurisdiction. Violators of genocide should be brought to trial by States either before their own competent tribunals or before international penal tribunals. So, ICC was anticipated in 1949 by the Article 6 of the Genocide Convention. But, complementarity was still visible in this provision.

Then, finally for a long time, the experts went on producing drafts. The ILC came up with one draft on Draft Offences against Peace and Security of Mankind, then a draft on ICC. Both the drafts were not ratified because of a lack of definition of aggression. So, by 1958, the General Assembly decided that ILC should postpone this business. Then, some definition of aggression came up in 1974 when the General Assembly adopted the definition, I said some definition. The reason is at the end of the day, the declaration on defining Aggression leaves the Security Council free to decide what constitutes aggression. I am not blaming for GA for doing it because Article 39 of the UN Charter generally says that it is for the Security Council to decide whether a situation amounts to threat of peace and aggression. One of the reasons why I am saying this is because in the future the impending review of the ICC Statute, we may run into this problem. Whatever the outcome, you have to take into account Article 39 of the UN Charter. The 1972 Friendly Relations Declaration declared the crime of aggression as a crime. The Declaration defining aggression said so, still look at the

hesitation of the States to empower the ICC to deal with crimes of aggression. ICC is allowed only to deal with matters arising only as a result of aggression. The other crimes are committed soon after aggression, then, ad hocism continued, cold war ended, lot of internal conflicts began appearing in the several parts of the world.

I would begin with Yugoslavia, the Security Council decided that there should be an international criminal tribunal to deal with the heinous crimes committed in a particular area, and then came Rwanda, but there is a difference between Rwanda and Yugoslavia. In the case of Yugoslavia, the tribunal was imposed on Yugoslavia. In the case of Rwanda, the new Government of Rwanda wanted it, although, the new Government of Rwanda was unhappy that the jurisdiction of the ICTR was limited to one year, 1994. The new Government would have liked this tribunal to go far back to find the roots of the racial divide in Rwanda. I am the one of those who certainly argued that the Security Council decision was illegal in creating an international criminal tribunal in the case of Yugoslavia, I would read the Article 7 of the UN Charter differently, and we could argue that later. But in the case of Rwanda, it was not so, because it was with the consent of Rwanda, which makes the difference. Then, came the ICC, with all the paraphernalia, in fact, I suspect the reason why the ICC came into the being was because the Security Council created an ad hoc tribunal for Yugoslavia. Nation States thought it is better to create an ICC on the basis of their own consent rather than by the Security Council by a whip of hand. That is why in such a short time, the ILC came up with a draft in 1989. Trinidad and Tobago restarted the procedure. In 1994, we had the draft already, in 1998, this became a reality. I think the credit for bringing the ICC should go to the Security Council decision on Yugoslavia tribunal, you may differ. But as an academic, I look at in this way.

Now, I begin with the first contribution of the Nuremberg Ad hoc Tribunal, individual criminal responsibility. It is not easy to study the Yugoslavian Tribunal as well as the ICTR. According to a report by the President of the ICTY, Mr. Robertson, as of 2008, the Tribunal had dealt with 116 accused. We have had Madam Judge Saiga earlier in the day

explaining how the ICC deals with a case. So to deal with 116 accused is no joke. Still 2 have not accounted for. And one of them is a serious offender, Blatich. Then in the case of Rwanda, they must have spent lot of time in identifying major war criminals from around 16,000 convicts. I think looking at the way these tribunals worked, despite my reservations on ICTY, one is certainly amazed and in the end, one finds that there is an international criminal tribunal with all the nitty, gritty which you find in domestic criminal law. So, domestic criminal legal systems also had come together with the help of jurisprudence. The impact is very serious, it has even impacted the International Court of Justice (ICJ). In 2007, *Bosnia Herzegovina vs. Serbia Montenegro* case was decided by the ICJ. The imprint of the ICTY's jurisprudence is extremely clear. The Court accepts many of the findings without question. Then, what about domestic courts?. The impact of the jurisprudence of the tribunals is found in the domestic courts as well. One of the best case, I could cite is *Exparte Pinochet case*, British House of Lords, 1999, the revised one. You would find the impact of ICTY and ICTR on the individual judgment of the House of Lords. I am sure over a period of time; many national courts will be able to follow this jurisprudence. Now, to mention only a few technicalities, I thought it would be useful, in the case of genocide, where the major problem has been the intention. The Genocide Convention says that there has to be an intention and what degree of proof would you require to prove intention. A very high degree and intention both ICTY and ICTR have said so. The mental intention (*Mens Rea)* requirement is higher here than in crimes against humanity. There is a number of cases began with *Tadic Case* in ICTY and the emphasis is on the phrase 'intent to destroy a group in whole or in part'. I mean that intent to destroy has to be shown whether it exists. That's a very high level proof of intent, and then protected group has to be properly identified. Intent to destroy a group in whole or in part, which group. One problem in ethnic cleansing in Bosnia and Herzegovina has been that the Bosnian Serbs wanted to clear Kurds, Bosnian Muslims from certain areas. Ethnic cleansing, but this kind of ethnic cleansing could not be genocide because identification of group is negative here not positive. If it were just Bosnian Muslims yes it is genocide, if it is non-Serbs, it is not specific, so, the protected group is

not clear. Thus, crimes committed are not genocidal, but crimes against humanity. In many cases, references have been given in this regard.

The *Seberenica* case has been the one which shocked the conscience of mankind in which 6000 or 7000 Bosnian Muslims were tortured or massacred. The ICTY clearly identified this as a protected group and therefore, the crimes committed were crimes of genocide. The term "committing genocide" has been given a new meaning by Rwanda. This is the *Seromba* case in 2008. In this case, a Roman Catholic priest running a church about 1500 Tutsis took shelter and Hutu militants were running around. Suddenly, the priest decides to dismiss all the Tutsi employees of the church and they were pushed out and massacred. Then one night, the Tutsi marauder requested permission to enter the church with a bull dozer. This priest allowed and explained in which way they could get into the church. So the Tribunal held that Seromba was not aiding or abetting, but, he was committing genocide.

I would consider these as innovations in criminal law as such when it comes to such heinous crimes. Then, jurisdictional control, there has been a minor pedantic difference between the ICJ and ICTY. The ICTY in *Tadic Case* said Jurisdiction over a particular territory is good enough is culpable to make an offence, but ICJ said in the Nicaragua's case, jurisdiction is not enough, it should be actual control. The United States could not be blamed for aiding the rebels in Nicaragua. You have to prove that the United States had control over them. That is not proved in that case. The ICJ reiterated the same in the 2007 Bosnia's case. But in the *Tadic Case*, ICTY said the jurisdiction is enough, but later on ICTY would have realized and in one of the recent cases, an Ex President of Serbia was acquitted. His name is Milan Milutinovic, a former President of Serbia, he was acquitted of all the charges of crimes against Kosovars. The Court did a tremendous thing. Many of the issues relating to Command Responsibility, Superior Responsibility have been called into question here. What the Court did was to look at the evidence. Yes, there was a meeting with Milosevic, how many meetings did this man attempt? In how many meetings, the extermination of Kosovars took place? Did he have a role in armed control forces? What role he played

in the negotiations with Kosovo? Finally, the court came to the conclusion that this man was not guilty. Then, another area which fascinated me was the concept of protracted armed conflict. Law of war would have applied only in armed conflict. In such civil war situations, what do we do? It is not from the day one to day last, you have armed conflict and conflict could be sporadic. ICTY said it would look at the intensity of armed conflict at any particular point of time. So, it is not one armed conflict, but armed conflicts. I thought it was a very practical approach. Application of law, this is which some thing we could learn and applied with regard to other civil war and even with situations of terrorism.

Now, I will point out a controversy which restarted now. When Nuremberg Tribunals said that only individuals can be responsible, criminally responsible for the crimes against international law. We would have thought that there wouldn't be any problem, but problem arose in the ILC, particularly with Mr. Roberto Ago, later on, a great judge in the ICJ when he was appointed as a Rapporteur for the item State Responsibility in 1976, he introduced a special provision, i.e. Article 18 which later became Article 19. He said there can be *jus cogens* crimes. *Jus Cogens* has been recognized under Law of Treaties, there can be crimes against peremptory norms of international law and these crimes can be committed by States. Can States commit international crimes?. My answer is no. States themselves cannot work, rather States work through the instrumentality of humans. So, humans are responsible, whatever is done, but this has been raked up in the Bosnia case by the ICJ and promptly they were dissents. You would find dissenting opinion by Judge Shi, Judge Koroma and Judge Owada. I leave you with that doctrinal dissent when it comes to international crimes. Thank you Mr. Chairman.

Chair: Thank you very much for highlighting the progressive developments which led to the establishment of ICC as well as some issues arising from the Jurisprudence of the ad hoc tribunals and also for the issues he has raised for discussion. I now invite Mr. Christopher Harland to make his presentation.

3. "Principles of International Humanitarian Law in the Rome Statute": Mr. Christopher Harland, Regional Legal Adviser for South Asia, ICRC, New Delhi

Mr. Chairman, President of AALCO; Secretary-General of AALCO; Madam Justice Saiga, Amb. Komatsu; Professor Mani; Excellencies, Ladies and Gentlemen,

At the outset, let me thank the Asian-African Legal Consultative Organisation, and its Secretary-General Prof. Rahmat bin Mohamad for the invitation. Let me also thank the Government of Japan for its kind and generous support of the event.

Allow me to cover three points in this presentation. First, I will offer a brief, selective sketch of some of the history regarding written rules governing armed conflict which the ICC is concerned with under International Humanitarian Law (IHL). Secondly, I will touch upon some elements of war crimes in Article 8 of the Statute of the International Criminal Court with regard to Review Conference in 2010. And thirdly, a brief discussion of the ICRC's relationship with the ICC.

On the first point, rules governing armed conflict are not new. Nor are written rules governing armed conflict. Over thirty centuries ago, the Chinese Military ruler Jiang Taigong, in Six Secret Teachings, wrote: "Do not set fire to what the people have accumulated; do not destroy their houses, nor cut down the trees at gravesites or altars…" This was before 3000 years ago.

Similarly, in Chapter VII of the Code of Manu, we find the following prohibitions "When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire."

Thirdly, one branch of Buddhism includes the Vimalakirti Sutra, which contains the following verse, "In times of war, give rise in yourself to the mind of compassion…"

Almost all the traditions of the world have laws regulating war, prohibitions and restrictions, written laws regulating war. One thing sometimes we forget is not only the rules which are quite old but in fact war crimes trials go in fair ways. Sir William Wallace was convicted of crimes resulting from attacks against the civilian population, with his conviction including the fact that he engaged in war "sparing neither age nor sex, monk nor nun." We have a similar kind of provision in the ICC Statute.

In the 19th century, wars in Europe led to the desire to codify and put in treaty form, to be agreed to by the nations of the world, rules governing which could and could not do in the armed conflict.

Thus, the 1864 Geneva Convention, some times called the First Geneva Convention, Article 7 provided that a Red Cross on a White Ground would provide protection against attack for medical workers in times of armed conflict, and also provided that medical hospitals should be respected and protected by the belligerents, which became a provision after the Solferino incident that happened in Italy in the year 1859.

The 1907 Hague Regulations took this one step further by establishing a list of rules that would form the basis for war crimes set out as grave breaches to the Four Geneva Conventions of 1949. The Hague Regulations were one of the first attempts to codify a list of war crimes not just prohibitions but which are those prohibitions should actually constitute crimes. In the Four Geneva Conventions of 1949 which are now the most acceded treaty in the history and currently have 194 accessions, the only other entity which regularly accedes to multilateral treaties is United Nations. So, the UN Charter has lot of accession as well, but for technical reasons, we can say that the Four Geneva Conventions 1949 have been acceded by all countries in the world.

The grave breaches, which apply in times of international armed conflict and not applied in times of non-international armed conflict, can be summarized in number of categories. There are eight crimes listed in

the ICC in Article 8 and the crimes with respect to those that are attacks against the people who are combatant, civilians and prisoner of war. The crimes relating to what had happened in Germany in World War II of the civilian population, there are lot of civilian confinement of civilian population in taking up hostages. So, these are some of the crimes that are deemed to be grave breaches. There are 600 articles in 1949 Geneva Convention and few of them deemed to be so important for the violation of these war crimes and are called a grave breach. A grave breach is one of the serious violations in the international humanitarian law which constitutes war crimes.

Grave breaches specified in the four 1949 Geneva Conventions.
(Art. 50, 51, 130, 147 respectively)
Grave breaches specified in the third and fourth 1949 Geneva Conventions. (Art. 130 and 147 respectively)
Grave breaches specified in the fourth 1949 Geneva Convention.
(Art. 147)

- wilful killing;
- torture or inhuman treatment;
- biological experiments;
- wilfully causing great suffering;
- causing serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (this provision is not included in Art. 130 third Geneva Convention).
- compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power;
- wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions.
- unlawful deportation or transfer;
- unlawful confinement of a protected person;
- taking of hostages.

These can be summarised as killing or harming (in a number of different ways) those *hors de combat*, destroying property wantonly and unlawfully, compelling prisoners of war to serve in a hostile army or depriving him of a fair trial, unlawful deportation, unlawful confinement of a protected person and the taking of hostages.

It was earlier mentioned by Prof. Mani, the 1948 Genocide Convention required States to prevent and punish persons responsible for crimes defined therein. Genocide is not a war crime. In certain circumstances, war crimes can also be genocide. But Genocide itself does not need to take place in times of war; it takes place in times of peace as well

In 1977, after wars of liberation in Asia and Africa, new war crimes were added to the list in the 1949 Geneva Convention, although again, the crimes which are listed in the Additional Protocol I were to apply in international armed conflict only.

Grave breaches specified in the Additional Protocol I of 1977 (Art. 11 and Art. 85)

- Seriously endangering, by any wilful and unjustified act or omission, physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty;
- When committed wilfully and if they cause death or serious injury to body and health:

- making the civilian population or individual civilians the object of attack;
- launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects;
- making non-defended localities and demilitarised zones the object of attack;
- making a person the object of an attack in the knowledge that he is hors de combat;
- the perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs;
- When committed wilfully and in violation of the Conventions and the Protocol;
- the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- attacking clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;
- depriving a person protected by the Conventions or by Protocol I of the rights of fair and regular trial.

- These may be summarized as harming civilians, attacking civilians or civilian objects, attacking works containing dangerous forces, attacking demilitarised zones, the perfidious use of protected emblems, unjustified transfer of populations, unjustifiable delay in returning prisoners of war, apartheid, attacking cultural property, and not providing a fair trial.

Work continued in the United Nations International Law Commission to set out a Code of Crimes of Mankind, which was published in 1996.

- This formed the basis for the drafting of the Rome Statute, which was adopted in July 1998, and which entered into force on 1 July 2002.

So, we heard that the ICC covers the crimes of genocide, crimes against humanity and war crimes leaving aside the crime of aggression. The first two categories may be committed either in times of peace or times of war, while the third category, by its very name, applies only in times of international or non-international armed conflict. In order to know, whether a war crime has been committed, you need to know whether it is a armed conflict.

The ICRC has recently updated its test for determining whether it is international armed conflict or non-international armed conflict. In international armed conflict it is very clear that the first shot fire or the first captive soldier for example, but in non-international armed conflict we would generally require that there would be a conflict of territorial state party where depending upon whether you are using Common Article 3 or Additional Protocol II, the conflict between the government forces and rebel groups or between rebel groups under common article 3 but not Addl. Protocol II which has requisite level of intensity and which also gives a protracted nature, there is a degree of organization, and control by the armed forces. But for the armed groups whether there is a degree of organization. So, organization, protracted nature of the conflict and intensity are the three tests for non-international armed conflict situation.

A number of tribunals, both domestic and international, have also been trying and convicting persons for both genocide and crimes against humanity, including at the ICTY, the ICTR, the Special Court for Sierra Leone, the War Crimes Chamber of the Court of Bosnia and Herzegovina and others. Similarly, in national courts in Rwanda, Serbia, Croatia, Israel, North and South America, and elsewhere have held trials for genocide and crimes against humanity, using definitions similar to those found in the Rome Statute.

What war crimes are covered by the Rome Statute? The list, while perhaps not complete, is relatively comprehensive, and goes further than those crimes in the Geneva Conventions and their Protocols.

- There are four categories of crimes in Article 8 of the Rome Statute, they are as follows:
- a) grave breaches of the 1949 Geneva Conventions (8 of them)
- b) other serious violations of the laws of war in international armed conflict (26)
- c) common article 3 of the 1949 Geneva Conventions, in non-international armed conflict (4)

- d) other serious violations of the laws and customs of war in non-international armed conflict (12)

The ICRC recommends that States use the ICC crimes, genocide, war crimes, crimes against humanity as the basis for amending or working on a country's domestic legislation with respect to the crimes as laid out. As explained by Amb. Komatsu that some of the countries thinks that they have all of this, the Prosecutor has enough to prosecute any crime whether many other states said no, actually, need to amend legislation in order to cover them.

What crimes are not included in the Rome Statute? Two grave breaches of the Additional Protocols are not included, namely attacks against works or installations containing dangerous forces, and the failure

to repatriate prisoners of war following the end of the hostilities. There are also nine crimes which appear in the 2005 customary law study of the ICRC which are not included, most of which are reflected in the Hague Regulations of 1907. In practice, in many (but not all) cases, the facts involved in these omitted crimes (e.g., attacking a parlementaire) may in fact be covered by other provisions of Article 8 of the Statute.

The crime of aggression is not defined, and will not be a crime for which the Court may exercise jurisdiction until it is defined. The Statute was also explicitly referring weapons-related crimes, for potential further work, in accordance with article 8(b) (xx). The Review Conference in 2010 will present an opportunity for States to discuss the inclusion of new crimes although the Norwegian report of November 2006 back to the Assembly of States Parties in November 2006 did not indicate any urgent need felt by States parties on amendment to the Statute, apart from discussions concerning the crime of aggression.

With respect to terrorism, as attacks against the civilian population, even outside times of armed conflict are covered by Article 7 of the Statute (crimes against humanity), it is therefore likely that the Court would be able to prosecute these offences. Additionally, in armed conflict, attacks against civilians are prohibited, both in international and non-international armed conflict, and would therefore also fall under the remit of the Court.

What should States do with this information? Among the States represented here today, there are both States Parties to the ICC, and those that are not.

If you represent a State Party, you should ensure that your legislation implementing the Rome Statute is in order. While the crimes and defences listed in the Rome Statute are not explicitly required by the Statute, it is necessary, in order to be able to prosecute violators of these crimes, and thereby avoid a case being brought to the Hague due to the inability to prosecute such a case, that these crimes be punishable in your country. As an example, the International Criminal Tribunal for Rwanda

refused Norway jurisdiction in the decision on transfer of Michel Bagaragaza, which it sought, over a Rwandan national, because it had not incorporated the crime of genocide into its domestic law. A Norwegian plea that it could prosecute murder was rejected by the ICTY Trial Chamber and confirmed on appeal in August 2006, because, as the Court noted, "the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law".

The Commonwealth, in cooperation with the ICRC and other organizations, has published model legislation for States wishing to carry out this task, and we, together with the Court, are prepared to lend a hand in doing so.

However, currently only 42 States of the 108 States Parties are listed in the Legal Tools database of the ICC under national implementing legislation for States parties, and some of these laws are in draft form. That is, there are many States that are probably not able to carry out prosecutions for neither all of the core crimes nor offences against the administration of justice, which are required to be implemented by the Court.

If you are from a non-State Party, you could of course consider accession. But even if you do not immediately accede to the Rome Statute, you may wish to adopt the core crimes, in order to seek to avoid the prosecutorial action. Some States, in order to seek to have their citizens tried at home rather than abroad, are adopting these crimes in their domestic law.

As the President of the ICRC, Jakob Kellenberger noted in an address to the African Union, "The ICRC hopes that these developments and the trials of people accused of war crimes will eventually build a momentum conducive to better respect for IHL. It therefore strongly supports them."

The relationship between the Court and the ICRC can be described as separate but complementary. First, the ICRC supported the creation of

an international court to act as a catalyst for domestic prosecution of war crimes and other crimes in the Statute of the ICC. Second, the ICRC participated actively in the creation of the Statute, and the Elements of Crime produced by the Preparatory Commission. Third, the ICRC actively assists States in the domestic incorporation of the ICC Statute into domestic law. Fourth, since 2006, the ICRC visits detainees held by the ICC.

However, in practical terms, Rule 73 of the Rules of Evidence and Procedure of the Court provides ICRC staff with protection against testifying given the confidential nature of the work, recognised as a customary international law norm in the 1999 *Simic* case of the International Criminal Tribunal for the Former Yugoslavia and subsequently referred to in cases before other international bodies. Therefore, the ICRC cannot be compelled to testify before the Court.

So while the ICRC supports the work of the Court in general, and visits its detainees, the ICRC does not provide information relating to its activities in the field to the ICC.

In conclusion, the year 2009 marks the 11th year since the adoption of the Rome Statute, and the 7th year since its entry into force. The ICRC expects that the continued work of the court will encourage States Parties to ensure proper domestic incorporation of the provisions in the Statute, and the application of its provisions in practice. While the fight against impunity for war crimes has required the development of international legal norms, their adoption in treaty and customary law forms, their domestic incorporation into the legal structures of the countries of the world, the training on the rules by the armed forces and other bearers of weapons, and the application by armed groups and armed forces of these rules in the case of their contravention.

In summary, I encourage the accession to the Statute by the Member States of AALCO and others, and reiterate the ICRC's desire to work with you to seek increased implementation of its provisions in your domestic law.

Chair: I thank Mr. Harland for his presentation on the Crimes for which the ICC has jurisdiction and also for his detailed analysis for some of the jurisprudential aspects of the ICC. I now open the floor for discussions. Any delegations would like to raise questions or would like to make comments on which our panelists spoke.

4. Discussion

Dr. M. Gandhi: Director, Legal and Treaties Division, Ministry of External Affairs, Government of India

First of all, I thank the presenters for enlightening us on some of the issues. I have two questions. The first is to Mr. Christopher Harland. I think in your presentation, you said that the crimes which are given especially the war crimes are the derivative of customary international law plus the conventional international law on IHL, Additional Protocol I and II. Is it right if I put a question agreeing this provision or legislating these provisions would make it suffice for a country to observe the obligation flowing under customary international law under Addl. Protocol I and II. With regard to violations of punishment relating to war crimes, this is my first question.

My second question is to Prof. V.S. Mani. He rightly touched a point about the legality of establishment of ICTY, ICTR. These two things are little different, but he said ICTY, the very establishment itself is illegal. He also perhaps agreed to a point that because the Security Council is not established for implementing the international law. So, in a way the development of jurisprudence of international criminal law through ICTR as well as ICTY also need to be re-looked. In fact, it has been done during the Rome Conference itself; because Prof. Mani has been told us clearly that jurisdiction has been assumed on four basis. Territoriality, nationality, victim jurisdiction and universality. But, these are applicable in the end only when the national courts have to do that. In a famous dictum in the Lotus Case and in the other cases, the ICJ said that 'international law does not prescribe any criminal jurisdiction, it is left to

the State' where I want to raise a question, Is that supposing a State assumes jurisdiction on a particular crime committed by an individual on a universal jurisdiction? Whether double jeopardy that is laid here would be applicable, because a particular State's national to which normally assumes a territorial jurisdiction of that particular State, then if it decides and tries or determines crimes whether he has committed or not, then will there be any trial process before the ICC, if the universal jurisdiction is also applicable in this context?. These are my two questions. I would like to listen from both the panelists.

Chair: Thank you for your questions to the panelists, any other questions.

Mr. Suchitra Mohanty: I am representing Asia News paper. I have a couple of questions. My first question is to Mr. Harland. When terrorism would be brought under the ICC?. Secondly, to Mr. Narinder Singh. As far as my knowledge, India is not a member of ICC. Why and when India is going to join the Court?. Thank you.

Dr. Batra: I am senior Advocate of Supreme Court and Member of the Indian Society of International Law (ISIL). My question is to both the panelists who spoke very eloquently on the ICC. Whether in the present circumstances, whether in Sri Lanka whatever is happening nearby to India for last so many years. Lot of civilians who were trapped, who are not combatants and this was reported by the ICRC. Could they also invoke the jurisdiction of the ICC. Secondly, recently, there was a rebellion in Bangladesh. Even though Bangladesh Government said that those who are guilty would be punished, they have not been adequately punished and are they not indulging in international crimes against humanity, genocide, so to say. Thank you

Mr. Vinay Kumar Singh, Indian Society of International Law: I would like to know on the aspect of the role of the judges in ICC from Prof. Mani and Hon'ble Judge of ICC. In the morning Session, we heard from the Judge about the supervisory role of the judges and in this Session, we heard Prof. Mani about the role of the judges in the development of the jurisprudence of ICC. I would like to know, is there

any kind of guidelines or kind of a research has been made to regulate the role of the judges in ICC.

Mr. Harold. A. Agyeman, Ghana High Commission: First, I would like to thank Judge Saiga for her presentation as well as Prof. Mani and Mr. Harland. I would like to particularly ask Prof. Mani and Mr. Harland. If you could comment a bit upon the jurisprudence, particularly, the cases which are referred by the Security Council concerning the non-State Parties. What in your view is the jurisprudence that is currently prevailing referred to the Security Council of a non-party to the Statute.

Col. Anwar Yusri, Malaysian High Commission: The first question, Does the ICC have a political will to prosecute a Security Council member in the future who is involved in the particular crime?. Why I am asking is, in relation to the statement by the President of the AALCO, he mentioned that the Security Council decision is a political decision. When you link the political decision to the selective prosecution, how ICC in future would be removing the tag of selective prosecution by following Security Council decision especially the Security Council some of them are not the member of the ICC Rome Statute.

Chair: I will give the floor to the participants. Firstly, I will invite the panelists to respond to some of the questions.

Prof. Mani: Thank you Mr. Chairman. I also thank those participants who have raised the questions. Dr. Gandhi's was about the legality of ICTY. There are very few people who are questioning the legality of ICTY. One of the reasons, why I raised is to highlight the fact that ICTY was mainly responsible for the adoption of the draft Statute of the ICC by the ILC. Those where the days, I used to have correspondence with James Crawford and I did raise the issue. Why are you doing this in such a tiring hurry? Many of the issues are very intractable. One has to analyze further why this hurry. All this they have brought from 1937 and from 1952 to 1954. I think you have to look at it from the point of International Human Rights law as well. Then, he said let us not allow international criminal tribunals at random at the whims and fancies of the

Security Council. Then of course, we are conscious of the debate in the international law about the powers of the Security Council under Chapter VII of the UN Charter. But, that does not necessarily mean the jurisprudence of the ICTY is useless. Normally, a court follows the jurisprudence of another court for different reasons. That is why British House of Lords followed some of the rulings of ICTY. It is our parallel courts, when judge decides a case, he applies his mind, he applies point of law applicable, extrapolates on various things. It is a rational process, a judge employs in identifying examining and explaining a law and applying it to a particular situation. That is quite valuable. My criticism of legality of Security Council resolution does not extend to the value of the jurisprudence by such eminent people. So, I would still regard that jurisprudence of these tribunals are extremely valuable. In spite of Radha Vinod Pal's basic objection to Nuremberg Tribunals, but Nuremberg Tribunal's jurisprudence is extremely valuable even today.

An issue was raised by Dr. Batra about ICC jurisdiction to Sri Lanka and Bangladesh. I think we have to examine whether Sri Lanka and Bangladesh are parties to the ICC Statute in the first place.

Mr. Vinay Singh asked about the role of judges in ICC. We have our eminent Madam Saiga, she should be a better person to answer that. Then cases from the Security Council, at one time, Security Council used to appoint Commissions of Enquiry, the findings of the commissions of enquiry are generally authoritative, I don't say binding, because eminent men are sitting there, they may not be wasting time and to attribute partisanship to everything then that is the end of everything, the international solidarity. Thank you.

Mr. Christopher Harland (ICRC): Thank you very much for the question. The first question related to the crimes. I think you had incorporated provisions of 1949 Conventions and Addl. Protocol I. So, you are missing actually a lot from Article 8. The first thing you will be missing is war crimes in non-international armed conflict, because common Article 3 does not contains war crimes, so unless you are strict about it, for example, Ireland, Nigeria or some other countries which

went further and made all violations of Geneva Conventions, crimes of domestic law not just grave breaches. For example we are talking about India's Geneva Conventions Act, 1960. It only talks about grave breaches of 8 crimes rather than the whole 50 which you can found in ICC Statute, and that is the main area which you have no non-international armed conflict crimes. The second is that the violations of the war that if you find in any ICC go beyond which you find in Addl. Protocol I is missing. But then they incorporate some of the Hague Regulations are not either in the 1949 Convention, I do not have exact number to give you, but that's why we recommend the States look at the Article 8 because we think it is relatively comprehensive and actually go beyond for we have currently have Additional Protocol II or in Common Article 3 if it is less than the customary laws.

Secondly, with regard to terrorism, there are in fact you can cover under crimes against humanity which we understand is terrorist acts, so that's the problem. We do not have the comprehensive definition of terrorism. The international discussions are still underway as far as Comprehensive Convention on International Terrorism. It's not yet resolved. I suspect the both have stood on terrorism in any time soon, but you can prosecute systematic attacks against civilians, which are referred in Common Article 7.

With regard to Sri Lanka and Bangladesh, as ICRC's policy matter, we don't comment on the current situation. We discuss with the States concerned, we have expressed our concern about the fate of the civilian population. A statement was also released by the ICRC in relation to that. Sri Lanka has not signed the ICC and Bangladesh had signed the Rome Statute in 2001, but it has not ratified it.

Finally with respect to the question relating to the political will, 40% of the P 5 countries are parties to the Rome Statute i.e. France and the United Kingdom. In fact to my knowledge the very first trial on the national implementation of the ICC Act was held in the United Kingdom a P 5 country and the charges were framed under Article 8 of the ICC

Statute found not guilty, which goes beyond the charges enshrined in the 2 Additional Protocols (1977) to the Geneva Conventions of 1949.

Judge Fumiko Saiga: The provisions in the Rome Statute are in fact a reflection of the political will of not only the States Parties to the Rome Statute but also the countries that participated in the negotiations in the Preparatory Commission and Preparatory Committee of the Rome Statute. The ICC Judges are not the one's to reflect upon the political will in the amendment of the Rome Statute it is entirely up to the States Parties.

Chair: Thank you Judge Saiga. We had very interesting discussions on some of the issues raised by our panelists and I hope that the answers have provided more clarity to your perceptions of the ICC. There was one query which was directly referred to me which was whether there was a move now for India to join the Rome Statute. At the moment this matter is not under consideration at all but we are following the work of the ICC and are also participating in the work for the Review Conference but we have to see what comes out of the Review Conference and how the ICC functions. With this we now come to the end of the session and we will resume the afternoon session after lunch.

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III. AFTERNOON SESSION

Theme II: ICC: Current Developments and Contemporary Challenges (2.30 P.M. – 5.30 P.M.)

1. Chair: Ms. Dora Kutesa, Acting High Commissioner of Uganda to India

I welcome you all back from the lunch break and hope that you enjoyed it. Excellencies, Panelists, Ladies and Gentlemen. We begin our afternoon session and the theme for this session is "ICC: Current Developments and Contemporary Challenges". It is quite a timely one. Six years back on 11 March 2003, the first ever treaty based permanent International Criminal Court was established, with the task of bringing the perpetrators of the most serious concern to the international community as a whole and fixing individual responsibility for such crimes, irrespective of the status of the person involved. The ICC is an institution of dispensing international criminal justice is moving ahead. Africa has in a way become a testing ground for establishing the credibility of this six year old international judicial institution as all the four cases, as you heard this morning pending before the Court are from that continent. Uganda in particular, where I come from, participated very actively in the negotiation process of the Rome Statute of the ICC and is party to the treaty. One of our nationals, Judge Daniel David Ntanda Nsereko is a member of the ICC. The commitment of the Uganda Government towards the ICC is further reflected from the referral by the President of Uganda of the situation concerning the Lord's Resistance Army (LRA) to the ICC in

December 2003. So this gives Uganda all the credentials to become the host for the forthcoming Review Conference.

This afternoon we have an eminent panel to lead us into understanding the challenges before the Court. I am quite confident that we will be able to bring out the valuable view points in relation to the current developments and contemporary challenges before the ICC. The first speaker on the list is the Secretary-General of AALCO, Prof. Rahmat bin Mohamad, he will be speaking on the Asian-African perspectives of the ICC. Prof. Mohamad was appointed as the new Secretary-General of AALCO by its Member States on 30th June 2008. He brings to the post academic and administrative experience. He holds the position of Professor of Law at the Universiti Teknologi MARA, Malaysia, and before assuming the post of Secretary-General of AALCO he was the Deputy Vice Chancellor of that University. He had started his career as lecturer at that University in 1986 and over the years he taught commercial laws, public laws, international law and law of international organizations. He has been appointed external examiner for several universities in Malaysia and abroad. Prof. Mohamad is a prolific writer and has several books and articles to his credit. He has also delivered lectures at several prestigious universities including the Institute of Diplomacy and Foreign Relations, Malaysia as well as Australia, Canada and the UK. In 1998 he was a visiting scholar at the Institute of South East Asian Studies (ISEAS) in Singapore and he was awarded the scholarship under the Fulbright programme.

Our second panelist is Mr. Y.S.R. Murthy, who is a Director in the National Human Rights Commission of India and has been working there for the past several years in various capacities. Mr. Murthy has a Masters degree from the University of London and he has published a number of articles including on the Rome Statute of the ICC and has published a very famous Handbook of Human Rights Law in India.

Mr. C. Jayaraj is the discussant. He is a distinguished advocate in the Supreme Court of India. He has been the Secretary-General of the Indian Society of International Law. He is a visiting Professor at the University

of Madras and at the Indian Academy of International Law and Diplomacy. He has also worked as a Legal Officer at AALCO from 1984 to 1990. He has also served as a Prosecutor and Legal Officer in the Ministry of Justice, Nauru. He is the Managing Editor of the Indian Journal of International Law, New Delhi and Co-editor of the Yearbook of International Humanitarian Law. He has several publications in international law to his credit. As regards ICC he has been writing and speaking in various fora on various issues related to the ICC.

With this brief introduction of the distinguished panelists, I would now like to invite Prof. Mohamad for his presentation.

2. "Asian-African Perspectives on ICC" by Prof. Dr. Rahmat Bin Mohamad, Secretary-General, Asian-African Legal Consultative Organization

His Excellency Mr. Narinder Singh, President of AALCO, Hon'ble Excellency Ms. Dora Kutesa, Acting High Commissioner of Uganda to India, Hon'ble Judge Saiga of the International Criminal Court, Amb. Komatsu, Mr. Harland, Mr. Murthy, Distinguished Participants, Ladies and Gentlemen:

I. Introduction

I profoundly thank Her Excellency Ms. Dora Kutesa, the Chairperson of this Working Session for her introductory remarks and her kind words of introduction to me. I have been entrusted with the task of placing before this august gathering the Asian-African perspectives to the International Criminal Court. This august gathering is well aware that the Asian-African Legal Consultative Organization is the only body of its kind that embraces the two continents of Asia and Africa and serves as a consultative forum on international law matters for its Member States. It is well recognized and respected as an independent and neutral inter-governmental organization. Suffice it to mention in here that the AALCO's Annual Sessions are known for the balanced nature of the items on the agenda as well as the quality of deliberations.

In the informal regional grouping system that exists in the United Nations system, both Asia and Africa account for 53 countries each. Although, the present membership of AALCO is of 47 countries and nearly all major countries of the two regions are represented in it, therefore, in pursuing the topic entrusted to me I rely heavily on the deliberations that have taken place on the agenda item of the International Criminal Court in the Annual Sessions of our Organization in the last few years. The essence of the deliberations emanating out from the AALCO's Annual Session may be therefore seen as reflective of the Asian-African perspectives to the ICC.

My presentation is divided into four parts, firstly, I seek to highlight the views of the AALCO Member States, in relation to the Rome Statute and the International Criminal Court established under it. Secondly, I would proceed to draw your kind attention towards the concerns of Asian-African states, particularly in relation to the principle of complimentarity, the crime of aggression, and the bilateral immunity agreements, as these issues have attracted considerable attention in the AALCO's Annual Sessions. Thirdly, I intend to make an analytical enquiry regarding ratification status of the Rome Statute, particularly that of the Asian-African States and on that basis draws some preliminary inferences. Finally, I would briefly touch upon the Forthcoming Review Conference, as that is the topic on which my co-panelist Mr. Murty would be elaborating and then offer some concluding remarks, in which I seek to highlight how AALCO Member States wish the AALCO forum to be utilized, particularly in relation to the ICC.

II. Views of the AALCO Member States in relation to Rome Statute of the International Criminal Court and the International Criminal Court

Broadly speaking, the AALCO Member States consider the adoption of the Rome Statute of the International Criminal Court on 17 July 1998 as one of the most significant events in the history of the 20th century international law. Likely, the entry into force of the Statute on 1 July 2002

is viewed as an important development at the dawn of the new millennium. The establishment of the International Criminal Court is considered to be a positive step towards promoting world peace and order, that was an outcome of decades-long relentless efforts by the international community to end impunity and a significant development of international law to punish the most serious international crimes, namely, war crimes, genocide, crimes against humanity and the crime of aggression. It was an achievement in mechanism-building after a century of hard work to ensure individual criminal responsibility for these crimes.

There had been wide support for the establishment of an independent, just, efficient and universal international criminal court for the purpose of combating and punishing the most serious international crimes. The Member States were hopeful that the International Criminal Court would be such an impartial, effective, independent and universal and towards that end attach great importance to the fundamental principles of the work of the ICC, namely, independence, impartiality, the rule of law, transparency, and professionalism.

As not all countries have joined the ICC, a State that is a Party to the Rome Statute, elaborating on the reasons for countries not joining the ICC, at one of the AALCO Annual Sessions stated that generally speaking, there were two basic reasons that a State chooses not to join the ICC: *first*, a State may object to the idea of the ICC itself. For example, some governments and academics say that essential elements of criminal law or criminal due process are missing in the design of the ICC; *second*, some States seem to believe the ICC undermines the sovereign right to exercise jurisdiction over their own nationals. The idea of having its own citizen stand on international trial may not be that attractive. Although, the principle of complimentarity was clearly stated in the Statute of the ICC, it does not seem to be trusted by all States.

A country elaborating upon its decision of yet not acceding to the Rome Statute stated that it had *inter alia* concerns relating to *first*, effect on national sovereignty by virtue of principle of complementarity. In this regard, its concern was that the ICC would itself determine whether a

particular State was unwilling or genuinely unable to carry out the investigation or prosecution and this subjective interpretation by the Court would result in the sovereignty of a State being comprised if the Court determined that the State has not complied with what the Court deemed to be "willing" and "able"; *second*, effect on the national legal system- as it was concerned that the definition of "the most serious crimes of international concern" namely crimes of genocide, crimes against humanity and war crimes, adopted in the Statute, was far more broader than those recognized in customary international law. This vague and broad definition, they believed would give the Court an unfettered ability to decide when an alleged crime was within the jurisdiction of the Court. Further, wide definition of "crimes against humanity" might be against some of their domestic laws, in particular, the preventive laws which were intended to safeguard national security and public interest.

Explaining its rationale for not joining the ICC, another State observed that it would be prudent to observe at the first instance the implementation of the Rome Statute and the operation of the ICC. This, that State categorically stated did not mean lack of commitment to stop violation of human rights. Fundamental principles and provisions of Rome Statute, ICCPR, ICESR had been appropriately been incorporated in their national law. Another country stated that the process of accession would be carried out prudently and in conformity with the requirement of national development and the needs of its people. A State reiterating its support for the establishment of the ICC, stated that it would only accede to the Rome Statute once it was ready to do so, which included enacting the appropriate legislative provisions and putting in place administrative measures. Another State that was not a Party to the Rome Statute, said it joined in all the common efforts made by the international community for promoting peace and development.

A State, that was a Party to the Rome Statute had called for respecting the decisions of various governments not to join the ICC, and stressed that their criticism should be heeded and heard. They believed that such concern and criticism could be addressed by prudent and reasonable application and interpretation of Rome Statute, as well as by further

constructive consultations and discussions guided by the principles of justice and fairness. There was a need to continue such consultations and discussions because they would contribute not only to the progress in the future jurisprudence of the ICC, but also to the overall development of international criminal law.

Another stream of thought within the AALCO forum considers the establishment of the International Criminal Court a result of consensus only among some States. A State wished for a Declaration to be adopted by the AALCO stating that the ICC did not have any jurisdiction over the non-ratifying Parties, and it should not intervene in the internal matters of any such State. Another State has questioned the actions of the ICC regarding the issue of warrants of arrest against alleged war criminals of a non-State Party to the Rome Statute. On the other hand, a country would like to encourage States to consider becoming Parties to the International Criminal Court in order to send a clear signal of universal rejection of impunity.

The Member States have taken note that through tackling some very important cases, before it, the Court had entered its operational phase, and was going to be tested in practice on whether it would be able to prosecute individuals responsible for the gravest international crimes with its limited resources, to strictly comply with the principle of complementarity, to perform its functions equitably, impartially without political prejudice, and to avoid the application of double standards. A State had noted that the ICC was proving to be effective and at this juncture it was of crucial importance for the Court to gain support and cooperation from the international society. It was the wish of many AALCO Member States that the ICC should carry out its functions in an objective and just manner and contribute to international peace and security.

For ICC to be successful, it should receive more support and endorsement, and accomplishes the universality. In this regard, a country had emphasized that a larger representation of the Asian and African countries would ensure a legitimate and fair Court. Further, the just and

effective operation of the Court would facilitate general support and cooperation from the international community that was of significance to the future of the ICC. The focus, they stressed should now be upon ensuring the credibility of the ICC so that it attains universality.

III. Issues in the Rome Statue receiving Considerable attention at AALCO's Annual Sessions

Ladies and gentlemen, three aspects of the Rome Statute that has received considerable attention within the AALCO forum pertain to the principle of complimentarity, the crime of aggression and the bilateral immunity agreements. Allow me, now to briefly highlight the concerns of AALCO Member States in this regard.

A Principle of Complimentarity

The Rome Statute recognizes that States had the primary responsibility for investigating and punishing the crimes and the Court was complementary to the efforts of States bringing to justice perpetrators of international crimes. Elaborating on the principle of complimentarity and inter-dependence, Her Excellency Judge Akua Kuenyehia, Vice-President of the International Criminal Court, at the Forty-Fourth Annual Session of AALCO, held in Nairobi, Kenya observed that the ICC was part of a system, working together with States, inter-governmental organizations, and non-governmental organizations towards international justice. The support and efforts of States was central to the success of the Court.

She had emphasized that under the principle of complementarity, the primary responsibility to investigate and prosecute crimes lies with States. In the ordinary circumstance of a properly functioning national system, the ICC would not exercise jurisdiction. The ICC would defer to genuine national proceedings. The ICC would only act when States were unwilling or unable to investigate or prosecute. Whether a State was unwilling or unable to investigate or prosecute was an issue of law to be decided by the Court in accordance with strict legal standards. The right of States to challenge the admissibility of a case was safeguarded by the Statute.

AALCO Member States are of the firm opinion that the role of the ICC, in accordance with the Rome Statute, shall be complementary to the national criminal jurisdiction. Investigation and prosecution of serious international crimes should be in the first place handled by national judicial systems rather than by the ICC. It was vital in order to understand the role and the effectiveness of the Court, but its actual character would be further clarified through its application. The said principle defined the relationship between the ICC and the National Courts and determined who should have jurisdiction in a particular case. Under this principle, the ICC was complementary to national criminal jurisdiction over international crimes.

The conduct of the ICC Prosecutor should neither nullify the principle of complementarity nor prevent the national court of pertinent countries to invoke its jurisdiction against the perpetrators. They wish that the Court's activities should be conducted in strict compliance with the principle of complementarity set forth in the Rome Statute and be a true complement to national judicial systems. Serious international crimes should in the first place be handled and punished by national judicial systems. The Court should not take the place of the State in the exercise of its inherent powers and functions.

The application of this key principle in AALCO Member States perception was the key to survival and vitality of the ICC work. In this regard, the national juridical system, social tradition and culture deserved due respect. National court should be given the primary role in the prosecution of human rights violations, and this they believed would encourage universal acceptance of the jurisdiction of the ICC.

A Member State in this regard had observed that over and above the constitutional, legal and procedural issues of Rome Statute's membership, its government remained concerned on how the powers of investigation and prosecution would be exercised, particularly in relation to the principle of complementarity. Bearing in mind that the Court works on the principle of complimentarity, a State was of the view that it would be

wise to be comprehensive and certain in the study of Rome Statute to ensure that the two diverse legal systems could complement each other.

In this regard, a Member State had called for the Court to effectively address the concerns of Asian-African States and prove to the international community, through its operation and work, its just and independent role in strict compliance with the principle of Complementarity, and win wider trust and support among States.

A State had called for a determination by the AALCO 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. Another State had 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.

B Crime of Aggression

Regarding the "Definition of the Crime of Aggression", several delegations considered the Crime of Aggression as a serious international crime and its incorporation in 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. It was noted that the ICC should have the widest possible reach in terms of providing for various acts defining the crime of aggression, and in this regard the definition adopted by the General Assembly Resolution 3314 of 1974 could be a sound basis for a point of departure for both general definitions as well as for the selection of acts for inclusion in the definition. They also gave their views on the individual responsibility and command responsibility. Many delegations wanted a clearly defined role for the Security Council in case of failure or declining to determine the acts of Aggression to the effect that independent judicial bodies such as ICC should not be impeded.

The Member States of AALCO realize the imperative of having a clear and a broadly acceptable definition on the Crime of Aggression and consider it to be indispensable to developing the rule of law in the world. International community should strive to have consensus on this definition. In this regard, it had been noted that the major definitional issue that remained were the conditions for the exercise of jurisdiction, and especially the role of the political decision-making body, i.e. the Security Council in that regard. It was hoped that all States Parties and States that were participating in the proceedings of the Special Working Group to work towards an acceptable and workable compromise in this regard, taking the important principle of equality before the law duly into account.

C Bilateral Immunity Agreements

As regards the bilateral immunity agreements entered by the United States of America, to protect its nationals from the jurisdiction of the International Criminal Court, with several Parties and non-Parties to the Rome Statute, a State was of the view that although it was legally permissible to undertake such arrangement, States should not use Article 98 to undermine the integrity of the ICC or to weaken the spirit of the Rome Statute itself. It was of the view that most of these countries had entered into these bilateral agreements purely because of national interest and not for the furtherance of international law. It respected the position of these countries, but viewed the bilateral agreements as watering down the letter and spirit of the Rome Statute.

A State referred to the intense pressure brought about to sign Non-Surrender Agreements. However, it acknowledged the sovereign right of States to enter into such agreements. A State also desired that the forum of AALCO should offer an opportunity to its Members to determine whether such Non-Surrender Agreements were in compliance with their obligations under the Rome Statute, as it would ensure that perpetrators of the crimes covered under the ICC should not be shielded from justice through bilateral agreements.

IV. An Analytical Enquiry into the Ratification Status of the Rome Statute

Ladies and Gentlemen, presently, there are 108 States Parties to the Rome Statute of the International Criminal Court. 30 out of the 53 African Group of States, 14 out of 53 Asian Group of States, 16 out of 23 Eastern European Group, 23 out of 33 from Latin American and Caribbean Group of States, and 25 out of 27 from Western European and other States, have ratified the Rome Statute. One may infer from this that the greatest support to the Rome Statute is received from the Western European and Other Groups, while African, Latin American and Caribbean States and Eastern European group can be said to be proactively engaged in it. However, from the largest continent Asia, the Rome Statute can be said to have received a lukewarm response.

Moving on further, this number of 108 is indicative of the fact that approximately, 58% of the United Nations membership of 192 States is supportive of the Rome Statute and it is inching towards universalization. However, looking beyond the numbers reveals another story. At the present juncture, more than sixty percent of the global population living in nations, such as the People's Republic of China, India, Islamic Republic of Iran, Malaysia, Saudi Arabia, Arab Republic of Egypt, the Sudan, Russian Federation, United States of America and several other nations remain firmly outside the ambit of the Rome Statute. In terms of global power matrix, three out of the five veto-wielding powers, namely, China, USA and Russia also are not Parties to the Rome Statute.

One may draw from this analysis an inference that several States have their own very valid concerns in relation to the Rome Statute and the International Criminal Court created under it at this juncture cannot be described as a truly universal institution. This also makes out a case for heeding to the concerns and criticism of the non-party States to the Rome Statue, so as to make it a universal instrument.

V. Forthcoming Review Conference

It is my earnest hope that the forthcoming Review Conference that is scheduled to be held in the year 2010 in Uganda- a Member State of AALCO, would offer an opportunity in this regard. The success of the Review Conference should not solely rely on amendments and that it should also serve as an opportunity for stocktaking, benchmarking and evaluating the work of the international criminal justice system established by the Rome Statute. States Parties could also discuss and make commitments on issues such as cooperation, implementing legislation, complementarity and impunity gap. Also, the impact that international criminal justice has had on prosecutions and the affected communities including peace processes and peace building, among other areas could be considered.

During the Rome Conference in 1998 there were different opinions on the need to include the crimes of terrorism and drug trafficking. Regretting that no acceptable definition could be agreed upon for these serious crimes which destabilize the political, social and economic order in the States and threaten international peace and security, Resolution E of the Final Act of the Rome Conference had recommended that the Review Conference consider these crimes with a view to including them in the Court's jurisdiction.

There is a possibility that the venue of the Review Conference is likely to have implications on the substantive work at the conference and in shaping perceptions on the ICC, particularly those on its effectiveness and legitimacy. These implications may also have further effects on the future success of the Court with regard to potential ratifications of the Rome Statute and cooperation with the ICC.

VI. Concluding Remarks

Distinguished participants, Ladies and Gentlemen, the AALCO is a common fora for conducting the exchange of information on the experiences of the States in Asia and Africa, particularly in international

law matters. Its work on the International Criminal Court is an endeavour to promote international criminal justice and to raise awareness of International Criminal Law it has entered into a Memorandum of Understanding with the International Criminal Court in February 2008.

The consideration of the ICC issue by this Organization is conducive to update the knowledge of all Member States in relation to the recent developments of the Court in a timely manner and to enhancing the communication and cooperation among all Member States with a view to effectively bolstering criminal justice on both national and international levels. This has facilitated immensely amongst the Member States the understanding of the recent developments of the International Criminal Court.

The AALCO fully confirms that it was the Member Governments who were the best judges and it was their sovereign decision whether to join ICC or not, however, it would be desirable to know their concern about this very important legal body. Free and open exchange of views in this regard could perhaps help us to meet such concern. Furthermore, exchange of information would definitely contribute to a better understanding of Rome Statute and its importance in the process of achieving international criminal justice. This seminar today, is one such step in that direction.

The creation of the ICC was a milestone that needs to be supported by the international community. While becoming a Party was a sovereign decision, the AALCO Member States should remain vigilant about the work of ICC.

In conclusion, I would like to reiterate that the legal issues surrounding the implementation of the Rome Statute could be addressed in a manner where the concerns of all Parties and non-Parties would be addressed satisfactorily. Personally, as an academic, I do cherish the idea of a permanent International Criminal Court and wish to see the ICC as an independent, just and respectable court playing an important and positive role. Thank you for the patient hearing.

Chair: Thank you Prof. Mohamad for highlighting the views and concerns of the Member States of AALCO in relation to the ICC. I now call upon our next presenter Mr. Y.S.R. Murthy, Director of the National Human Rights Commission of India to present his views on the issues before the first Review Conference of the Rome Statute to be held in 2010.

2. "Issues before the First Review Conference of the Rome Statute to be held in 2010" by Mr. Y.S.R. Murthy, Director, National Human Rights Commission of India, New Delhi.

Distinguished fellow Panelists, Excellencies, Ladies and Gentlemen, first and foremost, I would like to clarify that the comments and observations that I propose to make in the course of my presentation, are purely in my personal capacity as a researcher and commentator on human rights issues. I need not reflect the views of the Organization that I represent here. My presentation is structured in four parts. First, I would like to briefly cover the Amendments in the Rome Statute. In the second part I would like to cover the issues that are likely to be on the agenda of the Review Conference. Thirdly, I would like to take up the Special Working Group on the Crime of Aggression, the latest formulations on the definition of the Crime of Aggression, as well as the conditions under which the Court may exercise its jurisdiction. Then there is a non-paper which talks about certain related issues and the dilemmas.

I. Amendments

Article 121 of the Rome Statute provides that:

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto…..

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The

Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eights of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall either enter into force for those State Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals on its territory.

Article 123 of the Rome Statute further provides that:

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in Article 5.

2. The Conference shall be open to those participating in the Assembly of States Parties.

II. First Review Conference and the Likely Agenda

The first review Conference of the Rome Statute will now meet in Kampala, Uganda in the first half of 2010.

It is expected to review the Statute and consider amendments to it, though some States and NGOs feel this exercise should be limited to stock-taking. Of course the Court has only spent a few years and not

many cases have been considered, so there are some who still hold the view that the present exercise should be limited to stock-taking.

During this year, the 8th Session of the Assembly of States Parties will consider proposals for amendments to be taken up at the review Conference. The likely agenda for the review Conference could include the:

(1) Adoption of the Crime of Aggression. The Assembly of States Parties has set up a Special Working Group on the Crime of Aggression on the revision of Article 124 which provided for a seven year opt-out clause on war crimes. The Government of Belgium sought expansion of the list of prohibited weapons in the Rome Statute to include cluster munitions and landmines. I will deal with the Crime of Aggression in greater detail. In the meanwhile I will give a brief overview that in the Statute, War Crimes have been codified and criminalized and yet an opt-out clause can be found therein. This is a transitional provision and in the same article there is a provision that it shall be reviewed at the first review Conference, and possible consideration of terrorism and drug crimes, was discussed when the Rome Statute was being adopted and there were debated whether that would strain the resources of the Court, whether the Court should spend its resources because this would involve the use of many languages, expenses in investigation, cross examinations particularly in drug crimes.

In the case of terrorism, there are many missing links for instance, as of now there is no comprehensive definition of terrorism even though there are 13 different Conventions dealing with different facets of terrorism and recent events have also underscored the need for some ways of addressing it, but whether it should be addressed by the national systems or by the International Criminal Court, is a point that needs to be discussed. As drug related crimes require lot of resources it was decided that the Rome Statute should deal with the most serious crimes, that's why war crimes, genocide and crimes against humanity were agreed upon. Even on the list of prohibited weapons there was extensive debate, India wanted inclusion of nuclear weapons, but the list adopted in the Rome Statute was a limited one.

Crimes within the Jurisdiction of ICC:

* Article 5(2) of the Rome Statute states that, "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations".

In other words, definition and conditions under which the Court shall exercise jurisdiction over this crime of aggression, these were the two elements which eluded when the Rome Statute was adopted in 1998.

These are all the modalities that the Review Conference would adopt the amendment on aggression as an annex to an enabling resolution. A short draft for such a resolution is provided in the paper of the Chairman of the Special Working Group on the Crime of Aggression. The amendment clause dealing with the question of entry into force is contained in the draft resolution, in order to limit the annex to the actual amendment to the Rome Statute.

Article 8 *bis*: Crime of Aggression is sought to be inserted after the Article 8 of the Rome Statute. This is the latest formulation which the Special Working Group has proposed and this is to serve as a basis of discussion in the Review Conference. It states:

1. "For the purpose of the Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". While this was being formulated there were some States that argued that any use of force or any aggression should be covered and such a threshold should not be set up, because any aggression would be a violation of the UN Charter.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. In this, there is a further elaboration of the following acts:

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces; or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

In other words, invasion attacking another State, or the military occupation of another State, however temporary, constitute crimes of aggression as also bombardments against another State, carrying out

blockades, allowing another State to perpetrate acts of aggression against a third State, or sending armed bands to carry out grave acts against other States. The proposed definition does not include acts of terrorism engineered by non-State actors, like Al-Queda. Some delegations argued that threshold clause would limit Court's jurisdiction to cases where the act of aggression "by its character, gravity and scale constitutes manifest violation" of the Charter of the United Nations. Some expressed support for this clause as it would provide important guidance for the Court and prevent it from addressing borderline cases. The current text retains this new definitional layer.

There were differences of opinion over the Role of the Security Council. States Parties were still in disagreement over role of the United Nations Security Council which under the UN Charter has the power to determine matters relating to acts of aggression. The Permanent Five Members of the UN Security Council took positions that determination of aggression belongs exclusively to the Security Council.

In the Special Working Group on the Crime of Aggression, a new definition has been provided in Article 15 *bis* regarding exercise of jurisdiction over the crime of aggression.

Article 15 *bis* states:

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by a State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security-Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

4. (Alternative 1) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.

Option 1 – end the paragraph here.

Option 2 - add: unless the Security-Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

5. (Alternative 2) Where no such determination is made within (6) months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

Option 1 - end the paragraph here.
Option 2 - add: provided that the Pre-Trial chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15:

There is another non-paper where certain other proposals have been made. Activation of ICC's subject-matter jurisdiction on aggression with respect to UN Security Council referrals:

* After adoption of the relevant amendments by the Review Conference; or
* After their entry into force; or
* The Security Council referral which may include the crime of aggression does not depend on the consent of the State concerned, as was the case with any other Security Council referral.

Implications of article 121, paragraph 5, second sentence, for State referrals and *proprio motu* investigations. There was a strong view that the application of article 121, paragraph 5, second sentence, should not lead to differential treatment between non-States Parties and States Parties that have not accepted the amendment on aggression.

If you see the following table the difference is clear:

May the Court exercise jurisdiction over the crime of aggression?	Victim: State Party, accepted CoA	Victim: State Party, has not accepted CoA	Victim: Non-State Party
Aggressor: State Party, accepted CoA	1 **Yes**	2 **?** ⟺	3 **Yes**
Aggressor: State Party, has not accepted CoA	4 **?** ⇕	5 **No**	6 **No**
Aggressor: Non-State Party	7 **Yes**	8 **No**	9 **No**

In the topmost corner you have the caption "May the Court exercise jurisdiction over the crime of aggression? In box number 1 you have the Aggressor State Party, that has accepted the Crime of Aggression, and in both cases the Court may exercise its jurisdiction. Similarly if you come to box number 5 where the Victim State Party has not accepted the Crime of Aggression, it says no. There are different formulations only on box numbers 2 and 3 and 4 and 5 these are what we call dilemmas. There are some countries and some delegations which wanted all the 9 scenarios to be examined by the ICC Judges. But some wanted scenarios 2, 3 and 4, 7 to be under the jurisdiction of the ICC.

As far as the leadership crime of aggression and territoriality are concerned, broad support was expressed for the view that "concurrent jurisdiction arises where the perpetrator acts in one State and the consequences are felt in another". In the non-paper, following formulation was proposed:

> *It is understood that the notion of "conduct" in article 12, paragraph 2 (a), of the Statute, encompasses both the conduct in question and its consequences.*

Only in the coming year we would know what exactly would be adopted by all the countries. Thank you.

Chair: Thank you Mr. Murthy for taking us through the likely issues and provisions to be considered during the Review Conference in 2010. Now I would like to call the Discussant Mr. C. Jayaraj, to take the floor.

4. "Some Views on ICC" by Mr. C. Jayaraj, Advocate, Supreme Court of India

Thank you, Madam Chairperson. First of all, I would like to state that I am very grateful to the organizers for having asked me to be a Discussant here, on a very important issue of contemporary international law. I am an independent researcher in international law. I will give my personal views on the subject. To the best of my abilities, I will present certain issues before consideration at the Review Conference.

What is the most important development in international political life or international law making? According to me, it is the extraordinary participation and extraordinary legal acumen rendered by the international civil society, cutting across all cultures, nationalities and ideologies contributing to the development of legal concepts, some of them are reflected and codified in the Rome Statute establishing the International Criminal Court. Therefore, it is very important for all of us that we study the Rome Statute, perhaps if possible article wise and see how far it can be improved, by amendment or deletion.

The mandate has been given to the Review Conference that we should complete the task of defining aggression, some countries expressed the desire that terrorism and drug trafficking should also be considered, we should not stop there. We should actually go ahead and see what are the other improvements that we can include in the Rome Statute.

I have very carefully heard both the presentations in the afternoon session and would like to say a few words about the papers that were

presented and then I would address some of the issues, particularly about the definition of the crime of aggression.

Firstly, I heard the Hon'ble Secretary-General stating the concerns of the Member States of AALCO. There are about 30 African countries and 14 Asian countries who are Parties to the ICC. It would be good to see how many States within AALCO support the Rome Statute, as this would be very important for the Organization to come to a better understanding, as some of the countries are repeating the arguments that they took during the Plenipotentiary Conference. There are about 22 countries within AALCO who are parties to the Rome Statute that is roughly 45% of the States Parties to the Rome Statute. This is a very good sign and we hope that more countries will come up for membership in the ICC.

Now the concerns raised by the Secretary-General of AALCO relate to the principle of complementarity. Notwithstanding the statutory clarity about complementarity, some countries feel that it intrudes into national sovereignty. Here first of all we have to determine what is sovereignty? I would like to say that in order to remove the problems raised by sovereignty, the principle of complementarity was incorporated into the Rome Statute. The Preamble as well as the article relating to the admissibility of cases very clearly talks about the parameters of the Court assuming responsibility of a case subject to certain conditions. Only upon the existence of such conditions, namely the total unwillingness or inability or breakdown of the judicial or governmental structures in a country, that the ICC will step into the investigation, prosecution and punishment in that particular situation. However, all these requirements will not be at the whims and fancies of the Public Prosecutor, there are absolutely clear statutory requirements that will have to be fulfilled, which are embodied in the Statute and have been accepted by 108 States Parties, and how can this still be an area of concern? But still one has to be very careful as there are 600 multilateral treaties after the Second World War, and one should not apply sovereignty as a mathematical concept and does not lose your sovereignty if you are party to these treaties. Sovereignty is a living concept. A country agrees with its own concerns and consciousness. I think the only question of sovereignty for many countries in the world,

particularly those who are parties to the Rome Statute is not because of the Statute but because of article 98 that deals with "Bilateral Immunity Agreements". This is the most important development in relation to the entire debate about sovereignty in the ICC Statute.

As I am an independent researcher, I will not hesitate to talk about my own country. I would like to put a question: the largest democracy in the world and senior officials in the Government of India is here, my intention is not to politicize the issue, but my concern is how a country like the Republic of Nauru has been able to sign the Rome Statute and not India. Does it mean that a smaller country has lesser sovereignty as compared to a big country? And India has signed this Article 98 agreement with US that it will not surrender a US citizen to the Court under this agreement. For example China has not signed that agreement with US. So the question of sovereignty in the context of complementarity in the ICC shows that the Statute does not intrude into any one's sovereignty. There are countries like Belgium who was told who's representative at the Special Working Group on the Crime of Aggression, when they started issuing a warrant of arrest against some American functionary, immediately the American State said that "if you continue to insist we will remove the NATO headquarters from Brussels to somewhere else". Either you repeal the legislation that you have enacted for universal jurisdiction or we will remove the NATO Headquarters. So in few months, the Belgium Government repealed the law. Belgium is a western country which believes in the rule of law, but still it faces a lot of pressure.

Another issue in the mainstream thinking is that ICC should not loose its credibility. In the seven years of existence of the ICC as a Court, we have an independent Prosecutor. In the case of the Security Council referral in the latest case, what is the material you have after seven years of existence? Every section of the ICC is working. The Pre-Trial Chamber, Prosecutor and then the Appeals Division. They are giving judgments about issues raised by the defenders. All the three division of the ICC are functioning. I have not seen one instance that would question the credibility of the Office of the Prosecutor or Pre-Trial Chamber or the

entire Court. This morning there was a question about the political leadership or what kind of leadership the ICC can give in certain situations? The role of ICC is purely judicial in nature, and it will and should know where the politics ends and where the crime begins. It will assume jurisdiction and that is the trend in the three cases that are pending before the Court. Now, I would like to focus on the role of the Prosecutor.

Every one is concerned with this one man and his actions in the Court. The Office of the Public Prosecutor is not that independent. It is subject to one important condition. I believe there are now 16 complaints that have been received by the Office of the Prosecutor. Except for accepting 4 or 5 they have rejected all other complaints. Every NGO in every part of the world is writing to the Prosecutor, that my Government has committed a war crime. In fact there is a lot of hope in the minds of people, that if something happens locally and it is so abominable or so inhuman we can approach the ICC. This hope in international law has never been there throughout its existence. This is the most important development in terms of public and judicial institutions in public life.

Even in the case of Sudan, in the most unquestionable situation in Darfur, in fact the Statute is very clear. The Prosecutor can easily make a charge as if to prosecute and then to arrest but, here the Security Council made the referral. The Prosecutor went to the Security Council addressed it and the Security Council decided, and even here the US and China abstained. It was not all the five Permanent Members agreement; still the Security Council accepted the referral as the rest of the three members did not want to oppose it. The Office of the Prosecutor cannot be approached so easily. Because of the question of the functioning of complementarity there is a burden on the Court. In my view, as I have also been to the ICC for 2 months as a Visiting Fellow, I have had an occasion to talk to almost all of the Judges particularly the President; this Prosecutor invited me for every single meeting that he conducted. He asked me to suggest situations where because I was a public prosecutor in my life, he asked me for my ideas which I gave. We have to see the interest of justice in Article 53. This is also a consideration as input for the

Public Prosecutor in leveling a charge against somebody. Therefore, I do not think that any Member State of AALCO should have apprehensions about the Court. I cannot go beyond this.

Now, I will touch upon a few issues before the Review Conference. It is correct that even after seven years the positions of some countries who wanted terrorism and drug crimes included in the Rome Statute, there is no change in their positions. The most important issue however, is to finish the unfinished task of defining the crime of aggression. Between now and the Review Conference in Uganda in 2010 we do not know how this matter will evolve. Nonetheless, now we have before us a draft definition all the aspects relating to that were very clearly presented by my co-panelist Dr. Murthy. The components of article 8 *bis* are sought to be incorporated, as well as the related article relating to the power of the Prosecutor contained in article 15 of the Rome Statute. These are the two articles that are sought to be amended at the Review Conference.

Now, I would like to make a comment. We all know that General Assembly Resolution 3314 of 1974 talks about the elements of the act of aggression. But we also have to remember that the 1974 definition was an upshot of the thinking from the Charter days till the adoption of Resolution 3314. In fact according to me Resolution 3314 can only be a limited basis for defining the term of aggression now, after 15 years of experience that we have seen in our lives.

Paragraph 1 of Article 8 *bis* that is the Crime of Aggression according to the draft definition proposed by the Special Working Group on the Crime of Aggression, it is very much in line with the scheme of the ICC Statute, that places the criminal liability on the individual, but criminal liability on the individual not for acts committed by him but by the State. I am still struggling to come to terms with this form of liability. In the morning Prof. Mani had pointed out whether the State has criminal liability for crimes? In my view the question cannot be more appropriate than today. I don't understand that if State is a person in law, it claims to have unlimited powers both above the citizens and outsiders, it says don't interfere don't talk about us, how come when it comes to the question of

crimes we attribute fiction to it, but everywhere else it is a legal reality. But when it is charged with the crime of aggression or international crime some individual has to be tried, that is why in the judgment delivered in the case of Bosnia *vs* Serbia in 2007, is very important as it has focused on the debate within the International Court of Justice about "whether a State is liable for its criminal activity as an entity or not". In my view I would say that the State as a legal entity is liable for crime. The individuals who act or control the political activities of a State, who is this person? A person who can effectively exercise control over both military and political actions, it refers to the highest executive i.e. the Head of the State or the Head of the Government, because it does not refer to persons in effective control but a person in effective control. I think we all should think about it. In my view it attributed criminal liability to the Head of the Government or the Head of State, in line with article 27 of the Statute, which states that the official capacity of the accused does not matter.

The next question that arises is whether it is a single person who is liable for the acts? Because, he directs the army to cause aggression. The reality on the ground is that there are tens of thousands of armed forces, who physically cause the crime of aggression. Therefore will all these persons be charged or let off because they only carried out the orders of a superior, the highest functionary of the State? This is a very important question in relation to command responsibility. In any case there is no exemption under the Statute, no individual will be exonerated because of the position, how come the one who orders is held liable and the one who executes is let off.

I think that the question of abetment of the crime of aggression should also be addressed. This is because from the Nuremberg days it is said that the crime of aggression is a 'supreme crime'. This is the mother crime, from which crimes against humanity, war crimes and in any case genocide occurs because of that superior crime. Therefore there is no complicity question. So how come we should consider the case of any other person than the supreme commander. In the Indian Constitution, the President is the Supreme Commander of all the three forces, so if the Government decides and gives an order who is responsible for that? In

International Humanitarian Law any soldier is exonerated if he does a war crime, if they are hauled up for war crimes under article 8 are they exonerated or am I implying that there will be exoneration? I will open this question for debate.

Suppose after all the efforts we do arrive at a definition of the crime of aggression. The next issue would be how to trigger the jurisdiction for the crime of aggression? The trigger mechanism laid down in the Statute does not differentiate between all the other crimes. In other words the trigger mechanism for all the crimes is the same, either a, b, or c option. How come only for the crime of aggression a completely new mechanism has been built up in the Statute? Articles 13 and 15 of the Rome Statute. For the cases concerning war crimes, crimes against humanity and genocide, the Prosecutor has an independent statutory power and he need not ask the State concerned, rather he need not ask the State Party if he has to start an investigation in a particular case. For the crime of aggression the Prosecutor has to go to the Security Council. The Security Council is a constitutional as well as political body; therefore, its decisions affect the rest of the legal questions. This provision has been made keeping in view that the Prosecutor, Mr. Ocampo, himself went to the Security Council in the case of Sudan, and therefore now this will become a statutory requirement. This is not the right course, because what he did was out of caution and that should not be made into criteria. As this would tantamount to a referral from the Prosecutor to the Security Council to get a referral back from it. This is a very complicated procedure where the role of the Prosecutor is only limited to that of a messenger. What would happen if the Security Council does not determine that there has been an act of aggression? Should he keep quite? No he should not. In this case there is a severe divide in the Working Group and Dr. Murthy demonstrated it very clearly. Therefore, I do not know how the Review Conference will resolve this question, as it is a very serious contradiction in terms.

Therefore, in my view, Article 15 of the Rome Statute should not be disturbed. The role of Security Council has been built into the Statute only for referral and deferral, but not for the Prosecutor to take a go ahead

from the Security Council in proceeding with the Crime of Aggression. I do not think that is the case, because there is an admission why is there such a high threshold for the trigger mechanism in the case of aggression. This is so because in the back of the mind of some Security Council member there will be a thought that the State is also criminally liable apart from the individual. This is perhaps one of their fears and that is the reason they want to hold the power of deferral. As the power of deferral already exists in the Statute there is no need to disturb article 15.

In the end, I would like to say Madam Chair that the Review Conference would have a very good draft, but the draft will have some problems and I have indicated what kind of problems could be there. The reason is that the draft presented to the Assembly of States Parties is a divided draft. Therefore, it is my submission that we will have to wait and see what happens in the Review Conference. However, in the end I would like to say that nobody can deny that the culture of impunity is over, and there are countries that are hurriedly promoting domestic legislations so that their credibility as a country, for having allowed your national to commit a crime on your territory will not be tested elsewhere. Therefore, the best way is to eliminate the crimes, the Court can only deter the occurrence of crimes it cannot abolish the crimes. As the origin of the crime is deeply sociological, politico-social and so on. Thus, ICC is not there to abolish crimes, it is there only to prosecute and punish; in my view the limited effort of the international community is getting consolidated. Thank you very much Madam Chair.

5. Discussion

Chair: Thank you, Mr. Jayaraj for that passionate and interesting presentation. I now open the floor to the participants to ask any questions or make any comments on the presentations made here this afternoon.

Amb. Komatsu: Thank you, Madam Chairperson. I would like to thank all the speakers who made excellent presentations this afternoon. I would like to offer one piece of information in relation to Article 98 of the Rome Statute, which was discussed by our distinguished Discussant. For

the benefit of all the participants I suppose that everybody in this room is quite familiar with the content of Article 98, I think the distinguished Discussant referred to paragraph 2 of Article 98 which reads as follows:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender".

In a nutshell, it is true that the Government of the United States of America was proposing a bilateral agreement with the State Members of the ICC to conclude an agreement with the US Government saying that it needs the prior consent of the US Government to surrender a suspect of the ICC crimes to the Court. As far as the Japanese Government is concerned we did not comply with the proposal of the US Government that means that we have not concluded such a bilateral agreement when we acceded to the ICC. I cannot speak for the others but, I know from information that the European Union (EU) made a common position not to agree to such bilateral agreements and I understand that no member of the European Union has signed such an agreement.

Dr. Anupam Jha, Senior Lecturer, University of Delhi: I would like to ask Madam Chair the Acting High Commissioner of Uganda that one of the references made to the ICC was from Uganda. So what was the kind of state of affairs in Uganda that the situation was referred to the ICC? Secondly, if the situation was referred one of the conditions of admissibility is that, there must be inability of that State to prosecute the criminals, or if there is a failure to do justice. So what were the facts that the case was referred to the ICC and did the Court go into these issues?

Chair: We will take all the questions together and then answer them.

Dr. M. Gandhi, Director, Legal and Treaties Division, Ministry of External Affairs, Government of India: I would like to comment on Article 98. I am infact not provoked enough by Mr. Jayaraj. The Government of India has not committed anything illegal by accepting Article 98, because Article 98 was a part of the package which was not bargained by India. Some other country bargained it signed the agreement under Article 98 and then unsigned it. India did not do that, so the blame does not belong to India. If the distinguished Discussant has to trace the history, he should clearly read the 17 July 1998 Statement of India. The last paragraph says "for these fundamental reasons of principle we cannot accept the Statute. It is a matter of very great regret to us but the Government of India will not be able to sign the Statute". We are very clear, so we do not have some obligation under the Statute or any other place to abide by it. If Article 98 is mutually beneficial then we will sign it. You may ask why it is mutually beneficial. It is mutually beneficial because it is not a concession; we are a very large true contributing country for the United Nations, still which are the provisions which will control the UN Peace Keeping Forces? Or otherwise is a very questionable subject. As an international lawyer I do agree that the development of international law and international humanitarian law to the extent it develops always creates a lid over sovereignty, everybody understands that, but our point is that without consent, you cannot restrict our sovereignty.

We simply argue that the referral/deferral provision that really restricts the sovereignty provision, because the referral deals with non-State Parties also. So that was our concern when we addressed all these issues. Now deferral is of much more concern for us. It is of more concern because by deferral an individual criminal, it is not a State, gets exempted under a deferral. So where the question is between peace vs. justice, where for the sake of peace justice is sacrificed we do not want that to happen. Our stance is for upholding international law that is why we took that stand. If that is to happen the Court's operations should be de linked from the United Nations. This is for two reasons. As the distinguished Discussant agreed that the Security Council is partisan in character, in making decisions. Whether it makes a decision or not, one ever knows first thing. Even if it makes the decision it should not be

linked to the justice delivery system. It should be independent and not controlled by political expediency.

On the same level we have a problem now. The Discussant raised a particular point on Article 8 *bis*. Article 8 *bis* is confusion, because it talks about two things. One is what is stated in Article 39, and then linking Article 39 with where? With Resolution 3314 clauses, which talk of individual criminal responsibility? But Article 39 deals with the determination of the act of aggression of a State. So these two things are being linked now in the sense that if there is no aggression according to the Security Council, the individual act of aggression cannot be easily established. The linkage is very clear Article 8 *bis* states "for the purpose of the Statute the crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". Whatever threshold is laid here is much more than the threshold lay down in Article, which does not have a threshold of its own. It is left to the sweet will of the parties there. But now they are trying to bring in a threshold that tries to link the act of aggression with the act of aggression, without proving one it is difficult to prove the other.

Ms. Sarah Kirlew, Second Secretary, Australian High Commission: I would like to thank all the Panelists for the very interesting presentations. The Australian Government is a strong supporter of the International Criminal Court, and we would like to take this opportunity to encourage other Member States to become parties to the Rome Statute. I would be interested to know how we could encourage and assist Member States of AALCO who are not yet parties to it to do so.

Col. Anwar Yusri, Malaysia High Commission: My question is to Mr. Jayaraj. This relates to Article 16 of the Rome Statute "Deferral of investigation or prosecution" which states "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, adopted a resolution

under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions". In my view the Security Council can on and off the switch at the same time. So how can the ICC be independent and credible when it is controlled by some other body?

My second question is to Prof. Rahmat Mohamad. In his presentation he talked of the concerns of the Member States who are not party to the Rome Statute. I agree with him, because after the Second World War everyone agreed that the veto power that vests with the 5 permanent members of the United Nations, over period of time people realized this mistake, how 5 members could be given the exclusive rights, even India objected to it. You have to look at the concerns of other countries numbers do not depict anything. So maybe the AALCO Member States who do not want to join the ICC have valid reasons. We don't have a crystal ball and cannot predict the future. For example we have a Constitution, how come there are some people who do not want to follow it? Because we must remember that at the end of the day judiciary should not be seen as partial. Perception management is important. For the past so many years' people have seen the Security Council as a purely political body so it will take time before this perception can change. Thank you.

Chair: Any other questions? Now I will give an opportunity to the Panelists to respond to the questions. I will start with Prof. Mohamad.

Secretary-General: Thank you Madam Chair. I can recall that there is only one question to AALCO. Others did mention it in passing, but the question related to how can we encourage AALCO Member States to be States Parties to the ICC? As I mentioned there are 16 Members of AALCO that are Parties to the ICC. What needs to be done first is to make Member Countries aware as to what would be the implications of becoming State Parties to the Rome Statute. As they need to know the political, social and other implications. In that sense confidence building, training programmes, awareness programmes must be launched at our level. The Secretariat has taken that seriously. We have a MOU with the

ICC as I mentioned this morning; the next step is to foster relationship to get other International Organizations working together with AALCO, to make Member Countries aware not just of the existence of ICC and what does it mean for them. I think this reality of *quid pro quo* is very important. Why Member States want to become members of a certain Organization needs to be answered first. The Secretariat would very much promote training programmes and seminars of this nature and we would like to see our Member Countries participating in it as often as possible.

Judge Fumiko Saiga, ICC: I would like to add a comment to what the Secretary-General has just said. I do share his view of informing the States of the implications. I would like to point not only the benefit or impact for the country but stress on the fact of being a part of the global network. Aiming towards the same purpose that I would very much like to request as many countries as possible to be a part of this global network. Thank you.

Chair: I think some of the questions were directed to Mr. Jayaraj, I give you the floor to answer them.

Mr. C. Jayaraj: Firstly to the credibility of the ICC. I had said that I do not see any lacune in the Rome Statute to discredit the ICC. Notwithstanding the UN Security Council's role of deferral. It is definitely interference because Security Council passed resolution 1422 regarding the armed forces, yet it could not sustain the deferral beyond two periods. Here the question is not about the credibility of the ICC rather about the credibility of the Security Council. This is my fundamental answer. The same thing is linked to Dr. Gandhi's comment. I am very impressed by his defense of his Government's position. It needs more persons like him to defend the non-participation. But as a lawyer I would like to say who works for justice everyday, I will not like a political forum which is intended to start aggression as a part of maintenance of international peace and security under the measures assigned under Chapter VII of the UN Charter. This means, to assemble the world's security forces under Article 48 because here you are expected to work 24 X 7 and the UNSC is the only continuous body by the nature of its function. You declare that

there is aggression, and if there is aggression you simply go and stop it, because it is your duty. But to determine a crime of aggression or there are times when you don't say it is aggression you pass resolutions of various formats. But introducing Security Council role in trigger mechanism is not called for as it dilutes the role of the Public Prosecutor. It also dilutes whatever independence the Court has got because it will increase the role of the Security Council in a much nastier manner than what it is now.

Therefore, the Public Prosecutor should not be asked to go to the Security Council, because paragraph 5 of Article 15 *bis* very clearly de-links these two findings. Security Council can do so under Chapter VII of the UN Charter. So, why only for this crime the Security Council should be given a monitoring role, in a manner of speaking, a role that interferes with the office of the Public Prosecutor. This is what is objectionable to me under this scheme.

Chair: I give the floor to Dr. Murthy to answer some of the questions.

Mr. Y.S.R. Murthy: State sovereignty has been mentioned many times today. It also implies responsibility to protect in 2005 in the UN General Assembly there was a clear recognition that state sovereignty involves responsibility to protect population from these three crimes of genocide, war crimes and crimes against humanity. When a country does not protect its population then the responsibility will pass on to the UN Security Council. Today there is an enhanced understanding that even in a democracy in the case of protection of human rights, as mentioned by Mr. Jayaraj, under Article 8 *bis* "the definition of the crime of aggression" about reference to a person. At the time of drafting in the Working Group there were demands that the word "person" should be replaced by "persons". And the intent should be added, as is the case of the definition of Genocide. The way it has been formulated now in a very wide manner for example "the crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". In fact it is also

believed that it would include influential industrialists and others who can be captured by this formulation and lastly the Australian representative enquired how one encourages countries to become parties to the Rome Statute. Maybe by allying their apprehensions over the Court, if a country has a robust judicial system and because of the principle of complementarity enshrined in the Statute, the Court will have to refer to the domestic jurisdiction and this is the way to ally the apprehensions of those who have not yet become parties. Thank you.

Chair: Thank you Dr. Murthy. I think we have one more question from the High Commissioner of Malaysia.

H.E. Dato Seng Sung Tan, High Commissioner of Malaysia: I think this seminar is a very good opportunity for us to express ourselves. We expect that in the Review Conference, countries that are Parties to the Rome Statute should take account of the concerns and reservations of the countries as to why they do not want to be a Party to the ICC. Malaysia has been actively involved in the negotiations, and we are very keen to know why the countries do not want to sign the Rome Statute. In the ASEAN region the only country that has signed and ratified the Statute is Cambodia. Thailand and Philippines signed it but did not ratify it. So there are reasons why countries do not want to become Parties to the ICC. Therefore, we should not be only concerned about the goodness of the ICC but also look at the reasons why countries want to remain outside it. Of course we are also concerned about Article 98 and the way certain countries will use it. At the Review Conference all these issues should be addressed. So if ICC is to be a respectable organization and not a body that takes only selective political decisions, that is our concern, not because we do not subscribe to the principles of ICC, its more than that. Such a seminar and such an occasion should be given, so that, we have some of the P-5 countries here, they should take into account the concerns of countries that are outside the ICC. Thank you.

Chair: I think the last question was addressed to me as to why this rebel group, the Lords Resistance Army that Uganda has taken to the ICC. Its not that Uganda does not have the capacity to prosecute this rebel group,

but our hands were tied because this group has no basis in Uganda at all. It is based in our neighbouring countries, it was in Sudan, but now has moved to DRC, I understand now they are again on the run and moving out of Congo to the Central African Republic which is even farther away from Uganda. So Uganda tried various options to stop these heinous acts against the people of Uganda. As we could not go and fight them in other countries, and as Congo did not have the administrative capacity, Uganda was itself taken to Court for invading Congo, we had to withdraw immediately, and seek international help to bring this rebel group to books. But otherwise if it were in Uganda we would have used other options to bring it to book. Maybe these are some of the benefits that countries can look and can become States Parties to the Rome Statute.

This brings us to the end of our afternoon session. I wish to call the Deputy Secretary-General of AALCO, Dr. Yuichi Inouye, for the vote of thanks.

Dr. Yuchi Inouye, Deputy Secretary-General, AALCO: H. E. Prof. Dr. Rahmat Bin Mohamad, Secretary-General of AALCO, Her Excellency Fumiko Saiga, Judge, International Criminal Court, H.E. Mr. Ichiro Komatsu, Ambassador of Japan to Switzerland and Ex-Director General of the Bureau of International Law, Ministry of Foreign Affairs, Government of Japan, Excellencies, Eminent Panelist's of the today's Sessions, Distinguished participants, Ladies and Gentlemen.

It is my honour and privilege to propose a vote of thanks on behalf of the Asian-African Legal Consultative Organization to Judge Saiga of the International Criminal Court for her kind approval to personally grace and inaugurate the Seminar on the "ICC: Emerging Issues and Future Challenges".

Excellency, based on the mandate given by the Forty-Seventh Session of AALCO, the Secretariat started preparing for this Seminar. In this regard, we received valuable support from all the Member States. I take it as a privilege to thank all the Member States for their kind support. Among the Member States, the Secretariat is particularly grateful to the

Government of Japan for the generous financial assistance to make this programme possible. In this regard, I thank H. E. Ambassador Hideaki Domichi, Japanese Ambassador to India, for his kind support.

I would also take this opportunity to thank the Expert Panelists who have readily agreed despite their busy schedules and lead the discussion on the identified themes. I thank H.E. Amb. Ichiro Komatsu; Prof.V. S. Mani, Director, School of Law and Governance, Jaipur National University; Mr. Christopher Harland, Regional Legal Adviser for South Asia, ICRC; Mr. Y.S.R. Murthy, Director, National Human Rights Commission and Mr. C. Jayaraj, Advocate, Supreme Court of India. Equally important for the successful holding of the Seminar would be the role of the Chairs, and I express my sincere thanks to H.E. Mr. Narinder Singh and Ms. Dora Kutesa, Acting High Commissioner of Uganda in New Delhi.

I would also like to thank in particular, the President of AALCO, Mr. Narinder Singh for his valuable guidance and keen interest shown in holding this Seminar.

The Secretary-General of AALCO, H.E. Prof. Dr. Rahmat Mohamad, by his inspiring leadership guides us in all our work. I would like to sincerely thank him for providing such guidance and support for this Seminar. My thanks also go to my other colleagues, both DSGs, and the Secretariat Staff of AALCO for making this Seminar a significant one.

I thank all the distinguished participants, diplomats representing Embassies in New Delhi, representatives of International Organizations, Academic community from various Universities, NGO's and Media for your able support and the interest shown on the themes of the Seminar.

I am certainly confident that the arguments at this Seminar on ICC would certainly receive much attention at the Review Conference in Uganda early next year under the UN mandate. The emerging issues and the future challenges pertaining to the International Criminal Court, as identified by the Panelists and delegates of this distinguished gathering

would serve as a guidelines for the AALCO Secretariat in its work on the ICC matters. I would also like to inform you all that the Secretariat will prepare a Report containing the presentations made by the Panelists as well as the summary of observations and discussions, which would be forwarded to all the Member States and participants of the Seminar.

With these few words, I thank you all once again for making this Seminar a momentous one. Thank you very much for your kind cooperation.

Chair: I also take this opportunity to invite all of you to Uganda in 2010.

The seminar was thereafter concluded.

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Rome Statute of the International Criminal Court*

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

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* Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to

physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to

render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations,

material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and

territorial integrity of the State, by all legitimate means.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United

Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of

the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21

Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24

Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal

purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall

be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration

of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34

Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35

Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in

other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37

Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39

Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case

the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40

Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in

this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43

The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44
Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the

highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral

under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person’s choosing, or, if the person does not have

legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether

necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold

a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges

as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62

Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to

communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64.

The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable

under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying

the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life

imprisonment in conformity with article 77, paragraph 1 (b).

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80

Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion

between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the

Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83

Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84

Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant

to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization;

and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Curt, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94

Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95

Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96

Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either

generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97
Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104
Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105
Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106
Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty

standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107
Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108
Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114

Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115

Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116
Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117
Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118
Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

Reservations

No reservations may be made to this Statute.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124

Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.