*AALCO/MLE/REP/ICC/PUTRAJAYA/2011*

**Asian-African Legal Consultative Organization**

# REPORT OF THE MEETING OF LEGAL EXPERTS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ISSUES AND CHALLENGES

**JOINTLY ORGANIZED BY THE GOVERNMENT OF MALAYSIA THE INTERNATIONAL CRIMINAL COURT AND AALCO**

**(19-20 JULY 2011, PUTRAJAYA, MALAYSIA)**

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## PREFACE

The International Criminal Court (ICC) has ushered in a new era to put an end to impunity for the most serious crimes that threaten the peace, security and well-being of the world, namely genocide, crimes against humanity, war crimes and aggression. It also aims to promote the rule of law. However, the Court acts only when national justice systems are unwilling or unable to do so and is thus termed by many as "the Court of last resort". Presently 118 countries have ratified the Rome Statute of the International Criminal Court.

The ICC is a crucial element of the international legal system established by States to regulate relations among its constituents and to secure the foundations of justice and peace which can provide redress to victims and hope for a better future.

As consideration of developments pertaining to the International Criminal Court, constitutes an important element of the work programme of the Asian-African Legal Consultative Organization, pursuant to the mandate received from the Forty-Ninth Session of AALCO, held in Dar es Salam, United Republic of Tanzania, 2010, and based upon the positive response received from the Government of Malaysia, and the International Criminal Court, the Government of Malaysia, the ICC Secretariat and the AALCO Secretariat, jointly organized a *"Meeting of Legal Experts on the Rome Statute of the International Criminal Court: Issues and Challenges" on 19th and 20th July 2011, in Putrajaya, Malaysia.*

This meeting was aimed at providing the Legal Experts from the Member States of AALCO, a forum to explicitly discuss the issues and challenges relating to the Rome Statute, as well as ponder over reasons as to why some States, particularly from the Asian region, were hesitant to ratify the Rome Statute. Besides this the meeting also intended to look at the implementation and practical issues pertaining

to the Rome Statute as well as to enhance understanding of the issues concerned.

The Meeting of Legal Experts was inaugurated by Honourable Tan Sri Abdul Gani Patail, the Attorney General of Malaysia. It was followed by, a very lucid and enlightening Keynote Address by H.E. Judge Sang-Hyun Song, the President of the ICC.

The discussions in the meeting were centered on the themes: (i) Preconditions for the Exercise of Jurisdiction; (ii) Bilateral Immunity Agreements (BIA's); (iii) Principle of Complementarity; (iv) Criteria for the Selection of Situations and Opening of Investigations: (v) Relationship between Peace and Justice; (vi) Post Kampala Review Conference: An Update; and (vii) Implications of Ratification of the Rome Statute.

The views expressed by the participating States revealed many concerns, in a nutshell they are as follows: the Principle of Complementarity remained a grave concern, as the term itself was not defined in the Rome Statute. The relationship between the ICC and the United Nations Security Council, in light of the referral of situations by the UNSC to the ICC, particularly in view of the fact that a few Permanent Members of United Nations Security Council were not members of ICC was also keenly debated. Concerns were also expressed about the interpretation of Article 98 of the ICC relating to the BIAs and that it was an issue that required careful interpretation. The powers of the ICC Prosecutor were also discussed at length. Some of the Member States also spelled out their reasons for not acceding to the Rome Statute which included additional financial burden on their Governments and the difficulties of internalizing the provisions of the Rome Statute into their domestic legislations.

The issue of States with constitutional monarchies or presidential immunities facing difficulty accepting the Rome Statute was also highlighted. Many delegates also noted that their countries

were not a Party to the Rome Statute for both legal and political reasons the primary one being the sovereignty of the nation. The interactions during the meeting were very focused and elicited intense interest among the participants. It brought out their concerns and was useful not only for the AALCO Member States but also a reciprocal opportunity for the ICC to understand the concerns of non-State Parties.

This publication brings together the proceedings of the meeting as well as the following debate. I hope it would be a useful document for the Member States.

I thank the Government of Malaysia for its constant support and encouragement in furtherance of the activities undertaken by AALCO to promote cooperation and better understanding of legal issues of common concern for its Member States.

I also wish to thank the President of the ICC for agreeing to jointly co-host this event and for sparing his valuable time to deliver the Keynote Address, as well as the Secretariat of the ICC for nominating Mr. David Koller, Legal Officer, ICC Appeals Chamber and Mr. Rod Rastan, Legal Advisor, ICC Office of the Prosecutor, the two key discussants for this meeting. Special thanks are also due to Judge Motoo Noguchi, a Judge of the Supreme Court Chamber, the Extraordinary Chambers in the Courts of Cambodia (ECCC), for having most ably chaired two of the Working Sessions.

A very special thanks to the Member States of AALCO for nominating their Legal Experts to attend this meeting, without their active participation this report would not have been possible. I also deeply acknowledge the subsequent interest of the Legal Experts from the Member States as well as from the ICC, who spared their valuable time in going through the Summary report of the meeting and providing their valuable input towards improving it further.

Last but not the least, I also wish to place on record my appreciation to all my colleagues in the AALCO Secretariat, especially the Deputy Secretaries-General of AALCO, Dr. Xu Jie and Dr. Hassan Soleimani, for their tireless efforts in making this meeting an overall success. I also wish to thank Mrs. Anuradha Bakshi, Assistant Principal Legal Officer for her efforts in preparing for the Meeting of Legal Experts and the publication of this Report of the proceedings.

***Prof. Dr. Rahmat Mohamad***
*Secretary-General*

New Delhi
15 October 2011

## I. INTRODUCTION

One of the primary functions of the Asian-African Legal Consultative Organization, as stipulated in its Statutes is to "exchange views, experiences, and information on matters of common concern having legal implications and to make recommendations thereto if deemed necessary". In furtherance to this function the Organization has been considering matters relating to the International Criminal Court (ICC). Since the adoption of the Rome Statute in 1998, and its subsequent entry into force on 1 July 2002, AALCO has been continuously monitoring the developments in the institutions established by the Rome Statute – the Assembly of States parties – the International Criminal Court and the Office of the Prosecutor. Until the Working Group on the Crime of Aggression culminated its mandate, a follow up of its work was also undertaken by the Organization. In 2010, AALCO sent a three member Observer Delegation, headed by the Secretary-General to attend the Review Conference of the Rome Statute of the ICC, which was held in Kampala, Uganda from 31 May to 11 June 2011.

Mindful of the successful Seminars on the subject convened in 2009 and 2010 on the International Criminal Court and the concerns of some States on many of the key issues and also bearing in mind that many of the Asian States were hesitant to ratify the Rome Statute of the ICC, the Forty-Ninth Annual Session held in Dar es Salaam, United Republic of Tanzania (2010) had requested the Secretary-General to consider the possibility of convening a Workshop in collaboration with the ICC specifically for the non-State Parties to the Rome Statute of the ICC. This mandate was further reiterated during the Fiftieth Annual Session of the Organization, that was held in Colombo, Democratic Socialist Republic of Sri Lanka, wherein all the Member States were requested to attend the Round Table Meeting of Legal Experts on the Rome Statute of the ICC, that had been scheduled to be held in Putrajaya, Malaysia on 19 and 20 July 2011.

Thirteen Member States of AALCO participated in the Meeting of Legal Experts namely: Brunei Darussalam, People's Republic of China, Republic of Ghana, Republic of Iraq, Japan, Republic of Kenya, Great Socialist People's Libyan Arab Jamahiriya, Malaysia, Kingdom of Saudi Arabia, Singapore, Kingdom of Thailand, Republic of Uganda and the United Arab Emirates.

## II. AGENDA

The following agenda was adopted for the Meeting of Legal Experts:

**Tuesday, 19 July 2011**

| | |
|---|---|
| **Inaugural Session** | **(**10.00 AM – 11.00 AM) |
| Welcome Address**:** | H.E. Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO |
| Inaugural Address: | H.E. Tan Sri Abdul Gani Patail, Attorney-General, Malaysia |
| Keynote Address: | H.E. Sang-Hyun Song, President, International Criminal Court |
| **Working Session I** | **(11.30 AM – 1.00 PM)**<br>**Chairperson: Judge Motoo Noguchi, Japan**[1] |
| | Preconditions for the Exercise of Jurisdiction |
| | Bilateral Immunity Agreements |
| | **Lead Discussant:** Mr. David Koller, Legal Officer, ICC Appeals Chamber |
| | Discussion |

[1] Judge Motoo Noguchi is a Judge of the Supreme Court Chamber, the Extraordinary Chambers in the Courts of Cambodia (ECCC).

**Working Session II (2.00 PM – 5.00 PM)**

**Chairperson: Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO**

Principle of Complementarity
Criteria for the Selection of Situations and the Opening of Investigations

Relationship between Peace and Justice
**Lead Discussant:** Mr. Rod Rastan, Legal Advisor, ICC Office of the Prosecutor

Discussion

**Wednesday, 20 July 2011**

**Working Session III (10.00 AM – 12.30 PM)**

**Chairperson: Judge Motoo Noguchi, Japan**

Post Kampala Review Conference: An Update

Implications of Ratification of the Rome Statute

Discussion

**Concluding Session (12.30 PM - 1.00 PM)**

Summation of the Proceedings:
Prof. Dr. Rahmat Mohamad,
Secretary-General, AALCO

Concluding Remarks (ICC Secretariat)

Vote of Thanks:
Dr. Hassan Soliemani,
Deputy Secretary-General, AALCO

# III. INAUGURAL SESSION

**Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO**, at the outset, congratulated H.E. Sang-Hyun Song, for celebrating 17 July 2011 as the International Criminal Justice Day. He recalled that during the Review Conference of the Rome Statute held in Kampala in the month of June 2010, July 17 was decided as the International Criminal Justice Day. Thereafter, Prof. Mohamad provided a brief background regarding the rationale for holding the meeting, and stated that consideration of developments pertaining to the International Criminal Court (ICC), since 1996, constituted an important element on the work programme of AALCO.

Realizing the importance of this topic for the Member States of AALCO, and being sensitive towards their concerns, since 2009 AALCO had actively pursued this topic and organized one seminar in collaboration of the Government of Japan in 2009 at New delhi, a Round-Table Meeting of Legal Experts, in collaboration with the Governments of Japan and Malaysia in 2010 at Putrajaya, Malaysia and this Meeting of Legal Experts in collaboration with the Government of Malaysia and ICC, with the ultimate aim and objective of providing the Member States, with a platform where they could share their concerns and experiences with each other on issues relating to the ICC.

He also recalled that soon after the Kampala Review Conference of the Rome Statute of the ICC, the Forty-Ninth Annual Session of AALCO was held in Dar es Salaam, United Republic of Tanzania from 5 to 8 August 2010. In order to discuss the outcome and important issues relating to post Kampala Review Conference, and noting that some of the issues were of continued common concern to the Member States of AALCO, a Special Meeting on the topic "International Criminal Court: Recent Developments" was held in conjunction with the Forty-Ninth Annual Session, where primarily two issues namely:

(i) the Principle of Complementarity; and (ii) the Crime of Aggression were discussed in greater detail.

Pursuant to the mandate received from the Forty-Ninth Session of AALCO and based upon the positive response received from the Government of Malaysia, and the Secretariat of the ICC, the meeting of Legal Experts was being convened. The Fiftieth Annual Session of AALCO which concluded on 1st July 2011 also adopted RES/50/S 9 which *inter alia* requested all the Member States to participate in the meeting of Legal Experts.

Prof. Dr. Rahmat Mohamad, mentioned that after nearly a little over a decade that the Rome Statute entered into force and the ICC envisaged there-under had been functional, till date 116 States had ratified it. However, despite the repeated calls from the Secretary-General of the United Nations for universalization of the Rome Statute, it had evoked lesser participation particularly from the Asian States. In view of that fact, he was confident that the Meeting of Legal Experts would provide a forum wherein the States Parties to the ICC, the prospective State Parties and non-State Parties to the Rome Statute especially AALCO Member States would engage in a dialogue to exchange their views and concerns relating to the Rome Statute.

Thereafter, Prof. Dr. Rahmat Mohamad welcomed and introduced Judge Sang-Hyun Song, the President of the ICC, who had willingly agreed to co-host the meeting as well as readily agreed to deliver the Keynote Address. He also thanked the ICC Secretariat for providing the necessary material for dissemination at the meeting as well as the experts who would be the lead discussants in the Working Groups.

He also thanked Judge Motoo Noguchi from Japan who had given consent to shoulder the responsibility of Chairing two Working Sessions during the meeting, and the Member States of AALCO for designating their officials to participate in the meeting;

The Secretary-General also thanked Tan Sri Abdul Gani Patail, the Attorney General of Malaysia for his continuous support and encouragement for the activities of AALCO and for being the generous co-host with Japan, for the Round Table Meeting of Legal Experts on the Review Conference of the ICC which was also held in Putrajaya on 30-31 March last year and for the current meeting as well.

**H.E. Tan Sri Abdul Ghani Patail, the Attorney General of Malaysia**, in his inaugural address stated that he was indeed honoured to co-host this Meeting of Legal Experts and was encouraged by the support shown by the Member States. He appreciated the AALCO Secretariat and the ICC Secretariat for their efforts in ensuring the success of the meeting. He deeply valued the presence of the President of the ICC and the lead discussants, also from the ICC who had come to the meeting specifically to address the general and specific concerns of the AALCO Member States in the pursuit of justice; he also addressed the issue of AALCO states not being States Parties to the ICC. He mentioned that the aim of the meeting was to look at the implementation and practical issues pertaining to the Rome Statute as well as to enhance understanding of the issues concerned.

The Attorney General recalled that AALCO had been following discussions pertaining to the ICC since 1996, when the issue was first discussed at the Manila Annual Session. It had also participated in the negotiations of the Rome Statute. The Member States of AALCO demonstrated their seriousness towards the issues relating to the subject when they agreed during the Forty-Ninth Annual Session (2010) to hold an Expert Group Meeting on this subject, focused at the non State Parties to the Rome Statute of the ICC and endeavouring to address their concerns. It was felt that this interaction would not be useful only for the AALCO Member States but would also be a reciprocal opportunity for the ICC to understand the concerns of non-State Parties. It was in this relation that he had highlighted the fact that out of the 81 Member countries of the UN which had not ratified the

ICC Rome Statute, 30 were AALCO Member States, which roughly formed about 40% of the total number. Therefore, in order to discuss common issues of concern relating to ICC, the Malaysian Delegation proposed to have another meeting in Putrajaya.

The Attorney General pointed out that the establishment of the ICC in 1998 was welcomed with the hope that it would put an end to the impunity for crimes and the perpetrators of the most serious crimes would be punished. However, it remained to be seen how the system actually works. He said that currently the focus of States was on the practical implementation of the Rome Statute at different levels and he hoped that the experts from ICC would shed light on some of the issues.

He further mentioned that Malaysia was committed to upholding the rule of law and rejected impunity of crime. Thus, before becoming a party to the Rome Statute, Malaysia had adopted a cautious approach and was considering the best way to implement the Rome Statute. For this purpose, the current practices of other countries were also being studied to ensure effective implementation of its obligations. He hoped to hear all views pertaining to the ICC bearing in mind that the majority of AALCO States were non State Parties.

Tan Sri Abdul Gani Patail emphasized that one particular concern relating to the ICC was the principle of complementarity, i.e. the ICC would only intervene if the State in question was genuinely unwilling or unable to prosecute. This debate would be particularly useful as the Rome Statute did not define the term complementarity.

He also hoped that the meeting would discuss Art. 5 of the Statute – the crimes listed in the Statute and the relationship between the ICC and the United Nations Security Council, in light of the referral of situations by the UNSC to the ICC, particularly in view of the fact that a few Permanent Members of United Nations Security Council were

not members of ICC. The Attorney General also mentioned the inclusion of the crime of aggression in the Rome Statute pursuant to the decision taken at the First Review Conference (2010) which was based on the UN General Assembly resolution 3314 of 14 December 1974.

Finally, Tan Sri Abdul Gani Patail said that that the quest for justice may come in various forms, however, for peace and harmony to prevail in the world, there might be varying of views but the common aim was the same. He added that Malaysia supported the ideals of ICC and not otherwise. Thus, Malaysia would continue to hold meetings like the present one so that the ICC would be respected and therefore, it was necessary to take each other's guidance and learn form experiences.

**H.E. Judge Sang-Hyun Song, President of the International Criminal Court** in his keynote address appreciated the efforts of the Secretary-General of AALCO in holding a number of events over the years to exchange views on the Rome Statute. He also thanked the Attorney General of Malaysia for co-hosting the meeting and was pleased to note that the Malaysian Government had taken the important decision to accede to the Rome Statute.

Thereafter, the President gave an overview of the mandate and current work of the ICC. Essentially, he said the ICC's task was to hold individuals accountable for the most serious crimes of international concern. He mentioned that there were four groups of crimes in the Rome Statute (Article 5), namely Genocide (Article 6); Crimes against humanity (Article 7); War crimes (Article 8) and the Crime of Aggression (Article 8 *bis*). He noted that genocide and crimes against humanity did not necessarily have to occur within the context of an armed conflict. In relation to the crime of aggression he said that at the time of adoption of the Rome Statute, States could not agree on the definition of this crime, however, this shortcoming was overcome at the First Review Conference of the Rome Statute, held in Kampala, Uganda in 2010,

even though the ICC could not exercise jurisdiction over this crime for at least another six years.

The President mentioned that six country situations were being actively investigated or prosecuted at the ICC: namely, Uganda; the Democratic Republic of the Congo, Central African Republic, Darfur (Sudan), Kenya and Libyan Arab Jamahiriya. As of June a seventh situation was before the Court as the prosecutor had requested authorization from the Judges to investigate the situation in Cote d'Ivoire since 28 November 2010. He added that since the situation in Cote d'Ivoire was not referred to the ICC by a State Party nor by the Security Council, the Prosecutor could not open an investigation without the prior approval of the Pre-Trial Chamber, following an independent judicial review. This was to prevent any frivolous or politically motivated investigations without proper basis. He added that an even bigger threshold had to be met before a warrant of arrest could be issued against an individual. These were examples of the many checks and balances contained in the Rome Statute.

On cases before the Court, the President informed that hearings in the ICC's first trial, that of Thomas Lubanga Dyilo had concluded and the closing arguments would be heard next month. Four more cases were at various stages of procedure preceding trial. In addition to that, arrest warrants against 11 suspects were outstanding.

The President noted with concern that out of the 47 Member States of AALCO, 31 countries were not Parties to the Rome Statute, with the majority of those being in the Asia-Pacific region. He emphasized that despite the differences in the geographies, histories or traditions of the AALCO Member States, the Preamble of the Rome Statute stated that "all peoples are united by common bonds, their cultures pieced together in a shared heritage". As President of the ICC it was his priority to encourage more countries from the Asia-Pacific region to join the ICC as it was the most underrepresented group of

States in the ICC. While acknowledging that joining the ICC was a sovereign decision, 116 States had joined the ICC, he added that it was heartening to see more and more countries taking that step. In the last few months he had been encouraged by the announcements from not only Malaysia, but also the Maldives, Philippines and Arab Republic of Egypt. This showed a rejuvenated interest in the Court across Asia and Africa. He hoped that these developments would give good reason for all AALCO Member States to give the Rome Statute a fresh look.

The President realized that many countries did not want to accede to the Rome Statute because of misconceptions of the mandate and work of the ICC, it was for this reason that meetings like the present one were important. He noted that one prejudice about the ICC was that it was a tool of Western States, he denied this and stated that ICC belonged to its States Parties among which the Western States were a minority. Further the Prosecutor and Judges were elected by the Assembly of States Parties, in which every State, irrespective of its financial contribution to the ICC had equal decision making power. The geographical and cultural diversity of the ICC as well as its gender balance were reflected in the number of Judges practically in every bench of the ICC.

Secondly, some claimed that the ICC only "targeted" African countries. Refuting that claim the President stated that the ICC did not target any country, region or nation, it only targets impunity. He noted that the fact that the ICC's current investigations concerned African countries meant that the Court was providing justice to African victims. Furthermore, he recalled that the first three situations were brought to the ICC by the countries themselves, and two were referred to it by the UNSC, these factors he noted were beyond the control of the ICC.

The third misperception of States was that the ICC would dig into a countries past once it ratified the Rome Statute. This, according

to the President, was presently impossible as the Court could assume jurisdiction only after ratification and could never under any circumstance have jurisdiction for any crimes that took place before 1 July 2002.

The fourth and common refrain from many leaders who were hesitant to ratify the Rome Statute was because of fear of repercussion from some big powers, most frequently the United States. He noted that this may have been a relevant consideration in the past, but of late the situation had changed. The most powerful shift in attitude was the UNSC's unanimous decision in February 2011 to refer the situation in Libya to the ICC, where all 15 members of the UNSC had voted in favour of that decision.

For the States Parties to the Rome Statute present at the meeting, the President said that there was plenty of room to tighten the partnership between the States and the Court. He emphasized the importance of implementing domestic legislation in line with the Rome Statute. He also encouraged States parties to consider ratifying the Agreement on Privileges and Immunities and concluding agreements on the enforcement of sentences, or on relocation of witnesses, with the ICC. The President acknowledged that joining the ICC could be a daunting task for smaller countries with limited government capacity, but this should not prevent any country from joining the ICC and the global movement for the rule of law and the protection of human dignity that it represented. Technical assistance for ratification and for harmonization of domestic legislation was necessary, and available from many sources, including ICRC, United Nations, many regional organizations, civil society organizations such as Parliamentarians for Global Action and the Coalition for the International Criminal Court. He added that last week the Commonwealth had adopted a Revised Model law for national implementation of the Rome Statute. Thereafter, the President enlisted some of the benefits of joining the ICC, namely the States Party's right

to nominate candidates and vote in the election of the highest officials of ICC as well as more opportunity for recruitment of staff to the ICC.

In conclusion, the President noted that joining the ICC also sent out a clear message that the country was committed to peace, justice and the rule of law; it would also increase the protection of its nationals and its territory against the terrible violations of international law that threatened the most fundamental values of human dignity. The fact of the matter was that the ICC existed to protect the ordinary people, those who often found themselves far removed from the scales of justice from the most serious crimes known to humankind. He opined that this meeting had a good agenda before it which would shed light on the work of the Court. There was also a need to send out a clear message that impunity would not be tolerated, and that the full force of law would come down on anyone committing an act that shook the conscience of humanity, for that to happen everyone had a role to play and particularly the legal experts.

# IV. WORKING SESSION I

**Judge Motoo Noguchi,** the Chairperson of Working Session I in his opening remarks stated that two issues namely: (i) Preconditions for the Exercise of Jurisdiction; and (ii) Bilateral Immunity Agreements would be discussed.

While introducing the first issue relating to the **Preconditions for the Exercise of Jurisdiction**, Judge Noguchi referred to Article 12 of the Rome Statute relating to Preconditions to the exercise of jurisdiction and said that once a State becomes a party to the Statute, it accepts the Court's jurisdiction with respect to crimes listed under the Statute. The Court may exercise its jurisdiction if one or more of the following States are Parties to the Statute or have accepted the jurisdiction of the Court: (a) the territorial State (the State on which territory the conduct in question occurred), or (b) the State of the accused person's nationality (the State of which the person accused of the crime is a national) except the referral of a situation by the Security Council. Thus, a national of a non-State party can also be tried by the ICC if the crime was committed on the territory of a State Party, providing a cause of concern for some of the non State-Parties to the ICC.

Thereafter, Judge Noguchi referred to Article 13 of the Rome Statute which enumerates the Exercise of Jurisdiction by the Court. The Court may exercise its jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes either when the situation is referred to the Prosecutor: by (i) a State Party or (ii) by the Security Council, or (iii) when the Prosecutor initiates a *proprio motu* investigation. However, in this last case, the Prosecutor must seek the authorization of the Pre-Trial Chamber before proceeding with the investigation. When the situation was referred to the Prosecutor by the Security Council, relation to any UN Member State further

preconditions provided in Article 12(2) are not necessary. Judge Noguchi said that so far three situations before the ICC were referred to it by States parties, namely, Uganda, the Central African Republic, and Democratic Republic of the Congo. Two situations, namely, Darfur (Sudan) and Libya were referred by the UNSC and the situations of Kenya and Cote d Ivoire was taken up by the Prosecutor. The *proprio motu* investigation of a situation in Kenya was opened by the Prosecutor with the authorization of the Pre-Trial Chamber. The authorization of the Pre-Trial Chamber has also been requested concerning the investigation of the situation in Cote d'Ivorie.

Regarding subject matter jurisdiction, the Court's jurisdiction is limited to the most serious crimes of concern to the international community as a whole. More concretely, the Court has jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes, all of which were defined in the original Statute and further elaborated by the Elements of Crimes. The crime of aggression was recently defined by the amendment to the Statute, but the amended Statute provides rather complicated conditions to be met before the Court becomes able to actually exercise jurisdiction over this crime after 2017.

He added that, as the first permanent international criminal court, with the temporal jurisdiction on crimes committed after 1 July 2002, the ICC can address past (i.e. from July 2002-2011), future as well as present cases. He contrasted this situation with past and existing international tribunals such as the Nuremberg and Tokyo Tribunals, the ICTY and ICTR as well as hybrid tribunals set up for: (i) Sierra Leone, (ii) East Timor, (iii) Kosovo, and (iv) Cambodia, all of which had fixed temporal, material and geographical jurisdictions to address crimes committed in the past.

Judge Noguchi also mentioned that the principle of complementarity was another important principle of the ICC, as the

Court could only intervene when a country was unwilling or unable genuinely to carry out the investigation or prosecution at the national level.

Introducing the second issue relating to **Bilateral Immunity Agreements**, Judge Noguchi stated that Article 98 of the Rome Statute deals with so-called Bilateral Immunity Agreements (BIAs). These agreements were designed by the United States of America to immune its military personnel and civilians from the jurisdiction of the ICC. Till date a total of 102 BIAs have been known as signed. The last BIA was allegedly concluded in 2007. It has been said there is no indication that the current administration will pursue more BIAs.

Judge Noguchi added that this was the attitude of the USA some years ago when it had strong opposing position against the ICC; however, as the President of ICC had pointed out earlier this morning, the situation had recently changed to the extent that the US stating that it does not oppose any country signing the ICC. However, the discussion on BIAs may be helpful to understand what it was about and where it came from.

It has been widely believed that the US concluded the BIAs with many countries to ensure that US nationals will not be subject in any way to the ICC's jurisdiction in the light of preconditions to the exercise of jurisdiction which we discussed earlier. This policy is enshrined in the American Service Members Protection Act (US Domestic Legislation).

**Mr. David Koller, Legal Officer, ICC,** the lead discussant briefly highlighted certain aspects relating to both the above mentioned issues. He briefly reviewed the Rome Statute's provisions on: (i) Subject Matter Jurisdiction of the ICC; (ii) Jurisdiction *ratione temporis*; (iii) Exercise of Jurisdiction; (iv) Preconditions to the Exercise of Jurisdiction and (v) Immunity and Jurisdiction.

The subject matter jurisdiction of the ICC was contained in Article 5 of the Rome Statute by virtue of which, the Court has jurisdiction over the crime of genocide (Art 6); crimes against humanity (Art 7); war crimes (Art 8) and aggression (Article 8 bis). He noted that Article 11 of the Rome Statute dealt with Jurisdiction *ratione temporis* and stated that the Court could exercise jurisdiction only for crimes after entry into force of the Rome Statute (1 July 2002). Exercise of Jurisdiction by the ICC was dealt with in Article 13 which enumerated three methods of triggering the ICC's jurisdiction: (a) referral by a State party; (b) referral by the UNSC or (c) *proprio motu* investigation by the Prosecutor with the approval of the Pre-Trial Chamber. Mr. Koller emphasized that situations could be referred to the ICC and not cases.

Till date there had been three referrals by States Parties: (a) Uganda; (b) Democratic Republic of Congo and (iii) Central African Republic.

Two situations had been referred by the UNSC: (a) Darfur, Sudan and (ii) Libyan Arab Jamahiriya.

*A Proprio motu* investigation is ongoing in the situation in Kenya.

He noted that it was also necessary to satisfy the provisions of Article 12 relating to the preconditions of exercise of jurisdiction. However, this article did not apply to UNSC referrals.

If the ICC's jurisdiction is triggered by a State Party or *proprio motu*, then either the territorial State must accept jurisdiction or the State of the perpetrators' nationality must accept jurisdiction. The acceptance of jurisdiction was automatic in case of State Parties. Other States could accept jurisdiction via ad hoc declarations (e.g Cote d Ivoire or Palestine). However, acceptance of jurisdiction does not trigger an investigation.

Mr. Koller, while speaking on immunity from jurisdiction, noted that there was no jurisdiction over persons under 18 at the time of crime as stated in Article 26 of the Rome Statute. However, there was no immunity based on official capacity as mentioned in Article 27 of the Rome Statute.

Turning to provisions relating to Immunities and Cooperation as envisaged in Article 98 of the Rome Statute, he mentioned that the Statute recognized two types of limited immunity: (i) State/diplomatic immunity of third States (Article 98(1)) and (ii) Immunity from surrender under certain international agreements (e.g SOFAs) (Article 98 (2) of the Rome Statute). Further, the immunity envisaged in Article 98 was from surrender/assistance, not from jurisdiction. The Court may obtain waiver of immunity/consent to surrender. Mr. Koller mentioned that under Article 97 of the Rome statute there was an obligation on States Parties to consult with the ICC if there were problems in executing requests.

In conclusion, Mr. Koller emphasized once again that jurisdiction depends on either State consent or Security Council authorization. Once jurisdiction was triggered, investigations would be carried out independently; there was no immunity from jurisdiction and finally in case of difficulty in cooperating, there was an obligation for States to cooperate with the ICC.

After the presentations, the following Member states presented their comments and observations: **People's Republic of China**, **Great Socialist People's Libyan Arab Jamahiriya, Malaysia, and Kingdom of Thailand.**

The delegate of the **People's Republic of China** expressed his concerns about the interpretation of Article 98 of the ICC relating to the BIAs signed by the US with over 102 States. He noted that although the US policy had changed recently towards the ICC, nevertheless

US military persons could not be surrendered to the ICC. It leaves an impression of double standard and an issue that required careful interpretation. He also expressed his reservation on the interpretation of Articles 26 (exclusion of jurisdiction over persons under 18) as the only provision concerning immunity issues. He highlighted the difference between exclusion of jurisdiction and immunity and also noted that the problem concerning Article 98 was not as simple as it appeared. Regarding preconditions to the exercise of jurisdiction, in particular the *proprio motu* investigations by the Prosecutor, he referred to the situation in Kenya and said that it was a very complicated issue and wanted to know how to interpret and regulate the powers of the Prosecutor.

In response to this question Judge Noguchi said that the US had tried to safeguard all its nationals from surrender to the ICC, including the military personnel. This policy was adopted by the US several years ago and remains fundamentally, but as discussed above the US has gradually changed its attitude vis a vis the ICC. He further cited Article 16 of the Rome Statute dealing with deferral of investigation or prosecution to illustrate his point. It was also noted that the US has endorsed a position that it does not oppose any State wishing to join the ICC.[2]

The delegate from **Great Socialist People's Libyan Arab Jamahiriya** shared the concerns of the previous delegate in relation to the BIAs. He was also of the view that it was a matter of concern that the ICC seemed to be targeting African countries. He did not understand why the ICC had not investigated even a single case in Palestine. The same was true for the situations in the Republic of Iraq and Afghanistan. But when it came to Libya, the UNSC had been very

[2] Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues: "to clarify on the public record that the United States does not object to any country joining the ICC … it was made plain that the US does not object to countries joining." http://www.state.gov/s/wci/us_releases/remarks/165259.htm

quick to refer the situation to the ICC. Therefore, the ICC's action seemed to be contradictory to its call for peace, justice, equality for all.

In response, **Mr Rastan from the ICC** stated that for non-Party States there were two ways jurisdiction could be accepted – *ad hoc* acceptance by the non-Party State (article 12(3) of the Statute) or UNSC referral, pursuant the Security Council's Chapter VII powers under the UN Charter. The jurisdiction of the ICC is not affected by agreements concluded under article 98 of the Statute (or so-called BIAs): the matter affects cooperation by the requested State with the ICC, not the jurisdiction of the Court itself. Afghanistan, for example, has signed a BIA with the US, but the Court nonetheless has jurisdiction in relation to any ICC crimes occurring within the territory of Afghanistan. With regard to the situation in Palestine, Palestine lodged a declaration accepting the exercise of jurisdiction by the ICC, pursuant to article 12(3) of the Statute. However, the issue was whether the declaration meets statutory requirements, which in turn relates to Palestine's own competencies to lodge such a declaration. The issue of Palestine's competence or its statehood was not straightforward. Different legal arguments had been presented from numerous sources.[3] The OTP has not dismissed the Palestine situation outright but has been willing to consider the arguments presented. The OTP was looking at the Palestinian situation from many perspectives which touch on the issues of the proper interpretation of the Statute, competencies, statehood, dual nationality of alleged perpetrators, etc.

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[3] See *Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements*, available at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20authority%20meets

Mr Rastan also noted that for non-Party States, the choice to become parties to the ICC rests solely with those States. In many situations, the exercise of ICC jurisdiction could be facilitated if States decided to become parties to the Rome Statute rather then await a UNSC referral or an ad hoc acceptance of jurisdiction. This particularly applied to countries from the Middle East and Asia, although more States from the region are becoming States Parties (such as most recently Tunisia and Bangladesh). Universal adherence to the Rome Statute by all States would therefore enable to the ICC to respond to the requirements of justice in all situations based on the same legal standards.

The delegate of **Malaysia** posed a question of how the ICC picks and chooses situations or internalizes information that would come to the Office of the Prosecutor. What was the threshold, if any, that the ICC adopt when it decides to investigate cases that were brought to its attention? Secondly, how does the Office of the Prosecutor itself view Art. 98? And finally it noted the political dimension of the Rome Statute's UNSC referral provision, which had caused many States, including Malaysia, from the beginning to have strong reservations against membership in the fear that the said provision might be abused or misused by those having a political agenda.

In response the official from the ICC stated that Office of the Prosecutor received many communication under article 15, but most of the information related to matters that were manifestly outside of the jurisdiction of the Court. The rest of the information goes through a filtering process to determine whether the requirements of the Statute have been satisfied in relation to jurisdictional, admissibility and the interest of justice. Part of this assessment relates to the gravity of any future cases. He added that this question would be dealt with in the afternoon session, while dealing with the prosecution's strategies during Working Session II.

The delegate from the **Kingdom of Thailand** noted that nationality was not properly defined in Article 12 of the Rome Statute. How does the ICC determine such cases? And how would it solve the questions relating to dual nationality?

The official from ICC noted that it was an interesting question and that there existed relevant State practice in relation to the exercise of criminal jurisdiction by States over persons who, nonetheless, possessed two different nationalities.. However, the situation had not yet arisen before the ICC, and therefore the Judges would decide on it once it came up before the ICC.

## V. WORKING SESSION II

**Prof. Dr. Rahmat Mohamad**, the Chairperson of Working Group II in his opening remarks mentioned that discussions would be held on the following three topics namely: (i) the Principle of Complementarity; (ii) the Criteria for the Selection of Situations and the Opening of Investigations; and (iii) the Relationship between Peace and Justice.

### *(i) Principle of Complementarity*

Prof. Dr. Mohamad underlined the fact that the Principle of Complementarity was one of the cornerstones of the architecture of the Rome Statute of the ICC. The Principle denoted that cases would only be admissible before the ICC if and when States were genuinely unwilling or unable to carry out investigations and prosecutions. According to this principle, the primary duty and responsibility for the enforcement of prohibitions of international crimes rests with national criminal jurisdictions.

He added that the principle of complementarity shaped various dimensions of ICC and domestic practice, ranging from prosecutorial strategy and criminal policy to statutory implementation and compliance. The operation of complementarity was of paramount importance to the operation and impact of international criminal justice. The application of this principle was considered as a key to the survival and vitality of the ICC's work and national juridical system, social tradition and culture.

He mentioned that although the word complementarity did not appear anywhere in the Rome Statute, paragraph 10 of the Preamble and Article 1 of the ICC Statute referred to the "complementary nature of the jurisdiction of the ICC". The Statute sets out the general contours of the concept in three paragraphs in Article 17. The existing text thus

left a considerable degree of ambiguity and space for creative interpretation.

He noted with concern that as the Court started taking up the cases, it was expected to confront several challenges encompassing practical aspects and the interpretation of the Statute. To address these challenges and concerns it was suggested that the OTP might be able to resolve some of the issues by interacting more closely and actively with national courts, adopting a policy called *positive complementarity*. It connotes that the Court and particularly the OTP should work to engage with national jurisdictions in prosecutions, using various methods to encourage States to prosecute cases domestically wherever possible. The aim of such a policy was to strengthen domestic capacity. It was therefore argued that traditional complementarity was meant to protect State sovereignty and was built on the idea that State could carry out national prosecutions as a result of the threat of international intervention by the ICC, positive complementarity looked for a more cooperative relationship between national jurisdictions and the Court.

Prof. Dr. Mohamad added that it was important for those who had become parties to the Rome Statute, may need to take certain measures. The first step in this direction may be to bring in effective national legislation.

The Secretary-General cautioned that one of the dilemmas of complementarity was that many of its theoretical underpinnings and operational features were still underdeveloped. Some of the conceptions deviated from classical understandings of complementarity. Core notions such as 'gravity', 'inability', 'case' and key concepts like 'self-referrals', 'primacy of domestic jurisdictions', 'positive complementarity' were at the heart of judicial and policy debate. Thus it could be argued that further clarifications on the principle of complementarity by the Court in its judgments in the future would help build confidence of the international community, mainly of States, and

encourage active response in the form of adopting adequate national measures and in more States becoming parties to the Statute.

He recalled that the Principle of Complementarity was discussed in great detail at the Special Meeting on "The International Criminal Court: Recent Developments" held in conjunction with the Forty-Ninth Annual Session of AALCO, which was held in Dar es Salaam, United Republic of Tanzania, in August last year.

### *(ii) Criteria for the Selection of Situations and the Opening of Investigations*

Prof. Dr. Rahmat Mohamad said that no aspect of the ICC's work had been more controversial to date than its decisions on the situations and cases to be brought before the ICC. Every decision relating to the selection of a situation was scrutinized by the Court, and many had given rise to strong criticisms. State actors had opposed vociferously some of the ICC's decisions whether to open investigations. In particular, leaders of African States, who formed one of the most supportive constituencies of the ICC, had begun to object to the ICC's exclusive focus on prosecuting African defendants. Therefore, the African leaders had expressed particular dismay at the ICC's decision to issue arrest warrants for Sudan's President and most recently for the Libyan President.

### (*iii) Relationship between Peace and Justice*

Speaking on the third issue, Prof. Dr. Rahmat Mohamad pointed out that the debate relating to the relationship between Peace and Justice was highly controversial because of its political nature. It had been agreed by the international community that there was no impunity anymore for the most serious crimes and this fact had certainly changed the world in recent times. Presently, it appeared that there was a positive relation between peace and justice, unlike the past when it was perceived as peace versus justice. Nevertheless, there were also

tensions between the two that had to be acknowledged and addressed properly. He added that there was an undeniable dilemma between peace and justice, which would persist for as long as there would be ongoing conflicts. However, it was important to bear in mind that future discussions on this point should deal with the topic in a holistic manner and not be narrowed down to the question of pursuing criminal charges alone. It may be recalled that there was no formal outcome on this debate during the Kampala Review Conference in 2010; nevertheless, the summary of discussions could be taken as an important component of the subject.

Briefly some of the important points that emerged from the debate on this subject in Kampala last year were:

1) In the early days of the ICC, the Court needed the support of all. Although in the early stages of its existence, the establishment of the Court had indeed brought about a **paradigm shift**; there was now a positive relation between peace and justice. Nevertheless, there were also tensions between the two that had to be acknowledged and addressed. In the past, this had been done, in a very unbalanced way, through amnesty laws, with varying degrees of effectiveness. Now, it was acknowledged, amnesty was no longer an option for the most serious crimes under the Rome Statute.

2) Regarding the **effects of international justice**, it could indeed result in marginalizing those who fomented war and encouraged justice efforts at the national level, but the potential deterrent effect of justice would only come into play if justice were perceived to be the norm rather than an exceptional measure. There was also a dilemma about whether justice did not sometimes prolong war in the short term. On the other side, it was clear that in the long run, justice prevented wars.

3) It was generally agreed that **non-judicial mechanisms**, very useful in themselves, should not be seen as an alternative, but rather supplementary to criminal justice processes, with the Court concentrating on those responsible for the most serious crimes.

4) As for **victims**, experience showed that their views shifted over time, with an immediate goal for peace followed by a quest for justice. Questions rose as to how to educate victims about the option of pursuing justice, without unduly raising their expectations.

5) In conclusion, it could also be observed that the establishment of the Court constitutes a development as momentous as the adoption of the Universal Declaration of Human Rights. At the Kampala Review Conference States were called to translate their commitment into actions, in particular, through executing arrest warrants and helping to reinforce the rule of law across the globe, but also by building new institutions, social and economic, to achieve, in the long term, justice in a broader sense.

**Dr. Rod Rastan, Legal Advisor, ICC Office of the Prosecutor**, the lead discussant for Working Group II, outlined that if one looked at the Preamble in the Rome Statute it contained 11 paragraphs and only Paragraphs 9 and 10 referred to ICC. Before that that preambular paragraphs affirmed the obligations of States Parties to uphold the principles of international law at the national level as well as upholding the principles of the Charter of the UN. Thus, States already had an obligation in this area. The ICC was set up to compliment it.

The ICC was not created to substitute, replace or take away State sovereignty. As stated in the Rome Statute, the national courts have the primary responsibility for the investigation and prosecution of such crimes, in preference to the ICC. Besides it was always better to

have justice locally if that is possible. Normally, national authorities know the contextual situation better, have better access of information and evidence and the crime scene, cost of translation and transporting staff, and witnesses to and fro was avoided, better familiarity of victims and witnesses with domestic proceedings, heightened prospects for local ownership and outreach, as well as a significant cost-savings. However, he said, that in some situations, however, this was just not possible. He highlighted this point by giving the example of Rwanda where after the 1994 Rwandan genocide, there were only a handful of lawyers left in the country and the judicial system had completely collapsed. Hence there was a situation of *inabilty*; and the need arose for an ad hoc tribunal. In the former Yugoslavia, the State authorities were allegedly involved in the crimes or were using sham courts proceedings or *in absentia* prosecutions to punish the other side and deter returns. Hence this was a situation of *unwillingness* to hold genuine national proceedings. The nearest approximation to that situation is in Darfur, Sudan, where the judiciary has not a collapsed, but the government forces and allied militia were allegedly involved in the international crimes. Thus, there was a role for the ICC to compliment the national system where it is inactive or otherwise unable or unwilling to address serious crimes.

Mr. Rastan added that the system created in Rome by States, focused on the primary responsibility of, and preference for, national criminal justice systems. The Court was not set up as human rights court as an appellate body to review normal decision of national courts. The ICC is a court of first instance and, moreover, deals with cases of particular gravity, i.e. massive atrocities committed as war crimes, crimes against humanity or genocide. Nor does it take up minor perpetrators: the Prosecutor's policy is to focus on those bearing the greatest responsibility for the most serious crimes. Thus, the Court exercises jurisdiction if there was a failure at the national level (i.e. through national inaction, or an domestic unwillingness or inability to genuinely address relevant cases), and added to that cases must be of sufficient gravity.

He added that in situations of massive atrocities, where there may be thousands of perpetrators committing widespread crimes against countless victims in numerous incidents, even if there is evidence available, there was unfortunately not the expectation that every single perpetrator would be prosecuted. Instead, the OTP's prosecutorial strategy is that only the most serious cases would be investigated, i.e. those bearing the greatest responsibility for the most serious crimes. Obviously broader moral and prosecutorial questions arise: what about other perpetrators, what about the impunity gap, what about victims right to redress at the national level? Hence, the importance of emphasising that the Rome Statute systems relies on combined responses to serious crimes, involving international and national judicial mechanisms, as well as other transitional justice approaches. The ICC cannot act alone, States also have their own primary responsibilities to fulfill in this area. The discussion in Kampala at the 2010 Review Conference on complementarity focused on this issue.[4]

Kenya was one of those situations where it was initially a regional organization, through Kofi Annan acting on behalf of the African Union Panel of Eminent African Personalities, that had called for ICC assistance in the event that the national system failed to respond. The emphasis was, thus, from the very beginning on national justice, with the ICC as a back-up. Kofi Annan proposed a time frame to Kenya and said that if Kenya could not set up a mechanism then the ICC should take up the matter. The ICC Prosecutor supported this approach and also emphasised the primary responsibility of the Kenyan judicial system, and held consultations with the Kenyan Government on the matter. When it became clear that the Kenyan Parliament was unable to adopt the necessary bill to adopt a national mechanisms to deal with the post-election violence, and the Government of Kenya informed the Prosecutor that they could not proceed, the Prosecutor announced

[4] http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.c-ENG.pdf

that the OTP would proceed. Kenya agreed to cooperate with the Court while maintaining they were committed to maintain justice in their own country.

On the identification of situations before the ICC and how it investigates, he distinguished between situations concerning States Parties (where the Court has jurisdiction on the basis of (i) territoriality and (ii) nationality of the accused); referrals from the UNSC (which may provide jurisdiction with respect to any UN Member State, including States not party to the ICC, pursuant to Chapter VII of the UN Charter); and where non-Party States voluntarily accept the jurisdcition of the Court on an ad hoc basis.

Mr. Rastan made an important point that in situations which were outside the ICC treaty jurisdiction, the ICC could only act if, a non-State party voluntarily went to the Court, (e.g. Cote d'Ivoire) or the UNSC gets involved. Whether it was good for UNSC to get involved? That was an issue discussed in Rome: the problem would arise if the UNSC decided to set up more ad hoc tribunals, like ICTR and ICTY, which would be more costly and inefficient when a standing permanent court existed. At the same time, the ICC is independent of the UNSC and could decline a UNSC referral if the criteria prescribed in the Rome Statute are not met. For instance, if the ICC were asked to investigate the crime of terrorism or piracy, or if the States desired to add an additional crime to jurisdiction, or the situation fell outside of the temporal jurisdiction of the Court (i.e. 1 July 2002 onwards), the ICC could decline to exercise its jurisdiction. This was the decision adopted by States during the Rome Conference.

In conclusion, Mr. Rod Rastan said that many States had posed the question that why did the ICC take up the Libyan situation and the situation in Darfur, and why did it not take up the situation in Sri Lanka or Syria. He replied all these were situation concerning non-Party States. In these situations the ICC could not act by itself, and had to

await the decision of the relevant States themselves or the UNSC. The matter thus related to the political decisions made by the UNSC to refer some situations and not others. The ICC itself was not involved in such decisions and only exercises jurisdiction where it possesses it. The issue of selectivity of referrals would only be resolved when there was universal adherence to the Rome Statute, meaning all States would join and there would be expansion of the Court's treaty-based jurisdiction. The ICC, as a judicial body, could then respond in the same way to all situations based on the legal criteria, without waiting for external referral of situations affecting non-Party States.

After the presentations, the following Member states presented their comments and observations: **People's Republic of China, Republic of Kenya, Malaysia,** and **Uganda.**

The delegate from the **People's Republic of China** noted the relationship between the ICC and UNSC, he mentioned the situations in Darfur and Libya which had been brought up before the ICC on referrals by the UNSC . He inquired what was the legal authority and criteria of the ICC to investigate situations in non State-parties. In response the official from the ICC said that even though Libya and Sudan did not have any obligations under the Rome Statute, they did have responsibilities as UN Member States under Chapter VII of the Charter of the United Nations and were bound to abide by UNSC resolutions. Whenever a situation was referred to the ICC by the UNSC, the ICC would seek cooperation of those States under the terms of the relevant UNSC resolutions imposing obligations on those States to cooperation with the Court.

The delegate from **Kenya** explained the situation in her country and said that it arose after the post elections violence. About 1200 people had died and a lot of displacements took place and many crimes were also committed. Immediately the Government called the international mediators headed by Mr Kofi Annan who was one of the

mediators. After that a Commission of Inquiry was set up which was headed by a judge of the High Court. One recommendation made by that Commission was that a Tribunal should be set up to hear these cases. There was also a recommendation that persons be investigated. The judge was very clear in his recommendation, that if this tribunal was not set up then this was the next course of action the matter would be given to the ICC. 2 attempts were made to create a tribunal. However, due to the political situation prevailing it was not passed in parliament. Two parties had equal votes so it was hard to get 2/3 votes. Even though Mr. Kofi Annan gave Kenya more time, it became clear a tribunal could not be set up and then the matter was handed over to the ICC.

The delegate highlighted that at all stages of the investigation, Kenya was kept informed. It had tried to deal with the issue of continuing investigation and signed the immunity and privilege agreement with ICC to enable it to step up an office in Kenya. Having said that she emphasized that no two situations could be similar. However, Kenya was doing its best to reform its national judicial system they had adopted a new Constitution that brought new reforms, a Truth Justice (reconciliation) Commission was also put in place, and Kenya also had a Supreme Court. They were doing all this with the hope that one day they would be able to try the perpetrators of crime nationally.

In response **Mr. Rod Rastan**, once again touched upon the principle of complementarity and showed that there was a relationship between Articles 17 and 20 of the ICC and that the national courts and the ICC could take up different case at the same time. The concept allowed the national courts to take up the many cases while discharging their responsibility. He also mentioned that the question of the threshold for admissibility was contained in Article 17(1)(d) of the Rome Statute. He noted that the issue of complementarity in relation to Kenya was currently on appeal, and therefore it would be important to note the decision of the ICC Appeals Chamber on the matter once issued.

The delegate from the **People's Republic of China** said that frankly speaking the principle of complementarity as enshrined in the Rome Statute was far from what was offered by the officer of ICC. According to the traditional norm of complimentarity, the national judicial systems always play a primary role in prosecuting those serious crimes, and what the Officer explained in the term of positive complementarity was concerning the cooperation between State Parties and ICC. He said that rather than the Court deciding whether a State is unable or unwilling it should be the States who should make that decision. He added that in his view as Kenya was now able and willing to prosecute the cases should revert back to it.

In response **Mr. Rod Rastan** stated that Article 19 of the Rome Statute gave a procedure where States could have judicial review of this issue by the judges of the ICC. If Kenya was successful in the Appeal, theoretically the cases could be referred back to the national level. If the case proceeds genuinely, this was fine. However, if the prosecution thought something was wrong then the prosecutor could ask the Court to revisit its earlier decision. The Rome Statute was not established to ensure cases are necessarily tried at the ICC. It was created to end impunity through genuine proceedings, where at the national level or before the ICC.

The **delegate of Malaysia** maintained that it was clear under Art 15 that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. However, she asked were there any guidelines for the prosecutor before he/she could initiate any investigation? This was necessary so as to avoid selective investigation. She further added that assuming that in Malaysia, we criminalize a particular crime under specific legislation, which may not be the same crime as enlisted in the Rome Statute what would be the status?

On complementarity, Malaysia illustrated a practical scenario. Malaysia was grappling with complementary legislation by criminalizing ICC offences (internalization of the Rome Statute). They had also seen countries that said their respective national penal laws were sufficient to address ICC offences. For example, genocide vs. multiple counts of murder. Does the ICC not see the latter being sufficient?

In response Mr. Rastan, noted that under Article 15 of the Rome Statute the Prosecutor could receive information from anyone. The OTP had some experience in this regard and till date it had received over 9000 (communications), however the OTP had opened only 6 investigations to date and the majority of such communications related to matters outside the jurisdiction of the Court. The seriousness and gravity of crimes committed lay at the heart of the matter. On specific criteria, he referred to the OTP's draft *Policy Paper on Preliminary Examinations*, which had been distributed to delegates.[5]

In response to the query from Malaysia regarding the internalizing of ICC crimes into domestic legislation, **Judge Noguchi** responded that when Japan was preparing for accession, Japan looked at the approaches taken by State Parties and found two approaches fundamentally; one approach was to criminalise the Rome Statute provisions under its penal laws (eg Canada and Germany). Another approach was not to do this, at least before becoming a State Party. It was noted that the need for criminalization had not been made compulsory except for offenses against the administration of justice.

Japan did not have the crime of genocide and crimes against humanity under its existing penal laws. but thought that almost all of such crimes would be effectively punishable according to existing domestic crimes of murder etc. There were the slightest possibilities, if

[5] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm

strictly speaking from legal and theoretical points of view, that certain crimes under the jurisdiction of the ICC might not be prosecutable under the existing domestic laws, such as a certain type of incitement of genocide which did not result in any casualties. However, Japan concluded that such possibilities were more or less for the sake of argument only and would not constitute a barrier for accession, because the ICC must also consider the factor of gravity of crimes in relation to the admissibility question under Article 17. This was perhaps the common understanding of all states, even those that have criminalized all the ICC crimes by domestic legislations. Which approach to take would greatly depend on the domestic situation. In the case of Japan, it was believed that if the penal code were to be revised comprehensively to adapt to the ICC, it would take many years and delay Japan's accession to the ICC.

**Mr. Rastan** added that reference to the obligations on States Parties to adopt implementing legislation related to Article 70, Art. 109, Part XI (on cooperation). Other than that, it was the States' decision and discretion whether and how to domesticate the ICC's penal provisions. He nonetheless noted that the concept of complementarity and the availability of the Court's admissibility provisions had led some States to decide to exhaustively domesticate all ICC crimes as international offences in the manner specific in the Rome Statute. He also pointed out Art. 17 (1) (c) cross reference to Art. 20 – linkage with conduct, suggesting that for complementarity the national courts needs to be proceeding against the same person for the same conduct. He maintained that if the cases were in fact different or the national authorities were prosecuting someone for different conduct, this related to the question of sequencing (who goes first), but also to prosecutorial discretion (i.e. whether as a policy matter the same person should be charged both the ICC and national level).

The Malaysian delegate further inquired what about Sudan? Sudan had stated that it would proceed to take action against the

perpetrators at the national level, but the ICC stated that it was not taking action on the same conduct.

**Mr. Rastan** replied that to date there had not been any admissibility challenges from the Government of Sudan. There were, moreover, no national proceedings for those bearing the greatest responsibility for the most serious crimes arising from the violence in Darfur. The OTP had learned that the Sudanese judges involved admitted to being frustrated with the fact that the police and the authorities were not cooperating to provide information. Hence, in Sudan, it was a situation of inaction. He noted that the ICC system was set up to ensure the end of impunity. If the national system did not respond, the ICC would.

The delegate of the **People's Republic of China** inquired about the implications of the ICC Rome Statute on universal jurisdiction, whether ratification of Rome Statute would promote State Parties to enact universal jurisdiction legislation to fulfil the requirement of Complementarity. Mr. Rastan recalled Rwanda – the Rule 11*bis* cases where situations were reverted back to the national jurisdiction – not exactly complementarity but it is perhaps the closest approximation thereto. In the *Ademi and Norac* 11*bis* referral to Croatia – the Tribunal accepted that, despite the absence of applicable penal provisions covering command responsibility by omission (article 7(3) ICTY Statute), that a combination of different relevant domestic provisions could approximate to the particular conduct sought by the ICTY Prosecutor, and accordingly referred the case to the national level. In another case, *Bagaragaza*, before the ICTR, the Tribunal was not satisfied that the national court, Norway, could sufficiently address the genocide case brought by the ICTR Prosecutor by charging the suspect under ordinary domestic penal provisions as aggravated homicide, because the essential elements of the crime (namely genocidal intent) would be insufficiently captured. Hence the ad hoc Tribunals have looked to the degree of discrepancy and their effect on the case before deciding

to refer cases to the national level. The ICC may or may not follow a similar approach and has yet to decide on such admissibility issues to date

The delegate of **Uganda** while referring to immunity and bilateral agreements between non state party and states parties said that there was a contradiction to the concept of immunity all by itself. Mr. Rastan responded by explaining the provision is enshrined in Article 98 of the Rome Statute, and that the scope of such agreements or the interpretation of applicable immunities could be something that is examined by the judges of the Court where it arose in the context of a specific case.

**Mr David Koller,** added that on reading Article 17, if the first question you ask was, "is there a prosecution or investigation or not?". If there was no investigation or prosecution, then there was no need to proceed with asking the question whether the state was unable or unwilling.

# VI. WORKING SESSION III

Judge Noguchi, the Chairman for Working Session III mentioned that it primarily dealt with two issues namely: (i) Post Kampala Review Conference Developments and (ii) Implications of ratification to the Rome Statute. Mr. David Koller was the lead discussant.

An overview of the First Review Conference of the Rome Statute that was held in Kampala, Uganda from 31 May to 11 June 2010 was given by Mr. Koller wherein the following points were noted:

**Amendments to the Rome Statute**:

The Conference adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction was subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as was required for the adoption of an amendment to the Statute.

The Conference based the definition of the crime of aggression on United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, and in this context agreed to qualify as aggression, a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter.

As regards the Court's exercise of jurisdiction, the Conference agreed that a situation in which an act of aggression appeared to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involved States Parties or non-States Parties.

Moreover, while acknowledging the Security Council's role in determining the existence of an act of aggression, the Conference agreed

to authorize the Prosecutor, in the absence of such determination, to initiate an investigation on his own initiative or upon request from a State Party. In order to do so, however, the Prosecutor would have to obtain prior authorization from the Pre-Trial Division of the Court. Also, under these circumstances, the Court would not have jurisdiction in respect to crimes of aggression committed on the territory of non-States Parties or by their nationals or with regard to States Parties that had declared that they did not accept the Court's jurisdiction over the crime of aggression.

The Conference also adopted a resolution by which it amended article 8 of the Rome Statute to bring under the jurisdiction of the Court the war crime of employing certain poisonous weapons and expanding bullets, asphyxiating or poisonous gases, and all analogous liquids, materials and devices, when committed in armed conflicts not of an international character.

Furthermore, the Conference adopted a resolution by which it decided to retain article 124 in its current form and agreed to again review its provisions during the fourteenth session of the Assembly of States Parties, in 2015. Article 124 allows new States Parties to opt for excluding from the Court's jurisdiction war crimes allegedly committed by its nationals or on its territory for a period of seven years.

**Stocktaking of international criminal justice**

The Conference concluded its stocktaking exercise on international criminal justice with the adoption of two resolutions, a declaration and summaries of discussions.

The resolution on the impact of the Rome Statute system on victims and affected communities, inter alia, recognized, as essential components of justice, the right of victims to equal and effective access to justice, support and protection, adequate and prompt reparation

for harm suffered and access to information concerning violations and redress mechanisms. Moreover, the Conference underlined the need to optimize outreach activities and called for contributions for the Trust Fund for Victims.

The Conference also adopted a resolution on the issue of complementarity, wherein it recognized the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level.

In the Declaration on Cooperation, the Conference emphasized that all States under an obligation to cooperate with the Court must do so. Particular reference was made to the crucial role that the execution of arrest warrants played in ensuring the effectiveness of the jurisdiction of the Court. Moreover, the Review Conference encouraged States Parties to continue to enhance their voluntary cooperation and to provide assistance to other States seeking to enhance their cooperation with the Court. In addition, the Conference took note of the summary of the roundtable discussion on cooperation.

The Conference further took note of the moderator's summary of the panel discussion held on the issue of "peace and justice". The panel highlighted the paradigm shift the Court had brought about; there was now a positive relation between peace and justice. Although tension between the two continued to exist and had to be addressed, amnesties were no longer an option for the most serious crimes under the Rome Statute.

**Enforcement of sentences**

In its resolution on strengthening the enforcement of sentences, the Conference called upon States to indicate to the Court their

willingness to accept sentenced persons in their prison facilities and confirmed that a sentence of imprisonment may be served in prison facilities made available through an international or regional organization, mechanism or agency.

It was noted that the Review Conference had exceeded expectations both in the stocktaking and amendment of provisions forums, even though some had their doubts as to what the Conference might actually achieve beforehand.

Presenting his views on **"Implications of Ratification to the Rome Statute**", Judge Noguchi was of the belief that such a decision had to be taken weighing both the pros and cons of the ratification. In most cases he opined that the discussion to become a State Party focused on the concerns and problems. While realizing that it was solely a sovereign decision; States also need to see the benefits of becoming a State Party. While citing the case of Japan he stated that even though it had taken some years for Japan to become a party to the Statute, there was always a firm understanding that it had to do so. While realizing that the ICC was not a perfect institution and it still faced numerous challenges, States could become a part of the universal system to fight against impunity by joining the ICC. For Japan issues that required careful scrutiny before the accession included: (i) the possible conflict of the ICC jurisdiction with the domestic legal system ; (ii) the relationship between the ICC and the Security Council; and (iii) the financial implications which arises by becoming a State Party. .

After the presentations, the following Member states presented their comments and observations: **Kenya, Kingdom of Thailand, and People's Republic of China**.

The delegate of **Kenya** while commenting on the principle of complementarity stated that if the ICC was supposed to act as a catalyst for assisting Member States in capacity building and technical assistance

what was the procedure to be followed in this aspect? Mr. Koller referred to Article 93(10) of the Rome Statute replied that the ICC, like many organizations played the role of facilitators. The court's role had focused on its activities e.g. outreach activities. Training Programmes were directed to assist counsel to apply the law domestically. Although the court may not have a specific mandate in assistance measures, informally, the Court would be happy to receive requests for assistance in any manner useful to States.

The delegate of the **Kingdom of Thailand** opined that one reason why Asian States were hesitant to ratify the Rome Statute related to the issue of non-international armed conflicts being enlisted under war crimes in the Rome Statute. She said that this article was largely based on Additional Protocol II of the Geneva Conventions of 1949, which was by far the least ratified. The concern of States related to the protection of their military personnel who would have no free hand in dealing with matters pertaining to the internal security of States. Secondly, the delegate felt that joining the ICC was an additional financial burden on a State and sometimes those resources could be used for some other priority areas e.g. the fight against piracy. Thirdly, the delegate shared the concern of some other States regarding Article 27 of the Rome Statute relating to the immunity of the head of State.

Nevertheless, as illustrated in the case of Japan, shouldering this burden amounts to a State's contribution towards the fight against impunity and providing financial support to a new system of international criminal justice. The ICC would be able to provide a rough estimate of a particular State's percentage of contribution if it were to join the ICC.

The issue of States with constitutional monarchies or presidential immunities facing difficulty accepting the Rome Statute was also highlighted. It was noted that it would otherwise be instructive to see how many other States with constitutional monarchies have justified

their positions of joining the ICC, including Jordan. Some had taken the position that any form of decision making by the monarch would be so remote that it would never implicate the monarchy for ICC offences. Others, such as France and Luxemburg, applied a general phrasing to the effect that their respective constitutions would be applied in line with the Rome Statute. Other States have expressed that if ever a case arises implicating the monarchy or the head of State, such cases would be considered on a case by case basis and could be procedurally waived in the case of republics.

On the issue of the concern by States parties on the application of the Rome Statute to internal armed conflicts, it was stressed that the Statute places a threshold bar on "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" that do not rise to the level of an armed conflict. Moreover, the non-international elements contain in article 8 derive from Common Article 3 of the Geneva Convention, which enjoy universal adherence. The remaining offences related to non-international armed conflict largely reflect those that are part of customary international law. Finally, the principle of complementarity holds that as long as a State genuinely addresses such situations, there would is no need for the ICC to intervene.

The delegate of the **People's Republic of China** wanted to know the criteria to be applied by the ICC while adjudicating on "Crimes against Humanity" and the definition of attacks? The chair responded that the criteria for "Crimes against Humanity" had been developed under the Nuremberg Charter. Mr. Koller replied that presently the ICC did not have any jurisprudence on this issue however the definition of crimes against humanity was set out in further detail in article 7 of the Rome Statute. Mr. Rod Rastan said that the ICC had provisionally examined the definition and elements of crimes against humanity in the Katanga/Ngodjolo and Bemba confirmation decisions as well as the Kenya article 15 decision and gave examples, but noted, as Mr Koller

had mentioned, that the jurisprudence would become more elaborated in the final judgements by the ICC in those cases. It was noted that it would be instructive to also examine the jurisprudence of the ICTY and ICTR in this regard.

## VII. CONCLUDING SESSION

The following Member States made their concluding observations**: Brunei Darussalam; People's Republic of China; Ghana; Malaysia; Uganda; United Arab Emirates; and Japan**

The delegate of **Brunei Darussalam** noted that her country was not a Party to the Rome Statute for both legal and political reasons the primary one being the sovereignty of the nation. The primary concern related to the application of Article 27 which applied to all persons, this article was in contradiction with the Constitution of Brunei Darussalam according to which the Sultan was immune. The next issue of concern was implementation of the Rome Statute into the domestic legislation, as terms such as genocide, crimes against humanity and war crimes were not defined in the penal law of the country.

The delegate of the **People's Republic of China** recalled that Judge Song had said that to ratify/not ratify the ICC was a sovereign decision, he recalled that his country had principledreservations to the Rome Statute since 1998 and subsequently to the working of the ICC, even though his country did share the spirit of the Rome Statute. However, he felt it was good to engage in a dialogue on the relevant issues of concern, but was not sure whether his country was ready to join the ICC as they had very substantial concerns, regarding the jurisdiction of the ICC. He added that it was argued by some participants that the ICC was the first permanent court against crimes for all humanity, but posed the question whether the international community as community of sovereign states was ready to accept the idea of international law?

The **delegate of Ghana** said that he had come to observe the proceedings of the meeting and would report them back to the capital.

The **delegate of Kenya** said that even though Kenya was a State Party to the Rome Statute, she was not sure whether she wanted

other countries to follow suit. She maintained that Kenya being a situation country, its experience with the court had been quite challenging. According to her it was critical for States Parties to strengthen their domestic institutions so that in case of need they could avoid going to the ICC. She hoped that with the fundamental changes and the functional institutions now in place in Kenya they would be able to handle the cases within.

The **delegate of Malaysia** stated that Malaysia's position regarding the ICC had been spelled out by the Attorney General. However, she believed that there was need to have the suitable legal framework in place, before proceeding to ratifying the Rome Statute. She also expressed her concern regarding monarchy and the provisions in the Rome Statute. The proper application of the principle of complementarity was the key to success of the system and it was also essential that States cooperate with the ICC.

The **delegate of Uganda** said that her country was the first one to refer a situation to the ICC. Currently it was at the pre-trial stage and there were difficulties faced in arresting the suspects. Her country had domesticated the Rome Statute in 2010 as a result of which they had established an international crimes division in the High Court, which could prosecute genocide, crimes against humanity and other crimes within the Rome Statute. Only last week one case pertaining to an IRA rebel had been referred to that division and the result would have to be seen. However, there were certain other challenges to be faced the first pertained to immunity as well as the age of the criminal responsibility (Uganda-12 years) as well as the issue of sentencing-Uganda has death penalty.

The delegate of the **United Arab Emirates** stated that presently his country was not a State Party to the Rome Statute, however they looked forward to joining the ICC and were studying the Rome Statute and domesticating it was a complicated process. At the same time they wanted to see the future role and direction of the ICC.

**Judge Noguchi** from Japan maintained that Japan was willing to share its experience of ratification with countries that are considering the accession. It would also be willing to cooperate with AALCO as well as the ICC in future activities. Questions could be referred to the Ministry of Foreign Affairs of Japan.

**Mr. David Koller** agreed that to join or not to join the ICC was a Sovereign decision. Meetings such as these provided Member States with an opportunity to engage with issues and concerns pertaining to the functioning of the ICC and such engagement could help States in making a conscious decision – if to join, how to join? ICC. However, he was of the view that the ICC would benefit from universal ratification. He referred to the discussion on the role of the UNSC and felt that once ICC attained universality this role would diminish. He noted that, while ratification and implementation were linked issues, there were only a few direct obligations under the Rome Statute in terms of specific implementation requirements. On the question of punishment he said that it was entirely up to State on what kind of punishment to impose and they did not necessarily have to apply the ICC punishment. He maintained that the officials from the ICC would be glad to engage further with States irrespective of the fact whether they were States Parties or non-States parties to the Rome Statute.

**Mr. Rod Rastan** also echoed Mr. Koller that the OTP would be willing to assist States with matters pertaining to the ICC, whether in the areas of exchanging lessons learned and best practices, participating in trainings or lending other forms of assistance.

**Prof. Dr. Rahmat Mohamad, Secretary-General** in his concluding remarks thanked the Judge Noguchi, Mr. Rod Rastan and Mr. David Koller for the valuable inputs provided by them on the various themes discussed during the meeting. As a follow up he envisaged three further activities: (i) Conduct a training/capacity building workshop for Judges and Prosecutors from AALCO Member States to acquaint

them with the Rome Statute; (ii) to co-host a conference with the ICC for greater in-depth consideration of significant issues arising out of the present Meeting of Legal Experts and (iii) conduct research on some of the key areas pertaining to the ICC.

**Dr. Hassan Soleimani, Deputy Secretary-General** thanked the Government of Malaysia and the ICC Secretariat for co-hosting the very productive meeting of legal experts on the Rome Statute of the ICC. A special thanks was due to President Song for his keynote address. He thanked the Chairpersons for their valuable introductory remarks on the themes discussed during the meeting and the lead discussants from ICC for their important input on the functioning of the ICC. He thanked the Member States of AALCO for their keen interest and participation and also for sharing their concerns and experiences with everyone. He thanked the Secretary-General for his inspiring leadership and his colleagues for a job well done.

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