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TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

SEMINAR ON INTERNATIONAL CRIMINAL JUSTICE:
THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

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Note

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PREFACE

The drafters of the Rome Statute envisioned a court with universal participation. In this spirit, the Assembly of States Parties adopted its Plan of action which sets out a series of measures to be taken at the national, bilateral and multilateral levels in order to attain universality.

This publication constitutes a compilation of the statements made at the 19 May 2009 seminar, which attracted a broad audience of delegates both of States Parties and non-States Parties, as well as representatives of international organizations, non-governmental organizations and academia.

The aim of the seminar was to engage in an open and in-depth dialogue on the various aspects of international criminal justice by assessing its current stage, with a particular focus on the role, the mandate and the functioning of the International Criminal Court as the first permanent international institution for prosecuting the most serious crimes of concern to the international community.

On behalf of the Assembly, I wish to express our appreciation to Ambassador Sanja Štiglic, Permanent Representative of Slovenia to the United Nations, and Mr. Marko Rakovec, the facilitator on the Plan of action, for their tireless efforts in organizing the seminar, which was co-sponsored by the Permanent Missions of Guatemala, Japan, Kenya, New Zealand and Trinidad and Tobago. The Assembly also expresses its appreciation to the United Nations Secretariat for providing the venue and facilities to make the event a success.

I hope that the dissemination of this publication will encourage similar initiatives in the future.

Ambassador
Christian Wenaweser
Permanent Representative of Liechtenstein to the United Nations
September 2009

OPENING REMARKS

H.E. Ms. Sanja Štiglic[*]

It is my pleasure to welcome you at today's seminar entitled "International Criminal Justice: The Role of the International Criminal Court", co-sponsored by the Permanent Missions of Guatemala, Japan, Kenya, New Zealand, Slovenia and Trinidad and Tobago to the United Nations. It is my great honour to welcome our distinguished guest H.E. Mr. Sang-Hyun Song, President of the International Criminal Court (hereinafter "ICC"), who is going to address for the first time, since being elected the President of the ICC, the United Nations community here in New York. Further, I would like to express our appreciation to H.E. Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations and other distinguished speakers that kindly responded to our invitation. I would also like to thank H.E. Mr. Zachary D. Muburi Muita, Permanent Representative of Kenya to the United Nations and Vice-President of the Assembly of States Parties of the ICC, who kindly accepted the invitation to moderate today's discussion and who will present all the panelists in due course.

The aim of today's seminar is to provide an open and in-depth discussion on the various aspects of international criminal justice, with a particular focus on the ICC, as the first permanent international institution for prosecuting the most serious crimes, such as genocide, crimes against humanity and war crimes. We should recall that it took us a very long time to establish this important institution that seeks individual accountability for these crimes. At the Rome Conference, in July 1998, the previous United Nations Secretary-General, Mr. Kofi Annan, said:

> "Now at last, thanks to the hard work of the States that participated in the United Nations Conference over the last five weeks – and indeed for many more months before that – we shall have a permanent court to judge the most serious crimes of concern to the international community as a whole: genocide, crimes against humanity and war crimes. The establishment of the Court is a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law. It is an achievement which, only a few years ago, nobody would have thought possible."

Ten years later the present United Nations Secretary-General, Mr. Ban Ki-moon, marked this Court's milestone with the following words:

> "The creation of the ICC is unquestionably one of the major achievements of international law during the past century. But this young Court remains a work in progress; a fragile part of a crucial and ongoing effort to entrench international law and justice."

These words clearly indicate the importance of the established institution and remind us, that today, a decade after the adoption of the Rome Statute, our work is not yet finished. On the contrary, we have to maintain and further build upon our past efforts with a view to achieving a truly universal international criminal court that would enjoy support of all States and will be able to provide justice for victims around the world in situations where governments alone are not able to prosecute perpetrators of these crimes.

[*] *Permanent Representative of Slovenia to the United Nations.*

Today's debate is therefore an excellent opportunity to address these important issues and to assess the current stage of international criminal justice. We are convinced that we can address these questions through an open and transparent dialogue. In this respect, I would like to encourage you to take the floor after the panel presentation and share your views on these issues. I am convinced that today's discussion will provide more clarity and better understanding of international criminal justice and the role and the work of the ICC.

ADDRESSES

Judge Sang-Hyun Song*

This seminar comes at a fascinating time for the ICC. The Court has come a long way since it was created. Already 108 States have ratified or acceded to its Statute. The Prosecutor has initiated four investigations. The judges have issued thirteen warrants of arrest and have clarified the interpretation of fundamental parts of the Rome Statute. States have surrendered four suspects to the Court. In January this year, we passed a milestone with the start of our first trial – that of Mr. Thomas Lubanga Dyilo. The second trial is scheduled to begin on 24 September 2009. Two other accused from the Democratic Republic of the Congo – Mr. Germaine Katanga and Mr. Mathieu Ngudjolo Chui – are scheduled to face trial then. Another case is still before a Pre-Trial Chamber. If the charges against him are approved, Mr. Jean-Pierre Bemba could go on trial before the end of the year for crimes the prosecution alleges he committed in the Central African Republic. And finally, just yesterday Mr. Abu Garda, the leader of a Darfur rebel faction, answered a summons to appear in court. The Prosecutor accuses him and two others of war crimes related to the killing of African Union peacekeepers in Sudan.

All this means that just six years after its start, the Court is a fully functioning judicial institution. Judges are hearing testimony. Witnesses and victims are telling their stories. The Prosecution is presenting its evidence. Defence counsel are vigorously defending the rights of the accused. The Trust Fund for Victims has launched its first projects. There are increasing indications that the Court could be having a deterrent effect on potential perpetrators of international crimes. And at the end of the day that has to be the key: if we bring perpetrators of the worst violations to justice, future horrors could be prevented.

With greater judicial activity, the work of the Court has drawn wider attention. So long as what we are doing is well understood, this is a good thing. Through diplomatic meetings, public information campaigns and outreach activities in the situation countries, the Court does what it can to ensure understanding. If our work is to contribute to reconciliation, affected communities must see justice being done. If the Court is to play a part in deterring atrocities, the broader international community must understand what it is – and what it is not.

Where the increase in attention to the Court's work combines with a poor understanding of its mandate and functioning, there remain risks to the Court and the larger goals of the Rome Statute. These risks can take different forms. For example, now that cases are at trial, there could be heightened expectations of what the Court can do. If people expect that the Court can handle all cases of genocide, crimes against humanity and war crimes, this will inevitably lead to disappointment.

Of course, the ICC does not have the capacity to handle all cases of genocide, crimes against humanity and war crimes. Indeed, it was never the intention of the Rome Statute's framers that it should. Under the principle of complementarity, the Court only acts where States are unwilling or unable to credibly investigate and prosecute crimes. If States ensure that they deal with crimes, the Court will not need to act. Indeed, in those cases, the Court has no jurisdiction. And apart from referrals from the Security Council, the Court only has jurisdiction over crimes committed on the territory of States Parties or committed by nationals of States Parties, which have all acceded to the Rome Statute voluntarily. By relying on these two classical determinants of jurisdiction, the Rome Statute actually reaffirms core principles of State sovereignty. Even where the Court has territorial jurisdiction, it only has the mandate

* *President of the International Criminal Court.*

and capacity to deal with the most serious of accusations. Further, it is restricted only to crimes that took place after the Rome Statute came into effect on 1 July 2002.

Insofar as the Court's mandate is limited by the principle of complementarity, this is something the Court embraces. It is crucial that where national judicial systems can credibly investigate and fairly try alleged perpetrators of atrocity crimes, they do so. Domestic trials bring justice closer to the victims. They help to build national judicial capacity. And over time they can help to enhance the deterrent effect of prosecutions.

It must not be forgotten that domestic trials are foreseen by the Rome Statute itself. The ICC is only one component of the larger Rome Statute system. But it is a critical part. In those places where governments are unable or unwilling to try their own, victims of the worst crimes known to humanity are just as deserving of justice. And by offering the possibility to provide justice in these most difficult of situations, the very existence of the ICC can help promote local efforts. The possibility of ICC jurisdiction can encourage States to develop the will and capacity to establish credible alternatives to trials in The Hague.

These facts about the Court are not new to anyone in this room. But they are not always well enough understood in the broader diplomatic community. The fact is that we are a judicial institution operating in a political world. The ICC is politically neutral and judicially independent, but we are aware that the world around us – a world that we depend upon for support and cooperation – is not always that way.

The Rome Statute created the possibility for a political body – the Security Council – to refer situations to the Court. In the case of Darfur, this is what happened in March 2005. Once a situation comes before the Court, States must accept that judges cannot and will not take political considerations into account. Efforts to blame the Court for insufficient political sensitivity in its decisions are, by definition, misplaced. If a case becomes a problem for international peace and security, the Rome Statute foresees an outlet in article 16: deferral. This political option is in the hands of a political body: the Security Council. It is not a matter for the Court.

You will recall all the work that went into ensuring the Court could operate without political influence. At the Rome Conference, States successfully banded together to ensure the Court's independence. It should be noted that this was particularly true of African States. With their experience of colonialism, African States were skeptical of investing power over the Court in the hands of a few countries. They rejected proposals to place the Court under the control of the United Nations Security Council. In a set of principles adopted in 1997, the Southern African Development Community (hereinafter "SADC") declared that the Court should be independent and that the Prosecutor should be able to investigate crimes "without influence from States or the Security Council, subject only to appropriate judicial scrutiny." Further, the SADC stressed that "the independence and operations of the Court and its judicial functions must not be unduly prejudiced by political considerations." These principles were subsequently adopted by other African States, and embraced by many States from other parts of the world. The initiative succeeded, and these important principles were embedded at the very core of the Rome Statute.

With the Court's judicial activity increasingly drawing the eyes of the world, it is once again necessary to seek guidance from the influential SADC principles of 1997. The Court is purely a judicial institution and cannot partake in political debates. We can try to disseminate simple facts about our mandate and work. But we rely on the States that created us to shield us from political winds. States Parties can best do this by ensuring that the broader diplomatic community understands fundamental facts about the Rome Statute system.

The endeavour launched in Rome has made tremendous progress. The Rome Statute has grown from a piece of paper to a functioning judicial system. The Court will continue to develop as the judicial institution of last resort for atrocities that must not be ignored. But it cannot succeed alone. Successful implementation of its mandate relies on States' continued support for the noble principles that resonated in Rome.

Ms. Patricia O'Brien*

In view of the time constraints we are all under, it is difficult for me to do justice to the almost five years of extensive cooperation between the United Nations (hereinafter "UN") and the International Criminal Court which has taken place on the basis of our Relationship Agreement. I would venture to say that this cooperation works so well that I can afford to use my time to address the important issue of complementarity which arises quite frequently in the context of UN-ICC cooperation which has been touched upon by the President. Before I embark on the substance, I must mention two matters which, although obvious, require to be highlighted.

Firstly, I will be making the following remarks in my personal capacity. Secondly, in addressing provisions of the Rome Statute, it is not my intention to offer interpretations of these provisions. As the UN is not a party to the Rome Statute, it is clearly not our role to interpret its provisions. However, I will be referring to provisions of the Rome Statute in the course of articulating my observations.

On that note, I propose to address the concept of complementarity as a tool or instrument to facilitate the resolution of the quandary of peace and justice in post-conflict environments.

The notion of complementarity has, I suggest, to be viewed in the context of the dilemma of peace and justice. I wish to propose to you today that complementarity should be seen as an important element in resolving this conundrum.

In this context, I will venture to go a step further and raise the issue of how an article 16 deferral by the Security Council, using its Chapter VII powers, can also constitute an important additional factor in this equation of peace and justice. It is possible that, where circumstances are deemed appropriate, the Council can through a "deferral" give a State the necessary time to establish and bring into operation a credible national alternative to a trial before the ICC.

Peace and justice

With the growing involvement of the UN in post-conflict societies – both in facilitating the negotiation of peace agreements and in establishing judicial and non-judicial accountability mechanisms – the Organization has frequently been called upon to express its position on the relationship between peace and justice.

As Secretary-General Ban has said on a number of occasions:

> "There are no easy answers to this morally and legally charged balancing act. However, the overarching principle is clear: there can be no sustainable peace without justice. Peace and justice, accountability and reconciliation are not mutually exclusive. To the contrary, they go hand in hand."

On the one side, if we ignore the demand for justice simply in order to reach a peace agreement, the foundations of that agreement will be fragile and possibly unsustainable.

* *United Nations Under-Secretary-General for Legal Affairs.*

On the other side, if we insist at all times on a relentless pursuit of justice a delicate peace may not survive. If we insist in punishing always and everywhere those responsible for serious violations of human rights it may be difficult or even impossible to stop the bloodshed and save lives of innocent civilians. At times, we may need to postpone the day when the guilty are brought to trial.

While we will uphold those principles, the challenge is always to find the right balance in each specific instance where this issue arises. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the one for the other. Indeed, I firmly believe that peace and justice can and must be pursued in parallel.

Complementarity

So how does complementarity fit into this framework? The notion of "complementarity" under the Rome Statute is premised on the basis that a case before the Court is only admissible when national courts are "unwilling or unable" to investigate or prosecute the statutory crimes concerned. And this has been gone into some detail by President Song.

There are several ways in which the question of complementarity can come into play before the Court: an accused individual or "indicted" person can raise it in order to challenge the admissibility of a case; a State with jurisdiction raises the issue to challenge the admissibility of a case; and thirdly, the Court examines the admissibility of a case and raises the issue of "complementarity" on its own motion.

In this brief statement, I would like to focus on the circumstances where a situation has been referred to the Court – either by the State itself or by the Security Council – and the territorial State has indicated that it wishes to investigate and prosecute the situation under its own national system.

In this connection, the situation of Uganda comes to mind. In late 2003, Uganda had referred the situation in the northern parts of the country to the ICC. During the course of 2007, as the peace process gathered momentum and the ICC arrest warrants were seen as a major "stumbling block", a framework of agreements was elaborated, that provided for the establishment of a "special division" of the Ugandan High Court that was supposed to provide a national alternative to proceedings before the ICC. However – as we all know – as the envisaged "final peace agreement" was never signed, this project never fully materialized and the peace process in that case broke down.

A State which has referred a situation to the ICC can "regain" jurisdiction over that situation only if it successfully makes the case before the ICC, under articles 17 and 19 of the Statute, that it is now "willing and able genuinely" to investigate and prosecute. This is also the case when a situation has been referred to the Court by the Security Council.

That State, if it so chooses, will have to challenge the admissibility of the case by means of a judicial submission before the Chambers of the ICC. The Court will not drop a case or take any other such measures just because of political or diplomatic representations.

The key consideration, I suggest, in this context is the interpretation of the phrase "willing and able genuinely" to investigate or prosecute. Again, please note that I have no intention whatsoever for my reading of this phrase to carry any authoritative weight. The authoritative interpretation of the Rome Statute is a matter for the Court and the States Parties to the Rome Statute and I have utmost respect for this.

That said, my reading of those provisions in the light of decisions of the Court rendered so far is that, to satisfy the complementarity test, a State has to demonstrate that investigations or prosecutions are underway at the very moment when the admissibility is called into question against essentially the same individuals for essentially the same international crimes. This willingness not only should manifest itself in a tangible way, it also has to be genuine, meaning that it needs to be carried out in a "good faith" manner. Any decision on admissibility is taken exclusively by the Chambers of the Court.

Taking the example of the situation in northern Uganda in this connection, a decision of 29 February 2008 by ICC Pre-Trial Chamber II which requested information from Uganda on the "status of execution of the arrest warrants" must be seen as a positive development as it can be seen as an effort by the ICC to engage the country – Uganda in that case - in a "judicial dialogue" on the issue of complementarity.

Therefore, in order for a "complementarity challenge" to be successful, the State in question needs to have or to put in place a credible national accountability mechanism that investigates and prosecutes the individuals indicted by the ICC for the international crimes for which they are charged before the ICC. While there are, of course, other requirements, this is the essential one.

A mere political intent or even enacting a requisite piece of legislation that establishes a "special accountability mechanism" to investigate and prosecute those international crimes at the national level is unlikely to suffice.

There is another element that can be regarded as clear or self-evident. It would be for the ICC alone to determine whether the conditions for challenging the "admissibility" of a case have been met, and whether the national accountability process put in place constitutes a viable and credible alternative.

Leaving aside special circumstances, such as for example article 95 which allows a requested State to postpone the execution of a cooperation request pending a decision by the Court of a related admissibility challenge, the situation is as follows: Until such time as the ICC has decided the matter, a State that is bound by the provisions of the Rome Statute, by virtue of ratification by that State of the Rome Statute or by virtue of a Security Council decision, is still under an obligation to cooperate with the Court in a way that is in conformity with the letter and spirit of the Rome Statute or the applicable Security Council decision. Such obligations can range from cooperation duties during a monitoring or investigation phase to the arrest and surrender to the Court of individuals pursuant to warrants issued by the ICC.

Under article 16 of the ICC Statute, the Security Council by a Chapter VII resolution may request the Court to suspend any investigation or prosecution for a one-year period. Such a request may be renewed by the Council under the same conditions.

It would, in my view, be within the purview of the Security Council to attach conditions to any such request. The ability to attach conditions arguably provides the Security Council with a valuable opportunity to steer a situation in a direction in which the Council wishes that situation to develop.

It is important to bear in mind, in any consideration of this issue, that any such "deferral" would only constitute a temporary measure that does not "lift" but only "freezes" pending ICC proceedings.

It might be argued that a "complementarity challenge" and a Security Council deferral could be combined. In such a scenario, the Security Council could give the target State in question the necessary time to establish a viable and credible national accountability system and get it up and running, so as to increase the chances for a successful "complementarity challenge".

UN-ICC cooperation

Allow me to close by getting back to the cooperation between the UN and the ICC under our Relationship Agreement. This autumn, and more precisely on 4 October 2009, we will mark the fifth anniversary of this cooperation. We are very pleased about the fact that our partnership with and support to the Court has progressively evolved and expanded. By now, many of the cooperation requests are handled as standard procedure. We have managed to successfully resolve challenges, such as the highly publicized issue of confidential information in connection with the Lubanga case.

The success story of UN-ICC cooperation has only been possible because of the dedication and trust that both parties have demonstrated in this respect. This dedication is also a clear manifestation of the fact that the UN wants and needs the ICC to succeed and that the ICC fully acknowledges and respects our mandate.

Since the beginning of the cooperation between the UN and the Court, my Office has acted as the "point of entry" for every cooperation-related matter. Allow me to say that I am proud of how we have shaped this cooperation and assisted cooperating UN entities with a view to ensuring a unified approach throughout the UN system.

H.E. Mr. Christian Wenaweser*

My comments will focus on the Review Conference. When the Rome Statute was adopted, one of the provisions provided for the convening of the Review Conference seven years after the entry into force of the Statute. That date is 1 July this year and the Review Conference will take place in the end of May - beginning of June 2010 for a maximum of two weeks in Kampala, Uganda. We will set the exact dates very shortly.

What will we do at the Review Conference? There are two issues that we will have to address because they are mandatory under the Rome Statute. One is article 124 of the Rome Statute, which offers States an opportunity to make a declaration that the Court does not have jurisdiction over war crimes for the first seven years of membership in the Court of that State. This is a provision that needs to be reviewed. The possible options of dealing with it have already been discussed but will be subject to further discussions.

The second topic is one that you probably are familiar with: the crime of aggression. In 1998, when the Statute was adopted, the Diplomatic Conference decided that the ICC has jurisdiction over four crimes: genocide, crimes against humanity, war crimes and also the crime of aggression. It has also decided that the Court can exercise that jurisdiction only after States Parties decide on provisions relating to the definition of the crime of aggression and the conditions for the exercise of jurisdiction. The first possible date to do this is the Review Conference and we have to take this up in Kampala.

I have had the honour to chair the Special Working Group on the Crime of Aggression that dealt with this topic up to February this year. It is fair to say that we have made very solid progress on this topic, in particular as regards the question of the definition of the crime of aggression, while there is still a difference of opinion as far as the conditions for the exercise of jurisdiction. This is a process that is still on-going. It is open to all States, and I am emphasizing this in particular here because I am delighted to see that there are States Parties and non-State Parties present in the room. The discussions on aggression will continue from 8 to 10 June and they will be chaired by Ambassador Prince Zeid Ra'ad Al-Hussein from Jordan, who has of course a very long history with the ICC and who was also the first President of the Assembly.

The Review Conference will also take up other suggested amendments that State Parties will put on the table. We have so far one issue, that has been proposed by Belgium: an expansion of the list of prohibited weapons that are contained in article 8 of the Rome Statute. There may be more coming, but I want to say also at this point that of course the Review Conference is not the last opportunity to make amendments to the Rome Statute, it is rather the first opportunity to do so.

The second function of the Review Conference that is extremely important, is what we sometimes subsume under the term "stocktaking". The Review Conference is meant to give all of us an opportunity to analyze how well the ICC is functioning. I think it is fair to say that there is a general view that the Rome Statute is a very solid legal treaty that has been negotiated perhaps with unprecedented care, but that does not mean that everything necessarily has to be perfect about it. We will have to talk in Kampala about the functioning of the ICC in a wider political context. We want to talk about the role of international criminal justice in general, and I hope very much that the Review Conference will find very strong

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* *President of the Assembly of States Parties and Permanent Representative of Liechtenstein to the United Nations.*

interest not only among States Parties but also among non-States Parties, and that it will be a positive event that illustrates the role that international criminal justice plays in our international system.

I would of course very much like to see more States join the Rome Statute prior to, during, and after the Review Conference. The goal of the drafters of the Rome Statute, of all of us when we got together in Rome, was to create a system that is universal, and that is the goal that we have to keep in mind. I am confident that the Review Conference will be a positive event, that will create additional momentum and a positive dynamic concerning possible new membership in the Statute.

Let me also quickly address the issue of cooperation, that is of concern in particular for States Parties, which have obligations under the Rome Statute that they have voluntarily undertaken. I believe we have to look at those obligations. We need to look at cooperation in connection with several aspects, but in particular in connection with the issue of arrests, because, as you know, the ICC of course is fully reliant on the cooperation of States in this respect.

Finally, as States Parties and non-States Parties, and I do believe that this is something that affects all of us, we have to have open, intelligent, constructive and business-like discussions on the issue of peace and justice that has been mentioned by previous speakers. I was glad to hear from Patricia O'Brien, again, I think the very principled position that the Secretary-General has been taking on this for a number of years, which I think is extremely important, namely that peace and justice are complementary and are certainly not mutually exclusive, but it is us, States, sometimes in particular in the Security Council, but I believe certainly also outside of it, that have the obligation to make this relationship actually work in practice. We all know that this is a difficult challenge and that there are no custom-made solutions for this.

H.E. Mr. Jorge Lomónaco*

As Vice-President of the Assembly in The Hague, I am also the Coordinator of The Hague Working Group of the Bureau. So, I would start my presentation by briefing you on our work.

As you know, we have been assigned with eight facilitations. We therefore have a very busy agenda. As of today, we have held six formal meetings. Tomorrow morning we will have the seventh, so I am flying back to The Hague this afternoon in order to chair it. Again, because we need to sustain the activity, we have adopted a programme of work that is a road-map for the activities in The Hague. It is meant to guide us also, as efficiently as possible, with a well-prepared and results-oriented approach, in order to be able to report and offer some concrete results to the Assembly in November.

Of the different facilitations, I would like to point briefly at where I see the challenges, in particular those which might be more relevant at this point in time. Some of the facilitations are moving faster than the others; that is due to their own dynamic, to the calendar of activities of the Court and also to the different interactions between the facilitators and Court officials.

The issue of cooperation will be addressed by Ambassador Haesendonck, so I will not refer to it in depth, but I will simply say that I attach tremendous importance to the topic. I do believe that subjects such as cooperation and implementation should be considered particularly relevant in view of the upcoming Review Conference.

As regards to the independent oversight mechanism, we made a preliminary report[1] to the resumed session of the Assembly here in February and were instructed by the Assembly to submit a report to the Committee on Budget and Finance (hereinafter "the Committee"). The Committee has already issued some recommendations that will be discussed in The Hague with a view to adopt a decision. Of course the road-map contemplates the establishment of an independent oversight mechanism at the next Assembly.

Legal aid for victims and for defence are also on our agenda. The challenges in the case of victims include the issue of common legal representatives and the determination of indigence. These are the two main elements that drive the discussions in The Hague. Regarding the defence, there is also the issue of assessing indigence and the financial implications thereof, including the consideration of the assets of dependents in the determination of such indigence.

As far as family visits are concerned, the dynamic of the discussion completely changed when the 10 March 2009 decision by the Court was made public and placed positive obligations upon the Registrar to provide financial assistance for family visits. You might be aware that some concern has been expressed by several delegations as to the nature and implications of this decision vis-à-vis the ensuing financial implications and the possibility of setting a precedent and the consequences thereof.

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* *Vice-President of the Assembly of States Parties and Ambassador of Mexico to the Netherlands.*

[1] Interim report to the Bureau of the Assembly of States Parties by the facilitator on the issue of establishing an independent oversight mechanism for the International Criminal Court (ICC-ASP/7/INF.2).

As regards the Secretariat of the Trust Fund for Victims, it was decided that the Assembly of States Parties will be represented in the panel that will select the new Executive Director. We have also been in the process of inviting States Parties to nominate members to the Board of Directors and we have added a couple of important criteria to the qualifications that we believe the members of the Board should have.

We also have other issues to deal with. The strategic planning process, which is on-going, and the issue of the proposed budget, which we intend to discuss as soon as the Court makes its proposal public. We would then be able to start discussions of this complex issue, not only due to its nature and importance, but because of the financial situation that we all experience.

Now, having gone rapidly through the main issues under consideration of The Hague Working Group, I would like to share with you, from a personal perspective, some reflections on where the Court stands and what effect its standing may have in the future.

We of course have heard today and on other occasions the legal and political challenges that the Court faces, which are of considerable magnitude. But I would like to add one additional challenge, which is the image of the Court. The importance of gathering support of the international community, and I am not referring only to the diplomatic community but also to the public at large, and the perception that the public and civil society has of the Court. I will start with the challenge of the lack of knowledge of what the Court is and of what the Court can and cannot do. The expression we sometimes hear, “See you in The Hague”, nowadays can mean anything from the International Court of Justice, the Permanent Court of Arbitration, or the ICC, and there is sometimes confusion on which court can deal with a given issue. That has lead to some misunderstandings and misperceptions. I do believe that we cannot support what we cannot understand. It is thus very important for the Court to disseminate information about what it is, what it can do and the importance it has.

In facing this challenge all stakeholders have a role to play: the Court, States Parties and non-governmental organizations. We need the cooperation from other States and all the international organizations as well.

I also believe that the role of NGOs is crucial at this juncture in conveying the message of the ICC, in showing the international community the gravity of the crimes and transmitting the suffering of the victims, which is fundamental. We also need to learn from our own experience as we progress and develop the architectural structure of the Court. This process is still on-going and will be, in my view, for a while. We also need to learn from other international tribunals.

Furthermore, States Parties need to be consistent on the message about what the Court really is, how it operates and where it stands. At the same time, NGOs must continue working in motivating civil society, in probably more audacious ways, to create public awareness on what the Court can do in fighting impunity, preventing crimes against humanity and saving human lives through that preventive effect.

In order for civil society, for the media, for all relevant non-State actors to really appreciate what the ICC represents for future generations, relevant stakeholders and the Court itself, we must work and speak out every day, at all junctures, and convey the same strong message: we support the mandate of the Court and its effective implementation.

H.E. Mr. Gert Rosenthal*

My participation in this event is a double anomaly. First, I am not a lawyer by profession and have no experience in international juridical questions. Second, I belong to a country that, while participating actively in the negotiations of the Rome Statute, did not sign on and, therefore, at least up to now, is not a party to same. However, I understand that I was sought out by my colleague, Ms. Sanja Štiglic, the Permanent Representative of Slovenia to the United Nations, to co-host and participate in the event precisely for these reasons. While not a lawyer, I am obviously interested in the rule of law, both at the national and international level. And, while my country is not a party to the Statute, we aspire to become one, and that also entails a story to be told.

The creation of the International Criminal Court came to my attention in a very personal and anecdotal manner. When I returned to Guatemala in 1998 from Santiago, Chile, after serving in the United Nations Secretariat, my Government asked me to help organize the official visit of Secretary-General Kofi Annan and his wife, Nane, to Guatemala, as part of a Latin American tour. The visit was scheduled for 16 and 17 July, and all the preparations had been made when the Secretary-General received the news that the Rome Statute would be signed on 17 July; an occasion which warranted his presence. For a while, it looked like the trip to Guatemala would be aborted, and we made our displeasure known. Finally, the Secretary-General extended his visit to Guatemala by one day, and flew to Rome to be present at the signing ceremony, and then returned to Guatemala, where his wife had remained, to conclude his official visit.

Fast-forward to December 2000. I was then the Permanent Representative of Guatemala to the United Nations, and had persuaded – or thought I had persuaded – President Alfonso Portillo to adhere to the Statute before December 31. We only awaited our written instructions to proceed, and were promised by the Minister for Foreign Affairs that these would be forthcoming. Instead, we received a written instruction not to adhere. The reason behind that written instruction leads me to the substantive part of the story, which is grounded in very specific circumstances.

Indeed, the conventional wisdom that explains that a relatively large number of countries have not yet joined the Court can be traced to apprehensions regarding the impact of the Court's activities on national sovereignty. In a similar vein to the apprehensions surrounding the responsibility to protect, some nation-States are reluctant to submit to an international instance decisions that could be construed as intervening in their internal affairs, notwithstanding the principle of complementarity enshrined in the Rome Statute.

In Guatemala's case, joining the ICC would have been consistent with the guidelines of our foreign policy, and most of the senior officials of our Foreign Ministry were supportive of such a move. In effect, since Guatemala signed the Peace Accords of 1996 to put an end to a forty-year internal conflict, we have incorporated into our foreign policy the same tenets that underlie those accords: support of democracy, respect for human rights, championing a multi-ethnic and multi-cultural society and economic progress with social justice.

* *Permanent Representative of Guatemala to the United Nations.*

So, why did we not join the Court? Two roadblocks had to be overcome: one, eminently juridical; the other, rather more political in nature. As to the first question, and consistent with the "conventional wisdom" I just mentioned, there is still a strong resistance in Guatemala to the notion of subordinating domestic jurisprudence to international law, and some lawyers argued early on that the ICC was not only incompatible with internal legislation, but that it was unconstitutional, since only Guatemalan courts could prosecute and try Guatemalan citizens.

However, in 2002, the Executive Branch asked the Constitutional Court for an advisory opinion regarding the compatibility of the Rome Statute with Guatemala's Constitution, and the Court issued its opinion in the affirmative; that is, that there was no constitutional impediment for Guatemala to join the Court.

The second matter – the political opposition – stemmed directly from the fact that the Secretary-General of the political party in power at the time, the Guatemalan Republican Front, was none other than General Efraín Ríos Montt, who is accused by numerous non-governmental organizations and the Guatemalan Truth Commission of having condoned wide-spread human rights abuses, including genocide, during his *de facto* presidency in 1982-1983. Although at one level the lawyers of the party understood that the Court would not have jurisdiction over crimes committed prior to July 2002, on another level they were not taking any chances. Thus, a culture of opposition to joining the Court was born within the party; a party that today is in the opposition, but still yields considerable albeit dwindling influence.

During subsequent Governments – Oscar Berger, 2004-2008, and Alvaro Colom, 2008 to the present – the Executive Branch has actively promoted joining the ICC, but faced the staunch opposition of the Guatemalan Republican Front, some of their allies in Congress, and the more conservative elements of Guatemala's legal establishment. In fact, in 2007, the Government of Oscar Berger invited former ICC President Philippe Kirsch to visit Guatemala, in an effort to persuade the recalcitrant factions that they had nothing to fear by adhering to the Rome Statute. President Kirsch did an admirable job of outreach, explaining the scope of the Court's jurisdiction and the safeguards to avoid retroactive actions involving the crimes contemplated in the Rome Statute, but his efforts did not yield the tangible success we had hoped for.

Where do we stand today? The Government continues to be firmly committed to joining the Court, as an action fully compatible with its stance on supporting the defense of human rights and the fight against impunity. The coalition that opposes this move, and especially the Guatemalan Republican Front, has been numerically reduced in Congress, although their own reading of recent events surrounding the arrest warrant against President Omar Hassan Al-Bashir of Sudan has reignited their apprehensions, and probably strengthened their resolve to oppose ratification. It is difficult to predict how the Government's efforts will play out in this regard.

In the meantime, at the international level we continue to follow the work of the Court, and we participate with Observer status in the meetings of the Assembly of States Parties, while domestically we pursue our goal of obtaining Congressional approval to our joining the Court. In this context, I believe that the upcoming Review Conference, which will bring together parties and non-parties to the Statute, represents a new opportunity for bringing the Court's activities to the attention of our public opinion.

H.E. Mr. Baso Sangqu*

It is apt to begin our brief statement by emphasizing that for us, the Rome Statute, and the International Criminal Court it created, does not operate in a vacuum, but is rather an important element in a new system of international law. This modern system is one characterized by greater solidarity, which, while remaining true to the principle of sovereignty, prioritizes the common good. The foundations for this modern system of law are, of course, contained in the United Nations Charter, and in particular the Purposes and Principles of the United Nations, namely to "maintain international peace and security" and to bring about peaceful solutions to conflict "in conformity with the principles of justice and international law".

International criminal law as it stands today is built upon the pursuit of peace through the fight against impunity. Already in 1946, the Nuremburg Tribunal recognized that only through fighting impunity can the provisions of international law be enforced and peace attained. The relationship between peace and justice is therefore ubiquitous in the development of modern international law. And this relationship between peace and justice was evident to the drafters of the Rome Statute.

We are firmly committed to the idea that peace and security, on the one hand, and justice and the fight against impunity, on the other hand, must go hand in hand. We find these values – which we emphasize are the foundation of the modern system in which we interact – to be reflected in the Rome Statute creating the ICC. In the promotion of international justice and in an effort to fight impunity, the Statute confers jurisdiction on the ICC over "the most serious crimes of concern to the international community as a whole". These crimes, as we all know, include the crime of genocide, war crimes, crimes against humanity and the crime of aggression, although the latter is yet to be defined. The importance attached to the principles of justice and the fight against impunity is buttressed by the fact that, under the Statute, no one can escape jurisdiction of the Court on account of their official capacity or immunities.

Having said this, it is important that we remember what we have said above, namely, that the relationship between peace and justice is ubiquitous in the foundation of our modern system, and it is similarly present in the Rome Statute. Therefore, peace is also important and peace must be given an opportunity to flourish in any given situation. By now all of us are familiar with contents of article 16 which provides that investigations and prosecutions may not be proceeded with for a period of a year after the adoption of a Chapter VII resolution by the Security Council. Article 16 is present in the Statute precisely to ensure a complementary relationship between the pursuit of justice, on the one hand, and the attainment of peace on the other. It exists in the Statute precisely to ensure that, while pursuing justice, peace must be given a chance to flourish.

As members of the international community, concerned about peace and justice, we are concerned about issuing warrants which may derail peace-processes. For this reason we have supported the call made by the African Union for the Security Council to adopt an article 16 resolution in the context of Sudan.

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* *Permanent Representative of South Africa to the United Nations.*

It is because of the relationship between peace and justice, as it exists in the new value-laden system of international law, that we see no contradiction between South Africa's continued support for the ICC as a judicial body mandated to dispense justice, on the one hand, and our pursuit for the attainment of peace in Sudan through political means, including through the process provided for in article 16 of the Statute.

The political process aimed at securing peace for the people of Sudan includes the establishment of a High Level Panel, chaired by former President Mbeki, mandated to submit recommendations to the African Union Peace and Security Council on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing on the other hand, could be comprehensively dealt with. Indeed, if one carefully reads the African Union Peace and Security decisions on the issue of Sudan, it will be clear that in the pursuit of article 16 deferment, the Council has continuously called for the authorities to take immediate steps in pursuit of peace, security, stability and justice. The Peace and Security Council, for example, has called on the Sudanese parties to "ensure that issues of impunity, accountability and reconciliation and healing are appropriately addressed during negotiations". Similarly, the Council has called on Sudan "to take immediate and concrete steps to investigate human rights violations in Darfur". Speaking of the mandate of the High-Level Panel, and expressing the link between peace and justice, President Mbeki said in March of this year:

> "The Continent must act not only to end war and violent conflict in Africa, but also to ensure that where war does anyway break out, all belligerents must know that war crimes, crimes against humanity and other abuses will be punished resolutely, and that a culture of impunity will not be permitted to take root and entrench itself."

For us therefore, peace and justice must necessarily go together. We cannot pursue one without regard to the other and we certainly cannot pursue one at the expense of the other. They are two sides of the same coin. And while the Court continues to pursue justice, the political organs of the system we have created, including the African Union Peace and Security Council and the UN Security Council, must use all means available to them to ensure the attainment and maintenance of peace and security.

In 2010 the ICC States Parties will converge in Uganda to review the Rome Statute. We hope that preparations for this very important event are proceeding well and that the delegates, as they meet to contemplate the definition of the crime of aggression and other amendments of the Statute, will keep in mind the purposes of the existence of the ICC within a system designed to ensure peace and justice for the world and all who live in it.

H.E. Ms. Marina Annette Valère*

I deem it a privilege to have been afforded the opportunity to address you on an issue that holds great significance for Trinidad and Tobago and which constitutes the theme of this morning's proceedings, International Criminal Justice; the Role of the International Criminal Court. Trinidad and Tobago takes pride in the achievements of the ICC, since the adoption and entry into force of the Rome Statute, the election of the first bench of judges and the commencement of its first trial. We are all aware that in the period since its establishment, the ICC has been subject to the many criticisms of individuals, States and other entities alike. Trinidad and Tobago remains convinced however that in the ICC, the international community has created a truly independent, global and permanent mechanism in the fight against impunity. Those who are accused of committing the most serious crimes of concern to the international community are recognizing that there is no safe haven, no defense of superior orders, or even sovereign immunity, in their attempt to escape justice. Correspondingly, the victims of these grave crimes, whatever corner of the globe they may reside, are embracing the ICC as a dispenser of justice and, to a large extent, a beacon of hope.

It must always be remembered though that the ICC is not an instrument imposed on States from the North on those from the South, or the developed on the developing, or the West on the East, as some of its detractors would have us believe. When the Honourable Arthur N.R. Robinson, former President and Prime Minister of Trinidad and Tobago, took the political initiative to reintroduce to the United Nations the necessity for the establishment of a permanent international tribunal, he, like others, such as Mr. Benjamin Ferencz, former prosecutor at the Nuremburg trials, did not envisage a court confined to a particular region, people, culture or civilization. They saw it as a court to serve all of humanity. We remain satisfied that the ICC has not betrayed its mandate under the Rome Statute.

Indeed the ICC is a product of what is good about the international community and an outstanding example of success through multilateral efforts.

From the regional perspective, Trinidad and Tobago and its CARICOM counterparts have helped to shape the ICC in the last decade. We have promoted and continue to promote the ICC in our sub-region of CARICOM. We have hosted seminars and workshops on the ICC to create greater awareness within our community. Having enacted its own implementing legislation, Trinidad and Tobago has put it at the disposal of several of our neighbours seeking model legislation in order to fashion their own domestic laws to give effect to the provisions of the Rome Statute. Moreover, we have worked with members of the NGO community, in particular, the Coalition for the International Criminal Court (CICC), in lobbying delegations and regional governments to place on the agendas of CARICOM and other groupings, matters pertaining to the ICC. Indeed, all of us have played a part and will continue to play a part in the defense of the integrity of the Rome Statute. Of great significance was the refusal by several CARICOM States to sign any bilateral non-surrender agreements which were at variance with the object and purpose of the Rome Statute and our commitments under the Vienna Convention on the Law of Treaties. Additionally, we have also provided judges of the Court and some of our nationals work in various areas of the Secretariat of the Assembly of States Parties.

* *Permanent Representative of Trinidad and Tobago to the United Nations.*

The international community with its myriad problems needs the ICC, more so as we strive to overcome many of the failures of the twentieth century. One of the gravest failures was disregard for the human rights of hapless victims of genocide and other grave crimes, notwithstanding the presence of various instruments on international human rights law and international humanitarian law. Trinidad and Tobago calls on all members of the United Nations, which have not as yet done so, to ratify or accede to the Rome Statute. Through our combined efforts, we can continue to build the ICC as a bulwark against those who utilize positions of power to inflict untold misery on the most vulnerable among us.

H.E. Ms. Rosemary Banks*

New Zealand is a strong supporter of the International Criminal Court and the Rome Statute, and we see value in this kind of dialogue in New York to deepen understanding of the nature of the Court. This is especially important at a time when there are some misunderstandings over the role of the Court.

I want to bring another regional perspective and provide a brief update on the ICC in the South Pacific region. As you know, there has been no investigative activity in our region; the focus has been instead on the goal of universal participation and implementation of the Rome Statute.

The Pacific region is not well-represented in the ICC. To date, we account for only 7 of 108 States Parties. Those States Parties are Australia, Cook Islands, Fiji, Marshall Islands, Nauru, Samoa and New Zealand. Solomon Islands has signed the Rome Statute and Papua New Guinea has expressed an interest in ratification. The low membership does not necessarily indicate lack of interest but a difficulty in prioritizing.

There are obstacles to overcome for ratification. It is difficult for countries in our region to cope with the demands and costs of the legislative change and development that is needed. There are also competing priorities, including the pressures from the international community to comply with requirements relating to terrorism, money laundering and drug smuggling.

There is work underway designed to overcome these obstacles. Several seminars and workshops have been held in the South Pacific in recent years. For example, the high-level seminar hosted by Australia in 2007, and a regional workshop hosted in Samoa in August 2008. These activities have aimed to increase knowledge about the ICC in the Pacific region, to encourage parties to ratify, and to help States that want to do so to adopt suitable implementing legislation. The Samoan workshop, for example, included an introduction to the Commonwealth Model Law for implementing the Rome Statute.

Bilateral assistance has been provided in our region to strengthen key frameworks for meeting ICC obligations and international cooperation, including for mutual criminal assistance. Parliamentarians, notably the Parliamentarians for Global Action, and non-governmental organizations have also been active on ICC matters in our region.

To sum up, our regional priority will be to continue to support the Court and work towards universal ratification and implementation. We believe increased ratifications can improve security in the region and help to deny the perpetrators of egregious crimes a safe haven.

In closing, I wish to reaffirm New Zealand's support for the ICC. In relation to the current debate, we strongly support the independence and impartiality of the Court in carrying out its legal mandate. We distinguish this from the political processes such as the role of the United Nations Security Council under the Rome Statute, including in relation to article 16.

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* *Permanent Representative of New Zealand to the United Nations.*

H.E. Mr. Yves Haesendonck[*]

I am very grateful to have been given the opportunity to say a few words on cooperation, because I consider my role of focal point or facilitator on cooperation as one of outreach or proselytism, and I am grateful for all opportunities to brief colleagues and non-governmental organizations on the activities that are being developed within this subject.

Cooperation covers cooperation between States and the International Criminal Court, cooperation between international organizations and the ICC, and cooperation also with the NGOs. It is therefore of crucial and critical importance for the proper functioning of the Court and for its future success.

At its sixth session in 2007, the Assembly of States Parties adopted the recommendations from a report of the Bureau (Report of the Bureau on cooperation, ICC-ASP/6/21). There were 66 recommendations on cooperation, and we have been working on these over the past 18 months. With these recommendations the Assembly had provided guidance on how States can support the Court. The Assembly had also decided to appoint the focal point to contribute to the work on cooperation.

As was stated in the report of the Bureau, the issue of cooperation is dynamic and depends on the case load of the Court. Some of the recommendations were of more urgent nature than others. Some may also become urgent, depending on the evolution of the activities of the Court. So what we tried to do first in close cooperation with the Court, but also with NGOs and States, was to try to identify the priorities and implement them. We have been working on this over the past 18 months and have done so in a concrete and pragmatic manner.

These priorities are not necessarily the most visible ones. There are technical issues, such as implementing legislation, freezing of assets, tracing of assets, protection of victims and witnesses and relations with international organizations. They are not the most spectacular ones, like arrest and surrender, or diplomatic support, but they are actually crucial for the functioning of the Court.

Important progress has been made on the identified issues and perhaps we can start considering new ones such as communication, which has been raised by Ambassador Lomónaco. I think communication and the Court's diplomacy are extremely important for cooperation. In the next few weeks, I would like to work with colleagues in the Court and in the missions on these issues of Court diplomacy and communication. I also think there is one issue which would deserve further attention: the best practices on cooperation. After the implementing legislation, what are the best practices that have been put in place by some States which have experience in cooperation to really respond to requests for cooperation from the Court.

And then we have to look, as President Wenaweser told us, to the eighth session of the Assembly in November, where I hope that we will have the opportunity to have discussions on cooperation, and also to the Review Conference, which will include a stocktaking exercise and where we will probably also have discussions on cooperation.

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[*] *Permanent Representative of Belgium to the International Organizations in The Hague.*

H.E. Mr. Norihiro Okuda*

My presentation will focus on universality of the Rome Statute and the regional perspectives.

Since Japan formally joined the ICC on 1 October 2007, we have attached great importance to realizing universalization of the Rome Statute among others. Japan particularly feels obliged to help increase the number of States Parties in the Asian region, given the fact that currently, out of the 108 States Parties, only 14 are from Asia. It is unfortunate that given this current geographical representation, the ICC is often seen, or perhaps misperceived, as an institution which is dominated by particular regions. The geographical balance needs to be addressed for the Court to be a more universal institution. Japan, being fully aware of its role in the region, has made efforts in this regard through our bilateral contacts, as well as regional fora such as the Asian-African Legal Consultative Organization (AALCO). Not only have we actively explained the significance of joining, but we have also shared our experiences and know-hows in the ratification process to those who are keen.

I would like to introduce our recent effort in this regard. On 18 March 2009, the Government of Japan together with the AALCO jointly organized a one-day seminar entitled "International Criminal Court: Emerging Issues and Future Challenges" in New Delhi. The event attracted 92 participants from the international diplomatic corps based in India, international organizations, the Ministry of External Affairs of India, the Indian Academy of International Law, and Indian universities.

At both the morning and afternoon sessions, participants engaged in constructive discussion of a range of problems concerning the ICC, such as the relationship between the Security Council of the United Nations and the ICC, how to promote Asian countries' accession to the Court, and the 2010 Review Conference of the Rome Statute in Uganda. I would like to highlight some of the comments made at the seminar, which should be interesting.[1]

Late Judge Fumiko Saiga, in her keynote speech, stressed the significance of the ICC and explained the legal framework of the ICC, such as the principle of complementarity, due process within the Court's proceedings and the Court's limited jurisdiction, based on her own concrete experience as a judge. It was a precious opportunity for the participants to hear from the incumbent judge how the ICC actually works based on the above legal framework.

H.E. Mr. Ichiro Komatsu, Ambassador of Japan to Switzerland, who was Director-General of the International Legal Affairs Bureau of the Ministry of Foreign Affairs of Japan at the time Japan joined the Court, stated the challenges Japan has experienced in accessing the Rome Statute. He pointed out three issues, namely: 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. This has deepened the understanding of the participants, especially for those who share the similar challenges.

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* *Deputy Permanent Representative of Japan to the United Nations.*

[1] A summary of the AALCO seminar is included as an annex.

The Secretary-General of the AALCO stated that there were few ICC States Parties among AALCO Member States, and that in particular there were only 14 in Asia. The concerns expressed by those countries that had not acceded to the ICC were: local judicial jurisdiction might be restricted by the ICC; it might be necessary to revise national laws as a precondition for joining the ICC; and the problems presented by bilateral agreements that had been concluded for the purpose of preventing their citizens from being surrendered to the ICC. The Secretary-General pointed out the need for the AALCO to carry out a training program with a view to disseminating information about accession as a means of overcoming these objections.

We think that this kind of regional seminar is very useful in sharing concerns and experiences in a frank manner among those who have a certain commonality. Japan will continue its utmost efforts to realize the universalization of the Rome Statute particularly by increasing its membership in the Asian region.

Annex

The International Criminal Court:
Emerging Issues and Future Challenges

Organized by the Asian-African Legal Consultative Organization
and the Government of Japan
(Summary of results)

A one-day seminar entitled "International Criminal Court: Emerging Issues and Future Challenges", jointly organized by the Asian-African Legal Consultative Organization (hereinafter "AALCO") and the Government of Japan, was held at the Hotel Maurya Sheraton in New Delhi on 18 March 2009. The event attracted 92 participants from the international diplomatic corps based in India, international organizations, the Ministry of External Affairs of India, the Indian Academy of International Law, and Indian universities. A keynote speech was delivered on the contributions Japan had made to the International Criminal Court and its experience with the process of accession to the Rome Statute. There were also lively discussions on issues related to the ICC and future cooperation between the AALCO and the ICC. The results of the seminar are summarized below.

1. Overall observation

a) The inaugural address at the opening session, by the Hon. Mrs. Fumiko Saiga, ICC judge from Japan, was a lively presentation of the activities of the ICC, which met with warm approval from the audience.

b) The keynote speech at the opening session, intended to help the audience better understand the ICC, was given by the current Ambassador of Japan to Switzerland, H.E. Mr. Ichiro Komatsu, who was Director-General of the International Legal Affairs Bureau of the Ministry of Foreign Affairs of Japan at the time Japan joined the Court. Ambassador Komatsu described Japan's contributions to the ICC and its experience with accession to the ICC.

c) At both the morning and afternoon sessions, participants engaged in constructive discussions of a range of problems concerning the ICC, such as the relationship between the Security Council of the United Nations and the ICC, how to promote Asian countries' accession to the Court, and the 2010 Review Conference of the Rome Statute in Uganda.

2. Summary of discussion

a) Morning session: "Progressive Development of International Criminal Jurisprudence and an Overview"

i) A representative of the Government of India stated that his country had been actively contributing to the development of the ICC since the adoption of the Rome Statute. He also explained why India had not signed the Rome Statute at the United Nations Diplomatic Conference in Rome in 1998, while also emphasizing that India would attend the 2010 Review

Conference of the Rome Statute in Uganda in order to express its basic positions.

ii) A distinguished scholar from India touched upon the history of international criminal tribunals, making reference to the historical background of the establishment in the 1990s of such courts as the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") and the International Criminal Tribunal for Rwanda (hereinafter "ICTR"). He also described the problems that could arise at international criminal tribunals in the course of prosecuting individuals who had committed the most serious of those crimes of concern to the international community.

iii) The regional legal adviser for South Asia of the International Committee of the Red Cross (hereinafter "ICRC") based in New Delhi presented an overall picture of how the ICRC had contributed to respect for fundamental principles of international human rights law and international humanitarian law, which are enshrined in the Rome Statute. He also described the concrete cooperation provided by the ICRC to the ICC.

b) Afternoon session: "ICC: Current Developments and Contemporary Challenges"

i) The Secretary-General of the AALCO stated that there were few ICC States Parties among AALCO Member States, and that in particular there were only 14 in Asia. The concerns expressed by those countries that had not acceded to the ICC were: local judicial jurisdiction might be restricted by the ICC; it might be necessary to revise national laws as a precondition for joining the ICC; and the problems presented by bilateral agreements that had been concluded with the United States for the purpose of preventing US citizens from being surrendered to the ICC. The Secretary-General pointed out the need for the AALCO to carry out a training program with a view to disseminating information about accession as a means of overcoming these objections.

ii) The Director of the National Human Rights Commission of India gave an explanation of the challenges that faced the 2010 Review Conference of the Rome Statute in Uganda, including the definition of the crime of aggression.

iii) Representatives of the Government of India announced that India was carrying out its own study on the revision of the Rome Statute and the definition of the crime of aggression in the run-up to the 2010 Review Conference.

Ms. Christine Chung*

From my perspective from outside the diplomatic community, I have chosen a topic that should be of great interest to States ten years after the Rome Statute was negotiated: complementarity in practice. It was a significant preoccupation at Rome for States to create an international justice system that, on the one hand, respected State sovereignty, and on the other, disallowed impunity. State representatives at Rome devoted a great deal of time and effort to finding: 1) the degree of deference to State sovereignty they deemed appropriate; and 2) the best ways to draft the Rome Statute to ensure that the complementarity principle chosen would be both workable and effective.

Ten years on, there is reason to believe that the provisions about complementarity are a very successful part of the Rome Statute. Ambassador Wenaweser referred in his intervention to the idea that the Rome Statute has proven to be a solid text. In my view, the portions of the Statute dealing with complementarity are perhaps among the most successful. There are two aspects worth thought.

Robust enforcement of complementarity: deference to domestic proceedings

First, the practice of the International Criminal Court has shown that the Court will robustly enforce the complementarity principle in the opening of ICC investigations and cases. Deference to national proceedings, on the part of the ICC, has been very serious.

The first example is Darfur. One perhaps overlooked aspect of the Darfur intervention is that in the process of bringing the investigation and then the cases, the ICC Prosecutor reported extensively – both to the United Nations Security Council and to the ICC judges – about the existence and nature of any domestic initiatives to bring accountability in the Sudan. The warrant naming President Omar Al-Bashir was issued only after the judges of the Pre-Trial Chamber of the Court determined that there was no "ostensible cause" to even question the admissibility of the case against the President. Similar findings were made in connection with the warrants issued earlier by the ICC: those naming Ahmed Harun and Ali Kushayb.

In addition, in the case of Darfur, the warrants continue to be given force, by a large part of the international community, in part because there has been no serious effort by the Sudanese government to provide domestic redress for abuses and crimes suffered by victims in Darfur. The Sudanese government has failed to live up to its own promises to take concrete steps to provide justice. It has not heeded urgings by others, including the African Union and the Arab League, to take immediate and real steps to provide accountability for crimes committed in Darfur.

The second example is Uganda. The situation there presents a very different factual scenario, in which the ICC prosecutions indeed prompted serious, concrete, and detailed proposals to conduct domestic proceedings, including domestic trials for those most responsible for crimes committed in northern Uganda. The point about strict ICC observance of the principle of complementarity is the same, however. As recently as this spring, the ICC Pre-Trial Chamber re-examined whether the domestic initiatives were reason to doubt the admissibility of the cases of the ICC: the continued vitality of those cases. The Court concluded that there was, to date, no reason to put aside the ICC intervention. There are no

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on-going national proceedings yet. But the Court has made equally clear that it is committed to being vigilant about enforcing deference to any genuine domestic proceedings.

Promotion of domestic accountability, even when the ICC has not yet investigated or prosecuted

The second area in which the principle of complementarity has shown early signs of success is in promoting domestic accountability. In other words, in the cases not brought by the ICC, as well as the cases commenced by the ICC, one can see the positive effects of the Rome Statute's adoption of the complementarity principle.

The situation in Uganda can also be considered an example of how the existence of the ICC system encouraged domestic initiatives to provide redress to victims of international crimes.

Two further examples, though, are Colombia and Kenya. In Colombia, since 2004 the ICC Prosecutor has had the situation under what he calls pre-examination or analysis. He has monitored the situation in Colombia, and even visited that country twice, in an effort to promote the ending of human rights abuses there, and the bringing of accountability for past abuses. The presence of the ICC, for example, has played a role in ensuring that in the process of demilitarizing paramilitary forces, the Colombian government does not grant immunity in exchange for the laying down of arms. The potential for ICC intervention has also strengthened the hand of elements of Colombian civil society, and within the Colombian government, who seek the fullest possible response to crimes and abuses committed in that country.

Kenya is a more recent example. There, the Commission of Inquiry on Post-Election Violence recommended the creation of a special tribunal to provide accountability for crimes committed in the wake of the national elections. The Commission also compiled a list of the most responsible perpetrators, to be turned over to the ICC Prosecutor if and when the Kenyan government failed to establish the recommended special tribunal. The deadline for the establishment of the special tribunal has already passed once and has been extended. The outcome of the domestic process is uncertain. Still, the existence of the Rome Statute system, and the enforcement of the principle of complementarity, will ensure that in Kenya there is a full exploration of domestic or regional accountability before any point of ICC intervention is reached.

The principle of complementarity, as adopted at Rome, had two objectives: the protection of State sovereignty and the promotion of State responsibility. The first objective is core: for the credibility of the Court, it is essential that the ICC demonstrate serious commitment to the principle of deferring to genuine domestic proceedings. The second objective is more ambitious and it is essential to the effectiveness of the global Rome Statute system: the promotion of domestic accountability systems. Everything about the Court remains young and subject to on-going review. Still, the practice of the Court so far shows that both objectives of the principle of objectivity are being fulfilled, with perhaps a surprising degree of success.

Mr. William Pace*

I would like to give a brief presentation on the issues surrounding universality, complementarity and cooperation.

Universality

In the more than 10 years that have passed since the historic adoption of the Rome Statute in 1998, the Court now has a remarkable 108 States Parties. Despite this, however, one must remember that the Court is a new institution-- one that requires cooperation from States in order to succeed and carry out its work effectively. In this context, universality remains key to ensuring that the ICC truly becomes a global institution capable of bringing to justice those accused of perpetrating the gravest crimes against humanity. Shoring up political support for the Court from among the world's major non-state party powers and ensuring significant representation from all regions of the world at the ICC are two of the core goals and parameters embodied in the CICC definition of the principle of universality.

As we sit here I am reminded that the Rome Statute was a product of the United Nations codification processes and the CICC has affirmed throughout the last 14 years that the Rome Statute and the ICC cannot succeed without a strong and constructive relationship with the United Nations. We therefore welcome this timely seminar on International Justice and the role of the ICC at UN Headquarters. It is important to remember the indispensable role of the General Assembly and the Sixth Committee, including the dramatic action taken by the Committee's Chair, Ambassador Lamptey of Ghana, in November 1994 when the large "like-minded group" caved in to accepting the P-5 resolution on considering the International Law Commission Draft Statute. Thus, from the very beginning this initiative received strong African support for an independent ICC.

Colleagues, to first comment on other statements and issues raised at this seminar let me state plainly that complementarity cannot be exercised unless State Parties or non-state parties have national laws allowing investigations and prosecutions of Rome Statute laws and the crimes of genocide, war crimes and other crimes against humanity. Since most governments still have not adopted these national laws, the Rome Statute system remains severely incomplete, relying too extensively on the ICC.

The Coalition for the ICC will fight for a fair Court and an independent Court. We will strenuously combat any efforts of political control and misuse of the ICC. It is a misrepresentation to claim the Prosecutor and ICC are "targeting" Africa. Our more than 600 NGO members in Africa would challenge this assertion. Instead, Africa is the continent of the most ratifications and where governments have themselves asked the ICC to assist in investigating and prosecuting these most serious crimes occurring in their territories.

Besides the deficits in complementarity measures, the main imbalance in the Rome Statute system is due to major gaps in ratification in Asia, North Africa and the Middle East, among the governments of the former Soviet Union and Central America. The three best ways to address the imbalances and misperceptions are to make significant advances in universality, complementarity, and cooperation.

* *Convenor of the NGO Coalition for the International Criminal Court.*

The Coalition continues to closely monitor and encourage ratification and implementation processes globally and works with various actors including government officials, NGOs, media, parliamentarians and academics to advance national processes.

In that context we recognize the work that has been carried out by the current and past facilitators (Mexico, Brazil, Slovenia) on the Plan of Action for Achieving Universality and Full Implementation of the Rome Statute. Continuing to compile a list of national ICC focal points is particularly important, and we encourage States to cooperate with the facilitators by providing updated information in this regard. Similarly, we welcome the more than 25 completed responses to the questionnaire submitted by States Parties to the Assembly; we call upon all States that have not yet submitted this documentation to do so as soon as possible. We also respectfully recommend that the Assembly issue some type of summary document which systematizes the responses into categories so that these may serve as a resource for comparing the different experiences of countries in this regard.

Additionally, it could prove extremely useful to establish a new post in the Secretariat of the Assembly which engages States in information-sharing and acts as a focal point for technical assistance requests.

The Review Conference also presents an important opportunity to promote universal ratification and implementation. As stocktaking is a central objective of the Review Conference, States should consider allocating some time during the Review Conference to evaluate the implementation of the Plan of Action. In order to ensure the Review Conference's success, it will be essential to provide adequate funds for observers and all States Parties to participate in this meeting. In particular, given that the LDC trust fund is insufficient, it will be important to ensure that adequate funds are available to guarantee maximum participation by governments in the Review Conference. A robust engagement by States during the Review Conference will have direct effects in promoting universality.

We hope that States Parties will devote sufficient attention and energy to implementing the Plan of Action. We urge you to use your membership in regional and sub-regional organizations to ensure that the ICC is on the agenda, be it through resolutions, as a topic of discussion in meetings or an issue on which member states can report their progress. We recognize the impact that States' support of the spirit and letter of the Statute, as well as the ICC itself, can have, and we call upon other States to ensure that this positive experience translates into concrete actions being taken by other regional networks and organizations.

Complementarity

To ensure the effective functioning of the ICC, international cooperation is important and necessary for the Court's work. Thus, the Rome Statute recognizes the need to adopt measures at the national level to ensure that the gravest crimes are effectively brought to justice. The Court is an institution complementary to national criminal jurisdictions; the Preamble of the Rome Statute recognizes the need to adopt measures at the national level and enhance international cooperation, while Part IX of the Statute establishes the guidelines for this international cooperation and judicial assistance. In the same manner, the Rules of Procedure and Evidence, as well as diverse norms that regulate the functioning of the Court, make reference to cooperation in its diverse modalities.

As of May 2009, CICC figures indicated that more than 40 States Parties had enacted some form of legislation implementing the Rome Statute. Of these, more than 25 had enacted legislation containing both complementarity and cooperation provisions, while the other States Parties had legislation on either complementarity or cooperation. This leaves 150 States where we are just beginning!

So, although important progress has been made in terms of enacting complementarity and cooperation legislation, there are still a great number of States Parties who need to follow through with the ICC implementation process. This process can pose a burden for countries with limited personnel and financial and technical resources. Many countries in this situation have therefore worked jointly with civil society organizations or hired consultants to prepare ICC implementing legislation drafts. In cooperation with some of our key international and national members the CICC serves as a facilitator during these processes. We thus encourage all States who require assistance in this regard to contact us so that we may support their efforts.

In developing their implementing legislation, several States have taken the opportunity to simultaneously modernize their own criminal codes and criminal procedural codes. Such an opportunity ensures that States' legal systems reflect developments in international law and international humanitarian law which have been adopted in accordance with international treaties.

In diverse regions of the world, many States continue to follow through with implementation. Just a few weeks ago, the Chilean Congress adopted a law incorporating Rome Statute crimes, a pre-requisite established in order to move forward with ratification. Similarly, at the end of March 2009, Timor Leste approved a new Criminal Code that includes a very detailed section implementing genocide, crimes against humanity and war crimes.

Furthermore, there is a pressing need for States to capitalize on the upcoming Review Conference to assess issues such as complementarity, positive complementarity and the impunity gap in situation countries. In this regard, a successful stocktaking process at the Review Conference should focus on issues related to the challenges, lessons learned, experiences and way forward of States Parties in dealing with the Rome Statute at the national level as well as the performance of the Assembly.

Cooperation

Coalition members have dealt extensively with cooperation over the years in their work with other national and international courts and tribunals, experience within the Rome Statute system, and constant discussions and consultations with governments and Court officials on this issue.

Cooperation is essentially a bilateral relationship between the Court and a State, or between a State and an international organization, but also extends to multilateral political support. Regardless of its modalities, cooperation is vital. In this sense the CICC Secretariat and its members:

- Continue to support an active and constructive role of the Assembly.
- Advocate at the international and multilateral level for actual cooperation, including the conclusion of agreements between the Court and regional organizations.

- Work with regional organizations to promote institutionalized support of the ICC and the Rome Statute system.
- Advocate for ratification of the Agreement on the Privileges and Immunities of the Court (APIC).
- Monitor judicial and institutional developments and identify challenges.
- Provide, advise on and share experiences with the Court, governments and other key actors.
- Monitor UN and other international and regional organization developments.

Besides its technical and legal components, cooperation must be vested with political support from all ICC States Parties. As the Court is now fully operative, this is fundamental to ascertaining that the Court is capable of working effectively in order to fight impunity and serve as a powerful deterrent force.

States need to continue to train their officials so that they understand the jurisdiction, characteristics, and mandate of the Court and recognize the importance of cooperation—grounded on the firm understanding that for States Parties, the ICC is an extension of their national jurisdictions, and therefore constitutes a competent authority entitled to solicit cooperation in the different spheres related to its mandate. But even for States not party to the treaty, all actors need to understand the role that the Court plays in the international arena.

In November 2007, the Assembly adopted what our members believe is a major report on cooperation containing sixty-six recommendations. These emerged from consultations with Court officials, States Parties and other relevant actors. The Coalition has applauded this initiative as an important first step. However, to endorse the recommendations contained in the report without a commitment from the Assembly to implement such recommendations, and a strategy to do so, is not sufficient.

The CICC welcomed the appointment of Ambassador Yves Haesendonck (Belgium) as the facilitator on cooperation, and supports his work in 2008-2009 which identified challenges and addressed ways to enhance the level of cooperation.

However, we believe the issue of cooperation demands the establishment of a more robust structure to complement the work of the facilitator. Therefore, the Assembly should establish a Working Group on Cooperation during each session of the Assembly in order to complement the work of the facilitator, follow up on the implementation of the recommendations in the Bureau's report and discuss practical ways in which a global framework for cooperation could effectively be established.

It is also particularly important for the Assembly to devise appropriate procedures to consider any issue in relation to non-cooperation of States Parties with the Court pursuant to article 87, paragraphs 5 and 7 and article 112, paragraph 2(f). The Coalition is of the view that such procedures should be established in advance of any such issues arising so as to avoid decisions being taken on the basis of emerging political considerations.

The CICC views cooperation and support by States Parties to the Rome Statute as critical to the Court's success, but not as yet adequate. Therefore, we urge States Parties to utilize every opportunity presented to affirm your commitment to justice; to insist on the need to respect and uphold the integrity of the Rome Statute; to pledge your willingness to fully cooperate with the ICC, including with regard to the urgent execution of outstanding warrants of arrest; and to identify ways in which your State has taken steps to cooperate with the Court.

In conclusion, we should not be discouraged by difficult challenges the new systems of international justice are facing. The Assembly, perhaps wisely, backed off during the first five years of the ICC establishment. But, as called for in the Rome Statute, during the next 1-2 years, the Assembly must not only engage in a major review process, but it should map out a strategy for tackling the next decade of its work. This is an extraordinary body of, mostly, the world's small and middle power democracies. It has created a major new international organisation, an historic new and strengthened system of international humanitarian law and justice. The challenges it will face will be enormous. Many powerful and autocratic leaders argue the ICC was a step too far too soon. They will argue that peace and justice are incompatible. They must be proven wrong.

Mr. James Goldston*

If one measure of a new venture's success is the number of powerful interests it upsets, the International Criminal Court is flying high. In its short lifespan, the Court has provoked controversy from Washington to Addis Ababa to Beijing.

Since 4 March, when the Court issued a warrant of arrest for President Omar Al-Bashir of Sudan for extermination and other grave crimes in Darfur, things have come to a head. Al-Bashir retaliated by expelling humanitarian aid workers and cracking down on rights defenders. A number of States have asked the United Nations Security Council to halt the proceedings. At least one president has branded the indictment "First World terrorism". Others have warned of renewed fighting, not just in Darfur, but in South Sudan as well.

For the first time, the possibility of States withdrawing from the Rome Statute has been seriously floated. If that were to happen, it would deal the Court a terrible blow. How did we get to this point a mere 11 years after the signing of the Rome Statute and 6 years after the Court began to function?

This is a complex question with many aspects to it. In the brief time available here, let me limit myself to three reasons: 1) the political interests of those who oppose the mission of the ICC; 2) a perceptions gap between the ICC and its many supporters; and 3) still unresolved disagreements about the role of the Prosecutor.

Opposition to the Court's Mission

One challenge for the Court is entirely predictable – some political actors have never reconciled themselves to the Court's mission of securing legal accountability for mass crimes.

The indictment of President Al-Bashir throws this problem into sharp relief. Indicting a Head of State is profoundly unsettling, notwithstanding the fact that the Rome Statute expressly allows for it. It should come as no surprise that the Court's issuance of an arrest warrant has discomfited not just other political leaders who dislike the precedent, but all those who fear the uncertainty of injecting a new and independent element into the already-complex dynamics of peace negotiations and conflict resolution.

As the debate over the Darfur case heats up, ad hominem attacks are on the rise. The Court's Prosecutor, Mr. Luis Moreno-Ocampo, has been accused of, on the one hand, allowing politics to infect his decisions, and, on the other, being politically tone-deaf; of shilling for publicity, and not doing enough to promote the Court's work; of bringing cases too slowly – and moving too quickly to charge a Head of State. But the central issue is not the character of the prosecutor or the judges, but the crimes of a president.

We have been down this road before. The indictment of President Slobodan Milosevic in 1999 by an international tribunal brought threats of destabilization and defiance. But two years later the Kosovo war had ended and Milosevic was in The Hague, where he died on trial. When, in 2003, the United Nations-backed Special Court for Sierra Leone brought charges against former Liberian President Charles Taylor, many predicted mayhem in West Africa. Within three years, Taylor was in custody, and today Liberia has a peaceful, democratic government.

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* *Executive Director, Open Society Justice Initiative. In 2007-2008 he served as Coordinator of Prosecutions and Senior Trial Attorney, International Criminal Court, Office of the Prosecutor.*

We do not know how long it will be, if ever, before the ICC gets its man. President Al-Bashir is doing all he can to thumb his nose at the Court, including traveling freely to neighboring countries. But one point is clear: the ICC cannot be left alone to respond to this challenge on a matter of principle. By investigating the situation in Darfur, marshaling the evidence and applying the law, ICC officials were just fulfilling the task given to them by the United Nations Security Council. The Council and the broader community of States must now act to support the Court.

The perceptions gap

A second source of controversy is that, in the years since the Rome Statute was signed, a perception gap has opened up between the Court and those – including many in the NGO community and some States Parties – who supported the Court's establishment. For perhaps understandable reasons, a number of the non-governmental organizations and States Parties who were at Rome were not prepared for the fact that the independent Prosecutor they lobbied so hard for would, when he came into existence, actually be independent. Some advocates of international justice find it hard to distinguish between, on the one hand, support for the broad mission of the ICC and, on the other, agreement with every decision taken by each organ of the Court. It should be possible for all of us who support accountability for mass crimes to accept that the Prosecutor, the judges and other actors are free to make up their own minds.

At the same time, some inside the Court appear to suffer from a similar difficulty in recognizing that supporters of the Court's basic purpose may on occasion differ with specific decisions. In the long run, an independent and at times critical set of external voices monitoring the Court's work may serve it better than a group of sycophants.

Similarly, Court officials may not be sufficiently attentive to the intensity or significance of external developments, or of the extent to which the Court's processes and limitations are not well understood. This may lead some within the Court to underestimate the need to visit situation countries, to meet with external actors, to explain what the Court can and cannot do.

In this, I speak from personal experience. I spent the year 2007-2008 as a senior official in the Office of the Prosecutor (hereinafter "OTP") at the ICC. During that time, many of us inside the Office celebrated what we thought were a number of significant achievements: the formal commencement of the investigation into crimes in the Central African Republic, the arrest of Jean Pierre Bemba for his role in those crimes, the transfer to The Hague of two senior warlords for their role in serious crimes in the Democratic Republic of the Congo (hereinafter "DRC"), and the submission to a Pre-Trial Chamber of an application for an arrest warrant for the President of Sudan for crimes in Darfur.

In the fall of 2008, when I left the Court and returned to the world outside, I was somewhat surprised to discover that, over the course of the year, not everyone had been standing around applauding each of these actions. To the contrary, many of my once and future friends in the NGO community were quite critical. It took some time for me to view both sides of the equation with some perspective. But I think it is fair to say that, over time, the relationship between the Court and its external interlocutors should and will mature to the point that all sides increasingly appreciate the need for mutual respect without demanding uncritical allegiance.

The role of the Prosecutor

A third cause of some of the debate concerning the Court has been a lack of agreement on the nature of the Prosecutor's role – in particular, what factors may the Prosecutor properly take into account in exercising his discretion about whether, where, whom, what, and when to charge? Disagreements about these issues have fuelled debates in each of the situations under the Court's review. Some factors seem beyond dispute. Thus, the OTP has stated that it will "focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes."

As a matter of policy, the Prosecutor has indicated that gravity is "one of the most important criteria for the selection of situations and cases." Thus, in explaining the focusing of his investigation in Uganda on crimes committed by the Lord's Resistance Army (LRA), the Prosecutor has said that those crimes "were much more numerous and of much higher gravity than alleged crimes committed by" the national army (UPDF). Similarly, it would seem hard to quibble with a decision to take into account the relative difficulty of gathering evidence and/or of protecting victims and witnesses.

But other factors are not so black or white. For example, the OTP initially explained its decision to charge Thomas Lubanga as the first suspect in the DRC situation by noting that he was facing "imminent release" from prison – suggesting that securing custody of the accused was a paramount consideration. Some have questioned placing what they consider excessive weight on this criterion, even at the cost of having the first ICC trial focus on one category of crimes – recruitment and use of child soldiers – which, while worthy of sanction, do not purport to reflect the full scale of criminality in the DRC.

In its official documents, the OTP has suggested that its "duty of independence" precludes it from considering, as a factor in deciding which cases to take, "the importance of the cooperation of any party or the quality of cooperation provided." (OTP June 2006, p. 3). A number of commentators wonder whether this position adequately reflects the reality that the ICC Prosecutor is substantially more dependent on State cooperation than his ICTY and ICTR counterparts. They thus ask whether the ICC Prosecutor can help but take into consideration his dependence on States for his own effectiveness in deciding whether, when and whom to charge? Indeed, more than one person has argued that the Prosecutor's dependence on the State where crimes occur to carry out his investigations is not just inevitable, it is also desirable, precisely because such dependence can compel greater sensitivity to the political implications of his decisions.

Finally, what about the effort to deflect accusations of bias? How, if at all, should the Prosecutor take into account the reality that, in the course of an ongoing conflict, any action he takes will likely be seen by either of the contending sides primarily from the vantage point of how that action favors or disfavors itself? To put it more pointedly, so long as evidential and jurisdictional requirements are satisfied, would it be permissible, having first charged leaders of non-government rebel groups in a particular country in successive cases, for the Prosecutor then to charge government actors, in part to counter the perception of one-sidedness?

These are not easy questions. In resolving them, it may be necessary to go beyond the commonly-repeated mantra that the role of the Prosecutor is "to apply the law, nothing more, nothing less".

In short, the ICC has achieved a great deal. And yet, the challenges it faces are substantial. Going forward, it will require the invigorated support of States Parties and regional bodies, even as it nourishes its relationship with an increasingly diverse, independent and vibrant range of voices in civil society.

H.E. Mr. Fernando Valenzuela[*]

The European Union (hereinafter "EU") is committed to the ICC and to promoting the widespread ratification of the Rome Statute. To facilitate this, the EU adopted a Common Position on the ICC in 2003 and an Action Plan immediately afterwards, in 2004. The Action Plan is divided into three principles: 1) coordination of EU activities; 2) universality and integrity of the Rome Statute; and 3) independence and effective functioning of the ICC. I will expand on the support provided by the EU to the ICC using the three principles of the Action Plan.

Regarding the coordination of EU activities, all EU institutions work collectively to promote the ICC. The European Security Strategy emphasizes EU commitment to promoting a rule-based international order and supporting the Court. As exemplified with today's seminar, the Commission is active in supporting events of academic or official character for the widest dissemination of the values and principles of the Statute.

The ICC has also been made an EU Focal Point. A sub-area of the Council Working Party on Public International law is devoted to it. In addition, EU special representatives who provide an active political presence in key countries and regions help to promote the Rome Statute.

The European Parliament also has an important role. The "European Parliament Friends of the ICC" works to ensure that Members of the European Parliament take advantage of any political opportunities to promote the Court.

Outside of its own institutions, the EU demonstrates support for the ICC in United Nations fora. In particular, EU Member States always co-sponsor the annual resolution of the General Assembly in support of the Court.

Turning to the second principle of the Action Plan, universality and integrity of the Rome Statute, the EU strives to promote the widespread ratification of the Rome Statute using a number of tools.

The EU initiatives include political dialogue, demarches and other bilateral agreements with third States. The ICC has been on the agenda of almost all major summits and Ministerials with third countries. The ICC was raised in 31 separate demarches in the period from July 2007 to December 2008.

The EU systematically pursues the inclusion of an ICC clause in negotiating mandates with third States. On the initiative of the Commission, the Cotonou Agreement with ACP countries (2005) includes a binding ICC clause. Under the European Neighborhood Policy, the Commission has also negotiated the insertion of ICC clauses into many related Action Plans.

The EU Presidency issues statements and declarations in support of the ICC's work on a regular basis, most recently, urging Sudan to comply with the arrest warrant for Al-Bashir in March this year. The EU also marks important ICC landmarks, such as its tenth anniversary in July 2008.

The ICC is mainstreamed into EU internal, as well as external, policies targeting areas where the Court is underrepresented, such as Asia, Central Asia and the Middle East. The EU is committed to strengthening domestic judicial capacity. This is to ensure that the principle of complementarity (and thus integrity of the ICC) is upheld as many African Union States recently advocated for.

[*] *Head of the Delegation of the European Commission to the United Nations.*

This combination of both internal and external promotion of the values of the Rome Statute supports both its integrity and its universality.

Finally, the third principle of the Action Plan, independence and effective functioning of the ICC, is paramount to the European Commission.

The EU and the ICC signed a Cooperation and Assistance Agreement in April 2006, placing a general obligation of cooperation on both the EU and the ICC. The agreement covers attendance at meetings, exchange of information, testimony of staff of the EU and cooperation between the EU and the Prosecutor.

The EU has already shown cooperation on the cases of the Democratic Republic of the Congo and Sudan. It is hoped that the exchange of classified information will further strengthen the EU's relationship with the ICC. Cooperation is also enhanced by the European Union institutions' hosting of ICC diplomatic briefings in Brussels.

The support of the EU for the ICC would not be complete without the additional support given by many EU Member States. EU Member States provide financial assistance to the Court in their own name. Additionally, some Member States have entered into sentencing agreements and witness protection programs with the ICC.

In this way, the integrity of the Court and its mandate is preserved.

In the area of technical and financial assistance, the European Commission plays a key role as provided by the EU Action Plan. The Commission funds civil society organizations promoting universal participation in the Rome Statute.

Since 1994, we have provided over 28 million euros under the European Initiative for Democracy and Human Rights (EIDHR). The Coalition for the International Criminal Court has received about 3.7 million euros in such grants between 2000 and 2008. Parliamentarians for Global Action have received just over 2 million euros. The non-governmental organization "No Peace Without Justice" has received 3.5 million euros over the same period.

In a further show of solidarity, the Commission also funds the internship and visiting professionals program of the ICC. A further grant of 2 million euros has been awarded for the period 2008-2010. The program is an excellent way to increase the profile of the Court and raise awareness of its mandate and proceedings.

In addition, a list of experts has been drawn up by the EU to facilitate ratification of the Rome Statute in third States.

Further, the European Commission and Member States provide political and financial support to the associated International Criminal Tribunals for Rwanda and the former Yugoslavia, as well as for the Special Court for Sierra Leone, the Khmer Rouge Special Chamber in Cambodia and soon the Special Tribunal for Lebanon.

We believe that the impact of the work of the EU to promote the ICC and the universality and integrity of the Rome Statute has already been significant. The resources available to the Commission and the active participation of its Member States continues to strengthen its relationship with the Court.

There are presently 108 ratifications of the Statute. This is significant, but not yet beyond the critical mass to ensure universalisation. Thus, both EU and international community sustained action remain vital.

PROGRAMME

Programme

Trusteeship Council Chamber

10:00 am – 10:15 am
Opening remarks:

- H.E. Ms. Sanja Štiglic, Permanent Representative of Slovenia to the United Nations

10:15 am – 10:45 am
Addresses by:

- H.E. Judge Sang-Hyun Song, President of the International Criminal Court
- H.E. Ms. Patricia O'Brien, Legal Counsel of the United Nations

10:45 am – 1:00 pm
Panel discussion "Ten years of the Rome Statute – prospects and challenges for the Court", followed by a question & answer session (historical perspectives and situations before the Court; the International Criminal Court and the United Nations; universality and implementation; cooperation; Review Conference; regional perspectives); moderated by H.E. Mr. Zachary D. Muburi Muita, Permanent Representative of Kenya to the United Nations, Vice-President of the Assembly of States Parties.

Panelists

- H.E. Mr. Christian Wenaweser, Permanent Representative of Liechtenstein to the United Nations, President of the Assembly of States Parties
- H.E. Mr. Jorge Lomónaco, Ambassador of Mexico to the Netherlands, Vice-President of the Assembly of States Parties
- Ms. Christine Chung, former Senior Trial Attorney, International Criminal Court, Office of the Prosecutor, and former Visiting Lecturer, Yale Law School
- Mr. William Pace, Convenor of the NGO Coalition for the International Criminal Court
- Mr. James Goldston, Executive Director, Open Society Justice Initiative, served in 2007-2008 as Coordinator of Prosecutions and Senior Trial Attorney, International Criminal Court, Office of the Prosecutor
- H.E. Mr. Yves Haesendonck, Permanent Representative of Belgium to the International Organizations in The Hague
- H.E. Ms. Rosemary Banks, Permanent Representative of New Zealand to the United Nations
- H.E. Mr. Gert Rosenthal, Ambassador, Permanent Representative of Guatemala to the United Nations
- H.E. Ms. Marina Annette Valère, Permanent Representative of Trinidad and Tobago to the United Nations
- H.E. Mr. Norihiro Okuda, Deputy Permanent Representative of Japan to the United Nations.