

**Universalisation of International Criminal Justice System:  
the Role of the International Criminal Court?**

**Address by  
Judge Kuniko OZAKI  
International Criminal Court**

**At the Round-Table Meeting of Legal Experts on the Review  
Conference of the Rome Statute of the International Criminal Court  
Putrajaya, Malaysia**

**30 March 2010**

H.E. Prof. Dr. Rahmat Bin Mohamad, Secretary-General of AALCO,  
Hon'ble Tan Sri Abdul Gani Patail, the Attorney General of Malaysia and  
the President of AALCO, H.E Ambassador Yasuji Ishigaki, Excellencies,  
Ladies and Gentlemen,

It is a great pleasure to be here in Putrajaya and to be with you today. I would like to thank Governments of Malaysia, Japan and the AALCO for organizing this meeting and for inviting me to address you. I would also like to express my personal appreciation to Honourable Attorney General and his staff for their warm hospitality. I am very honoured to be able to exchange views with such distinguished guests on the ICC and its role towards the establishment of the rule of law in the world.

Before starting, however, I have to emphasize that all of the views and opinions I am about to express during this address are my own and do not reflect the position of the Court. I would also like to ask for your understanding that I am not in a position to comment on any specific questions related to pending proceedings.

### A. Introduction

Almost twelve years ago, a conference of 160 States adopted in Rome the Statute of the International Criminal Court. Already four years later, the Statute entered into force and the Court has now been in operation for almost 8 years. This year a Review Conference will take place in Kampala, as mandated by the Rome Statute.

I will not elaborate on the long history of international tribunals and on background of the Court, as you all know it very well. But I would like to emphasize that the purpose of the Statute, as stipulated in its preamble, is to put an end to impunity and thus to contribute to the prevention of crimes, recognizing that grave crimes such as the crimes under the jurisdiction of the Court threaten the peace, security and well-being of the world. The Statute affirms that those crimes must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. It is important always to come back to the purpose and spirit of the Statute in order to understand properly the jurisdiction and nature of the institution.

### B. The Court today

Let us first have a look at the current work of the Court.

Since 2003, four situations have been referred to the Court: the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic (CAR) and Darfur, Sudan. The Security Council referred the situation in Darfur to the Court, but the other situations were referred not by the Security Council or by third States, but by the States concerned themselves, the so-called self-referrals. In this context it is important to mention that during the Rome Conference, self-referrals were not expected but you may say that they demonstrate the trust and confidence that the international community has in the Court. And, honestly, the Court HAS fought hard in the last years to gain this credit from the States.

Lately the Prosecutor requested approval from the Judges to open an investigation in Kenya. This is the first time that he has used his *proprio motu* powers.

In sum the Court issued 13 arrest warrants thus far. Four detainees are currently in custody. The first trial began in January 2009 and the second in November of the same year. A third trial is scheduled to begin in early July of this year. You can follow all these proceedings closely through website of the ICC.

### B. Main features of ICC

Now let me briefly revisit the main features of ICC, which is essential to understand the work of the Court properly.

#### *1. Basis for jurisdiction*

The ambit of the Court's jurisdiction is strictly limited. Three main principles govern its competence.

The subject matter jurisdiction is restricted to the “most serious crimes of concern to the international community as a whole”. Currently, only cases of genocide, crimes against humanity and war crimes, all of which have very detailed and clear-cut definition negotiated and agreed by the State Parties, can be prosecuted before the ICC.

Moreover, the Court does not possess universal jurisdiction. Unless the Court receives a referral from the Security Council under Chapter VII of the UN Charter, it is restricted by the principle of active personality and territoriality, two classical and well-accepted grounds for the exercise of criminal jurisdiction. Thus the perpetrators have to be citizens of a State Party or the crimes have to be committed on the State Party’s territory. The Court’s jurisdiction is also limited in time. *Its jurisdiction ratione temporis* encompasses only crimes committed after the entry into force of the Rome Statute on 1 July 2002. It does not apply retrospectively. New State Parties are subject to the Court’s jurisdiction only from the date of accession.

## *2. Triggering mechanisms*

The Court’s jurisdiction can be triggered by a State Party, the Security Council referring a situation or by the Prosecutor using his *proprio motu* powers. It is vital to note the role of the Security Council in this context. Under article 13 (b) of the Statute the Security Council, acting under Chapter VII of the UN Charter, can pass a resolution establishing the jurisdiction of the Court for a situation.

## *3. International cooperation*

The ICC itself does not have the means to investigate arrest or enforce its decisions as comparable to national criminal justice systems. It is designed to operate through its States Parties and other supporters, as you see in the various provisions of Part 9 of the Statute entitled “International Cooperation and Judicial Assistance”. States’ support is needed in all aspects. Gathering information and evidence, executing arrest warrants and providing protection for the victims and witnesses cannot be done without States’ co-operation. In general, States Parties are cooperative and the cases that are currently before the Courts are all thanks to such cooperation, but we need more cooperation from more States to do our work properly. Another important partner of the ICC is the UN, with which the ICC has a Relationship Agreement, and we are receiving various operational support from their offices around the world.

#### *4. Victims’ participation*

The Court’s Statute foresees active participation of victims in the trial to fulfil its mission of creating a good foundation for reconciliation. Victims have a right to participate in the proceedings even if they are not called as witnesses. The Court can also rule on reparations. It has the power to order restitution, compensation and rehabilitation. It is furthermore designed to take into account special interests of victims of violence against women and children.

#### *D. A Court of last resort*

Now let me turn to the two most important aspects of the Court, which make it unique and at the same time universal institution, or a court of last resort.

These are the principle of complementarity and the ICC's strictly judicial character in usually the most politically difficult situations.

### *1. Complementarity*

The most significant is that the Court is governed by the principle of complementarity. This principle means that the Court will not act in cases where the responsible State investigates or prosecutes, unless it is unwilling or unable to do so genuinely.

In other words, State Parties remain sovereign and domestic courts retain primacy of their own criminal jurisdiction even after their accession to the Rome Statute. The ICC steps in only if the concerned State or States stay inactive, or fail to demonstrate their genuine will or ability to end impunity.

You may recall the long and tortuous history of the development of international criminal law and international criminal tribunals, one of the main reasons being the common perception in the past that the criminal law is something very national where international institution should not intrude. And this perception has a truth in it. At the end of the day, criminal law is and should be local. It is for the local community to take appropriate measures to recover itself from damages done to it by serious crimes. The community itself, but not an international organization situated in a far-away country, has to establish rules to protect its members, find facts if the rules are broken, punish the perpetrators if necessary, protect the victims and find the way to prevent the repetition of the crimes, achieve reconciliation and reintegration. If not, there will never be a really effective system to ensure rule of law in that community.

No one international organization can substitute such a basic attribute of national criminal justice. As I mentioned at the outset, the Statute, in its preamble, affirms that effective prosecution of the most serious crimes must be ensured by taking measures at the national level and by enhancing international cooperation. ICC is universal only because it is subsidiary and secondary. Therefore, complementarity is its inherent attribute as an universal court. Only when national criminal justice system does not work, the ICC is there to help, as a court of last resort.

## *2. Judicial character of the Court*

The subsidiary and secondary nature of ICC does not mean that the Court can be subsided and is second-rate in its work. Absolutely not. The court of the last resort inevitably has to have the best quality in terms of its judicial work. Hence, another feature of utmost importance is the Court's purely judicial character and its high legal standards. Let me dwell upon this aspect a little bit as it is not always understood well enough.

The Court was created as a judicial body disconnected from political considerations. The independence of judges and the Prosecutor is guaranteed by the provisions of the Statute. Their mission is to establish good practices and high legal standards. These can only be achieved if the judiciary is autonomous and free from political influence. Of course, we are fully aware of the fact that the Court operates in a political environment. Situations and cases before it have a strong political and social context. Therefore voices have been raised that the Court shall take into account extra-judicial factors while deciding on matters of law. Nevertheless, this would be contrary to the nature of the Court itself. At the Rome Conference

this was one of the few principles on which all States agreed. The States desired certainty that the actions of the Court will be based purely on law and governed by the fundamental principle of equality.

The Court has demonstrated its purely judicial nature both through its judges and the prosecution. And although it is possible that future actions of the Court could be subject to political pressure it should stay faithful to the will of the fathers of the Rome Statute and provide for fair trials and best practices guided exclusively by law.

### *3. Fairness of the proceedings*

This idea is further developed in the rules governing the proceedings. The provisions of the Statute establish a mechanism of checks and balances assuring that the Court applies the highest standards and good practices. Bound by these, both the judges and the Prosecutor have the duty to guarantee fair public trials consistent with internationally recognised human rights principles. The main responsibility of the judges is to ensure that cases brought before the Court are soundly entrenched in law and supported by sufficient evidence. In its short history the Court has demonstrated its commitment to the rules of due process and the rights of the accused on several occasions. Some charges introduced by the Prosecution in the indictments were not confirmed by the Pre-Trial Chamber. In the case of Abu Garda they were dismissed. In the case of Kenya the Pre-Trial Chamber asked the Prosecutor for additional evidence before deciding on the authorisation of the initiation of investigation. This shows that the judges are impartial and assure that the Prosecutor presents sufficient evidence for the alleged crimes.



*E. Universalization of ICC; Asia and the Middle East*

As I highlighted before, the ICC cannot function at all without the support of State Parties. The number of States Parties to the Rome Statute increased much more rapidly than expected. There are currently 111 States Parties to the Rome Statute. On the 23 of March we welcomed Bangladesh amongst our State Parties. We are very happy and proud about this development. This remarkable speed is the result in part of wide acceptance of the need for an ICC, and in part of demonstration by the Court of its strictly judicial conduct.

Unfortunately, however, the Court stays under-represented in Asia and the Middle East, although the goal of accountability for gross human rights violations is strongly shared and embraced by these regions as well. As the Court was designed as a universal model, encompassing all legal traditions, a more proper geographical balance would help greatly in achieving its goal. Asia and the Middle East especially have a long and extremely rich history with a variety of sophisticated legal traditions. Asia and the Middle East also have a lot of experiences in overcoming the serious crimes in the past. These should be more widely represented in the work of the ICC and of its State Parties. Their legal traditions and experiences should contribute to the emerging system of international criminal law and have their share in shaping the developing global standards.

Moreover, joining the ICC means becoming a part of wide network of international cooperation in criminal matters. I know that there are already various levels of formal and informal networks of regional and international cooperation existing in Asia, but our network will certainly be an added value to them.

More concretely, Asia's extended membership would open doors to its participation in the meetings of the Assembly of State Parties and the possibility to nominate judges and the Prosecutor. As one of the only two judges from Asia, I do want to have more colleagues from the region to work with in order to establish best practices and develop international standards through the Court's actions.

#### *E. Kampala Conference*

I cannot finish my statement without mentioning the coming big event in Kampala, since I understand this is the main theme of this roundtable meeting. In several weeks the States Parties will meet at the Review Conference. What can we expect from the Kampala Conference and its proposed modifications of the Rome Statute? How will it influence the Court and thus the international justice system?

Fact is that the Kampala Conference will be somewhat different from what was anticipated in Rome. It will to some extent deal with its original mandate, but will also address other issues that have emerged in the cold light of the reality of the first years of the Court.

It was envisaged that the first Review Conference will reconsider the provisions of article 124, which allows a State to exclude war crimes from the jurisdiction of the Court for a transitional period of seven years. Its original mandate also included a review of the crimes listed in article 5. One of the main issues is still the crime of aggression. In addition, the Government of Belgium, with 17 co-sponsors, submitted a proposal to ensure that weapons which are already prohibited in international armed conflicts are equally prohibited in non-international conflict. A number of other proposals had been submitted; however, the Assembly of States Parties

decided to limit consideration at this time to only these amendment proposals which have broad support.

The Kampala conference then will turn its attention to subjects that were not anticipated in Rome, which is, what are the lessons learned at this stage. This stocktaking will focus on four themes: complementarity, cooperation, impact of the Rome Statute System on victims and affected communities and peace and justice. I understand that this retrospective approach is aimed at identifying future policies and practices for the ICC and international criminal justice as a whole. They are all relevant to enhance the work of the Court in identifying and facing its current and future challenges, and we in the Court are all looking forward to having fruitful discussions in Kampala.

#### *F. Conclusion*

With a large and interdisciplinary commitment, international criminal justice will continue to develop. It may move faster at times and slower at others, but it must keep on moving. The changes we see on a day-to-day basis may be gradual, but the underlying move from a purely state-based system of international law to a global culture in which individuals expect and can be expected to be held accountable for their actions is truly revolutionary. The ICC will always offer a last hope for justice in response to humanity's deepest depravity.

We must work toward the day when there is a realistic chance of justice for every atrocity. Then the ICC will underpin a system that fulfils justice's promise to deter crime. Few will then doubt that justice sustains peace. But to reach this goal we need your assistance: especially the assistance of all of

you here from this region to reach the goal of global movement to end impunity.

Thank you very much.