

# International Criminal Court: Review Conference

Keynote Address

by

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Round-Table Meeting of Legal Experts on the Review Conference  
of the Rome Statute of the International Criminal Court,  
jointly organised by the Governments of Malaysia and Japan and  
the Asian-African Legal Consultative Organisation (AALCO)

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## Slide 1

Mr. President,  
Distinguished Members of the AALCO,  
Ladies and Gentlemen,

It is my great privilege to make a keynote address at this Round-Table Meeting of Legal Experts on the Review Conference of the Rome Statute on the International Criminal Court, jointly organised by the Government of Malaysia, the Government of Japan and the Asian-African Legal Consultative Organisation (AALCO). I wish to express our deep appreciation to Honourable Tan Sri Abdul Gani Patail, the Attorney General of Malaysia and the incumbent President of the AALCO, and Dr Rahmat Mohamad, the Secretary-General of the AALCO, for organising this Round-Table Meeting.

The topic I have been assigned to speak about today is the Review Conference of the Rome Statute of the International Criminal Court to be held in Kampala, Uganda from 31 May to 11 June this year. I am going to briefly overview issues to be discussed at the Review Conference, in order to

provide the common ground for the discussion in the following 3 sessions today and tomorrow.

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### 1. Review Conference: An Overview

Article 123, paragraph 1 of the Rome Statute states that “[s]even years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in Article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions”.

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Accordingly, the first Review Conference could be convened after 1 July 2009. Furthermore, non-party States which have signed the Rome Statute or the Final Act of the Rome Conference may participate in the Review Conference as observers. Other interested States can participate in and make a statement at the Review Conference upon the authorisation of the Conference.

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Agenda for the Review Conference is the following:

- (1) Crime of Aggression
- (2) Review of Article 124
- (3) Criminalising the act of employing certain weapons (poison, poisonous gas, etc.) in internal armed conflict
- (4) Strengthening the enforcement of sentences
- (5) Topics for Stocktaking
  - (a) Complementarity
  - (b) Cooperation
  - (c) Impact of the Rome Statute system on victims and affected communities
  - (d) Peace and justice

I would like to elaborate further on each subject.

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### 2. Crime of Aggression

The first subject is the crime of aggression.

First of all, Article 5, paragraph 1 of the Rome Statute provides as follows:

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes; and
- (d) The crime of aggression.

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Article 5, paragraph 2 states that:

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

Thus, the crime of aggression is clearly within the jurisdiction of the ICC, but the ICC is suspended to exercise jurisdiction with respect to the crime until a provision on the definition of the crime and the conditions for the exercise of jurisdiction is agreed upon. In addition, such a provision must be consistent with the relevant provisions of the UN Charter.

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The reason why the ICC is suspended to exercise jurisdiction with respect to this crime is that at the Rome Conference in 1998, States tried to agree to the definition of this crime and the conditions for which the ICC may exercise jurisdiction with respect to this crime, but failed to do so.

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Therefore, soon after the Rome Statute entered into force in July 2002, the first session of the Assembly of States Parties of the ICC set up the Special Working Group on the Crime of Aggression (SWGCA) to discuss this crime.

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The Special Working Group continued its discussion until February last year, when it adopted the draft amendments on the Crime of Aggression. Then the draft Elements of Crimes were also finalised at the informal inter-sessional meeting on the crime of aggression at the Princeton Club in New York in June last year.

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However, there are some unresolved issues on the Crime of Aggression.

First, with regard to the definition of the crime, there has never been an established legal definition of crime of aggression. The General Assembly of the United Nations adopted Resolution 3314 on the Definition of Aggression in 1974 but this was purported to give guidance for the determination of an act of aggression by the Security Council. On this point, much improvement has been made as a result of the discussion at the Assembly of States Parties of the ICC since 2002 and we now have the single text without brackets which will be sent to Kampala.

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Second, as to the conditions for the exercise of jurisdiction, there has been the intensive debate on whether the ICC may exercise jurisdiction only when the UN Security Council determines the existence of the act of aggression or even when there is no such determination as long as certain requirements are met. This question arises only when a mechanism is triggered by the Prosecutor or a State Party. Some countries, particularly Permanent Members of the Security Council, have insisted that the power of

the Security Council to determine the existence of the act of aggression should not be undermined by the activities of the ICC. Other countries wish not to see an involvement of the Security Council in order to assure the independence of the ICC. Much has been discussed in the Assembly of the State Parties which was held in New York last week but there were still a wide range of views.

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Third, there is a technical question of how to realise an amendment. Do we use Article 121, paragraph 4 or Article 121, paragraph 5? In other words, for the ICC to exercise jurisdiction over the crime of aggression, is it necessary for an aggressor State to have accepted the amendment? This point was also debated in New York last week but a consensus has not emerged yet.

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The focus of discussion of the Review Conference will be the conditions for the exercise of jurisdiction and the method of amending the Rome Statute.

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#### 3. Review of Article 124

Article 124 is a transitional provision which enables a State Party to opt out from the jurisdiction of the ICC with respect to war crimes for 7 years. The aim of this provision is to make it easier for a State to ratify the Rome Statute by allowing it to see how the ICC exercises jurisdiction over war crimes at an early stage.

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In fact, France and Colombia have made declarations to opt out under Article 124, though France withdrew its declaration in August 2008.

At the Review Conference, States discuss whether Article 124 should be

deleted or not.

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4. Criminalising the act of employing certain weapons (poison, poisonous gas, etc.) in internal armed conflict

The act of employing certain weapons, such as poison or poisonous gas, in the context of international armed conflicts has been criminalised by the Rome Statute (You may find the relevant provisions in Article. 8, paragraph. 2, (b)(xvii), (xviii) and (xix)). Belgium has submitted its proposal which intends to criminalise the same acts in the context of armed conflicts not of an international character.

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5. Strengthening the enforcement of sentences

Norway has proposed to add to Article 103 the phrase that enables the ICC to utilise prison facilities in developing countries which have been improved to satisfy the required prison standards with international aid from other States or international or regional aid agencies.

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One of the motives for this proposal is that the experiences of *ad hoc* tribunals shows that only a limited number of States have agreed to accept sentenced prisoners in their prisons. Thus it is quite difficult for those *ad hoc* tribunals to find a State which may accept persons who have been sentenced by those tribunals. It was also pointed that it is better for sentenced persons to serve their sentence in the countries which are relatively close to their mother countries in terms of the cultural similarity.

The resumed 8th session of the Assembly of States Parties of the ICC, which was held in New York last week, decided that this proposal is to be discussed at the Review Conference.

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## 6. Topics for Stocktaking of International Criminal Justice

### (a) Complementarity

The ICC is based on the principle of complementarity. Therefore, if a State which has jurisdiction over the crime in question genuinely investigates and prosecutes the crime, the ICC cannot intervene in the investigation and prosecution. However, if we look at the reality of certain countries, they may not have the judicial system sufficient to conduct complicated investigation and prosecution of crimes committed in a massive scale. Thus, the Office of the Prosecutor of the ICC, and some States Parties, started to argue the importance of the concept of “positive complementarity”. Positive complementarity means that the ICC should make positive efforts to enable national jurisdictions to conduct genuine investigations and prosecutions of crimes under the Rome Statute by encouraging States to assist each other on a voluntary basis. This concept intends to increase and strengthen both the State-to-State assistance and assistance by international and regional aid agencies in the fields of legislative assistance, technical assistance, capacity building and construction of physical infrastructure. The ICC acts as a catalyst for assistance.

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This concept attracted a considerable support in the Assembly of State Parties in NY last week but doubt was also cast on this concept. Therefore the concept of “positive complementarity” disappeared from the draft resolution that will be sent to the Review Conference.

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### (b) Cooperation

The aim of undertaking the discussion on this topic of “cooperation” is to foster a common understanding of further steps needed to improve cooperation between the ICC and (a) States Parties, (b) The UN system, (c) international and regional organisations and (d) other stakeholders.

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The discussion on this topic focuses on (1) implementing legislation, (2) supplementary agreements and arrangements, (3) challenges encountered by States Parties in relation to requests for cooperation, (4) cooperation with the UN and other international bodies, and (5) enhancing knowledge, awareness and support for the ICC. The discussion has rendered particular attention to supplementary agreements and arrangements on the enforcement of sentences, the relocation of witnesses, and interim release of suspects.

The expected final outcome for this topic has not been decided yet.

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#### (c) Impact of the Rome Statute system on victims and affected communities

The aim of discussing this topic is to consider how victims and affected communities experience and perceive justice 8 years after the initiation of the ICC's activities.

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The discussion focuses on (1) the role of outreach in impacting victims' expectations of obtaining justice and their enhanced knowledge of their legal rights, (2) especially in situation countries, the importance of recognising victims' rights to justice, participation and reparation, (3) a review of how the Trust Fund for Victims (TFV) has contributed towards individual dignity, healing, rehabilitation, and empowerment and areas in which its work could be enhanced.

The expected final outcome is: (1) a high-level declaration, (2) a resolution, (3) a final document or/and (4) encouragement to States to consider further contributions to the TFV.

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#### (d) Peace and justice

Amnesties, once viewed as a necessary price for peace, are no longer considered acceptable for the most serious international crimes. But the pursuit of peace and justice has presented challenges, since, in the short



term, tensions have arisen between efforts to secure peace and efforts to ensure accountability for international crimes.

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Therefore, the aim of considering this topic is to draw lessons from past experience about what can be done to manage the tensions between peace and justice.

With respect to the expected final outcome, there is no formal outcome. A summary of the discussion will be prepared. We believe that AALCO member States have a big role to play on this subject.

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The above is the brief overview of the issues to be discussed at the Review Conference in May to June.

The International Criminal Justice system is an important agenda for the entire international community. The discussion should not be monopolised by the State Parties of the ICC. The Review Conference will provide a precious opportunity.

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Divergent views exist on each agenda item among the State Parties of the ICC but they work hard to produce positive results. AALCO Member States, whether being States Parties to the Rome Statute or not, have big roles to play.

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I hope this round-table meeting of experts provides the unique opportunity to ASEAN countries and other AALCO Member States to exchange views on these issues.