



**No Peace without Justice
Roundtable on Implementing Legislation**

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I want to start with some reflections on implementing legislation and complementarity.

I do not exaggerate by saying that implementing legislation underpins the whole Rome Statute system.

The ICC is a court of last resort and ICC crimes should be prosecuted domestically, in local jurisdictions. It is only where the country in question is either unwilling or unable to do so that the ICC gets involved. Even then, however, the Prosecutor has clearly indicated that he will focus only on the most serious perpetrators, thus leaving a potentially large number of perpetrators to be tried domestically. Such domestic prosecutions are essential in order to avoid what has been called an impunity gap.

Implementing legislation is the legal foundation for prosecuting nationally, and for the ICC to intervene where nationally there is an unwillingness or inability to prosecute. Without criminalisation of crimes against humanity, war crimes and genocide, for instance, national courts may only be able to prosecute for some of the constitutive acts, such as murder or rape. This would undermine the basis of national prosecutions, inviting the ICC to step in on a technicality, where it may not be necessary to do so. Without implementing legislation, the whole system set up under the Rome Statute becomes ineffective.

Implementing legislation also forms the backbone of the cooperation of states with the ICC. As an international institution without direct enforcement mechanisms, the Court heavily relies on cooperation from states. As the former President of the Court described it, the Rome statute is a two pillar system: a judicial pillar represented by the Court, and an enforcement pillar represented by the states, which undertook a legal obligation to cooperate with the Court through the Rome Statute.

Cooperation is the inter-play between these two pillars, where the judicial pillar requires the enforcement pillar to play its part in order for the system created by the Rome Statute to work.

Domestication of the Rome Statute through national implementing legislation normalises and renders possible at the national level complying with requests for

cooperation from the Court, which are based on international treaty obligations and depending on the constitutional system in place need to be incorporated into domestic law through the normal legislative processes.

In fact, states have a legal obligation under the Rome Statute, Article 88, to “ensure that procedures are available under their national law for all forms of cooperation which are specified” in Part 9 of the Statute. Indeed, this is consistent with Article 27 of the Vienna Convention on Treaties, which states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

It is of real concern to me, as an Italian citizen, as an Italian judge, that Italy has not yet adopted implementing legislation despite its obligations to do so. Not only does this failure flout international law, as I have just highlighted, but it could also place Italy in an embarrassing and difficult international situation.

By way of example, if one of the ICC suspects were to be arrested by the Italian authorities, there is currently no Italian law recognising an ICC arrest warrant and the crimes that it pertains to, nor are there any mechanisms on how to surrender the suspects to the ICC as opposed to extradition to a state. Even with the best of political wills available, it would be difficult for Italy to cooperate with the Court whilst following its national law, as indicated by Article 59.

Examples are not limited to such high profile and visible situations, however. If the Court issues a freezing order against the assets of a suspect, say a holiday home in Italy, again the Italian judicial system will not recognise the order, or the issuing institution. As a result, it will be difficult to freeze the assets. This has two consequences. The money available for eventual reparations orders to victims is decreased, and the legal aid budget of Court is increased. Not only victims, but also ordinary Italian citizens thus end up paying as a result of the lack of political leadership on this issue.

These examples go to show the crucial importance of the existence of implementing legislation for sustained and reliable cooperation with and States Parties and for the effective functioning of the ICC as a judicial institution.

Recognizing the importance of this issue, States Parties themselves have been engaged in systematising and promoting the domestication of the Rome Statute through the Assembly of States Parties, the ICC's governing body. The Bureau of the ASP presented to the 5th session of the Assembly a Plan of Action for achieving universality and full implementation of the Rome Statute.

In the Plan of Action, the Bureau placed the primary responsibility for full and effective implementation of the Rome Statute on State Parties themselves, and asked them to provide to the Secretariat of the ASP all information relevant to this issue, including the status of any implementing legislation, any obstacles to its drafting or adoption and any technical assistance required.

At its 5th Session, the ASP decided "to monitor developments in the field of implementing legislation, inter alia with a view to facilitating the provision of technical assistance that States Parties to the Rome Statute...and, to that end, decides to adopt and implement the plan of action for achieving universality and full implementation of the Rome Statute".

The Assembly also recalled "that the ratification of the Rome Statute must be matched by national implementation of the obligations emanating therefrom, notably through implementing legislation, in particular in the areas of criminal law, criminal procedural law and judicial cooperation with the Court, and in this regard urges States Parties to the Rome Statute that have not yet done so to adopt such implementing legislation as a priority".

On this basis, the Secretariat of the Assembly has been writing yearly to States Parties seeking information on the status of any implementing legislation, any obstacles encountered and technical assistance needed, as well as to find out what efforts States Parties have undertaken to promote full implementation by other States Parties. These requests and the answers provided by States are posted on the website of the Court, and you can have a look if you are interested. I am happy to note that Italy has always responded to these letters. These responses, however, simply highlight the fact that Italy has not yet placed implementing legislation high on its political agenda.

In parallel, and to assist with the systematisation of knowledge on implementing legislation, the Registry has also been writing every year since 2007 to States Parties asking for official copies of any implementing legislation they may have. In cooperation with the University of Nottingham's Human Rights Law Centre, a database has been created and when official copies are received by the Registry, the University of Nottingham places them on the database which is accessible to the public at large.

On the database, you will see that only 39 states out of our 109 States Parties (110 in a few weeks with the ratification of the Czech Republic) have adopted implementing legislation. This is just about 1/3 of our States Parties and a very disappointing effort.

It is worthy of note that none of the situation countries have adopted implementing legislation. Although we have received much cooperation from these countries, the legal basis for doing so is many times unclear and ad hoc, practical solutions have been the norm.

From anecdotal evidence, it appears that the major hurdles to adopting implementing legislation are as follows. In some states, once ratification has been pushed through, domesticating the Rome Statute does not come up as a priority in the political agenda. In this situation, we rely on civil society to keep the issue as a priority and advocate on the importance of implementing legislation.

In some cases, it is political will that is missing, for instance when the composition of parliament has changed and is more hostile to the ICC since ratification took place. Again, sustained efforts by civil society are key here.

In some states, the real problem is capacity. Especially in the Least Developed Countries, there is a no expertise in international criminal law, and legislative drafting on this topic poses a real challenge. A number of organizations can assist in this respect, if requested.

I must note here that the Court as a whole does not take the lead in pushing for, and advising on implementing legislation. As the ASP decided, it is States themselves that have this primary responsibility. This is also a point of legal policy for the Court, as there may be legal questions pertaining to the quality of implementing legislation in a state which the Chambers will have to adjudicate on, and as such, the Court as a whole has to keep itself neutral on the issue.

Nevertheless, if a State turns to the Court and asks for assistance with its implementing legislation, the Court has a database of organizations and states that are willing to provide technical assistance with this exercise which it proposes to the state concerned. For instance, the ICRC and the Commonwealth Secretariat provide such assistance, and the latter has actually developed a model implementing legislation for common law countries which has proved very useful.

As I just mentioned, another point on implementing legislation is that it is not only the fact of adopting implementing legislation that counts, but also the quality of the legislation that is adopted. Implementing legislation needs to domesticate and penalise the ICC crimes, with a definition of such crimes consistent with that in the Rome Statute. It also needs to include all the forms of cooperation envisaged by Part 9 of the Statute. States have undertaken to cooperate in various ways, and all such cooperation needs to be legalised domestically. Finally, States should provide a national focal point for ICC issues, and implementing legislation could highlight where such a focal point should be located.

I would highlight here that whilst only 39 states have implementing legislation, more states have simply domesticated ICC crimes. Recently, the NGO Parliamentarians for Global Action, which you all know well, conducted an informal research and identified between 48 and 55 states which have domesticated the ICC crimes. Whilst a good first step, and essential to conduct national proceedings, this is not sufficient. It certainly does not assist the Court when it seeks cooperation from these States. It also does not place the ICC on solid legal footing in a country.

Once implementing legislation is in place, another very useful tool to facilitate cooperation, and bridge the two pillars I mentioned above, is the streamlining of

national bureaucracies so that requests for cooperation are complied with in a timely and efficient manner.

There are usually a number of different departments that have to address ICC requests for cooperation. The Ministry of Foreign Affairs tends to be the central point for international organizations and courts, but also the Ministry of Justice is usually heavily involved, and often also the Ministry of Interior in respect of issues such as witness relocation. As such, it often takes a long time to get a response from a State as all these departments have to be consulted, briefed and up to speed with ICC matters.

The best way to speed matters up, and to create uniformity and consistency in the way a State responds to ICC requests for cooperation is by creating an ICC focal point in the most relevant ministry, who then coordinates any request from the Court with the appropriate ministries. Alternatively, an inter-ministerial committee could be created in order to consider request from the Court. It is important that such a committee or focal point is well versed in ICC matters so that it can deal with request speedily.

I am not aware of any such mechanism being set up in Italy, and would strongly encourage that it be so set up.

I will finish here as I want to leave time for questions and a more interactive format for discussion. Thank you.