ASSEMBLY OF STATES PARTIES
TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT
AND THE
COMMONWEALTH SECRETARIAT

COMMONWEALTH MEETING ON THE INTERNATIONAL CRIMINAL COURT

MARLBOROUGH HOUSE
LONDON
5-7 OCTOBER 2010

Note

Symbols of documents of the Assembly of States Parties to the Rome Statute of the International Criminal Court are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a document of the Assembly of States Parties to the Rome Statute of the International Criminal Court. Resolutions of the Assembly bear the letters "Res.", while its decisions bear the letters "Decision".

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Secretariat, Assembly of States Parties
International Criminal Court
P.O. Box 19519
2500 CM The Hague
The Netherlands

asp@icc-cpi.int
www.icc-cpi.int/menus/asp

Tel: +31 (0)70 515 9806
Fax: +31 (0)70 515 8376

Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom

info@commonwealth.int
www.thecommonwealth.org

Tel: +44 (0)20 7747 6500
Fax: +44 (0)20 7930 0827

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PREFACE

In the struggle against impunity for the commission of the most serious crimes of concern to the international community, there is a need to pursue universal participation in the Rome Statute system, so as to ensure that investigations and prosecutions are undertaken, preferably at the national level, but at the ICC in case the respective State is unwilling or unable to do so.

The Assembly of States Parties adopted a Plan of Action that sets out a series of measures to be taken by the different stakeholders, at the national and international level, in pursuit of that collective endeavour.

A seminar series under the Plan of Action commenced in 2009, seeking to foster an exchange of views on the challenges posed in that undertaking, and to address some of the queries and concerns that States Parties and non-States parties may have in their consideration of how to best implement their obligations under the Statute or to join the Rome Statute system respectively.

On behalf of the Assembly, I wish to express the appreciation to the Commonwealth Secretariat, in the person of Secretary-General Kamalesh Sharma, for convening this timely ICC meeting at Marlborough House in the aftermath of the Review Conference.[1] Our appreciation is also extended to Mr. Akbar Khan, the Director of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat, who has kindly participated in several ICC events regarding the Plan of Action, and who was instrumental in organizing the meeting with the participation of experts from numerous Commonwealth States.

The seminar constitutes another tangible example of how international organizations can cooperate and strengthen their common resolve to combat impunity for the most serious crimes, such as those foreseen in the Rome Statute, and thus contribute to upholding the rule of law through respect for their international legal obligations.

With 34 Commonwealth member States being parties to the Rome Statute, the gathering constituted an ideal opportunity to increase the understanding of and support for the Court within the Commonwealth.

The two follow-ups meetings foreseen for 2011, which will focus on a possible revision to the Commonwealth Model Law on the ICC, will provide additional impetus to those States that are still in the process of considering when to join the Rome Statute family.

Ambassador
Christian Wenaweser
President of the Assembly of States Parties to the Rome Statute
December 2010

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[1] See: www.icc-cpi.int/menus/asp/reviewconference.

FOREWORD

I am appreciative that the Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) has dedicated this publication to disseminating the information and outcomes of the important workshop hosted by the Commonwealth Secretariat on the International Criminal Court at Marlborough House in October 2010. As the material in this publication testifies, the Meeting underscored the strong commitment of the Commonwealth to combating impunity through supporting the mandate of the International Criminal Court, while in parallel stressing the urgent need to develop the capacity of national criminal justice systems to conduct effective investigations and prosecutions.

The adoption of the Rome Statute at the diplomatic conference in July 1998 was a landmark development for international criminal justice and for achieving justice for victims. By ushering in a new era of accountability the international community sent a clear message to perpetrators of the worst atrocities known to mankind, namely, war crimes, crimes against humanity and genocide that impunity will no longer be tolerated.

With the advent of this landmark development in international criminal architecture, it is recalled that it was Trinidad and Tobago, a member of the Commonwealth family and currently the Chair of the Commonwealth, that resurrected the long-standing idea of establishing a Permanent Criminal Court that eventually led to the Rome Statute. Today, 34 of the 54 Member States of the Commonwealth have ratified the Rome Statute. We continue to work vigorously to assist Member States in the ratification and implementation of the Rome Statute across the Commonwealth membership.

Since its establishment in 2002, Commonwealth nationals have made a significant contribution to the mandate of the Court. We recognize the important work of the Deputy Prosecutor, and several of the Court's judges, amongst others too numerous to mention. We are also mindful that the first referral to the Court was from Uganda in respect of the Lord's Resistance Army, and that the Court is now also conducting investigations in Kenya, both Commonwealth Member States.

In supporting the work of the ICC, it is a significant contribution of the Commonwealth Secretariat to have developed specific tools to assist its Member States to prosecute ICC crimes through the creation of a model law to implement the Rome Statute. It is also worth noting that our work does not stop at ratification and implementation, but goes further in giving practical help to build the domestic capacity of national justice actors, including assisting with creating national frameworks for the protection of victims and witnesses.

Here, I would like to recognize the work of our partners in the field, who include the British Red Cross Society, the International Committee of the Red Cross and the International Bar Association. Without their valuable support-and collaboration as well as assistance from other stakeholders-our work in support of the Court would certainly be diminished.

Looking ahead to the future, we should not forget that the ICC is not a supranational court with universal jurisdiction. It operates on the principle of complementarity. It is a court of last resort, not first resort. This means that recourse to the ICC is secondary, and that States have a primary responsibility to prosecute. States should be encouraged to ratify and enact implementing legislation under the Rome Statute, so that national investigations and prosecutions of ICC crimes can take place. This will create the ability to prosecute cases which should be properly dealt with at the national level and also prevent overloading of the ICC and the pressure this will create on its resources.

Implementing legislation is the most effective basis for providing co-operation to the ICC and for enabling national prosecutions. This twin-track approach is critical to the success of the Court and to help closing the impunity gap.

I hope that the dissemination of this publication will raise the awareness of the Commonwealth's important work in this area and highlight the urgent need for the international community to reaffirm its efforts to work together in order to assist in further ratifications and to strengthen national jurisdictions, so that complementarity can truly become a reality in our lifetime for the benefit of all victims who deserve justice.

His Excellency Kamalesh Sharma
Commonwealth Secretary-General
Commonwealth Secretariat, Marlborough House
Pall Mall, London
December 2010

OPENING REMARKS

Mr. Akbar Khan*

President Song, Excellencies, Ladies and Gentleman, on behalf of the Secretary - General, His Excellency Kamalesh Sharma, it is with great pleasure that I welcome you all to the Marlborough House and to the opening of the Commonwealth Meeting on the International Criminal Court.

Your collective attendance today representing several Commonwealth States, international organizations, civil society actors and academia is testimony to the importance you all attach to the Commonwealth's unwavering commitment to supporting the mandate of the International Criminal Court in combating impunity and bringing justice to victims.

As many of you know, the Commonwealth's commitment to supporting the International Criminal Court's mandate is a long-standing one originating from a Meeting of Commonwealth Heads of Government (CHOGM) In Coolum, Australia in 2002, where States were urged to ratify and implement the Rome Statute. These calls from Commonwealth leaders for ratifications were repeated at subsequent CHOGMs in 2003, 2005 and 2007. In 2007, Heads of Government, in stressing the importance of ending impunity for the perpetrators of genocide, crimes against humanity and war crimes, took positive note of the work of the International Criminal Court and of ad hoc Criminal tribunals.

Most recently, at the 2009 CHOGM held in Port of Spain, Trinidad and Tobago Commonwealth Member States reaffirmed that respect for the rule of law is a core Commonwealth value and is essential to the progress and prosperity of all.

In my role at the Commonwealth Secretariat's principal legal adviser, the promotion of the rule of law in the context of the Rome Statute is not an abstract concept to me. Rather it is about offering a helping hand through the provision of capacity building and technical assistance to our Member States to help further strengthen their domestic legal systems to enable effective national investigations and prosecutions to be conducted in full conformity with the notion of complementarity under the Rome Statute, so that justice can be achieved for the countless children, women, men who continue to be victims of the worst atrocities known to mankind.

The focus of this meeting over the next three days is on the promotion of ratification and implementation of the Rome Statute and to identify how best to collectively move forward to make universality of the Rome Statute and the notion of positive complementarity a reality in our time for the benefit of future generations.

On occasions like today it is pleasing to note that 34 of Commonwealth's 54 Member States have ratified the Rome Statute, a figure which represents over half of our membership that we as an organization can feel justly proud of, particularly as the last two ratifications submitted in recent months, came from the Seychelles and St. Lucia, both members of the Commonwealth family.

Of equal importance, we are also proud of having been at the forefront of producing one of the first ICC model laws for implementing the Rome Statute and related guidance on prosecuting ICC crimes in Commonwealth States. Both documents exemplify what we in the Commonwealth do best when working together to promote the rule of law through the provision of technical assistance and capacity building to our membership. In the course of the meeting we will again be looking at these important documents to see how best we can revise and improve upon them in light of subsequent legal developments and best practice.

* Director, Legal and Constitutional Affairs Division (LCAD), Commonwealth Secretariat.

Despite the notable achievements the picture is not a completely rosy one with only 12 of our 34 ratifying Members States having any form of domestic implementing legislation in place. I hope that this meeting will serve to further catalyze our collective efforts toward promoting further ratifications and ensuring a greater commitment from our States to enacting implementing legislation.

With the International Criminal Court now fully operational an accused person could be found on the territory of any Commonwealth State for a number of reasons, as visitor, refugee, in transit, resident or citizen.

In the absence of domestic implementing legislation to enable the surrender of the individual to the Court or to provide with co-operation, or indeed to allow for domestic prosecution of ICC crimes, impunity will flourish unchecked.

Without cooperation with the ICC, including through domestic implementing legislation there will be no arrests, no protection of victims and witnesses and no proceeding. In short, the Court will fail.

The importance therefore of having full implementing legislation in place backed up by a strong expression of political and diplomatic support for the Court's mandate from the international community cannot be overstated.

Recently at the First Review Conference of the Rome Statute held in Kampala, the international community reaffirmed its commitment to the Rome Statute of the International Criminal Court and its full implementation, as well as to its universality and integrity, and further reiterated the international community's determination to put an end to impunity for perpetrators of the most serious crimes of international concern.

Let us in the Commonwealth through our meeting today start work towards honoring that promise made in Kampala for the common good of mankind. To quote UN Secretary - General Ban Ki-moon "in our modern era, let us send a clear message: No nation, large or small, can violate the rights of its citizens with impunity".

H.E. Judge Sang-Hyun Song*

At the outset, let me sincerely thank the Commonwealth Secretariat and Mr. Akbar Khan for inviting me to give a keynote speech at this important gathering.

This three-day meeting promises to be a very timely event which provides an opportunity to discuss several crucial aspects of the system created by the Rome Statute of the International Criminal Court. Before those detailed discussions start, let us first remind ourselves what the ICC is there for and what has been achieved so far.

History

The Rome Statute of the ICC, adopted in 1998, marked a historic decision of the international community to put an end to the most serious crimes of concern to humanity as a whole - genocide, crimes against humanity, war crimes and the crime of aggression.

The ICC's origins trace back to the aftermath of the Second World War. The terrible crimes committed in the course of that War led to the creation of military tribunals in Nuremberg and Tokyo. These tribunals embodied a new recognition that the darkest crimes should be met with fair and public trials. The seeds of international criminal justice had been planted.

The horrors of the Second World War also prompted States to adopt the four Geneva Conventions of 1949 and the Genocide Convention, as well as the Universal Declaration on Human Rights.

Soon afterwards, however, the Cold War and its polarizing effect on the international community paralyzed the progress of international criminal justice for almost 50 years. International humanitarian law continued to develop but the penal repression of war crimes at the international level was not a realistic option. At best, justice was an afterthought to peace, if it was considered at all.

Then, in the early 1990s, with the newly found consensus among the world's leading powers, the United Nations Security Council took the unprecedented step of creating *ad hoc* tribunals to try those responsible for the atrocities committed in the former Yugoslavia and Rwanda. Hope for international justice was revived.

Encouraged by the success of the ad hoc tribunals, in 1998, States decided to create a permanent international criminal court, the ICC. Gathered in Rome, 120 States adopted the ICC's founding document, the Rome Statute. The mandatory 60 ratifications of the Statute followed faster than anyone expected and already in 2002 the ICC was ready to open its doors. Today, eight years later, it is a fully functioning International Criminal Court with 113 States Parties.

Achievements

The creation of the ICC in itself is a great achievement. But the Rome Statute has far wider implications than the mere establishment of an international court; the Statute created a truly progressive multilateral system that is making a very concrete impact on the global struggle against impunity.

* President of the International Criminal Court.

The Rome Statute reflects the conviction of the majority of the world's States that genocide, crimes against humanity, war crimes and the crime of aggression cannot be tolerated and that it is the duty of every State to exercise its national criminal jurisdiction over those responsible for such crimes.

Accordingly, the ICC is a court of last resort which may only exercise its jurisdiction if national courts are unwilling or unable to carry out genuine investigations and prosecutions of the crimes under the Statute. In other words, the ICC is a safety net which ensures that impunity will not prevail even when justice cannot be provided in a national setting.

Therefore the ICC is not a substitute for national justice systems; it merely complements them. While this principle of complementarity is well known, its importance cannot be overstated. One of the most important effects of the ICC and the Rome Statute is that they act as a catalyst for States to ensure their domestic capacity to deal with the crimes under the Statute. So far, almost 50 States Parties of the ICC have enacted implementing legislation to that end and others will hopefully follow soon.

Perhaps we do not always realize what a momentous development this is in the struggle against impunity. Let us not forget that the vast majority of crimes under the Rome Statute have been recognized as crimes under customary international law for decades, yet it took the impetus of the Rome Statute to push States to finally ensure that their national laws allow the prosecution of such crimes.

Of course the effective functioning of the ICC itself is also an important factor in deterring future violations and setting standards in the prosecution and adjudication of crimes under the Statute. And indeed a lot has been achieved over the last eight years; the ICC now has five active situations under investigation or on trial. Four suspects in total are currently in custody and three others have appeared before the Pre-Trial Chamber. Our first trial began in January 2009, and the second trial began last November. A third trial may start very soon.

Three States Parties - the Democratic Republic of the Congo, Uganda and the Central African Republic - have referred situations to the Court themselves, asking the ICC to investigate crimes that occurred on their territory. One case - that of the Darfur region of Sudan - was referred to the ICC by the United Nations Security Council in accordance with the Rome Statute. And one investigation - that concerning post-election violence in Kenya - was opened by the Prosecutor at his own initiative and approved by the Pre-Trial Chamber. Therefore, all three mechanisms for bringing a situation before the ICC have now been used in practice.

One of the great achievements of the Rome Statute is that it puts a strong emphasis on the position of victims. It allows victims to be substantially integrated into the ICC's proceedings even when not called as witnesses. The Statute is mindful of the particular interests of the victims of violence against women and children. In the countries where we have active cases, the ICC's outreach programme communicates actively with the local population, informing the victims of their rights and helping communities generally understand the ICC's mandate and proceedings. The ICC has the power to order reparations to victims - including restitution, compensation and rehabilitation, and a separate Trust Fund has been set up to collect donations for this purpose. The Trust Fund also has a mandate to assist victims outside the context of the court proceedings, and it has already supported tens of thousands of beneficiaries.

While the Rome Statute is very progressive with respect to victims, it also guarantees fair trials and protection of the rights of the accused.

I would like to stress that the ICC's mission is purely judicial. It is not part of the United Nations system or any political organ. The independence of the ICC, its 18 judges and the Prosecutor are protected under the Rome Statute. The judges and the Prosecutor are elected by States Parties, which number 113 at the moment. Of them, 31 are African States, 25 are Latin American and Caribbean States, 17 are Eastern European States, 15 are Asian States and 25 belong to the group of Western European and other States.

Role of the Commonwealth

From the very start until today, the countries of the Commonwealth have played an immeasurable role in the creation of the ICC. It was Trinidad and Tobago that resurrected a pre-existing proposal for the establishment of the ICC at the United Nations in 1989. This year, Uganda hosted the first ever Review Conference of the Rome Statute in Kampala and it was also the first country to refer a situation to the ICC in 2004. Mr. Kofi Annan of Ghana played an important role in the process leading to Rome during his mandate as United Nations Secretary-General.

Numerous Commonwealth States had a very active role in the negotiations on the adoption of the Statute and most voted to adopt the Rome Statute. Mr. Philippe Kirsch of Canada was the chairman of the Rome conference in 1998 and the subsequent Preparatory Commission for the ICC, and he served as the first President of the ICC until last year. Seven of the first 18 judges of the ICC were Commonwealth nationals and three others have later been elected to the Court. These ten judges have come from countries as diverse as Botswana, Canada, Cyprus, Ghana, Kenya, Samoa, South Africa, Trinidad and Tobago, Uganda and the United Kingdom. 34 Commonwealth countries have joined the ICC, three of them this year. Five other Commonwealth States have signed the Statute.

Where do we stand today

As I have already explained, the ICC's achievements are truly impressive; we now have a system that encourages States to investigate and prosecute the most serious offences under international law and that provides an international court as a backup. It is a system that sends out a strong statement against impunity and a warning for anyone who contemplates the commission of crimes under the Statute. It is a system that promotes the rights of victims, deters future atrocities and demonstrates in practice that persons responsible for atrocities can and must be held accountable. The ICC really is ushering in a "new era of accountability", to quote the expression used by the UN Secretary General, Ban Ki-moon.

But, unfortunately, man's cruelty against man still terrorizes populations in many regions of the world. I have recently visited war-affected communities in Uganda and the Democratic Republic of the Congo and I had a chance to speak personally to victims, some of them with severely mutilated bodies, their arms or legs having been intentionally cut off.

While this experience saddened me greatly, it also reinforced my commitment to the ICC and the Rome Statute, reminding me that a lot of work still needs to be done if we wish to end impunity and achieve universal deterrence of the most serious crimes which "threaten the peace, security and well-being of the world".[1]

[1] Rome Statute, Preamble.

What needs to be done

So what can the Commonwealth and its Member States do to achieve that goal? They can do a great deal. Indeed, what I want to stress in my remarks today is the primary responsibility of States to take decisive and concrete action in order for the struggle against impunity and the deterrence of international crimes to be successful.

States are the main actors in the fields of international relations and international law; States conclude treaties; States enact domestic laws; States direct the activities of regional and other inter-governmental organizations; States are responsible for ensuring that they have effective judiciaries and States are the main funders of rule of law development activities.

That is why I am delighted to speak today here at the Commonwealth Secretariat to an audience consisting largely of representatives from the countries of the Commonwealth, an association of sovereign States united by common values which include peace and the rule of law. Many of you represent governments and other State authorities. Others among you represent intergovernmental or non-governmental agencies that either reflect or seek to influence the actions of States. Together, the people gathered in this room today can make a huge difference by acting decisively in furtherance of justice and of respect for the most fundamental rules of international law.

The Review Conference of the Rome Statute held in Kampala earlier this year highlighted several areas which still require considerable work by States, including universality, cooperation with the ICC, the principle of complementarity and national implementing legislation.

Universality may be far away, but every ratification takes us closer to global reach. Cooperation of States is crucial for the ICC, since it does not have enforcement mechanisms of its own. We rely entirely on the assistance of States, especially when it comes to the arrest and surrender of suspects. The fact that eight suspects are at large, some of them for more than five years, shows the seriousness of the challenges that we face. While the arrest of suspects is a legal obligation under the Rome Statute, there are also extremely valuable forms of voluntary assistance that States can provide to the ICC, particularly in the form of agreements on the enforcement of sentences and relocation of witnesses.

I already spoke about complementarity, but let me again stress how important it is that States ensure that they have the laws and the practical means necessary to prosecute the worst offences known to mankind.

All these areas require decisive action by States, and I am delighted to see that this conference will devote significant attention to them. Furthermore, I believe that the Model Law developed by the Commonwealth Secretariat can be of great assistance to States in the process of implementing the Rome Statute in their national legislation.

Misconceptions

The member nations of the Commonwealth are natural candidates to join the Rome Statute. Yet twenty Commonwealth States have so far not joined the ICC, although five of them have signed the Statute. Unfamiliarity with the ICC's mandate and activities may be one reason why some States have not ratified the Rome Statute. This is why I use every opportunity to raise awareness about the ICC and to dispel any myths that may exist.

One prejudice that one sometimes hears about the ICC is that it is a tool of Western States. This is utter nonsense. The ICC belongs to its States Parties, among which the Western States are in the minority. The judges and the Prosecutor are elected by the Assembly of States Parties, in which every State has an equal vote. The richest States provide the bulk of the funding for the ICC on the same principles as the UN budget contributions are assessed, but this does not give them more decision-making power in the ICC. It is a global court with participation from all the continents of the world. The geographical and cultural diversity of the ICC, as well as its gender balance, are in fact reflected not only in the totality of the Court's judges but practically in every bench of the ICC consisting of three or five judges.

Some claim that the ICC only targets African countries. This assertion is groundless. Of the five situations before the ICC, three were brought to the ICC by the countries themselves, one was referred to the ICC by the Security Council and only one was initiated by the Prosecutor at his initiative. Furthermore, the Office of the Prosecutor is conducting preliminary examinations in a number of countries, including Afghanistan, Georgia, Guinea, Côte d'Ivoire, Colombia and Palestine. But I wish to stress that the Prosecutor cannot initiate a formal investigation without the approval of the Pre-Trial Chamber following an independent judicial review. This is to prevent any frivolous or politically motivated investigations without proper basis. An even higher threshold must be met before a warrant of arrest can be issued against an individual. These are just some of the many checks and balances contained in the Rome Statute.

Yet another common misconception is that the ICC may start digging into a country's past if it ratifies the Statute. This is patently impossible. The ICC's jurisdiction with respect to a new State Party starts only after its ratification. And in any case the ICC cannot ever have jurisdiction for crimes that took place before 1 July 2002.

The international atmosphere for expanding the reach of the Statute has improved greatly. In the early years, many countries came under intense pressure from the American government not to ratify the Rome Statute. But those days are over. I have had extensive discussions with senior officials in the Obama administration and the prevailing US policy with regard to the ICC is now one of positive engagement with the Court. The US officials have assured me that there will be no retribution from the United States for any country seeking to join the Rome Statute.

The United States in fact participated actively in the Kampala Review Conference and pledged to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide. This pledge by the US goes to show that the goals set by the Rome Statute are also shared by many, probably most non-States parties, which for one reason or another so far have not joined the ICC.

Assistance for and implications of ratification

I know that for some small States, government capacity can make ratification processes daunting. The ICC lacks the resources to provide assistance, but others are available to assist - notably, in this case, the Commonwealth Secretariat. Other important partners include for instance the United Nations, the European Union, the International Committee of the Red Cross, Parliamentarians for Global Action, Amnesty International and the Coalition for the International Criminal Court. There is also a special Trust Fund for the Least Developed Countries to assist States with less means to participate in the Rome Statute system.

Joining the ICC sends out a clear signal of a country's commitment to the rule of law, peace and the struggle against impunity, not only at home, but around the world. Ratification also gives a State the right to nominate candidates and to vote in the election of the highest officials to the ICC. The next elections for the Prosecutor and six posts of judges will take place in 2012, so now would be an excellent time to join the ICC to shape its future development and make it even more global than it is now.

Yet another consideration is that citizens of States Parties are preferred in the recruitment of staff to the ICC. Therefore, membership in the ICC opens an avenue for the lawyers and other professionals of a country to participate in the work of a Court that is on the cutting edge of the development of international law.

I would be thrilled to welcome additional Commonwealth States as new States Parties. But I wish to reiterate that this is a decision for your governments alone to make.

Conclusion

Let me now conclude by summarizing what I would like to see happen in the near future:

(a) I would like to see all Commonwealth countries that are States Parties to the Rome Statute use their good relations with Commonwealth non-States parties to highlight the benefits of membership in the Rome Statute system.

(b) I would like to see the Commonwealth States Parties and the Commonwealth Secretariat offer their help to those Commonwealth countries that may be in need of technical assistance to facilitate their ratification of the Statute.

(c) I would like to see the Commonwealth States Parties make sure that they have national procedures in place in accordance with article 88 of the Statute to allow effective co-operation with the ICC.

(d) I would like to see the Commonwealth States Parties make sure that they have the necessary legal and other means to investigate, prosecute and try the crimes under the Rome Statute.

(e) I would like to see Commonwealth countries that are not States Parties to the Rome Statute consider ratification with an open mind, and to seek additional information about the ICC if necessary. I am always available to assist in that respect.

(f) I would like to see all of you gathered here, in your capacity as experts on the ICC, use any opportunities you may have to spread awareness of the ICC and the Rome Statute, particularly among your colleagues in your own countries.

(g) I would like to see all States share information among them on the technical aspects of ratification and implementation, and to use the assistance and resources provided by the Commonwealth Secretariat as well as non-governmental organizations and regional organizations. Please note that we welcome Visiting Professionals from any country to learn about the ICC from the inside.

(h) I would like to see the Commonwealth Secretariat continue its excellent work as a facilitator of technical assistance and a catalyst in promoting ratification and full implementation of the Rome Statute among the Commonwealth countries. Furthermore, I would be delighted to see the next Commonwealth Strategic Plan include explicit reference to the struggle against impunity for the crimes included in the Rome Statute.

Let me stress that these are all just wishes - as the ICC President I am in no position to demand anything. But I do want to inspire you all to work hard towards the noble goals set by the Rome Statute for the good of humanity.

OVERVIEW OF THE COMMONWEALTH SECRETARIAT'S WORK IN SUPPORT OF THE INTERNATIONAL CRIMINAL COURT AND IN PROMOTING THE RULE OF LAW THROUGH BUILDING NATIONAL CAPACITY

Mr. Vimalen Reddi[*]

Presentation on the work of the Legal and Constitutional Affairs Division (LCAD)[**]

Criminal Law Section

The Criminal Law Section carries out mandates given by Heads of Government and Law Ministers.

We collaborate closely with other Sections and Divisions on issues relating to the rule of law and the promotion of democratic values.

LMSCJ Mandates

(a) Criminal Jurisdiction

(b) Making Legal Materials Available Online in Small States

(c) Anti-Corruption Strategy for Small Jurisdictions

LMM Mandates

(a) International Criminal Court

(b) International Co-operation

(c) Prosecution Disclosure

(d) Victim and Witness Assistance

(e) International Humanitarian Law

(f) Counter Terrorism

(g) Anti-Money Laundering and Countering Terrorist Financing

(h) Anti-Corruption

(i) Human Trafficking

Comparative value

We are trusted partners of Member States and regional and international agencies, and are able, as a result, to work very closely with all the relevant stakeholders on the ground.

Needs-based: effectiveness and sustainability

Needs assessment

E.g.: In-State focused scoping visits; needs assessments at meetings/ programmes; consultations and reports from other specialized agencies and our partners; engagement of external experts in the more specialized areas of law for assistance; requests from Member countries.

[*] Consultant, Criminal Law Section, Commonwealth Secretariat, London.
[**] Power Point presentation.

Tailored delivery

E.g.: Training Programmes (Web-based, Intensives and Mentoring - E.g.: The CLS is presently developing training components/exercises suitable for delivery at both regional and national level. Pilot Programme was launched for Asia/Pacific in 2009); Placements and Mentoring; Commonwealth Schemes (Extradition and Mutual Legal Assistance); Model Laws (ICC; Counter-terrorism; Money-Laundering and Financing of Terrorism; Corruption etc); Implementation Kits and Practical Manuals; Commonwealth Network of Contact Persons.

Interconnections: holistic approach

Interconnectedness of mandates and cross-cutting themes

E.g.: Our mandates on Victims and Witness Protection and Assistance or Prosecution Disclosure Obligations are relevant in our work on combating all forms of transnational or international crime. Our programmes also aim to mainstream human rights and gender principles.

Foundational and specialist skills

E.g.: CLS training programmes focus on improving both the foundational and the more specialist skills of Criminal Justice Officials.

All criminal justice officials and stakeholders are involved

E.g.: The CLS programmes often aim to bring together investigators, prosecutors and judges as well as other stakeholders.

Consultations

In our needs assessment, we identify and consult with the national/regional/ international agencies, which may be involved, in our work.

National criminal justice system agencies

E.g.: The office of Attorneys-General and Law Ministers; Directorates of Public Prosecution; Judicial Commissions/Institutes; and other relevant agencies.

Regional/international agencies

E.g.: United Nations agencies; INTERPOL; ICRC; IAP etc.

Collaboration

We support and collaborate with a number of national, regional and international agencies to ensure a more effective and comprehensive delivery of programmes as well to avoid duplicating work.

National, regional and international agencies

E.g.: United Nations agencies; INTERPOL; ICRC; IAP etc.

Other agencies

E.g.: Universities and training institutes (Judicial Services Board of England and Wales); Practitioners in private practice.

Support and promotion of networks

E.g.: Prosecutors Network in Commonwealth Regions; International Association of Prosecutors etc.

International cooperation (main initiatives)

Commonwealth schemes

E.g.: London Scheme for Extradition; Harare Scheme on Mutual Assistance; Scheme for the Transfer of Convicted Offenders.

Revision of the Harare Scheme

Proposals include new provisions on the Interception of Communication; Covert Surveillance; Defence Requests etc.

Commonwealth network of contact persons

E.g.: Informal network to enhance co-operation between member countries.

Prosecution disclosure initiatives

Comparative study of the approaches in the Commonwealth;

Identify best practices;

Model Legislative Provisions as well as detailed guidance addressing the issue of disclosure, particularly in relation to unused material;

Training programmes for investigators/prosecutors/judges;

Specific focus on difficult areas of disclosure practice, such as the treatment of sensitive material, third party material and defence disclosure obligations.

Victims and witness protection and support:

Adoption of the Commonwealth Statement of Basic Principles of Justice for Victims of Crime (2005);

Development of a Best Practice Guide for the Protection of Victims/Witness;

Criminal jurisdiction (LMSCJ)

Criteria to be taken into consideration by member countries in enacting jurisdictional provisions in domestic law to address transnational and international crimes;

Criteria to be considered by member countries in resolving competing criminal jurisdiction matters.

Making legal materials available online (LMSCJ)

Development of a Criminal Law Library in collaboration with the Australasian Legal Information Institutes - which will aim to draw together materials available in the Commonwealth relating to Criminal Law issues.

Mr. Jarvis Matiya[*]

Presentation on the work of the Justice Section of the Legal and Constitutional Affairs Division[**]

Strategic objective

Contributes to the achievement of the organization's strategic objective of upholding the Rule of Law in member countries

Acts as a catalyst for Commonwealth legal cooperation.

Assists countries in the fulfillment of their international legal obligations under various multilateral and bilateral agreements and conventions

Source of mandate

Past CHOGMs

Meetings of Law Ministers

Other ministerial mandates i.e. Finance Ministers, Youth Affairs Ministers, and Ministers for Gender

Main areas of work

Assist in strengthening the independence of the judiciary

Enhance access to justice (e.g. supporting Bar Associations)

Develop legislative drafting skills, support law reforms

Support democracy and good governance

Assists with the strengthening of justice sector agencies

Addressing human rights and gender dimensions in the administration of justice

The way we work

Biannual meetings with Law Ministers

Receive requests

Consult with member countries

Undertake assessment missions

Organize training programmes, conferences, and workshops on various subjects in different parts of the Commonwealth

[*] Head of Justice Section, Commonwealth Secretariat, London.
[**] Power Point presentation.

Examples of our work

(a) The judiciary and administration of justice

Respond to challenges faced by countries in strengthening the independence of the judiciary

Greater priority given to the review and strengthening of democratic institutions, including constitutions, judiciaries and judicial processes

(b) Training and capacity building in legislative drafting

Challenges faced by small jurisdictions more acute impedes implementation of policies and government legislative programmes

Placement of legal drafters and a 12-week training course in legislative drafting in Africa and the Caribbean

Regular review meetings of heads of drafting offices to review progress on the short course and other capacity-building initiatives

Plans to draw up the Legislative Drafting Manual for Africa and the Model Guidelines for the Pacific States

Gender and the law

Formulation of strategies in law reform, administration of laws and custom

Improved access to justice that recognizes gender and culture

A series of regional colloquia on gender, culture and the law began in 2006

A case law book on international women's rights

Supported a review of CARICOM's model legislation on women's human rights in 2007

Good governance

The Commonwealth (Latimer House) Principles on the Accountability of and Relationship between the Three Branches of Government

An effective framework for the implementation by governments, parliament and judiciaries of the Commonwealth's fundamental values to entrench good governance

Constitutional and administrative law

A regional Seminar on Emergent Issues of Law, with a focus on Constitutional and Administrative law for the Caribbean

Discussed the establishment of the Caribbean Court of Justice and legal issues pertaining to the accession to its appellate jurisdiction, as well as other constitutional issues such as dual nationality among parliamentarians

Legal advice to the Secretariat

Provides in-house legal advice to the Secretariat in a variety of areas relating to international administrative law

Represents the Secretariat at the Commonwealth Secretariat Arbitral Tribunal (CSAT)

OVERVIEW OF THE OUTCOMES FROM THE REVIEW CONFERENCE OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT HELD IN KAMPALA, UGANDA (JUNE 2010) RELEVANT TO COMMONWEALTH STATES

H.E Ms. Mirjam Blaak*

I would like to thank the Commonwealth Secretariat and in particular our Chairperson of this session and host Mr. Akbar Khan, with whom we already had a pleasure of working when he was still in The Hague employed by his Government. We are still missing you Mr. Khan, especially your legal expertise which you so often shared with the various working groups. However, I am aware that you are carrying out an important mandate at the Commonwealth Secretariat, for the benefit of the entire Commonwealth family to which my country belongs and our paths will no doubt continue to cross.

It is a great pleasure for me to address you on the outcome of the Review Conference, which in our view was a great success not only for the Assembly of States Parties (ASP) of the Rome Statute of the International Criminal Court (ICC), but also Uganda and the Court. I hope that most of you who were present and worked very hard to come to consensus on one of the most contentious issues discussed at the Conference, namely the crime of aggression, share similar sentiments of success and optimism for a stronger and functional ICC.

My conclusion is the following: "The Rome Statute was adopted in Rome but was finally completed in Kampala."

I would like to remind all of you of the Kampala Declaration:

States Parties resolved: *to continue and strengthen efforts to ensure full cooperation with the Court in accordance with the Statute, in particular in the areas of implementing legislation, enforcement of Court decisions, execution of arrest warrants, conclusion of agreements and witness protection, and to express their political and diplomatic support for the Court.*[1]

Victims

Whereas the crime of aggression appears to have stolen the show before, during and after the Review Conference, it is not disputed that issues relating to victims' remedies and rights not only featured prominently but also took center stage at the Conference. Every topic tackled had victims as the ultimate beneficiaries of whatever debates, dialogue and decisions taken. In discussing cooperation, all delegates, diplomats, scholars, activists and participants from NGOs emphasized the importance of the apprehension of fugitives in order to bring them to accountability and render justice to the victims. In the same vein, discussions during the stocktaking sessions regretted the sluggish pace of translating the provisions of the Rome Statute intended to give reparations to victims into reality. Most importantly, by holding this meeting in a situation country, the ASP and the Court symbolically went down to the level of the victims. Beyond the academic and legal discussions, the Review Conference gave a face to the Rome Statute and the Court in simple ways such as when victims and delegates shared social events like the delegates' visits organized by No Peace Without Justice preceding the Conference. Another important social event was the football match that brought the Secretary General of the United Nations and our Head of State, H.E. President Yoweri Museveni, to play alongside the victims.

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* Deputy Head of Mission, Embassy of Uganda, Brussels, Belgium.

[1] *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Review Conference, Kampala, 31 May - 11 June 2010* (RC/11), part II, declaration RC/Decl.1, para. 7.

Several academic and legal reviews of the Conference have already been made and there is no shortage of commentaries on what the likely consequences of the post Review Conference will be so I am going to direct myself more towards the practical aspects of how the amendments and resolutions adopted will be translated into reality and how this will impact on Commonwealth countries.

Crime of aggression

For many delegates, settling the unfinished business of July 1998 in relation to the crime of aggression was the crux of the Conference. Whether the outcome in terms of the definition and the exercise of jurisdiction of the crime of aggression is of greater relevance to the Commonwealth States than for others, is in my opinion not the case. We have another seven years of waiting, engaging in political and academic debate and speculation on how this result will impact on the work of the Court. Consequently, we have to decide how best we, as the Commonwealth, are going to use these seven years to ensure that we achieve the desired results in 2017. In my view, the obligations imposed by the adoption of the amendment on the definition of this crime and the conditions for the exercise of jurisdiction holds tremendous significance for all Member States regardless of which region they originate or which type of legal system they follow. This amendment to the Statute will cut across boundaries and invoke debate among both ICC Members States and those States which are still sitting on the fence. Evidently, the adoption of the amendments at the Review Conference presents an opportunity for States Parties to think of new strategies to make the Court more effective. Moreover it also presents new prospects for African countries, for the Commonwealth and all those who played “king maker” at the Conference to renew their determination in the fight against impunity. It is a time for enhanced cooperation between States Parties and the Court, to jointly take the steering wheel which would result in the strengthening the ICC.

Factually speaking, conflict has ravaged quite a respectable fraction of countries belonging to the Commonwealth family. If I start with Rwanda, a recent addition to the family, Burundi, Uganda, Kenya, Sudan (not yet a member but eligible), Pakistan, Zimbabwe (withdrew in 2003), Sierra Leone, to mention but a few, we cannot be proud of our human rights record. The implication of this past is that chances are higher that countries affected by conflict or those, neighbouring conflict-affected-regions, will as a consequence require the presence of peacekeeping forces. One could argue that some countries especially those contributing to peacekeeping forces will, at some stage, have to deal with the crime of aggression and may even be accused of aggression. Even though we have been talking about the crime of aggression for a long time, we all consider the outcome at Kampala to be a major step.

Some skeptics have argued that the adoption of the amendment on the crime of aggression will alienate the Court further from the reluctant States that could have considered joining it. This is not necessarily true because this provision was left in abeyance for 12 years and there was ample opportunity for these States to become parties to the Statute. Based on their sovereign right, they decided to opt out. In my view, we could have postponed the adoption of the definition for the crime of aggression for another 20 years and certain States will not move any closer to the Court.

The fact that the amendment provides that the aggressor State must have accepted the amendment as a condition for it to be subject to the jurisdiction of the Court on the crime of aggression, may ironically serve as an incentive to embrace the ICC. Those countries that may be itching to point fingers at those who they consider to have invaded or violated their territorial integrity could come running to the Court, a positive result that could go a long way in universalization of the Statute. The impact could thus be a double-edged sword that would go either way. Maybe this is what several countries in the Arab world, the Middle East and Asia have been waiting for. If they can be assured that by becoming States Parties, they could benefit by being able to refer perceived aggressors to the Court. This could be the incentive they need to become parties to the Statute.

At present, 34 Members of the Commonwealth family are parties to the Rome Statute. One of the riches we have as a group is that an overwhelming majority of us share the common law legal system which we inherited from the United Kingdom. Having regard to our size which spans several regions of the globe, we need concerted action to start planning to stamp out impunity within our family, and elsewhere. If we put together positive attributes at a forum we have like today, we could become a formidable force that could influence the future of the ICC. The first step would be for us to convince ourselves that the crime of aggression, as Prof. Benjamin Ferencz would put it, is "the mother of all crimes". It violates a people, a nation and goes to the very core of a country's existence. Commonwealth countries and more so African countries should continue to spearhead the fight against impunity like they have done in the past.

The current stand off between the ICC and the African Union (AU) can only be detrimental to the work of Court and Africa does not stand to benefit from it either. To the contrary, it may suggest that certain elements in the African leadership are failing to cooperate in finding solutions to the many problems that have besieged this beautiful continent.

Secondly, we need to convince ourselves that the Court is for us, not against us. We are the Court and if we decide to let it down, then it cannot work. How do we do that? By taking our obligations seriously. By choosing to apprehend those for whom arrest warrants have been issued by the ICC; by putting the victims at the forefront when deciding who to stand by when conflict arises between loyalty to leaders who have turned themselves into perpetrators and victims. If aggressors are isolated, they easily relent. We need to rediscover our common wealth and act as one. We should return to our values as embedded in the various declarations that define us as a family. If we ensured that international peace and security, democracy, human rights, tolerance, respect and understanding, separation of powers, rule of law, freedom of expression, development, gender equality, access to health and education, good governance, civil society as our way of leadership, what reason would we have not to embrace the ICC in totality?[2] We will have no cause to be weary of the ICC Prosecutor or the Security Council. This reminds me of the saying; "The guilty are afraid when no one pursues them." We should only have reservations to the crime of aggression if we act contrary to our fundamental values set out above.

My conviction is that the Review Conference presented us with the opportunity to re-establish our place on the world stage and the battle against impunity. It is time to regroup ourselves. Those of you who were in Kampala will recall that best results to negotiations were achieved in small groups. The permanent 5 had their interests represented, the African block agreed to be a single voice, as did others.

[2] Affirmation of Common Wealth Values and Principles, Declaration of 29 November 2009.

Pledges

Before I start commenting on the stocktaking exercise I would like to comment on the pledges made at the Conference, quite a novelty in the history of the ICC, I dare suggest, and was hugely successful. The Commonwealth could play a significant role in fulfilling some of these pledges. I recognize that some of the commitments made were quite ambitious but at the same time, that is a very good starting point. Since the Director of Secretariat to the ASP is here with us, I am sure that we shall find out how we are going to handle these pledges and what we are going to do with the compilation that has been made. There is a need to follow these pledges through while they remain fresh in the minds of those making the commitments and while good will lasts.

Complementarity

This is possibly the area where the Commonwealth could be most effective by providing education and training of experts, enhancing the Rule of Law and human rights programmes, and more importantly, aiming towards full domestication of the Rome Statute by enacting implementation legislation at national level.

While Model law may be said not to be encouraging, we, on the other hand, need to have some common principles like a list of minimum standards or provisions to implement the Rome Statute.

In order for this programme to succeed, a need may arise requiring that we exercise some caution to the implementation of the Rome Statute uniformly in all countries. As we speak now, there is no indication that the implementation of the Statute can only be fully realized if it is imported wholesale into national legislation. This as I understand is not required by the guiding principles of implementing laws. Secondly, the mimicking of the Rome Statute may not be desirable in certain situations. There is a need for each State to undertake a detailed study, identify areas where national legislation may be inconsistent with the Rome Statute and devise legitimate means of ironing out the differences. It would be absurd if a State lost a case on technicalities just because the homework for domestication of the Statute was not done.

The Uganda situation and complementarity

We completed the draft ICC Bill in 2005 with the help of the Commonwealth Secretariat but it took another five years before Parliament approved it. This was due to delays in tabling this Bill because of the political process invoked by the Juba Peace Talks with the Lords Resistance Army (LRA). Organizations like Parliamentarians for Global Action (PGA) played an important role in informing the members of the Ugandan Parliament in understanding the need for this ICC Bill to be passed and its intricacies. This paved the way for the Uganda Parliament to adopt the Bill on 10 March 2010.

As you may recall the Rome Statute was domesticated in Uganda as the ICC Bill was enacted into law when President Museveni signed the Bill on 25 May 2010. In some quarters it has been said that Uganda has the best implementing legislation possible and should serve as an example to other countries. I like the praises but am also a little apprehensive as I consider the possible consequences of what we did by mimicking the Rome Statute. We adopted the Statute in its entirety and did not stop to think of issues such as participation of victims in criminal trials.

Most of you would, given our common law inheritance find this challenging in terms of procedural management, not to mention the gross financial implications that go with the victim participation scheme. Neither the bench, nor those appearing before it would, for the most part, be familiar with having victims in the courtroom other than in the capacity of witnesses. Had we had more time to reflect on this, we would have realized that while our friends with a civil law system find the participation of victims as *civil parte* common practice, it is alien to the adversarial system that we practice.

Having a blanket model law is not sufficient, one needs to tailor make the law by paying a lot of attention to suit each country as required.

The ideal approach would be to first examine the laws of the particular State Party, before asking for the Statute to be domesticated in a consistent manner and to take cognizance of a national situation. Certainly not: "one size fits all".

Consideration of the following quick questions could act as a guide:

(a) What is the legal system used in the country?

(b) What unique aspects of its legal system does the country wish to uphold and what reforms are necessary to make domestication authentic?

(c) What is the prevailing situation in the given State? Has the country experienced or is experiencing internal strife, have they had a truth and reconciliation commission or traditional mechanisms or other transitional justice mechanisms such as Gacaca in Rwanda?

(d) What does a country hope to achieve, complementarity or merely keeping Mr. Moreno-Ocampo at bay.

(e) State of the economy, what is realistically manageable under the circumstances?

(f) Financial obligations likely to arise out of the new system. Can the country deal with it?

(g) Human Resources: What does a country have, what training is required to bring up to required standard, what else is the country short of?

(h) Actual requirements versus "niceties". New obligations which are alien to the legal system that is used, should be distinguished from absolute requirements. Novelties such as active victims' participation are nice but I dare state that victim's participation is not a necessity but a nicety. One should look at the issues that are legal requirements and within the means of the implementing country.

The Commonwealth could be instrumental in drawing up guidelines for meeting minimum requirements to address the issue of complementarity which in a way was partly done in the model law which was designed in 2004.

The Court has clearly said that they are not obligated to advise States on matters relating to complementarity and that this was the responsibility of the ASP. I suggest, therefore, that we as the Commonwealth family engage in a discussion and come up with guidelines for domestication of the Rome Statute which could eventually be submitted to the ASP.

For example, in Botswana and Namibia, there are at the moment discussions ongoing to suggest that e.g. victims' participation is not necessary but if the country wishes it could include this in their domestic legislation with a delayed entry into force. Since this is an expensive exercise for African countries with little funding available for legal aid and extensive protection of victims, it may be hard and unrealistic for certain countries to adhere to these kind of conditions.

When Uganda was dealing with the problem of how to satisfy the requirements of the ICC, questions were put to the Court. Unfortunately, the response of officials of the Court was negative with some of officials remarking that the Court is neither a development agency nor a donor agency. We explained that we were not seeking to obtain financial contributions to the drafting process but all we needed was some advice on technical matters. This reaction is, however, not surprising if one considers that the Office of the Prosecutor (OTP) itself as well as the Registry, has never internalized this issue and hence actually had no response to the questions raised. In Uganda we had to incorporate a regime and draft special legislation to build up the various bodies that have to deal with the introduction of these new elements.

However, in the light of the policy as expressed by the Court and especially by OTP on "positive complementarity", this matter needs to be handled appropriately. One could wonder indeed whether this ought to be the task or mandate of the OTP or the Registry and if States Parties would like to engage in this process, then it may be wise to let it be handled by the ASP and have a senior legal officer be charged with responsibility for the matter.

At the moment we are all uncertain about the conditions for complementarity, these are rather unknown although we all may have certain ideas about what this should involve.

What is surely required is to have a system available at national level in each State, thus a system that is complementary to the ICC.

I briefly take you back to the Uganda situation and especially some relevant issues regarding an ongoing case of one accused who is currently before the Special War Crimes Division of the High Court in Uganda, and which calls for urgent enhanced cooperation with the OTP. This falls right into the prosecutorial strategy of positive complementarity.

Two major issues in order to succeed with the prosecution of the accused, a well-known LRA perpetrator, called Kwoyello:

(a) Exchange of information and evidence and

(b) Allowing and encouraging ICC witnesses to also appear before our local Court.

The outcome of this process between the OTP and Uganda will be a test case for future situations and if handled properly could be an excellent example of implementing the strategy of the Prosecutor promoting positive complementarity.

The Commonwealth Secretariat should look at this and look at those countries that have domestic legislation in their respective areas and regions and *dialogue with the prosecutors* in different jurisdictions to explore how the laws have been implemented at domestic level. Discussions with prosecutors could be very enlightening. It appears that in some regions it is not at all clear how the law is being applied and whether it is the right one. Prosecutors would be most suited to inform us as to whether certain laws might be impractical. We can learn from their experiences and therefore devise and draft new laws and recommend their implementation in other States.

Training of Members of the Bar and Judiciary in Commonwealth countries will enhance their understanding of the mandate of the ICC. This is another area that the Secretariat could assist with.

The other indirect benefit of highly trained and skilled personnel could be making the *presence of our nationals visible at the Court*. In terms of geographical representation, many countries of the Commonwealth, especially those from the African continent are quite under-represented in the higher positions in the Court and in the Secretariat of the ASP. It is easy for the Court to get away with this anomaly on the basis of lack of qualified individuals. Our basic training in law and investigations is good and what we need is sharpening it a little so that we can compete effectively for jobs at the Court. I believe that our contribution of Staff to the Court ought to supersede our contribution of detainees and accused persons. The Commonwealth Secretariat could with other members in conjunction with e.g. Trinidad and Tobago train our lawyers in drafting implementing legislation of the Statute.

The way forward

There are many ways through which the Commonwealth could help improve cooperation of its Members with the Court. It is crucial that the Secretariat reminds Commonwealth countries which are States Parties, of their obligations and responsibilities in seeing to it that the ICC does not become a "barking dog with no teeth". We need to move from rhetoric to action. In particular, the Commonwealth could play a role in harnessing goodwill and responsibility amongst its members, including its 19 strong African membership.

As I noted at the start, our record in the area of human rights and rule of law has sometimes not been always flattering. But then so are many other recent situations, not on the continent of Africa. However, not all is lost and all indications are that we are on board and determined to do our part. It is our people who have taken the brunt of the evils of civil strife and war and it is high time we resolve to make our countries safer and ensure policies to reduce poverty and provide our peoples with a decent standard of living.

Conclusion

Needless to say stamping out impunity and giving redress to victims of injustice remain the ultimate objectives of the Court. Consistent with the principles that define us and our fundamental values, we should carry the torch forward. As the Rome Statute was completed in a Commonwealth country, Uganda, we should symbolically do whatever it takes to accomplish the goals of the drafters. If all the 54 nations ratify the Rome Statute, we would be closer to achieve universality of the Statute. If all 54 nations enforce their treaty obligations, that will mean an additional 54 countries are out of bounds for perpetrators of crime, another 54 countries where sentences handed down by the Court could be served.

The Commonwealth countries ought to be shining examples of upholding human rights ad the rule of law.

REVIEW OF THE STATUS OF RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE AND OTHER INTERNATIONAL HUMANITARIAN LAW OBLIGATIONS WITHIN THE COMMONWEALTH MEMBERSHIP

Ms. Eva Šurková[*]

It is my great honour to participate at this event on the International Criminal Court organized by the Commonwealth Secretariat and to be included among distinguished speakers, such as the ICC President Song. This is an important initiative for promotion of the Court and its Rome Statute.

First, I would like to commend the Commonwealth Secretariat for its activities regarding the ICC, since it plays an indispensable role in supporting the Court throughout its membership. We have established an excellent cooperation with the Commonwealth Secretariat, in particular with Mr. Akbar Khan, Head of the Legal and Constitutional Affairs Division, which I am sure will continue to the future, as well. I am really thankful for this mutual cooperation and for the opportunity to address topics with regard to my responsibilities as facilitator of the New York Working Group of the Bureau, mainly the issue of promotion of the universality and implementation of the Rome Statute.

I was appointed for facilitator for the Plan of Action for achieving universality and full implementation of the ICC Rome Statute (Plan of Action); my main task is to proactively promote the Rome Statute. On the one hand, its ratification among States that are currently Observers and on the other, its full implementation among States Parties because not only ratification but also its full implementation at national level is needed.

In general, a State's approach towards ratification and implementation of the Statute should reflect the fact that the ICC is not an ordinary international body. It has a special role in confronting "the most serious crimes of concern to the international community as a whole" and thereby to promote international peace and security. Supporting ratification of the Statute remains a cornerstone to making the ICC truly global and universal.

The principle of complementarity is the cornerstone of the Rome Statute system and as such, the less recourse States need to have to the ICC, the more successful one can say the system is, as it would mean that States are the ones investigating and prosecuting the Rome Statute crimes. The prerequisite for such a scenario however is that a State has the crimes duly incorporated into its national legislation.

As far as the universality principle, we see that the regional distribution of States Parties remains mixed, with under-representation in different regions (e.g. Asia, Middle East). As mentioned previously, the Rome Statute was recently ratified by the Seychelles and Saint Lucia, both Commonwealth members, bringing the total number of States Parties to the Statute to 113.[1] Thus, of 54 Commonwealth States, 34 are States Parties to the Rome Statute, which is approximately 1/3 of all States Parties; however 20 did not ratify the Rome Statute, so far. There are still many countries which have not joined the Rome Statute, yet. We should therefore continue in our activities towards identifying obstacles to attain the universality of the Statute and seek adequate means to address them.

[*] Assembly of States Parties Facilitator for the Plan of Action on achieving universality and full implementation of the Rome Statute of the International Criminal Court; Legal Adviser, Permanent Mission of Slovakia to the United Nations.

[1] Africa 31, Asia 15, EEG 17, GRULAC 25 and WEOG 25.

Besides ratification of the Rome Statute, States must work towards full implementation of its mandate. Thus, States have the obligation to incorporate crimes defined by the Statute - genocide, war crimes, crimes against humanity and the crime of aggression (after entry into force of the recently adopted amendment) - into their national penal system in order for the principle of complementarity to be effective.

However, in reality States Parties face several difficulties ensuring that. Indeed, it is not an easy task. It is truly challenging for national legislations to amend existing constitutional systems and to overcome the existing structural, political and legal hurdles. However, need for such implementation is truly urgent for achieving the universal goal of fighting impunity for the most grave international crimes, as well as for strengthening the rule of law.

When it comes concretely to the Commonwealth States, some of the key obstacles leading to non-compliance with the Rome Statute are e.g. down-prioritizing the implementation of the Statute due to other urgent domestic legislative matters. Structural problems of amending the constitutions, as well as immunity for heads of States, parliamentarians and public officials are other factors. The so called “pick and choose” implementing approach, when States choose some concrete provisions/parts of the Statute and implement only them instead all obligations arising out of the Statute, is another element to bear in mind. But the Commonwealth Secretariat and other stakeholders are here to offer States assistance and tools on how to overcome these hurdles.

We will deal with these topics in more details within the topic “Strategies for promoting ratification and implementation of the Rome Statute in Commonwealth States: lessons learned and challenges for the future”.

Mr. Leonard Blazeby*

The International Criminal Court (ICC) Statute requires States to undertake national legal measures to ensure they can meet the obligations that arise from the Statute. States may also consider the adoption of domestic law incorporating the crimes of the Statute.

Of the 34 Commonwealth States that have become party to the ICC Statute, only 11 have put in place domestic legislation to deal with the subject matter of the Statute. Rwanda has also incorporated penal provisions of the Statute but has not adhered to the Statute. Each State has dealt with the Statute in a different way. While some States have to a large extent followed the content of the Commonwealth Model law, others have been selective in the areas they cover.

Interestingly, the Statute does not explicitly require States to put in place domestic law to incorporate the core crimes under the Statute, crimes against humanity (CAH), genocide and war crimes, however, it is important when implementing the ICC Statute that States consider implementing these core crimes into domestic law, especially since the intention of the drafters of the Statute is to end impunity and this can be done most effectively by having a mechanism to prosecute domestically. As the Court focuses on the prosecution of the most serious crimes and most serious offenders, a lack of appropriate national law may lead to the situation where some violators may escape prosecution as a result. Further, the principle of complementarity, whereby national prosecution has primacy over the Court, means that the ICC will only prosecute if a State is not willing or able to prosecute. The absence of national law on the core crimes could be seen by the Court as an inability to prosecute.[1]

This paper will look at the efforts by Commonwealth States to incorporate the ICC Statute into their domestic legal framework, focusing in particular on the incorporation of the crimes, jurisdiction and general principles of criminal law as well as mentioning the cooperation requirement.

Implementation of the ICC crimes

All of the 12 implementing States have included the incorporation of at least some of the crimes into their domestic law. Most have undertaken this task in the simplest way, that is, to make reference to the crimes in the Statute as set out in articles 6 - 8 and to annex the Statute. Cyprus, Kenya, New Zealand, South Africa, Trinidad and Tobago and the UK have all incorporated the crimes in this manner. Malta refers to its Criminal Code where the crimes from the Statute are replicated. Some States have also not limited themselves to the crimes as reflected in the Statute and have added other crimes, such as other violations of the Geneva Conventions and Protocol I, which do not appear in the Statute. Some States have even incorporated the Statute's elements of crime.[2]

Some States have implemented the ICC crimes in a form other than by reference to the Statute followed by an annex. Australia has implemented the ICC crimes in a unique way for common law States, its ICC (Consequential Amendments) Act, adds over 160 provisions to the Criminal Code Act 1995. The Act is amended by adding a new Division by way of 7 schedules. The Director of Public Prosecutions Act is also amended as is the 1957 Geneva Conventions Act repealing Part II of the Act on punishment of offenders and other relevant Acts.

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* Legal Adviser, Advisory Service on International Humanitarian Law, International Committee of the Red Cross (ICRC).

[1] Rome Statute of the International Criminal Court, article 17.

[2] See Australia, Criminal Code Act 1995.

In its substance, the incorporation of the crimes is very detailed, reflecting precisely the five offences of genocide in the elements of crime, the specific offences of CAH and the individual elements. Note here that in the crime of torture, there is no specific requirement of infliction of pain or suffering for CAH but there is for war crimes. The section relating to war crimes omits article 8 (2) (b) (xx) of the Statute on weapons because it refers to an annex which is void. Malta also omits this section. The Act also adds the Grave Breaches provisions of Protocol I that are not contained in the ICC Statute- subjects such as performing unwarranted medical procedures, removal of blood, tissue or organ for transplantation, attacks against dangerous forces, unjustifiable delay in repatriation of POWs and apartheid.

Canada and Samoa have implemented the crimes by consolidating the offences of genocide, crimes against humanity and war crimes into national law, though they go further than the Statute in including those acts or omissions that at time of commission were crimes under customary as well as treaty law and criminal according to the general principles of law recognised by the community of nations. The term 'war crime', for example, is defined in the Canadian Act as follows: '"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission'. The Samoan law uses essentially the same wording. The Canadian Act goes on to annex articles 6-8 of the ICC Statute.

Fiji incorporated Genocide and CAH into their Crimes Decree 2009 but did not include war crimes as these are dealt with by its Geneva Conventions Promulgation.

The Rwandan law is, in turn, a hotchpotch of offences based on the ICC Statute, albeit with notable omissions and with the addition of certain grave breaches such as collective punishments and other serious violations that do not appear in the Statute (N.B. Rwanda is not a party to the ICC Statute).

In terms of the elements of crime, Australia has implemented both the crimes and their elements into the Criminal Code. Fiji incorporates the elements of crime for genocide and CAH only. The New Zealand law allows judges to make reference to the ICC's Elements of Crime as adopted by the Assembly of States Parties in accordance with article 9 of the Statute, as do the Kenyan and Cyprus laws. The same elements of crimes were incorporated into British law by the International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001. The instrument follows the form of articles 6, 7 and 8 of the Rome Statute and sets out the details of each of the crimes. It implements the finalized draft text of the Elements of Crimes by the Preparatory Commission for the International Criminal Court (PCNICC/2000/1/Add.2). None of the other domestic laws refer to the elements of crime specifically.

Jurisdiction

It is also important for States to determine what bases of jurisdiction should be used for prosecution of the crimes. Other than the well-established territorial and active personality principles, many States have incorporated some form of extra-territorial jurisdiction including some form of universal jurisdiction either unconditional or with a link (usually presence of the accused) in the territory of the prosecuting State. There is a strong argument for providing universal jurisdiction for the crimes of the ICC in domestic law on the basis that grave breaches require universal jurisdiction, flowing from the Geneva Conventions, and it would therefore be contradictory for there to be a narrower jurisdiction attached to the same offences

in an Act incorporating the ICC Statute. It should also be kept in mind that most Commonwealth States possess Geneva Conventions Acts which generally include universal jurisdiction for the punishment of offences.

There are examples of these various types of jurisdiction in the domestic law enacted by Commonwealth States. The jurisdictional basis in Kenya's law for example takes the common stance in establishing that a person may be tried if the act or omission is committed in Kenya or, at the time of the offence, the suspected offender was a Kenyan citizen or was employed by the Government of Kenya, or the person was a citizen of a State engaged in armed conflict against Kenya, or was employed by such State. The offence may also be prosecuted if the victim was a Kenyan citizen, or the suspected offender is, after commission of the offence, present in Kenya. Canada, Samoa and South Africa use a similar jurisdictional basis.

Other States have gone to one of the two extremes. To one end, the Fiji Act applies a restrictive form of extra-territorial jurisdiction and the Maltese Act restricts its jurisdiction to offences committed by Maltese citizens and refers to the domestic criminal code for penalties. The UK is similar in that there is extra-territorial jurisdiction only if the offence is committed by a United Kingdom national or resident, or a person subject to UK service jurisdiction.[3] At the other end of the spectrum, the legislations of Australia, New Zealand, Cyprus and Trinidad and Tobago use universal jurisdiction in a wider manner - where the offender need not to have committed offence in the State or be present when decision to prosecute arises, (e.g. New Zealand Act article 8 2 (c)).

Another aspect to be taken into account is the temporal jurisdiction for prosecution and whether to make the law prospective or retrospective. There is an argument for retrospective jurisdiction in that article 15 (2) of the International Covenant on Civil and Political Rights, which allows for the trial and punishment for committing an act 'criminal acceding to the general principles of law recognised by the community of nations'[4]. As the core crimes can be seen as falling under the category of crimes outlined in article 15 (2), retrospective jurisdiction for these crimes to the point where they were considered crimes under international law would be permissible[5]. New Zealand and Canada have made their legislations retrospective, but on different bases. Canada uses retrospective jurisdiction for crimes committed within Canada as well as for those committed outside and New Zealand in its Act allows for retrospective jurisdiction for genocide and CAH but not for war crimes, although war crimes have been punishable since the enactment of the Geneva Conventions Act in 1958. Samoa has 1 July 2002 as the commencement date and most other States that have addressed the issue[6] have made the law prospective.

[3] This means: 'a person subject to military law, air force law or the Naval Discipline Act 1957 (c. 53); any such person as is mentioned in section 208A or 209(1) or (2) of the Army Act 1955 (c. 18) or the Air Force Act 1955 (c. 19) (application of Act to passengers in HM ships and aircraft and to certain civilians); or any such person as is mentioned in section 117 or 118 of the Naval Discipline Act 1957 (application of Act to passengers in HM ships and to certain civilians).

[4] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

[5] See Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court, Marlborough House London, 7 - 9 July 2004.

[6] Australia, South Africa, UK.

It is also vital that the concept of responsibility of commanders and other superiors[7] is catered for in domestic law. Each Commonwealth implementing legislation, with the exception of Cyprus, makes reference to this concept, generally reproducing the wording of the Statute. The incorporation of command responsibility is particularly important because, although the duty of commanders is mentioned in Protocol I Additional to the 1949 Geneva Conventions,[8] the prior absence of express reference to the criminal responsibility of commanders in domestic legal regimes has restricted the possibilities for prosecution of war crimes.

Another important concept is that there be no Head of State immunity from prosecution. Some Commonwealth implementing legislation makes express reference to this, (Kenya, New Zealand, Rwanda, Samoa, South Africa, Trinidad and Tobago, and the UK), however there is no mention of it in the other Acts.

A domestic ICC law also requires States to be able to prosecute the administration of justice offences, which are found in article 70 of the Statute. Usually, States list each sub paragraph of article 70 in the domestic Act[9]. Seven of the Commonwealth States have implemented these offences into their national law.

Cooperation

States must also provide for cooperation with the Court and this involves sections covering a range of issues such as requests for assistance from the Court, arrest and surrender of persons to the ICC, assistance in the taking of evidence and the protection of witnesses and victims, and the enforcement of sentences and orders of the ICC in the State. There is also need to provide for the sitting of the ICC in the territory of the State and the legal status, privileges and immunities of ICC officials. Of the States that have implementing legislation for the Statute, ten have provided for cooperation with the Court.[10] In most cases the Commonwealth Model law has been followed in terms of the cooperation elements.

We can see from this analysis that those States that have undertaken the task of national legal implementation of the ICC Statute have incorporated the majority of the topics of the Statute and in doing so some States, such as Kenya, Samoa, South Africa and Trinidad and Tobago have faithfully followed the existing Commonwealth Model law. In terms of the incorporation of the crimes and ancillary matters it is interesting to note the addition, in some pieces of legislation, of crimes outside of those mentioned in the ICC Statute, as well as the use of universal jurisdiction. For those that have undertaken the task, the cooperation provisions have generally been translated fully.

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[7] See article 28 of the ICC Statute.
[8] Article 87.
[9] See Samoa International Criminal Court Act 2007, Act no. 26 of 2007. Other States that have reference to these offences are Canada, Fiji, Kenya, Malta, New Zealand, South Africa, Trinidad and Tobago and the UK.
[10] Australia, Canada, Kenya, Malta, New Zealand, Samoa, South Africa, Trinidad and Tobago and the UK. Mauritius has a law which covers cooperation issues (Mutual Assistance in Criminal and Related Matters Act 2003).

SHARING BEST PRACTICE IN THE COMMONWEALTH

Presentations by individual Commonwealth States of their domestic experience of ratification and implementation of the Rome Statute

Ms. Annemieke Holthuis*

Ratification and implementation of the Rome Statute: the Canadian framework**

Points covered

Instrument and method of ratification

Core crimes, jurisdiction and application

Consent to Prosecute, Defences, Immunities

Administration of justice and other offences

International cooperation, including enforcement of sentences, fines and orders

Penalties and other amendments of note

Crimes Against Humanity and War Crimes Act (CAHWCA)

Assented to June 29, 2000 and as amended

No safe haven for serious breaches of international criminal law

Comprehensive legislative approach to implement the Rome Statute

Amended other Acts, as needed

- Criminal Code
- Citizenship Act
- Corrections and Conditional Release Act
- Extradition Act / Mutual Legal Assistance in Criminal Matters Act
- State Immunity Act
- Witness Protection Program Act
- Application of the Proceeds of Crime provisions of the Criminal Code and amendments to Seized Property Management Act

Core crimes, jurisdiction and application

Genocide, war crimes, crimes against humanity established as indictable offences in accordance with Rome Statute definitions, with some modifications

Distinguish between offences within Canada and outside Canada

- Prospective and retrospective application ss. 4(3),(4), 6(4),(5)
- Extraterritorial jurisdiction - universal jurisdiction, with link to Canada

* Counsel, Criminal Law Policy Section, Department of Justice, Canada.
** Power Point presentation.

Core offences reference similar crimes

In any convention to which Canada is a State Party;

Conduct that at the place and time of its commission constitutes such a crime according to customary international law; or

Conduct that is criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, (s. 4(3), CAHWCA)

Additional modes of participation - conspiracy, attempt, accessory, counselling to commit such offences

Consent to Prosecute, Defences, Immunities

Act binding on the Crown

No immunity for persons subject to surrender to ICC or other listed international criminal tribunals (s.6.1, Extradition Act)

Requirement for the personal consent in writing of the Attorney General or Deputy Attorney General of Canada

Director of Public Prosecutions to conduct most prosecutions

Proceedings conducted in accordance with laws of evidence and procedure at time of commission of the offence and applicable Charter safeguards

No defence of conformity with internal law (s. 13)

A limited defence of superior orders (s. 14)

Ability to plead autre fois acquit, autre fois convict or pardon limited where proceedings used to shield person from criminal responsibility or where proceeding not conducted independently or impartially (s. 12, s. 45)

Administration of justice and other offences

Breach of responsibility by military and other superiors in and outside Canada (ss. 5, 7)

Differing mental elements

Administration of justice offences expressly created

Obstructing justice or officials of the ICC (ss. 16, 17)

Bribery of ICC judges or officials (s. 18)

Perjury, contradictory statements, fabrication offences (ss. 19, 20, 21, 22)

Intimidation of persons in relation to ICC proceedings and retaliation against witnesses (ss. 23, 26)

For citizens, acts or omissions outside of Canada deemed to have been committed in Canada (ss. 25, 26)

Application of conspiracy and other modes of participation

Penalties and other amendments of note

Penalties - if intentional killing forms the basis of the offence, then a mandatory minimum penalty of life imprisonment applies (otherwise a maximum penalty of life imprisonment) - ss. 4(2), 6(2)

Breach of responsibility - liable to life imprisonment

Administration of justice offences - differing penalties

Parole eligibility based on the above distinction, previous core crimes convictions and time served - s. 15

Impact on grants of citizenship for persons under investigation for or conviction of CAHWCA offences (Citizenship Act)

Provisions permitting witness protection agreements with the ICC (Witness Protection Program Act)

International cooperation

Amendments to the mutual legal assistance and extradition regimes

ICC designated as an extradition partner

Certain special procedures relating to ICC extradition requests

Longer period before discharge if no proceedings instituted - s. 14(2), Extradition Act

Reverse onus on bail and recommendations from ICC as to release - s. 18, Extradition Act

Extension of time at the submissions stage - s. 40(5), Extradition Act

Ministerial grounds for refusal to extradite do not apply - s. 47.1, Extradition Act

Unscheduled landing provisions - s. 76, Extradition Act

Mutual Legal Assistance in Criminal Matters Act (MLACMA)

To restrain, seize proceeds of crime - s. 9.1

Enforce orders for reparation, forfeiture or fines - s. 9.2

Establishment of Crimes Against Humanity Fund - s. 30

Requests for various investigative measures - s. 10, 11ff

Mr. Koteswara Rao[*]

Seychelles ratification and implementation of the Rome Statute[**]

Singed the Rome Statute on 20 December 2000, though not participated in the Plenipotentiary Conference of Rome in June-July 1998.

Signed a bilateral agreement in 2003 with the USA not to surrender its nationals to the ICC

Reluctance to go ahead with ratification of the Rome Statute for it might conflict with the obligation undertaken with the USA.

Questions raised about why major countries like the USA, China, Russia India, etc., not signed or ratified

National Assembly debate on 13 July 2010. The Leader of Government Business stated that each country has its own reasons not to ratify. For example: USA: would not allow its nationals to be tried by international courts for due process of law concerns;

India: doubts about the Security Council Role in the judicial process.

Become party to the Cotonou Agreement

Amendment of 2005 obliges States Parties to 'seek to take steps' to ratify and implement the Rome Statute.

Agreement with the USA: Conflicts with the Rome Statute

Article 98(2) of the Rome Statute;

Conflict of Obligations; Consent of the sending State required to surrender its nationals to ICC.

Is ICC capable of punishing piracy?

Esp., the aspects of taking of sailors as hostages and demanding ransom and aspects of organized crime.

Constitutional requirement to submit to the National Assembly

Article 64(4) requires approval of the National Assembly for international treaties by way of an Act or Resolution.

[*] Legal Adviser, Ministry of External Affairs, Seychelles.
[**] Power Point presentation.

Submitted to the National Assembly on 13 July 2010

National Assembly unanimously approved ratification proposal upholding the principle of ending of impunity, etc;

Reference was also made to obligations as an African Union member;

Sudan President Al-Bashir case;

Kenya Elections and ICC, etc.

Implementation: a huge task

Lack of legal draftsmen;

Complementarity: Revision of Crimes and Criminal Procedures;

Cooperation with ICC/OTP: Provisions to cooperate under Part 9 of the Rome Statute.

Mr. S.S. Chahar*

The International Criminal Court commonly referred to as the ICC is a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression (although it cannot currently exercise jurisdiction over the crime of aggression).

The creation of the ICC perhaps constitutes the most significant reform of international law since 1945. It gives teeth to the two bodies of international law that deal with treatment of individuals: human rights and humanitarian law.

The Court came into being on 1 July 2002—the date its founding treaty, the Rome Statute of the International Criminal Court, entered into force—and it can only prosecute crimes committed on or after that date. The official seat of the Court is in The Hague, Netherlands, but its proceedings may take place anywhere. As of August 2010, 111 States are members of the Court. Seychelles and Saint Lucia will become the 112th and 113th States Parties on 1 November 2010 after they both ratified the Rome Statute in August 2010. A further 35 countries, including Russia and the United States have signed but not ratified the Rome Statute. A number of States, including China and India are critical of the Court and have not signed the Rome Statute. The ICC can generally exercise jurisdiction only in cases where the accused is a national of a State Party, the alleged crime took place on the territory of a State Party, or a situation is referred to the Court by the United Nations Security Council. The Court is designed to complement existing national judicial systems: it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes. Primary responsibility to investigate and punish crimes is therefore left to individual States.

To date, the Court has opened investigations into five situations: Northern Uganda, the Democratic Republic of the Congo, the Central African Republic, Darfur (Sudan), and the Republic of Kenya. The Court has indicted sixteen people; seven of whom remain fugitives, two have died (or are believed to have died), four are in custody, and three have appeared voluntarily before the Court.

The ICC's first trial, of Congolese militia leader Thomas Lubanga, began on 26 January 2009. On 24 November 2009 the second trial started, against Congolese militia leaders Germain Katanga and Mathieu Ngudjolo Chui.

Membership

As of August 2010, 113 countries have joined the Court, including nearly all of Europe and South America, and roughly half the countries in Africa. The Seychelles and Saint Lucia will become the 112th and 113th States Parties on 1 November 2010; the Seychelles ratified the Statute on 10 August 2010, and on 18 August 2010, Saint Lucia delivered its instrument of ratification of the Rome Statute to the UN Secretary General.

A further 35 States have signed but not ratified the Rome Statute; the law of treaties obliges these States to refrain from “acts which would defeat the object and purpose” of the treaty. Three of these States—Israel, Sudan and the United States—have "unsigned" the Rome Statute, indicating that they no longer intend to become States Parties and, as such, they have no legal obligations arising from their signature of the Statute.

* Joint Secretary and Legal Adviser, Department of Legal Affairs, Ministry of Law and Justice, India.

Jurisdiction

Crimes within the jurisdiction of the Court

Article 5 of the Rome Statute grants the Court jurisdiction over four groups of crimes, which it refers to as the "most serious crimes of concern to the international community as a whole": the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The Statute defines each of these crimes except for aggression: it provides that the Court will not exercise its jurisdiction over the crime of aggression until such time as the States Parties agree on a definition of the crime and set out the conditions under which it may be prosecuted. In June 2010, the ICC's first Review Conference in Kampala, Uganda expanded the definition of "crimes of aggression" and the ICC's jurisdiction over them. The ICC will not be allowed to prosecute for this crime until at least 2017.

A Review Conference was due to take place in the first half of 2010. Among other things, the Conference will review the list of crimes contained in article 5. The final resolution on adoption of the Rome Statute specifically recommended that terrorism and drug trafficking be reconsidered at this Conference.

Territorial jurisdiction

During the negotiations that led to the Rome Statute, a large number of States argued that the Court should be allowed to exercise universal jurisdiction. However, this proposal was defeated due in large part to opposition from the United States. A compromise was reached, allowing the Court to exercise jurisdiction only under the following limited circumstances:

(a) Where the person accused of committing a crime is a national of a State Party (or where the person's State has accepted the jurisdiction of the Court);

(b) Where the alleged crime was committed on the territory of a State Party (or where the State on whose territory the crime was committed has accepted the jurisdiction of the Court); or

(c) Where a situation is referred to the Court by the UN Security Council.

Temporal jurisdiction

The Court's jurisdiction does not apply retroactively: it can only prosecute crimes committed on or after 1 July 2002 (the date on which the Rome Statute entered into force). Where a State becomes party to the Rome Statute after that date, the Court can exercise jurisdiction automatically with respect to crimes committed after the Statute enters into force for that State.

Complementarity

The ICC is intended as a Court of last resort, investigating and prosecuting only where national courts have failed. Article 17 of the Statute provides that a case is inadmissible if:

"(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court."

Article 20, paragraph 3, specifies that, if a person has already been tried by another Court, the ICC cannot try them again for the same conduct unless the proceedings in the other Court:

"(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

Victim participation and reparations

One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court.

Article 43(6) establishes a Victims and Witnesses Unit to provide "protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses." Article 68 sets out procedures for the "Protection of the victims and witnesses and their participation in the proceedings." The Court has also established an Office of Public Counsel for Victims, to provide support and assistance to victims and their legal representatives. Article 79 of the Rome Statute establishes a Trust Fund to make financial reparations to victims and their families

Reparation for victims

For the first time in the history of humanity, an international court has the power to order an individual to pay reparation to another individual; it is also the first time that an international criminal court has had such power.

Pursuant to article 75, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. On this point, the Rome Statute of the International Criminal Court has benefited from all the work carried out with regard to victims, in particular within the United Nations.

Agreement on the crime of aggression in the ICC Review Conference

From 30 May to 11 June 2010 around 4000 State delegates to the Assembly of States Parties of the International Criminal Court and civil society representatives from all over the world gathered at the scenic Speke Munyonyo resort on Lake Victoria in Kampala, Uganda, for the biggest gathering ever held in international justice. At stake was a renegotiation of the Rome Statute of the International Criminal Court which had come into force in 2002 and was due to be reviewed in seven years. Two heads of State (Uganda and Tanzania), as well as the former and current Secretary General (Kofi Annan and Ban Ki-moon) were also in attendance, as well as many senior officials from the ICC itself and from other courts and tribunals, including the Special Court for Sierra Leone.

Due to civil society pressure on the Assembly of States Parties, the formal agenda of the Conference included two days to "stock-taking" the progress of the International Criminal Court. Stock-taking covered four crucial areas: (1) its impact on victims and affected communities; (2) peace and justice; (3) complementarity (the ability of the national courts to try Rome Statute crimes); and (4) cooperation. Except for the topic of peace and justice, the stock-taking resulted in general resolutions by the Assembly of State Parties in each of these areas. More importantly, the time taken for stock-taking reflected the ongoing political commitment and support of States Parties for the work of the ICC.

However, most of the negotiations were dedicated to the crime of aggression and whether it should be included in the ICC Statute. At the beginning of the Conference, it was not clear that agreement between the States Parties would be reached. The issue of aggression was very contentious. While a Working Group had agreed a definition of aggression, the main disagreement was about how the Court could assume jurisdiction (i.e. the "trigger mechanism"). The United States, represented at the Conference by a delegation of around 20 lawyers although it is not a State Party, took the position that aggression should not be included in the Statute. Other permanent members of the Security Council such as France and the United Kingdom indicated that jurisdiction should only be triggered by the Security Council, whereas many other States, including States from Latin America and Africa, supported other ways of triggering the Court's jurisdiction, such as a Pre-Trial Chamber decision.

Contrary to expectations, agreement on the issue of aggression was reached in the very final moments of the Conference, at midnight of the last day. A definition of aggression was adopted which reads as follows:

"The "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[1]

The definition of acts of aggression follows an earlier definition by the General Assembly in a 1974 resolution.

[1] *Official Records … Review Conference … 2010* (RC/11), part II, resolution RC/Res.6, operative paragraph 1.

However, the remainder of the provisions on how the crime of aggression will come into force and how it will operate are highly complex. The jurisdiction of the Court will only commence once it is reviewed by the Assembly of State Parties in 2017 and approved by 7/8ths of them. After that time, amendments to the Statute still need to be ratified by thirty States, and there are other limitations on the Court exercising its jurisdiction. In particular, it is not able to do so in respect of non-States parties or States Parties who have lodged a declaration saying they are not willing to accept the jurisdiction of the Court over aggression. In other cases, if the Security Council has made a determination of aggression, the Prosecutor can proceed. Even where the Council has not, the Prosecutor can still proceed subject to Pre-Trial Chamber approval and as long as the Security Council does not seek to defer the issue. Even though the provisions are cumbersome, the inclusion of aggression in the Statute is historic and will enable the first prosecutions for waging aggressive war since the Second World War.

Some of the world's largest and most powerful countries, including China, India, Russia and the United States, have not joined. And it will remain so until at least 2017.

This is partly because what constitutes the crime of aggression has been a long-running source of contention in international law. After nearly one decade of discussion, 111 countries that are parties to the Rome Statute have reached an agreement on the definition of the crime of aggression.

The resolution adopted at the end of the two-week-long ICC Review Conference in Kampala, Uganda, on June 11, defines the crime of aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

It remains to be seen in how far this definition will prove its mettle. But it was agreed that blockades of ports or coasts of a State by armed forces of another State, as well as an invasion or attack by troops of one State on the territory of another, will be considered as acts of aggression under the Statute.

States Parties also agreed that the ICC can exercise jurisdiction over crimes of aggression, but only over those committed one year after 30 States Parties have ratified the newly-made amendment.

According to the UN, this will not happen until at least 2017, when States meet against to review the amendment, according to the new resolution adopted in the Ugandan capital.

However, the Kampala resolution noted that if the ICC Prosecutor wishes to move forward with an investigation of possible cases, he or she will take the case to the UN Security Council. Once that body has determined that an act of aggression has taken place, the Prosecutor will move forward with a probe.

India and the International Criminal Court

India did not want the ICC to have "any inherent or compulsory jurisdiction" that infringes national sovereignty. It is felt that the ICC jurisdiction should be "complementary or supplementary to the primary jurisdiction of nation states" and should not interfere into something that "is before the national courts, or decided upon, or the accused has been convicted or acquitted". India has also spoken about the fear of political influence on court's functioning. It was also felt that the absence of an agreed definition of crimes of aggression and terrorism limits the authority of ICC.

Initially, many States wanted to add terrorism and drug trafficking to the list of crimes covered by the Rome Statute; however, the States were unable to agree on a definition for terrorism and it was decided not to include drug trafficking as this might overwhelm the Court's limited resources. India lobbied to have the use of nuclear weapons and other weapons of mass destruction included as war crimes but this move was also defeated. India has expressed concern that "the Statute of the ICC lays down, by clear implication, that the use of weapons of mass destruction is not a war crime. This is an extraordinary message to send to the international community." Some commentators have argued that the Rome Statute defines crimes too broadly or too vaguely. For example, China has argued that the definition of 'war crimes' goes beyond that accepted under customary international law.

India, it may be remembered, has neither signed nor ratified the Rome Statute establishing the Court because of what it saw as double-standards and the Court's reluctance to criminalize wars of aggression and the use of weapons of mass destruction. According to some commentators, India's position has been vindicated in the Review Conference. According to them, its members represent just over one quarter of the world's population: India, China, Russia, the United States, Indonesia and Pakistan are just some of the many countries that have remained outside the Court's jurisdiction.

India was an early supporter of the United Nations and other international institutions, but, over the years, it did not see the ICC playing a role in the fight against international terrorism.

Nonetheless, the Statute creating the ICC contains many legal standards "that could be useful for civil society in India to strengthen the domestic legal system through law reform initiatives, including provisions on reparations and protection of victims". It is also recommended to have a federal police system for India to tackle crimes that raise issues of jurisdiction between the States and between the State and the Union Government.

Concluding remarks

India was one of many countries which were actively involved in drafting the Rome Statute, the treaty that established the ICC. India has, however, not ratified the treaty, joining other countries such as China and the U.S. India recognizes that mass crimes are crimes against humanity and that genocide and persecution are serious crimes. The Indian Penal Code is fairly comprehensive and India has an independent judiciary. A universal acceptance of the Court is necessary, and India, as one of the world's largest democracies would like to play a more prominent role on the world stage and can help develop International Law against mass crimes.

The functioning of any court or tribunal can only be furthered if we promote better knowledge of and compliance with the laws of war and other principles of international humanitarian law.

If one is truly seeking a strong and effective International Criminal Court, then the question raised by some of the countries, their domestic concern and interest, the question raised about sovereignty of responsible governments and the apprehension that their military personnel or political leaders may be targeted for criminal investigation and prosecution may have to be addressed.

The ICC may be looked as a Standard-Setting Mechanism from which inspiration can be drawn to strengthen the domestic legal machinery and engaging with law reform initiatives.

We may conclude with a hope that all these efforts will, if not eliminate, considerably reduce serious violation of human rights and bring some relief for victims.

Mr. Edward Antony Gomez*

The Republic of the Gambia sincerely believes that the establishment of the ICC is a major step forward for international law and brings the world closer the ending impunity for those accused of committing atrocities.

It is our belief as a people that the ICC will ensure that individuals whether acting in the name of State or for themselves who are believed to have committed genocide, crimes against humanity, war crimes and crime of aggression do not do so with impunity. The ICC is therefore not only a viable but an essential step towards international justice. It is also a gift of hope for future generations and a giant step towards universal human rights and the rule of law. In fact as evidence of our firm belief in the ICC, our illustrious daughter and former Attorney General and Minister of Justice of Gambia, Mrs. Fatou Bensouda, is now serving as deputy chief prosecutor of the ICC.

It is with conviction and recognizing the fact that the Statute of ICC is a culmination of years of efforts and resolve of the International Community to ensure that those who commit grave crimes do not go unpunished that my country, the Gambia in 2002 ratified the Rome Statute.

Our experience as a people on the ratification of the Rome Statute is not unique. It is the same as in other parts of the globe.

Concerns and skepticism have been raised on methods of enforcing the area of law particularly laws of war and crime of aggression. Other questions raised on the establishment of the ICC include:

(a) What the Court can do?

(b) Who will appoint the judges?

(c) Who can be tried?

(d) What crimes are included?

(e) What sentences can be handed down?

(f) Can past crimes be tried? and

(g) Where should ICC prisoners serve their sentences?

However sensitization of the concept and the Statute has positively changed the perception of the Gambia public. In particular, the fact that the ICC will not detract from Gambia's capacity to try its own people, but rather will add an extra, and in most cases optional, lawyer to the process, is of great interest to the Gambia public.

Myself, being a strong advocate and protagonist of human rights prior to my appointment as Attorney General and Minister of Justice, hosted a radio program known as "know your constitutional rights" which was sponsored by the Embassy of the United States of America in the Gambia, during which Gambian citizens were sensitized concerning their constitutional rights in both English and local languages.

I have also attended the recent Review Conference on the overview of the Rome Statute of the ICC in Kampala and made significant contributions amongst other things in trying to agree on what constitute a crime of aggression.

* Attorney General and Minister of Justice of the Gambia.

Furthermore, in the quest of ensuring the preservation or protection of human rights of our people, I have established and ensured maintenance of a functional human rights unit in the Ministry of Justice. We are also on the verge of incorporating the Rome Statute which we have ratified into our domestic law.

The Commonwealth model law and practical guide to prosecuting ICC crimes developed by the Commonwealth Experts working group in 2004 and produced in 2005 is a step in the right direction. Let me hasten to add that one of the key areas that dominated deliberation of participants during the ICC Review Conference that took place in May/June in Kampala was the definition ascribed to ICC crime of aggression and consequential sentences that follows on conviction.

This august meeting which is aimed at considering broad areas of Commonwealth model law and its practical guide including the desirability of updating or revising it is not only desirable but timely. The Gambia wishes to associate itself with these efforts and will participate fully in the deliberation.

One of the challenges on the implementation of the Rome Statute is conflict with domestic laws, particularly on sentences prescribed by most of the ICC crimes. For instance apart from offences involving the killing of a human being, sentences prescribed for other ICC crimes conflict with sentences prescribed for offences with similar definition under the domestic penal laws, in our case the Crime Code. It is gladdening to note that most of these conflicts have been resolved in the Commonwealth model law by providing options consistent with domestic laws of individual State for consideration.

On behalf of the Government and people of the Gambia, I wish this gathering a fruitful deliberation.

Ms. Gaitree Jugessur-Manna*

Mauritius was a participant to the Assembly of Plenipotentiaries in Rome in 1998 and it signed the Statute of the International Criminal Court on 11 November 1998. On 5 March 2002, Mauritius ratified the Statute and became the 53rd State Party to the Rome Statute.

Mauritius has, on numerous occasions at international fora, including at the ICC Review Conference this year in Kampala, reiterated its unconditional commitment to the ICC and to combating impunity for grave human rights violations.

States Parties are required to ensure that there are procedures available under their national law for all of the forms of cooperation. Lack of such mechanisms may be construed as inability or unwillingness to exercise jurisdiction over a perpetrator found on the territory of a State Party.

It is therefore important that Mauritius be in a position to fully honour its obligations under the Rome Statute. This can only be done by the enactment of implementation legislation.

A draft International Criminal Court Bill is being finalised by the Attorney General's Office and is being circulated for comments among concerned Ministries before being presented to Cabinet shortly. It is expected that the Bill will be introduced in the Assembly before the end of the year.

The main objects of the Bill are to:

(a) Provide for the effective implementation of the Rome Statute of the International Criminal Court in the laws of Mauritius;

(b) Provide for the jurisdiction of our Courts to try persons charged with international crimes;

(c) Prescribe the procedure for the surrender of persons to the ICC and for other forms of cooperation with that body; and

(d) Lay the legal foundation to enable the accession by Mauritius to the Agreement on the Privileges and Immunities of the ICC (APIC).

The Bill will not only enable Mauritius to honour its international obligations and exercise criminal jurisdiction over those responsible for international crimes, thereby rendering justice to the victims of such heinous crimes, but will also enhance international cooperation in relation thereto.

The APIC is independent from the Rome Statute and is vital for the independent and effective functioning of the ICC. Thus Mauritius intends to accede to the APIC shortly after the enactment of the ICC Act.

It is to be noted that Mauritius intends to seize the opportunity also to provide its implementing legislation for the amendment relating to the extension of the criminalisation of the use of certain weapons to situations of armed conflicts not of an international character (article 8 of the Rome Statute); this amendment was adopted at the Review Conference.[1] Mauritius will therefore also be in a position to accept/ratify this amendment once the ICC Bill has been enacted.

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* Assistant Solicitor General, Attorney General's Office, Mauritius.

[1] *Official Records … Review Conference … 2010* (RC/11), part II, resolution RC/Res.5.

In order to fully implement the Rome Statute, legal training and non-legal technical expertise and assistance will be required for: (a) the police force; (b) relevant government departments; (c) prosecuting authorities; and (d) members of the Judiciary as regards their respective involvement.

In this context, particular attention will have to be paid to cooperation requests and judicial assistance, arrest and surrender requests, investigations and collection of evidence, protection of witnesses and victims as well as their participation in proceedings, prosecution of international crimes, and enforcement of sentences.

Dissemination of information to government and non government organizations, as well as to the public generally so as to enable them to cooperate fully and without delay with the authorities, will have to be carried out.

The challenges faced in achieving these objectives

(a) The finalization of the Bill was delayed on account of human resources being already overstretched in the relevant government departments.

(b) Parliament does not sit the whole year, and during parliamentary session, the legislative agenda has been very heavy in the recent years.

Mr. Peter T. Akper[*]

Ratification and Implementation of the Rome Statute: Nigeria's Experience[**]

Introduction

Nigeria is a State Party to the Rome Statute of the International Criminal Court.

Nigeria ratified the Rome Statute on 27 September 2001.

Since the Statute came into force on 1 July 2002, Nigeria was one of the countries that deposited her instruments of ratification to enable the Statute to come into force.

Implementation challenges

Although Nigeria was quick to ratify the Rome Statute, its implementation has not enjoyed the same speed.

Nigeria practices the dualist system which is characteristic of many Commonwealth jurisdictions. Accordingly, law making treaties such as the Rome Statute have to be domesticated into national laws before they can become operative and enforceable within the domestic courts.

Section 12 of the 1999 Constitution of the Federal Republic of Nigeria makes the requirement of incorporation into domestic law a mandatory requirement.

Thus the process of implementation involves the presentation of a Bill for that purpose to the National Assembly which is a bi-cameral legislature.

In view of Nigeria's federal structure, a Bill for the purpose of implementing the Rome Statute must not only be passed by the National Assembly, but also enjoy majority approval of the various State Houses of Assembly (36 States).

Attempt to implement the Rome Statute in Nigeria

A Bill for the purposes of domesticating the Rome Statute was presented to the National Assembly in the 2001/2002 Legislative year.

The Bill was not an Executive Bill as it was sponsored by the National NGO Coalition on the ICC in Nigeria, a Civil Society group based in Lagos. The Bill was not successful as there were strong resentments to some of its provisions especially those that seemed to have negated traditional immunities recognized by the Constitution.

The pit-falls in the 2002 attempt to implement the Rome Statute

The Bill was presented at a time when it was not exactly clear whether the ideals and general principles of the Rome Statute were well understood in the country.

Given the prevailing circumstances, an Executive Bill would have been the best option, but this was not the strategy that was adopted.

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[*] Deputy Director/Special Assistant to the Hon. Attorney General of the Federation and Minister of Justice, Federal Republic of Nigeria.

[**] Power Point presentation.

An Executive Bill would have given indication to the legislature and the populace that government was ready to discharge the obligations imposed by the Statute. This may have engendered passage of the Bill in 2002.

Factors militating against the implementation of the Rome Statute

Critics generally contend that the lack of political will is the greatest impediment to the implementation of the Statute.

They point to lack of political will on the part of the Executive to present an Executive Bill since 2001, when the Statute was ratified.

The absence of a sustained campaign for the legislature to appreciate its critical role in the domestication of the treaty as part of Nigeria's body of laws as required by section 12 of the Constitution is seen as indicative of the lack political will.

Lack of political will on the part of the legislature to ensure review of existing domestic penal legislations and constitutional law that are incompatible with Nigeria's treaty obligations under the Rome Statute.

Lessons learned

Ratification and domestication are two different procedures. While ratification is within the realm of Executive Powers of the federation and easy consensus may be achieved, domestication is mainly within the realm of the legislative powers of the federation and greater consensus is required.

Domestication process must be actively supported by the Executive arm for success to be achieved in view of the obligations imposed by the Rome Statute.

Sustained public enlightenment is required to engender the necessary understanding and eventual buy-in of the legislature as well as the entire populace.

While civil society advocacy is very important, that alone may not be sufficient to ensure success.

The Federal Executive Council has a major role to play in taking ownership of the obligations imposed by the Rome Statute and promoting same.

Next steps

Sustained advocacy on the part of the government on the ideals of the Rome Statute.

A National Stakeholder summit to be hosted by the Federal Ministry of Justice in conjunction with the Nigerian Institute of Advanced Legal Studies and the National Human Rights Commission to discuss implementation challenges, strategies and the way forward.

Already two options have been identified as modalities that can be adopted to drive the implementation process.

These are namely; the presentation of an Executive Bill to the National Assembly for purposes of implementing the Rome Statute or the piecemeal implementation through the amendment and incorporation of the Statute within existing body of laws.

The Stakeholder summit is expected to consider these options and make suitable recommendations.

Realistic timelines will be agreed upon to ensure success.

The FMOJ proposes to lead this process and there is every hope that this time around, more progress will be recorded in our attempt to implement the Rome Statute.

Conclusion

Nigeria is a responsible member of the international community.

Despite the delay in the implementation of the Rome Statute, there are indications that Nigerians ordinarily subscribe to the ideals of the Rome Statute.

What is required is the requisite political will, sustained public enlightenment and support of the government and the legislature to ensure success. There is every indication that the requisite political will is emerging.

OVERVIEW OF THE COMMONWEALTH PRACTICAL GUIDANCE ON PROSECUTING CRIMES UNDER THE ROME STATUTE AND DISCUSSION OF PROPOSED REVISIONS

Mr. Dapo Akande*

What exactly was agreed in Kampala on the crime of aggression?

The ICC Review Conference held in Kampala earlier this year decided, by consensus, to amend the ICC Statute so that the ICC can exercise jurisdiction over the crime of aggression once the amendments come into force. The final text of the amendments to the ICC Statute on the crime of aggression is now available on the ICC website.[1] However, there seems to be some (significant) confusion as to what exactly was agreed on the crime of aggression in Kampala. There is also room for argument as to whether some of the decisions made in Kampala will be legally effective, in other words it is possible that they will not have the legal effect the drafters sought to achieve. This post will examine briefly set out what was agreed and highlight those areas where there is significant ambiguity surrounding the agreement. In particular I want to discuss issues surrounding the definition of aggression, when the aggression amendments will become operational and most importantly who will be bound by the amendments.

Definition of aggression

First of all, the definition of aggression to be included in the Statute is that recommended by the Special Working Group on the crime of aggression prior to Kampala. In other words no changes were made to the text. The definition, which will be article 8 *bis* of the Statute, states that:

"For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[2]

The contentious part of this definition was the qualifier, i.e. the requirement that the act of aggression be a 'manifest' violation of the Charter. What does that mean? Does it mean an obviously illegal violation, a violation with serious consequences or a violation which is both obviously illegal and serious? This question was not resolved in the text of the amendments but addressed in the Understandings attached to the text. Two of those understandings read as follows:

"6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself."

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* Co-Director, Oxford Institute for Ethics, Law and Armed Conflict (ELAC) University Lecturer in Public International Law and Yamani Fellow, St. Peter's College Oxford, OX1 2DL; http://www.law.ox.ac.uk; http://www.elac.ox.ac.uk; blog: www.ejiltalk.org.

[1] http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

[2] *Official Records … Review Conference … 2010* (RC/11), part II, resolution RC/Res.6.

I read this to mean that a breach of the prohibition of the use of force will only amount to aggression where it is a grave violation with serious consequences. There can be debate about whether two of the three criteria of character, gravity and scale would suffice or whether all three are required. The first sentence of Understanding 7 suggests that all three criteria must be at work while the second sentence appears to suggest that two will do. However, either way, either or both of gravity and scale must justify the conclusion that the use of force is a manifest violation of the Charter. So the seriousness of the consequences of the use of force must be considered.

When will the aggression amendments become operational?

Throughout the negotiations on the crime of aggression there had been a debate as to whether the amendments should come into force under article 121(4) or article 12(5) of the Statute. The former requires ratification or acceptance by 7/8ths of the States Parties with the amendments then binding on all States Parties. On the other hand, the latter states that:

"Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."

Argentina, Brazil and Switzerland submitted a paper in Kampala which attempted to bridge the divide. However, in the end, in the resolution that adopted the aggression amendments the Review Conference decided that the amendments shall enter into force in accordance with article 121(5). Apparently, Japan strongly opposed this decision though not strongly enough to block consensus.

The parties in Kampala seemed to think that it was for them to decide on how the amendments were to come into force. But it is not clear that the "decision" taken in Kampala that the amendments shall come into force in accordance with article 121(5) is in any way binding. Can a State that opposes this decision or an accused person argue that the amendments can only come into force in accordance with article 121(4)? It could be argued that an opposing State or defendant can challenged the "decision", if article 121(4) actually applies on its face. Arguably, all that was done in Kampala was to adopt a text (to use the language of article 9 of the Vienna Convention on the Law of Treaties) and the adoption of a text does not usually create legal obligations on States or indeed on the Court that allows bypassing of the binding text of article 121 as it exists. The alternative view would be that even if article 121(5) did not apply on its face, somehow the parties in Kampala have amended that article such that it now applies. Such a conclusion would raise a number of issues of fact and law which require further examination.

In any case, whether the Kampala "decision" to bring the amendments into force by article 121(5) is in itself binding or not, the view that article 121(5) is the applicable provision is a reasonable one. However, it is by no means an open and shut case and this matter will also require further examination. Article 121(5) only applies to amendments to articles 5, 6, 7 and 8. The aggression amendments go beyond amendments to those provisions. However, I think a good case can be made that the amendments are all a package intended to bring into effect the 'new' crime and that the intention behind article 121(5) is that it applies to amendments dealing with the creation of new crimes.

Having decided that the amendments will come into effect under article 121(5) the parties decided to impose additional conditions before the Court can prosecute for aggression. The Court may only exercise jurisdiction over aggression committed one year after 30 States have ratified the amendment. Furthermore, the Court's jurisdiction over aggression will only commence once a decision is made to that effect, after 1 January 2017 by States Parties. The decision is to be made by at least 2/3rds majority. So we will have to wait nearly seven years before the aggression amendments become operational (assuming we have 30 ratifications by then). These conditions apply to prosecutions commenced as a result of a state party referral and *proprio motu* prosecutions (article 15 *bis*) as well as to prosecutions resulting from a Security Council referral (article 15 *ter*).

Trigger mechanisms for prosecutions for aggression

The aggression amendments make a distinction between the three trigger mechanisms that exist for ICC jurisdiction. Article 15 *bis* deals with referrals by States Parties and *proprio motu* prosecutions by the Prosecutor and article 15 *ter* deals with Security Council referrals. Starting with the latter, all that is required is a referral of a situation by the Council and the Council need not have determined that an act of aggression has taken place.

Article 15 *bis* was the more controversial provision. It is significant to note that it was agreed that referrals by States Parties and *proprio motu* prosecutors can take place without a Security Council filter. In other words the Security Council need not have determined that an act of aggression has taken place. Moreover though the Security Council can defer an investigation or prosecution under article 16 it is not given any additional powers to stop aggression prosecutions.

The other significant features of article 15 *bis* is that States Parties may opt out of ICC jurisdiction over aggression under this provision and the Court may not exercise jurisdiction over the crime of aggression when committed by a national of a non-State party or on its territory.

Who will be bound by article 15 bis of aggression amendments?

The opt out provision is the most confusing aspect of the aggression amendments. Who exactly is required to opt out? Once the requisite number of ratifications is reached and a decision is made in or after 2017 to activate the aggression provisions, are all States Parties to be regarded as bound such that the ICC has jurisdiction over aggression committed by the nationals of all States Parties unless they opt out? Or does the ICC only have jurisdiction over nationals of States Parties who have accepted/ratified the amendment unless that State Party opts out? Bill Schabas and Kevin Jon Heller appear to believe that all States Parties are bound unless they opt out. So, absent an opt out any national of any State Party can be prosecuted for aggression once the amendments come into force. However, I have recently spoken to members of two State delegations at Kampala who take the view that only those States Parties that ratify the amendments are bound and that only aggression committed by a State that has ratified the amendment can be prosecuted by the Court, unless they opt out. This latter view would seem to accord with article 121(5) that the amendments only enter into force for those States that have ratified or accepted them. Further that provision states, the Court may not prosecute with respect to the crimes committed by nationals of, or on the territory of those States Parties who do not accept.

I doubt if this was thought through in Kampala and I doubt that if asked the specific question I pose in this paragraph, all delegations would have given a uniform answer. It worthwhile noting that the only part of the resolution that adopts the aggression amendments is not conclusive with regard to who needs to opt out. It states that: "any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance." By referring to opt outs prior to ratification or acceptance it must be referring to those who have not yet ratified or accepted and opens up the possibility that such States need to opt out. However, this clause may also be read as referring simply to the time within which a ratifying or accepting State must opt out, if it wishes to do so. In other words, if a State Party ratifies or accepts the amendment and wishes to opt out, it needs to have done so before it ratifies or accept. On this view, the opt outs could still be confined to those State Parties who ratify or accept.

But it may be argued that if only those States Parties who ratify are bound, why have an opt out provision. Why would a State ratify the amendment only to opt out of jurisdiction? On this view, the opt out provision must be included mainly in relation to those States Parties who do not ratify. Otherwise it would be redundant. But this is not necessarily so. The opt out is not redundant even if only those who ratify are bound. For one thing, ratification by 30 States is necessary for the Security Council referral mechanism to come into effect. So a State may wish to ratify to bring that part of the amendment into effect but to opt out of the State referral and *proprio motu* prosecutions mechanisms. Secondly, a State may wish to bring the amendments into effect generally while excusing itself from prosecution.

There is perhaps another view that would argue that it is consistent with article 121(5) for all States Parties who do not opt out to be bound. On this view, one would have to argue that a State Party is presumed to accept the amendment unless it opt outs. So only those who opt out are to be regarded as not accepting the amendment and in that way the principle of consent is maintained though consent is presumed.

It will be interesting to see how all of this plays out. It may well be that even those who don't ratify play it safe, adopt a belt and braces approach and choose to opt out anyway. But to the extent that many States do this then this may be considered as practice indicating the view of the Parties that those States who don't opt out are bound. So States Parties are in a catch 22 situation: opt out and they may be taken as supporting the view that presumed consent is a valid way of binding States; don't opt out and a court may find that it has jurisdiction over aggression committed by that State.

STRATEGIES FOR PROMOTING RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE IN COMMONWEALTH STATES: LESSONS LEARNED AND CHALLENGES FOR THE FUTURE

Ms. Eva Šurková[*]

As I have indicated in my previous intervention, I was appointed for facilitator for the Plan of Action last year. In introducing this topic, I would like to start by outlining the Plan of Action, an official document adopted by the Assembly of States Parties during its fifth session in 2006.[1] It constitutes the basis of the mandate for the facilitator for the Plan of Action (usually appointed for one year), it sets out the responsibility of States Parties for promotion of the Rome Statute and also provides know-how on how to achieve its objectives. The Plan of Action is divided into two parts:

(a) Objectives of the Plan of Action (universality and full and effective implementation of the Rome Statute);[2] and

(b) Obligations addressed to States Parties, the Secretariat of the Assembly (SASP) and the Assembly itself.

States Parties

The Plan of Action stipulates the primary responsibility of States Parties to proactively promote universality and full implementation of the Rome Statute through bilateral and regional relationships. Furthermore, under the Plan of Action the efforts of States Parties should include expressis verbis:

(a) Direct political and other contacts with relevant States, regional groups or regional organizations with the objective of fostering political will and support for ratification and full implementation of the Rome Statute;

(b) Ratification and full implementation of the Agreement on the Privileges and Immunities of the ICC (APIC) and encouragement of its ratification and implementation by other States not yet parties to the Agreement;

(c) Providing technical or financial assistance to States wishing to become Parties to the Rome Statute as well as to States and other entities wishing to promote its universality;

(d) Convening and supporting seminars, conferences and other national, regional or international events aimed at promoting ratification and full implementation of, and support for, the Rome Statute;

(e) Wide dissemination of information about the Court and its role, including by giving consideration to inviting representatives of the Court or the Secretariat of the Assembly to address national, regional and international events

(f) Identification of a national contact point for matters related to promotion of the ratification and full implementation of the Rome Statute;

[*] Assembly of States Parties Facilitator for the Plan of Action on achieving universality and full implementation of the Rome Statute of the International Criminal Court; Legal Adviser, Permanent Mission of Slovakia to the United Nations.

[1] ICC-ASP/5/Res.3, annex I.

[2] Universality of the Rome Statute of the International Criminal Court is imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice. Full and effective implementation of the Rome Statute by all States Parties is equally vital to the achievement of these objectives.

(g) Providing to the SASP information relevant to promotion of the ratification and full implementation of the Rome,[3]

(h) Full and effective implementation of the Rome Statute, including the duty to cooperate fully with the Court. To this end, any State facing difficulties with ensuring full implementation should identify its assistance needs promptly with a view to obtaining appropriate technical and/or financial assistance;

(i) Active participation in and support for the meetings and activities of the Assembly and its subsidiary bodies, in order to, inter alia, promote attendance at Assembly meetings by other States Parties and those not yet parties.

The Secretariat of the Assembly and the Assembly of States Parties

The SASP, under the Plan of Action, supports States in their efforts to promote universality and full implementation of the Rome Statute (by acting as a focal point for information exchange) and collects relevant information of States and various stakeholders on promoting universality and full implementation of the Rome Statute.

The Plan of Action also requires the Assembly of States Parties, through its Bureau, to keep the Plan of Action under the review which means that facilitator has to present once a year a report on his/her activities and outcomes arising out of them.

The Plan of Action has been under consideration by the New York Working Group of the Bureau. As the Plan of Action and the discussion on the issue of cooperation are in some respects interconnected, we have been in consultation with the focal point on cooperation, Ambassador Mary Whelan (Ireland), under the aegis of The Hague Working Group of the Bureau, on the best way to advance discussion on these items.

As regards the mandate of the facilitator for the Plan of Action, I have concentrated on various kinds of activities since my appointment as facilitator for the Plan of Action last year.

First, I convened two open informal meetings in April and September 2010 in New York where representatives of States, the SASP, international organizations, the Court and civil society were invited to participate. The informal consultations focused on the presentation of the Plan of Action, the mandate and programme of work of the facilitator, the status of ratification and implementation of the Rome Statute and the progress achieved, so far.

Further, within the project on seminar series and within the framework of the preparations for the Review Conference of the Rome Statute in Uganda in 2010, I organized a seminar on the ICC in April 2010 at UN Headquarters in New York with the participation of the UN Secretary-General, the Minister of Foreign Affairs of Slovakia, the President of the Court, the President of the Assembly, representatives of States and civil society. This event was co-sponsored by various States Parties representing all regional groups.

Besides this, I organized various other events, such as panel discussions and conferences focusing on proactive promotion of universality and implementation of the Statute (two regional meetings, one for Pacific States and another for Caribbean States). In addition, I held many bilateral meetings with representatives of States, members of civil society, international organizations, academia, ICRC and the SASP.

[3] The ASP Secretariat has, under the Plan of Action several times sent out note verbales (questionnaires) requesting States to provide information relevant to the promotion of ratification and full implementation of the Rome Statute and States should provide the Secretariat with this information.

With regards to the findings arising out of these activities, it is clear that States face three key obstacles in becoming parties to the Statute, mainly: legal, technical and political.

Legal complications

In order to align their national legislation with the obligations ensuing from becoming a State Party, some countries must introduce modifications to their existing laws, such as the penal codes, codes of criminal procedure and, in some instances, possibly amend their Constitutions. These steps may take time since it involves careful study by the respective parliamentary committees and constitutional courts or chambers. Sometimes, it may require inclusion of all three branches of the government - executive, legislative and judicial, as well. Another layer of complexity arises when the draft bill is also meant to internalize obligations arising from other international treaties, for example regarding the enforced disappearance of persons, since this requires additional amendments to the existing legal framework which must result in a coherent approach.

Technical issues

The respective foreign or justice ministries, especially among developing States, sometime lack the financial resources, as well as the human resources with the knowledge or time to prepare those amendments to their national legislation.

Political issues

On occasions the respective governments or parliaments may have other more urgent priorities to deal with, resulting in a deferral of ICC issues, which can take years. There are draft ICC and APIC implementation bills in legislative committees around the world, but without the political support to bring them for consideration of the plenary of the Legislature, they can languish for a disconcerting period of time, among the hundreds of other draft bills.

Sometimes there are also political concerns about issues such as whether the Rome Statute may be applied retroactively, which is not the case, or how to deal with the immunities that the Constitution or national laws may bestow upon the Head of State or a perceived infringement of national sovereignty. Overcoming these concerns requires a period of clarifications and reassurances on the non-retroactivity of the Statute or seeking the best means of moving forward with the ratification process. For example, in some cases an amendment to the Constitution - usually a lengthy and complex procedure - may be required, while in others an interpretation of the Constitution by the relevant body has sufficed to expedite the ratification of the Statute.

This is the status quo and we should endeavor to assist States in overcome the existing hurdles in becoming States Parties to the Statute or in its full implementation. There are numerous tools to do so: the assistance of various stakeholders like civil society, international organizations including the Commonwealth Secretariat, and others is indispensable in this regard.

Our speakers would now address these issues from a more detailed perspective and give us their views and concrete samples of how to promote ratification and implementation of the Statute more effectively.

Conclusions

The Plan of Action constitutes the basis for proactive promotion of universality and full implementation of the Rome Statute of the International Criminal Court;

States Parties to the ICC Rome Statute should to promote the universality and full implementation of the Rome Statute in all international forums, including in their bilateral, regional and multilateral relations. In that regard, cooperation with international organizations, civil society, the ICRC, academia, the Secretariat of the Assembly and the Court itself is extremely important;

The organization of regional and subregional seminars or the inclusion of ICC topics in existing fora constitute a useful means of allaying concerns that may exist among key policy-makers in Observer States;

Organizing visits of Court officials and representatives of the Assembly of States Parties to speak to key actors in Governments may assist is overcoming obstacles, especially at the political level. Having high-level officials from Observer States who may be visiting the Netherlands for other reasons pay a visit to meet senior ICC officials may also help to clarify some of the concerns and thus facilitate a better understanding of the Court;

In the medium term, reaching out to the next generation of politicians and magistrates is also important. This can be attained, for example, via the introduction of international criminal law courses in universities and the organization of “Moot Court” style competitions at the national, regional and subregional level.

Another way of promoting universality of the Rome Statute would be to encourage the participation of States not yet party to the Statute in sessions of the Assembly, through contributions to the Trust fund for the participation of least developed countries and other developing States.

Ms. Cheryl Thompson-Barrow*

CARICOM Countries have been valued partners in the drive by the international community to combat impunity, though the establishment of the ICC with jurisdiction over genocide, crimes against humanity, war crimes and aggression.

It is by now well known that Trinidad and Tobago provided leadership in this matter when in 1989 it re-introduced onto the agenda of the 44th United Nations General Assembly, after a hiatus of over 40 years, the need for the creation of a permanent international criminal court. The item received the support of all CARICOM States and a number of other countries. By the end of 1989 this led to the adoption by consensus of a resolution calling for the establishment of a permanent international criminal court.

Despite the adoption of the resolution, the idea at first received a "lukewarm" reception; however the 1991 outbreak of conflict in Yugoslavia and subsequently in Rwanda ignited support that eventually led to the adoption of the Rome Statute of the ICC on 17 July 1998.

This paper contemplates, from a CARICOM Perspective, strategies to promote ratification and implementing legislation of the Rome Statute to achieve the coveted universality of the ICC's reach. In the following order these CARICOM States have ratified the Statute: Trinidad and Tobago, Antigua and Barbuda, Barbados, Belize, Dominica, Guyana, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname and most recently St. Lucia on 18 August 2010. Haiti, Jamaica and The Bahamas signed but have not yet ratified the Rome Statute. Grenada did not sign the Rome Statute.

To provide a foundation to assess the best strategies to be employed to encourage the few countries that have not yet done so to ratify and implement the Statute this paper will do the following:

(a) Briefly review the structure and regime established by the Statute;

(b) Examine particular challenges which have deterred some CARICOM States from becoming States Parties or passing implementing legislation; and

(c) Propose "next steps" particularly in light of the recently concluded First Review Conference of the Rome Statute held in Uganda in June 2010.

The ICC structure and regime in brief

Structure

The move towards ending impunity for the most serious crimes of concern to the international community led to the creation of ad hoc International Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) and Tribunals with a fusion of domestic and international components in Sierra Leone, East Timor and Cambodia.

The permanence of the ICC is however the foundation upon which the international community aims to effectively combat impunity. Perpetrators of genocide, crimes against humanity, war crimes and since the first Review Conference, the crime of aggression, (although the Court cannot yet exercise jurisdiction over this crime), now know that an enduring rather than an ad hoc international system exists which despite all the challenges, may one day bring them to justice.

* General Counsel, CARICOM.

Under the oversight of the Assembly of States Parties the Court carries out its mandate. The judges, elected by the Assembly sit in three Divisions, (Pre-Trial, Trial and Appeals), and hear cases brought by the Office of the Prosecutor. The Registry provides wide ranging administrative support for the Court under the authority of the President of the Court.

The ICC also has established an independent Office of Public Counsel for the Defence (OPCD) to provide logistical support, advice and information to defendants and their counsel.

The creation of the ICC involved a number of significant "firsts" in international criminal law:

(a) Victims are able to participate at several levels of proceedings and have their views heard; and

(b) The Court may order an individual to pay reparation to another individual and a Trust Fund has also been established to provide resources for reparation to victims and their families.

Critically the work of the Court is also facilitated by cooperation agreements between the Court and both States Parties and non-States parties, (on issues including investigations, collection of evidence, enforcement of judgments and serving of sentences), as well as through Agreements on the Privileges and Immunities of the Court.

Regime

The *subject matter jurisdiction* of genocide, crimes against humanity, war crimes and the crime against aggression has already been outlined.

The *temporal jurisdiction* of the Court commenced after the date of entry into force of the Statute, 1 July 2002.

The *territorial and active nationality jurisdiction* of the Court is such that it is dependent on acceptance of its jurisdiction by the State on whose territory the crime occurred or by the State of nationality of the accused person. Becoming a State Party automatically amounts to acceptance of jurisdiction and a non-State party may also declare its acceptance of jurisdiction.

There is also *"jurisdiction by referral"* where the United Nations Security Council acting pursuant to Chapter VII of the UN Charter may refer any situation to the Court.

The jurisdiction of the Court is ultimately underpinned by the principle of "complementarity" (another important innovation of the ICC) whereby "the ICC cannot exercise jurisdiction over a crime if the same crime is being investigated or prosecuted by a State that has jurisdiction over it or a decision not to prosecute has been taken properly and independently by the appropriate authorities in that State."[1]

[1] See page 33 of The Prosecution of International Crimes: *A Practical Guide to Prosecuting ICC Crimes in Commonwealth States*, edited by Ben Brandon and Max du Plessis, 2005.

Challenges deterring ratification and implementation

Given the role of Caribbean States led by Trinidad and Tobago in bringing the issue of a permanent international criminal court back on the international agenda and the innovative regime established by the Rome Statute, it is not surprising that ten of the 15 members of CARICOM have signed and ratified the Rome Statute and that all but one member has signed it.[2]

The road to this level of ratification has however not always been smooth. Myriad challenges such as, the efforts by the United States of America (US) to conclude Bilateral Immunity Arrangements (BIAs; also called "article 98 agreements"); legal concerns about the ICC regime; the existence of other legal and political priorities in a context of resource constraints; misunderstanding of the Court and the accompanying supplementary legal arrangements attendant on becoming a State Party have posed concerns in the CARICOM region.

Bilateral immunity arrangements

At the time of the coming into force of the Rome Statute, the US was actively opposed to the ICC, concerned that there was significant exposure for their nationals given their military engagement worldwide. The US therefore from 2002 to early 2008 sought to conclude bilateral immunity arrangements with countries States Parties to the ICC that would prevent these countries surrendering US nationals to the ICC. To "encourage" the conclusion of such BIAs the American Service Members Protection Act (ASPA) passed in 2002 prohibited the provision of military aid to countries that ratified the Rome Statute but which did not enter into BIAs unless they enjoyed a waiver of that requirement.

The subsequent amendment to the Foreign Operations, Export Financing, and Related Programs Appropriations Act proposed by former US Representative of Congress George Nethercutt, the so called "Nethercutt Amendment", added the withdrawal of economic aid to the arsenal of persuasion employed by the US to promote BIAs.

CARICOM countries were among those affected by these US policies which were considered in detail by the highest decision making body of the Caribbean Community, the Conference of Heads of Government; by the Council for Foreign and Community Relations (COFCOR) comprising CARICOM Foreign Ministers as well as the Legal Affairs Committee (LAC) composed of Ministers of Legal Affairs and Attorneys General. Legal advice was provided by the LAC and the Twenty-Fourth Meeting of the Conference (June 30 - July 1 2003) recognized that some CARICOM members may wish to enter into BIAs if they were advised by their legal authorities that any agreement into which they entered was consistent with their obligations under the Rome Statute, which the Conference was and remained resolute in supporting.

[2] NB. The Rome Statute applies to eleven members of CARICOM as Montserrat, which is both an Overseas Territory of the United Kingdom and a CARICOM member, would be subject to the ICC by virtue of the fact that the United Kingdom is a State Party.

Antigua and Barbuda, signed in its view "the most advantageous article 98 agreement with the US consistent with our obligations under the Rome Statute, which Antigua and Barbuda has signed and ratified"[3] and Belize, Dominica, Grenada, Guyana, Haiti and Saint Kitts and Nevis also signed such agreements. Initially however, in November 2006 St. Kitts and Nevis was granted an ASPA waiver permitting military aid.

Other CARICOM territories that declined signing BIAs such as Barbados, Saint Vincent and the Grenadines and Trinidad and Tobago suffered cuts in either military or economic aid.

This approach by the US to the ICC did not encourage ratification and implementation of the Rome Statute by CARICOM States which had not yet crossed that threshold.

The US approach however had other unintended consequences. The policy was deeply criticized by several high officials in the Defense Department for creating a void of contact with friendly countries which was gladly being filled by other countries such as China. It also affected programmes critical to US security such as counter-terrorism training. Perhaps the most poignant admission of the failure of the policy was made by then US Secretary of State Condoleeza Rice in March 2006 when she indicated it was, "sort of the same as shooting ourselves in the foot".[4]

This recognition led the US Congress by mid 2009 to remove all the International Military Education and Training (IMET) restrictions on countries and not to renew the Nethercutt Amendment. One major political hurdle with military and economic implications has therefore now been removed from the ratification and implementation equation.

Legal concerns about the ICC Regime

Jamaica is at the stage of submissions from the relevant Ministries for Cabinet consideration and approval of the passage of implementing legislation preparatory to ratification.

One complication however is that the Attorney General has advised that a constitutional amendment will be required to ensure that surrendering a person to the Court will not be deemed a breach of the double jeopardy provision.

This approach is cautious given that that no other country with a constitution similar to Jamaica has found it necessary so to do, however it is a factor that has to be addressed given the position of the Attorney General's Office.

It should also be noted that the legal obligations undertaken at ratification do not only include the passage of legislation to implement the Rome Statute.

For the Court and its officials to enjoy protection and appropriately function Agreements on the Privileges and Immunities of the Court (APIC) and cooperation agreements with the Court on a variety of matters ranging from arrangements for victims to agreements on the serving of sentences have to be contemplated.

[3] Working Document for the Ninth Special Meeting of the Conference of Heads of Government of the Caribbean Community, Castries, Saint Lucia, 13-14 November 2003.

[4] See Trip Briefing, en route to San Juan, Puerto Rico 10 March 2006 available at http://www.scoop.co.nz/stories/WO0603/S00230.htm and http://www.iccnow.org/documents/CICCFS-CommentsUSOfficials_BIA-ASPA_current.pdf both accessed 16 September 2010.

As at 10 March 2010 three CARICOM members, Trinidad and Tobago, Belize and Guyana had signed and ratified APIC arrangements; and the Bahamas and Jamaica had signed such agreements.[5]

Other legal/political priorities and resource constraints

The wide ranging sweep of international obligations to which small or otherwise vulnerable jurisdictions such as Caribbean States have had to respond in the 12 years since the adoption of the Rome Statute have likely played some part in the failure of the few States indicated, to ratify and implement the Rome Statute.

The plethora of international prescriptions and responsibilities associated with combating drug and arms trafficking, transnational organized crime, corruption, terrorism and its financing and money laundering, have consumed significant political, diplomatic and legal resources especially where "listing" or other sanctions have been used to inspire compliance with standards, some of which had not yet been manifest in developed countries, and many of which arguably were not sufficiently sensitive in design to the realities of systems, structures and prevailing socio-economic conditions in Caribbean States.

The drive to persuade CARICOM countries that have not yet done so to ratify and implement the Rome Statute also has to be considered in light of the fact that given day to day realities of drug offences, gun crimes and concerns about corruption and money laundering, issues outlined in the preceding paragraph occupy a high profile in the region's security concerns. Their high profile contrasts with the fact that outside of government ministries required to work on implementing the Rome Statute, in the public sphere only concerned NGOs and ardent students of international criminal law are focused on the ICC.

This lack of focus on the ICC is not surprising given that the CARICOM region unlike others has no situation that could be referred to the Court.

It bears repeating therefore, that the high level of ratifications within CARICOM indicates the general broad and tangible support within the region for the ICC and its ideals.

Next steps

There is every reason to be optimistic that the political, legal and other hurdles than have deterred The Bahamas, Jamaica and Grenada from becoming parties to the ICC will be overcome in due course. The following four factors support that optimism.

The Impact of the First Review Conference of the States Parties to the International Criminal Court held in Uganda, June 2010

The recently concluded First Review Conference has renewed focus on the Court and provided fresh impetus for ratification and implementation of the Rome Statute. Indeed St. Lucia was one of two countries to ratify the Statute since the Conference, Seychelles being the other.

[5] See http://treaties.un.org and Ratification/Accession and Signature of the Agreement on the Privileges and Immunities of the Court (APIC), by Region available from the CICC website at http://www.iccnow.org/documents/APIClist_updated_en_10_March_2010.pdf accessed 2 September 2010.

The major outcome of the Review Conference was the adoption of a resolution by which it amended the Rome Statute to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. Though the actual exercise of jurisdiction is subject to a further decision of the States Parties to be taken after 1 January 2017 by the same majority required for the adoption of an amendment to the Statute the fact that a definition was agreed was a major step forward.

The stocktaking on the international criminal justice system also conducted at the Review Conference additionally allowed States to take a examine and to renew commitments to the fundamental principle of complementarity, programmes dealing with victims and affected communities, cooperation with the Court and the enforcement of sentences.[6]

Key to the wave of optimism generation by the Conference however is the apparent softening of the position of the three of the five permanent members of the United Nations Security Council towards the Court, in particular the United States, which in ensuing years should encourage States affected by the long shadow of their influence to more readily engage with the Court.

The impact of the Caribbean Court of Justice (CCJ)

The establishment on 14 February 2001 of the CCJ and its success to date may serve to increase the level of acceptance of Courts "beyond borders" including the ICC. Though the region has a long history with the Judicial Committee of the Privy Council in the United Kingdom, CARICOM States have had the opportunity with the CCJ, as with the ICC, to participate in establishing a Court and shaping its structure. Ownership of the process of establishing a Court that determines the jurisprudence to which you are subject provides strong impetus for participation and deeper engagement.

The jurisprudence espoused by the ICC is such that is readily embraced by CARICOM States. As Mr. Justice Patrick Robinson, son of Jamaica and President of the ICTY indicated in a newspaper article,[7] three reasons Caribbean States should ratify the Rome Statute are: the Caribbean history of the atrocities of slavery that would qualify today as crimes against humanity; Caribbean countries strong record of valuing human rights and the fact that Caribbean States having fought for their independence and therefore which value sovereignty, need not fear the ICC in this regard.

The Trinidad and Tobago/Belize proposal on international drug trafficking

You may no doubt be aware that the impetus for Trinidad and Tobago's proposal that a permanent international criminal court be established, was the desire that international drug trafficking would be a crime falling within the jurisdiction of the court. That issue is back on the agenda.

It was initially proposed for consideration by the First Review Conference but at the eighth session of the Assembly of States Parties (The Hague, November 2009) States expressed concern about the ability to resolve, without adequate discussions, the issue of whether the threshold by which the crime is considered one of the most serious crimes for the

[6] See 17 June 2010 Press Release issued by the ICC at the conclusion of the First Review Conference on 12.06.2010 available at http://www.icc-cpi.int/Menus/ASP/ReviewConference/PressReleaseRC/Press+Releases+2010.htm, accessed 4 September 2010.

[7] Jamaica Gleaner of 11 April 2010 available at http://www.jamaica-gleaner.com/gleaner/20100411/focus/focus5.html, accessed August 19, 2010.

international community and therefore decided to postpone the issue until after the Review Conference. The issue is now on the agenda for the consideration at the ninth session of the Assembly (December 2010) at the UN in New York.

Given the shared circumstances of Caribbean countries it is anticipated that this issue will achieve unanimous support of CARICOM States Parties to the Rome Statute. It may also however encourage the Bahamas, Grenada, Jamaica and Haiti to become States Parties to enable them to effectively lend their support to an initiative that seeks to address at the highest international forum an issue which daily affects the security and well being of Caribbean people — located as we are between the major drug producers of the south and the major drug consumers of the north.

Available resources and continued advocacy for the Court

Several NGOs such as the Coalition for the International Criminal Court (CICC) and Amnesty International (AI) as well as legal research and policy institutes such as The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) have produced manuals, model legislation, implementation kits and other aids to assist Countries in the ratification and implementation process. This wealth of resources and the continued advocacy of these groups should also be positive push factors leading the four outstanding CARICOM Members into becoming States Parties to the Rome Statute.

There may yet however be an even more powerful tool in the arsenal of persuasion — the ICC itself. President of the ICC Judge Sang-Hyun Song speaking to *Commonwealth News* during a visit to the Commonwealth Secretariat on 5 March 2010 said, "My experiences of dealing with some countries have shown that ignorance, misperception and indifference are common reasons why they fail to ratify the Statute". The President continued that, "The Commonwealth Secretariat and the ICC could team up and organize regional seminars on the ICC itself or the broader Rome Statute system to enhance public awareness and knowledge about this newly emerging international criminal justice system".[8]

The CARICOM Secretariat could perhaps join in this collaboration. Such a regional seminar possibly jointly hosted by the CCJ, the CARICOM and Commonwealth Secretariats and the ICC, may just provide the final impetus that would spur ratification and implementation among CARICOM States where necessary.

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[8] See full report of the visit of the President to the Commonwealth Secretariat available at http://www.thecommonwealth.org/news/221311/150310cwnewsicc.htm.

Mr. Rafael de Bustamante Tello*

The European Union experience in promoting ratification[1]

Introduction

One of the 2 main objectives of the EU common position on the ICC is to promote the widest possible participation in the Rome Statute. The other being "the effective functioning of the Court"

Why? Because an effective system of international criminal justice should be based in the acceptance by all States of the Court's jurisdiction. This is important because international criminal justice must not be seen as unfair or uneven.

How? Several tools / instruments

(a) Demarches. 50 per year. EU pledges at Kampala

(b) Political dialogue: CARIFORUM

(c) ICC clauses. Cotonou agreement. Language on the fight against impunity (another EU pledge)

(d) Funding civil society: €6 million from 2010 to 2012

Universal: Not shy from addressing this issue with countries such as China, Russian Federation, US, India, Israel.

Lessons learned: how effective we are

Is there a cause-effect in the EU action? Yes and no.

Yes. The EU had contributed to the accessions of Japan, Chile, Seychelles or Moldova (in the process of acceding)

But it will be pretentious to say that this is result of the EU action. Even if we are "the champions of Universality", our success rate depends on the combined action of several actors.

(a) Civil society. Sometimes EU funded or no;

(b) EU MS - privileged relation;

(c) Third partners (action plans, partnership frameworks, agreements) Australia, Japan, Brazil, Canada and South Africa;

(d) ICC: Presidency / ASP (facilitator) / SASP;

(e) Other organizations: Commonwealth; and

(f) Peer pressure.

Success: Multilayer approach

Example: St. Lucia identification target (NGOs). Demarche by the EU + Letter by the HR: Request for assistance (Commonwealth).

* European Union focal point for the ICC.

[1] The views expressed are solely those of the writer and may not be regarded as stating an official position of the Council.

In our current set of demarches we are going to target some Commonwealth countries: Some on ratification (Maldives, Solomon, Grenada, Vanuatu, Kiribati) / implementation (Tanzania), we have included in our terms of reference the indication that the Commonwealth Secretariat can assist these countries.

Challenges

(a) Better coordination – avoid duplication / better synergies;

(b) Committed States Parties (pledges);

(c) ICC and ASP focal point;

(d) Commonwealth;

(e) NGO campaigns;

(f) Our partners (there are areas Oceania/Asia where our partners might be stronger);

(g) Miconception / information (crime of aggression) / false rhetoric; and

(h) Treaty of Lisbon/European External Action Service. More coherent approach. EU Delegation in third countries will be the permanent interlocutor for partners.

Mr. Anton du Plessis*

Introduction and overview of ISS and ICAP

The Institute for Security Studies (ISS) in a regional policy think-tank and technical assistance provider that focuses on the enhancement of human security and justice in Africa. The Institute is committed to core values of sustainable development; democracy; human rights; rule of law; collaborative security; and gender mainstreaming. It does considerable work in the field on international criminal justice and counter-terrorism. The ISS is staffed by more than 150 full-time employees representing a broad political spectrum from over half a dozen African countries.

The International Crime in Africa Programme (ICAP) leads the ISS's research and capacity building work on international criminal justice and the ICC. ICAP aims to raise awareness and build specialized capacity of civil society actors, law enforcement officials, criminal justice practitioners and policy makers in requesting African countries to enable them to respond effectively and appropriately to international crimes and terrorism. ICAP's work is motivated by the goals of durable peace building and strengthening the rule of law, both of which are threatened in Africa by the pervasive culture of impunity and the general lack of criminal justice capacity to respond effectively to these crimes that include war crimes, crimes against humanity, genocide and terrorism.

I have delivered technical assistance and training on international criminal justice and counter-terrorism issues in 18 African countries over the past ten years. I have undertaken this work as a government official working for the South African Prosecuting Authority, a UN expert working for UNODC in Vienna, an individual consultant, and importantly, an African NGO expert working for the ISS. It is my NGO experience in recent years that throws out the most interesting examples of the changing landscape on international criminal justice in Africa, and the new, exciting and expanding role being played by selected (often larger) policy and technical assistance NGO's like the ISS. It is clear to me that African NGOs are vital partners in any sustainable effort to promote complementarity in the context of the ICC.

I have limited time: will therefore cut straight to the task of identifying lessons and challenges for the future of technical assistance and capacity building in this specialized field of international criminal justice. Much has been covered by other speakers so I will try to highlight a few new challenges and good practices.

General considerations

Before discussing specific lessons relating to capacity building to support complementarity, I feel it is important to highlight a few general considerations relevant to any work on international criminal justice (and the ICC) in Africa:

(a) Despite recent controversies relating to the work of the ICC in Africa (particularly at the level of the African Union), Africa still wants and definitely needs the ICC. I say this after having worked in dozens of countries with senior government and NGO stakeholders. Indeed, Africa led the development of the ICC in many ways. Moreover, Africa remains home to many perpetrators of grave international crimes – a fact recognised by the AU's own constitutive act which obligates AU Member States to stamp out impunity for these crimes.

* Head, International Crime in Africa Programme, Institute for Security Studies, South Africa.

(b) This does not mean that the ICC (and International Criminal Justice more broadly) has permanently won the hearts and minds of Africans. At the operational and practical level international criminal justice is still seen as something exotic, different or apart from 'the rule of law' or the daily grind of criminal justice work. More needs to be done to bring it home to Africans. I have seen this is the context of my work in Africa on counter-terrorism, transnational organised crime, etc. Other 'national priorities' are often (and correctly) placed way up the list of important issues requiring better policy and capacity.

(c) Another reality, which complicates the previous point even more, is that international criminal justice (and the ICC) is still perceived to be something driven by western (and sometimes academic) interests, often at the expense of African development or peace objectives. The gap between ratification and implementation is indicative of this. I have heard practitioners saying "Our politicians and executive are part of this international 'rolex club'." Easy to make promises and ratify in the corridors of European and US conferences and UN buildings. Reality on the ground is often different.

Overcoming these challenges: lessons from the field

Specific challenges to ratification and implementation

(a) Lack of awareness and understanding of relevance at national level

Many practitioners (and some political leaders), especially in non-conflict/stable countries do not think it is important to build national capacity to respond to crimes that they believe are not likely to be committed in their countries and by their nationals. Limited awareness about the importance of international cooperation to close down safe havens for perpetrators of grave international crimes.

(b) Other priorities

Many African countries face many other key priorities, from national health crises to massive underdevelopment. Spending time and money on developing policy and capacity to deal with international crimes is not always high enough on their to-do lists.

(c) Lack of capacity (including specialized capacity)

Effective and appropriate domestic complementarity capacity requires specialized skills, especially on the part of law enforcement and criminal justice officials. Many countries in Africa do not have this capacity.

(d) Political concerns (including concerns about immunity)

African leaders' political concerns about the ICC are well known, not just about Al-Bashir, but also about universal jurisdiction, double standards at the UNSC etc.

(e) Concerns about cost

Effective complementarity at domestic level takes time, money and effort. Some countries are not sure what full complementarity entails – especially in relation to witness protection, prison conditions, cooperation with the ICC, etc.

Lessons and opportunities

To provide effective and sustainable capacity building, International Criminal Justice agencies and international organizations need to deliver targeted technical assistance and training to the right people, in the right countries, upon request, all the while ensuring that they have the political support from the right people – political leadership and policy makers and influential NGOs.

Regions and countries require specific tailoring of approaches in order to address divergent political and practical realities they face. While Africa should never be viewed as a homogenous landmass, based on my experience in Africa, the following general observations and suggestions can be made regarding the capacity building challenges highlighted above.

(a) Mainstream International Criminal Justice technical assistance into broader rule of law and international criminal justice context

Contextualise International Criminal Justice technical assistance and capacity building within the framework of broader rule of law and criminal justice reform. I am pleased to see we have a dedicated discussion on complementarity and tailored technical assistance to enhance it. Many of my remarks might be relevant to that discussion as well. Like with broader rule of law and criminal justice reform, it is vital to reach recipients interested in appropriate International Criminal Justice and rule of law reform. Won't always be governments.

(b) Regional and local partners are vital

Number of reasons: better regional buy-in, sustainability, prevent duplication of efforts, overcome mandate restrictions, etc. At the regional and sub-regional levels, partnerships ensure that the political, economic and development dynamics and sensitivities germane to the regions are properly understood and effectively incorporated into technical assistance activities. These practical realities will clearly differ markedly from region to region and country to country, but they are important factors that must inform the eventual implementation of the UN's technical assistance and training initiatives on the continent. The partnership organisations also bring invaluable local expertise and experience with them, thereby enhancing the overall quality and relevance of the technical assistance activities. Regionally, the African Union (AU), whose foremost objectives include the promotion of collective security and common values in Africa, and whose membership covers all nations on the continent, has an indispensable role to play in building International Criminal Justice capacity in Africa.

(c) Focus on what works and those who want to work

Aim is to bring International Criminal Justice home, make it less exotic, etc. Local good practices and strong officials working on MLA and extradition etc. ICC cooperation will be familiar. Build on the pride these officials have in their work.

(d) Work with specialised units

(e) Don't stovepipe technical assistance on international criminal justice

Aim to include ICC technical assistance and training as part of broader efforts to enhance the country's response to international crime more broadly, including counter-terrorism, TOC, etc. Often the same practitioners and policy makers. Frame and coordinate assistance as part of broader rule of law and criminal justice programming for the country. Also ongoing human rights and constitutional education programmes, including at early stages (universities, justice colleges etc).

(f) Ensure proper follow-up and evaluation of recipient country progress and implementation

Another useful tool to promote effective follow-up is the elaboration of workshop outcome documents. The training provider can facilitate the drafting of the outcome documents. However, care should be taken to ensure that countries accept full ownership of their commitments contained in the document. At regional or sub-regional levels, these outcome documents assist in setting benchmarks from which Member States agree to progress by taking certain steps to properly implement the provisions of the Rome Statute. The outcome document should be reviewed at subsequent annual training workshops, thereby creating a system of internal peer review within the region/sub-region. At the national level, the workshop outcome document is also an effective tool to measure the country's progress against the commitments it undertook to implement at the workshop.

Other important good practices

Ensuring sustainable results based on a recognition that measures, such as International Criminal Justice-related criminal justice reform, take years to implement and requires a long-term commitment from the donor as well as technical assistance providers who are on the ground who can nurture the reforms;

Obtaining a commitment that officials who receive training will remain in their posts for a minimum period of time in order to best utilize the training;

Designing programmes that can produce measureable results, surveying recipients, and conducting evaluations to ensure effectiveness and incorporate necessary adjustments;

Developing practical, user-friendly training materials and other tools in the relevant languages to facilitate States' efforts to meet international standards;

Institutionalizing inter-agency cooperation and joint police-prosecutor cooperation and investigative training;

Engaging executive branch decision-makers and parliamentarians whose support may be needed to adopt the necessary legislation or to provide practitioners with the tools and other resources to put their training into use.

POSITIVE COMPLEMENTARITY AND BUILDING NATIONAL CAPACITY TO PROSECUTE: REFLECTIONS AFTER KAMPALA

Mr. Renan Villacis[*]

My presentation will focus on the discussions held on positive complementarity in the Assembly of States Parties and how the Secretariat of the Assembly (SASP) envisages going forward on the matter.

The issue of "positive complementarity" is a relatively novel concept in the Rome Statute system. The term does not appear in the Rome Statute nor in its ancillary norms and has until recently required a careful explanation of what it is and, concomitantly, what it is not.[1]

Although positive complementarity was referred to in some of the papers and statements of the Office of the Prosecutor (OTP), the Assembly did not embark on its discussion until 2009 as part of the preparations for the Review Conference. The Bureau of the Assembly entrusted its working group in The Hague to consider the issue via two focal points, Denmark and South Africa.

One can summarize the discussions among the States in the working group by indicating that at the outset of such consideration there were several States, which did not consider that the Court should proceed down the path of positive complementarity. Some of the doubts expressed were conceptual and, in other cases, of a functional and practical nature. These States recalled that the Statute did not refer to the concept of positive complementarity and that to raise the matter in a resolution might eventually lead to the perception that there was an obligation flowing from the Rome Statute for States to undertake activities on positive complementarity. This point was being raised as a couple of other topics not explicitly foreseen in the Statute had been the object of discussion and had resulted in divergent views among States.[2]

Another key point raised by these States was that the Court should focus on its core mandate, i.e. the investigation and prosecution of the most serious crimes of international concern, which were clearly set out in the Statute. It was posited that if the Court began to look into positive complementarity activities, its resources and focus could be distracted, which would then have a negative impact upon its ability to deliver on its core mandate.

On the other hand, there were States who espoused the view that positive complementarity was called for, as it would actually reinforce the Rome Statute system and make the principle of complementarity effective.

For its part, the Presidency of the Court and the Registry stated that they did not foresee a major role for the Court *per se* and that what they could undertake in that connection would be within existing resources. On the other hand, the OTP indicated that they already had a mandate to undertake positive complementarity activities and would continue to do so.

The discussions led to a Report of the Bureau on complementarity (ICC-ASP/8/51) and to additional discussions at the resumed eighth session of the Assembly in March 2010, which was the last session prior to the Review Conference.

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[*] Director of the Secretariat of the Assembly of States Parties to the Rome Statute.

[1] See the interview with Amb. Kirsten Biering, in ICC Newsletter #3, January 2010 at http://www.icc-cpi.int/iccdocs/asp_docs/Publications/Newsletter-ASP-3-ENG-web.pdf

[2] These two topics were funding by the Assembly for family visits of indigent detainees and the interim release of a detainee in a country of his preference.

A draft resolution on complementarity was agreed to for consideration by the Conference. The resolution adopted at the Review Conference, which set out the steps to be taken, inter alia, calls for the Secretariat to assume certain functions in helping States and other actors in undertaking positive complementarity activities.[3]

Requests for assistance

The SASP is preparing a proposal for consideration of how to move forward with the mandate of the resolution. The main task would be to compile information about the types of assistance that States request, as well as the assistance which other States and other stakeholders may be able to provide. The SASP would act as a sort of central depositary or clearing-house for such information. Having been informed about the respective requests and offers of assistance, the requesting State would then proceed to discuss directly with the stakeholder offering assistance.

In order to compile the information, the SASP envisages sending out a note verbale/questionnaire to States whereby they could provide information about the type of assistance they would like to receive as well as which they can provide to interested States. The precise content of the questionnaire would be prepared on the basis of the discussions held at this seminar and an event organized by the International Center for Transitional Justice (ICTJ), scheduled for the end of October in New York, where several stakeholders involved in capacity-building and judicial reform matters will have a first opportunity to interact.[4]

A reference for the questionnaire is the annual communication sent by the SASP to States regarding the Plan of Action of the Assembly.[5] Although 42 relies were received to the 2009 and 2010 questionnaires, there were only a few requests (Dominican Republic[6], Honduras,[7] Mauritius[8], Paraguay[9]) for assistance and they tended in some cases to be of a rather general or all-encompassing nature. The references to assistance States are able to provide were also limited.[10]

Although we are still in the early phases of setting out how to take the process forward, we think that the requests for assistance should be: specific, not of a general nature, with an indication of the target group within a State, so that appropriate matching may take place with the possible provider of assistance.

[3] Resolution RC/Res.1. See also the follow-up on the topic made at the ninth session of the Assembly in operative paragraph 47 of resolution ICC-ASP/9/Res.3 and the Report of the Bureau on complementarity (ICC-ASP/9/26).

[4] The outcome of this Greentree retreat in October 2010 is available at http://www.ictj.org/static/Publications/ICTJ_Complementarity_GreentreeSummary_Nov2010.pdf. See also http://www.icc-cpi.int/iccdocs/asp_docs/Events/2010/MeetingSummary-Complementarity-Retreat-13Nov-ENG.pdf.

[5] http://www.icc-cpi.int/Menus/ASP/Sessions/Plan+of+Action/2010+_+Plan+of+Action_ASP9.htm.

[6] Dominican Republic requested assistance with training for the personnel dealing with application of the Statute (prosecutors, judges and technical judicial staff).

[7] Honduras requested training and technical juridical assistance for practitioners that may have to deal with ICC issues, as well as support for the dissemination and socialization of the Statute with different social sectors, especially those dealing with human rights.

[8] Mauritius requested assistance with legal training and non-legal technical expertise and assistance to the police, prosecuting authorities and judiciary, as well as assistance in disseminating information to the government and the public so as to enable them to cooperate with the ICC.

[9] Paraguay requested assistance with adapting the legal penal terminology to the implementing legislation.

[10] Japan offered assistance on the ratification of the Rome Statute.

It is also essential, for budgetary and practical reasons, that the Assembly provide guidance in terms of what States should be approached as possible requesting States, so as to focus these activities on a limited group in this initial phase of the endeavour.

Ms. Lorraine Smith*

This abbreviated paper will map out the crucial issues for ensuring a coordinated, cohesive, strategic and effective approach to national capacity building initiatives.

(a) Provide a brief overview of the International Bar Association (IBA) with particular emphasis on our niche role as transformative knowledge providers for the legal community;

(b) Examine the main priorities that should be considered when addressing this issue; and

(c) Identify some challenges and suggest some recommendations going forward.

Much of what will be said will be neither new nor innovative. But it is nevertheless important to revisit the issues and hopefully leave with some clear consensus as to how this matter should be approached going forward

Overview of IBA

The IBA, established in 1947, is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 40,000 individual lawyers and 197 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

The International Bar Association's Human Rights Institute (IBAHRI) works to promote, protect and enforce human rights under a just rule of law. The core mandates of the IBAHRI also include the promotion and protection of the independence of the judiciary and of the legal profession worldwide. More recently since 2005, the IBA has also commenced the ICC Monitoring and Outreach Programme based in The Hague. The monitoring component follows and reports on the work and proceedings of the ICC, focusing particularly on issues affecting the fair trial rights of the accused; the implementation of the 1998 Rome Statute, the Rules of Procedure and Evidence. The outreach component of the programme works in partnership with bar associations, lawyers and civil society organizations disseminating information and promoting debate on the ICC in different jurisdictions across the globe.

Main priorities

The Kampala Review Conference was very helpful in providing a non-exhaustive list of the areas of assistance required by States. These include:

(a) Legislative assistance;

(b) Technical assistance and capacity building including training of judicial and law enforcement personnel;

(c) Physical assistance-Building or reform of prisons; and

(d) Support for awareness raising initiatives.

* Programme Manager (ICC), International Bar Association, The Hague, Netherlands.

Stakeholders

States are the key stakeholders in this process and therefore have the greatest role to play in such initiatives. Given their primary obligation to prosecute Rome Statute crimes, States have the responsibility to ensure that their legal systems conform to the Rome Statute criteria including by enhancing capacity to investigate such crimes, protect witnesses and victims and ensure a fair trial for defendants. However, a number of States may require assistance in fulfilling this important objective. Their initial approach should be a horizontal one- seeking support from other States and sharing expertise and best practices.

The Court has a limited but important role, from technical support and assistance in terms of archived evidentiary material, sharing best practices in terms of investigation and prosecution, to participating (if not necessarily organizing training initiatives). International, inter-governmental and civil society organizations also play a crucial role.

Challenges

1. Lack of coordination between the various actors.

2. Resource challenges and lack of political will- priorities.

3. Lack of comprehensive information about capacity building initiatives. Independent researchers on this issue have found some particular challenges such as:

(a) Difficulty gathering data:

(i) Information is usually incomplete in almost every respect: from the actual projects or programmes, their content and outputs, and the assessment of their results;

(ii) The websites of the relevant local public institutions (notably the Ministry of Justice, or local judicial bodies) and other institutions in the different jurisdictions are not always accessible and usually out of date. The data they contain is often difficult to find, and at best partial. In some cases, only the title of the programme/project is provided; and

(iii) These problems are less acute with international, and governmental or intergovernmental organizations, but even then accessibility was less than perfect and information usually incomplete.

(b) Lack of coherent training initiatives:

(i) Researchers found that training initiatives lacked coherency and consistency. They were generally short courses lasting from 1-3 days with little follow-up. Much of the training focused on substantive law with little emphasis on procedural aspects of the law; and

(ii) It is also noted that there is significant imbalance in the personnel targeted for such training. Disproportionate emphasis is placed on training judges and prosecutors and not enough in training law enforcement officials and defence counsel.

(c) Insufficient emphasis placed on provision of physical assistance:

In relation to provision of physical assistance, the researchers found that only limited parts of capacity development initiatives have taken the form of providing supplies, equipment and infrastructure (mainly in the form of buildings or offices) to the national jurisdictions. Furthermore there was very little by way of needs assessment and consultation

4. Not enough emphasis on ensuring sustainability of efforts according to the OECD, sustainable capacity building remains one of the most difficult areas of international judicial development practice.

Charting the way forward

5. Need to ensure comprehensive rather than piecemeal approach to capacity building. Start by conducting a needs analysis or cost analysis. In this regard, such data on the possible costs of establishing a unit such as the Priority Crimes Unit in South Africa could be obtained from South African authorities.

6. Streamlining capacity building efforts. For example, the Commonwealth Secretariat referred to a national focal point or contact person with whom they would liaise on extradition and MLA matters. Given that this is usually the one resource person in the ministry who might also be tasked with facilitating ICC requests, it may be useful to also encourage that this person also be designated the ICC focal point.

7. Mainstreaming- Many initiatives are focused on specific issues in international law. Training on the rule of law initiatives can and should include reference to the ICC as one of the principal pillars in the fight against impunity.

8. Ensure that information concerning capacity building initiatives is documented, easily accessible and known, e.g. IBA Rule of Law Directory.

International Rule of Law Directory

Through its contract with the United States Institute of Peace, the IBA has created a worldwide directory of organizations offering assistance to the rule of law. The purpose of the International Rule of Law Directory is to provide users with reliable information and a compiled directory of internet resources and links to organizations offering assistance in promoting the rule of law. The International Rule of Law directory is designed to improve access to, and the dissemination of, information and will facilitate the support of organizations engaged in the area of the rule of law.

This is the first centralised, fully searchable, online database of entities engaged in rule of law work throughout the world and will provide an invaluable tool to those establishing and implementing rule of law programmes. It allows organizations to provide a brief description of the rule of law work carried out, to define assistance provided by category (searchable) and to include their contact details and web address. Organizations which would like to be included in the database, and which qualify, are invited to complete a registration form and provide relevant information including the categories of assistance they provide.

Annex I - IBA projects

IBA/ICC Monitoring and Outreach Programme

The IBA's International Criminal Court (ICC) Monitoring and Outreach Programme commenced in 2005 through funding provided by the John D. and Catherine T. MacArthur Foundation.

The monitoring component follows and reports on the work and proceedings of the ICC, focusing particularly on issues affecting the fair trial rights of the accused; the implementation of the 1998 Rome Statute, the Rules of Procedure and Evidence, and related ICC documents, in the context of relevant international standards. The outreach component of the programme works in partnership with bar associations, lawyers and civil society organizations disseminating information and promoting debate on the ICC in different jurisdictions across the globe. Given the important role played by lawyers in advancing implementation of the Rome Statute, particular attention is paid to the issue of implementing legislation and publicity of ICC proceedings.

IBA publications

(a) The HRI, together with the United Nations has produced a manual for judges, prosecutors, and lawyers: Human Rights in the Administration of Justice, which is the core human rights training manual used by both organizations. The manual is also available in Spanish, downloadable in two parts, Chapters 1 - 9 and Chapters 10 - 16;

(b) The IBAHRI also recently published an International Criminal Law Manual which is an excellent training tool for judges, prosecutors and lawyers on international criminal law; and

(c) The ICC Monitoring and Outreach programme produces an E-Magazine for lawyers as well as periodic reports detailing the key findings and recommendations which are made available to the Court, IBA members, civil society and the public at large.

Annex II - Presentation overview

(a) Opening remarks- Kampala setting the stage for discussions on national capacity building and their importance in ensuring that States realize their potential in fulfilling complementarity objectives;

(b) Issues to be covered in presentation:

Unable to fully address the issue given its breadth and scope but will flag main priority areas.

(c) Overview of the IBA HRI and objectives and mandate;

(d) Categorization of national capacity building initiatives:

(i) Legislative assistance;

(ii) Technical assistance and capacity building; and

(iii) Physical assistance.

(e) Main players:

(i) States;

(ii) Court;

(iii) International Organizations; and

(iv) NGOs.

(f) Main challenges:

(i) Lack of coordination;

(ii) Lack of resources; and

(iii) Not enough pre-work (needs assessment).

(g) Next steps and way forward:

(i) IBA Rule of Law Directory; and

(ii) Commonwealth Secretariat initiatives (focal point).

Mr. Rafael de Bustamante Tello*

The European Union and the complementarity toolkit[1]

Background

At the Review Conference held in Kampala, on 31 May-11 June 2010, a resolution of the Assembly of States Parties recognized "the primary responsibility of States to investigate and prosecute the most serious crimes of international concern"; emphasized "the principle of complementarity as laid down in the Rome Statute"; and stressed "the obligations of States Parties flowing from the Rome Statute."[2] In order to fulfill the potential of the Rome Statute in fighting global impunity, national systems need to play a stronger role in filling the impunity gap that currently exists in dealing with international crimes. The premise of complementarity is that national systems are best placed to investigate and prosecute Rome Statute crimes, as they are closer to the victims and affected communities. However, for the complementarity principle to be effective, national systems must have the necessary capacity to conduct these investigations and trials. At the same time, the political will to prosecute these crimes must exist. The resolution adopted in Kampala "encourages the Court, State Parties and other stakeholders, including international organizations and civil society to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern as set out in the Report of the Bureau on complementarity, including its recommendations."

In the course of a high panel debate on Complementarity, the European Commission (represented by K. Kovanda, Relex DDG) proposed the idea of 'Complementarity toolkit' aimed at describing in greater detail what national jurisdictions actually need in terms of support and development as well as presenting best practices and recommendations for the integration of complementarity related activities in the rule of law and development programmes of States and international organizations.

Some follow-up initiatives emerge after the Conference:

(a) Denmark and South Africa will continue to play a role of focal points on complementarity;

(b) The Assembly of States Parties Secretariat (SASP) was tasked "within existing resources, to facilitate the exchange of information between the Court; and

(c) States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions,"[3] and civil society is mobilizing to build up on the momentum on complementarity created by the Kampala Conference (cf., meeting in New York on 29-30 October for international actors organized by OSI-Justice Initiative/ICTJ).

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* European Union focal point for the ICC.

[1] The views expressed are solely those of the writer and may not be regarded as stating an official position of the Council.

[2] Resolution on Complementarity: *Official Records … Review Conference … 2010* (RC/11), part II, RC/Res.1.

[3] See ICC Assembly of States Parties, Resolution on Complementarity, ASP document RC/Res.1, adopted by consensus 8 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf (accessed June 23, 2010), para. 9.

Tool kit

(a) A living document containing the information on what complementarity involves and recommendations as to how to make the support to national capacity building in this area more effective;

(b) An instrument for various actors involved in providing assistance in a rule of law sector, identifying key elements needed to be addressed in the context of the most serious crimes, identifying challenges and opportunities – country specific and international, best practices and lessons learned to date; and

(c) Developed with the participation of practitioners from the development sector, technical experts from major rule of law donors, international justice practitioners (including from the ICC); host country government officials and justice practitioners (lawyers, judges and investigators); civil society groups and resource people who implement complementarity-specific programming.

Way forward

Complementarity toolkit workshop

The Commission, in cooperation with Open Society Justice Initiative will organize a workshop devoted to the development of the framework for the toolkit on 29-30 November 2010 in Brussels with the participation of experts from justice and development fields involved in the complementarity related work.

Importance of Laying the Foundations Generating national civil society, host country and donor ownership.

Seminar open to all interested parties, including Commonwealth countries. It is essential that participants are able to provide technical expertise.

More details concerning the seminar will be available in the coming weeks.[4]

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[4] Contact: Michal Golabek, European Commission/Relex B1, michal.golabek@ec.europa.eu, Tel. +32 2 29 87688; Rafael de Bustamante Tello, EU focal point for the ICC, rafael.debustamante@consilium.europa.eu, Tel. +32 2 2815190.

PROGRAMME

Programme

Marlborough House, London, UK
5-7 October 2010

5 October 2010
9:00 am – 9:15 am
Welcome introduction to the meeting

Mr. Akbar Khan, Director, Legal and Constitutional Affairs Division (LCAD), Commonwealth Secretariat

9:15 am - 10:00 am
Introductory session

Keynote speech by H.E. Judge Sang-Hyun Song, President, International Criminal Court

Plenary discussion with President Song

10:00 am - 10:45 am
First session: Overview of the Commonwealth Secretariat's work in support of the International Criminal Court and in promoting the rule of law through building national capacity

Chair: Mr. Akbar Khan, Director, Legal and Constitutional Affairs Division (LCAD), Commonwealth Secretariat

Speakers:
- Mr. Vimalen Reddi, Consultant, Criminal Law Section, Commonwealth Secretariat, London
- Mr. Jarvis Matiya, Head of Justice Section, Commonwealth Secretariat, London

11:15 am - 12:00 pm
Second session: Overview of the outcomes from the first Review Conference of the Rome Statute of the International Criminal Court held in Kampala, Uganda (June 2010) relevant to Commonwealth States

Chair: Mr. Akbar Khan, Director, Legal and Constitutional Affairs Division (LCAD), Commonwealth Secretariat

Speaker:
- H.E. Ms. Mirjam Blaak, Deputy Head of Mission, Embassy of Uganda, Brussels, Belgium

Open discussion

12:00 pm - 1:00 pm
Review of the status of ratification and implementation of the Rome Statute and other international humanitarian law obligations within the Commonwealth membership

Chair: Ms. Eva Šurková, Assembly of States Parties Facilitator for the Plan of Action on achieving universality and full implementation of the Rome Statute of the International Criminal Court; Legal Adviser, Permanent Mission of Slovakia to the United Nations

Speakers:
- Mr. Leonard Blazeby, Legal Adviser, Advisory Service on International Humanitarian Law, International Committee of the Red Cross (ICRC)

Open discussion

2:00 pm - 4:15 pm
Third session: Sharing best practice in the Commonwealth. Presentation by individual Commonwealth States of their domestic experience of ratification and implementation of the Rome Statute

Chair: Mr. Leonard Blazeby, Advisory Service on International Humanitarian Law, International Committee of the Red Cross (ICRC)

Speakers:
- Ms. Annemieke Holthuis, Counsel, Criminal Law Policy Section, Department of Justice, Canada
- Ambassador Amina Mohammed, Permanent Secretary, Ministry of Justice, National Cohesion and Constitutional Affairs, Kenya
- Mr. Koteswara Rao, Legal Adviser, Ministry of External Affairs, Seychelles
- Mr. S.S. Chahar, Joint Secretary and Legal Adviser, Department of Legal Affairs, Ministry of Law and Justice, India
- Mr. Abdullahi Mikailu, Deputy Director of Public Prosecutions, Attorney General's Office, The Gambia
- Mr. Ahmed Ali Sawad, Attorney General, Maldives
- Ms. Gaitree Jugessur-Manna, Assistant Solicitor General, Attorney General's Office, Mauritius
- Mr. Peter T. Akper, Deputy Director/Special Assistant to the Hon. Attorney General of the Federation and Minister of Justice, Federal Republic of Nigeria
- Mr. Ian Rampersad, Senior Legal Executive, Ministry of the Attorney General, Trinidad and Tobago

Open discussion

4:30 pm - 6:00 pm
Fourth session: Challenges facing Commonwealth States in ratifying and/or implementing the Rome Statute

Chair: Mr. David Donat-Cattin Director, International Law and Human Rights Programme, Parliamentarians for Global Action (PGA)

Speakers: Presentation by individual States of the domestic challenges faced in ratifying and/or implementing the Rome Statute

Open discussion

6:00 pm - 7:30 pm
Welcome reception at Marlborough House, hosted by Mr. Ransford Smith, Commonwealth Deputy Secretary-General

6 October 2010
9:15 am - 11:15 am
Fifth session: Overview of the Commonwealth model law on the implementation of the Rome Statute and discussion of proposed revisions

Chair: Mr. Akbar Khan, Director, Legal and Constitutional Affairs Division (LCAD), Commonwealth Secretariat

Speaker:
- Mr. David Donat-Cattin, Director, International Law and Human Rights Programme, Parliamentarians for Global Action (PGA)

Open discussion

11:30 am - 1:00 pm
Sixth session: Overview of the Commonwealth practical guidance on prosecuting crimes under the Rome Statute and discussion of proposed revisions

Chair: Mr. Akbar Khan, Director, Legal and Constitutional Affairs Division (LCAD), Commonwealth Secretariat

Speaker:
- Mr. Max Du Plessis, International Crime in Africa Programme, Institute for Security Studies, South Africa

2:00 pm - 2:45 pm
Sixth session (continued): The crime of aggression after Kampala

Speaker:
- Mr. Dapo Akande, Co-Director, Oxford Institute for Ethics, Law and Armed Conflict, St. Peters College, University Oxford

Open discussion

2:45 pm - 3:30 pm
Seventh session: Developing an accession kit for Commonwealth States seeking to ratify the Rome Statute

Chair: Ms. Margaret Bruce, Legal Officer to the Director's Office, Legal and Constitutional Affairs Division, (LCAD) Commonwealth Secretariat.

Speaker
- Professor David McClean, University of Sheffield

Open discussion

3:45 pm -6:00 pm
Eighth session: Strategies for promoting ratification and implementation of the Rome Statute in Commonwealth States: lessons learned and challenges for the future

Chair and speaker: Ms. Eva Šurková, Assembly of States Parties Facilitator for the Plan of Action on achieving universality and full implementation of the Rome Statute of the International Criminal Court; Legal Adviser, Permanent Mission of Slovakia to the United Nations

Speakers:
- Ms. Cheryl Thompson-Barrow, General Counsel, CARICOM
- Mr. Rafael de Bustamante Tello, European Union focal point for the ICC
- Mr. Anton du Plessis, Head, International Crime in Africa Programme, Institute for Security Studies, South Africa
- Mr. David Donat-Cattin, Parliamentarians for Global Action
- Mr. Christopher Hall, Amnesty International

Open discussion

7 October 2010
9:00 am – 11:15 am
Ninth session: Positive complementarity and building national capacity to prosecute: reflections after Kampala

Chair: Evelyn A. Ankumah, Executive Director, Africa Legal Aid, The Hague

Speakers
- Ms. Yolande Dwarika, Assembly of States Parties Facilitator on the issue of complementarity at the Review Conference of the Rome Statute, Legal Counsellor, Embassy of South Africa to The Netherlands
- Mr. Renan Villacis, Director of the Secretariat of the Assembly of States Parties to the Rome Statute
- Ms. Elizabeth Evenson, Legal Counsel, Human Rights Watch, Brussels, Belgium
- Ms. Lorraine Smith, Programme Manager (ICC), International Bar Association, The Hague, Netherlands
- Mr. Rafael de Bustamante Tello, European Union focal point for the ICC

Open discussion

11:30 am - 12:00 pm
Tenth session: Merits of convening a Commonwealth Working Group for review of model law: Draft terms of reference (TOR)

Chair: Mr. Akbar Khan, Director, Legal and Constitutional Affairs Division (LCAD), Commonwealth Secretariat

12:00 pm -1:00 pm
Final session: Presentation of conclusions and recommendations

Speakers
- Mr. Vimalen Reddi, Consultant, Criminal Law Section, Commonwealth Secretariat, London
- Mr. Shadrach Haruna, Legal Adviser, Criminal Law Section, Commonwealth Secretariat, London
- Ms. Margaret Bruce, Legal Officer to the Director's Office, Commonwealth Secretariat, London

Plan of action for achieving universality and full implementation of the Rome Statute of the International Criminal Court*

To the Assembly of States Parties

1. To continue to monitor closely the implementation of the Plan of action.

To States Parties

2. To continue to promote, as far as possible, the universality and full implementation of the Rome Statute in their bilateral, regional and multilateral relationships;
3. To continue their efforts to disseminate information on the Court at the national and international level, including through events, seminars, publications, courses and other initiatives that may raise awareness about the work of the Court;
4. To continue to provide the Secretariat with updated information relevant to the universality and full implementation of the Rome Statute, including current contact information on national focal points;
5. To organize seminars in different regions and to disseminate information about the Court's work and the provisions of the Rome Statute;
6. To continue to provide, wherever possible, technical and financial assistance to States wishing to become party to the Statute and to those wishing to implement the Statute in their national legislation; and
7. To continue to cooperate with the Court so that it can fulfil its functions accordingly.

To the Secretariat of the Assembly of States Parties

8. To continue to support States in their efforts to promote universality and full implementation of the Rome Statute by acting as a focal point for information exchange and by making available updated information on this matter, including on the website of the Court;[1]
9. To compile information on all available resources and potential donors, and post it on the Court's website for easy access by States; and
10. To prepare a matrix to serve the purpose of enhanced information sharing between potential recipients and donors of technical assistance.

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* Recommendations adopted by the Assembly on its eighth session, resolution ICC-ASP/8/Res.3, para. 7.

[1] http://www.icc-cpi.int/Menus/ASP/Sessions/Plan+of+Action.

Assembly of States Parties publications*

Plan of Action seminar series

Seminar on International Criminal Justice: The Role of the International Criminal Court, United Nations, New York, 19 May 2009

Seminar on the ICC Review Conference: Key challenges for International Criminal Justice. United Nations, New York, 30 April 2010

Commonwealth meeting on the International Criminal Court, Marlborough House, London, 5-7 October 2010

Other publications

Selected Basic Documents related to the International Criminal Court, 3rd edition, 2011

The Rome Statute of the International Criminal Court. Tenth Anniversary Commemoration, United Nations, New York, 17 July 2008

Newsletter, ASP Special Edition #1, May 2009

Newsletter, ASP Special Edition #2, November 2009

Newsletter, ASP Special Edition #3, January 2010

Newsletter, ASP Special Edition #4, May 2010

Newsletter, ASP Special Edition #5, December 2010

Factsheet: The Assembly of States Parties, 2nd edition, 2011

Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Review Conference, Kampala, 31 May - 11 June 2010 (International Criminal Court publication RC/11)

Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First to ninth session, 2002 to 2010 (International Criminal Court publication ICC-ASP/1/3 to ICC-ASP/9/20)

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* See http://www.icc-cpi.int/menus/asp/asp+publications.