



Embassy of Botswana

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The Embassy of the Republic of Botswana presents its compliments to the Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court and has the honour to forward a Report by Botswana on the Implementation of the Plan of Action for Achieving/Universality of the Rome Statute of the International Criminal Court.

It would be appreciated if the Report could be forwarded to the Assembly of States Parties.

The Embassy of the Republic of Botswana avails itself of this opportunity to renew to the Secretariat of the Assembly of States of Parties to the Rome Statute of the International Criminal Court the assurances of its highest consideration.

Brussels 14 September 2011

**Secretariat of the Assembly of States Parties
to the Rome Statute of the International
Criminal Court
Maanweg 174
2516 AB
The Hague**



**THE IMPLEMENTATION OF THE PLAN OF ACTION OF THE ROME STATUTE OF
THE INTERNATIONAL CRIMINAL COURT**

1. **BACKGROUND**

- a) Botswana ratified the Rome Statute of the International Criminal Court (the Statute) on the 8th September 2000. Botswana is a Roman/ Dutch and Common Law jurisdiction and therefore a "dualist" state. As such, the national courts cannot apply international law as a direct source of law. Botswana must incorporate its treaty obligations through an Act of Parliament for them to become part of the national laws and it is in this context that she is in the process of drafting an ICC Bill to domesticate the Rome Statute into national law.

- b) A number of versions of a draft ICC Bill (hereinafter draft Bill) have been prepared by the Attorney General's Chambers and refined with the assistance of the Institute for Security Studies (the Consultant), which has been engaged to assist with drafting the implementation legislation. The draft Bill was submitted for internal vetting by the Head of the Drafting Division of the Attorney General's Chambers (hereinafter HOD) and refined on the basis of the comments received. The Attorney General's Chambers is awaiting feedback from the Consultants, after which the Bill will go for another vetting process by the HOD. Her comments, if any, will be incorporated, and it is hoped that the Bill will then be dispatched to the Ministry of Justice Defence and Security for consultations/comments.

2. **INFORMATION ON OBSTACLES TO FULL IMPLEMENTATION**

One of the primary constitutional obstacles to full implementation of the Statute concerns immunity, which most African constitutions including Botswana grants to heads of states and Senior Government Officials. Historically, heads of states were not subject to criminal responsibility for their actions, because of the concept of sovereign immunity.

Contemporary international law no longer accepts that a state may treat its nationals as it pleases. Under Article 27 of the Rome Statute, a head of state or other Official who commits a crime within the jurisdiction of the International Criminal Court (the Court) loses his or her immunity and can be prosecuted by the Court. This means that the provisions of the Statute are applicable to everyone regardless of any distinction based on official recognition.

There are also practical challenges that will have to be taken into account during the drafting process, relating to the concepts of:

- a) Search and seizure;
- b) Arrest, detain and surrender: - with regard to surrender under the Rome Statute of the ICC Bill, it should be noted that surrender in this case is a different procedure from surrender under the Extradition Act as the surrender under the ICC Bill is dealing with cooperation with the ICC and not cooperation with another state. Therefore the traditional notion in extradition of looking behind a warrant does not apply in the context of cooperation with the ICC.
- c) Prosecution;
- d) Detention after conviction; and
- e) Other forms of cooperation provided for in the Statute;

The implementation of the Rome Statute of the ICC Bill will be mainly done through the office of the Directorate of Public Prosecution (DPP) (see Parts III-VII). This is likely to put a huge strain on the office of the DPP especially with regard to manpower.

3. NATIONAL OR REGIONAL STRATEGIES OR PLANS ACTIONS TO PROMOTE RATIFICATION AND/OR FULL IMPLEMENTATION

a) The Rome Statute and Southern African Development Community

The Southern African Development Community (SADC) played an important role in the establishment of the Court. Delegations from Botswana, Lesotho, Malawi, Swaziland, Tanzania, and South Africa have participated in the efforts to establish the ICC from as early as 1993, when the ILC presented a draft statute to the General Assembly's Sixth Committee for consideration. The SADC Ministers of Justice and Attorneys-General later issued a 'Common Statement' which became the instruction manual for SADC's negotiations during the Rome conference.

There was a follow up meeting in July 1999, following the adoption of the Statute in 1998. Delegates representing 12 SADC Member States participated in the SADC conference on the Rome Statute of the ICC in Pretoria, South Africa. At the end of the conference, participants adopted a Model-Enabling Act -- Ratification for the ICC and 'Common Understanding' setting out general principles, which would guide the SADC approach to ratification and subsequent Preparatory Commission meetings. The Model Act is divided into five parts and deals with issues such as interpretation, definition of crimes, immunities and privileges of Court officials, cooperation with the Court, arrest and surrender of persons to the Court, enforcement of sentences and miscellaneous provisions. Follow up meetings were also held in several SADC states on the ratification and implementation of the Statute.

- b) Botswana has not yet developed a national strategy to promote full implementation of the Statute but as mentioned above is already in the process of domesticating the Statute. However, the Ministry of Defence Justice and Security has informed that it is intended that the strategy once formulated will include the following:
- i. Domestication;
 - ii. Capacitating relevant stakeholders, Judicial Officers, Prosecutors , Prison Officials...etc;
 - iii. Infrastructure development Court Rooms, Holding facilities, Prisons;
 - iv. Public education campaigns; and
 - v. Enhancing cooperation with the Court and the Office of the Prosecutor

4. TECHNICAL AND OTHER ASSISTANCE NEEDS AND DELIVERY PROGRAMMES

Botswana's need in terms of technical assistance include:

- a) training or capacity building programs for drafters, Senior Government Officials (prosecutors, investigators prisons officials etc), or Judicial Officers, and/or foreign affairs officers;
- b) bilateral expert exchanges;
- c) organisation of workshops (with national, regional or trans-regional focus, as appropriate) for the purpose of knowledge sharing;
- d) presentation and training on Database of National Implementation Legislation (searchable by characteristics of legal system (e.g. common/civil, monist/dualist) and further filterable by particular elements of interest (e.g. genocide, assistance provisions etc.);and/or
- e) Secondment/attachment of Member States' experts.

5. **EXAMPLES OF IMPLEMENTING LEGISLATION FOR THE ROME STATUTE**

Implementing legislation in Botswana will be through an Act of Parliament which is currently at drafting stage. The most recent draft Bill is attached.

6. **BILATERAL COOPERATION AGREEMENTS BETWEEN THE COURT AND STATE PARTIES**

There are no such Agreements existing between Botswana and the Court. Such have been delayed by the some of the challenges such as insufficient capacity on ICC issues, lack on domestic legislation and others.

7. **SOLUTIONS TO CONSTITUTIONAL ISSUES ARISING FROM RATIFICATION**

In formulating clause 20 of the Rome Statute of the ICC Bill which gives effect to Article 27 of the Rome Statute, the drafting team was faced with the challenge of formulating the provision on state immunity. The President has blanket immunity under the Constitution and as the Rome Statute of the ICC Bill will be an inferior Act to the Constitution, the constitutional provision on the President's immunity cannot be subjected to this Act. The ISS had given us the option of leaving the provision out so that it will be left to the courts to interpret the provision. However, the Ministry will have to give us more guidance on this issue as this will also affect the state immunity given to Presidents of other states. With regard to diplomatic immunity and immunity granted to Members of Parliament, these will be subjected to the Rome Statute of the ICC Bill.

The proceedings under the Rome Statute of the ICC Bill will be instituted if the acts or omissions constituting the offence are alleged to have been committed on or after 1st July, 2002 which the date this Bill will be deemed to have come into force. Under the Constitution, section 10(4), a person shall not be guilty of an offence on account of any act or omission that did not at the time it took place constitute an offence.... However, with regard to the Rome Statute of the ICC

Bill, the crimes covered are crimes under customary international law so the international prohibition on retroactive criminalisation does not apply.

8. **NATIONAL CONTACT POINTS FOR MATTERS RELATED TO PROMOTION OF RATIFICATION AND FULL IMPLEMENTATION**

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