CJI/doc.290/08 rev.1

REPORT ON PERSPECTIVES FOR A MODEL LAW ON STATE COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

(presented by Dr. Mauricio Herdocia Sacasa)

I. INTRODUCTION

The OAS General Assembly, through resolution AG/RES. 2279 (XXXVII-O/07) Promotion of the International Criminal Court, of June 5, 2007, decided to:

> Request the Inter-American Juridical Committee, on the basis of the information received from and updated by the member states, the recommendations contained in the report CP/doc.4194/07, and existing cooperation law, to prepare a model law on cooperation between states with the International Criminal Court, taking into account the Hemisphere´s different legal systems, and to submit it to the General Assembly at its thirty-eighth regular session.

No doubt this is a complex initiative as it requires to address a large amount of legal and practical problems and finding possible solutions to current situations, in a scenario characterized by the peculiarity of laws and domestic criminal procedures, in the context of an international instrument with universal vocation.

As this work cannot be separated from previous works of the Juridical Committee involving the promotion of the International Criminal Court, there is need to bear in mind the background and general information on the issue.

II. THE ORIGIN OF THE WORK OF THE INTER-AMERICAN JURIDICAL COMMITTEE

The work of the Inter-American Juridical Committee on this subject, in more recent times, goes back to the mandate received by the General Assembly of the Organization of American States on June 7, 2005, when it was requested to prepare a questionnaire to be submitted to the OAS Member States. The questionnaire sought to secure information on how the respective national legislations were ready to cooperate with the International Criminal Court.

Some two months later, in August 2005, the Inter-American Juridical Committee approved including in the agenda the topic on the Promotion of the International Criminal Court.

It should be highlighted that at that time the "Questionnaire on the International Criminal Court" comprised Member States to the Statute of Rome as well as non-member countries.

In a short space of time, the "Questionnaire on the International Criminal Court" was responded by 17 countries, of which 11 were Parties to the Rome Statute and 6 were not. Based on this information, the Rapporteur submitted the requested report.

On June 6, 2006, the OAS General Assembly decided to request the Inter-American Juridical Committee, taking into consideration the results of the report presented, to prepare a document of recommendations to the OAS Member States, on how to strengthen cooperation with the International Criminal Court. Report

CJI/doc.256/07 rev.1 was forwarded to the Permanent Council, which in turn delivered it to the General Assembly.

This Report addresses the perspective of a model law on the cooperation of the States with the International Criminal Court, pursuant to the mandate contained in the aforementioned resolution AG/RES. 2279 (XXXVII-O/07).

III. UPDATING OF THE RAPPORTEUR´S REPORT REGARDING THE INTER-AMERICAN SYSTEM

Since the first Report, information was received from the Permanent Mission of the Eastern Republic of Uruguay at the Organization of American States. It is an update of the material submitted through Note No. 010/06 of January 12, 2006. The new note forwards a copy of Law No.18026, "Genocide, Crimes of Lese Humanity, War Crimes and Cooperation with the International Criminal Court", which was promulgated on September 25, 2006, as well as a copy of Law No. 18013 promulgated on September 11, 2006, through which the Agreement on Privileges and Immunities of the International Criminal Court was approved.

The last two working sessions of the Committee on Juridical and Political Affairs should also be mentioned as a very important updating element, with the support of the OAS Office of International Law, which took place at the Organization headquarters on February 2, 2007 and on January 28, 2008, and which will be reviewed later. These sessions were timely occasions for updating legislative developments by the States regarding the implementation of the Rome Statute.

The 23 countries of the Inter-American System which have already ratified the Rome Statute are:

Antigua and Barbuda (June 18, 2001), **Argentina** (February 8, 2001), **Barbados** (December 10, 2002), **Belize** (April 5, 2000), **Bolivia** (June 27, 2002), **Brazil** (June 14, 2002), **Canada** (July 7, 2002), **Colombia** (August 5, 2002), **Costa Rica** (June 7, 2001), **Dominica** (February 12, 2001), **Dominican Republic** (May 12, 2005) **Ecuador** (February 5, 2002), **Guyana** (September 24, 2004), **Honduras** (July 1, 2002), **Mexico** (October 28, 2005), **Panama** (March 21, 2002), **Paraguay** (May 14, 2001), **Peru** (November 10, 2001), **Saint Kitts and Nevis** (August 22, 2006) **Saint Vincent and The Granadines** (December 3, 2002), **Trinidad and Tobago** (April 6, 1999), **Uruguay** (June 28, 2002) and **Venezuela** (June 7, 2000).

The 12 countries of the Inter-American System which have not yet ratified the Rome Statute are: **Bahamas, Chile, Cuba, Haiti, Jamaica, Saint Lucia, United States of America, Grenada, Guatemala, Nicaragua, El Salvador and Suriname.**

The Agreement on Privileges and Immunities of the International Criminal Court (APIC) was ratified by 11 countries of the Inter-American System, namely: **Argentina** (February 1st, 2007), **Belize** (September 14, 2005), **Bolivia** (January 20, 2006), **Canada** (June 22, 2004), **Ecuador** (April 19, 2006), **Guiana** (November 16, 2005), **Panama** (August 16, 2004), **Paraguay** (July 19, 2005), **Trinidad and Tobago** (February 6, 2003), **Uruguay** (November 1st, 2006) and **Mexico** (September 27, 2007).

IV. CONTENTS OF REPORT CJI/doc.211/06 BY THE IAJC RAPPORTEUR

Since Resolution AG/RES. 2176 (XXXVI-O/06) requested that the preparation of a document of recommendations on how to strengthen cooperation with the Court should be based on the results of the Report presented by the Inter-American Juridical

Committee, we deem it pertinent to provide a general summary on the contents of the document.

Said report addressed, in the first instance, the overall situation of the Rome Statute as regards the countries in the Inter-American System, highlighting the presumably more conflictive items vis-à-vis ratification or adhesion to it in relation to domestic legislation of the countries: Ne Bis In Idem, Irrelevance of Official Capacity; Duties and Powers of the Prosecutor with respect to Investigations; Arrest Proceedings in the Custodial State; Life Imprisonment and Pardon and Amnesties.

The main cooperation measures contained in the Statute of Rome in Parts IX and X regarding cooperation were also mentioned.

Mention was also made of the final report of the Inter-American Juridical Committee CJI/doc.199/05 rev.1, of August 15, 2005, addresing the topic "Legal Aspects of Compliance within the States with Decisions of International Courts or Tribunals or Other International Organs with Jurisdictional Functions", which included replies from States on the issue of the International Criminal Court.

It was seen that most States have incorporated in their legislation the crime of genocide, while a smaller number of States have incorporated war crimes. Crimes against Humanity represent the lowest number of classifications within the domestic legislation of the States which replied to the questionnaire, and this seems to indicate a more complex problem in the process of legislative harmonization as regards the latter.

It was indicated that in the case of war crimes and crimes against humanity, some of the definitions provided by the States are frequently disseminated in their legislation and do not necessarily cover the broad gamut of the Rome Statute.

It was highlighted that a good number of States Parties to the Statute that replied to the Questionnaire expressed that they have norms for implementing cooperation with the Court, either because they were specially prepared or because they consider that the prevailing legislation allows them, in any case, to cooperate with the Court. It was then stressed that the fact that for some States Parties to the Statute the absence of specific legislation did not seem to necessarily prevent their capacity to provide for the requirements of cooperation of the Court under the prevailing legislation, while the corresponding amendments are carried out.

In the case of the States Parties to the Statute that did not have a legislation specially devised to implement the cooperation with the Court, these States Parties expressed that the corresponding legislation was currently being drafted and was being processed accordingly.

In order to resolve potential problems of the statute vis-à-vis the Constitution and the domestic legal frame, certain mechanisms are worth bearing in mind in case the States are not yet Parties to the Statute:

a) Global constitutional reform

b) Report, statement or opinion of the organs involved in constitutional control

c) Studies and consultations that allowed for a straight course of ratification or adhesion

Taking into consideration the complementary nature of the International Criminal Court jurisdiction, in relation to the domestic criminal jurisdiction, the relevance of the strengthening of the domestic jurisdiction itself was highlighted. This would imply the adequate classification of the crimes included in the Statute within the Criminal Codes

of each country and the qualification of the domestic legal framework for suing them locally.

V. CONTENTS OF IAJC REPORT CJI/doc.256/07 rev.1 BY THE RAPPORTEUR

The last report approved by the Inter-American Juridical Committee and forwarded to the Permanent Council (CJI/doc.256/07 rev.1), refers to the following considerations and preliminary recommendations, which in view of its relation to the topic are presented in full:

7.1. The first approach seeks to highlight the importance of the Member States responses to the Questionnaires

The rapporteur's Report indicated that, in an ample sense, the IAJC questionnaire was a way of strengthening cooperation and facilitation because it allows the exchange of information between the States and use of the face-to-face experiences with the ratification or adoption of the Rome Statute, to enable internal legislations for cooperation with the Court, and in general, to ensure an efficient application of the Statute.

Based on the latter, the rapporteur considers the convenience of respectfully reiterating the request made by the IAJC to the OAS Member States that still have not responded the questionnaire, to complete it, and to those States Parties to the International Criminal Court that have complied with the adoption process of the implementation laws for part IX and X of the aforesaid *Statute*, to remit such information to the Committee.

Likewise, to reiterate the request made by the IAJC to the States that have concluded the adoption process for the laws incorporating, modifying or including the criminal categorizations established in the Rome Statute, to give the referred updated information to the Committee.

7.2. For those OAS Member States that are still not Parties to the Rome Statute, to consider its ratification or adoption, as the case may be, of the Rome Statute, and for effects of the latter:

7.2.1 To take into account – if considered necessary – the mechanisms used by the States that currently form part of the Statute, to overcome eventual problems of clashes with the corresponding national laws, as the case may be, in light of the experience summarized in the rapporteur's Report, which could implicate encouraging the emission of favorable judgments and/or opinions by the Ministries, organs or dependencies in charge of their preparation.

In his previous Report, the rapporteur had already indicated that to resolve the possible problems of constitutional clashes that the Statute could cause, in the opinion of some States, there was recurrence to certain mechanisms that are useful to take into account for the case of States that are still not Parties to the Statute. Some of these mechanisms have been:

a) One global constitutional amendment that overcomes all contradiction or opposition, accompanied or not by interpretative declarations.

b) Request control organs a report, declaration or opinion of the corresponding constitutional that permitted, in some cases, a simple interpretation regarding the Statute and the Constitution, and in one case, the direct requirement of a previous Constitutional amendment.

c) Studies and consultations that generally permitted the Chancelleries to propose direct ratification or adoption, without further inconveniences or legal reforms.

7.2.2 To consider the eventual formation of ample intersectorial commissions or working groups for the making of these reports or opinions, including the possible invitation of other State Powers and representatives of the civil society.

7.2.3 To consider the support the ample variety of document prepared by governments, academic institutions, civil society organizations, and/or experts[30] could give those consultative mechanisms and especially the works of the Inter-American Juridical Committee on the subject, and the resulting recommendations of the three meetings held by the CAJP of the Permanent Council in the Organization headquarters.

7.2.4 To consider the inclusion of clauses that treat eventual matters of concern, as may correspond to the legislative practice, in areas such as retroactiveness, so this matter contemplated in the Rome Statute may be dissipated with due certainty and confidence.[31]

7.3 For those Member States who are Parties to the Rome Statute, determine the measures –including those of legislative nature-, modalities and mechanisms to ensure the existence of procedures applicable to full cooperation with the Court regarding the investigation and prosecution of crimes under its competence, and in general, compliance with the obligations stated in the Rome Statute, and to this end:

7.3.1 To consider additional legislative actions to strengthen cooperation with the Court. Particularly, evaluate the convenience of emitting a special cooperation law such as the laws of Argentina, Uruguay, or whether it is more convenient to incorporate specific provisions for already existing laws, either criminal codes or criminal procedural codes, as other countries have done.

7.3.2 To consider the possible conformation of Working Groups or Commissions at the level of the Executive Branch to analyze and define the best legislative implementing ways, also considering whether it is convenient the participation of representatives of other State Branches and representatives of the civil society.

7.3.3 To update the studies and provisions regarding the already existing forms of cooperation and international judicial cooperation

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30 See Annex.

31 The Rome Statute in its article 11 considers that "1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute".

practice –including treaties on the matter as well as cooperation laws which are regularly used– or if they can be eventually activated to attend petitions for cooperation within the scope of the Rome Statute.

7.3.4 To consider, in the inclusion of the types of crimes of the Rome Statute, the experience of the States, either through the in extenso definition used by some States in their implementing laws or the simple reference to the provisions contained in articles 6, 7, 8 and 70 of the Rome Statute, complemented in the case of Argentina with references to other instruments, or a mixed technique.

7.3.5 The States should consider the premise that the Rome Statute establishes the minimum standard accepted by the international community for the definition and scope of crimes under the competence of the ICC, therefore, the States have the prerogative of extending them.

7.3.6 To consider the designation by the States Parties of links or points of contact for issues relating to cooperation with the Court.

7.3.7 Other aspects that could deserve special attention are the following:

iv. sufficient regulations for guarantees on the matter of surrender of nationals to the ICC, considering the regulations for guarantees of extradition;

v. regulations for broad dissemination on the matter of information delivery without detriment to the limited exceptions previously established by the law;

vi. clauses for the protection of individuals –both victims and witnesses- who participate in the procedures before the ICC. The experience of the witness protection programs existing in the respective States, as the case may be, or the protection experiences of the Inter-American System of Human Rights could be evaluated with aims at deriving possible applications to Court cases.

7.3.8 Contemplate expeditious procedures to attend requests for cooperation on the matter of assistance and surrender, making sure that they are equivalent to those applicable to the assistance or extradition cases –as it may correspond–- and not more complicated or burdensome.

7.4 Contemplating the ratification or adhesion, as it may correspond, to the "Agreement on Privileges and Immunities" (APIC) of the International Criminal Court

7.4.1 The States may consider that the APIC is based on the principle of functional immunity, and therefore, it collects the international standards on the matter of privileges and immunities for the realization of the Court's function.

7.5 It is recommended to all Member States of the OAS:

7.5.1 To intensify the exchange of information in the hemisphere. Added to the answers to the Questionnaire and the laws for implementing

the Statute, the reports, declarations and opinions prepared for the ratification of the Statute by the States and any other legislative information that they may consider of interest with aims at their incorporation into the Rapporteur's Report, could be put at the disposal of the Inter-American Juridical Committee.

7.5.2 To strengthen the participation in regional and universal forums for discussion of the ICC, including –inter alia– the work meetings of the Committee on Juridical and Political Affairs of the OAS and the Assembly of States Parties of the Rome Statute.

7.5.3 To continue addressing the issue of the ICC within the scope of the regular sessions of the General Assembly of the OAS. It would also be important to include the topic of the ICC within the scope of the subregional integration processes, so as to keep this topic active in the inter-American, subregional and national agenda.

7.6 To consider the OAS cooperation mechanisms in the topic of the ICC

7.6.1 Possibility of cooperation agreements between the OAS and the International Criminal Court with the designation of a focus point.

7.6.2 Building a web site with the relevant and pertinent information provided by the States, with aims at facilitating access to and exchange of documents and experiences, strengthening the reciprocal knowledge of the mechanisms used by the countries with continental civil juridical tradition and Anglo-Saxon law (common law), could be considered.

VI. SPECIAL WORKING SESSION OF THE CAJP

The OAS General Assembly, through resolution AG/RES. 2176 (XXXVI-O/06), "Promotion of the International Criminal Court", requested the Permanent Council to organize a working session, with the support of the General Secretariat, on the proper measures that States have to take in order to cooperate with the International Criminal Court.

The working session of the Committee on Juridical and Political Affairs on the International Criminal Court –the third to be convened– took place on February 2, 2007; the results are compiled in document OEA/Sec.Gral. ODI/doc.02/07.

The Report contains the main ideas presented during the working session. They are:

- OAS Member States must familiarize their parliaments with the existence of the International Criminal Court and the Rome Statute;
- The participation of civil society and of intergovernmental organizations is essential for the promotion, dissemination, and implementation of the Rome Statute;
- Appropriate implementation and the overcoming of internal technical hurdles require resolute political commitment;
- The legal definitions established in the Rome Statute constitute a minimum benchmark for States. However, each country is free to implement policies and sets of laws that surpass those standards;

- Participants underscored the importance of recognizing the full effectiveness of the International Criminal Court and of respect for the principle of universality;
- Cooperation with the International Criminal Court and the Office of the Prosecutor at the various stages of proceedings are key to making the system fully effective. In this context, political will is essential;
- Comprehensive reparation for victims constitutes a major challenge involving full participation by States;
- Great importance was attached to the Organization of American States reaching cooperation agreements with the International Criminal Court and to designation of the Office of International Law as the unit responsible for liaison with the Court;

Later on, Resolution AG/RES. 2279 (XXXVII-O/07) requested the Permanent Council to hold a working meeting on appropriate measures that States should take to cooperate with the International Criminal Court, which should include a high-level dialogue in which member States discuss the recommendations contained in Report CP/doc.4194/07. This session took place on January 28, 2008.

The report of the working session on the International Criminal Court (OEA/Sec./Gral. ODI/doc.03/08 of February 14, 2008, summarizes the dialogue between delegations as follows:

At the end of the presentations the participants started discussions and comments on the event.

Among the comments and replies submitted by panelists, the following ideas should be highlighted:

- *Rationae persona* jurisdiction contained in Article 1 of the Rome Statute is applicable to natural persons but not to legal persons.
- The principle of universal jurisdiction may be organized in accordance with the domestic legal systems.
- Penalties included in article 80 of the Rome Statute should serve as a reference or minimum standard, as well as the elements included in the 1949 Geneva Conventions and their 1977 Protocols.
- The project of amendments to the Rome Statute for the year 2009 was mentioned, however informing that there is nothing concrete as regards the list of crimes. Nonetheless, there seems to be an interesting opportunity to include a definition of the crime of agression. Despite this, and regardless of the changes in the list, the will of the States to include in the domestic legislation a list as complete as possible is essential.

During the exchange of ideas, some delegations mentioned the legislative developments in their respective countries. The delegation from Argentina informed that the country's legislation was incorporating principles such as complementarity, territoriality and active nationality. The characterization of the crime involving the forced disappearance of people is also being addressed. Costa Rica in turn informed about the project of amendments to the Criminal Code, which embodies types of crimes such as genocide, lese-humanity, torture and forced disappearance and the inapplicability of any statute of limitations regarding those crimes, as well as the draft law on the Agreement on Privileges and Immunities of the International Criminal Court

(Legislative Records No.15676). The Venezuelan delegation stressed the need to preserve the integrity of the Rome Statute and mentioned the high value of some national legislation adopting cooperation schemes with the Court, while respecting the domestic legal framework. The representatives from Mexico explained that the country already has an instrument on privileges and immunities and that the Senate is currently studying a decree on cooperation with the International Criminal Court.[32].The Brazilian delegation reported on a draft law on effective cooperation with the International Criminal Court, which is currently in Congress. The Chilean delegation stated that the ratification of the Rome Statute is under consideration by the Senate, following a request of constitutional amendment. The Canadian delegation explained the efforts to implement the Rome Statute and other drafts and projects developed both in the country and abroad in favor of the approval of legislation on cooperation with the Court, making a technical manual on cooperation available on that occasion. The Ecuadorian delegation mentioned the events organized by the National Committee in charge of putting into effect the Rome Statute, taking into consideration that the Statute had already been approved as well as the Convention on Privileges and Immunities. The Peruvian delegation commented on the inclusion of a chapter on cooperation with the Criminal Court in the Criminal Code and reported on a draft law on crimes against human rights and international humanitarian law. Finally, the Colombian delegation announced that the Senate had approved a draft law on privileges and immunities, but that nevertheless there is still some debate going on regarding self-defense groups.

Some comments were also expressed on more general items. The Jamaican delegation considered that the model law under study by the IJC is really useful, because it will be instrumental both to States Parties of the OAS and non-Party states to the Rome Statute. The American delegation considered that cooperation with the International Criminal Court should take into consideration the interests of all the OAS Member States. The Mexican delegation showed interest in submitting a draft resolution on the promotion of the International Criminal Court during the forthcoming session of the General Assembly.

We should highlight here that most delegations expressed their consent regarding the drafting of an agreement between the OAS Secretary General and the President of the International Criminal Court in order to promote activities on the development of international law.

At the closure of the event, CAJP´s president requested the Secretariat to submit a report on the cooperation agreement prior to the sessions of the General Assembly, as requested by resolution AG/RES. 2279 (XXXVII-O/07).

In the afternoon of January 28th, an informal session convened by the Mexican delegation was organized, addressing the topic of a model legislation on cooperation between States and the International Criminal Court.

VI. PERSPECTIVES TOWARDS A MODEL LAW ON COOPERATION

Please see below the following starting points:

1. Obviously the project should include – although not restricted only to them – the experiences of national legislations, particularly the following: Crimes Against

[32] Regulation Law of item five of Article 21 of the Political Constitution of the United Mexican States and addition to the Organic Law of the Judicial Power of the Federation.

Humanity and War Crimes Act of the year 2000, Canada; Law No. 18026 on cooperation with the International Criminal Court on the Fight Against Genocide, War Crimes and Crimes of Lese-Humanity of the Eastern Republic of Uruguay, year 2006; Decree No. 957, Code of Criminal Procedures, Peru, 2004, containing norms on international judicial cooperation with the International Criminal Court and Law No. 28671 amending the coming into effect of the Code of Criminal Procedures and comprising supplementary norms for the process involving the implementation of the New Code on January 30, 2006; Law No. 8272 on Criminal Repression as a Punishment for War Crimes and Crimes of Lese-Humanity, year 2002, Costa Rica; Law No. 26200, which is the Law on Implementation of the Rome Statute of the International Criminal Court, year 2006, of the Argentine Republic and the International Criminal Court Act of Trinidad and Tobago of 2006.[33.]

The aforementioned recommendations should also be taken into consideration when pertinent, and which are contained in Report CP/doc. 4194/07.

2. However, the discussion on the topic of cooperation with the Court in each of the legislation will reveal certain characteristics which distinguish domestic legal frameworks, and for that reason, on some occasions, only the Committee will be in charge of indicating that certain aspects require development of internal procedures, but that the domestic law will detail them, based on their own democratic institutions.

Diversity and differences in organs and institutions in each State might be eventually liaised with the compliance of the provisions on cooperation with the Court and the peculiarities in their performance. A general perspective when drafting a model instrument is advisable, in order to avoid proliferation of possibilities which nevertheless would not necessarily encompass the whole gamut of alternatives available in the States.

3. Also in this dimension, we must bear in mind the need to harmonize a solution providing response to different legal systems involving common law and civil law prevailing in the hemisphere, on the grounds that there is already a unifying element which is precisely the Rome Statute. Taking into consideration the diversity of legal systems in the Hemisphere, the provisions of the International Criminal Court therefore represent a bridge between Systems, as a sort of common, uniform regime.

4. It is not too much to indicate that the Inter-American system and the practices of States present mechanisms for cooperation, mutual assistance, sentence enforcement, and so on, reflecting some dynamism in the cooperation that could well ease the avenues of an implementing law on the grounds -*mutatis mutandi*- of those experiences, and recalling that cooperation with the Court often requires special treatment, which is not necessarily achieved when we use the traditional aspects and reference frameworks in themselves, and which are contained in other treaties, without the necessary adequation work.

5. The meaning of a cooperation law with the Court should be crystal-clear. It does not replace the Statute nor displaces what is already agreed on in an international treaty such as the Rome Statute. There is no pretension whatsoever to amend it

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[33] We should also bear in mind the already mentioned drafts in part V.(Special Working Sessions of the CAJP) of this Report and other updatings, such as the approved of the New Criminal Code of Nicaragua including crimes such as Genocide, Crimes of Lese-Humanity and Crimes against Persons and Protected Assets during Armed Conflict.

restrictively. The idea is to complement it, making it effective, providing it with internal procedures in those areas where national provisions are essential. It is precisely here that local implementation measures are needed, and as the norms of the Statute are not sufficient, all the splendor of the real use of the law is revealed. These procedures cannot contradict, hamper and become inoperational or annul the provisions of the Statute.

6. From this viewpoint, no cooperation laws can, due to any excess in their regulation, complicate or hamper the achievement of the strict goals of the Statute. They are instruments meant to facilitate, dynamize and make effective the norms of the Statute itself in terms of cooperation. When adopting a certain procedure, the first question to be asked is whether it really facilitates and favors cooperation as it is. An affirmative response is the best test of efficacy.

7. For the sake of cooperation, it should be borne in mind that cooperation does not only rely on procedures which are mechanically established, but also that it has something of a transversal axis in terms of a system of consultations that will focus on local and very specific situations, and which is essential because it allows finding, in a spirit of cooperation, the adequate solutions for specific problems and the continuity of the procedures in case of difficulties.[34.]

8. Another starting point is that, in view of the complexity of the subject, it is important to simplify things as much as possible. Some legislations in force show a high degree of precision, austerity and certainty, but others present considerable development and have addressed extensively, generously and thoroughly the subjects under study. It would probably be good for the model legislation to benefit from balance which, without neglecting some topics, indicate the principles and guidelines on items that might need reinforcement of the domestic institutional machinery in order to enforce a certain norm of cooperation of the Statute, thereby filling gaps.

Trying to move ahead without taking into consideration the peculiarities of each domestic legislation, risks providing solutions which eventually might work in a certain legal framework but not necessarily in others, or even reveal inconsistencies.

9. Identifying criminal norms, either through remission to the Statute or through its full inclusion, is a highly useful element for cooperation, but special care should be taken to complement this with the set of regulations and principles referring, for example, to *Ne bis in idem* (Art. 20); Applicable Law (Article 21); Exclusion of the ICC's jurisdiction over persons under eighteen; Irrelevance of Official Capacity (Article 27) Responsibility of commanders and other superiors (Article 28); Non-applicability of Statute of Limitations (Article. 29) and Grounds for Excluding Criminal Responsibility (article 31) in order to avoid inconsistencies between the criminal norm and its applicability.

10. Cooperation measures, although basically concentrated in Part IX referring to international cooperation and judicial assistance, are in fact complemented by a long variety of situations and provisions in other parts of the Statute which also call for the collaboration of the States or local implementation norms. The Rome Statute, which is in any case an integral and indivisible text, cannot refer to one of its parts alone,

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[34] See for example the case of other forms of assistance, Article 93, item 3 and Article 72 (Protection of national security information).

without taking into account the others and the interaction among them as links of an indissoluble unity with a common objective and purpose.

11. Cooperation with the Court should be understood in a broad sense, where efforts to adapt domestic legislation to the Statute are also forms of cooperation with the purposes of the international criminal justice. Similarly, it must be borne in mind that States can be active subjects of cooperation with the Court in a two-way process. In this sense, pursuant to Article 93 item 10.a), the Court may cooperate and assist upon request a State Party conducting an investigation or in a suit of a conduct implying a serious crime pursuant to the domestic legislation of the requiring State.

12. When tuning-in domestic legislation, one needs to pay attention to the set of international obligations of each State, which is particularly relevant in the area of International Humanitarian Law with the Geneva Conventions of 1949 and the Additional Protocol I, taking into consideration that crimes do not necessarily coincide with infringements in all cases and that the Statute lists war crimes which are not mentioned in the list of serious infringements and especially that Additional Protocol I lists some crimes which are not listed in the Rome Statute, or which comprise broader elements.

13. States which are not Parties to the Statute are not excluded from cooperation with the Court. Article 87 item 5 a) determines that the Court may invite any State not Party to the Statute to provide assistance under Part IX on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. The rapporteur considers that some of the so-called "Other Forms of Cooperation" may be developed using –*mutatis mutandi*- conventional and internal mechanisms of international criminal cooperation in general.

With these premises in mind, there is a need to review the Statute of the Court in order to assess whether these basic premises are consistent or not with its provisions.

Article 86 of the Statute establishes the general obligation of the States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court", but this is performed "in conformity to the provisions of this Statute".

That is to say, in strict conformity with its provisions. Therefore local legislative developments have to stick to that conformity, by virtue of the obligation of cooperation.

"Conformity" does not mean that they cannot go beyond, but that they have to observe at least the three minimum standards established. It could also be desirable for States to trespass these limits inasmuch as they are true acquisitions and contributions to International Criminal Law, if they so consider.

The value of a model legislation would lie in offering principles and guidelines which can facilitate –within the States- operational cooperation with the Court, whenever possible or otherwise indicate where and in which topics a domestic development is required. But the idea would not limit itself to make the operation of the Court more efficient, but furthermore, the pre-eminent and fundamental exercise of local criminal jurisdictions in view of those crimes, under a broader concept of cooperation. The Preamble of the Statute of the Court recalls in its sixth paragraph that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

It was indicated that the International Criminal Court does not intend to replace the domestic administration of justice, but that the latter may be in condition to safeguard and protect prosecution, suing and punishment of those liable for crimes in the light of the statute. The domestic judge, so to speak, is also the judge fit to apply his/her jurisdiction in the field of criminal international law.

The legislation of Argentina, in line with the Spanish legislation, for example, confirms this statement when it establishes that the law has its field of action in "whatever is not contemplated in the Rome Statute", and complementary legislation. Procedures to be established by laws will be only applied in default of the Statute, that is to say, they will develop what is not included within the Statute because otherwise the procedure indicated in the instrument which generated the International Criminal Court prevails.

It should also be deduced from these norms that the absence of a domestic cooperation norm should not prevent nor would give rise to an allegation to justify any non-compliance with the obligations in the Statute. The purpose is that domestic law should adequately portray the agreements in the international arena.

Thus article 88 (Availability of procedures under national law), establishes that States Parties "shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

VII. GLOBAL VISION OF LAWS APPROVED SO FAR

It is also worth mentioning that in the case of the States which have approved any kind of norms as far as we know, not all of them have followed a uniform procedure. While in some cases they refer to specific laws exclusively related to the topic, in other cases norms are included in the substantive codes and codes of procedure or also using combined techniques. There has been no single way for implementing the Statute as demonstrated by the diverse initiatives. In some cases the technique involving the referral to the provisions of the Statute, while in others a unique and special legislation has been adopted, and also the technique of the systematic implementation in several legislative bodies.

With a larger or smaller development, laws adopted coincide with the basic purpose to ensure the existence of internal procedures ensuring cooperation, in conformity – in general – with the Statute in efforts which deserve to be recognized.

Most laws exceed the field of simple cooperation and make incursion in other aspects such as those referring to crimes, their types and penalties. While some laws do this by referring to the Statute, others provide a peculiar development.

The mandate received by the Juridical Committee consists in the drafting of a model legislation on cooperation by the States with the International Criminal Court. This basically sets out three scenarios:

1. A model instrument which covers, in line with most analyzed legislation, both cooperational aspects strictly speaking and those of another nature, but deeply interlinked to the real possibilities both of cooperation with the Court and fulfillment of the purposes of criminal justice in cases of international crimes in national fora.

2. A model instrument limited to the area of cooperation with the Court, exclusively in light of Part IX of the Statute, and

3. A model instrument comprising certain general principles which enable harmonization between the normative development of local legislation in those areas where procedures complementing their provisions are to be applied, thus concretizing the postulate which indicates that international law needs domestic law to operate properly.

Each one of these possibilities has its weak and strong points. Maybe the main thought for a model legislation is - preferably – to search for a formula that permits addressing the main aspects without necessarily trying to define procedures that only belong to the domestic law and its structure and peculiarities on which we cannot generalize.

That is why the Rapporteur considers it more convenient, at this stage of the work of the Committee, to draft an attached instrument of general characteristics, centered on the great principles[35] and identifying some of the areas where there is need of domestic legislative development and providing, in this case, guidelines or general principles so that domestic legislations – having a reference framework – may implement their respective norms in light of the specific peculiarities of domestic legislation.

This guideline is reinforced by the idea having legal systems of a distinct nature, such as the common law and the civil law systems in the Hemisphere.

This would lead us to refrain from not excluding a priori any of the scenarios, bearing in mind, at last, that this is not the case of an international treaty, but of a model instrument conceived to operate as a guideline and reference framework that the States have to adapt, when necessary, to their own, legitimate peculiarities, provided they do not affect the norms contained in the Rome Statute, the Elements of Crimes and its Rules of Procedure and Evidence.

Document "Guide to the General principles and Agendas for the Cooperation of States with the International Criminal Court", called OEA/Ser.Q CJI/doc.293/08 rev.1 of March 6, 2008, is attached.

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[35] See for example "Lineamientos en cooperación judicial con la Corte Penal Internacional" (Outlines of judicial cooperation with the International Criminal Court, February 2008, Andean Jurist Committee.