

INTERNATIONAL CRIMINAL COURT

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

At the 75th regular session of the Inter-American Juridical Committee held in Rio de Janeiro, Brazil, in August 2009, the importance of holding seminars or workshops to promote the International Criminal Court was stressed, for which reason several members proposed combining efforts with a view to encouraging the holding of seminars in their countries.

Accordingly, on February 18, 2010, the Ministry of Foreign Affairs of El Salvador carried out a “Seminar on the International Criminal Court”. The Seminar was held at the Dr. Alfredo Martínez Moreno auditorium of the Ministry of Foreign Affairs. It was opened by the Minister of Foreign Affairs of El Salvador, Eng. Hugo Roger Martínez Bonilla. The lecturers included: Dr. Miriam Spittler of the Office of the Prosecutor of the ICC, who delivered a lecture entitled “Overview of the Rome Statute”; Dr. Francesca Varda, of the NGO Coalition for the ICC, who delivered a lecture entitled: “Practical cases of actions and measures taken by Member States to facilitate the ratification of or adhesion to the Rome Statute”; Dr. Patrick Zahnd, ICRC Legal Adviser for Latin America and the Caribbean, who delivered a lecture entitled “Work carried out by the International Committee of the Red Cross (ICRC), with emphasis on the International Criminal Court”.

The Inter-American Juridical Committee (IAJC) was represented by its member Dr. Mauricio Herdocia Sacasa, and rapporteur on the topic of the International Criminal Court, who delivered a lecture entitled “Mechanisms used by Member States to Resolve Problems Encountered during the Ratification of the Rome Statute and Model Law on Cooperation with the International Criminal Court”, and the undersigned, who delivered a lecture entitled “Contributions of the Inter-American Juridical Committee of the OAS to Promote the International Criminal Court”.

Said Conference was called:

**CONTRIBUTIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE
OF THE OAS TO PROMOTE THE INTERNATIONAL CRIMINAL COURT**

Background

As a result of the atrocities committed during the First and Second World Wars, the International Community undertook to deprive future generations of these crimes, and that’s how the world cried out “Never Again” given the enormous suffering caused by this holocaust.

In keeping with this commitment and with the Principle of Universal Jurisdiction, five International Investigation Committees and four *Ad Hoc* International Tribunals were created, as follows: the International Military Tribunal for the trial of war criminals of the European Axis of 1945, better known as the Nuremberg and Tokyo Tribunals; the International Military Tribunal for the Trial of War Criminals of the Far East of 1946; the International Criminal Tribunal for the Former Yugoslavia of 1993; and the International Criminal Tribunal for Rwanda of 1994.

These Tribunals had a limited effect and only served as a partial mechanism to establish international criminal liability. Due to this reason and to the fact that criminal

justice lacked permanent international jurisdictional bodies, the United Nations International Law Commission resolved that it was necessary to set up a Permanent Criminal Court for the international community. In 1992, the United Nations General Assembly requested the International Law Commission to prepare a draft statute for an International Criminal Court.

The establishment of this Court dates back to the issuance of Resolution N° 50/46 dated September 11, 1995, whereby the United Nations General Assembly decided to set up a Preparatory Committee for the establishment of an International Criminal Court the main purpose of which would be to review the draft Statute for the establishment of a Permanent Criminal Court prepared by the United Nations International Law Commission in 1994.

After a series of meetings held by the Preparatory Committee, the United Nations General Assembly, at its 52nd Regular Session and by Resolution No. 52/160 dated December 15, 1997, summoned the “UN *Diplomatic Conference of Plenipotentiaries* on the Establishment of an International Criminal Court”, which was held in Rome, Italy, from June 15 to July 17, 1998, and adopted on July 17 the Final Act of the Rome Statute whereby the International Criminal Court was set up. Said Act contains the votes cast by Member States, as follows: 120 votes in favor, 21 abstentions, and 7 votes against. In said meeting, it was decided that the International Criminal Court would be headquartered in The Hague, Netherlands.

As provided for in the Rome Statute, the International Criminal Court is a permanent institution and has the power to exercise its jurisdiction over natural persons, not over States, for the most serious crimes of international concern like genocide, crimes against humanity, war crimes, the crime of aggression (still pending definition). For the first time, these crimes were coded on an organized and detailed basis, regulating effective individual criminal liability.

The Rome Statute is the result of the work carried out by the international community over a long period of time to establish a permanent criminal institution with jurisdiction over international crimes and an international jurisdictional instance against impunity, while contributing to the prevention of new crimes.

In keeping with the above, it is worth highlighting that the International Criminal Court *per se* is a very special jurisdictional instance which will only take action when a very serious infringement of human rights or of the International Humanitarian Law has taken place and in a way that complements or supplements national justice.

The International Criminal Court complements national jurisdictions and is competent only in those cases where the State cannot prosecute or does not wish to prosecute people accused of these crimes. The International Criminal Court is a permanent institution authorized to exercise its jurisdiction over natural persons with respect to the most serious crimes of international concern according to its Statute and is complementary to national criminal jurisdictions.

The Rome Statute which created the International Criminal Court went into effect on July 1, 2002 and the International Criminal Court was formally set up on March 11, 2003 at the inaugural session held in The Hague, Holland. As from the entry into force of the Rome Statute, the perpetrators of the most serious crimes against humanity can be prosecuted, thereby fighting impunity.

The Inter-American Juridical Committee (IAJC) and the Rome Statute

The Inter-American Juridical Committee (IAJC) included the topic of the International Criminal Court as an Agenda item to be discussed at its 67th Regular Session held in August 2005, by OAS General Assembly Resolution AG/RES. 2072 (XXXV-O/05) dated June 7, 2005, corresponding to its 35th Regular Session, whereby the Inter-American Juridical Committee was requested to draw up a questionnaire to be presented to the Member States of the OAS in order to obtain information on the manner in which their respective national laws are able to cooperate with the International Criminal Court.

The topic was included in the agenda of the Inter-American Juridical Committee as “Promotion of the International Criminal Court”. Dr. Mauricio Herdocia Sacasa was designated to act as rapporteur on the topic.

The Questionnaire on the International Criminal Court was approved by the Inter-American Juridical Committee at its 67th regular session held from August 1 to 19, 2005 in Rio de Janeiro, Brazil, by resolution CJI/RES. 98 (LXVII-O/05), and included both States Parties and Non-State Parties to the Rome Statute in the answer process. Answers were received from 17 countries, of which 11 were States Parties to the Rome Statute (Canada, Argentina, Ecuador, Bolivia, Colombia, Mexico, Uruguay, Dominican Republic, Costa Rica, Brazil and Paraguay) and 6 were then non-State Parties (Suriname, El Salvador, Nicaragua, Chile, Guatemala and the United States). Based on this information, the rapporteur presented the report he had been asked to prepare, stressing the great interest shown by OAS Member States in the topic of cooperation with the International Criminal Court, in view that 17 States had answered the questionnaire. Said Questionnaire showed that most States deal with genocide in their domestic legislation, followed by crimes of war and then, to a smaller extent, crimes against humanity.

Moreover, it was determined that not all countries have included in their domestic legislation the crimes enshrined in the Rome Statute, but many countries are currently working on the incorporation of such crimes.

Some States answered that they already have domestic laws in place to cooperate with the Criminal Court; therefore, they are ready to meet cooperation requests from the Court under the legal rules in force. Other States answered that they are drafting the necessary legislation to cooperate with the Criminal Court.

In said Questionnaire, some issues which could be raised by the States as a possible source of conflict between the Rome Statute and their domestic legislations were also determined, as follows: *ne bis in idem*, inadmissibility on public charge grounds, duties and powers of the Prosecutor with respect to investigations; the arrest procedure; the surrender of persons to the Court; life imprisonment; and remission of penalty and pardon.

To resolve this problem among OAS Member States which are still not a Party to the Rome Statute, certain mechanisms have been identified, as follows:

- Undertake a comprehensive constitutional reform which overcomes contradictions or objections, whether or not it includes interpretative statements.
- Request the Constitutional Control Bodies to issue an advisory opinion, statement or a similar document which will allow in some cases to make a simple interpretation under the Statute and the Constitution and, when applicable, directly request a previous constitutional reform.

- Carry out studies and consultations which result in the direct ratification of or adherence to the Rome Statute, without major inconvenience.

Following are some of the main cooperation measures contemplated in the Statute:

Part 9. International Cooperation and Judicial Assistance:

- States Parties shall cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.
- States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified in the Statute.
- States Parties shall, in accordance with the provisions of the Statute and the procedures established under their national law, comply with requests for arrest and surrender of persons.
- Concerning matter adjudged, the Court will determine whether it admits the cause and, if the case is admissible, then the State must comply with the request.
- A State Party shall authorize transportation through its territory of a person being surrendered to the Court by another State.
- If besides the Court another State is requesting a given person, then priority will be given to the Court, except for some specific cases:
- In urgent cases, the Court may request the provisional arrest of the person sought, subject to the fulfillment of the necessary formalities.
- States Parties shall comply with requests made by the Court to provide assistance in relation to investigations or prosecutions, provided they are not contrary to the law of the requesting State and further provided they facilitate the investigations or prosecutions.
- The Court can also cooperate with States Parties or non-State Parties (at their request) in relation to matters which constitute a crime within the jurisdiction of the Court or which constitute a serious crime under the national law of the requesting State.

Part 10. Enforcement

- A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
- States Parties shall give effect to fines or forfeitures ordered by the Court; otherwise, if a State Party is unable to give effect to a fine or order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court. Property or the proceeds of the sale of real property shall be transferred to the Court.

Document CJI/doc.199/05 dated August 15, 2005 was also taken into account. In said document, the Inter-American Juridical Committee addressed the topic of “Legal Aspects of Compliance within the States with Decisions of International Courts or Tribunals or other International Organs with Jurisdictional Functions”, which included a series of answers given by the States in relation to the International Criminal Court.

Based on the results of this report, the General Assembly of the Organization of American States, by resolution AG/RES. 2176 (XXXVI-O/06) dated June 6, 2006, took note with satisfaction of the Report and requested the Inter-American Juridical

Committee to prepare a document of recommendations to the OAS Member States on how to strengthen cooperation with the International Criminal Court, as well as on progress made in that regard, and to present it to the Permanent Council, so that it may in turn submit it to the General Assembly of the Organization at its thirty-seventh regular session. Said report was submitted by the rapporteur on the topic at the 70th regular session held by the Inter-American Juridical Committee in San Salvador, El Salvador, from February 26 to March 9, 2007 in the document entitled CJI/doc.256/07 “Promotion of the International Criminal Court”, which was approved by the Committee and submitted to the Permanent Council for it to refer it to the OAS General Assembly.

For this reason, the OAS General Assembly, by resolution AG/RES. 2279 (XXXVII-O/07) called “Promotion of the International Criminal Court”, dated June 5, 2007, requested the Inter-American Juridical Committee to prepare a model law on cooperation between States and the International Criminal Court, taking into account the different legal systems which exist in the hemisphere (civil law and common law), and to submit it to the General Assembly at its 38th regular session.

The rapporteur on the topic presented his report at the 72nd regular session of the Inter-American Juridical Committee held in Rio de Janeiro, Brazil, from March 3 to 24, 2008, where he expressed the convenience of embracing the experiences of existing national legislations, without limitation: Crimes against Humanity and War Crimes, Act of 2000 of Canada; Law N^o. 18.026 Cooperation with the International Criminal Court in the fight against Genocide, War Crimes and Crimes against Humanity in the Eastern Republic of Uruguay, of 2006; Law N^o. 26.200, Law on the Implementation of the ICC Rome Statute in the Republic of Argentina, of 2006; Decree N^o. 957 Peruvian Code of Criminal Procedure of 2004, which contains rules on international judicial cooperation with the International Criminal Court; Law N^o. 8272 on Criminal Repression to Punish War Crimes in Costa Rica; and the International Criminal Court Act of Trinidad and Tobago, of 2006.

Cooperation with the International Criminal Court in the above legislations will be consistent with the respective domestic laws. Accordingly, on some occasions, the Inter-American Juridical Committee will have to indicate the need to develop some national procedures in some fields, in which case said procedures will have to be established by national laws, based on their own democratic institutionality.

A solution should also be found to bring the various common law and civil law systems into agreement, starting from the premise that a unifying element already exists, that is, the Rome Statute, which actually provides a normative bridge between one system and the other one.

We should bear in mind the fact that a law on cooperation with the International Criminal Court does not replace the Rome Statute, nor does it displace it, because the Rome Statute is an International Treaty. For this reason, these laws are only intended to complement it because State rules are insufficient. It is necessary to establish internal procedures, in those cases where national rules are required, in order to facilitate, expedite, and implement the Rome Statute provisions.

Consequently, the model law should contain principles and guidelines on matters which may require the support of the domestic institutional machinery for it to be able to work in all legal systems. Almost all cooperation measures are addressed in Part 9 of the Rome Statute, related to International Cooperation and Judicial Assistance.

Cooperation with the International Criminal Court should be understood in the broadest sense. This means that States not only cooperate with the International Criminal Court; in fact, the Court also cooperates with States by providing assistance when a Party State is carrying out an investigation or trying a case related to a behavior with constitutes a serious crime under the domestic law of the requesting State, in accordance with the provisions set forth in Article 93, paragraph 10, of the Rome Statute.

Non-Party States are not excluded from the cooperation requirement, in accordance with the provisions set forth in Article 87, paragraph 5, of the Statute, which provides that the Court may invite any State which is not a party to the Statute to provide assistance under Part 9 of the Statute on the basis of an ad-hoc arrangement, an agreement with such State or any other appropriate basis.

The model law and domestic laws must be consistent with the Statute, in compliance with the duty of cooperation, for which reason the procedures to be established in these cooperation laws will be basically aimed at supplementing and complementing the Statute. In this sense, States Parties, in keeping with Section 88 of the Statute, must ensure that there are procedures available under their national law for all of the forms of cooperation with the Court.

It is worth highlighting that it is not the intent of the International Criminal Court to replace the national administration of justice, but rather to make the national administration of justice protect and safeguard the prosecution, trial, and punishment of the perpetrators of the crimes enshrined in the Statute, for which reason national judges are capable of exercising their jurisdiction in the field of International Criminal Law.

So far, the Inter-American System laws enacted to cooperate with the International Criminal Court have not followed a uniform procedure. In some cases, laws have been specifically issued to deal with this subject, while in other cases laws have been incorporated into Criminal or Procedural Codes. However, in other cases, mixed procedures have been followed, for which reason there has been more than one way to implement cooperation with the International Criminal Court.

For the above reason, the rapporteur on the topic, Dr. Mauricio Herdocia Sacasa, considered that the most convenient thing to do at this stage was to prepare a “Guide to General Principles and Guidelines on Cooperation between the States and the International Criminal Court” of general nature, in order for domestic laws, supported by a framework of reference, to implement their respective rules in accordance with the domestic legal systems.

At its 39th regular session, the General Assembly of OAS adopted resolution AG/RES. 2505 (XXXIX-O/09) dated June 4, 2009, entitled “Promotion of the International Criminal Court”, where it requested the Inter-American Juridical Committee to promote, using as a basis the OAS Guide on Cooperation with the International Criminal Court, the adoption of the relevant national legislation, within their means and with the support of Civil Society, by the States that do not yet have it, and, with collaboration from the General Secretariat and the Secretariat for Legal Affairs, continue providing support and promoting in OAS member states the training of administrative and judicial officials and academics for that purpose.

Moreover, the Inter-American Juridical Committee was instructed to prepare a model law on the implementation of the Rome Statute, in particular regarding the definition of crimes within the jurisdiction of the International Criminal Court.

The above request made by the OAS General Assembly to the Inter-American Juridical Committee is very special, to the extent it asked for collaboration in the training of officials, which implies a more dynamic way of performing its duties.

Due to this new request, the Inter-American Juridical Committee is drafting a model law on the implementation of the Rome Statute, for which purpose it will coordinate with the International Committee of the Red Cross (ICRC) and with other organizations which are directly related to this matter. Similarly, the work carried out by the Juridical Committee in relation to the International Humanitarian Law shall also be taken into account.

Current situation

So far, 25 Member States of the Inter-American System have ratified the Rome Statute, as follows: Antigua and Barbuda; Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Colombia, Costa Rica, Chile, Dominica, Ecuador, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and The Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Ten Member States of the Inter-American System have not ratified the Rome Statute, as follows: Bahamas, Cuba, El Salvador, United States of America, Guatemala, Grenada, Haiti, Jamaica, Nicaragua, and Saint Lucia.

Concerning the “Agreement on Privileges and Immunities of the International Criminal Court”, it has been ratified by 13 Member States of the Inter-American System, as follows: Argentina, Belize, Bolivia, Canada, Colombia, Ecuador, Guyana, Honduras, Mexico, Panama, Paraguay, Trinidad and Tobago, and Uruguay.

The above proves that the OAS Member States are seriously committed to cooperating with the International Criminal Court.

Worldwide, 110 countries are States Parties to the Rome Statute, which proves the international community Member States’ willingness to cooperate with the International Criminal Court.

The Inter-American Juridical Committee, through its member and rapporteur on the topic, Dr. Mauricio Herdocia Sacasa, attended on January 27, 2010, at OAS headquarters, in Washington, D.C., a work meeting on the International Criminal Court, in accordance with the provisions set forth in OAS resolution AG/RES. 2505 (XXXIX-O/09) dated June 4, 2009, where the Permanent Council, with support from the Department of International Law of the Secretariat for Legal Affairs, was instructed to hold a work meeting which should include high-level dialogue to discuss “topics of interest to the region to be considered in negotiations before and during the Review Conference”, in particular substantive amendments to the Statute, such as the definition of the crime of aggression.

At the 76th regular session to be held by the Inter-American Juridical Committee (IAJC) in Lima, Peru, from March 15 to 24, 2010, the rapporteur on this topic will present the progress made so far with regard to the fulfillment of the instructions given by the OAS General Assembly through its various resolutions, as well as the manner in which the Juridical Committee will continue to make progress on its work”.

This kind of Seminar leads the OAS Member States to cooperate with the Promotion of the International Criminal Court, in keeping with the provisions set forth in the OAS Assembly General resolutions issued in relation to this matter, as well as

with the resolutions adopted by the Inter-American Juridical Committee at its 75th regular session.

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