

**PROGRESS REPORT ON EFFORTS TOWARD ADOPTING NATIONAL LEGISLATION BASED ON GUIDELINES OF PRINCIPLES OF THE INTER-AMERICAN JURIDICAL COMMITTEE AND TRAINING OF EMPLOYEES FOR THE COOPERATION OF THE MEMBER STATES OF THE OAS WITH THE INTERNATIONAL CRIMINAL COURT AND THE DRAFTING OF MODEL LAWS FOR THE CRIMES CONTEMPLATED IN THE ROME STATUTE**

(presented by Dr. Mauricio Herdocia Sacasa)

**I. INTRODUCTION**

The General Assembly of the OAS, in resolution AG/RES. 2505 (XXXIX-O/09), “Promotion of the International Criminal Court”, adopted at the fourth plenary session held on 4 June 2009, has decided:

11. To request the Inter-American Juridical Committee to promote, using as a basis the OAS Guide on Cooperation with the International Criminal Court and insofar as it is able, the adoption of national legislation in the area in States that do not yet have it, and, with collaboration from the General Secretariat and the Secretariat for Legal Affairs, to continue providing support for and promoting in OAS Member States the training of administrative and judicial officials and academics for that purpose, and to report to the States Parties on progress thereon at its next working meeting of the International Criminal Court and to the General Assembly at its fortieth regular session.

12. Also to request the Inter-American Juridical Committee to prepare model legislation on implementation of the Rome Statute, in particular regarding the definition of crimes within the jurisdiction of the International Criminal Court, and to present a report, prior to the fortieth regular session of the General Assembly, on progress made.

**II. ORIGIN AND DEVELOPMENT OF THE WORK OF THE INTER-AMERICAN JURIDICAL COMMITTEE AND THE LEGAL STATUS OF THE ROME STATUTE AND THE APIC**

As described in previous reports, the more recent work of the Inter-American Juridical Committee on the matter goes back to the mandate received by the General Assembly of the Organization of American States on June 7, 2005, when it was asked to prepare a questionnaire for presentation to the Member States of the OAS. This questionnaire aimed to obtain information on how the respective national legislations were able to cooperate with the International Criminal Court.

About two months later, in August 2005, the Inter-American Juridical Committee approved including the topic International Criminal Court in its agenda.

It should be stressed that the “Questionnaire on the International Criminal Court” covered both the States Parties of the Rome Statute and those that were not Parties at that time.

In a very short time, the “Questionnaire on the International Criminal Court” received answers from 17 countries, 11 of whom were a Party and 6 not a Party to the

Rome Statute. Based on this information, the rapporteur presented the requested Report.

On June 6, 2006, the General Assembly of the OAS resolved to request the Inter-American Juridical Committee to prepare, on the basis of the results of the report presented, a document of recommendations to the Member States of the OAS on how to strengthen cooperation with the International Criminal Court. Said Report – CJI/doc.256/07 rev.1, “Promotion of the International Criminal Court” – was sent to the Permanent Council, which in turn forwarded it to the General Assembly.

Pursuant to a new request from the General Assembly contained in resolution AG/RES. 2279 (XXXVII-O/07), dated March 10, 2008, the rapporteur presented a “Report on Perspectives for a Model Law on State Cooperation with the International Criminal Court”, CJI/doc.290/08 rev.1. This Report came together with a “Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal Court”, CJI/doc.293/08 rev.1.

The rapporteur’s Report and the “Guide to the General Principles” were sent to the Permanent Council on March 24, 2008.

On August 14, 2009, the rapporteur issued his last report entitled: Report on the Preparations and Advances in Efforts Toward Adopting National Legislation Based on Guidelines of Principles of the Inter-American Juridical Committee and Training of Employees for the Cooperation of the Members States of the OAS with the International Criminal Court, CJI/doc.337/09.

The current Report describes the progress achieved since then, so that the Fortieth regular session of the General Assembly of the OAS may learn of the progress made in accordance with the mandate received.

Following the last report, the countries of the Inter-American System that have already ratified the Rome Statute are still 25. They are:

**Antigua and Barbuda** (18 June 2001), **Argentina** (8 February 2001), **Barbados** (10 December 2002), **Belize** (5 April 2000), **Bolivia** (27 June 2002), **Brazil** (14 June 2002), **Canada** (7 July 2002), **Colombia** (5 August 2002), **Costa Rica** (7 June 2001), **Dominica** (12 February 2001), **Dominican Republic** (12 May 2005), **Ecuador** (5 February 2002), **Guyana** (24 September 2004), **Honduras** (1 July 2002), **Mexico** (28 October 2005), **Panama** (21 March 2002), **Paraguay** (14 May 2001), **Peru** (10 November 2001), **Saint Kitts and Nevis** (22 August 2006), **Saint Vincent and the Grenadines** (3 December 2002), **Trinidad and Tobago** (6 April 1999), **Uruguay** (28 June 2002), **Venezuela** (7 June 2000), **Suriname** (15 July 2008), and **Chile** (29 June 2009).

The 10 countries of the Inter-American System that have not ratified the Rome Statute are: **the Bahamas, Cuba, Haiti, Jamaica, Saint Lucia, United States of America, Grenada, Guatemala, Nicaragua and El Salvador.**

#### **Ratifications of the APIC**

With regard to the Agreement on Privileges and Immunities of the International Criminal Court (APIC) the Dominican Republic has joined after the last report was issued.

The Agreement on Privileges and Immunities of the ICC has been ratified by 14 countries of the Inter-American System, namely: **Argentina** (1 February 2007), **Belize** (14 September 2005), **Bolivia** (20 January 2006), **Canada** (22 June 2004), **Ecuador**

(19 April 2006), **Guyana** (16 November 2005), **Panama** (16 August 2004), **Paraguay** (19 July 2005), **Trinidad and Tobago** (6 February 2003), **Uruguay** (1 November 2006), **Mexico** (27 September 2007), **Honduras** (1 April 2008), **Colombia** (15 April 2009), and the **Dominican Republic** (10 September 2009).

### **III. GENERAL CONTENTS OF THE GUIDE TO THE GENERAL PRINCIPLES AND AGENDAS FOR COOPERATION OF THE STATES WITH THE INTERNATIONAL CRIMINAL COURT, PRESENTED BY THE IAJC**

As a reminder, the Guide started out with the following points:

1. The project should bring together – but not be limited to – the already existing experience in national legislations, which were briefly summarized.

2. Since the treatment of the topic of cooperation with the Court in each legislation will have certain modalities that are peculiar to the internal juridical system, on occasion it will be solely up to the Committee to indicate that determined fields require development of the national procedures, notwithstanding that it is the domestic law proper that will be responsible for indicating them, based on its own democratic institutionality.

The diversity of and difference between organs and institutions that in each State may eventually be involved in enforcing provisions as regards cooperation with the Court, and the actual modalities of their actions, would advise in favor of a general perspective when drafting a model instrument, in order to avoid a proliferation of possibilities which moreover would not necessarily cover the whole gamut of options that exists in the States.

3. Still in this area, it must be remembered that a solution must be found that responds to the various *common-law* and *civil-law* systems that exist in the hemisphere, prevailing from the fact that there already exists a unifying element, namely the Rome Statute. Bearing in mind the different juridical systems that exist in the hemisphere, the bridge between one system and the other is then the normative of the International Criminal Court, as the uniform common regime.

4. It must not be forgotten that the inter-American system and the practice in the States contain mechanisms of cooperation, mutual assistance, enforcement of sentences and so on, which reflect a certain dynamic of cooperation that could facilitate the avenues of a law of implementation based – *mutatis mutandi* – on such experiences, without neglecting that cooperation with the Court often demands a special treatment that is not necessarily achieved by using the traditional figures and framework contained in other treaties, without the necessary adjustments.

5. The sense of a law of cooperation with the Court must be clearly understood. It does not substitute the Statute, nor does it replace what is already in place in an international treaty such as the Rome Statute. The idea is not to make restrictive changes, but rather to complement it, render it effective, endow it with internal procedures in those areas where national provisions are really needed. There where measures of national implementation are lacking and the norms of the Statute prove insufficient, that is where the true utility of the law is seen in its entire splendor. Such procedures could not contradict, hinder or make the provisions of the Statute inoperative or futile.

6. From this perspective, it is not a question of laws of cooperation whose excessive regulations make it more troublesome or more difficult to attain the substantive objectives of the Statute. It is clearly a matter of instruments to facilitate, accelerate and render effective the norms of the actual Statute in terms of collaboration. On adopting a determined procedure, the first question to be asked should be whether it really facilitates and favors the established cooperation. An affirmative answer is the best test of efficacy.

7. To render cooperation effective, it must be borne in mind that this lies not only in mechanically established procedures but rather entails a consultation system to respond to quite specific national situations and is essential insofar as it allows, in a spirit of collaboration and creativity, adequate solutions to be found for specific problems and prevents procedures from being paralyzed in case of difficulties.<sup>58</sup>

8. Another point of departure is that, given the complexity of the theme, it is important to simplify whenever possible. Some of the laws already emitted show a high degree of precision, austerity and certainty, while others demonstrate great development and have addressed the matter extensively, generously and with rigor. Perhaps it is for the better that the model legislation benefits from a balance that, without ignoring core themes, points to principles and agendas on matters that may need some reinforcement from the domestic institutional machine to make a determined norm of cooperation of the Statute effective, fill lacunas and complement the array of processes whenever they prove to be insufficient.

Any attempt to go further than this without taking into account the particularities of each national system risks offering solutions that might function in a certain juridical regime without necessarily working in others, or else reveal inconsistencies.

9. Identifying criminal norms, either by remission to the Statute or by their complete incorporation, is a very useful element for cooperation, but special care must be taken to complement them with the set of rules and principles relating, for example, to the *ne bis in idem* (art. 20); Applicable Law (art. 21); Exclusion of Jurisdiction over Persons under Eighteen (art.26); Irrelevance of Official Capacity (art. 27); Responsibility of Commanders and other Superiors (art. 28); Non-applicability of Statute of Limitations (art. 29) and the Grounds for Excluding Criminal Responsibility (art. 31), in order to avoid any inconsistency between the criminal norm and its form of application.

10. The measures as to cooperation, though basically concentrated in Part IX relating to international cooperation and judicial assistance, are in effect complemented by a large number of situations and provisions elsewhere in the Statute which also require collaboration of the States or norms of national implementation. The Rome Statute, an absolutely integral and indivisible text, cannot see only one of its parts without taking the others into account, and the interaction between them as links of a whole that is indissolubly united in its common objective and purpose.

11. Cooperation with the Court must be understood in a broad sense, where the efforts to adjust internal legislations to the Statute are also forms of cooperation with the objectives of international criminal justice. Likewise, it should be remembered that the States can be active subjects of cooperation with the Court in a two-way process. In

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<sup>58</sup> See, for example, the case of other forms of assistance in the Rome Statute, art. 93, “Other forms of cooperation”, paragraph 3, and art. 72, “Protection of national security information”.

this sense, according to art. 93 paragraph 10.a), the Court can cooperate with and provide assistance on the request of a State Party carrying out an investigation into or trial in respect of conduct which constitutes a serious crime under national law of the requesting State.

12. On adjusting internal legislations, one must bear in mind the need to attend to the set of international obligations assumed by each State, which is particularly important in the ambit of International Humanitarian Law with the Geneva Conventions of 1949 and Additional Protocol I, taking into account that crimes do not necessarily coincide with infractions in all cases and that the Statute codifies war crimes that do not appear on the list of grave infractions, and especially that Additional Protocol I enumerates some crimes that do not appear in the Rome Statute or else contemplate broader elements.

13. The States which are not Party to the Statute are not excluded from cooperation with the Court. Article 87 paragraph 5.a) provides that the Court can invite any State that is not Party to this Statute to provide the assistance specified in Part IX based on a special arrangement, an agreement with that State or any other appropriate form. At the discretion of the rapporteur, some of the so-called “Other forms of cooperation” may be preferred, using – *mutatis mutandi* – conventional internal mechanisms pertaining to general international criminal cooperation.

14. Article 86 of the Statute establishes a general obligation for States Parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”; but this is done “in accordance with the provisions of this Statute”. That is to say, in strict conformity with its provisions. Thus, national legislative developments must observe this same conformity, in keeping with the duty to cooperate.

Conformity does not mean that they cannot advance any further, but that they should respect at least the minimum standards set therein. It may even be desirable for the States to be allowed to cross these boundaries to the extent that they constitute real improvements and contributions to International Criminal Law, if that should be deemed convenient.

15. The worth of model legislation lies in offering principles and agendas that make it possible for cooperation with the Court to function better on the national level, whenever possible, or else to indicate where and on which themes domestic development needs to be improved. Yet the idea is not necessarily limited to rendering the functioning of the Court more effective, but rather especially the fundamental superior exercise of domestic criminal jurisdiction concerning these crimes, in a broader concept of cooperation. Paragraph 6 of the Preamble of the Statute of the Court recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

16. It has been said above that it is not the aim of the International Criminal Court to substitute the national administration of justice, but rather that this should be capable of safeguarding and controlling the investigation, trial and punishment of those guilty of crimes according to the Statute. As far as possible, to put it in other words, the national judge is also the judge qualified to apply his jurisdiction in the field of international criminal law.

17. The legislation of Argentina, following the line of Spanish legislation, for example, confirms this assertion by claiming that the law has its radius of action “as

provided in the Rome Statute” and its complementary norm. The procedures that establish the laws thus have a fundamentally supplemental relation to the Statute, that is, they develop what is not provided in it; otherwise, the prevalent procedure is what is indicated in the original instrument of the International Criminal Court.

18. It is equally important to deduce from these norms that the non-existence of an internal law on cooperation should be no impediment or justification for not complying with the obligations of the Statute. The objective is to ensure that provisions in the international sphere are properly reflected in internal law.

19. It must also be pointed out that in the case of States known to have enacted some type of law, these have not followed a uniform procedure. While in some cases this is a matter of specific laws that are exclusively related to the theme, others involve inclusions in substantive and processual codes or else mixed techniques. There has been no single way to implement the forms of cooperation of the Statute, as shown by the various initiatives. In some cases, the solution has been to resort to the technique of remitting to what is set forth in the Statute, whereas in other cases the option has been for a single, special legislation, as well as the technique of systematic implementation in various bodies of law.

With varying degrees of development, the laws adopted coincide in the basic purpose of ensuring the existence of internal procedures that guarantee cooperation, in general maintaining conformity with the Statute, in recommendable and praiseworthy efforts.

20. At that time, the rapporteur considered it more convenient at this stage of the Committee’s works to draft an instrument with general characteristics centered on large principles<sup>59</sup> and identifying some of the areas where there is a need for national legislative development and offering, when necessary, agendas and general guidelines so that the internal laws themselves – having a framework – can implement their respective norms in the light of the peculiarities of the internal systems.

This orientation is reinforced by the existence of different sorts of juridical systems in the hemisphere, such as the common-law and civil-law systems.

21. The Guide, as its name and contents indicate, is not an international treaty but rather a model instrument liable to constant revision and improvement, conceived to work as a parameter and framework that the States can adapt when necessary to their own legitimate particularities, always and whenever these do not affect the norm contained in the Rome Statute, the Elements of the Crimes and their Rules of Procedure and Evidence.

The Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal<sup>60</sup> Court establishes the purpose of ensuring the existence of internal procedures with a view to full cooperation between the States and the International Criminal Court in the exercise of the jurisdiction, competence and functions assigned to said permanent institution in the Rome Statute adopted on 17 July

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<sup>59</sup> See, for example “Lineamientos en cooperación judicial con la Corte Penal Internacional” (Outlines of judicial cooperation with the International Criminal Court), of the Andean Commission of Jurists, dated February 2008.

<sup>60</sup> The agendas and principles contained in this instrument are simply for the purpose of indicating what have been considered to be core themes and are not intended to exhaust or limit the various forms of cooperation and legal assistance with the International Criminal Court and its principles.

1998 and the complementary norms, including the Elements of the Crimes and the Rules of Procedure and Evidence.

- It assigns competences to organs of the States for such purposes and establishes procedures applicable to cooperation not provided in the Rome Statute and its complementary norms.
- Its Nature is supplementary to the provisions of the Rome Statute and its complementary norms, contemplating that the integrity of procedures already in place should be respected.
- In its scopes, the instrument is applicable to the following types of crimes within the competence of the International Criminal Court: the crime of genocide, crimes against humanity, war crimes and the crime of aggression, the latter when a provision defining it is adopted, together with the conditions for its application in accordance with the Rome Statute.
- It is also applicable to crimes against the administration of justice, as set forth in article 70 of the Rome Statute.
- The types of crime defined in articles 6, 7, 8 and 70 of the Rome Statute are the minimum standards to which the respective national legislations must adapt.
- Notwithstanding, adapting the types of crime to the domestic law must be in keeping with the obligations springing from the Geneva Conventions of 1949 and the Additional Protocol I of 1977.

As for its sphere of application, it contemplates the Universal Obligation of Judging, according to which the States shall exercise their jurisdiction in respect to any person found within its territory associated with the crimes indicated in article 5 of the Rome Statute, regardless of their nationality or the place where the crime was committed, when those States do not determine extradition to a third State or surrender to the International Criminal Court.

It contains a general obligation of cooperation according to which the organs of the States that are designated as competent shall attend to the requests for cooperation made by the International Criminal Court, in accordance with the terms and conditions set out in the Rome Statute, its complementary norms and this instrument.

- Requests for cooperation shall be attended to expeditiously and in good faith.
- Total or partial absence of procedures in the internal system with regard to cooperation with the International Criminal Court may not use this as an excuse to deny the cooperation requested, which shall be attended to by implementing the necessary legal mechanisms so as to ensure the accused person's right to defense.
- Quick and effective procedures shall be used, ones that do not constitute unnecessary obstacles to full cooperation or that impose conditions that are incompatible with the Rome Statute.
- The consultation processes established in the Rome Statute shall be used with a view to reaching an understanding, in an attempt either to resolve the questions that motivated the consultation or to find other ways and mechanisms to lend or facilitate assistance.
- Upon providing cooperation, the States shall take into account possible arrangements for the protection of persons, including victims and witnesses.

- Consider a system of broad diffusion of information without affecting the limited exceptions previously set forth by law.

The States may request the Court (through the competent organ in accordance with the law and in the modality stipulated by same) for cooperation and assistance when it carries out an investigation or substantiates a decision on conduct that constitutes a crime within the competence of the Court or that constitutes a grave crime according to its domestic law.

The Guide also considers the States' appointing competent bodies; remitting a situation to the Office of the Prosecutor; the required waiver by the Comptroller; impugnation of the Court's competence or the admissibility of the cause; requests for detention and surrender of persons to the International Criminal Court; field investigation by agents of the International Criminal Court; serving sentence in the territory of a State Party to the Rome Statute; non-prescriptibility and the question of amnesties and pardons.

- It also contains agendas on responsibility of superior and hierarchical obedience; the system of immunities and the questions related to education and training.
- Part II of the Guide is dedicated to those States that are still not Parties to the Rome Statute. Such States may engage in cooperation with the International Criminal Court as dictated by the provisions in the Rome Statute, either in the declaration provided in article 12, paragraph 3, or else based on a special arrangement, an agreement or in any other appropriate way provided in article 87, paragraph 5.a) of said Statute.
- It also contemplates that the States may adapt, with the changes deemed necessary and pertinent, and taking into account its condition as non-Party to the Rome Statute, the previous provisions of this Guide.
- The States may also designate an organ (in accordance with the law and the modalities provided therein) to attend to and foster cooperation with the International Criminal Court.
- It is suggested that the States under this condition shall undertake studies on the domestic legal basis and international instruments that bind them juridically to lend cooperation and assistance to the Court in the areas provided in Part 9 of the Rome Statute, and provide ratification of such.

#### **IV. SPECIAL WORKING SESSION OF THE CAJP**

The 6<sup>th</sup> Working Session on the International Criminal Court was held on January 27<sup>th</sup>, organized by the Committee on Juridical and Political Affairs (CAJP) with the support of the Department of International Law of the Secretariat for Legal Affairs of the OAS, which is documented in document OEA/Ser .G CP/CAJP-2811/10.

This session took into consideration the following mandate contained in resolution AG/RES.\_2505 (XXXIX-O/09), paragraph fourteen of which reads as follows:

*14. To request the Permanent Council to hold a working meeting prior to the Review Conference of the Rome Statute, with support from the Department of International Law, which should include a high-level dialogue among the Permanent Representatives of all OAS Member States,*



*to discuss, among other matters, 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. The International Criminal Court, international organizations and institutions, and civil society will be invited to cooperate and participate in this working meeting.*

During the working meeting, the rapporteur made the following presentation on the Committee's work on efforts toward adopting national legislation based on Guidelines of Principles of the Inter-American Juridical Committee and Training of Employees for the Cooperation of the Member States of the OAS with the International Criminal Court (partial text):

*“On behalf of the Inter-American Juridical Committee and in my capacity as rapporteur, it is a great pleasure to attend the Working Session which has already become an institutionalized annual activity of the OAS, of great value and timeliness which allows a fresh and innovative exchange of ideas, offers information that is essential to encourage cooperation with the International Criminal Court and allow convergence of efforts and actions both within and outside the Organization as an important core of associations and groups linked by enthusiasm and dedication in this work. Precisely, we have just held a meeting to establish an Informal Group of bodies and associations participating in this Special Meeting Process, in order to jointly promote dissemination, learning and cooperation with the International Criminal Court.*

*In its last mandate, the General Assembly of the OAS decided to: “Request the Inter-American Juridical Committee to promote, using as a basis the OAS Guide on cooperation with the International Criminal Court, the adoption of national legislation on this topic, to the extent of its possibilities and with the support of civil society, among States that still do not have such legislation; and that with the cooperation of the General Secretariat and the Secretariat for Legal Affairs, continue supporting and encouraging the Members States to provide training to administrative, judicial and academic officials...”.*

*The mandate also requested the Inter-American Juridical Committee “... to prepare model legislation on implementation of the Rome Statute, in particular regarding the definition of crimes within the jurisdiction of the International Criminal Court...”.*

*This group of mandates of the General Assembly to the Juridical Committee has the very special characteristic of entrusting it to join efforts toward qualifying and promoting the adoption of national legislation in the Member States of the OAS. This implies not only the traditional form of exercise of its functions through opinions, studies, preparing conventions and model laws, but also includes it directly in the preparation of efforts as to training and education, which enhance its activities in the area, while exposing the need to rely on human and financial resources to complete its work, with the full support of the General Secretariat and the Secretariat for Legal Affairs, especially including the Department of International Law.*

## **PREPARATIONS AND ADVANCES ON PROMOTING THE GUIDE OF PRINCIPLES**

### ***Request for assistance and support to Organizations***

*An overall list was drawn up of the organizations and personalities who have taken part in the five Working Sessions on the International Criminal Court in order to request their cooperation, support and assistance in fulfilling the resolutions of the General Assembly to promote the adoption of cooperation laws and undertake qualification processes.*

### **Letter of the Chairman of the IAJC**

*The Chairman of the Inter-American Juridical Committee addressed the States Parties to the Rome Statute that had not adopted legislation on cooperation with the International Criminal Court in order to place at its disposition the work of the Juridical Committee on the matter, as well as any services of technical assistance that the Secretariat and the rapporteur and other members of the Committee can possibly offer. (...)*

*In addition, the Honorable Permanent Missions were very respectfully requested assistance to “identify and establish relations of collaboration with the sectors of the government in each country involved in the topic of cooperation with the International Criminal Court, including the Ministries of Justice and Foreign Affairs, among others and as the case may be, aiming at fostering adoption of the corresponding laws of cooperation and the efforts to qualify personnel on the matter”.*

*In this sense, I would like to take the opportunity to reiterate the request and thank the parties that have already replied.*

### ***Next activities scheduled***

*I would also like to announce that next February 18, two members of the IAJC will be in El Salvador together with officers from the Coalition, the Court and the ICRC, at the invitation of El Salvador to hold a special seminar on the situation, challenges and solutions for the ratification of the Rome Statute. I would also like to stress that the Committee members have collaborated with the mission of international organizations in encouraging the work of either ratifying or adapting legislation in their respective countries for the purpose of cooperating with the Rome Statute.*

*The organization of academic meetings in Peru has also been contemplated to address the topic of the International Criminal Court, among others, on the occasion of the next session of the IAJC to be held in this country in March of this year.*

### ***Cooperation Project***

*In very close coordination with the IAJC, the Department of International Law prepared a project on Strengthening Cooperation of the States with the International Criminal Court concerning legislation, to last an estimated of 3 years beginning February 2010 and ending February 2013, for the purpose of strengthening the capacity of State bodies in respect of legislative cooperation of the States with the ICC.*

*Two stages are planned:*

- a) *Seminar or Course on the perspectives of the model legislation of the Inter-American Juridical Committee, addressed to a first group of Spanish-speaking countries that have ratified the Rome Statute. Convocation will be done in such a way that each country appoints 4 high-level employees connected to the Ministries of Justice, Foreign Affairs, the Judicial Sector and Parliament. The 15 countries initially selected will be: Venezuela, Costa Rica, Honduras, Argentina, Paraguay, Peru, Ecuador, Panama, Brazil, Bolivia, Uruguay, Colombia, Mexico, the Dominican Republic and Chile.*
- b) *Seminar or Course on the perspectives of the model legislation of the Inter-American Juridical Committee, addressed to a second group of English-speaking countries that have ratified the Rome Statute. Convocation shall be done in such a way that each country appoints 4 high-level employees connected with the Ministries of Justice, Foreign Affairs, the Judicial Sector and Parliament. The 10 countries selected for this second activity will be: Trinidad and Tobago, Belize, Canada, Dominica, Antigua and Barbuda, Saint Vincent and the Grenadines, Barbados, Guyana, Saint Kitts and Nevis, and Suriname.*

*Of course, nothing prevents the courses or workshops from being held in countries that have not ratified the Rome Statute, at their request.*

*In principle, the expected results consist in:*

- i) *Train high-level employees of the Ministries of Justice, Foreign Affairs, the Judicial Sector and Parliament qualified in the sphere of cooperation of the States with ICC, in order to enable national legislations to act in coherence with the Rome Statute and so that national employees can interpret and properly apply the juridical instruments so as to facilitate cooperation with the ICC.*
- ii) *Another desired result consists in establishing a follow-up mechanism on the national development made on the legislative, administrative and judicial level in the countries whose employees received training.*

*I am pleased to inform that the Project Evaluation Commission (CEP) in its 51<sup>st</sup> session held on December 17 adopted the document entitled Strengthening of Cooperation of the States with the International Criminal Court on Legislation matters (ILA0901). The next step is to implement it with your support.*

#### ***Offer of collaboration***

*The members of the Inter-American Juridical Committee offered the collaboration of their countries for immediate actions in qualifying and training in matters related to the International Criminal Court or to promote adoption of laws based on the Guide of Principles of the IAJC.*

*The Department of International Law and the rapporteur have contacted organizations such as the Coalition for the International Criminal Court and Parliamentarians for Global Action, among others, to*

*advance possible forms of collaboration. Likewise, several organizations have been contacted during the Committee's regular sessions.*

#### **MODEL LAWS FOR CRIMES**

*The IAJC proposes to work on drafting model legislation on implementation of the Rome Statute, particularly in respect to typification of war crimes. To this end, it intends to intensify consultation with the International Committee of the Red Cross and other organizations, following the orientation that it has been working on. Similarly, it intends to take advantage of the work already being carried out by the Committee in the area of International Humanitarian Law and the mandate of the General Assembly contained in Resolution AG/RES. 2507 (XXXIX-O/09), Promotion of and Respect for International Humanitarian Law, in the sense of: "Supporting efforts made by Member States to fulfill obligations under international Humanitarian Law Treaties..."*

*The International Criminal Court is becoming more and more a reality that is gaining institutional and juridical life. Not only the ratification processes are impressive but also the transformation of national legislation according to the Statute, with or without the ratification thereof. Now, for the sixth time, we are assembled at a working meeting shortly before the Review Conference of the Rome Statute, which will add the crime of Aggression to the list of crimes under its supplementary jurisdiction. The OEA is giving more and more firm testimony of its commitment of promoting the Court's work and the IAJC is very satisfied to be afforded the opportunity of contributing to this monumental effort". (end of quote).*

#### **V. ESTABLISHMENT OF A WORKING GROUP AMONG THE PARTICIPATING ORGANIZATIONS**

Prior to the Special Session, a meeting was held in Washington among the participating organizations: Assembly of States Parties to the Statute; International Criminal Court; Parliamentarians for Global Action; Coalition for the International Criminal Court; International Committee of the Red Cross; Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs of the OAS.

As a result of the foregoing, an informal exchange and communications group was set up among the above institutions and organizations in order to facilitate a smoother communication and establish coordination mechanisms. This tool will allow them to remain up-to-date on the various activities held on this matter, and exchange ideas and share efforts for a close and dynamic cooperation on this matter. On February 1, Dr. Dante Negro, Director of the Department of International Law, addressed the participating organizations to offer support in coordinating communications among the members of this informal Group.

#### **VI. COMMUNICATIONS FROM SURINAME AND PERU**

On January 20<sup>th</sup>, the Republic of Suriname sent a letter to the Department of International Law, acting as Technical Secretariat of the IAJC, informing it that, in response to the note dated October 21, 2009, related to the delivery of information on the national law on cooperation with the International Criminal Court, and as indicated

by the Ministry of Justice and Police, the following laws were being drafted by said Ministry:

- Design Law regarding International indictable offences.
- Design law regarding cooperation with the International Criminal Court.
- Design law regarding amendment of the Statute Book of Criminal Law, as to include indictable offences against the Criminal Court.

Similarly, at the request of the rapporteur on the International Criminal Court, the Minister Counsellor and Alternate Representative of Peru to the OAS Permanent Mission, Luis Castro Joo, submitted a draft law related to violations of the international human rights law and the international humanitarian law. Peruvian Congress is still to issue its advisory opinion on this draft law.

## **VII. SEMINAR ON THE INTERNATIONAL CRIMINAL COURT**

The IAJC, through its rapporteur and through Dr. Ana Elizabeth Villalta Vizcarra, at the request of the Minister of Foreign Affairs of El Salvador, organized a Seminar on the International Criminal Court in El Salvador. The event was held on February 18<sup>th</sup> at the Ministry of Foreign Affairs of El Salvador, with nearly 200 people in attendance. Present were representatives from the Supreme Court of Justice, the Legislature, the Central American Court of Justice, Ambassadors, Prosecutors, government officials, and members of civil society. The following persons participated in this event: Hugo Martínez, Minister of Foreign Affairs of El Salvador; Miriam Spittler, International Criminal Court Delegate; Francesca Varda, representative of the organization “Coalition for the International Criminal Court”; Patrick Zhand, Principal Legal Adviser to the International Committee of the Red Cross; Mauricio Herdocia Sacasa, IAJC Rapporteur on the International Criminal Court; and Ana Elizabeth Villalta Vizcarra of the OAS Inter-American Juridical Committee.

The following agenda was discussed at the meeting:

### **SEMINAR ON THE INTERNATIONAL CRIMINAL COURT**

Ministry of Foreign Affairs, “Dr. Alfredo Martínez Moreno” Auditorium,  
Antiguo Cuscatlán, February 18, 2010

#### **AGENDA**

**8:00 – 8:15 Attendee Registration.**

**8:15 - 8:30**

**Opening Ceremony and Welcome Speech** by the Minister of Foreign Affairs of El Salvador, Eng. Hugo Roger Martínez Bonilla.

**8:30 – 9:15**

**First Lecture. “Overview of the Rome Statute”** by Dr. Miriam Spittler, Representative of the Office of the Prosecutor of the International Criminal Court.

**9:15 – 10:00**

**Second Lecture. “Mechanisms used by States to resolve the problems encountered for the ratification of the Rome Statute, and the Model Law on Cooperation with the International Criminal Court”** by Dr. Mauricio Herdocia Sacasa, Member of the Inter-American Juridical Committee of the Organization of American States (OAS) and IAJC Rapporteur on this topic.

**10:00 – 10:30**

**Third Lecture. “Practical cases on actions and measures taken by States to facilitate the ratification of or adhesion to the Rome Statute”** by Dr. Francesca Varda of the Coalition of NGOs for the International Criminal Court.

**10:30-10:45** Coffee break

**10:45-11:15** Questions and answers

**11:15- 11:30**

**Fourth Lecture. “Work carried out by the International Committee of the Red Cross (ICRC) with emphasis on the International Criminal Court”** by Dr. Patrick Zahnd, Legal Advisor for Latin America and the Caribbean, ICRC.

**11:30 – 12:00**

**Fifth Lecture. “Contributions of the OAS Inter-American Juridical Committee to Promote the International Criminal Court”** by Ambassador Ana Elizabeth Villalta Vizcarra, member of the Inter-American Juridical Committee and *Ad-honorem* Under-Secretary for Legal Affairs of the Ministry of Foreign Affairs of El Salvador. The text of this lecture is included in the International Criminal Court document OEA Ser. Q CJI doc. 384/10.

**12:00 – 12:15** Questions and answers

The rapporteur addressed the topic of the “Mechanisms used by States to resolve the problems encountered for the ratification of the Rome Statute, and the Model Law on Cooperation with the International Criminal Court”. Following are some of the relevant sections of his lecture:

*“I am going to divide my lecture into two major parts. In the first part, I will address the efforts made towards the development of a model law on cooperation with the International Criminal Court, and in the second part of my lecture I will address the Mechanisms used by States to resolve the problems encountered in relation to the ratification of the Rome Statute, which will be thoroughly developed later on by Francesca Varda of the Coalition of NGOs for the International Criminal Court, making reference to specific cases.*

*I will begin then with the model law on cooperation with the International Criminal Court.*

*I would like to start by saying that 25 countries of the Inter-American System have already ratified the Rome Statute, while 14 countries have ratified the Agreement on Privileges and Immunities of the International Criminal Court. This means that, from 110 States Parties to the Rome Statute, almost one-fourth are American countries. The Rome Statute is pending ratification by only 10 American States, including three Central American countries. That’s why it is so important not to delay anymore the enactment of laws on cooperation with the Court by the various domestic legal systems.*

*As a result, the General Assembly of the OAS entrusted the IAJC with the task of drafting said model instruments, which resulted in the presentation of the “Guide to General Principles and Guidelines on Cooperation between the States and the International Criminal Court”.*

*Let me refer now to the Mechanisms used by States to resolve the problems encountered for the ratification of the Rome Statute.*

*The practice of the different States has made it possible to identify the various mechanisms used by States to resolve the problems posed by their domestic legislation.*

*Before addressing these mechanisms, it is important to dispel three myths:*

*The first one is to think that the jurisdiction of the Court somehow replaces or annuls domestic jurisdiction.*

*It's in fact quite the opposite. The Rome Statute is a subsidiary and complementary system. It acknowledges the central character of domestic courts and only takes action in exceptional circumstances when it is not possible for domestic courts to take action or otherwise if they do not wish to do it.*

*The International Criminal Court is not necessarily the main actor of the Rome Statute. In fact, the domestic courts of States should have the necessary criminal laws in place to exercise their domestic jurisdiction, which additionally implies enacting the necessary legal rules to cooperate with the Court whenever necessary.*

*Consequently, the Rome Statute endorses the national system's capacity to react, prevent and punish international crimes, thereby limiting the possibilities available to oblige the International Criminal Court to exercise its jurisdiction.*

*Another myth that should also be dispelled is the idea that the Rome Statute can be retroactively applied. That's absolutely false. The Rome Statute cannot be retroactively applied. Its mechanisms only have future application, once the Statute has been adopted and ratified by a State. There isn't any valid legal argument or cunning argument in support of the myth that the Rome Statute can be retroactively applied.*

*We cannot speak of preliminary acts or of the continuity of events throughout time. Nothing can make a past event acquire jurisdictional relevance if the Rome Statute is not yet effective in a State. The Statute is closely linked to past events. These crimes can be prosecuted by any institution other than the International Criminal Court if the timeframe premise is not fulfilled, that is, as from July 1, 2002 or on the date the Rome Statute goes into effect in each State Party (Articles 11 and 24), as the case may be.*

*The third myth built around the Rome Statute refers to the argument that national laws are so diverse that no solution can be similar to the other one. Such a categorical statement cannot be justified. Although it is true that the domestic legal systems of States differ from each other, it is also true that many constitutional laws are very similar to each other. For instance, the legal rule which prohibits the extradition of nationals is contained in almost all legislations. Constitutional authors frequently resort to these legal rules.*

*The same thing occurs with the legal rules which grant certain official immunities by reason of the position filled. That's why comparing experiences, when similar legal rules exist, is of great importance.*

*The solutions found by States having similar constitutional rules are used as a basis to find a solution which will obviously have some national colors and nuances. It is very useful and profitable to examine and compare legal rules and jurisprudence to inspire our own decisions.*

*Of course, we should also bear in mind the fact that the general legal principles contained in the various national legal rules, and also in international legal rules,*

*point towards a set of rules which naturally foster cooperation and reciprocal assistance, fight impunity for the most serious crimes, prevent the commission of said crimes, and collaborate in the attainment of the high aims of international justice, while contributing to the maintenance of international peace and security.*

*The great objectives and the mission of the International Criminal Court, that is, prevent impunity and punish the most serious crimes like genocide, crimes against humanity and war crimes, cannot be perceived, within that perspective, as incompatible with the spirit and vision of the Constitution of a State.*

*Some other considerations are linked to sovereignty. As recognized by international jurisprudence, the adoption of international commitments, instead of becoming a limitation, rather reflects the State's power to consent to and assume international obligations. Accordingly, the ratification of the Rome Statute is an act of sovereign willingness. The commitments acquired thereunder in relation to the International Criminal Court become obligations enforceable against the relevant State by decision of the competent bodies of the State.*

*The gap between international law and domestic law has been narrowed. More and more, both legal systems are coming closer to each other and interacting with each other with a high degree of collaboration and coordination, as components of a common system which fosters justice and security.*

*Now that I have dispelled the existing myths on this topic, I would like to underscore the fact that States have basically resorted to three different types of mechanisms to overcome possible internal legal frictions with the Rome Statute. These possible frictions are related both to the Court as such, as well as to some provisions of the Statute. The frictions which have caused more concern are related to the topic of Surrender of Nationals, which cannot be assimilated into extradition, which is an act between States; followed by the topic of life imprisonment and functional immunity linked to certain positions.*

*Broadly speaking, the following mechanisms have proved to be legally effective to overcome obstacles:*

*1.- There is a first group of States which afford the ratification of the Rome Statute full power to become a State commitment by reason of the sovereign act involved in the ratification process, without requiring any other type of interpretation, internal legal reform or constitutional change.*

*More than 80 States which did not consult with their national courts and have legal rules in place which prohibit the extradition of nationals are included in this group. These States ratified the Rome Statute without any problem. This shows their willingness to find pragmatic solutions, for which reason lawmakers seek constitutional interpretations which do not hinder the attainment of the objective of the Statute.*

*2.- A second group of States has opted for interpreting the coherence between the Rome Statute and the national system. All those States which required a formal interpretation from a judicial body (for instance, from a constitutional court) are included in this group. For example, Ecuador, Honduras, Costa Rica and Guatemala.*

*3.- There is another group of States which has undertaken constitutional reforms to open some space for the Rome Statute, like France, Germany, Mexico and Chile.*

*In most cases where constitutional reforms were undertaken, those articles related to purported incompatibilities between the topics of surrender of nationals,*



*functional immunity, life imprisonment, and other eventual conflicting topics were not necessarily modified; in fact, only some articles were modified to allow incorporating the Court into the internal legal system.*

*It is worth highlighting that the problems resolved have not always been the same ones. Those countries which thought that incompatibility existed with the jurisdiction of the Court, to say it in some way, opted for a constitutional reform. Those countries which thought that certain incompatibilities existed with regard to the topic of surrender of nationals, life imprisonment or functional immunity ended up resorting to interpretations of compatibility and non-conflicting opinions.*

*Those Central American countries which have ratified the Rome Statute have resorted to the interpretation that the Rome Statute is in line with their domestic legislation.*

*It is worth highlighting the large number of countries which did not perform any act other than the ratification of the Statute, which shows the growing trend that gives sovereign acts an increasingly important and renewed role, including incisiveness and an effect on domestic legal rules, in keeping with a growing trend which focuses on narrowing the gap between national and international legal rules – to which I have already referred.*

*All these cases prove that, regardless of the mechanism sought, there should always be an enormous political willingness to achieve the great aims of international justice and the principles of international cooperation and assistance to prevent and eradicate this kind of crimes which are so detrimental to human dignity and constitute a crime against humanity, for which reason, to achieve these aims, the collective action and solidarity of everyone is required, including cooperation to preserve the sacred assets which form part of the human heritage, which should be urgently protected and safeguarded” (end of quote).*

## **VIII. MODEL LAW RELATING TO WAR CRIMES**

In view that one of the mandates received by the Juridical Committee refers to the drafting of a model law on the crimes defined in the Rome Statute, the Rapporteur will only address war crimes in this report. The Crimes against Humanity and Genocide will be addressed in his next report, including, in due course, the crime of Aggression.

In view that a close relationship exists between the International Criminal Court topic and the International Humanitarian Law topic, the rapporteur attended, along with the IAJC rapporteur on International Humanitarian Law, Dr. Jorge Palacios Treviño, a Special Session on International Humanitarian Law held in Washington on January 29, 2010. Following is part of the text of his report:

*“Through the mandate given by the General Assembly to the Inter-American Juridical Committee in 2009 in relation to the promotion of the International Criminal Court, the IAJC was entrusted with the task of drafting legislation on the implementation of the Rome Statute, particularly with regard to the definition of crimes which fall within the jurisdiction of the International Criminal Court (War Crimes, Genocide and Crimes against Humanity, and Aggression once the definition of this crime is approved at the Review Conference), and submitting a progress report before the fortieth regular session of the General Assembly.*

*This mandate allows making a comprehensive and complete review of the crimes enshrined in the Rome Statute and in the International Humanitarian Law. This is a great opportunity to complement and enrich the contributions made by the International Humanitarian Law in relation to the development of the different crimes enshrined in the Rome Statute. This is the right time to bring the jurisdictional world closer to the normative world embodied in the International Humanitarian Law.*

*American States have undertaken to punish war crimes, according to the system established in the Geneva Conventions, its Additional Protocol I, and the Rome Statute, among other conventions.*

*The challenge is that reform processes must overcome the problem that some crimes embodied in some conventional legal rules are not necessarily embodied in others or they are different or otherwise contain more restrictive and narrower elements, including provisions which introduce new criteria which are subject to interpretation on the scope thereof.*

*The harmonization and integration of these complementary realities is an interesting task that I will perform very soon in my capacity as rapporteur on the International Criminal Court. This is particularly true with respect to the crimes defined in Articles 11 and 85 of Additional Protocol I, on the one hand, and in Article 8 of the Rome Statute, on the other hand.*

*The idea is then to find appropriate solution channels which respect the integrity of the different texts, but at the same time complement said texts and resolve in a harmonious fashion the differences and omissions. Accordingly, it is important to create awareness of the need not to distinguish unnecessarily (when there is no need to do it) between international and non-international armed conflicts when the situations apply to both types of conflicts. This is the case of the use of certain weapons and poisoned gases: what is not acceptable under some circumstances is not acceptable under others. Its serious dehumanizing nature is not lost just because we shift from one circumstance to another. Criminalization exists in both fields.*

*In the Guide to General Principles on Cooperation with the International Criminal Court, prepared by the Inter-American Juridical Committee, we addressed the importance of incorporating the crimes contemplated in the Geneva Conventions and in Protocol I. Of course, we share the idea that if we bring Criminal Law into agreement with the Rome Statute, we cannot weaken the obligations arising therefrom or from systemic complementarities, as the highest standards should always be enforced. Enrichment is undoubtedly a two-lane road.*

*Therefore, we must make sure that criminal law allows punishing the war crimes defined in the Geneva Conventions and in Additional Protocol I.*

*Accordingly, the challenge faced by the model Law lies in strengthening and complementing the design – in a model law – of both the Statute, as well as the Geneva Conventions and other instruments.*

*Then, this adjustment should be made notwithstanding the obligations undertaken under other agreements. The Rome Statute codifies a series of War Crimes which are not always considered a serious infringement under the Geneva Conventions. In turn, Additional Protocol I lists some crimes not included in the Rome Statute.*

*There are also some elements which are more restrictive in one Convention than in the rest (manifestly excessive, which is the phrase they use).*

*There's also an opportunity to complement related matters like, for instance, the protection of cultural wealth if an armed conflict breaks out.*

*The ICRC has been working with several countries in America to develop an extended list of war crimes which could be useful to the rapporteur. Several countries have also focused their efforts on developing this list, so we will very much appreciate if they could send us their laws, even their draft laws, if they have not done it already. There are laws and draft laws from the following countries, without limitation: United States, Canada, Trinidad and Tobago, Argentina, Panama, Nicaragua, Costa Rica, Peru, Brazil, Chile, El Salvador, Ecuador, Guatemala and Honduras.*

*The message that I want to share with you is that the drafting of a model law may turn out to be a very interesting exercise to give this work a broader perspective related not only to the Rome Statute, but also to the International Humanitarian Law, which is thus integrated into this necessary work which actually requires a large unifying vocation.*

*This statement may also be valid for another dimension of Humanitarian Law, related to the use of certain weapons. The international standards applied so far seem to be minimal, for which reason it might be necessary to take into account some initiatives presented by both American and non-American States for the Review Conference to be held in Kampala, Uganda, to eventually consider the possibility of extending the list of crimes, debating, for example, the use of weapons of massive destruction, Mexico's proposal on the threat or use of nuclear weapons, other proposals on anti-person mines, cluster ammunition, chemical and biological weapons, and other weapons which inflict unnecessary suffering and manifestly have indiscriminate effects. It may seem, I repeat, that these crimes should be punished, regardless of the international or domestic nature of the conflict.*

*All things considered, we are performing some interesting, though challenging, work where the convergence and support of the International Humanitarian Law is of utmost importance to draft model laws in this field. The mandates received by the International Criminal Court and the International Humanitarian Law are increasingly pointing to a necessary, useful and mutually enriching direction, which constitutes an integrating challenge". (end of quote)*

#### Draft articles

*The rapporteur does not intend to draft his own model law when substantial progress has already been made by the rapporteur on International Humanitarian*

Law,<sup>61</sup> additionally considering the hard work carried out by ICRC with several American countries, including the studies conducted by ICRC within said legislative framework. On the contrary, the rapporteur intends to benefit from said draft laws and avoid duplicating efforts. Accordingly, the rapporteur would like to underscore a group of 22 model articles taken from some working documents of ICRC, which could be used as a reference by States, **bearing in mind their own internal features.**<sup>62</sup>

In the opinion of the rapporteur, in relation to the Rome Statute, the model laws should take into account the following instruments, among others:

- a) Four Geneva Conventions, Articles 49, 50, 51, 129, 130, 146 and 147.
- b) The Third Geneva Convention, Article 130.
- c) The Fourth Geneva Convention, Article 147.
- d) 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, Article 1.
- e) Additional Protocol I, Articles 11, 51(5)(a), 75, 85(3), 85(3)(a), 85(3)(b), 85(3)(c), 85(3)(d), 85(3)(e), 85(3)(f), 85(4)(a), 85(4)(b), 85(4)(c), 85(4)(d), 85(4)(e), 86, 86(2), and 87.
- f) Additional Protocol II, Article 6.
- g) Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict, Article 15.
- h) 1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction.
- i) 1980 Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects.
- j) Protocols I, II and IV to the 1980 Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects.
- k) Optional Protocol of 2000 to the Convention on the Rights of the Child, Articles 1 and 2.
- l) Inter-American Convention on Forced Disappearance of Persons of 1994.
- m) Similarly, the elements of crimes, as far as war crimes are concerned, should be taken into account.

#### Model texts

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<sup>61</sup> See, for example, **International Criminal Courts**. OAS. Ser. Q CJI/doc. 349/10 and **War Crimes under International Humanitarian Law**. OAS Ser.Q CJI/doc. 328/09 rev.1.

<sup>62</sup> See, especially, the working document entitled *Repression of War Crimes in the National Criminal Legislation of the American States*. International Committee of the Red Cross. Advisory Service, Latin American Unit. See also **War crimes, according to the Rome Statute of the International Criminal Court**, based on International Humanitarian Law. Comparative Chart. Advisory Service on International Humanitarian Law, ICRC.

**Article 1. (Voluntary Manslaughter)** Whoever, on the occasion of an armed conflict, deliberately kills a person protected by International Humanitarian Law, shall be punished with ...

**Article 2. (Torture and Inhuman Treatment)** Whoever, on the occasion of an armed conflict, commits torture or gives any other cruel or inhuman treatment or otherwise causes great pain or suffering to a person protected by International Humanitarian Law, shall be punished with ...

**Article 3. (Mutilations and Medical Experiments)** Whoever, on the occasion of an armed conflict, mutilates a person protected by International Humanitarian Law or makes him/her undergo medical or scientific experiments or removes tissues or organs for reasons not justified by the medical, dental or hospital treatment that said person is receiving, or for reasons which do not benefit said person, causing the death or seriously endangering the health of said person, shall be punished with ...

**Article 4. (Sexual Crimes)** Whoever, on the occasion of an armed conflict, engages in acts of rape, sexual slavery, involuntary prostitution, forced pregnancy, involuntary sterilization or in any other form of sexual violence against a person protected by International Humanitarian Law, shall be punished with ...

**Article 5. (Apartheid)** Whoever, on the occasion of an armed conflict, commits an inhumane act against a person protected by International Humanitarian Law in order to maintain an institutionalized oppression regime or make a given racial group systematically dominate one or more racial groups, shall be punished with ...

**Article 6. (Assault on Dignity)** Whoever, on the occasion of an armed conflict, performs an act which constitutes an assault on the dignity of a person protected by International Humanitarian Law, particularly through humiliating or degrading treatments, shall be punished with ...

**Article 7. (Taking of Hostages)** Whoever, on the occasion of an armed conflict, takes a person protected by International Humanitarian Law hostage, shall be punished with ...

**Article 8. (Illegal Arrest)** Whoever, on the occasion of an armed conflict, illegally deprives a person protected by International Humanitarian Law of his freedom, shall be punished with ...

**Article 9. (Delay in Repatriation)** Whoever, on the occasion of an armed conflict, delays without justification the repatriation of prisoners of war or civilians, shall be punished with ...

**Article 10. (Denial of Judicial Guarantees)** Whoever, on the occasion of an armed conflict, deprives a person protected by International Humanitarian Law of his/her right to legitimate and impartial trial, shall be punished with ...

**Article 11. (Obligation to Serve in Enemy Forces)** Whoever obliges a prisoner of war or another person protected by International Humanitarian Law to serve in the armed forces of a party, which is in an armed conflict with the party on which said persons depend, shall be punished with...

**Article 12. (Abolition of Rights)** Whoever, on the occasion of an armed conflict, declares the abolition, suspension or inadmissibility before a court of rights and actions that persons belonging to the enemy who are protected by International Humanitarian Law are entitled to, shall be punished with ...

**Article 13. (Deportation or Illegal Transfer)** Whoever, on the occasion of an armed conflict, deports or illegally transfers a person protected by International Humanitarian Law, especially when the population of the occupying power is transferred into occupied territory, or deports or transfers in or outside the occupied territory all or part of the population of that territory, or if the transfer of the civilian population is ordered, unless it is so required for the security of the civilians involved or by imperative military reasons, shall be punished with...

**Article 14. (Prohibited Attacks)** Whoever attacks the civilian population or civilians or civil assets; or launches an indiscriminate attack knowing that such attack will result in the loss of lives, injuries to civilians or damage to civilian assets or in extensive, long-lasting, excessive and serious damage to the natural environment; or attacks defenseless cities or villages; or attacks defenseless homes or buildings that are not military targets; or attacks works or facilities containing hazardous substances knowing that this attack will result in casualties or injuries among the civilian population or in excessive damage to civilian assets; or attacks defenseless premises or non-militarized areas; or attacks a person knowing that he is out of action; or attacks health-related buildings, material, units and means of transport or the personnel wearing Geneva Convention identification badges in accordance with International Law; or attacks a protected cultural asset; or attacks buildings used for religion, teaching, arts, science or welfare purposes, as well as those places where ill or injured persons are assembled, provided they are not military targets; or attacks personnel, facilities, material, units or vehicles participating in a mission for the maintenance of peace or humanitarian assistance in accordance with the Charter of the United Nations that are entitled to protection granted to civilians or civil assets, shall be punished with ...

**Article 15. (Prohibited Weapons)** Whoever uses poison or poisonous weapons; or asphyxiant, toxic or similar gas, or any similar liquid, material or device; or bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; or other war weapons, projectiles, materials and methods that, due to their own nature, inflict superfluous damage or unnecessary suffering or indiscriminate effects in violation of international law, shall be punished with ...

**Article 16. (Starvation)** Whoever intentionally uses starvation upon the civilian population as a method of warfare, depriving them of objects indispensable to their survival, including the fact of willfully impeding relief supplies in accordance with the Geneva Conventions, shall be punished with ...

**Article 17. (Treachery)** Whoever kills or wounds an enemy soldier using treason shall be punished with...

**Article 18. (Undue Use of Signs)** Whoever unduly uses the white flag or the national flag or military insignia or the uniform of the enemy or of the United Nations, as well as Geneva Convention identification badges to inflict death or serious injuries, shall be punished with...

**Article 19. (Showing No Mercy)** Whoever declares that no mercy will be given shall be punished with...

**Article 20. (Human Shields)** Whoever uses the presence of a person protected by international humanitarian law to cover for certain areas or military forces from military operations, shall be punished with...

**Article 21. (Children)** Whoever recruits or enlists children under 18 years of age in the armed forces or groups or uses them to actively participate in hostilities, shall be punished with...

**Article 22. (Destruction and appropriation of assets)** Whoever destroys or confiscates assets of the enemy without an imperative military need or loots a city or main square, even when it is taken by assault, shall be punished with...

**Additional comments and comprehensive proposal:**

On this basis, which has been used by various States in the process of adaptation of their domestic law<sup>63</sup>, the rapporteur has deemed it necessary to underscore, on the one hand, certain additions and provisions taken from certain national texts which, by way of example, he considered interesting to offer as part of this report. In other cases he simply separated certain texts for clarity purposes, as follows<sup>64</sup>:

**Article 1. (Voluntary Manslaughter)** Whoever, on the occasion of an armed conflict, deliberately kills a person protected by International Humanitarian Law<sup>65</sup>, shall be punished with ...

**Article 2. (Torture and Inhuman Treatment)** Whoever, on the occasion of an armed conflict, commits torture or gives any other cruel or inhuman treatment or otherwise inflicts great pain or suffering to a person protected by International Humanitarian Law, shall be punished with ...

**Article 3. (Mutilations and Medical Experiments)** Whoever, on the occasion of an armed conflict, mutilates a person protected by International Humanitarian Law or makes him/her undergo medical or scientific experiments or removes tissues or organs for reasons not justified by the medical, dental or hospital treatment that said person is receiving, or for reasons which do not benefit said person, causing the death or seriously endangering the health of said person, shall be punished with ...

**Article 4. (Sexual Crimes)** Whoever, on the occasion of an armed conflict, engages in acts of rape, sexual slavery, involuntary prostitution, forced pregnancy, involuntary sterilization or in any other form of sexual violence against a person protected by International Humanitarian Law, shall be punished with ...

**Article 5. (Apartheid)** Whoever, on the occasion of an armed conflict, commits an inhumane act against a person protected by International Humanitarian Law in order to maintain an institutionalized oppression regime or make a given racial group systematically dominate one or more racial groups, shall be punished with ...

**Article XX.- Racial Discrimination<sup>66</sup>.** Whoever, on the occasion of an armed conflict, engages in racial discrimination against any protected person, shall be punished with...

**Article 6. (Assault on dignity)** Whoever, on the occasion of an armed conflict, performs an act which constitutes an assault on the dignity of a person protected by International Humanitarian Law, particularly through humiliating or degrading treatments, shall be punished with ...

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<sup>63</sup> Case of the Nicaraguan and Panamanian Criminal Codes.

<sup>64</sup> With the valuable cooperation of Salvador Herencia who contributed with his comments.

<sup>65</sup> In general, a person protected by IHL is understood to be protected by the Geneva Conventions and Additional Protocols.

<sup>66</sup> Text adopted from Art. 137 of the Colombian Criminal Code. Nicaraguan Criminal Code. Art. 491.

**Article 7. (Taking of Hostages)** Whoever, on the occasion of an armed conflict, takes a person protected by International Humanitarian Law hostage, shall be punished with ...

**Article 8. (Illegal Arrest)** Whoever, on the occasion of an armed conflict, illegally deprives a person protected by International Humanitarian Law of his freedom, shall be punished with ...

**Article 9. (Delay in Repatriation)** Whoever, on the occasion of an armed conflict, delays without justification the repatriation of prisoners of war or civilians, shall be punished with ...

**Article 10.- (Denial of Judicial Guarantees)** Whoever, on the occasion of an armed conflict, deprives a person protected by International Humanitarian Law of his/her right to legitimate and impartial trial, shall be punished with ...

**Article 11. (Obligation to Serve in Enemy Forces)** Whoever obliges a prisoner of war or another person protected by International Humanitarian Law to serve in the armed forces of a party, which is in an armed conflict with the party on which said persons depend, shall be punished with...

**Article XX. Plundering**<sup>67</sup>. Whoever, on the occasion of an armed conflict, strips the corpse or a protected person of their belongings, shall be punished...

**Article XX. Failure to Provide Relief and Humanitarian Assistance**<sup>68</sup>. Whoever, on the occasion of an armed conflict and having the obligation do to so, fails to provide relief and humanitarian assistance to protected persons, shall be punished with...

**Article XX. Hindering of Health and Humanitarian Tasks**<sup>69</sup>. Whoever, on the occasion of an armed conflict, hinders or prevents the medical, health or relief personnel or the civilian population from performing health and humanitarian tasks which can and must be performed in accordance with International Humanitarian Law, shall be punished with...

**Article 12. (Abolition of Rights)** Whoever, on the occasion of an armed conflict, declares the abolition, suspension or inadmissibility before a court of rights and actions that persons belonging to the enemy who are protected by International Humanitarian Law are entitled to, shall be punished with ...

**Article 13. (Deportation or illegal transfer)** Whoever, on the occasion of an armed conflict, deports or illegally transfers a person protected by International Humanitarian Law, especially when the population of the occupying power is transferred into occupied territory, or deports or transfers in or outside the occupied territory all or part of the population of that territory, or if the transfer of the civilian population is ordered, unless it is so required for the security of the civilians involved or by imperative military reasons, shall be punished with...

**Article 14. (Prohibited Attacks)** Whoever attacks the civilian population or civilians or civil assets; or launches an indiscriminate attack knowing that such attack will result in the loss of lives, injuries to civilians or damage to civilian assets or in

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<sup>67</sup> Text adopted from Art. 151 of the Colombian Criminal Code.

<sup>68</sup> Text adopted from Art. 152 of the Colombian Criminal Code. Nicaraguan Criminal Code. Art. 506.

<sup>69</sup> Text adopted from Art. 153 of the Colombian Criminal Code.



extensive, long-lasting, excessive and serious damage to the natural environment; or attacks defenseless cities or villages; or attacks defenseless homes or buildings that are not military targets; or attacks a person knowing that he is out of action; or attacks buildings used for religion, teaching, arts, sciences or welfare purposes, as well as those places where ill or injured persons are assembled, provided they are not military targets, shall be penalized with...

**Article XX. Attack to Hazardous Forces**<sup>70</sup>. Whoever attacks works or facilities containing hazardous substances knowing that this attack will result in casualties or injuries among the civilian population in or excessive damage to civilian assets, shall be punished with...

**Article XX. Attack to Non-Militarized Areas**<sup>71</sup>. Whoever attacks defenseless premises or non-militarized areas, shall be punished with...

**Article XX. Attack to Health Assets and Facilities**<sup>72</sup>. The attack to or destruction of ambulances or health transportation means, field hospitals or hospital buildings, depots of relief elements, health convoys, assets to be used to assist and provide relief to protected persons, health zones and non-militarized areas or health assets or facilities duly marked with conventional Red Cross or Red Half Moon signs, shall be punished with ...

**Article XX. Attack to or Illegal Use of Cultural Assets or Places of Worship**<sup>73</sup>. Whoever attacks and destroys historical monuments, works of art, educational facilities or places of worship, which form part of the cultural or spiritual heritage of the people, or use such assets to support military efforts, shall be punished with...

**Article XX. Attack to Humanitarian Missions**<sup>74</sup>. The attack to the personnel, facilities, materials, units or vehicles participating in a mission for the maintenance of peace or humanitarian assistance in accordance with the Charter of the United Nations and which are entitled to the protection afforded to civilians or civilian assets, shall be punished with...

**Article 15. (Prohibited Weapons)** Whoever uses poison or poisonous weapons; or asphyxiant, toxic or similar gas, or any similar liquid, material or device; or bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; or other war weapons, projectiles, materials and methods that, due to their own nature, inflict superfluous damage or unnecessary suffering or indiscriminate effects in violation of international law, shall be punished with ...

**Article 16. (Starvation)** Whoever intentionally uses starvation upon the civilian population as a method of warfare, depriving them of objects indispensable to their

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<sup>70</sup> In this case, this text was removed from Art. 14 in order to define a clearer and more concise crime.

<sup>71</sup> In this case, this text was removed from Art. 14 in order to define a clearer and more concise crime. Nicaraguan Criminal Code defines non-militarized areas as the ones which such status has been granted to by verbal or written agreement. Art. 513.

<sup>72</sup> Text adopted from Art. 156 from the Colombian Criminal Code.

<sup>73</sup> Text adopted from Art. 157 from the Colombian Criminal Code.

<sup>74</sup> Text adopted from Art. 155 from the Colombian Criminal Code.

survival, including the fact of willfully impeding relief supplies accordance with the Geneva Convention, shall be punished with ...

**Article 17. (Treachery)** Whoever kills or wounds an enemy soldier using treason shall be punished with ...

**Article 18. (Undue Use of Signs)** Whoever unduly uses the white flag or the national flag or military insignia or the uniform of the enemy or of the United Nations, as well as Geneva Convention identification badges to inflict death or serious injuries, shall be punished with...

**Article 19. (Showing No Mercy)** Whoever declares that no mercy will given or that no survivors will remain,<sup>75</sup> shall be punished with...

**Article 20. (Human Shields)** Whoever uses the presence of a person protected by international humanitarian law obtain cover for certain areas or military forces from military operations shall be punished with...

**Article 21. (Children)** Whoever recruits or enlists children under 18 years of age in the armed forces or groups or uses them to actively participate in hostilities, shall be punished with...

**Article 22. (Destruction and Appropriation of Assets)** Whoever destroys or confiscates assets of the enemy without an imperative military need or loots a city or main square, even when it is taken by assault, shall be punished with...

**Article XX. (Violation of Truce)**<sup>76</sup>. Whoever violates an agreed truce or armistice shall be punished with ...

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<sup>75</sup> Panamanian Code, Law No. 14. Art. 441.

<sup>76</sup> Nicaraguan Criminal Code. Art. 499.