

The Rome Statute Regime as a Mainspring of International Criminal Law

The Success of the Rome Statute in Latin America and the Opposition of the USA

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This study focuses on the impact of the principle of complementarity on the development of international criminal law. An overview of the Rome Statute's ratification and implementation status in Latin America will be given, in order to see whether the Rome Statute regime is serving as a catalyst for the domestic reform of substantive criminal law in these countries. The principle of complementarity means that it is in the States Parties' own interest to pass national legislation dealing with international criminal law. This interest may stem from the desire to close the gap between the demands of the Rome Statute on the one hand and existing national criminal law on the other. Or the motive may be far more pragmatic: if national law creates the requisite conditions for the comprehensive prosecution of crimes under international law, it will guarantee that the jurisdiction of the ICC can be excluded in each specific case.

Thereafter, to conclude, a brief look will be had at the United States' attitude to the principle of complementarity, not least because this has a considerable impact on Latin America.

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I. The Rome Statute Regime

1. The Principle of Complementarity¹

Genocide, crimes against humanity and war crimes must not go unpunished. Ensuring that justice is done in such cases is first and foremost the duty of the states concerned. But should national prosecution be inadequate, for reasons of law or fact, these three most serious crimes of concern to the international community can now be prosecuted by the International Criminal Court to ensure that the perpetrators do not get off scot-free.

These three basic considerations are united in the principle of complementarity, on which the Rome Statute is founded; this principle is enshrined in Article 17 (1) (a) and (b) thereof.²

2. The Impact of the Principle of Complementarity

a) Widespread Acceptance of the Rome Statute

One effect of the principle of complementarity cannot be overlooked: it ensures that the sovereignty of the States Parties is not encroached upon more than is strictly necessary, since it is up to each state to exclude the jurisdiction of the ICC by itself genuinely prosecuting the case.³ This is one of the principal reasons for the widespread acceptance achieved by the Rome Statute only a few years after its adoption: 97 states have ratified it within 6 years – and more are bound to follow – notwithstanding the transfer of sovereignty involved.⁴ Only rarely in the history of international law has a treaty of such great consequence gained acceptance so rapidly.

¹ The principle of complementarity enshrined in Article 17 of the Rome Statute creates a link between the ICC and national law enforcement agencies and courts which are in any case responsible for prosecuting lower ranking offenders. Close cooperation between these instances (e.g. as regards the collection and evaluation of evidence) will thus be vital in practice, as will be a flexible approach to such cooperation. This issue is however outside the scope of this paper. Like Hans-Werner B u s s - m a n n, Head of the Foreign Office Task Force for the International Criminal Court and Commissioner for the International Criminal Court, I believe it is nonetheless justified to talk of the Rome Statute regime, for in practice, assuming that the relevant national authorities are able and willing to act, situations can only be resolved through coordinated prosecution by such national authorities and the ICC.

² S. Williams, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden 1999, Article 17, margin 1 et seq.

³ *Ibid.*, margin 20.

⁴ *Ibid.*, margin 16.

b) A Further Development of International Criminal Law?

International prosecution by the ICC represents a direct contribution to the fight against impunity for international crimes under the Rome Statute regime. However, pursuant to the principle of complementarity, this direct, international intervention based on the Statute is only the second-best solution. It is a subsidiary solution, which only applies if national prosecution is inadequate.

States that ratify the Rome Statute are thus not simply announcing their desire to subject particularly grave crimes to the possibility of international prosecution. By ratifying the Statute they are also implying that the prosecution of genocide, crimes against humanity and war crimes is a national priority.⁵

The creation of the ICC by the Rome Statute was thus not only a milestone in the fight against impunity at international level. What could yet prove to be of far greater importance is the crucial impetus provided by the Rome Statute regime, and more specifically the principle of complementarity, for the development of international criminal law at national level.

For states that have ratified the Rome Statute thereby accept that the prosecution of international crimes is an important national task. However, international criminal law has to date received scant attention in the legal systems of the States Parties, which include at best a few special provisions such as those on genocide.

The principle of complementarity means that it is now in the States Parties' own interest to pass national legislation dealing with international criminal law.⁶ This interest may stem from the desire to close the gap between the demands of the Rome Statute on the one hand and existing national criminal law on the other. Or the motive may be far more pragmatic: if national law creates the requisite conditions for the comprehensive prosecution of crimes under international law,⁷ it will guarantee that the jurisdiction of the ICC can be excluded in each specific case.

In line with the intention of the framers of the Rome Statute and as advocated by many proponents, particularly non-governmental organizations, Germany thus passed numerous pieces of criminal legislation upon the entry into force of the Rome Statute. The most important new provisions were brought together in the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) and the Act on Cooperation with the ICC (*Gesetz über die Zusammenarbeit mit dem IStGH*).⁸

One can view the Code of Crimes against International Law, i.e. the adaptation of substantive criminal law to match the elements of crimes specified in the Rome Statute, as the result of the Rome Statute and thus as an indirect contribution by

⁵ This obligation is also expressly included in the 6th recital of the preamble (O. Triffterer, in: Triffterer (note 1), Preamble, margin 17).

⁶ A. Eser/H. Kreiker, in: K. Ambos/E. Malarino (ed.), Montevideo 2003, 15 et seq.

⁷ The term "crimes under international law" (cf. G. Werle, *Völkerstrafrecht*, 100) means those crimes proscribed directly under international law, i.e. genocide, crimes against humanity and war crimes.

⁸ An English translation of the *Völkerstrafgesetzbuch* is available online at <<http://www.iuscrim.mpg.de/forsch/legaltxt/vstgblpan.pdf>> (version of 2 August 2004).

the Statute to the fight against impunity. For the Rome Statute is here making its impact felt at national level, not by means of direct obligations, such as those that govern cooperation between States Parties and the Court, but by cultivating the aforementioned vital self-interest of the States Parties. It is thus clear that the further development of national international criminal law is an intended consequence of the Rome Statute regime. It is however questionable to what extent this has occurred or is likely to occur, since such a development relies solely on states' self-interest.

In Germany, the ICC regime has led to the above-mentioned development of pertinent national law, which in some respects goes beyond the Rome Statute, since it also takes account of customary international law on war crimes. This is not really surprising, since the Federal Republic has championed the Rome Statute from the very beginning. In order to ensure that international criminal law can be fully, simply and consistently applied, Germany has produced its own codification – the Code of Crimes against International Law. However, looking at Germany alone is not enough to reliably determine the indirect impact of the Rome Statute on the incorporation of such norms in national law.

Looking at developments in the other European Union member states, some of which have also passed national rules of international criminal law,⁹ is likewise insufficient. This study will therefore turn to developments in the countries of Latin America to answer the question of whether and to what extent the Rome Statute and the principle of complementarity have had an indirect effect on the States Parties by encouraging them to create international criminal law at national level.

In these States Parties, the self-interest in passing such national legislation confronts a number of major obstacles. Many of these countries are still plagued by the wholesale impunity enjoyed by those who committed the crimes under international law that ravaged their societies not so long ago. Furthermore, other, more pressing problems dominate the political agenda. In Europe, the implementation process is not hampered by economic or social problems of the same magnitude.

However, if these obstacles were to be overcome, and if a further development of national rules of international criminal law were to be observed in Latin America, this would be valuable new evidence of the effectiveness of the Rome Statute regime and the further development of national (international) criminal law.

⁹ Implementing Acts have been passed in several European states, for example Finland, Switzerland or Slovenia.

II. Ratification Status in Latin America as Proof of the Effectiveness of the Rome Statute Regime¹⁰

Belize was the first country in the region to ratify the Rome Statute, doing so in early 2000.¹¹ It was followed by Venezuela,¹² Argentina,¹³ Dominica,¹⁴ Paraguay,¹⁵ Costa Rica,¹⁶ Peru,¹⁷ Ecuador,¹⁸ Panama,¹⁹ Brazil,²⁰ Bolivia,²¹ Uruguay,²² Honduras²³ and Colombia.²⁴ Chile,²⁵ Mexico,²⁶ the Dominican Republic,²⁷ Haiti²⁸ and Guyana²⁹ have all signed the Statute. The only states that have neither signed nor ratified the Rome Statute are El Salvador, Cuba and Nicaragua, Guatemala and Suriname.³⁰

The acceptance of the ICC in Latin America, and in particular South America, is thus one of the greatest in the world. This should be viewed as a further reflection of the position previously adopted by these countries, which are eager to ensure that international crimes can be effectively prosecuted.³¹

This position was earlier unequivocally demonstrated by the signature and ratification of numerous international and regional agreements on the protection of human rights.³² The declaration by the Ibero-American Heads of State or Gov-

¹⁰ This paragraph reflects information gathered during a research at the German Foreign Office that finished in March 2004. The information was updated in August and September 2004. For obvious reasons the information gathered in the German Foreign Office cannot be cited.

¹¹ Signature and ratification on 5 April 2000.

¹² Signature on 14 October 1998; ratification on 7 June 2000.

¹³ Signature on 8 January 1999; ratification on 8 February 2001.

¹⁴ Accession on 12 February 2001.

¹⁵ Signature on 7 October 1998; ratification on 14 May 2001.

¹⁶ Signature on 7 October 1998; ratification on 7 June 2001.

¹⁷ Signature on 7 December 2000; ratification on 10 November 2001.

¹⁸ Signature on 7 October 1998; ratification on 5 February 2002.

¹⁹ Signature on 18 July 1998; ratification on 21 March 2002.

²⁰ Signature on 7 February 2000; ratification on 20 June 2002.

²¹ Signature on 17 July 1998; ratification on 27 June 2002.

²² Signature on 19 December 2000; ratification on 28 June 2002.

²³ Signature on 7 October 1998; ratification on 1 July 2002.

²⁴ Signature on 10 December 1998; ratification on 5 August 2002.

²⁵ On 11 September 1998.

²⁶ On 7 November 2000.

²⁷ On 8 September 2000.

²⁸ On 26 February 1999.

²⁹ On 28 December 2000.

³⁰ French Guiana, an overseas department of France, is not an independent state.

³¹ K. Ambos/E. Malarino, in: K. Ambos/E. Malarino (ed.), *Persecución Penal Nacional de Crímenes Internacionales en América Latina*, Montevideo 2003, 578.

³² For example, the regional Convention for the protection of all persons from enforced disappearances (OAS/Serie P, AG/doc.3114/94 rev. 1).

ernment of 15 November 2003 recently underlined this stance, stressing the importance of the ICC for punishing international crimes and emphasizing the necessity of achieving universal acceptance and ratification of the Rome Statute. The Inter-American Commission on Human Rights, one of the principal organs of the Organization of American States (OAS), adopted a resolution (Res. 1/03) in unambiguous support of the ICC, in which members “urge states that have not yet done so to ratify the various regional and international instruments on the subject, such as the Statute of the International Criminal Court”.

1. Positions of the Non-States Parties

a) The Non-Signatory States

El Salvador³³ has neither signed nor ratified the Rome Statute on the grounds that the Statute is incompatible with its constitution. Article 27 of the constitution, which prohibits life imprisonment, is frequently cited in this context. It is also said that the Statute violates the Convention against Torture. Life imprisonment is, it is argued, a form of inhuman or degrading treatment. Lastly, misgivings based on the risk of double jeopardy (*ne bis in idem*) have also been expressed.

The recent reforms (of the Penal Code in 1998 and the constitution in 2000) were not used to prepare for the ratification or implementation of the Rome Statute. It is however noteworthy that the constitutional reforms did make it possible, under specific circumstances, for Salvadorian nationals to be extradited.³⁴ Nevertheless, the political situation is such that it seems extremely difficult to pass the constitutional amendments necessary for the ratification of the Rome Statute. Even advocates of the ICC (which include the Human Rights Commissioner, the Churches, and to a lesser extent the FMLN opposition party and the Foreign Ministry; the opponents include the military, the ARENA governing party and the Supreme Court) are wary of initiating these further constitutional amendments – which are generally thought to be necessary although the amended constitution permits the extradition of Salvadorian nationals – for they fear that any attempt to adapt the constitution to the ICC Statute could put the entire constitution at risk. It is not in anyone’s interest to gamble away the settlement achieved by the peace negotiations enshrined therein.

El Salvador has no special interest in the prosecution of international crimes, even where they have been committed in its territory.³⁵ This fact informs the guarded position adopted by the Government with respect to the Rome Statute. The Government has to date only established an inter-ministerial committee which

³³ J. Martínez Ventura/N. Vaquerano Gutiérrez, in: Ambos/Malarino (note 31), 305 et seq.

³⁴ Ibid., 306.

³⁵ Ibid., 329.

has been charged with drafting a report for parliament on the necessary constitutional amendments. This restraint is quite possibly due to the fact that key political positions are currently occupied by persons who, in the civil war not all that long ago, were themselves involved in some way or another in the commission of such offences. This would explain why no significant efforts have been made in the country to ratify the ICC Statute.

The reasons why Nicaragua has not yet signed or ratified the Rome Statute are no doubt similar. There has not yet been any domestic debate on the subject.³⁶ The constitutional ban on extraditing own nationals is also cited as being incompatible with the Rome Statute. Nicaragua's hesitation may well also be due to the country's desire not to risk losing the goodwill of the United States of America.

In Guatemala, the Government asked the Constitutional Court for an opinion on the constitutionality of the Rome Statute. The Court raised no objections to the Statute.³⁷ The matter is now before Congress, where opponents of the Statute find themselves hard put to argue that it is unconstitutional. The opponents also fear an end to impunity for crimes committed prior to the entry into force of the Statute. As long as the former putschist Rios Montt has the say in Congress, one cannot expect it to ratify the Statute.

Suriname and Cuba have also neither signed nor ratified the Statute.

b) Countries Currently Ratifying the Statute

aa. Chile³⁸

Chile has signed the Rome Statute and the Government has pushed for its ratification. The procedure for obtaining parliamentary approval was launched on 6 January 1999, with the lower house, the Chamber of Deputies granting its approval on 22 January 2002. However, the bill was blocked by the Senate, which argued that ratification would limit the criminal jurisdiction of the Chilean courts and thus also the sovereignty of Chile, with the result that ratification would only be considered following an amendment to the constitution. Against this background, 35 Deputies brought the issue before the Supreme Court on 4 March 2002. In an opinion of 6 April 2002, the Court declared various elements of the bill to be unconstitutional.³⁹

This development has seriously diminished the chances of the Statute being ratified in the near future. The Government, judiciary and, if certain conditions are fulfilled, the Constitutional Court are in favour of ratification. In academic circles, too, there have since the 1970s been calls for increased consideration of interna-

³⁶ <http://www.iccnw.org/espanol/nicaragua/nicaragua_estrat.htm> (as of 14 September 2004).

³⁷ <http://www.iccnw.org/espanol/guatemala/guatemala_estrat.htm> (as of 2 August 2004).

³⁸ J. Guzmán Dalbora, in: Ambos/Malarino (note 31), 163 et seq.

³⁹ The judgement is printed in: Boletín no. 2293-10 de la Cámara de Diputados de Chile. Of particular interest are sections 31, 45, 51, 55, 90 and 91.

tional crimes in Chilean criminal law. In addition, numerous civic groups established as a result of the suffering under the dictatorship, in particular the countless disappearances, unequivocally support the International Criminal Court and the prosecution of crimes against humanity under the principle of universal jurisdiction.

On 12 August 2003 the President submitted a new bill on human rights to Congress, which provides for the constitutional amendments necessary for the ratification of the ICC Statute.⁴⁰

bb. Mexico⁴¹

On 10 December 2001, well over a year after signing the Rome Statute, the Mexican Government submitted a bill on the reform of Article 21 of the constitution to the Senate. This bill was designed to pave the way for the country's accession to the Rome Statute. It was however rejected with little debate, and it is only thanks to the initiative of the Mexican Coalition for the ICC that the bill was tabled again by a small parliamentary group. The constitutional amendment is the last hurdle blocking the ratification of the Rome Statute by Mexico. Several expert committees have now agreed on a rather unusual bill which makes the recognition of international jurisdiction and the extradition of Mexican nationals subject to approval by the Senate. Whether this condition is compatible with the Rome Statute is a matter of some doubt. However, it enabled the Mexican Senate to pass the amendment on 15 December 2002 with a two-thirds majority. All that is required now is for the bill to be approved by the newly constituted Chamber of Deputies and the state parliaments. The Government plans to ask the legislature to give the bill top priority and is confident that it will be possible to ratify the Statute in the near future.⁴² In November 2003, Mexico was the country targeted by the Coalition for the International Criminal Court's ratification campaign. The Foreign Ministry is already working on an act implementing the Statute.

Opponents of the Rome Statute are to be found in the conservative wing of the PRI, which dominated Mexican politics for decades, as well as here and there in the PAN, the party currently in power. The Defence Ministry seems to have abandoned its reservations, as has the Supreme Court. The Government, the vast majority of PAN members, as well as the Bar Association and numerous other non-governmental organizations are unequivocally in favour of the ICC. The Court's proponents now have to decide whether to support the flawed Senate bill or to persuade the Chamber of Deputies to send it back to the Senate for reconsideration.⁴³ The latter strategy however entails the risk that the Senate might then veto the bill, thus indefinitely postponing debate on the issue. That would torpedo the

⁴⁰ <http://www.iccnw.org/espanol/chile/chile_estrat.htm> (as of 14 September 2004).

⁴¹ E. Neri Guajardo, in: Ambos/Malarino (note 31), 403 et seq.

⁴² <http://www.iccnw.org/espanol/mexico/mexico_estrat.htm> (as of 14 September 2004).

⁴³ Neri Guajardo (note 41), 405.

reform process and would banish Mexico's ratification of the Rome Statute to a distant horizon. Due to all these circumstances it is therefore not clear whether the ratification of the Rome Statute will take place in a near future.

cc. Other Countries

Haiti signed the Statute in 1999, but has not yet ratified it.⁴⁴ The Foreign Minister of Haiti has stated that ratification is certain to happen soon, blaming the delay on bureaucratic complications. It is however to be feared that Haiti will not ratify the Statute in the near future given the current political crisis and the rule by Presidential decree in the first half of 2004. In this legislative period, too, few laws have been passed. It is also possible that ratification may be postponed at the behest of the USA.

Since signing the Statute, the Dominican Republic has on the whole been hesitant with regard to ratification. In October 2002 the Foreign Ministry drew up a questionnaire on the constitutionality of the Rome Statute, which it sent out to numerous constitutional organs.⁴⁵ Congress is now awaiting a recommendation from the Ministry on the subject of ratification. The Foreign Ministry is a firm advocate of the Statute, but does not believe a quick ratification to be probable. The Dominican Republic's expert committee on international humanitarian law has already looked at the implementation process once, albeit without any concrete results, and will remain seized of the issue. All in all, despite the huge influence exerted by the USA, the basic attitude in this Latin America-oriented country is pro-ICC.

In Jamaica, ratification seems to have been delayed due to foreign policy considerations. All political parties support the Rome Statute. No detailed information is available on Guyana.

2. Reforms in the States Parties⁴⁶

An inter-ministerial committee was established in Argentina⁴⁷ in August 2002, which included numerous NGOs and academics and presented the President with a draft international criminal code⁴⁸ later that year. The President submitted this bill to Congress on 9 October 2002. The Congressional Committee on Foreign Af-

⁴⁴ <<http://www.iccnw.org/espanol/list-rat.htm>> (as of 14 September 2004).

⁴⁵ <http://www.iccnw.org/espanol/rep_dominicana/rep_dominicana_estrat.htm> (as of 2 August 2004).

⁴⁶ Insufficient information is available on Belize and Dominica, so they cannot be included in the following overview. It appears, however, that in Belize the Statute has not been incorporated into national law and no institutional measures have been taken.

⁴⁷ E. Malarino, in: Ambos/Malarino (note 31), 35 et seq.

⁴⁸ This draft can be found online at <<http://www.abogarte.com.ar/criminescompetenciapci.htm>> (as of 2 August 2004).

fairs began its deliberation of it in March 2003 and organized a public hearing. The Senate was then expected to vote on the bill in 2003 and send it on to the Chamber of Deputies. However, a vote on the bill failed on 5 November 2003, because the required quorum of Senators were not present.⁴⁹ In addition to the inter-ministerial bill, two further bills have been put forward, one by Deputy Cafiero and another by Deputies Rivas, González and Bravo. These have the aim of enshrining crimes against international law in the Penal Code, but have less chance of success.

The inter-ministerial draft was surprisingly withdrawn following expert consultation and thus lost its parliamentary status. On 9 March 2004, Senator Yoma presented Parliament with a new bill. Its chances of success are however uncertain. In late spring 2004 another draft was presented. At the moment the situation in Argentina is not very transparent.

In Bolivia⁵⁰ there are signs that the Statute will be implemented. Although the country has not yet taken any major steps to transpose the norms into national law, the Ministry of Justice did start work on an implementing bill in September 2002. Germany has pledged Bolivia assistance in implementing the Statute, which will be provided through the German Agency for Technical Cooperation (GTZ).⁵¹ A working group in the Vice-Ministry of Justice is to be established in this framework.

Brazil⁵² ratified the Rome Statute on 20 June 2002. Reforms to amend the constitution have not yet been adopted. The implementing law will clarify precisely what is required.

Ratification took place on the basis of a somewhat controversial report from the Foreign Ministry, which pronounced the Statute to be in full compliance with the constitution. However, the constitutionality of the Statute is increasingly being called into question, and so the possibility can no longer be excluded that the implementing act will have to be preceded by a constitutional amendment of the type seen in France. The most controversial issues are the non-applicability of any statute of limitations for the crimes governed by the Statute, life imprisonment, the extradition of own nationals and questions of immunity.

In 2001, prior to ratifying the Rome Statute, Brazil established a committee to draft an international criminal code.⁵³ It was charged with three tasks: to elaborate penal provisions in line with the Statute, to adapt procedural rules and to structure cooperation with the Court. The committee submitted its report to the Ministry of Justice on 18 October 2002. In February 2003, several NGOs availed themselves of the opportunity provided to comment on it. The draft law is currently being re-

⁴⁹ <http://www.iccnw.org/espanol/argentina/argentina_estrat.htm> (as of 2 August 2004).

⁵⁰ E. Santalla, in: Ambos/Malarino (note 31), 83 et seq.

⁵¹ <http://www.iccnw.org/espanol/bolivia/bolivia_estrat.htm> (as of 14 September 2004).

⁵² M.-Th. Moura/S. De Figueiredo Steiner/G. Righi Badaró/T. Del Maso Jardim, in: Ambos/Malarino (note 31), 119 et seq.

⁵³ By Portaria no. 1036 of 13 November 2001.

viewed by the President (Casa Civil), where, as a bill inherited from the previous government, it will be subject to careful scrutiny to ensure that it can pass through Congress without any major changes.⁵⁴

As Brazil itself has said, the aim of this law is to safeguard its sovereignty in the face of international criminal jurisdiction. Brazil views itself as a pioneer in international criminal law and wants to implement the Rome Statute as a complete and integral whole. There is broad support for the Statute in the country.

No efforts are being made in Colombia⁵⁵ to adapt substantive law to the provisions of the Rome Statute – but for good reason. Even prior to the adoption of the Statute, Colombia's domestic law contained a wide range of relevant norms which are considered an adequate basis for the effective prosecution of the crimes in question.⁵⁶

Costa Rica⁵⁷ passed an implementing law in May 2003. It did not choose to adopt an international criminal code, but rather incorporated international crimes into its Penal Code. Provisions on cooperation with the Court do not yet exist, but are in elaboration.⁵⁸ It is possible that the new offences may be amended again as part of a major reform of the Penal Code, prospects for which are rather vague, however.

Ecuador ratified the Rome Statute on 5 February 2002, following a declaration by its Supreme Court that it was in conformity with the constitution. The National Congress's "Comisión Especial Permanente de Asuntos Internacionales y Defensa Nacional" (Permanent Committee for International Affairs and National Defence) is now responsible for implementing the Statute.⁵⁹ This Committee has not yet submitted a bill. A draft implementing law was however submitted by the Committee for Children's and Women's Affairs in October 2002, after it had consulted numerous NGOs and pro-ICC members of Congress.

In its ratifying act, Honduras designated the authorities responsible for requests for cooperation (Article 87 of the Rome Statute) and also declared its willingness to accept Honduran nationals to serve their sentences in Honduras pursuant to national law (Art. 103 RS). According to the Coalition for the International Criminal Court, a committee has started to revise the special part of the Penal Code, concentrating in particular on crimes under international law.⁶⁰

Panama's committee on the implementation of international humanitarian law, which was charged with codifying the Rome Statute crimes and regulating cooperation with the ICC, presented the Foreign and Justice Ministry with a draft law

⁵⁴ <http://www.iccnw.org/espanol/brazil/brazil_estrat.htm> (as of 14 September 2004).

⁵⁵ A. A p o n t e C a r d o n a, in: Ambos/Malarino (note 31), 201 et seq.

⁵⁶ Ibid., 249.

⁵⁷ P. H e r n á n d e z B a l m a c e d a, in: Ambos/Malarino (note 31), 259 et seq.

⁵⁸ <http://www.iccnw.org/espanol/costa_rica/costa_rica_estrat.htm> (as of 14 September 2004).

⁵⁹ <http://www.iccnw.org/espanol/ecuador/ecuador_estrat.htm> (as of 14 September 2004).

⁶⁰ <http://www.iccnw.org/espanol/honduras/honduras_estrat.htm> (as of 2 August 2004).

in May 2003.⁶¹ This must now be forwarded to the President and thereafter to the Parliament. In any case, in Panama the extradition of own nationals is unproblematic.

An inter-ministerial committee on the implementation of the Rome Statute was formed in Paraguay by a Presidential decree of 10 December 2002. It was meant to produce a draft implementation law by March 2003, but failed to do so. Its draft is still expected.⁶²

In Peru⁶³ the national committee for international humanitarian law is working on a law on cooperation with the ICC. This committee has already produced a draft law amending the code of criminal procedure. In mid-September 2002, the Government set up another committee charged with adapting the Penal Code and other provisions of criminal law to the demands of the Rome Statute and other international treaties.⁶⁴ The Committee comprises government representatives as well as academics and members of non-governmental organizations. In April 2003 this committee submitted guidelines on the harmonization of the Peruvian Penal Code with the Rome Statute and concluded its work on international crimes. The Government submitted a bill for debate in March 2003 and extended the committee's mandate until October 2004.

On 18 January 2003 the Uruguayan President presented Congress with a draft international criminal code, drawn up by the Ministry of Justice, which covers both international crimes under the Rome Statute and cooperation with the ICC.⁶⁵ Four days later this bill was forwarded to the Senate committee on constitutional and legislative affairs. On 31 October 2003 the first Chamber of Congress passed the bill unanimously. It has been under debate in the second Chamber since 5 November 2003.⁶⁶ The bill is likely to be passed in the near future.

Venezuela⁶⁷ was the first South American state to ratify the Rome Statute. The committee on the implementation of the Rome Statute produced a draft law on the adaptation of existing criminal legislation to the demands of the Rome Statute.⁶⁸ This bill provides for comprehensive amendments to the Penal Code. It will in all probability be passed in the near future, since it is not controversial domestically.

⁶¹ <http://www.iccnw.org/espanol/panama/panama_estrat.htm> (as of 14 September 2004).

⁶² <http://www.iccnw.org/espanol/paraguay/paraguay_estrat.htm> (as of 14 September 2004).

⁶³ D. Caro Coria, in: Ambos/Malarino (note 31), 447 et seq.

⁶⁴ <http://www.iccnw.org/espanol/peru/peru_estrat.htm> (as of 14 September 2004).

⁶⁵ J. González González, in: Ambos/Malarino (note 31), 495 et seq.

⁶⁶ <<http://www.iccnw.org/espanol/uruguay/uruguay.htm>> (as of September 2004).

⁶⁷ J. Modollel González, in: Ambos/Malarino (note 31), 535 et seq.

⁶⁸ <<http://www.iccnw.org/espanol/venezuela/venezuela.htm>> (as of 14 September 2004).

3. The Substance of the Reforms

The implementing bills and laws fall into two distinct categories. Brazil, Ecuador and Uruguay have, like Germany, decided to create a separate International Criminal Code. Panama, Peru, Venezuela and Costa Rica have merely amended their Penal Codes, inserting the Rome Statute crimes at the appropriate points.

On the whole, the provisions on the individual crimes reflect more or less the definitions and elements of crimes contained in the Rome Statute, with only occasional differences. For example, the Brazilian definition of “disappearance” is much wider than the definition in the Rome Statute. Some laws refer directly to the Rome Statute, thus by-passing the need to formulate the crimes themselves (Venezuela, Costa Rica, Uruguay). A look at the bills currently on the table reveals that the major lacunae regarding the prosecution of international crimes will be eliminated once the reforms have been passed and legislation adapted to the Rome Statute. The almost total absence of relevant international offences discovered by Ambos and Malarino in early 2003 will soon – as the numerous legislative bills attest – be a thing of the past.

The scope of the legislative measures implementing the Rome Statute varies considerably from country to country. It is not yet clear whether Honduras will take further measures in addition to the two declarations on cooperation with the ICC and to the acceptance of sentenced persons under the ratification law. The countries which have chosen to adopt an international criminal code (Uruguay, Brazil and Ecuador) include provisions on cooperation with the Court in their codes. As regards the other countries, it cannot yet be predicted just what measures they may take to adapt not only their substantive law but also their procedural rules, thus regulating cooperation with the ICC.

4. Results

An overview of the ratification status of the ICC Statute in Latin America and parts of the Caribbean is overwhelmingly positive. Not only have almost all countries in the region signed and ratified the Rome Statute with remarkable speed – within six years of its adoption and three years since it entered into force – but they have also taken significant steps towards anchoring the Statute in national law. An implementing law has already been passed in Costa Rica. With the Statute so well accepted, this region can stand up to comparison with Europe.

As regards the non-signatory states, it is surprising how few they are. Cuba, Nicaragua, Guatemala, Suriname and El Salvador can be counted on the fingers of one hand and, given their recent past, they are not states that anyone had seriously expected to accede quickly.

With Mexico and Chile, there are only two larger countries that are, along with a few other states, still in the process of ratifying the Statute. The governments of both these countries are strongly in favour of ratification, but face the problem that

constitutional amendments are needed which require the support of the far more sceptical opposition parties.

The States Parties of the Rome Statute form the overwhelming majority in the region. Particularly encouraging is the fact that all states took steps to adapt their national law to the Rome Statute shortly after or even prior to ratification.⁶⁹ In some countries, including important states such as Brazil and Venezuela, these reforms are already well-advanced. In Costa Rica they have already become law. It is remarkable that many countries are not content with merely adapting existing law, but plan – like Germany – to pass separate codifications to enable the comprehensive prosecution of international crimes.

It is clear that in Latin America signing and acceding to the Rome Statute have had an indirect effect on substantive criminal law. Although the Rome Statute does not oblige states to adapt their national law (even if it does hope they will do so), criminal law is being reformed in all States Parties, except Colombia, which is a special case. This is irrefutable proof of the effectiveness of the Rome Statute regime which, through the principle of complementarity, clearly gives primacy to the national level for the prosecution of crimes. This principle was taken seriously by the states of Latin America, notwithstanding the opposition there, with the result that in almost all countries long overdue and politically contentious reforms have been set in motion. Legislative bills designed to end impunity for international crimes are being drafted everywhere, and have unexpectedly high chances of success. Such a widespread positive development is truly surprising and is indubitably an indirect effect of the Rome Statute on the substantive (international) criminal law of the States Parties.

This development is still in full swing. It should be kept under careful observation until it has come to its conclusion. There are enough reasons to hope that this conclusion will be a positive one. In Costa Rica, the norms have already been passed into law. In Uruguay and Venezuela, as well as in Brazil, national norms implementing international criminal law are on the verge of being adopted. So, even before the reforms described above have been concluded, it can safely be said that the Rome Statute has a considerable indirect effect on substantive criminal law – without imposing any direct obligations – and in this way provides a crucial impulse for the enactment of national provisions on international criminal law. This was the intention of the Rome Statute regime.

Ultimately, the principle of complementarity is a positive force for the further development of international criminal law as a whole, since every national reform must look at the state of international criminal law and because it is indeed possible that, as in Germany's case, laws may be enacted that go beyond the provisions of the Rome Statute.

The Rome Statute regime and with it the principle of complementarity have thus become a mainspring of international criminal law, the impact of which extends far

⁶⁹ With the exception of Colombia, where already existed provisions of international criminal law in the criminal code.

beyond the actual provisions of the Statute itself. This regime's vast influence is currently making itself felt in Latin America, notwithstanding the many hindrances in the region to the enactment of substantive international criminal law at national level.

III. The Rome Statute Regime and the USA

1. The US Position

The United States of America is the most important and influential country on the American continent, and so it seems appropriate to conclude this paper with a brief examination of its position.

So far some 94 states from around the world have acceded to the Rome Statute, and over 132 have signed it. In Europe and – as this study has shown – likewise in Latin America, this Statute has not just established a (subsidiary) jurisdiction for the ICC over crimes of international law. It has also, through the principle of complementarity, led to the further development of international criminal law within national legal systems. In spite of these international developments, the US, the only remaining world power, remains opposed to the Rome Statute regime.

This regime is unacceptable to the United States. The US, like most of the States Parties by the way, wants at any cost to prevent its own citizens from being indicted by the ICC.⁷⁰ However, unlike the nigh on one hundred States Parties, the US does not have any faith in the core element of the Statute, i.e. the principle of complementarity, according to which the ICC's jurisdiction and thus its right to prosecute a country's nationals can be excluded by effective national prosecution. This lack of faith is the reason the United States has gone its own way, while in Latin America and Europe legislative measures have been taken to preclude the international prosecution of own citizens by wholly eliminating impunity at national level for the as yet three ICC crimes.

The US retracted its signature of the Rome Statute. No obligations thus derive from the Statute for the US as a non-State Party. The US is not obliged to surrender its citizens to the ICC.

This does not however exclude the possibility that a US citizen could be surrendered to the Court by a State Party (e.g. Afghanistan), on whose territory he has committed a crime under international law (e.g. genocide). Surrender would in such a case fall within the jurisdiction of the State Party (in the example Afghanistan), because it is universally accepted that under the territoriality principle the State on whose territory the crime was perpetrated is responsible for prosecuting the offence. This would however interfere with the interest of the US in keeping its citizens away from the ICC. The United States has thus exerted considerable political pressure in a major campaign to encourage all states to conclude bilateral

⁷⁰ American Service-members' Protection Act of 2002, Sec. 2002, para. 8.

“non-surrender” agreements with it, which could prevent the surrender of US citizens to the Court under such circumstances.⁷¹ The interesting thing about these agreements is that while they prevent the surrender of US nationals to the ICC, they do not preclude prosecution before the national courts of States Parties which have passed their own national legislation on international criminal law.

The present US policy towards the ICC is based on its profound distrust of the principle of complementarity. Is this distrust justified?

Firstly, it is hard to imagine that an American citizen could commit war crimes, crimes against humanity or genocide and not be prosecuted by the US courts. No other country inspires so much confidence in this regard as does the US, which is among the oldest and most stable democracies in the world and since its foundation has fought for human rights like almost no other.

It is therefore understandable that the main fear of the United States is that the principle of complementarity could be abused. It thinks there is a danger of politically motivated prosecutions, a danger that its scope for political action could be seriously impaired. It points out that this danger is aggravated by the fact that so many of its soldiers are stationed abroad on missions that are often far from easy.

The framers of the Rome Statute were well aware of the danger of abuse. The Statute therefore includes numerous legal mechanisms to prevent such abuses of the principle of complementarity. For example, it establishes an independent Pre-Trial Chamber to decide on the admissibility of each case, which must determine whether a political abuse of the Statute is involved.⁷² This and other mechanisms are an integral part of the Statute and have been judged sufficient by many countries that, like the US, have a large number of soldiers stationed abroad, for example Great Britain, France, Italy, Germany and Poland.

In the highly unlikely event that these additional measures somehow fail to prevent an abuse of process, the US would still be able to bring its unparalleled political influence to bear. The extent of this political influence should not be underestimated. Its strength is currently on show in the world-wide campaign to conclude bilateral non-surrender agreements. This campaign even made its impact felt in the case of US citizens charged in Belgium.

The danger of cases being brought before the ICC against US citizens is thus very small indeed:

- first of all, because of the principle of complementarity,
- secondly, because of the legal mechanisms contained in the Rome Statute to safeguard this principle,
- and lastly, because of the unparalleled political power that the US can wield if need be.

⁷¹ John Bolton, the Under Secretary of State for Arms Control and International Security, said in a speech at the American Enterprise Institute in Washington on the 3rd November 2003: “the US is engaged in a global campaign to conclude bilateral agreements that will ensure U.S. persons are not subjected to the ICC’s jurisdiction” (cf. <http://usinfo.state.gov/dhr/Archive/2003/Nov/05-321546.html> [as of 16 September 2004]).

⁷² See for example Article 15 (4) and Article 17 of the Rome Statute.

Given this background, the US position towards the Rome Statute should be urgently reviewed. As national legislation on international criminal law in Latin America shows, the Rome Statute regime has had its first successes in the fight to end impunity for international crimes, even before the ICC has accepted its first case. The US should at least rethink its open opposition to the ICC and overcome its distrust of the principle of complementarity, as the ever-rising number of States Parties to the Rome Statute have done.

2. Effects of the US Position on Latin America⁷³

As things are, however, the US is also pushing the countries of Latin America and the Caribbean to conclude bilateral non-surrender agreements.

It is not easy to provide an overview of the number of agreements concluded to date, since they are often closed without any publicity. Bolivia and El Salvador have signed such agreements in confidentiality. So far there has only been official confirmation of the Agreements signed with Colombia and Bolivia, after the matter had come to light. Press reports are the main source of information on other countries. It is thus not surprising that the otherwise well-informed Coalition for the International Criminal Court (CICC) was unable to even guess whether Guyana had signed an agreement or not. The following overview should thus be treated with caution.⁷⁴

Non-surrender agreements have so far been ratified by Nicaragua,⁷⁵ El Salvador⁷⁶ and the State Party Honduras.⁷⁷ Similar executive agreements have been concluded with the States Parties Colombia⁷⁸ and Antigua and Barbuda.⁷⁹ The Dominican Republic⁸⁰ has signed non-surrender agreements, as have States Parties Panama⁸¹ and Bolivia. In Bolivia the agreement is currently awaiting approval from Congress. The Bolivian senate approved the agreement in May 2004.⁸² So far only smaller countries have given in to the pressure exerted by the United States.

⁷³ Cf. note 10.

⁷⁴ A regularly updated summary of these agreements can be found on internet: <http://www.iccnw.org/documents/otherissues/impunityart98/BIADB_current.xls>.

⁷⁵ XINHUA GENERAL NEWS SERVICE, 11 July 2003.

⁷⁶ <http://www.iccnw.org/documents/otherissues/impunityart98/BIADB_current.xls> (as of 16 September 2004).

⁷⁷ <http://www.iccnw.org/documents/otherissues/impunityart98/BIADB_current.xls> (as of 16 September 2004).

⁷⁸ ABC NEWS ONLINE, Thursday, 18 September 2003.

⁷⁹ Caribbean Media Corporation News Agency, BBC Monitoring International, 3 October 2003.

⁸⁰ <http://www.iccnw.org/documents/otherissues/impunityart98/BIADB_current.xls> (as of 16 September 2004).

⁸¹ LA PRENSA, 9 October 2003.

⁸² <http://www.iccnw.org/documents/otherissues/impunityart98/BIADB_current.xls> (as of 16 September 2004).

The countries of Latin America and the Caribbean are dependent on the US in so many ways in the economic, military, cultural, development and security policy fields. The US hold is particularly strong on Honduras, which received over one billion US-Dollars after Hurricane Mitch, on Costa Rica, which has no armed forces and relies on US protection, and on Panama, Ecuador and Colombia, which receive massive assistance from the US, as well as on the smaller countries of El Salvador, Guatemala, Haiti and Jamaica. Venezuela is the only country that opposes the US, notwithstanding its continuing dependence on the world power.

Above all, the United States uses other countries' military dependence to exert pressure on them. The American Service-members' Protection Act of 2002⁸³ allows military assistance to be stopped if a country refuses to sign a non-surrender agreement. Argentina is the only country expressly excluded from this rule. US action does not however confine itself to this field. According to press reports, the Americans have linked negotiations with Peru on a free trade agreement to the signing of a non-surrender agreement.⁸⁴ US conduct vis-à-vis Caricom states, which could not agree on a united position, differentiates clearly between States Parties and non-States Parties. At the UN General Assembly, the US President met only the Heads of State of the non-States Parties, whereas it seems that US military aid to States Parties has been cancelled.⁸⁵

Reactions to the US approach differ widely. Some states have signed the desired agreements or are working towards their conclusion. Argentina,⁸⁶ Brazil,⁸⁷ Costa Rica, Paraguay,⁸⁸ Peru,⁸⁹ Uruguay and Venezuela⁹⁰ have publicly rejected non-surrender agreements, notwithstanding US pressure. The States Parties Ecuador and Belize have not (to date) signed such agreements.

Non-surrender agreements are in contravention of the Rome Statute. The growing number of these agreements in Latin America is not however a reflection of a change of policy. Attitudes are still clearly pro-ICC. The non-surrender agreements are rather the result of the considerable pressure exerted by the US, which could not be resisted, above all by smaller states which are particularly dependent on the US in one way or other. Larger countries such as Argentina and Brazil have not been cowed. And some smaller countries such as Uruguay, Costa Rica and Paraguay have bravely withstood this intense lobbying.

⁸³ Sec. 2007 (<<http://www.state.gov/t/pm/rls/othr/misc/23425.htm>> [as of 16 September 2004]).

⁸⁴ <<http://www.elcomercioperu.com.pe/EdicionImpresa/Html/2004-08-17/impMundo0179922.html>> (as of 16 September 2004).

⁸⁵ <http://www.isri.cu/Paginas/Boletin/boletin_7.htm> (as of 16 September 2004).

⁸⁶ EFE News Service, 4 September 2002.

⁸⁷ <http://www.iccnw.org/documents/otherissues/impunityart98/BIADB_current.xls> (as of 16 September 2004).

⁸⁸ XINHUA GENERAL NEWS SERVICE, 26 October 2003.

⁸⁹ BBC, 14 July 2003.

⁹⁰ <http://www.iccnw.org/documents/otherissues/impunityart98/BIADB_current.xls> (as of 16 September 2004).