

Bringing the ICC to Countries of the Southern Caucasus

*Report on a workshop on the ratification and implementation
of the Rome Statute of the International Criminal Court
in the Southern Caucasus, February 29-March 1, 2004*

April 2004



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**REPORT**

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**WORKSHOP ON THE RATIFICATION AND IMPLEMENTATION OF
THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT
IN THE SOUTHERN CAUCASUS**

**February 29 – March 1
Tbilisi, Georgia**

Organized by the Institute of European Law and International Law of Human Rights
at the State University of the Republic of Georgia (Tbilisi)
with support and assistance from the Open Society Justice Initiative, the Open Society Policy Center
the Open Society Institute Assistance Foundation–Armenia
and the Open Society Institute Assistance Foundation–Azerbaijan

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A workshop on the ratification and implementation of the Rome Statute of the International Criminal Court in the countries of the Southern Caucasus was organized by the Institute of European Law and the International Law of Human Rights at the State University of the Republic of Georgia, in cooperation with the Open Society Justice Initiative and the Open Society Assistance Foundations of Armenia and Azerbaijan. The meeting shared the experience of Georgia, which in 2003 ratified the Rome Statute and implemented it into national law, and gathered experts, officials and potential lead organizations from Armenia and Azerbaijan.

The workshop took place in Tbilisi, Georgia on 29 February and 1 March 2003. Professor Levan Alexidze of the Institute of European Law and International Law of Human Rights presided and provided an introductory discussion of the importance of the ICC as an integral element of the international legal order of the twenty-first century, while Irina Kurdadze of the Institute presented some treaty law issues related to the primacy of the ICC. The meeting then heard presentations from international experts on the main features of the Rome Statute and the ICC, and in particular on the principle of complementarity (which ensures that states will have both the right and an incentive to prosecute crimes within their jurisdiction) and the system of cooperation (which presupposes effective implementation of the Rome Statute into national law). Constitutional and other legal issues that could arise in the process of ratification or implementation were also addressed. The delegations of Georgia, Armenia and Azerbaijan gave detailed presentations of the present situation in their own countries regarding Rome Statute ratification and implementation, including a survey of relevant legal issues and approaches. Participants expressed great satisfaction with the meeting and look forward to working together in future. An agenda of the conference is attached to this report.

The Open Society Justice Initiative is now working with the organizers and participants to consider ways of following up in each country. With informed and dedicated officials, academics and NGOs present in each country, it is hoped that Armenia and Azerbaijan will soon join Georgia among the States Parties to the Rome Statute of the ICC.

## SUMMARY OF PRESENTATIONS BY INTERNATIONAL EXPERTS

International expert Mr. Jonathan Huston provided an overview of the ICC's basic structures, jurisdiction and functioning. He emphasized that the Court's jurisdiction is limited to the most serious crimes of concern to the international community—namely genocide, crimes against humanity and war crimes (aggression is also named, but cannot be applied until a definition is adopted, which cannot happen before 2009). Unlike the International Court of Justice, the ICC will have jurisdiction over individuals, not states, and unlike the ad hoc tribunals for Rwanda and the former Yugoslavia, the Rome Statute was negotiated by the international community as a whole and gives the ICC potentially worldwide jurisdiction. Nonetheless, the Court can only act with respect to crimes committed on the territory or by the nationals of a State Party (or a state that otherwise consents), or where a situation is referred by the United Nations Security Council. Moreover, it can act only where the crime occurs after the entry into force of the Statute (July 1, 2002). Consisting of 18 judges elected by the Assembly of States Parties for non-renewable terms, the Court is headed by the President, Judge Philippe Kirsch of Canada, and has a Pre-Trial Division, a Trial Division and an Appeals Division. Investigations can be triggered either by referral from the Security Council or a State Party, or on the Prosecutor's own motion if confirmed by the Pre-Trial Chamber. Luis Moreno Ocampo of Argentina was elected Chief Prosecutor by States Parties in 2003, and has announced that his office is looking at situations in the Democratic Republic of the Congo and at northern Uganda as potential first cases. The Rome Statute now has 92 States Parties, or about half of the international community.

Dr. Bruce Broomhall of the Open Society Justice Initiative introduced the principle of complementarity as reflected, in particular, in Arts. 18 and 19 (containing procedures) and Arts. 17 and 20 (containing the substantive criteria). This principle was universally agreed throughout the negotiations, and ensures that states will always have primacy if they choose genuinely to investigate and prosecute crimes within the jurisdiction of the Court. It is only where states are unwilling or unable to act within the meaning of the Statute, or where they are simply inactive, that the ICC will take on a case. Moreover, if a state has undertaken proceedings (and even if it has decided to discontinue them, or has acquitted the individual), the ICC will only be able to take on the case if it is shown that national authorities acted with an intention to shield the person concerned from justice, or in a manner that was in the circumstances inconsistent with the intent to bring the person concerned to justice. Without such a finding, it is not enough that, for example, the national procedure failed to observe to perfection international standards of due process, or that a different sentence was applied than the ICC would impose. Nonetheless, the consequence of the complementarity provisions is to provide national authorities with a strong incentive to incorporate the Rome Statute definitions of genocide, crimes against humanity and war crimes into their national law, and a growing number of States Parties has done this.

A second presentation by Mr. Huston focused on the importance of proper implementation of the Rome Statute within the national law of States Parties. Mr. Huston emphasized the almost complete reliance of the ICC on the cooperation of States Parties in the investigation and preparation of cases, and the elaborate machinery set out in Part 9 of the Statute to ensure this. First, States Parties are under an unequivocal obligation to cooperate fully with the Court (Art. 86) and to modify national law as necessary to allow the forms of cooperation required by the Statute (Art. 88). States are obliged to arrest and surrender suspects to the Court (Art. 89) and to provide

other forms of cooperation as requested, such as the questioning of witnesses, the conduct of searches and seizure of evidence, the protection of witnesses and the tracing, freezing, and seizure of assets related to the crimes under investigations (Art. 93). The grounds for refusing cooperation are extremely limited: for example, States Parties cannot refuse to extradite their own nationals, and immunities available under national law can be no bar to handing over ones own nationals to the Court. On the other hand, national security can provide one limited basis for a refusal to cooperate, provided all the consultation measures set out in Art. 72 of the Statute are undertaken. Whether a separate law should be adopted to provide for the required cooperation, or whether existing legislation can be modified, is something that will depend on the legal context of a particular country.

Ms. Iruno Aguirrezabal Quijera presented an overview of the experience of Eastern and Western European countries in the ratification and implementation of the Rome Statute, and remarked on the positions with respect to the ICC of the United States and the European Union. The European Union played a leading role in the “Like Minded Group” that promoted the establishment of an independent, fair and effective ICC throughout the negotiations. The Rome Statute has now been ratified by a significant number of states, including all the current members of the European Union and nine of the current accession states (all except the Czech Republic). This has reinforced the Court’s legitimacy and potential effectiveness and sends a strong signal to other states, like those of the Southern Caucasus. The European Union has continued to defend the integrity of the Rome Statute since its adoption, while the Council of Europe and other bodies have been active in its promotion as well. Armenia and Azerbaijan, like countries that have already ratified and implemented the Statute, may face certain legal questions (immunities, surrender of nationals, and issues regarding the substantive criminal law), but extensive work has been done on this subject, innovative solutions have been devised, and many different examples of implementing legislation are available to be studied and used as examples. For example, France and Luxembourg chose to amend their Constitutions so as to ensure compatibility with the Statute, while Spain and others have adopted an interpretative approach that avoided potential problems. Concluding, Ms. Aguirrezabal drew participants’ attention to the fact that the Agreement on Privileges and Immunities of the Court is also crucial to the effectiveness of the Court’s operations, and should be signed and ratified by all states; she also reminded participants of the significant number of NGOs that are interested in working with states working towards ratification of the Rome Statute. Ms. Aguirrezabal encouraged both Armenia and Azerbaijan to seek cooperation with such NGOs and to actively work towards the implementation and ratification of the ICC Statute.

## COUNTRY SUMMARIES

**GEORGIA** signed the Rome Statute on July 18, 1998, and ratified it on September 5, 2003. A legislative package of five bills was passed by Georgia's Parliament on August 14, 2003: (1) regarding cooperation with the ICC; (2) amending the Code of Criminal Procedure; (3) amending the Criminal Code; (4) amending the law of Georgia on custody; (5) amending the law on executive actions (proceeding). Parliament subsequently passed a further bill containing additional amendments to the Code of Criminal Procedure Art. 9, para 2. which provides that prosecution, detention or any other procedural means regarding certain official accorded immunities or similar protections by Georgian law or its Constitution, as well as persons enjoying diplomatic immunity and representatives of the ICC, are determined by the Constitution, by international agreements to which Georgia is party, the Code of Criminal Procedure and other laws. Prof. Marina Kvachadze and Judge Merab Turava of the Supreme Court of Georgia summarized the steps that were taken by Georgia towards ratification and implementation of the Statute, and recounted the following approaches to constitutional issues:

- ◆ There was no need for amendment of the Georgian Constitution, as interpretative solutions were successfully found for all difficulties. Although the Constitution does provide for immunities (Arts. 63, 75), these are not absolute and if necessary can be lifted by Parliament.
- ◆ Regarding surrender by Georgia of its own nationals, no incompatibility was found between this Rome Statute requirement and Georgian law, given that Art. 13 of the Constitution provides that Georgian nationals cannot be extradited *except when otherwise established by international treaties* to which it is a party. Moreover, the distinction in Rome Statute Art. 102 between extradition (to another State) and surrender (to the ICC) was recognized.
- ◆ No problems arose regarding either sentencing or the principle of *ne bis in idem*. In addressing possible inconsistencies between the Georgian Criminal Code and Criminal Procedural Code, Georgia chose not to adopt a separate law but rather to proceed with a series of amendments to certain provisions. The crimes within the jurisdiction of the Court are now included in the Georgian Criminal Code as follows (genocide under Art. 407, crimes against humanity under Art. 408, and war crimes under Arts. 411, 412 and 413).

**ARMENIA** signed the Rome Statute on October 1, 1999, and took a number of steps towards ratification and implementation, Koriun Nahapetyan, Senior Assistant of General Prosecutor of Armenia, informed the meeting. A comparative analysis of the conformity between national law and the Rome Statute was recently published in Armenia. The working group on the compatibility of Armenian national law with the Statute concluded that no major inconsistencies or constitutional difficulties stood in the way of Armenia's ratification of the Rome Statute:

- ◆ Regarding possible Constitutional incompatibilities Mr. Nahapetyan noted that, once ratified, international agreements become part of national law and prevail over other laws of Armenia. However, the Constitution is excepted from this rule, thus requiring harmonization of the provisions of the Constitution with those of an international agreement before ratification.
- ◆ Immunities are provided for but, as their character is not absolute, they can be lifted, thus eliminating any formal incompatibility in this regard. No provisions relating to the surrender or extradition of Armenian citizens are found either in the Constitution or in the Criminal Procedural Code. A Special Law on Citizenship does deal with this issue, but were the Rome Statute to be ratified it would have primacy over this law.

- ◆ With respect to the criminal code and the code of criminal procedure some need for amendment does exist, but there is no reason to think that this is a major problem. A new criminal code was adopted on April 18, 2003. Furthermore, the Ministry of Justice in cooperation with the Ministry of Foreign Affairs is working on a draft project regulating in detail cooperation between the ICC and a national agency created for this purpose.

Mr. Nahapetyan concluded that while he could not give an exact date for the Rome Statute's ratification by Armenia, he believes that there are no major political reasons that would delay the process. He felt confident that this would happen in the not too distant future.

**AZERBAIJAN's** accession to and implementation of the ICC Statute has suffered from a lack of political interest caused mainly by the importance attributed by the government of Azerbaijan to the process of accession to the Council of Europe, explained Erkin Gadirov, Senior Lecturer at Baku State University and a participant at the Rome Diplomatic Conference. Considerable efforts continue to be directed in Azerbaijan towards the requirements of the Council of Europe. Since 1998, numerous steps have been taken to remove possible incompatibilities between national legislation and the Rome Statute.

- ◆ According to the present law in Azerbaijan regarding the hierarchy between international and national law, state authorities are bound by international laws when addressing international issues and by national laws when addressing national ones. This confusing situation makes it likely that the Constitutional Court will have to interpret the law and establish the applicable hierarchy.
- ◆ Constitutional amendments are possible only through a process of referendum, but it is considered unlikely that a special referendum would be organized to remove any incompatibilities between the Constitution and the Rome Statute. Any changes needed should rather be incorporated into the new draft Constitution, currently under development.
- ◆ Existing immunities with regard to the Head of State, parliamentarians, members of the government and judges are not seen to represent a legal obstacle given that they are not absolute and can be lifted.
- ◆ Problems related to the extradition of nationals are unlikely to be resolved by an interpretative solution drawing on the difference between the terms "extradition" and "surrender" (Rome Statute Art. 102), as a linguistic particularity in Azerbaijan results in the same term being used for both extradition and surrender.
- ◆ The crimes within ICC jurisdiction are all covered by Azerbaijan's Criminal Code; no amendments are needed in this regard.
- ◆ The maximum term of provisional detention allowed under Azerbaijan law is limited to 48 hours, unlike the Rome Statute period of 96 hours.
- ◆ Mr. Gadirov concluded with his opinion that Azerbaijan should eventually adopt a separate law on cooperation with the ICC, rather than make piecemeal amendments.

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**AGENDA**

**Sunday, February 29, 2004**

**9.30 – 10.00**

***Registration of Participants***

**10.00– 10.30**

***Opening***

- Levan Alexidze, Head of International Law Chair of the Department of International Law and International Relations, Director of the European Law and International Human Rights Institute, State University of the Republic of Georgia;
- Bruce Broomhall, Visiting Fellow, European University Institute (Florence, Italy); until Dec. 2003, Senior Legal Officer for International Justice, Open Society Justice Initiative and Assistant Professor of International Law, Central European University (Budapest, Hungary).

**Moderator - Levan Alexidze**

**10.30 – 11.00**

***ICC – The historical meaning of the creation of the International Criminal Court for the development of the International Criminal Law***

- Levan Alexidze

**11.00 - 11.30**

***Problems of primacy of the International Criminal Court over national jurisdiction***

- Irina Kurdadze, European Law and International Law of Human Rights Institute

**11.30 – 11.45**

Coffee break

**11.45 - 12.15**

***Basic structures of the Court, its jurisdiction and functioning***

- Jonathan Huston, international expert; formerly advisor to the Principality of Liechtenstein with respect to the ICC, NGO participant in ICC negotiations, and advisor on Rome Statute implementation to national governments and NGOs

**12.15 – 12.45**

***Admissibility and the principle of complementarity***

- Bruce Broomhall

**12.45 – 14.00**

Lunch Break

**Moderator - Konstantin Korkelia**

**14.00 – 15.15**

***Importance of proper implementation of the Statute in national legislation of States Parties in the context of complementarity and the obligation to cooperate***

- Jonathan Huston

**15.15 – 15.30**

Coffee Break

**15.30 – 16.00**

***Ratification and implementation of the Rome Statute: the experience of eastern and western European countries, and a few remarks on the stances of the United States and the European Union***

- Irune Aguirrezabal Quijera, European Coordinator, NGO Coalition for the International Criminal Court, Brussels

**16.00 – 16.15**

Coffee Break

**16.15 – 18.00**

Discussions

Monday, March 1, 2004

**Moderator - Marina Kvachadze**

**10.00 – 11.00**

***Implementation of the Statute: experience of Georgia***

- Merab Turava, Judge of the Supreme Court of Georgia, European Law and International Law of Human Rights Institute

**11.00 – 11.30**

***Implementation of the Statute: experience of Georgia***

- Natia Gvazava, ICRC, Georgia

**11.30 - 11.45**

Coffee Break



**11.45 - 13.15**

***Implementation of the Statute: experience of Georgia***

- Lali Papiashvili, Parliament of Georgia, Speaker's Office

**13.15 – 13.45**

***Implementation of the Statute: Experience of Georgia***

- Ketik Khutsishvili, Georgian Young Lawyers Association [absent]

**13.45 - 14.30**

Lunch Break

**Moderator - Irina Kurdadze**

**14.30 – 15.30**

***Steps undertaken for the implementation of the Rome Statute: experience of Azerbaijan***

- Erkin Gadirov - Senior Lecturer, Baku State University
- Kamil Salimov - Professor at the Baku State University and Chair at the Association for Prisons in Azerbaijan, (PhD)

**15.30 – 15.45**

Coffee Break

**15.45 – 16.45**

***Steps undertaken for the implementation of the Rome Statute: experience of Armenia***

- Koryun Nahapetyan - General Prosecutor Office of the Republic of Armenia, Senior Assistant of General Prosecutor of Armenia

**16.45 – 17.00**

Coffee Break

**17.00 – 18.00**

Discussions