

FOREWORD

The ICC treaty has as of January 2005, 97 states parties. Notwithstanding its complexity, it is surprising that only fifteen states have actually adopted national implementing legislation, while another ten to fifteen states are in the process of completing draft legislation to eventually be submitted to their parliamentary authority. One assumption is that a number of state parties may find it sufficient under their constitutions to have ratified or acceded to the treaty in accordance with their parliamentary procedures. While this reasoning may be doubtful with respect to dualist states, it is also doubtful with respect to monist states, since a treaty of that complexity does require national implementing legislation.

Suffice it to recall that most of the states parties do not have in their domestic criminal laws provisions on genocide, crimes against humanity, and war crimes. Those who have provisions on war crimes include them in their military laws, and not in their civilian criminal codes. The distinction is important since civilian commanders can, under the statute, be responsible for war crimes. In some legal systems, the provisions of the Statute regarding the initiation of the criminal action and complementarity require national implementing legislation, particularly when many national legal systems have the principle of the obligation of the criminal action to be initiated by its own prosecuting authorities. In other words, prosecutorial discretion is not a choice. No national legal system recognizes complementarity as a jurisdictional mechanism applicable in inter-criminal justice relations. This new concept therefore requires its specific inclusion in national legislation, and accordingly, amendments to various provisions of the code of criminal procedure, and in some cases, even amendments to the constitution. This issue, as well as the issue arising out of the responsibility of heads of state and other senior government officials (Art. 27) who may enjoy some immunities under national laws, falls within the category of sovereignty issues and, in many cases, requires constitutional amendments.

Different states may have alternative approaches to this problem, but the national models vary significantly insofar as some have a mixed political/judicial approach to the responsibility of heads of states and ministers, while others have special tribunals and procedures for their accountability. Probably more significant for the effectiveness of the ICC and the ability of

states parties to carry out their obligations thereunder, are the provisions in Part 9 of the Statute dealing with surrender and cooperation. It is in this respect, more than any other, that national implementing legislation is necessary, bearing in mind also that a number of states parties have constitutional prohibitions on extradition of nationals. For these countries, it could be argued that surrender of a national to the ICC which is a treaty-based extension of national criminal jurisdiction is not extradition to another sovereign state. However, such an argument needs to be articulated expressly in national implementing legislation, to insure against future protracted litigation in national courts and other difficulties that would arise in the relationship between a state party and the ICC.

As stated above, it is surprising that so few states have addressed these issues, and that indeed so few states are considering addressing the issue. Because of the importance of the subject, this book is a valuable and welcome addition to the expanding literature on the ICC. Roy Lee, the editor, is no stranger to the subject, since he served as Executive Secretary to the Rome Diplomatic Conference and, prior to that, as the Director of the Codification Division of the UN which serviced the 1995 Ad Hoc Committee and the 1996–98 Preparatory Committee for the Establishment of an International Criminal Court. He is also the editor of two books on the subject, the first containing contributions by a number of distinguished authors who participated in the ICC's drafting process, commenting on the Statute itself, while the second volume, taking the same approach, commented on the elements of crimes and rules of procedure.

This third book completes the trilogy. It describes how a number of states parties have either developed national implementing legislation or are preparing such legislation. Of the fifteen chapters, thirteen address issues of implementation of the Rome Statute in Canada, France, Germany, Netherlands, South Africa, Sweden, UK, Argentina, Brazil, Italy, Lichtenstein, Japan, and Mexico. Not all of these contributions, however, address legislation which has been adopted; some of them address either draft of pending legislation. Chapters 1 and 15 respectively address states responses to the various issues raised by the Statute's implementation, and describe alternative solutions. Chapter 1 is contributed by the editor himself, who gives a summary review of the other contributions contained in the book.

Chapter 15 offers some critical remarks from the perspective of China, which has not signed the treaty. Even though the book does not include contributions describing all of the fifteen national implementation schemes and the ten to fifteen drafts, it nonetheless covers enough of these to show the different orientations and approaches that will surely be helpful to states

parties considering the adoption of national legislative measures. It is therefore another very useful contribution to the literature on the ICC. The editor should be commended for his continued efforts in support of the ICC through his scholarly and academic work.

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