The ICC at work
21. – 22. September, Berlin
Panel: Strengthening the co-operation with ICC
Topic: Reinforcing national capacities
Dr.iur. Helen Ahrens

Es gilt das gesprochene Wort

Introduction

Within the context of my speech, I will outline the challenges the national state is facing when implementing the Rome Statute. To this end, first, I would like to comment on what makes the evolvement of the international criminal law so particular. This will help further on to specify the challenges ahead.

Globalised law

After the ages of “law of coordination” and “law of cooperation”, it now can be observed that during the last decades a new kind of international law is in the process of developing, the so called globalised law. Its characteristics are, on the one hand, the rise of the individual within the international context. On the other hand, this tendency is accompanied by a transfer of States’ sovereignty to communitarian mechanisms.

The vice president of the ICC, Judge René Blattmann, pointed out during a speech in Berlin on November 2005, that the ICC and its constituting instrument (the Rome Statute) are one of the best examples illustrating this new type of international law that claims universal and direct enforcement. To this, the conclusion of a scholar can be added. That what the international criminal law expresses today worldwide, it expressed nationally yesterday, namely the emergence of a community of values.

Both statements indicate that there are processes attempting to harmonize rule of law principles (*Rechtsstaatsprinzipien*) at the

international and national level. These references are further supported by the fact that since last year, the rule of law has been a topic on the agenda of the General Assembly of the United Nations.

Thus, the claim of “globalised law” for direct enforcement and universal validity is facing enormous challenges.

Capacity Development at a national level

A look on the activities of the ICC, as described in its recent report on programme performance, demonstrates that ongoing investigative and other activities are taking place in those States whose security and judicial systems have failed to deliver. The reasons are that either these systems did not exist at all, or that they were lacking legitimacy and recognition, or that behind their formal facade these systems themselves were involved in international crimes.

But the lack to deliver justice does not affect international crimes only. Insecurity exists with reference to all types of crimes. Often, the (criminal) justice systems have not been involved in redemocratisation processes, like in Latin America. Therefore, GTZ is or has been supporting, on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ), reforms of the criminal justices systems in Bolivia, Chile, Paraguay, Peru, and Venezuela. Within the context of the projects in Bolivia and Chile, discussions about adapting national regulations to the Rome Statute were initiated; in Bolivia with the support of the ICC.

Projects of German Technical Cooperation to establish or re-establish national criminal justice systems were initiated in Burundi. They are ongoing in Rwanda, where the focus lies on strengthening the capacities of the Prosecutor General’s Services. In Afghanistan support to strengthen national capacities is focused on police, prosecutors, and judges. However, experiences of bilateral and international development cooperation show that (re-)building national capacities to investigate, prosecute, and bring to justice “national” and international crimes will take some time.

JRR mechanism

In the past, the convergence of weak or absent state institutions and the fragile, transient nature of the evidence has created a torrent of impunity. Therefore, a realtime securing of evidence is crucial.

To this end an initiative named Justice Rapid Response (JRR) has been launched. The concept of JRR is to provide, on short notice, cost efficient expertise and/or resources in support of genuine efforts to investigate, prosecute, and bring to justice alleged perpetrators of international crimes. A feasibility study has been prepared and can be found on the home page of the German Foreign Ministry. The main implications are:

- JRR is intended to be an international cooperative mechanism.

- For the deployment of expert missions a request has to be formulated either by an international organisation, or by the State whose police and justice system lacks capacity to prosecute international crimes on its own.

- The request would be channelled through the Permanent Missions at the UN in New York. These Permanent Missions would contact, at an early stage, those Nations that are interested in supporting the JRR mechanism. These Nations will decide whether the deployment of JRR mission teams is suitable, taking political and security aspects into account. In case of a positive decision, an advance team will be deployed in order to assess political, legal, and security aspects on the field. It is foreseen that the advance team will be sent within four weeks after the request has been transmitted. After assessing the advance team report, the supporting Nations will decide on the deployment of a JRR mission team. The deployment should be done within 6 weeks after the decision has been taken.

The feasibility study has been discussed during a conference held in Venice last year. There has been broad participation by both representatives of interested Nations (from Europe, Africa, and Latin America) and by representatives of interested NGOs. The study raises a

number of practical issues that need to be discussed further. For example an organisational issue, such as whether the tasks of deploying expert teams under the JRR mechanism should be carried out by an international organisation, was raised. Further questions of importance are: What will happen with the evidence gathered? Who retains ownership of the information, bearing in mind issues such as confidentiality and protection of witnesses? Where will the evidence taken be stored?

Discussions on these issues are ongoing. They highlight the challenge enforcement of the globalised law is facing: The Prosecutor of the ICC does not count on a "world police" that might help him implement prosecutorial activities. He relies on the cooperation with the national level. The very different realities at national levels will take some time to be standardized in a way that the cooperation mechanism expressed in the Rome Statute will be fully realized. Meanwhile the international community will have to provide interim solutions in order to uphold the prospects of globalised law.

Example Chile

However, not only limited capacities of national security and criminal justice systems hamper the direct enforcement of the new international criminal order. In fact, the applicability of the international criminal law is questioned by those Nations that feel some discomfort with the diminishing National sovereignty. Within this context I would like to refer to Chile as an example, because on the one hand it has demonstrated enormous efforts to modernize the national criminal justice system, but on the other hand it has shown a lack of discussions about adapting the Constitution in order to ratify the Rome Statute.

Within Chile the judicial reforms discussion started, at a national level, as soon as it returned back to democracy. The reform of the penal procedural law took centre stage from the mid 90's on. In 2000 the new procedural law was adopted. Beforehand feasibility studies, constitution reforms, and creation of other relevant laws took place. In the new penal procedural law the principles of indictment, orality and immediacy were introduced. This not only required the instruction of judges within the

new law, but a fundamental modernization of the criminal justice. The Public Prosecution Service and a Public Defence Service were created. In 2005 the reform came to its preliminary end. The expenses incurred so far sum up to more than 600 Million Dollars. In short: Chile introduced a criminal procedure that is in line with international standards.

Therefore it was astonishing, when in 2002 the Chilean Constitutional Court decided that, in order to ratify the Rome Statute, a reform of the Constitution was needed beforehand. The Statute had already passed the Chamber of Deputies with the majority needed. But in the Chamber of Senators, the conformity of the Rome Statute with the Chilean constitution was questioned and it went to the Constitutional Court. In its reasoning the majority of the judges highlighted the fact that, in certain cases, the ICC can substitute national courts or alter their sentences. This was found to be against the principle of sovereignty as laid down in the Chilean Constitution. According to historical interpretation, no other courts (other than national ones) are allowed to decide in cases were the public interest in restabilising the public order is concerned. According to the majority opinion of the judges, the subjection of Chile to the Interamerican Court of Human Rights does not contradict this type of interpretation. This Court does not have the competence neither to substitute nor to alter directly sentences taken by national courts.

The dissenting opinion of judge Libedinsky assesses the interpretation of the constitution by the majority of judges as too narrow. According to his opinion the norms have to be interpreted in line with the general development of national and international law. His opinion might be right. For example, Chile is a member of the WTO since 1995. Its dispute settlement mechanism shows some features that may affect the public interest. Furthermore, the majority of the judges of the Constitutional Court will be hard-pressed to explain the conformity of the dispute settlement mechanism of ICSID that Chile joined in 1991. Investors are making increase use of the arbitration panels, also against Chile. At a regional level Chile is an associate member of Mercosur and the Andean Community that has been modelled on the European Community. Being an associate, decisions taken by the tribunals (that have been set up within the regional economic communities) do not affect Chile directly. But the question arises, whether the decision of the

Constitutional Court will hamper Chile immersing further in the regional and international economic integration processes?

Up to now there are no definite answers, especially because a debate about the reform of the Constitution (that should have been initiated in light of the decision of the Constitutional Court) obviously has not taken place. Such a debate would be necessary. The outlined developments so far give rise to the assumption that legal evolvements within the context of consolidating a community of values are handled differently, from those that occur in the context of economic integration. It is to be noted that both generate globalised law. In order to avoid incurring contradictions, it is time to generate a debate about legal developments in different sectors and to look at their impacts. Also to this end, we are at your disposal.

Thank you for your attention.