

Conference on ICC Ratification in Lusophone Countries

PGA International Law and Human Rights Programme
International Criminal Court (ICC) Campaign Event

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The European Commission, European Union
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The Ford Foundation
The Government of the Netherlands
The Government of Denmark

19/20 February 2001

Lisbon, Portugal – Senate Hall, Assembleia da Republica

SUMMARY OF THE CONFERENCE PROCEEDINGS

The President of the Parliament of Portugal, Dr. Antonio de Almeida Santos, opened the “Conference on ICC Ratification in Lusophone countries” on Monday, 19 February 2001 in the Senate Hall of the Congress in Lisbon.

The objective of the Conference was to promote and facilitate ICC ratification and implementation processes in Angola, Brazil, Cape Verde, Guinea Bissau, Mozambique, Portugal and Sao Tomé et Príncipe, with special focus on the creation of parliamentary leadership and a “partnership on the ICC” with relevant Governmental authorities. None of these countries have yet ratified the Rome Statute of the International Criminal Court (ICC) adopted on 17 July 1998.

The Conference was structured in three sessions, respectively focusing on:

- (1) “The International Criminal Court and the contribution of Lusophone States in the Development of International Justice: from the ad hoc Tribunals for Former Yugoslavia and Rwanda to the permanent Court”,
- (2) “Survey on the National procedures towards ratification and implementation of the ICC Statute in Lusophone domestic legal systems: analysis of problems and solutions”,
- (3) “Where do we go from here? A plan of action on ICC ratification and National implementation for the Members of the Community of Portuguese Speaking Countries (CPLP)”. This session hosted a specific discussion on the text of the Final Document of the Conference, which was analyzed, amended, approved and signed by all parliamentary delegates, the Executive Secretary of

the CPLP, the Minister of Justice of Angola and the Secretary of State for Parliamentary Affairs of Portugal.

The event was followed by a Press Conference attended by all Conference participants and covered by all Portuguese media, as well as several African and Brazilian correspondents.

Without detailing the intense discussions which led to strong and clear conclusions in favor of immediate ICC ratification, this brief paper will try to outline the most important contributions to the Conference on a country-by-country basis.

As usually occurs at all PGA sub-regional meetings on the ICC, the Lisbon Conference participants were MPs and experts, while other representatives of Governments and NGOs were invited as observers.

Notably, three Presidents of Parliament (Guinea-Bissau, Portugal and Sao Tome' et Principe), seven Presidents of Constitutional Affairs, Justice or Foreign Affairs Committee (two from Brazil and Portugal, one respectively from Angola, Mozambique and Sao Tome' et Principe) and other senior politicians represented their countries. Cape Verde was represented by a diplomatic agent, because MPs from majority and opposition had a legal requirement to be in their Parliament on 19 and 20 February 2001 to discuss and vote on the programme of the newly formed Government. Nevertheless, the new Speaker of Cape Verde, Dr. Aristides Lima, sent a message of support to PGA the day after his election, thus making clear that the newly elected parliament will soon embark on the ratification process.

PGA distributed a complete list of participants, the full programme and selected papers presented at the Conference at the next session of the ICC PrepCom.

PORTUGAL

It has been said that Portugal is the one country in which the ICC has the highest media-exposure. However, interventions of politicians in public debates, especially on television, have shown in several occasions serious misinterpretations of the norms contained in the ICC Statute and its assumed impact on the National legal order.

In an interview on the main news-radio station of Portugal (TSF), Speaker of Parliament Almeida Santos – second highest authority of the State – stressed that “with the approval by this Conference of the Final Document [on ICC Ratification in the CPLP countries], it is now clear that an extraordinary revision of the Portuguese Constitution is necessary to permit the timely participation of Portugal in the ICC... The ICC is an essential institution to advance the protection of human rights in the world, and Portugal can not be left behind... The Final

Document of the Lisbon Conference approved by all CPLP parliamentary delegations has made these steps clear and ineluctable”.

During the Press Conference, President Almeida Santos described the process of constitutional revision as entailing the insertion of a brief one-paragraph norm in the Constitution allowing the ratification of the ICC Statute and the collaboration of Portugal in pursuing the goals of the ICC.

The issue of the Constitutional revision process has been addressed by most Portuguese MPs that participated in the Conference.

The President of the Constitutional Affairs and Civil Liberties Commission, Dr. Jorge Lacao, described the constitutional-compatibility problems posed by ICC ratification and their solution. In his view, there are four areas in which action is needed in order to prevent judicial intervention on the unconstitutionality of the ICC Statute in Portugal with respect to the following principles:

- the jurisdictional monopoly of Portuguese Tribunals of the sovereign attribution to adjudicate individuals;
- the regimes of expulsion and extradition, which are constitutionally reserved to national judicial authorities and are subject to constitutional discipline;
- the constitutional prohibition of life-imprisonment or any other penalty with perpetual character;
- the regulation on immunities for certain State officials, which is contrary to the ICC Statute [and customary law] principle of the irrelevance of official capacity (art. 27) vis-à-vis individual criminal responsibility for crimes under international law.

The solution proposed by Dr. Lacao and endorsed by Speaker Almeida Santos is to avoid a painful process of surgical review of the Constitution, and “to establish an acceptancy clause of the ICC Statute in the Portuguese Basic Law, thus leaving the regulation of all specific issues to the implementing legislation, which will give effect to the complementarity nature of the Court’s exercise of jurisdiction”.

Opposition MPs, including the Vice-President of the Constitutional Affairs Commission, Dr. Guilherme Silva, gave a constructive contribution to the discussion on life-imprisonment. He also chaired the special panel on ICC PrepCom developments with Amb. Antonio Costa Lobo, Head of the delegation of Portugal to the PrepCom, Dr. Joao Miguel, Prosecutor, and the enlightening interventions of the head of the Spanish delegation Ambassador Juan Antonio Yanez-Barnuevo.

Another opposition leader, Dr. Marques Mendez, President of the Foreign Affairs Commission, took a strong standing against demagogic tendencies aimed at imposing imprisonment-sentences that would go against the principle of humanity and frustrate the principle of rehabilitation and social re-integration of convicted persons. Several others, including the President of the Supreme Court of Portugal, Dr. Cardona Ferreira, underlined the humanistic foundation of the

Portuguese legal system based on the respect of human dignity, but also the compelling need to advance in the pursuit of international criminal justice, even through an imperfect instrument such as the Rome Statute.

The critical intervention of the President of the Portuguese Bar Association – very concerned about the possibility of re-introducing the penalty of life-imprisonment in the Portuguese legal system – was rejected by Conference participants after the persuasive rebuttal of Ana Cristina Nogueira, President of the Portuguese Section of Amnesty International. Antonio Maria Pereira, former President of the Bar Association and representative of the International Commission of Jurists in Portugal, dissociated himself from the position taken by the Presidency of the Bar, stressing that an anti-ICC ratification attitude would be a complete denial of the lawyers’ tradition in Portugal. Dr. Luis Silveira, Prosecutor, made a presentation on behalf of Amnesty International on the human rights’ protection elements of the ICC Statute for victims and defendants.

Professor Paula Escarameia, member of the Portuguese delegation at the PrepCom, gave more arguments than anybody else in favour of immediate ratification of the Rome Statute by Portugal. Her comments on the qualitative difference between surrender (from a State to the ICC) and extradition (between Sovereign States) as well as the current obligation under the European Convention on Extradition that Portugal faces when requested by a European State in which life-imprisonment is allowed (although never fully enforced in practice), were highly appreciated by the politicians.

Several members of the majority party (Socialist) and of the largest opposition party (Social-Democrats belonging to the International Christian-Democrat) intervened in the discussion and contributed to the *consensus* on the Final Document of the Conference that affirms constitutional revision and Portugal’s ratification. The concerns of Dr. G. Silva and Dr. M. Mendez against life imprisonment, shared by Portugal’s Minister of Justice Antonio Costa in his opening speech, are properly addressed in the Preamble of the Final Document of the Conference, in which the sovereign right of States under art. 80 of the Rome Statute to impose penalties for the most serious crimes is re-affirmed.

ANGOLA

Represented by the largest visiting delegation at the Conference, the Angolan MPs and Government officials took the floor to restate their National commitment to the ICC.

Dr. Diogenes Boavida, President of the Constitutional and Legal Affairs Commission and former Minister of Justice, explained why there is perfect Constitutional compatibility between the Statute and the Angolan basic law. Namely, the latter recognises the primacy of international law over National laws in that it requires that “constitutional and other legal norms be interpreted and integrated in line with the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights and other international instruments to which Angola is a party” (art. 21, para. 2, Constitution of Angola).

In case of conflict between the ICC provision on penalties (art. 77, including the possibility of life-imprisonment in exceptional cases and a maximum sentence to 30 years) and the Angolan maximum penalty of 24 years of imprisonment, the Angolan laws will be interpreted in line with the ICC Statute. The recent legislation on nationality-law reinforces this interpretation of the relationship between Angolan Constitutional law and the international law pertaining to human rights.

The Angolan parliamentary delegation saw also the participation of an eminent academic and former Minister of Justice, Prof. Dr. Franco Van-Dunen.

After analysis by relevant parliamentary committees, the plenary of the National Assembly of Angola approved the ICC Statute on 1 August 2000 and transmitted it to the President of the Republic, who has the authority to sign and ratify treaties under the Angolan Constitution. The President of the Republic has been, indeed, the Constitutional organ that sent the Statute to the Parliament as urgent matter for analysis, approval and relevant ratification, in case the Parliament would have found the Statute consistent with the principles of the Angolan legal order.

The Minister of Justice, Dr. Paulo Tchupilica, accompanied by two members of the Angolan delegation to the ICC PrepCom, delivered one of the most significant speeches of the second session of the Conference. He underlined the role played by Angola in Rome, within the SADC, and at the PrepCom, in defense of the integrity of the Statute “to safeguard the independence of the Court, a *condicio sine qua non* for the credibility and success of the ICC in the global scenario”. He stated that the last 30 years of war marked dramatically the life of all Angolans, and the protection of future generations was the main objective behind the engagement of its Government throughout the entire ICC process.

BRAZIL

The Brazilian delegation to the Conference consisted of three MPs from both opposition and majority who acted on a consistent pro-ICC position throughout the entire Conference proceedings with competence and authority. Not only did they share a common understanding of the positive impact of the ICC on contemporary international relations, but they also decided to join Parliamentarians for Global Action. Notably, several MPs from other CPLP countries did the same, with the awareness that their PGA membership would entail having a leading role in their National ratification and implementation processes.

Dep. Nilmario Miranda (President of the Human Rights Commission) and Dep. Antonio Carlos Pannunzio (President of the Foreign Affairs Commission), respectively from the opposition and majority, intervened in the opening session presenting the current situation on ICC Ratification in Brazil.

Dep. Miranda, the first signatory to that amendment, presented the Constitutional amendment. He stressed that the ICC process in Brazil is twofold: *first*, the official version of the Statute in Portuguese must be transmitted from the Executive to Parliament for discussion and approval, which would result in the ratification of Brazil; *second*, the Parliament must finalize discussion and adoption of the Constitutional amendment as early as possible, without prejudice to an earlier ratification (in light of the fact that there is still sufficient time before the entry into force and, even more, before the actual functioning of the Court).

Dep. Pannunzio stated with emphasis that the ICC is an important component in humanising the current phenomenon of globalisation in that it promotes the globalisation of the protection of human rights and fulfils the promise of the Universal Declaration subscribed more than 50 years ago.

In her intervention, Dep. Fatima Lucia Pelaes made a survey on the different positions taken by Brazilian jurists on the issue of the Constitutional compatibility of the Statute, which can not be acceded by States with reservations. She concluded that a comprehensive interpretation of the ICC Statute promotes the progressive abolishment of life-imprisonment as long as mandatory revision of that sentence is provided after 25 years. In addition, she presented the possibility for the CPLP members and other States – especially those from Latin America and Europe – to create a “negotiating-block” against the penalty of life-imprisonment in the review-Conference that should take place seven years after the entry into force of the Statute.

GUINEA-BISSAU

The Speaker of the Guinea-Bissau Parliament, Dr. Jorge Malu, gave a very interesting presentation on his country’s interest and support for the entry into force of the Rome Statute. Guinea-Bissau signed the treaty on the occasion of the UN Millennium Summit, while Cape Verde, Mozambique and Sao Tome’ appended their signature to the Statute at the “latest hour” permitted by the Rome Conference Final Act, on December 28, 2000.

Speaker Malu stressed the necessity of the permanent Court to prosecute crimes against humanity, war crimes and the crimes of genocide and of aggression. He spoke of the importance to overcome the impediments that often prevent prosecutions by National jurisdictions, because individual States may not have sufficient means to combat these gravest offenses. “It is indeed a common interest of all States, as members of the International Community, to make a joint effort for eradicating these horrible conducts, and to make the ICC a reality, thus avoiding the constant need to establish ad hoc Tribunals for the adjudication of crimes of these type, such as the ones for former Yugoslavia, Rwanda, and of ‘Nuremberg’.”

He concluded on behalf of his parliamentary delegation, supported by the presence of the President of the Bar Association of Guinea-Bissau, Dr. Laurence, that the urgency of the entry into force of the ICC would justify the

harmonization of the national Constitution with the provisions of the Statute and to allow ratification.

MOZAMBIQUE

Like the other country delegations, the parliamentarians of Mozambique reflected a multi-party composition. This was of particular importance in the case of Mozambique, since Frelimo (majority) and Renamo (opposition) had never engaged in discussions on the ICC, as the Executive had not yet ceded the matter to Parliament.

Dr. Teodato Mondim da Silva Hunguana, representing the Speaker of Congress, pointed out the substantive and procedural obstacles vis-à-vis ICC ratification in Mozambique. First of all, the Constitution allows for the ratification of treaties only when they are compatible with the Constitution. The Constitution must therefore be revised so that the Court can exercise its jurisdiction for the core crimes listed in Art. 5, insofar as Art.167 of the Mozambican Constitution includes for an exhaustive list of Tribunals which have exclusive jurisdiction over crimes committed in the territory of the country. However, the second paragraph of the same article permits the creation of “Tribunals exclusively aimed at adjudicating certain categories of crimes as expressly provided by the Constitution”. In addition, the norms on immunities in Articles 132 and 144 of the Constitution must be changed to adapt them to the ICC jurisdiction and its general principles of law that envisage no immunity-bar against prosecutions.

On the procedure to be followed, Dr. Hunguana said that the Parliament of Mozambique may face the alternative of inserting the ICC in the general Constitutional revision process initiated in December 2000, or to launch a special procedure to amend the Constitution tailored to the Statute, the latter being a more rapid solution.

The representative of Renamo, Dr. Chico Francisco, stressed the fact that the Mozambican Parliament was never confronted with the item of ICC ratification, in that the Executive did not yet submit it for consideration to the Legislative. He recognised that the national Constitution affirms positive principles such as the right to life, and negative principles such as the prohibition of the death penalty and of the use of torture or any other inhumane or degrading treatment. He therefore inferred that the ICC would be an instrument of protection for Constitutional protected interests or values under the Mozambican basic law, thus allowing the creation of a large civil society movement in Mozambique to support the ratification of the ICC.

The final document of the Conference reflects the statements of both representatives of the Mozambican delegation at the PGA Conference for Lusophone Countries. In letter (c) of section 5, there is a clear indication of the intention of these members of parliament to generate a consensus between majority and opposition on ICC ratification and related-Constitutional revision.

SAO TOME' ET PRINCIPE

The Speaker of the Parliament, Dr. Francisco Fortunato Pires, and the President of the Constitutional and Legal Affairs Committee, Dr. Armindo Vaz de Almeida, represented the highest possible Parliamentary level at the Conference.

Speaker Pires announced the realization of a public hearing open to Civil Society contributions of the Constitutional Affairs Committee as soon as the Parliament will resume from its ordinary session in April 2001. He prompted the need for a comprehensive discussion of all aspects of the National Basic Law, with respect to issues such as penalties (life imprisonment), sovereignty (in general and with respect to the Sovereign organization of jurisdictional bodies) and immunities.

A special place should be given to the understanding of the qualitative difference between extradition and surrender (*entrega*), with the latter concept being utilised in all future ICC-related legislation.

Dr. Pires concluded stating that Sao Tome' already ratified numerous legally-binding instruments aimed at fostering human rights protection and international cooperation at the regional and universal level. The Sao Tome parliamentarians are therefore mindful of the fact that the country is a party to other international regimes and will look to these as a precedent.

In conclusion, both the Speaker and the President of the Constitutional Affairs Committee are looking forward to a prompt ratification of Sao Tome' et Principe as part of the CPLP, whose members should play a leading role in the Court's Assembly of the States Parties.

COMUNIDADE DOS PAÍSES DE LÍNGUA PORTOGUESA (CPLP)

The Sao Tome' position fully reflected the official standing of the Executive Secretary of the CPLP, Dr. Dulce Maria Pereira. She emphasized the need for joint action at sub-regional level, and the importance of disseminating documents on the ICC in Portuguese to generate public support for, and common understanding of, the institution.

Most importantly, the CPLP will be a partner of PGA in the follow-up to the Conference, to support the National ratification and implementation processes in all members States and promote the ratification of all seven States as soon as possible, with the inevitable addition of East Timor, the authorities of which already expressed full support for immediate ICC ratification in case of the creation of an independent State.

ACKNOWLEDGEMENTS

The “Conference on ICC Ratification in Lusophone countries” has been organised by PGA with the support of the European Commission, the Government of Canada and the Assembly of the Republic of Portugal.

The “ICC Ratification Campaign” of PGA also received support from the Governments of The Netherlands and Denmark.

This Conference – whose successful conclusions have been commented by major media in Portugal and in the other six States in which Portuguese is the official language – would not have been possible without the essential contribution of the Portuguese Branch of the International Law Association and of the Office of the Speaker of the Parliament, Dr. Antonio de Almeida Santos. ILA Portugal has been represented at the Conference by Dr. Ligia Vaz (Rapporteur and principal co-organiser of the Conference) and Dr. Gabriel Goucha. The Chief of Staff of the Speaker, Dr. Jorge Monte-Cid, had played a crucial role in the organisation of the event. Amongst PGA members, particular mention must be made of Dr. José Magalhães, Secretário de Estado dos Assuntos Parlamentares, for his invaluable work in support of the Conference.

PGA is indebted to the members of the European Law Students’ Association (ELSA - Portugal) and the representatives of the International Human Rights Law Institute (DePaul Univ., Chicago) for their contribution to the drafting of the Final Document of the Conference, as well as to Amnesty International who prepared 11 papers in Portuguese for the Conference.