

## Implementation of the Rome Statute of the International Criminal Court in Bolivia

### I. INTRODUCTION

This State report contains a summary of the information requested from the State pursuant to the resolution of 1 December 2006 on the **full implementation of the Rome Statute**, and is presented in the order sought by the honourable Court. The most important sources consulted in the preparation of this report were public institutions such as the Ministry of Justice, the Plurinational Constitutional Court, the Supreme Court of Justice, the Chamber of Senators and the Ombudsman (*Defensor del Pueblo*).

In this regard, this report contains a representative summary of the information supplied on the points requested in Assembly resolution ICC-ASP/5 No. 3 of 1 December 2006, by which the Assembly of States Parties to the International Criminal Court decided inter alia to adopt and implement the **Plan of Action of the Assembly for Achieving Universality and Full Implementation of the Rome Statute**.

The report is divided into four sections, setting out the information requested by the honourable Court in relation to: i) Planned events and activities; examples of implementing legislation for the Rome Statute; ii) strategies to promote ratification and/or full implementation; iii) technical or other assistance needs; and, lastly, iv) obstacles to ratification or full implementation facing States.

### II. IMPLEMENTATION OF THE ROME STATUTE IN BOLIVIA

The International Criminal Court is a permanent international criminal court of justice, the mission of which is to try individuals responsible for war crimes, crimes against humanity and genocide, slavery, extermination, murder, forced disappearances, torture, abduction, apartheid and the crime of aggression, among others. Accordingly, Bolivia ratified the Rome Statute of the International Criminal Court through its Law 2398 of 16 May 2002, while the Ombudsman has submitted a Draft Proposal dated 10 July 2007 for a Law for the Implementation of the Rome Statute of the International Criminal Court, prepared with a view to implementing the Statute.

Although the Rome Statute does not contain any specific provision on the amendment of domestic law, under article 70 (4)<sup>1</sup> it places an obligation on States Parties to extend their criminal laws penalizing offences against the administration of justice to the offences established by the International Criminal Court. In this regard, article 86<sup>2</sup> of the Statute lays down an obligation to cooperate with the Court in the investigation and prosecution of crimes within its jurisdiction; likewise, article 88 of the Statute provides

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<sup>1</sup> Article 79(4)(a) of the Rome Statute: Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals; (...)

<sup>2</sup> Article 86 of the Rome Statute: States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

that “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation [...]”

Accordingly, States Parties to the Rome Statute are expected to apply these rules on the basis of the principle of complementarity, which presupposes that the State where an international crime is committed is able or willing to initiate proceedings and punish those responsible. Thus each State needs appropriate rules and regulations to be able to prosecute the authors of genocide, crimes against humanity and war crimes within the meaning of articles 5<sup>3</sup>, 6<sup>4</sup>, 7<sup>5</sup> and 8<sup>6</sup> of the Rome Statute. Therefore, if the State has not characterised the above crimes in its internal law, it is under obligation to adapt that law to the Statute, or the International Criminal Court may have jurisdiction in the case at hand.

With regard to progress in the full implementation of the Rome Statute, it should be noted that in 2006 the Ombudsman prepared a Proposed Draft Law for the Implementation of the Rome Statute in Bolivia, which was agreed with civil society and then submitted to the National Congress, where it was approved in principle by the Constitutional Commission of the Chamber of Deputies as far as article 51 of the Draft.

The Ombudsman subsequently added some observations to those made by the Chamber of Deputies. However, despite the progress of the proposed draft through the legislative process, the Constitutional Commission of the Chamber of Deputies decided to send it to the Ministry of Justice, as it had been established that the matter fell within the realm of the Department of Human Rights of the Ministry of Justice. Accordingly, in April 2007 a technical Report was issued by the Ministry of Justice and sent

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<sup>3</sup> Article 5 of the Rome Statute. Crimes within the jurisdiction of the Court. 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:(a) The crime of genocide; (b) Crimes against humanity;(c) War crimes;(d) The crime of aggression. 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

<sup>4</sup> Article 6 of the Rome Statute. Genocide. For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group;(e) Forcibly transferring children of the group to another group.

<sup>5</sup> Article 7 of the Rome Statute: Crimes against humanity. 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:(a) Murder;(b) Extermination;(c) Enslavement;(d) Deportation or forcible transfer of population;(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;(f) Torture;(g) Rape, sexual slavery, enforced prostitution (...)

<sup>6</sup> Article 8: War Crimes 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.2. For the purpose of this Statute, "war crimes" means: (...)

directly to the Constitutional Commission of the Chamber of Deputies with a view to commencement of the legislative phase.

#### **- Planned events and activities with a view to the full implementation of the Rome Statute**

The Bolivian State has in principle approved a number of laws along the lines of the various existing international agreements and treaties; thus the Rome Statute of the International Criminal Court, through its universal acceptance, widespread dissemination and implementation, represents a legal basis that strengthens the rules of international humanitarian law and accordingly requires the adoption of domestic legislation in order to comply with the obligations deriving from it and to facilitate the Court's operations, as well as mutual technical assistance among States with a view to the drafting of such implementing legislation, bearing in mind that all States have an obligation to uphold and enforce in all circumstances the rules established under the Geneva Conventions of 1949, insofar as those rules apply to them, including those contained in the additional Protocols of 1977.

Accordingly, the rules of domestic law reflect respect for the fundamental rights that are enshrined in the Political Constitution of the State, which ultimately provides that all individuals are subject to the Constitution and laws, supreme decrees, draft laws and regulations, in accordance with the rules of international humanitarian law.

Under the Political Constitution of the State, in accordance with the American Convention on Human Rights, the death penalty has been abolished and torture and forced disappearances are prevented and punished, as well as acts of terrorism that constitute crimes against individual persons. Playing an important role on the international scene since 1971, the Convention receives support for its implementation from other institutions of the inter-American system for the promotion of international humanitarian law.

One of the most significant advances on the part of the State is undoubtedly the approval of its Political Constitution, the provisions of which allow for the direct application of the rules of international criminal law, stating in article 13(IV) [TRANSLATION]:

**International Treaties and agreements ratified by the Plurinational Legislative Assembly that recognise human rights and prohibit their limitation during States of Emergency (*Estados de Excepcion*) shall take precedence in domestic law.** The rights and duties enshrined in this Constitution shall be interpreted in accordance with the international treaties on human rights ratified by Bolivia (emphasis added).

In accordance with above provision, articles 256 and 257 of the Constitution state:

Article 256.I: International treaties on Human Rights that have been signed, ratified or adhered to by the State and **which set out rights that are more favourable than those contained in the Constitution shall take precedence over the latter (...)** (emphasis added)

Article 257.I: Ratified international treaties form part of the internal legal order and have the force of law. II: Approval by popular binding referendum is required to ratify international treaties that involve:

- 1.Border issues;
- 2.Monetary integration;
- 3.Structural economic integration;
- 4.Transfer of institutional powers to international or supranational organisations in the framework of integration processes.

Thus, the State interprets the rights and duties enshrined in the Constitution in accordance with ratified international human rights treaties.

In this sense, Bolivia prohibits and punishes any form of discrimination and guarantees for all persons and communities **the free and effective exercise of the rights established in Magna Carta and in human rights laws and international treaties**; and under this principle it has adopted Law No. 045 of 8 October 2010, the Law Against Racism and Any Form of Discrimination, the purpose of which is to establish mechanisms to prevent and punish acts of racism and discrimination in accordance with human rights principles.

In addition to the major advances in the State Political Constitution with regard to judicial guarantees and defence rights, article 111 provides that: *crimes of genocide, crimes against humanity, (...), war crimes are not subject to any statutory limitations, in accordance with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, ratified by Law No.2116 of 13 September 2000, and Supreme Decree No 19777 of 13 September 1983.

The State has progressively subscribed to international rules promoting the effective protection of Human Rights, as for instance the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, through Law No. 2273 of 22 November 2001.

Thus Bolivia is working on the implementation of internal laws that reflects the legal norms of the Rome Statute, applying as one of its criteria the Bolivian Criminal Code, which provides in article 1(7) that the Code shall apply to: *the crimes which Republic has pledged to prosecute pursuant to treaties or conventions, independently of whether or not they were committed on its territory.*

#### - **The obstacles to full implementation**

The provisions referred to were not contained in the previous Political Constitution, which was in force until February 2009; on the contrary, under the constitutional order that has now been abrogated, the State adhered to the continental system, which precluded it from applying international criminal rules directly, or from amending its legislation by reference to an international instrument, owing to the

requirements enshrined in the principles of *nullem crimen sine lege* and *nulla poena sine lege*. In this regard, note should be taken of the interpretation given by Constitutional Ruling No. 034/2006 of 10 May, which states:

*Pursuant to article 1 of its Statute, the international Criminal Court is complementary to national criminal jurisdictions, meaning that, in order for an offence to be tried internationally, it is necessary, as a general rule, that no proceedings have been initiated — or, more precisely, that there is no provision for proceedings in the case — by the State that has jurisdiction over a particular person; thus, the scope of national jurisdiction is respected and, consequently, the internal legal orders of the various States that have ratified the Statute of the International Criminal Court are likewise always respected, insofar as they incorporate the provisions set out in said Statute.*

While the current Constitution does address the issue of the precedence and direct application of the Rome Statute, amendments are nonetheless necessary in order to implement the Rome Statute in a full and complete manner, for example in the case of the crime of genocide, which is defined under article 138 of the Criminal Code in the chapter on Crimes against International Law, and has not been modified since its inclusion in the Criminal Code.

Moreover, the extension of the definition of the crime of genocide to include “mass killings” as a separate form of conduct, in a situation of armed conflict not of an international character, raises the question of what right is being protected, and whether that right is linked to a right whose protection motivated accession to an international agreement for the international punishment and prosecution of any violation of said right. Although States are free to criminalise conduct when it is considered appropriate in the framework of international human rights law, the penalties applicable under internal law must be consistent with those established under the Rome Statute.

Crimes against humanity are considered to be part of a widespread or systematic attack against the civilian population. Under article 7 of the Rome Statute, the civilian population is not an individual victim, but the article allows the prosecution of conduct as an ordinary criminal offence, although, without specific characterisation, it loses the spirit that distinguishes crimes against humanity, which involve a series of serious widespread violations of human rights, the victims of which need a greater degree of protection under the internal legal order.

In this regard, the Bolivian State is working on amendments to the Criminal Code with a view to introducing a chapter on crimes against humanity, such as torture and slavery, which complies with international standards. Likewise, it is necessary to define war crimes in light of the Rome Statute, the Geneva Conventions of 1949 and their Additional Protocols, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in armed forces in the field, the Geneva Convention relative to the treatment of prisoners of war, the Biological Weapons Convention of 1972, Protocol II of the Convention on Certain Conventional Weapons of 1980, the 1993 Chemical Weapons Convention and the 1997 Ottawa Treaty.

By the same token, offences against the administration of justice will also be included; in relation to these, the Rome Statute expressly establishes an obligation to incorporate in the domestic legal order all

the offences against the administration of justice contained in article 70 (1).<sup>7</sup> The current criminal code contains a chapter on crimes against the judiciary, but it must be fleshed out and adapted to the crimes established in the Statute.

With regard to immunities, under the new constitutional order the Bolivian State has made progress by allowing special trial rights (*juzgamiento de privilegio*) only to the President and the Vice President of the State, subject to authorisation from the Plurinational Assembly. The constitutional provisions must be interpreted in such a way as to be compatible with the international obligations of the State, as international law prohibits States from granting immunity for certain types of crimes (Convention on Genocide), and, moreover, under international law States have a duty to investigate and punish serious crimes irrespective of an individual's status.

It may accordingly be concluded that the State is working on eliminating obstacles to the implementation of the Rome Statute in accordance with the new Political Constitution of the State, which provides for a preliminary check on constitutionality, enabling the Constitutional Court to consider and rule on the constitutionality of the Treaty.

#### **- Strategies to promote ratification and/or full implementation**

The Rome Statute is currently under implementation, being included in the preparation of the Bolivian State's penal policy and in the revision of the Criminal Code, where its involvement will have the backing of the Ministry of Justice and the Ombudsman.

The Regional Conference of the Americas against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which took place in the year 2000, committed the State to active participation in the World Conference for Improved Transparency and Accountability of Defence and Security Institutions, and will accordingly promote a better level of understanding and cooperation between the participating governmental organisations on matters of security and policy through an improved exchange of policy documents and defence principles, staff and information, including, where possible, cooperation and training for participation in United Nations peace-keeping activities and the provision of an enhanced response to legitimate security and defence needs, thus improving transparency in arms procurement with a view to increasing trust and security.

Article 162<sup>8</sup> of the Political Constitution of the State allows citizens, Assembly members, the Executive, the Supreme Court and autonomous governments to present Draft Laws. This procedure will enable the

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<sup>7</sup> Article 70: Offences against the administration of justice. a) giving a false testimony when under an obligation pursuant to article 69 (1), to tell the truth; b) presenting evidence that the party knows is false or forged; c) corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence (...)

<sup>8</sup> Article 162 Political Constitution of the State. The following have the power of legislative initiative, subject to compulsory consideration by the Plurinational Legislative Assembly: 1. Citizens 2. Assembly members in each of their chambers 3. The executive 4. The Supreme Court, in the case of initiatives related to the administration of justice 5. The autonomous governments of the territorial entities.

presentation of a Draft Law for Implementation of the Rome Statute in the Plurinational State of Bolivia, with due regard for the preliminary matters described above and with the participation of the various institutions of the State concerned.

Furthermore, in view of the third transitional provision of the Law on the Judiciary, which proposes amendments to the various codes for its implementation, provisions for the implementation of the Rome Statute could be included in the new Criminal Code. In this regard, the Ministry of Justice, through the Vice Ministry of Justice and Fundamental Rights within the Unit of Judicial Coordination and Regulatory Analysis, has prepared a draft Criminal Code Law for the implementation of changes to the Criminal Code that is currently being examined with a view to its adoption.

Through the penal legislation that is currently under review, with a view to assessment of the Criminal Code's consistency with the requirements of international humanitarian law, Bolivia is preparing draft amendments to the revised Criminal Code that include sanctions for international humanitarian law violations. The Military Justice Code may also be revised and comprehensive sanctions for war crimes added to it.

#### ***-Technical assistance needs***

Bolivia has made provision for a five-year period of specialised training assistance for the promotion of the Rome Statute for civil society in general and for actors within the system, and also for technical assistance to ensure that the punishment of war crimes, crimes against humanity and other serious violations of treaties on humanitarian law is brought within the ambit of Bolivian criminal law; implementation will require the provision of training to the armed forces and the national police, with human rights and international humanitarian law being included in the curricula of those bodies' university courses.

The State also has a Committee attached to the National Commission on international humanitarian law at national level that advises the government on these and related matters with a view to the coordination of measures for the introduction and implementation of international humanitarian law at national level. Accordingly, national workshops have been organised on international humanitarian law, as well as national committees and international courses on human rights and international humanitarian law for armed forces instructors, the national police, judges, magistrates, civil and military prosecutors, lawyers and civil servants in general, the judiciary and Ministries of the central American countries, as well as the Ministry of the Interior and Justice, in order to make provision for the punishment of violations of international humanitarian law.

Moreover, Bolivia is party to the Geneva Conventions of 1946 and to the Additional Protocols of 1977, having made a declaration under article 90 of Additional Protocol I of 1977 recognising the competence of the International Commission of Inquiry, the Convention of 1972 on Biological Weapons, the Chemical Weapons Convention of 1983 and the Ottawa Convention of 1977.

In conclusion, while the individual acts that constitute crimes against humanity or war crimes, such as murder, homicide, bodily harm, torture, etc., are offences under national law, they lack the element that converts them into international crimes; in the case of crimes against humanity, their widespread or systematic perpetration and, in the case of war crimes, the existence of an armed conflict. Thus their relationship with international crimes will be problematic, unless and until these are expressly incorporated in the Bolivian legal code.

In this regard, given the principle of complementarity, which implies an obligation of implementation in respect of the crimes provided under articles 5 to 8 of the Rome Statute, insofar as these are recognised under international customary law, the principle of universal jurisdiction will be explicitly included in our internal legal order.

The Rome Statute covers crimes under international law, which have been incorporated in the **Proposed Draft Law for Implementation of the Rome Statute of the International Criminal Court**, as well as rules for their implementation, broadening their scope and taking account also of other instruments of international human rights law and international humanitarian law to which the Bolivian State is bound. The Draft Law contains 95 articles, three transitional provisions and eight final provisions, which are spread over five parts and are appended to this report for your consideration.

In ratifying universal and inter-American human rights treaties, the State reaffirms its determination to fight and eliminate impunity at all levels of our society by strengthening judicial systems and national institutions for human rights and fundamental freedoms of all persons, including those of women, children, the elderly, indigenous people, migrants, repatriated persons, persons with disabilities and those of other vulnerable groups or groups that are subject to discrimination.

There are also **national contact points** for issues relating to the promotion of ratification and full implementation in: the Ministry of Justice, the Ministry of Foreign Affairs and Worship, the Ministry of the Interior and the Ministry of the Presidency, which are elements of the executive power, while the Ombudsman, an organ independent of the State, and the legislative power, through the Constitutional Chamber of the Chamber of Senators and Deputies of the Plurinational Legislative Assembly and the Vice-Presidency of the State, act as coordinating bodies, the Ministry of Foreign Affairs being the State body responsible for relations with States, international organisation and other subjects of international law in accordance with Supreme Decree 29894.

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