

THE PLURINATIONAL STATE OF BOLIVIA
Embassy of The Hague – The Netherlands

**INFORMATION ON THE PLAN OF ACTION FOR ACHIEVING
UNIVERSALITY AND FULL IMPLEMENTATION OF THE ROME
STATUTE**

I. BACKGROUND

The International Criminal Court is a permanent international criminal court of justice with a mandate to try individuals who have committed war crimes and crimes against humanity, such as genocide, slavery, extermination, murder, forced disappearances, torture, abductions and aggression, among others.

The Rome Statute establishing the International Criminal Court was signed by the Bolivian State on 17 June 1998 and ratified by law N° 2398 of 24 May 2002, published in the Bolivian Official Gazette N° 2.407 of 19 June 2002; pursuant to the Constitution, it enters into force in domestic law from the date of its publication.

The Rome Statute sets out two main guiding principles: a) the principle of complementarity in relation to crimes falling within the jurisdiction of the International Criminal Court and b) the principle of cooperation, consisting in the adoption of internal implementing mechanisms. At its last meeting, as part of the follow-up to the Review Conference, the Assembly of States Parties considered an additional issue, namely the impact of the Rome Statute on victims and affected communities, and also decided to keep the issue of improving the efficiency and effectiveness of the Court under review.

In view of its subsidiary nature, the Court does not replace the power of States to administer justice; instead, it acts on the basis of the principle of complementarity, under which every State has an obligation to integrate the Rome Statute into its internal legal order.

**II. OBSTACLES TO FULL IMPLEMENTATION OF THE ROME
STATUTE**

a) Bilateral immunity agreements

During the government of Gonzalo Sánchez de Lozada, a Bilateral Immunity Agreement was signed with the United States, whereby the Parties undertook not to surrender each other's nationals to the International Criminal Court. The Bolivian State adheres to the monist conception of public international law, according to which any international agreement must be ratified by statute in order for it to enter into force. In mid-May 2004, the Senate approved the above Agreement and the Chamber of Deputies rejected it. The validity of this type of agreement is an obstacle to the full application of the Rome Statute.

b) Absence of legislation implementing the Statute of the International Criminal Court

To implement the Statute of the International Criminal Court, the Human Rights Office was designated to prepare a bill (Preliminary Draft Law for Implementation of the Statute of the International Criminal Court, Human Rights Office Project- GTZ) that was formally submitted to the National Congress during the 2006 administration for examination by the Constitutional Committee of the Chamber of Deputies. Of the 95 articles set out in the draft, 51 received general approval.

In June 2009, the Human Rights Office amended the Draft Law for Implementation of the Statute of the International Criminal Court in line with the new Political Constitution of the State, promulgated on 7 February 2009. Thus, the Ministry of Justice once again set in motion the procedure to implement the Statute of the International Criminal Court, by initiating a comprehensive criminal law reform and preparing a Preliminary Draft Bolivian Criminal Code containing a chapter on violations of international law.

Regarding these efforts, it should be borne in mind that performance of the obligations undertaken by the Bolivian State in regard to the Rome Statute is bound to take account of current political and constitutional requirements.

c) Maximum Criminal Penalty

Article 118-II of the Political Constitution of the Bolivian State provides: “The maximum criminal penalty shall be 30 years’ imprisonment, without right of pardon”. The Rome Statute provides in article 77 (b) for “a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”. A conflict arises in this regard, given that life imprisonment has been banished under the law of most Latin American countries. Accordingly, it may be advisable to review the penalties applicable under the Rome Statute. For Bolivia to recognize life imprisonment, in the absence of such a review, would represent a legal step backwards.

d) Immunity of high-ranking officials

The political Constitution of the Bolivian State provides, under article 184 (4), that “the Supreme Court of Justice of Bolivia has the power to try, as a collegiate court in full and sole instance, the President or Vice-president for offences or crimes committed in the exercise of their mandate.

The proceedings require previous authorization from the Plurinational Legislative Assembly by a decision adopted by at least two-thirds of the members present, upon a properly-founded request by the Public Prosecutor or Director of Public Prosecutions. The latter will bring charges if he or she considers that the outcome of investigations justify initiating proceedings. Such proceedings are to be oral, public, continuous and uninterrupted. The procedure is to be laid down by law”.

For its part, article 27 of the Rome Statute establishes the irrelevance of official capacity:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

In this regard, the immunity attaching to high Bolivian State officials represents an obstacle to the powers of the International Criminal Court and hence hinders the implementation of the Rome Statute. However, in regard to the validity of and compliance with international treaties, the Bolivian State applies the *pacta sunt servanda* principle of public international law.

e) Amnesty

In accordance with article 17 of the Rome Statute, the Political Constitution of the Bolivian State makes provision, under article 172 (14), “To declare amnesty or pardon, with the approval of the Plurinational Legislative Assembly”.

To grant amnesty is to release particular persons from their criminal responsibility. This has an inherent and immediate practical effect on the investigation, trial and or execution of the individual’s sentence, irrespective of the grounds for granting amnesty.

III. PROCEDURE FOR THE IMPLEMENTATION OF THE ROME STATUTE

The Plurinational State of Bolivia actively participated in the adoption of the Rome Statute of the International Criminal Court, from the time of its ratification in Congress by Law N° 2398 of 24 May 2002, published in the Official Gazette of Bolivia N° 2.407 of 19 June 2002. Accordingly, pursuant to article 410-II of the Political Constitution of the State, it constitutes a Supreme Law of the National Legal Order and takes precedence over internal statutes, thereby according the Rome Statute the status of a treaty having the force of national law.

The Political Constitution of the State of 1967 adhered to the continental or civil law system, precluding any direct application of international criminal rules or amendment of those rules by reference to an international instrument, in accordance with the principles of *nullem crimen sine lege* (naturally) and *nulla poena sine lege*. In this context, the interpretation provided by the Bolivian Constitutional Tribunal in Constitutional ruling N° 034/2006 of 10 May states:

“The International Criminal Court, in accordance with the provisions of article 1 of its Statute, is complementary to national jurisdictions, which means that the crime to be tried internationally must not have been the subject of investigations or criminal proceedings, in other words that the State with jurisdiction over a particular person must be unwilling to act; in this way the scope of the national jurisdiction is respected, and hence also the domestic norms of the various States that have ratified the Statute of the International Criminal Court, insofar as they incorporate the provisions set out in the latter instrument”(sic).

The obligation of States Parties to cooperate (articles 86 et seq.) presupposes that States Parties will be able to comply with such obligation given the appropriate criminal legislation.

The principle of complementarity presupposes that the State, where an international crime characterised in accordance with the Rome Statute has been committed, has the ability and willingness to prosecute and punish those responsible. Whereas willingness may be viewed as an issue of judicial or criminal policy, ability requires appropriate legislation to prosecute acts of genocide, crimes against humanity and war crimes within the meaning of articles 5 to 8 of the Statute. Hence, if a State has not characterized these crimes in its internal legislation, it must amend its national legislation to bring it into line with the Statute; if not, the International Criminal Court may have jurisdiction in that particular case.

Complications arise when considering the complex relationship between international crimes and ordinary domestic ones. Although, taken individually, the acts that constitute crimes against humanity or war crimes are provided for in domestic law, such as murder, homicide, bodily harm, etc., they do not contain the element that makes them international crimes: in the case of crimes against humanity, their systematic or widespread commission, and in the case of war crimes, the existence of an armed conflict. In this context, there is an implied de facto obligation to implement.

The Bolivian State has undertaken to find mechanisms to implement the Rome Statute of the International Criminal Court, and in this regard specific actions have been prepared; they are currently under analysis, with a view to translating them into specific objective actions. With the entry into force of the new Political Constitution of the State, the law is being amended in order to achieve effective implementation, and this will basically require consideration of the following aspects :

3.1. The obligation to cooperate

The Rome Statute clearly creates a series of obligations for States Parties. The obligations contained in the Rome Statute can be generically divided into two groups:

(i) The obligation to cooperate fully with the International Criminal Court:

The Court has the power to formulate requests for cooperation with States Parties and, in some cases, with States that are not parties to the

Statute. In Bolivia, Title VI of Book III of the Code of Criminal Procedure contains a chapter on international judicial and administrative cooperation: articles 138 to 148 and Supreme Decree N° 22243 of the Consular Regulations. While these provisions are of a general nature and do not directly result from any intention on the part of the legislator to comply with the Rome Statute, they provide basic support for this obligation, even though our law will have to be amended in line with our commitments.

(ii) The obligation to establish procedures applicable to all forms of cooperation with the International Criminal Court.

In accordance with the provisions of article 88 of the Rome Statute of the International Criminal Court, States Parties must ensure the availability of procedures in their national law for international cooperation and legal assistance. The Bolivian State is taking a number of steps to meet this obligation through internal coordination between institutions and jurisdictional and prosecutorial authorities so as to be able to comply with all requests for cooperation submitted to it.

While procedures must be reviewed and implementing legislation adopted to allow prompt and swift processing of International Criminal Court requests, a detailed procedure for each type of cooperation is unnecessary; but, at the very least a general framework must be established, so that solutions to the Court's requests may be found and essentially enable these to be addressed.

3.2. The characterisation of international crimes

The jurisdiction of the International Criminal Court is set out in article 5 of the Rome Statute, limiting it to the most serious crimes of concern to the international community as a whole, such as genocide (article 6), crimes against humanity (article 7), war crimes (article 8) and the crime of aggression (article 9).

In this context, the following crimes have been characterised in our country:

1.- The crime of genocide was characterised in article 138 of the criminal code, which to date has not been amended and has remained in force since its recognition by the Bolivian State.

The General Part of the Draft Reformed Criminal Code provides in article 10 that “[w]here a sentence in a particular case is cruel, inhuman, degrading or very seriously affects innocent third parties or is clearly disproportionate, judges will avoid or reduce it, irrespective of whether it has been provided for in law...”.

While the criminal code in force penalises crimes of abuse and torture, pursuant to the above international norms, the Expert Committee on Criminal Reform has proposed the following amendments to the criminal characterization of “abuse and torture”: “A public official, or a private individual acting independently or on behalf of the former, who intentionally inflicts serious harm or suffering on a person, whether physical or mental, shall be punished with a sentence of imprisonment of between

four and ten years”. This is a measure representing a step forward and act of implementation of which account should be taken.

2.- With regard to crimes against humanity, national law has not criminally characterised acts committed as part of a widespread or systematic attack against a civilian population (article 7 of the Statute of the International Criminal Court). In this regard, the Bolivian State does not treat the general population as a subject of law, which means, given that the acts described in article 7 of the Statute of the International Criminal Court constitute ordinary crimes, that they would be prosecuted under the ordinary criminal law, disregarding the spirit distinguishing crimes against humanity as serious human rights violations committed systematically, the victims of which require enhanced protection from the legal system.

Under article 114, the Political Constitution of the Plurinational State of Bolivia sets out the legal penalties and administrative sanctions against public officials who use any form of torture, disappearance, confinement, coercion, abuse or any form of physical or mental violence.

In article 256, the said Constitution provides: I “International human rights treaties and instruments signed, ratified or adopted by the State, containing rights more favourable than those provided under the Constitution, will take precedence”, II “The rights recognised in the Constitution will be interpreted in accordance with international human rights treaties insofar as the latter norms are more favourable”. This country is alone in adhering to this legal principle, most countries having constitutional obstacles, as reflected in the case law of their constitutional tribunals.

3.3. Other offences and issues to consider

In regard to the above, due consideration must be given to the fact that the Statute of the International Criminal Court expressly creates an obligation to incorporate the whole range of offences against the administration of justice provided for in article 70 (1) into the domestic legal order. While the current criminal code does contain a heading entitled Offences Against the Judiciary, it needs to be completed and brought into line with the Statute.

Concerning the Armed Forces, the Political Constitution of the State provides under article 245 that “[t]he organisation of the Armed Forces is based on its hierarchy and discipline. It is essentially obedient, does not deliberate and is subject to military laws and regulations. As an institutional body, it does not carry out political activities: individually, its members enjoy and exercise citizenship rights in accordance with the conditions established by law”. The powers of the military institutions are enshrined in the principles and values of the Political Constitution of the State.

With regard to the responsibility of superiors, the Military Criminal Code and the regulations relating to the Bolivian police force need to be amended in line with article 33 of the Statute of the International Criminal Court. The Bolivian State is currently in a process of regulatory amendment and implementation within the framework of the Political Constitution of

the State, whereby amendments may be made to the above provisions governing the institutions mentioned.

With regard to life sentences (article 77), this poses a problem for our State, which tacitly prohibits such sentences: the current maximum sentence is 30 years' imprisonment without right of pardon, which means there is incompatibility on this point.

Concerning immunities, in accordance with the new constitutional order, the Plurinational State of Bolivia grants to the President and Vice-President of the Plurinational State of Bolivia alone the right to special trial privileges, subject to authorisation by the Plurinational Assembly; however, the constitutional provisions must be interpreted in a manner compatible with the international obligations of the State, in accordance with international law, which bars States from giving immunity for certain types of crimes (Genocide Convention). Moreover, under international law, States have a duty to investigate and punish serious crimes, irrespective of the status of the perpetrator of such crimes.

IV. STRATEGIES OR PLANS OF ACTION TO PROMOTE FULL IMPLEMENTATION OF THE STATUTE

The Bolivian State, through the competent criminal-law authorities, is considering the following broad options:

a) A single norm

Preparation of a single Draft Implementing Law, thereby avoiding the need for individual criminal statutes, which could all be incorporated into the relevant code, including both substantive and procedural matters.

b) Individual reform of all relevant legislation

To reform all the legislative instruments on the subject would run the risk of weakening the natural role of the International Criminal Court.

c) Hybrid measure

A single law that effectively reforms all the relevant legislation currently in force, while at the same time implementing, in consolidated form, all the obligations of Bolivia under the Rome Statute.

V. SOLUTIONS TO CONSTITUTIONAL PROBLEMS ARISING OUT OF RATIFICATION

The Bolivian State ratified the Rome Statute by Law N° 2398 of 24 May 2002, whereby it fully entered into force on Bolivian territory; that Law's ninth transitional provision provides for a review of international treaties and conventions and a report on provisions found to be inconsistent with the Constitution.

VI. NATIONAL CONTACT POINTS

- Ministry of Foreign Affairs
- Ministry of Justice
- Human Rights Office

VII. CONCLUSIONS

- In an effort to comply with the international treaties to which it is party, Bolivia has initiated an implementing procedure involving an analysis and discussion of a Preliminary Draft Law for Implementation of the Statute of the International Criminal Court, Human Rights Office Project - GTZ. It is being prepared in accordance with the Constitution, which in articles 111 and 114 establishes basic parameters that will contribute to the implementation of the Rome Statute.

- A law to amend related legal instruments, namely the Criminal Code, Code of Criminal Procedure and Organic Law, is currently under review. It is also intended to cover other aspects related to the full implementation and promotion of the Rome Statute, such as amendment of the Military Criminal Code in line with said Statute.

- The ninth provision of the Political Constitution of the State lays down a period of four years from the time of election of a new executive body to review, report on, and if necessary renegotiate, international treaties that are inconsistent with the Constitution.

- The need to optimise the implementation of the Rome Statute, essentially in the area of cooperation with and assistance to the International Criminal Court, and to characterize crimes appropriately, has been recognised.

- The Bolivian State has considered the adoption of a single law to implement the Rome Statute.
