Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2000

Part One. Legal status of the United Nations and related intergovernmental organizations

Chapter I. Legislative texts concerning the legal status of the United Nations and related intergovernmental organizations

CONTENTS

Chapter I

LEGISLATIVE TEXTS CONCERNING THE LEGAL STATUS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

Spain

INTERNATIONAL CRIMINAL COURT. PRESENTATION OF GROUNDS FOR AUTHORIZING RATIFICATION OF THE STATUTE BY SPAIN[1]

I

On 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries, convened for the purpose by the United Nations and meeting in Rome, adopted the Rome Statute of the International Criminal Court. The Statute was signed by Spain, and by a number of other countries, at the end of the Conference, on 18 July.

The Rome Statute represents the culmination of a series of endeavours and negotiations which date back virtually to the birth of the United Nations, and which have followed, one after the other, over the past half-century, with varying degrees of intensity.

Thus, following the precedents of the Nuremberg and Tokyo international military tribunals, set up in 1945 and 1946 to judge the main German and Japanese leaders accused of "committing crimes against peace, war crimes and crimes against humanity", the United Nations General Assembly adopted, in 1948, the Convention on the Prevention and Punishment of the Crime of Genocide and set up a special Committee to draft the statute of a permanent international criminal jurisdiction, which eventually prepared a draft, between 1951 and 1953.

Under the terms of a 1971 decision, the International Court of Justice at The Hague considered that the 1948 Convention against genocide was part of customary international law. Later, the General Assembly of the United Nations, in its resolution 3074 (XXVIII) of 3 December 1973, declared that crimes against humanity would be prosecuted and could not remain unpunished. This combination of efforts in the area of legislation, doctrine and jurisprudence established the foundations for the effective protection of human rights within the international arena, breaking with old theories of criminal law, such as the principle of territoriality in criminal law, based on the notion of national sovereignty, which yields to a new principle of universal jurisdiction.

After the end of the cold war, the United Nations returned to the theme, appointing the International Law Commission to draft the Rome Statute of the International Criminal Court and the Draft Code of Crimes against the Peace and Security of Mankind. These draft laws were presented by the Commission in 1994 and 1996, respectively, and, after they had been revised, expanded and completed by a Committee composed of government representatives, provided the working foundation for the work of the United Nations Diplomatic Conference of Plenipotentiaries held in Rome.

In parallel with this process, a number of other initiatives have emerged over recent years. They are less ambitious, but of great significance as precedents for the International Criminal Court. There are, for example, the International Tribunals created in 1993 and 1994 by the United Nations Security Council for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia and in Rwanda, respectively.

As a result of all these endeavours, the Rome Conference, after wide-ranging and intense negotiations, was able to complete the drafting of the Statute, whose text was approved, with 120 votes in favour (including all countries in the European Union, and the majority of Western countries), 7 against and 21 abstentions.

The purpose of the Rome Statute is to create the International Criminal Court, as a judicial body that is independent, but related to the United Nations, with permanent status and potentially universal scope, and with the authority to prosecute crimes of major significance to the international community as a whole.

Because the four international criminal courts that have been created thus far have represented a response to concrete but temporary situations, the constitution of an international criminal jurisdiction with a universal and permanent vocation constitutes a decisive step in the evolution of the international order.

The constituent elements of the Rome Statute of the International Criminal Court allow us to state that it provides the foundations for a new kind of international law: more humanizing, in that it seeks to provide greater protection of the human being with respect to the most serious attacks against basic human dignity; more inclusive, in that it successfully combines the wills of a large number of countries that have legal and political systems that are very different from one another; and more effective, in that the international community has equipped itself with a new instrument, which is able to guarantee effective respect for its most basic rules.

II

Overcoming the difficulty posed by the diversity of the political and legal systems of the States participating in the Rome Conference, the Statute arising out of their deliberations is a complex text, regulating all elements required for the launching and the effective functioning of the International Criminal Court: its foundation, composition and organization; the applicable law and the general principles of criminal law that must underlie its procedures; the definition of its powers, from a material point of view, as well as from a spatial and temporal point of view; the categorization of crimes and the penalties to be imposed, as well as the rules governing their application; the procedural and operational standards for legal institutions; and the mechanisms for collaboration with States and with other international agencies, with a view to achieving more effective fulfilment of the desired objectives.

The Statute also provides that its constituent regulations be further developed through various regulatory instruments, in particular the Elements of Crimes, the Rules of Procedure and Evidence, the Rules of the Court, the Agreement on the relationship with the United Nations, the Agreement on the Privileges and Immunities of the Court, the Financial Regulations and the Staff Regulations etc., all of which will contribute towards the proper and effective functioning of the Court.

III

Structurally, the Statute consists of a preamble and 128 articles, grouped systematically in three parts. Within this wide-ranging whole, a number of more significant aspects should be given special mention.

The Court begins its work as an institution that is independent, yet linked to the United Nations system, endowed with an international personality, and with the legal capacity necessary for the fulfilment of its functions. It shall be established at The Hague.

In keeping with the principle of complementarity, the Court does not replace national criminal jurisdictions. The jurisdiction of the Court shall be exercised solely on a subsidiary basis, whenever the competent State is not willing to prosecute certain crimes, or is unable to do so effectively.

It is important to note that the Court is not competent to prosecute States, but individuals. Nor does the Court have the competence to prosecute isolated crimes, but rather grave violations of international humanitarian law, committed on an extensive or continuous basis, in a given situation.

With respect to the material competence of the Court, the Statute limits the said competence to the most serious crimes of concern to the international community as a whole, such as genocide, crimes against humanity, war crimes and aggression. The first three categories of crime are set out in the Statute itself, in keeping with the most recent trends in international criminal law. Provision is made for the drafting, at a later date, of an instrument called the Elements of Crimes, which will specify the above criminal categories in greater detail, with the aim of helping the Court to interpret and apply those precepts. With regard to the crime of aggression, the competence of the Court shall be deferred until, after the expiry of at least seven years from the entry into force of the Statute, a Review Conference shall adopt a provision defining the said crime, by a specially defined majority, and shall regulate the modalities by which the Court may exercise its competence with regard to the same.

The jurisdiction of the Court shall be mandatory for States parties, which automatically accept the Court's jurisdiction with the very act of ratifying or acceding to the Statute. The jurisdiction of the Court may also extend to other States not party to the Statute, when such States have accepted the Court's competence in cases where a crime is committed on their territory or is committed by nationals of the said States, or when the Security Council rules to that effect under the powers accorded to it within the terms of Chapter VII of the Charter of the United Nations. With regard to the temporal parameters of the Court's competence, the Statute expressly states that it shall not have retroactive powers.

Only the Prosecutor may initiate criminal action, once the mechanism for activating the Court has been set in motion. It may do so in one of three ways: at the initiative of a State party; at the initiative of the Security Council; or at the initiative of the Prosecutor, provided that authority has been granted by the Pre-Trial Chamber. However, in order to ensure that the Court shall act solely in those cases in which internal jurisdictional bodies cannot or do not wish to act, the Statute recognizes that the State having jurisdiction over the crime has broad powers to recommend disqualification of the Prosecutor and to challenge the competence of the Court or the admissibility of the action, with the sole exception of those actions in which the case has been sent to the Court by the Security Council. In such cases, it is understood that

the prevailing interests are those of the international community, on behalf of which the Council acts, with justice being sought through the Council, as a way to restore international peace and security in a certain situation. For the same reason, the Statute recognizes the Security Council's extraordinary power to recommend suspension of the Court's actions with regard to a specific situation if the Security Council considers such action necessary in the interests of international peace and security.

As a complement to the rules governing competence and procedures, the Statute includes a series of general principles of criminal law, which are intended to guide the actions of the Court: *nullum crimen sine lege*; *nulla poena sine lege*; non-retroactivity *rationae personae*; individual criminal responsibility; exclusion of jurisdiction over persons under 18; irrelevance of official capacity; responsibility of commanders and other superiors; non-applicability of statute of limitations; mental element; grounds for excluding criminal responsibility; mistake of fact or mistake of law; and superior orders and prescription of law.

Organically speaking, the divisions of the Court, whose official languages are the same as those of the United Nations (Arabic, Chinese, French, English and Russian), are as follows: Presidency, Sections, Prosecutor's Office and Secretariat.

Also, as well as the judicial bodies and the Secretariat, the Statute accords significant powers to an Assembly of States Parties. The Assembly's tasks shall include the adoption of instruments for the development of the Statute and for any reforms that may need to be made to the Statute, for the election of judges and prosecutors, for the approval of the Court's budget and for the rules governing implementation of the budget, for the supervision of administrative and financial management, as well as for the management of the Court's relationship with the United Nations and other international bodies, and for ensuring that States cooperate effectively with the Court when the latter requests their collaboration.

With regard to the structure and development of trials, the Court will utilize a combination of procedures from Anglo-Saxon law and continental law. It will also make use of the experiences of the existing ad hoc International Tribunals. The Statute provides for a system of dual authority, once the preliminary phase is concluded.

As far as penalties are concerned, the Statute provides that the Court may impose on a person convicted of a crime a sentence of imprisonment for a specified number of years, which may not exceed a maximum of 30 years, or, in exceptional cases, a term of life imprisonment, when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. The Court may also order fines, as well as the forfeiture of proceeds and assets deriving from the crime, without prejudice to the rights of bona fide third parties. Prison sentences will be served in a State designated by the Court, in each case, based on a list of States having declared their willingness to accept convicted individuals in their penal institutions (a willingness that may be subject to certain conditions).

Lastly, the Statute regulates the obligation of States parties to provide international cooperation and legal assistance to the Court, therein contemplating three main forms of cooperation: surrender of persons to the Court; international legal assistance regarding the provision of documents, the taking of evidence etc.; and the application of the Court's judgements, in their various aspects. In the event that States parties shall fail to cooperate, the Court may bring the matter to the attention of the Assembly of States Parties, or to that of the Security Council, if the case was referred by the latter.

IV

Unlike the International Tribunals for the former Yugoslavia and Rwanda, which were both created under a resolution of the United Nations Security Council, under Chapter VIII of the Charter of the United Nations, the International Criminal Court is based on a convention—namely, the multilateral treaty known as the Rome Statute, signed under the auspices of the United Nations.

As provided for in the Statute itself, under the terms of its final clauses, the treaty is open for signature by all States and is subject to ratification, acceptance or approval by signatory States, as well as to the accession of any other State. For the Statute to enter into force, 60 instruments of ratification, acceptance, approval or accession must be deposited. The requirement for this number of States to act together reflects a manifest desire to endow the new Court with sufficient support and legitimacy for it to act effectively on behalf of the international community.

In Spain, Parliament has on a number of occasions demonstrated its clear support for the process of drafting the Statute. One notable action in this context was Parliament's approval of a broad motion in the Foreign Affairs Committee of the Congress of Deputies, dated 24 June 1998, in which specific guidelines were determined for negotiations by the Spanish delegation. Our country ultimately signed the Rome Statute on 18 July 1998.

V

To sum up, the contents of the Rome Statute embrace all the organic, functional and procedural aspects of the International Criminal Court, such as the scope of its jurisdiction. The Statute thus represents a new, independent instrument, which is of unprecedented significance for the international legal order. The effect of the present Organic Law is to authorize the State to give its consent to ratification of the Statute, in accordance with the provisions of article 93 of the Constitution. This authorization is expressed in the sole article included in the Law, which is accompanied by a statement expressing Spain's willingness to accept persons convicted by the Court in our country's penal institutions, provided that the duration of the prison sentence imposed does not exceed the maximum allowed under our legislation. This declaration is expressly permitted under article 103 of the Statute, and is also required under the terms of article 25.2 of the Constitution, which requires that punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration of the convicted individual.

Finally, by ratifying the Statute, which is authorized by this Organic Law, Spain takes its place among those countries that, by participating in the process of setting up the new Court and drafting the mandatory instruments of development, will make an initial contribution to the establishment of a more just international order, based on the defence of basic human rights. Active participation in the creation of the International Criminal Court thus offers a historic opportunity to reiterate the firm conviction that the dignity of the individual person and the inalienable rights inherent in that dignity constitute the only possible basis upon which people may live together in any political, state or international structure.

Sole article

Ratification of the Rome Statute of the International Criminal Court, signed by Spain on 18 July 1998, is hereby authorized.

Sole additional provision

In accordance with the provisions of article 103, paragraph 1 (*b*), of the Statute, permission is given for formulation of the following statement:

> "Spain declares that it is willing, in due course, to receive persons convicted by the International Criminal Court, provided that the duration of the penalty imposed shall not exceed the highest maximum provided in the case of any crime under Spanish law."

Sole final provision

The present Organic Law shall enter into force on the day following its publication in the Official State Journal.

I therefore decree that all Spanish citizens—individuals and authorities—shall observe and enforce this Organic Law.

Madrid, 4 October 2000

KING JUAN CARLOS

President of the Government
José María AZNAR LÓPEZ

NOTES

[1] Text transmitted by the Permanent Mission of Spain to the United Nations in a note dated 15 May 2001.