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FOURTH
CONSULTATION
ON
THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE
RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL
COURT
PROGRESS REPORT
SPAIN

Council of Europe, Athens (Greece)
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Progress Report

1.- After Spain's ratification of the Statute of the International Criminal Court (ICC), significant legislative changes have been made in order to adapt the Spanish legal system to the Rome Statute, to ensure that the latter is fully operational within Spanish law and that Spain may comply with its international obligations and commitments undertaken with respect to the ICC.

This process, which has already been discussed in previous Consultations, was addressed in 2003 by the passing of two Organic Acts referring, respectively, to the amendment of the Criminal Code and to cooperation with the ICC. The text of the two laws has been communicated to the Council of Europe for their incorporation into the legislation database of the Consultations on the International Criminal Court.

In addition, the process has been initiated to proceed to the ratification of the Convention on Privileges and Immunities of the ICC.

1.- Organic Act 15/2003, of 25 November, to amend Organic Act 10/1995, of 23 November, on the Criminal Code. (Official State Gazette, No. 283, of 26 November 2003; correction of errata in Official State Gazette, No. 65 of 16 March 2004 and Official State Gazette, No. 80 of 2 April 2004).

2.- The general reform of the Criminal Code, carried out in 2002 and 2003, made various amendments to accommodate it to the Rome Statute, both as regards the inclusion of new definitions of criminal offences, as described in the Statute, or related to it, and to adjust Spanish legislation to conform to certain principles of criminal law contained in the Statute. These amendments are located in Titles VII, XX, XXII and XXIV of the Criminal Code.

3.- The 1995 Criminal Code already defined a considerable number of criminal offences corresponding to those included in the Rome Statute, especially as concerns war crimes and some offences classified in the Statute as crimes against humanity. With the amendment of Title XXII ("Offences against public order") and, especially, of Title XXIV ("Offences against the International Community"), the catalogue of offences has been updated to incorporate new criminal offences that correspond to war crimes defined in Article 8 of the Statute, with particular reference to prohibited weapons (Art. 566); the prohibition of the order to give no quarter (Art. 610); the illegal, forced detention of civilians (Art. 611); the protection of certain cultural goods (Art. 613); hospitals, installations and materials protected by distinguishing marks (Art. 612); and violence against persons protected by distinguishing marks (Art. 612). In addition, UN personnel carrying out peacekeeping operations, together with associated personnel, are incorporated into the category of protected persons, in order to adjust the Code to correspond to the new criminal classification described in the Statute, in the conception and creation of which Spain played a significant role (Art. 607).

Above all, the 2003 reform had the effect of including a new Chapter II b (Art. 607b), which is intended to regulate the category of crimes against humanity, in a separate, independent and systematic way; this constitutes a notable change in the Spanish legal framework.

4.- Secondly, it should be stressed that Title XX of the Criminal Code, regulating "Offences against the administration of justice", has also been amended to incorporate a new Chapter IX dedicated specifically to "offences against the administration of justice by the International Criminal Court" (Art. 471b), thus fulfilling the requirements of Art. 70.4.a) of the Rome Statute.

5.- Finally, the 2003 reform also introduced modifications concerning the general principles of criminal law contained in the Statute. In this respect, special mention should be made of the reinforcement of the principle of the non-applicability of any statute of limitations to the international crimes regulated by the Rome Statute (Art. 131.4), which was complemented by the non-applicability of any statute of limitations to the sentences handed down in response to the

commission of such offences (Art. 133.2). Other features of the 2003 reform were the inclusion of the principle of responsibility of commanders and other superiors (Art. 615b); of the principle of the impossibility of alleging obedience to a legal order, with respect to genocide and crimes against humanity (Art. 616b); and the incorporation of a new aggravating circumstance to criminal responsibility applicable to war crimes when the latter are committed as part of a plan or policy or are committed on a large scale (Art. 614b).

II.- Organic Act 18/2003, of 10 December, on cooperation with the International Criminal Court (Official State Gazette No. 296, of 11 December 2004).

6.- The Organic Act on Cooperation with the International Criminal Court addressed all the measures considered necessary concerning the Spanish legal system in order to facilitate Spain's fulfilment of the general obligation to cooperate with the ICC, as set out in Article 86 of the Rome Statute. In particular, this was done by establishing internal procedures to make the latter possible (Art. 88 of the Statute). In addition, Organic Act 18/2003 included clauses regulating Spain's participation in the process of activating and exercising the ICC's jurisdiction, including, logically the rules concerning complementarity.

This broad approach of the Organic Act on Cooperation with the ICC is also reflected in the definition of the competent authorities and bodies for its application which, in accordance with the provisions of Article 4 of this Act, are as follows: the Government, the Ministry of Justice, the Ministry of Foreign Affairs and Cooperation, the Ministry of Defence, the Ministry for Interior Affairs, the courts of law of the ordinary jurisdiction, especially the *Audiencia Nacional* (National High Court), and the martial courts, especially the Central Military Court. Each of these authorities and bodies will adopt the relevant measures for cooperation with the ICC in the context of their respective areas of competence and in accordance with the stipulations set out in the Organic Act.

7.- As regards cooperation, *sensu stricto*, the Act establishes the obligation to cooperate in a broad sense, regulating both international judicial cooperation and assistance, on the one hand (Arts. 11-21), and cooperation concerning execution of the sentences imposed by the Court, on the other (Arts. 22 and 23); an important aspect is the creation of internal procedures concerning requests for the surrender of the person claimed and for the appearance of technical experts and witnesses.

The Act also defines the legal bodies that are empowered to implement requests for cooperation (in particular, the *Audiencia Nacional*, for the surrender of persons to other countries, and all the judicial bodies for other forms of cooperation) and the authority responsible for communication and consultation with the ICC for the purposes of cooperation (the Ministry of Justice, without prejudice to the competences pertaining to the Ministry of Foreign Affairs and Cooperation). In this respect, let us note that cooperation basically corresponds to judicial parameters, especially judicial assistance, with the participation of the Executive in processes of cooperation having been reduced to the bare minimum.

8.- As regards Spain's participation in the process of initiating a procedure before the ICC, the Organic Act grants the Government the power to decide on referring a situation to the ICC Prosecutor, and also to adopt other decisions in this respect (Art. 7.1). These decisions are to be adopted by the Council of Ministers acting collegiately, at the joint proposal of the Ministry of Foreign Affairs and Cooperation and of the Ministry of Justice. Thus, Spain has decided that its model for initiating activities within the jurisdiction of the ICC shall be based upon the Executive, thus making it possible to take into consideration both the legal requirements set out in the Rome Statute and the diverse variables of foreign policy that need to be assessed by the body that is constitutionally responsible for foreign policy.

9.- Together with the mechanism for initiating activities within the jurisdiction of the ICC, and in order to ensure the correct application of the principle of complementarity, Organic Act 18/2003 establishes a set of mechanisms intended to mitigate any possible jurisdictional conflict between

the ICC and the Spanish courts (Arts. 8-10). Following a parallel model with the system for initiating activities, in this second ambit, too, the Government is empowered to request the abstention of the ICC Prosecutor and to challenge the competence of the ICC or to determine the inadmissibility of a trial; the Government shall take such decisions in the same way and in accordance with the same procedures as described above for initiating activities.

The aim of the Government's intervention shall be to safeguard the jurisdiction of the Spanish courts. Notwithstanding this, such an aim is not defined in absolute, discretionary terms. On the contrary, the Organic Act subjects the exercise of this competence to two basic rules:

- i) The Government must always uphold the competence of the Spanish courts in the initial phase of the investigation carried out by the Prosecutor. On the contrary, when the ICC has ruled on the question of its own competence, the Government shall enjoy a margin of discretionality to decide whether or not to challenge the competence of the ICC or the admissibility of the trial. Be that as it may, the exercise of the Government's powers is limited by the stipulations of the Rome Statute.
- ii) The jurisdictional parameters to be taken into account by the Government when taking its decision are the territoriality of the crime and the nationality of the alleged author of the acts, that is, the two jurisdictional considerations set out in the Rome Statute.

10.- Finally, it should be noted that this regulation of the Government's competence concerning the inhibition of or challenge to the jurisdiction of the ICC is complemented by a provision addressed directly to the Courts, the Public Prosecution Office and other authorities of the Public Administration that may receive complaints, statements or diverse requests concerning facts that may constitute crimes falling within the competence of the ICC.

Thus, by virtue of the provisions of Art. 7.2, when a judicial body, the Public Prosecution Office or a Ministerial department receives a communication presenting the above characteristics, it shall exercise the competences pertaining to it under Spanish legislation and proceed with respect to such a communication only if the acts it refers to took place in Spain or if the alleged author is a Spanish national. In all other cases in which the Spanish authorities are informed of a crime that falls within the competence of the ICC, and that does not lie within the above mentioned categories, the Public Prosecution Office or the administrative bodies shall abstain from proceeding and merely inform the author of the report, complaint or request of the possibility of addressing a communication to the ICC Prosecutor.

Neither shall the Public Prosecution Office or the courts act *ex officio* when they have knowledge of crimes that may fall within the competence of the ICC if such crimes have not been committed in Spain or by a Spanish national.

Thus, in the case of crimes falling within the competence of the ICC, Spanish legislation has amended the scope of the principle of universal jurisdiction set out for the Spanish legal system under the Organic Act on the Judiciary. However, it should be noted that this amendment of universal jurisdiction is defined as temporary and that it could operate, as needs be, as a mere "suspension" of Spanish jurisdiction if the ICC does not exercise its own. In this sense, it is noteworthy that Art. 7.3 of the Organic Act on Cooperation with the ICC expressly states that if the ICC Prosecutor does not initiate an investigation related to the facts that have been reported, or if the ICC determines the inadmissibility of the matter, the report, complaint or request may be resubmitted to the competent Spanish authorities, which thus recover their full jurisdiction and competence.