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ON

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

PROGRESS REPORT
ALBANIA

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Progress Report

The Rome Statute for the International Criminal Court is an important international treaty, which requires careful considerations from the States Parties in order to be able to comply with its requirements. This is mainly an issue related to the relation between national and international law and depends on the criteria adopted by the national legal systems.

Albania is one of the countries, which for the most part belongs to the civil law system, the international treaties ratified by the legislative bodies become part of the national legal system, without being subject to any mandatory implementing legislation. According to the Constitution: the Republic of Albania applies international law that is binding upon it. The main sources of international law, which are binding, are customary international law and the international treaties of which Albania is a party. As regards the later, there is a specific article in the Constitution, which states: Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires enactment of a law. This means that the Rome Statute on the ICC, ratified by the Law no.8994, of December 23, 2002 is part of the Albanian legal system and has superiority over the laws of the country that are not compatible with it.

However the treaty establishing the ICC requires the cooperation of States Parties in order to accomplish its main goal: the punishment of the perpetrators of the most serious crimes of international concern and thus contributing to the prevention of these crimes. So it is essential for the States to have effective legal mechanism in place in order to be able to fulfill their obligations under these Statute provisions.

The most Important Aspects of Implementation

Implementing the Rome Statute on the ICC might be a rather complicated task. The Statute represents an instrument where the main elements of the substantive and procedural criminal law are included, obtained by different legal systems. Despite this fact they include the basic criminal justice principles, already incorporated in all developed legal systems and international human rights instruments as well.

The issue of the implementation can be discussed in two aspects.

1 The first one relates to the incorporation of the crimes over which the Court exercises its jurisdiction namely: genocide, crimes against humanity, war crimes and the necessary criminal procedures to prosecute these crimes. Even though there is not a clear and explicit clause in the Statute that obligates the State Parties to incorporate the crimes and their elements as they are embodied in the Statute, it is implied first to the preamble and the complementary nature of the Court.

Secondly, this obligation becomes logical considering the complementary character of the ICC. Its role is to intervene and start proceedings in cases when States are unable or unwilling to carry out investigation and prosecutions. The absence of any reference in the criminal law of the crimes of the Statute and lack of available criminal procedures to prosecute the crimes could be a clear example of unwillingness and thus entitles the Court to act. This is the most important incentive for the State parties to incorporate the crimes of the Statute in their national legislation.

In the case of Albania, the crimes of the Rome Statute were introduced in the new Penal Code adopted in 1995 (this issue will be discussed further on).

2 The second aspect of the implementation process, which might be considered as the most important, is the adoption of the legislation, which will enable the State Parties to fulfill the obligation of cooperating and giving assistance to the Court in performing its tasks. "It follows from

the foregoing that the provisions in the Rome Statute creating a legal framework for the international cooperation and judicial assistance will be of vital importance to the proper functioning of the newly established International Criminal Court. This will largely determine whether or not that Court will be able to achieve what it is supposed to achieve."

In fact, many States Parties in order to be able to fully cooperate with the Court have adopted different forms of cooperation legislation, including the substantive part of the ICC Statute and the provisions dealing with the cooperation and judicial assistance as well. Many countries from different regions did already passed the necessary laws prior or after the ratification and are fully able to cooperate with the Court for any specific matter included in the Statute.

The Case of Albania regarding the Implementing Legislation

Albania due to the options offered by its constitutional system ratified the Rome Statute on the ICC without primarily adopting any implementing legislation. The Decision no.186, of August 23, 2002 of the Constitutional Court found it compatible with the constitution and according to article 122 (1) it has become part of the Albanian legal system, ranked after the Constitution in the hierarchical legal order. Besides, whenever there is a conflict between any ratified international agreement and the national law, the former shall prevail.

As it has been pointed out, the Statute's provisions are applicable directly in the territory and in the national courts and they are superior to the national laws, which might conflict with them. This has been one of the reasons why the adoption of an implementing legislation was not considered a priority. The authorities involved in the process of ratification, mainly the Ministry of Foreign Affairs and the Ministry of Justice, after the Constitutional Court ruled that it did not conflict with the Constitution, reflected on its compatibility with the existing laws and acts in force in the territory of the Republic of Albania. It specified that there were not any major conflicts with the national laws on human rights and criminal area. Furthermore, the report prepared by the two mentioned institutions on the law "For the ratification of the Rome Statute for the ICC", approved by the Government of the Republic of Albania and submitted to the Parliament, concluded that it is important to proceed with the assessment of the existing legislation and possibly drafting an implementing legislation.

Article 122 (1) of the Constitution states: A ratified international agreement is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. This article is the legal basis for the adoption of implementing legislations or any other legal act related to the ICC. "Not all the key provisions in the Rome Statute are considered as self-executing in all jurisdictions, and the detail required for the effective fulfillment of some of the self-executing provisions is simply not provided for under the Statute itself." Even though some of the provisions of the Rome Statute might be considered self-executing, important parts of it such as the procedures for the States cooperation, including arresting and surrendering, offences against the administration of justice of the ICC, enforcement of the sentences to a certain extend need to be incorporated in the national legal system in order to make them effective.

Incorporating the ICC Crimes

As regards the substantial criminal law, the Albanian Penal Code of 1995 in its first Chapter of the Special Part incorporates the three core crimes of the Rome Statute:

a. Genocide

Article 73 on the "Genocide" defines it as: The execution of a premeditated plan aiming at the total or partial destruction of a national, ethnic, racial or religious group directed towards its members, and combined with the following acts, such as: intentionally killing the group members, serious physical and psychological harm, placement in difficult living conditions which cause physical destruction, applying birth preventing measures, as well as the obligatory transfer of children from

one group to another, is sentenced with no less than ten years of imprisonment, or with life imprisonment, or the death penalty.

This definition is verv similar to that of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 and the Rome Statute for the International Criminal Court. The difference consists on the fact that the Albanian Code considers the commission of the crime as the corollary of the execution of a premeditated plan while in the two others international instruments this connection is not required. Anyway this formulation is not totally inconsistent with the ICC documents, as in the Elements of Crimes, adopted by the Assembly of the State Parties there is accepted to a certain degree a similar position in this respect considering the conduct as taking place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Nevertheless, it is important that the formulation of the crime of genocide in the Albanian Criminal Code to be revised and amended in accordance with the genocide Convention and the ICC Statute.

b. Crimes against humanity

The Albanian Criminal Code in its Article 74 defines "crimes against humanity" as "Murders, massacres, slavery, internal exile and deportation, as well as every act of torture or other inhuman violence committed according to a concrete pre-meditated plan against a group of civil population, for political, ideological, racial, ethnic, and religious reasons, is punished by not less than fifteen years of imprisonment or with life imprisonment". This definition, even though it corresponds to a certain extend to article 7 of the ICC Statute, is quite limited in different aspects. It is more detailed even than the related provisions in Nuremberg and Tokyo Charters and in the Statutes of ICTY and ICTR.

"Although the definition in the ICC Statute is more detailed than previous definitions, it generally seems to reflect most of the positive developments identified in recent authorities. For example the definition does not require any nexus to armed conflicts, does not require proof to any discriminatory motive, or and recognizes the crime of apartheid and enforced disappearance as inhumane acts."

In the Albanian Code the commission of the crimes is not conditioned to the existence of any armed conflict. But on the other hand, it is based on discriminatory grounds and does not include several elements of crimes such as sexual offences, the crime of apartheid etc. It is true that the expression "other inhumane violence", when interpreted by the Courts may include these elements, but it still remains too general. These differences make the amendment of Article 74 a necessity in order to harmonize it with the ICC definition.

c. War crimes

Article 75 of the Albanian Criminal Code, based on the International Humanitarian Law and especially in the Geneva Conventions of 1948 defines the war crimes as: Acts committed by different people in war time such as murder, maltreatment or deportation for slave labor, as well as any other inhuman exploitation to the detriment of civil population or in occupied territory, the killing or maltreatment of war prisoners, the killing of hostages, destruction of private or public property, destruction of towns, commons or villages, which are not ordained from military necessity, are sentenced with no less than fifteen years of imprisonment, or life imprisonment.

In fact, the Rome Statute goes beyond the Geneva Conventions, including elements of the additional protocols; expanding the provisions on internal conflicts further than the definitions in common article 3 etc.

General principles of criminal law

Part 3 of the Rome Statute contains provisions on general principles of criminal law, such as *nullum crimen sine lege*, *nulla poena sine lege*, non-retroactivity *ratione personae*, individual criminal responsibility, exclusion of jurisdiction over persons under eighteen, irrelevance of officials capacity, responsibility of commanders and other superiors, non-applicability of statute of limitations, mental element, defenses, mistake of fact or mistake of law, superior orders and prescription of law. In other parts you can find other important principles such as presumption of innocence, right of the accused etc.

Article 1/a of the Albanian Criminal Code as amended states: The Criminal Code is based on the Constitution of the Republic of Albania, general principles of international criminal law, and international treaties ratified by the Albanian State. In this framework most of the principles of the Rome Statute, which are considered as general principles of international criminal law, apart from being incorporated in the Albanian legislation are also applicable by virtue of the Albanian Constitution and the previous provision. The most important principles are found both in the Constitution and Criminal Law, such as the nullum crimen sine lege, nulla poena sine lege, the right of the application of the most favorable law, individual criminal responsibility etc. According to Article 67 of the Criminal Code: There is no prescription for the criminal prosecution against war crimes and crimes against humanity.

The Cooperation Regime

The issue of adopting an implementing legislation for the cooperation with the International Criminal Court remains the main priority for Albania. This obligation derives first of all by the Article 86 of the Rome Statute according to which, the States Parties should cooperate fully with the Court in its investigation and prosecution of the crimes within the jurisdiction of the Court. This means that the necessary legal instruments should be adopt to make it possible to cooperate with the Court whenever it is required.

The cooperation regime with the ICC could be considered in the framework of the existing regime on International Cooperation and Judicial Assistance. Albania has a developed system regarding the inter States judicial cooperation and the extradition procedures. The Albanian Criminal Procedure Code devotes its Title X to the jurisdictional relations with foreign authorities. This Title is composed of several Chapters dealing with the extradition, judicial cooperation, execution and enforcement of sentences etc. Currently the Ministry of Justice is working on drafting a law on Judicial International Cooperation in Criminal Matters that will widen the scope of the Criminal Code addressing the latest developments in this respect. Anyway the draft law refers only to the inter-State cooperation between Albania and other States, based on the bilateral and multilateral international agreements to which Albania is a party and on the reciprocity principle.

The fact that the cooperation with the ICC is not included in this draft law might lead to the conclusion that the project is to adopt a distinctive act dealing exclusively with the cooperation with ICC. In the Bltaškić subpoena decision, the ICTY Appeals Chamber elaborated on the nature of the relationship between the States and the ICTY with regard to cooperation. "It distinguishes the relationship that exists between the national courts of different States, which in its view is horizontal in nature from the "vertical" relationship between states and the ICTY. The question arises as to whether the system of cooperation adopted in Part 9 of the Statute has more in common with the interstate or the supranational model of cooperation... the final outcome of these discussions is that Part 9 of the Statute contains essential elements of both models."

Requests for Cooperation and Assistance

Part 9 of the Statute contains different provisions related to different aspects of cooperation, such as the procedures to submit requests, the channels for transmitting requests, the content of the requests, the execution of the requests, their confidentiality, etc. State Parties must comply with all

the requests and follow the prescribed procedures on the Statute on how to act in accordance with its requirements.

The law on cooperation with the ICC that Albania should adopt has to contain firstly, the channel of transmitting the requests for cooperation, the authority designated to deal with the communication with the Court and the languages of communication. In fact, it has already been communicated to the Court that the authority in question is the Ministry of Justice and the documents will be transmitted in one of the working languages of the Court, accompanied by the translation in Albanian.

Attention should be given to the communications with the Court in urgent cases as provided by Article 99 and the possibility of the Prosecutor to execute such requests directly on the territory of the country, in case when the crime is alleged to have been committed in the territory of Albania and it has been a determination of admissibility pursuant to article 18, or 19. Finally, provisions related to the costs of executing the request should be introduced, as Article 100 provides that the ordinary costs for execution of requests in the territory of the requested State shall be born by the that State.

In fact, most of these elements are already present in the Albanian legal system, but they are applicable to the inter-States judicial cooperation. Title X, Chapter 2 of the Albanian Code of Criminal Procedure contains provisions on the procedures to be followed in cases of application from a foreign authority regarding communications, notifications and the taking of evidences. It provides for the channels of communications, the grounds for prohibiting the execution of such requests, the necessary Court proceedings etc. The draft law on the International Judicial Cooperation in Criminal Matters, which has not yet been approved, provides many details on the procedural aspects of this communication.

Arrest and surrender

The participation of the States Parties on the arrests and surrender of the persons suspected to have committed one of the crimes within the jurisdiction of the Court remains certainly the most important aspect of the State's cooperation. It is crucial because the Court lacks any special institution such as a police force, which could exercise this function. And even if it had one, it would be difficult to challenge the States territorial sovereignty. There are several provisions in the Statute, apart from part 9 providing for the procedures to be followed.

The Albanian Constitution allows for the extradition of its own nationals only on the bases of an international agreement, to which it is a party, and only through a judicial decision. The Criminal Procedures Code provides in details the procedures to be followed in the case of a request for extradition from another country with which Albania has concluded a bilateral agreement. It includes the documents required to accompany a request for extradition, the conditions upon which the extradition is possible, the grounds for refusing the extradition, the action of the prosecutor, the procedures for provisional arrest, the court proceedings etc.

Consequently the procedures introduced by the ICC are not unusual either for the Albanian legislation or legal authorities, which have been examining several cases of extradition in the past years. But as underlined in the Statute, in the case of the ICC a distinction is made between extradition and surrender in order to allow the participation of countries, which do not permit the extradition of their nationals to other states. However the principles that apply are in general the same.

The basic provisions in the Statute are found in Part 9. There are three means by which the ICC can seek to have a person brought before the Court:

1. Issuing an arrest warrant in accordance with articles 58, 89, & 91;

- 2. Issuing a provisional arrest warrant in accordance with article 58, paragraph (5) and article 92, in urgent cases where the required supporting documentation is not yet available; and
- 3. Issuing a summons in accordance with article 58, paragraph (7), where the Pre-Trial Chamber is satisfied that a summons is sufficient to ensure the person's appearance.

States are required to respond promptly to all requests to execute such warrants and to serve such summons in their territory (article 59, paragraph (1), and article 89). This means that the Albanian legislation should provide the necessary procedures to be able to comply with a Court's request for provisional arrest, arrest and surrender. In the mean time, the person should be brought promptly before the competent judicial authority, which only determines that the warrant applies to that person, the person has been arrested in accordance with the proper process and the person's rights have been respected.

Furthermore, special attention has to be given to the grounds for refusal. There are no grounds for refusal according to the Statute, as it provides for the highest standards governing a criminal process. This provision makes it distinct from a normal extradition procedure, which according to the Albanian legislation requires a careful consideration of the request of extradition and renders a decision in favor when it possesses important data on the guilt. In addition there are several conditions and grounds for refusing a request for extradition. On the other hand, the Statute is very clear specifying that the custodial State has no authority to consider the legality of an warrant of arrest.

Finally, the issue of the postponement of a request for surrender has to be considered. There are two situations in which a request can be postponed: firstly when the request interferes with an ongoing investigation of a case different from that to which the request relates and when the person brings a challenge before the national court on the basis of the principle of *ne bis in idem*. In both cases the requested State should consult with the Court before reaching to any decision. The procedures on how to deal with this situation and the consultation with the Court are very important and have to be introduced in the Albanian law.

Other forms of cooperation (Article 93)

Article 93 of the Rome Statute deals with a wide range of other forms of cooperation with the Court such as: the identification and whereabouts of persons or the location of items; the taking of evidence; the questioning of any person being investigated or prosecuted; the temporary transfer of persons as provided in paragraph 7; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the provision of records and documents, including official records and documents; the protection of victims and witnesses and the preservation of evidence; the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture etc.

These are elements that fall under the international judicial cooperation regime. In fact the Albanian Criminal Procedure Code provides in general the procedures to be undertaken in cases when there is a request for cooperation, without specifying in details what kind of requests could be considered. It is left to the judicial authorities to determine whether to comply with a specific demand, probably based on the provisions of bilateral agreements on "Judicial Cooperation", if concluded with the requesting State. In fact the draft law on the International Judicial Cooperation in Criminal Matters tries to comprise these elements and it is quite similar to the forms of cooperation provided in the Statute.

Offences against the administration of justice

Article 70 of the Rome Statute is a very interesting provision, which gives the Court the right to exercise its jurisdiction over offences other than the crimes provided in Article 5. They are offences against the administration of justice, dealing with false testimony; presenting evidence that the

party knows is false or forged; corruptly influencing a witness; impeding, intimidating or corruptly influencing an official of the Court; retaliating against an official of the Court; soliciting or accepting a bribe as an official of the Court in connection with his or her official duties etc.

The Court will be able itself to investigate and prosecute these offences, based on the principles and procedures provided for in the Rules of Procedure and Evidence. But in the frame of the complementarity principle, the Statute obliges the State Parties to penalize such offenses under their criminal systems as well, when committed against the integrity of their own investigative or judicial process. This could not be considered a problem as most of the advanced national criminal systems provide for offences against the administration of justice in their own criminal laws. The Albanian Criminal Code in its Chapter IX includes around 25 crimes and offences against justice, including all the offences contained in article 70 of the Rome Statute.

What has to be implemented from this Article and which is an expressed obligation deriving from the Statute is paragraph 4, subparagraph (b), according to which upon the request by the Court, whenever it deems proper, the State party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively. What this article implies is that the Court might ask any of the State Parties to prosecute any of these offences when committed against the administration of the justice by the ICC.

In order to be able to prosecute these offences committed against the Court by the Albanian judicial authorities it is necessary to include a specific provision in the implementing legislation.

RATIFICATION OF THE PRIVILEGES AND IMMUNITIES AGREEMENT OF THE INTERNATIONAL CRIMINAL COURT

Albania is a party of the Agreement from September 1, 2006.