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

LES IMPLICATIONS POUR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE DE LA RATIFICATION DU STATUT DE ROME DE LA COUR PENALE INTERNATIONALE

PROGRESS REPORT BY ESTONIA AND APPENDICES

The Rome Statute ratification process

The Ministries of Foreign Affairs and Justice are working on the implementation legislation and before the Statute will be debated in the Parliament, it will be submitted to the Government for approval. The schedule is planned as follows: the Statute and ratification legislation shall be submitted to the Government by the end of July and it should be in the Parliament for ratification at the beginning of the autumn session – in September. We expect the ratification process to be finished by the end of this year.

Surrender of persons to the ICC

It might be stated that Estonia is in a better position than some other countries since the Constitution of Estonia does not prohibit the extradition of nationals. The Constitution of Estonia provides that an Estonian national shall be extradited to a foreign state only under conditions prescribed by an international treaty and extradition shall be decided by the Government of Estonia. As the Constitution does not say anything about the surrendering to international courts – which are independent international subjects – it may be concluded through analogy that the Constitution allows the surrender of nationals to the Court. This reasoning can be justified by the fact that the ICC provides for a large number of procedural safeguards and the excuses for refusal used in case of extradition cannot be invoked.

The draft ratification act¹ of the Rome Statute prescribes that the surrendering of nationals to International Criminal Court shall take place according to the same procedure as for extradition.² According to the Estonian Code of Criminal Procedure³, the State Prosecutor's Office shall submit the case to a court which shall either support or shall not support the extradition – the latter ruling can be made only in case where the extradition is not legally justified. We do not see this as a threat to the surrender procedure because the possibility that the request of surrender by the ICC would be legally unjustified is minimal due to the fact that article 58(3) provides for sufficient information upon which to make a final decision of surrender. After the court has supported the extradition, it shall be decided by the Government of the Republic (in the case of Estonian citizens) or by the Minister of Justice (in the case of citizens of foreign states and stateless persons). It is evident that the named competent authorities shall take into account the distinct nature of the ICC as is requested by the Statute. The decision of extradition shall be sent to the Police Board for enforcement. The decision can be appealed. Since the current legal co-operation between Estonia and foreign states has been without complications we expect this practice to continue with the International Criminal Court as well.

The requirements or exceptions of extradition, i.e. double criminality, political offence, shall not be applied to the surrender procedure and shall not be an impediment because these conditions are not regulated in the Code of Criminal Procedure, but rather in the relevant extradition agreements (e.g. European Convention on Extradition). When a request to

¹ Produced in Appendix I to this Report.

² It must be noted that the practice with regard to extradition in Estonia has been very friendly towards requesting states – from the date of ratification of the European Convention on Extradition (27.07.1997) Estonia has granted extradition on all requests.

³ Draft Amendment produced in Appendix II to this Report.

surrender is submitted to Estonia, it shall be enforced under the procedural acts regulating extradition provided in the Code of Criminal Procedure.

Constitutional issues with reference to the ratification of the ICC Statute

Immunity provisions

According to article 27 of the ICC Statute, the Statute shall apply equally to all persons without any distinction based on official capacity and does not exclude the criminal responsibility of high state officials.

According to the Constitution of Estonia, criminal charges against the President, members of the Parliament (*Riigikogu*), members of the Government and some other high officials may be brought only on the proposal of the Legal Chancellor and with the consent of the majority of the membership of the Parliament. At first this may imply that the immunity provisions are in conflict with Article 27 and, due to the fact that the Constitution of Estonia prohibits the conclusion of international treaties that are in conflict with the Constitution (§ 123), at least in the year 1999, the ratification of the Statute was questionable. At the present moment, however, this interpretation is not dominant. Taking into account the practice of other states strong endeavours have been made to interpret the Statute more teleologically. It is clear that the *raison d'être* of the immunity provisions in the Constitution was not to provide shelter for the officials in case of commission of heinous crimes stated in the Statute, but rather to protect them from internal criminal prosecutions that might have a political background. The practice of the Parliament has so far been that in case there is strong evidence, the consent to bring criminal charges has been given. So it may be interpreted that when the ICC is entitled to exercise criminal jurisdiction against an official, the legal chancellor **must** make a proposal and the Parliament **must** give consent. The only conflict may arise when the Parliament does not give consent, but it is very unlikely because it is clear that Estonia is under an international legal obligation to criminalize these acts and bring charges against the perpetrators since the crimes enumerated are crimes under customary international law. The court has complementary jurisdiction – Estonia always has the possibility to exclude the exercise of jurisdiction by the ICC by commencing true criminal proceedings against the person itself. Moreover, Estonia has ratified the Genocide Convention, which also provides no exclusions due to immunity justifications.

Substantive criminal law issues⁴

Jurisdictional issues

In order to comply with the complementarity requirements, national systems must be able to enforce their primary jurisdiction. It is clear that if a State Party wishes to prosecute ICC crimes, it should enact legislation allowing it to exercise territorial jurisdiction over such crimes and extra-territorial crimes that are committed abroad. The Estonian Penal Code naturally provides territorial jurisdiction (§ 6 of the Penal Code). In addition it applies extraterritorially: in all cases, irrespective of the place of commission of the offence, when Estonia has concluded the appropriate international agreements undertaking to criminalize the

⁴ Under this section, the report is based on the new Penal Code, which was adopted on June 6, 2001 and shall enter into force in the beginning of next year. Relevant extracts from the Code are produced in Appendix III to this Report.

acts prescribed in the Agreements (§ 8), the Penal Code sets out universal jurisdiction. The relevant international agreements impose a legal duty on Estonia to investigate and prosecute certain criminal offences irrespective of the location of the commission of the crime and whether the act is criminally punishable in the place it was committed e.g. the four Geneva Conventions of the year 1949, the Genocide Convention of the year 1948. The Penal Code also provides passive personality and national jurisdiction.

Crimes listed under the Statute

Genocide

The genocide definition comes from the Genocide Convention article 2 and this definition is enacted in many criminal laws of various states (e.g. Germany StGB §220a). As a supplementary element the Code provides that groups resisting an occupying regime may also be regarded as a victim of the crime of genocide. Although the Genocide Convention does not provide for this type of group, the drafters have regarded it necessary to include it for reasons of historical experience. Prof Müllerson from London King's College among others has stated that he approves this broader definition and believes that genocide has a broader meaning in customary international law as well. Giving a broader meaning does not of course mean that it will be in conflict with international law.

Crimes against humanity

The wording of the Penal code is in conformity with Article 7 of the Rome Statute. The drafters of the code have been guided by Article 18 of ILC draft Code of Crimes against the Peace and Security of Mankind. The provision uses a more abstract wording, the phrases "unfounded deprivation of liberty" and "other wrongful treatment" enacted in the Penal Code should cover the acts not enumerated here compared to the ICC Article 7.

War crimes

The Penal Code provides a large number of war offences: military activities against the civilian population, illegal use of means of warfare against the civilian population, attacks against a prisoner of war and interned civilian, attacks against a protected person, use of prohibited weapons, attacking a non-military object, etc.⁵ An offence, which was committed during the time of war and is not prescribed in the war offences' division of the Penal Code, is punished under other provisions of the special part of the Penal code. A person who has committed an offence prescribed in the war offences division, can only be punished for the commission of a war crime even if the crime corresponds to other essential elements of an offence prescribed in the special part of the Code.

The defence of superior orders

The Penal Code does not provide the defence for superior orders as is prescribed in Article 33 paragraph 1 of the Rome Statute. The agent of state authority can be regarded as commander of civil authorities. Due to the novelty of the Penal Code, it entails the relevant provisions that deal with the concept of responsibility of commanders. It should be noted, as in conformity

⁵ The list of war offences shall be accompanied with the report in the extracts from the Penal Code.

with international law, the superiors are responsible for the commission of international crimes of their subordinates, not for all of their offences.

No statute of limitations

The Estonian Penal Code provides that statutory limitations do not apply to offences against humanity, war offences and offences that shall be punished for life imprisonment.

APPENDIX I*Draft***Rome Statute of International Criminal Court Ratification Act**

§ 1. To ratify Rome Statute of International Criminal Court, which was adopted July 17th, 1998 in Rome and was signed by the Republic of Estonia on December 27th, 1999.

§ 2. The Government of the Republic shall appoint a representative in the Assembly of States Parties according to the Rome Statute of International Criminal Court article 112.

§ 3. The request to surrender under the Rome Statute of International Criminal Court shall be executed according to provisions under Code of Criminal Procedure regulating extradition of a person to a foreign state.

APPENDIX II

Draft

Amendment Act to the Code of Criminal Procedure

With the ratification of the ICC Statute, the Code of Criminal Procedure will be amended as follows:⁶

Article 398 will be supplemented with a second paragraph:

“The requests for legal assistance with the International Criminal Court are adjudicated by the Public Prosecutor’s Office”⁷

Article 415 shall be added to the Code of Criminal Procedure:

“Article 415. Co-operation with the International Criminal Court

(1) The courts, prosecutors, and pre-trial investigators shall co-operate with the International Criminal Court pursuant to this Code and relevant international norms.

(2) Having received the request for the arrest, the Public Prosecutor’s Office shall arrange the arrest of the person named in the request pursuant to the procedure provided for in article 108¹ of this Code and taking into custody pursuant to the procedure provided for in article 73 of this Code.⁸

(3) The Prosecutor of the International Criminal Court shall have rights and duties of a prosecutor pursuant to this Code to perform procedural acts. The Prosecutor of the International Criminal Court shall perform procedural acts pursuant to the procedures of this Code.⁹

(4) If the request for legal assistance is in conflict with the request for legal assistance of a foreign state, the request shall be adjudicated pursuant to the procedure provided for in the international agreements.”

⁶ Unofficial translation. Draft prepared by the Estonian Ministry of Justice.

⁷ This paragraph is meant to follow article 87, paragraph 1 of the Rome Statute, according to the State must in case of ratification designate procedure of transmitting the requests of co-operation. According to the amendments, the Public Prosecutor’s Office shall adjudicate the request under articles 18, 53, 59, 87, 89, 91-99 of the Rome Statute.

⁸ This paragraph regulates the adjudication of requests for co-operation under articles 59 and 89 of the Rome Statute.

⁹ This paragraph specifies the authority of the Prosecutor of the ICC.

APPENDIX III

Relevant extracts from the PENAL CODE¹⁰

SPECIAL PART

Chapter 8

OFFENCES (CRIMES) AGAINST THE HUMANITY AND INTERNATIONAL SECURITY

Division 1

General provisions

§ 88 Punishment for the offence prescribed in this chapter

(1) In addition to the direct perpetrator of the offence prescribed in this chapter, the representative of state power or military authority who has given a command for committing an offence or under whose consent the offence has been committed or who has not prevented committing the offence although it has been in his or her power, shall be punished.

(2) Commitment of a crime prescribed in this chapter under a command of the representative of state power or military authority does not exclude punishment of the perpetrator of the crime.

Division 2

Offences against humanity

§ 89 Crime against humanity

Systematic or large scale deprivation or delimitation of human rights and freedoms, also the killing, torture, rape, causing bodily harm, forced transfer, deportation, forcing to prostitution, unfounded deprivation of liberty or other wrongful treatment of civilian population, instigated or directed by State or by organization or group, is punishable by eight to ten twenty years' imprisonment or by life imprisonment.

§ 90 Genocide

Killing, torturing, causing bodily harm, imposing measures intended to prevent births within the group or forcibly depriving children of a national, ethnic, racial, religious group, of a group offering resistance to the occupying regime or of other social group or its member, with intent to destroy the group, in whole or in part, also putting members of a group to living conditions that have caused a danger to bring about destruction of the group, in whole or in part, is punishable by ten to twenty years' imprisonment or life imprisonment.

¹⁰ Unofficial translation by Estonian Ministry of Foreign Affairs

Division 3

Offences against peace

§ 91 Aggression

Leadership or participation in organisation of an aggressive war of a state against other state, or of a war that breaks international agreements or security guarantees given by the state itself, also threatening with the aggressive war by the representative of the state, is punishable by three to twelve years' imprisonment.

§ 92 War propaganda

Call on war or on use of armed forces in other way, ignoring the general principles of international law, is punishable by monetary punishment or up to three years' imprisonment.

§ 93 Manufacturing and distribution of prohibited weapons

(1) Elaboration, production, preservation, acquirement, transmission, sale or giving into use or other ways offering for use chemical, biological or bacteriological weapon or other internationally prohibited weapon of mass destruction or other weapon, or their important components, is punished by three to twelve years' imprisonment.

(2) Same act, if committed by legal entity, is punishable by monetary punishment or compulsory liquidation.

Division 4

War offences

§ 94 Punishment for the offence not prescribed in this division

(1) Offence committed during the time of war not prescribed in this division is punished under other provisions of the special part of present code.

(2) Person, who has committed an offence prescribed in this division, is only punished for the commitment of a war crime even if the crime corresponds to other essential elements of an offence prescribed in the special part.

§ 95 Military activities against the civilian population

Attack against civilian population in the area of warfare or destruction or rendering unfit for use necessary food or water supplies, sowing or cattle or attacking buildings and installations containing dangerous power, is punishable by five to fifteen years' imprisonment or life imprisonment.

§ 96 Illegal use of means of warfare against the civilian population

Use of means of warfare in a way that does not enable to make a difference between the military and civilian objects and if it has caused death, bodily harm to civilians, damaged civilian objects or caused danger to the life, health and property of civilians, is punishable by six to fifteen years' imprisonment or life imprisonment.

§ 97 Attack against the civilian population

Killing, torturing, causing bodily harm, raping, forcing to serve in armed forces of the adversary or forcing to take part of the military operations, taking hostage of the civilian; illegally taking his freedom or depriving his rights of fair and regular trial in the area of military activities or in the occupied territory, also resettling residents of the occupying state to the occupied area or resettling residents of the occupied territory, is punishable by six to twenty years' imprisonment.

§ 98 Unlawful treatment of prisoner of war and interned civilian

Mistreatment of prisoner of war or interned civilian or neglecting duties by the person who was obliged to take care of the prisoners of war or interned if it caused deterioration of the situation of prisoners of war and interned, but there is no essential elements of a criminal offence prescribed in § 99 of the current code, is punishable by monetary punishment or up to three years' imprisonment.

§ 99 Attack against prisoner of war and interned civilian

Killing, torturing, inhuman treatment, causing bodily harm of prisoner of war or interned civilian, forcing him to serve in armed forces or depriving his rights to fair and regular trial, also delaying his liberation or repatriation, is punishable by six to twenty years' imprisonment.

§ 100 Failure to provide assistance to sick or wounded or to castaway

Failure to provide assistance to sick, wounded or castaway in the area of warfare, if it has caused death or bodily harm, is punishable by three to twelve years' imprisonment.

§ 101 Attacking a combatant unable to fight

Killing, causing bodily harm or torturing sick, wounded or otherwise unable to fight combatant of adversary who is has laid down his arms, is punishable by six to fifteen years' imprisonment.

§ 102 Attack against protected person

Killing, torturing, causing bodily harm or taking hostage of the member of a medical unit or other person who takes care of the sick and wounded and is wearing distinctive colours as required; cleric, representative of humanitarian organization fulfilling its obligations in the

area of warfare, employee of civil defence, truce envoy or the person that escorts him, is punishable by six to fifteen years' imprisonment.

§ 103 Use of prohibited weapons

Use of biological or bacteriological weapon, chemical or other mass destruction weapon, poisoned weapon, poisonous or asphyxiating gases, trap mines that is explosive disguised to safe small objects, explosive projectiles, weapons that create fragments not seen by x-rays or use of other internationally prohibited weapons or extensive employment of incendiary weapon in circumstances when military target was not distinguished from civilian population, objects or environment, is punishable by three to twelve years' imprisonment.

§ 104 Damaging environment as method of warfare

Intentionally influencing environment as method of warfare if it has caused major damage to the environment, is punishable by monetary punishment or up to five years' imprisonment.

§ 105 Misuse of distinctive emblems and badges standing for international protection

Misuse of the emblem or title of the red cross or the red half-moon or the red lion and sun, the sign that marks the camp of prisoners of war, cultural monument, object of civil defence or building that contains dangerous powers or misuse of a flag of truce, is punishable by monetary punishment or up to three years' imprisonment.

§ 106 Attacking a non-military object

Attacking an object not used for military purposes, demilitarised zone, hospital zone, medical institution or unit, camp of prisoners of war or interned, settlement or building without military protection, neutral cargo vessel, aircraft, hospital ship or aircraft or other means of transport if used for carrying the non-combatants, is punishable by monetary punishment or up to five years' imprisonment.

§ 107 Attack directed against objects of cultural heritage

Destructing, damaging or appropriating of objects of cultural heritage, church or other building or object of religious significance, work of art or science, archives of cultural heritage, library, museum or science collections which are not used on military purposes, is punishable by monetary punishment or by one to five years' imprisonment.

§ 108 Destruction and appropriation of property in the area of military activities and in the occupied territory

Extensive destruction or appropriation of property in the area of military activities or in the occupied territory by a person who belongs to armed forces or who is taking part of military activities if it was not subject to military necessity and if there is no essential elements of an offence prescribed in articles 95, 106 or 107 of this code, is punishable by monetary punishment or up to five years' imprisonment.

§ 109 Marauding

Taking away, in order to illegally appropriate an object from a person who has been fallen in the battlefield or wounded, is punishable by one to five years' imprisonment.