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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 POLAND AND APPENDIX

I. Ratification

In December 2000 the Government referred the bill of ratification of the Rome Statute to the Parliament. According to the justification of the government's draft bill, the ratification of the Statute would not require a change of the Constitution both as regards the question of surrender and in respect of immunities. After the first reading, the draft was submitted to the parliamentary commissions for debate. However, some deputies presented a draft bill according to which the ratification of the Statute should take place within the framework of a special procedure provided for by the Polish Constitution designated, *inter alia*, for accession to the European Union. This procedure involves a transfer of competence of the State to an international organization or international institution (art. 90, which states: "*Poland may, by virtue of international agreements, transfer to an international organization or international institution the competence of organs of State ...*"). Such procedure requires a high, qualified majority of votes and is even more restrictive than the procedure stipulated for making amendments to the Constitution. In the deputies' opinion the ratification of the Rome Statute would lead to the transfer of competence referred to in the above specified article. The deputies have also raised the question of compliance of the Statute with the Constitution in respect of extradition and immunities.

A special sub-commission was appointed and assigned with the task of providing an opinion on both the governmental and the parliamentary draft bills. The sub-commission asked specialists in the field of constitutional, international and penal law for their opinion. Eventually, the sub-commission concluded that:

- Government's position to choose the ordinary procedure of ratification was correct,
- *surrender* is not identical to the "extradition of a Polish citizen", which is prohibited by virtue of art. 55 paragraph 1 of the Constitution;
- there is no fear of conflict with the Polish law in the case of surrender to the ICC of persons protected by immunity.

The Parliament adopted the draft bill on 5 July 2001, then the bill was referred to the Senate. On 2 August it was adopted without amendments by the Senate and then submitted to the President for his signature. It is possible that the President will submit the bill of ratification to the Constitutional Tribunal for final settlement, by virtue of a judgement of the Constitutional Tribunal, of any doubts in respect of a possible conflict between the Statute and the Constitution.

II. Implementation

No legislative work aimed at comprehensive implementation of the Statute has been undertaken so far. It will be undertaken after the Statute has been ratified. Then a special team is planned to be appointed whose task will be to draw up a law on cooperation with the Court.

However, the draft bill on the change of the Penal Code and the Code of Penal Procedure, which is currently under parliamentary debate, includes a number of proposed provisions which tentatively regulate the most important issues concerning cooperation with the international courts. Those provisions will regulate the scope of application of the Code of

Criminal Procedure in relations with the international courts (including relevant application of extradition provisions in respect of *surrender*, but excluding the possibility of invoking any grounds to refuse extradition), the obligation to notify the Court of the institution of proceedings in respect of an offence subject to the jurisdiction of the Court and the obligation to transfer prosecution to the Court, the possibility of executing acts of legal procedure by the organs of the Court in the territory of the Republic of Poland, as well as the *ne bis in idem* principle in relations with the Courts.

III. Texts of proposed changes

Code of Criminal Procedure

"Art. 615 § 3. The provisions of this section [*proceedings in criminal matters arising from international relations*] shall be applied accordingly in relations with the international courts and their organs acting under the international agreements to which Poland is a party to or constituted by virtue of an agreement ratified by Poland. The provisions of art. 602 [*hearing by the public prosecutor*], 603 [*court's judgement on extradition*] and 604 [*grounds to refuse extradition*] shall not be applied if the international agreement or the legal act regulating the operation of the Court stipulates otherwise.

§ 4. The Minister of Justice shall notify the international court of the institution of proceedings against a person suspected of having committed an offence subject to prosecution by that court.

§ 5. The organs of the international court may also execute in the territory of Poland acts of legal procedure which have not been mentioned in this section, according to the principles and under the conditions specified in the legal acts which regulate the operation of that court.

§ 6. If criminal proceedings have been instituted both in Poland and before the international court in respect of the same act committed by the same person, the Minister of Justice shall transfer the prosecution to the international court if the legal acts which regulate the operation of that court so require".

Penal Code

"Article 114 § 3. The provision of § 1 [*a judgement rendered abroad does not constitute an obstacle for criminal proceedings before the Polish court in respect of the same offence*] shall not be applied to judgements of the international criminal courts acting pursuant to the international law binding on Poland."

IV. Constitutional issues

1. Extradition/surrender

The interpretation has been adopted that the prohibition to extradite a Polish citizen as stipulated by article 55 of the Constitution applies to relations with states, and its scope does not cover the International Criminal Court. The following arguments may be put forward to justify the absence of contradiction between article 55 paragraph 1 of the Constitution of the Republic of Poland and the Statute in respect of *surrender*:

- the institutions of surrender and extradition are two qualitatively different forms of international cooperation (extradition relates exclusively to cooperation with another state and its scope does not cover surrender of a person to the international courts);
- ICTY and ICTR had already been operating at the time the Constitution of 1997 was enacted; the legislator, when creating the new Constitution, did not consider it necessary to introduce separate regulations concerning the surrender of a Polish citizen to the international courts, which gives grounds for the assumption that even at that time *surrender* as stipulated in the Statutes of both Courts was not considered to be tantamount to extradition;
- the Rome Statute defines surrender and extradition in different manner.

2. Immunities

The Constitution of the Republic of Poland provides for immunities for the President (art. 145), Members of the Council of Ministers (article 156), deputies and senators (art. 105, 108), judges (art. 181, 196), members of the Tribunal of State (art. 200), President of the Supreme Chamber of Audit (art. 206) and the Commissioner for Citizens' Rights (art. 211). It has been assumed that the existence of those immunities is not contrary to the Statute, for the following reasons:

- Poland is a party to 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which stipulates in article IV criminal responsibility for the crime of genocide regardless of the function discharged by the perpetrator. This Convention has not been considered to be an instrument including provisions contrary to the Constitution within the framework of the review made by the Government pursuant to a constitutional requirement (in accordance with article 241 para 2 of the Constitution, which states: "*The Council of Ministers shall, within 2 years of coming into force of the Constitution [i.e.17 January 1999] present to the Sejm [a lower chamber of the Parliament] a list of international agreements containing provisions not in conformity to the Constitution*";
- the purpose of immunities is to prevent bringing high state officials before common courts in connection with the activities undertaken by them to perform their constitutional functions. However, such immunities concern the domestic law only and do not constitute an obstacle to be held criminally responsible before the international courts. It is because in accordance with article 42 of the Constitution there is a possibility of being held criminally responsible for an act which constitutes an offence under the international law;
- responsibility of state officials under international law, regardless of their office and function (including crimes covered by the jurisdiction of the Court) constitutes a clearly binding norm of the customary international law as formed on the basis of the Nuremberg Rules and subsequent international practice (the Pinochet case). Poland has been bound by this norm and its violation would be tantamount to the violation of article 9 of the Constitution, which stipulates that "*the Republic of Poland shall respect international law binding on it*".

V. Substantive criminal law issues

- a) The Polish Penal Code includes a chapter "Offences against peace, humanity and war offences". It covers the majority of offences established in the Statute, *inter alia*:

aggressive war; genocide; use, manufacture and trading in means of extermination prohibited by international law; attack or other means of fight prohibited by international law; (e.g. attack against a sanitary or neutral zone); war crimes against civil population, and other crimes (see appendix)

- b) Both the Constitution and the Penal Code stipulate that crimes against humanity and war crimes are not subject to limitation.
- c) In Poland there is no death penalty; there is the penalty of deprivation of liberty for life.
- d) According to article 91 of the Constitution, the Rome Statute, after it has been promulgated in the Journal of Laws (*Dziennik Ustaw*) will constitute part of the domestic legal order, and its self-executing provisions will be applied directly. The Statute will have precedence over domestic statutes. [article 91 of the Constitution states: "*1. After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw) , a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.*"]
- e) According to the Polish law the universal jurisdiction is applicable only to offences covered by an international agreement - committed by a Polish citizen or a foreigner with respect of whom no decision on extradition has been taken. [art. 113 of the Penal Code states "*Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements.*"]

Appendix

“Penal Code of 6 June 1997 - Chapter XVI. Offences against peace, and humanity, and war crimes

Article 117. § 1. Whoever initiates or wages a war of aggression shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

§ 2. Whoever makes preparation to commit the offence specified under § 1, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

§ 3. Whoever publicly incites to initiate a war of aggression shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.

Article 118. § 1. Whoever, acting with an intent to destroy in full or in part, any ethnic, racial, political or religious group, or a group with a different perspective on life, commits homicide or causes a serious detriment to the health of a person belonging to such a group, shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

§ 2. Whoever, with the intent specified under § 1, creates, for persons belonging to such a group, living conditions threatening its biological destruction, applies means aimed at preventing births within this group, or forcibly removes children from the persons constituting it, shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years.

§ 3. Whoever makes preparation to commit the offence specified under § 1 or 2, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

Article 119. § 1. Whoever uses violence or makes unlawful threat towards a group of person or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.

§ 2. The same punishment shall be imposed on anyone, who incites commission of the offence specified under § 1.

Article 120. Whoever uses a means of mass extermination prohibited by international law, shall be subject to the penalty of the deprivation of liberty for a minimum term of 10 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

Article 121. § 1. Whoever, violating the prohibition contained in international law or in internal law, manufactures, amasses, purchases, trades, stores, carries or dispatches the means of mass extermination or means of warfare, or undertakes research aimed at the

manufacture or usage of such means, shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.

§ 2. The same punishment shall be imposed on anyone, who allows the commission of the act specified under § 1.

Article 122. § 1. Whoever, in the course of warfare, attack an undefended locality or a facility, hospital zone or uses any other means of warfare prohibited by international law, shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years, or the penalty of deprivation of liberty for 25 years.

§ 2. The same punishment shall be imposed on anyone, who, in the course of warfare, uses a means of warfare prohibited by international law.

Article 123. § 1. Whoever, in violation of international law, commits the homicide of

- 1) persons who surrendered, laid down their arms or lacked any means of defence,*
- 2) the wounded, sick, shipwrecked persons, medical personnel or clergy,*
- 3) prisoners of war,*
- 4) civilians in an occupied area, annexed or under warfare, or other persons who are protected by international law during warfare,*

shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

§ 2. Whoever, in violation of international law, causes the persons specified under § 1 to suffer serious detriment to health, subjects such persons to torture, cruel or inhumane treatment, makes them even with their consent the objects of cognitive experiments, , uses their presence to protect a certain area or facility, or armed units from warfare, or keeps such persons as hostages shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years

Article 124. Whoever, in violation of international law, forces the persons specified under Article 123 § 1 to serve in enemy armed forces, resettles them, uses corporal punishment, deprives them of liberty or of the right to independent and impartial judicial proceedings, or restricts their right to defence in criminal proceedings, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

Article 125. § 1. Whoever, in an area occupied, taken over or under warfare, in violation of international law, destroys, damages or removes items of cultural heritage shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.

§ 2. If the act pertains to an item of particular importance to cultural heritage, the perpetrator shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

Article 126. § 1. Whoever, in the course of warfare, illegally uses the emblem of the Red Cross or Red Crescent, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

§ 2. The same punishment shall be imposed on anyone, who, in the course of warfare, illegally uses protective emblems for items of cultural heritage or other emblems protected under international law, or uses a national flag or the military markings of the enemy, neutral country or an international organisation or commission.”