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The Lack of Attention to the Distinction between Situations and Cases in National Laws on Co-operation with the International Criminal Court with Particular Reference to the Spanish Case

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Abstract
This essay examines the impact of the distinction between situations and cases under the Rome Statute in national laws on co-operation with the ICC. It argues that this distinction is likely to create difficulties in three areas: (i) the communication of the *notitia criminis* to the Court; (ii) admissibility issues in proceedings under Articles 18 and 19 of the Statute; and (iii) the efficacy at national level of admissibility rulings by the Court.

Key words
admissibility; International Criminal Court; national co-operation with International Criminal Court; principle of complementarity; universal jurisdiction

1. Introduction

In its decision of 17 January 2006, Pre-Trial Chamber (PTC) I of the International Criminal Court (ICC or the Court) clarified the distinction between situations and cases under the Rome Statute (Statute). The chamber made it clear that situations and cases form the object of the different proceedings before the Court, explaining this differentiation in the following terms.

> The Chamber considers that the Statute, the rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been

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committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.[1]

PTC I also established that the issuance of a warrant of arrest or a summons to appear marks the demarcation line between proceedings concerning the situation and proceedings concerning the case. As PTC I put it concerning the application of VPRS-1–6 for participation at all stages of the proceedings,

> With regard to the applications currently under consideration, the Chamber notes that, for the time being, no case has been initiated through the issuance of a warrant of arrest or a summons to appear by the Chamber under article 58 of the Statute in the light of the investigation of the situation in the territory of the DRC under way since 1 July 2002. At this stage, therefore, the Chamber can accord the status of victim only in connection with the situation in the DRC. As the applicants have applied to be accorded the status of victim 'at the investigation, trial or sentencing stage', once a case ensues from the investigation of the DRC situation, the Chamber will automatically address the question of whether the applicants seem to meet the definition of victims set out in rule 85 of the Rules in connection with such a case.[2]

The distinction between situations (e.g. the armed conflict in the territory of the former Yugoslavia between 1991 and 1995 or the crisis situation in the territory of Rwanda after 6 April 1994) and cases (e.g. the criminal responsibility of Dario Kordić for crimes committed during the attack on the village of Ahmici on the morning of 16 April 1993, or the criminal responsibility of General Krstić for the massacre following the fall of Srebrenica on 11 July 1995) is a core feature of the procedural regime of the Statute, which has multiple implications for the proceedings of the Court.

In its decision of 17 January 2006, PTC I highlighted the consequences of the situation/case distinction for the procedural status of victims.[3] The chamber distinguished the procedural status of victims of the situation and victims of the case. The chamber pointed out,

> In the light of this distinction, the Chamber considers that, during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question. At the case stage, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case.
>
> The Chamber notes that, according to regulation 86 (2) (g) of the Regulations of the Court, when a natural or legal person makes an application to be accorded the status of victim, the applicant is required to provide, to the extent possible, '[i]nformation on the stage of the proceedings in which the victim wishes to participate'. It follows that where any natural or legal person applying for the status of victim in respect of a

1. *Decision on the Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6* ('PTC I's Decision on the Participation of Victim at the stage of Investigation of a Situation'), ICC-01/04, issued on 17 January 2006 (available at http://www.icc-cpi.int/library/cases/ICC-01–04-101_tEnglish-Corr.pdf), para. 65.
2. PTC I's Decision on the Participation of Victim at the Stage of Investigation of a Situation, para. 68.
3. For a general discussion of victim's participation at the pre-trial stage, see C. Stahn, H. Olásolo, and K. Gibson, Participation of Victims in Pre-Trial Proceedings of the ICC, (2006) 4 *Journal of International Criminal Justice*, 219.

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> situation also requests to be accorded the status of victim in any case ensuing from the investigation of such a situation, the Chamber automatically takes this second request into account as soon as such a case exists, so that it is unnecessary to file a second application.[4]

Moreover, in a subsequent decision dated 10 February 2006, the chamber found that the distinction between situations and cases has implications for the admissibility analysis under the Statute. PTC I noted,

> According to a contextual interpretation, the Chamber observes that the gravity threshold provided for in article 17 (1) (d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold; and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided for in that provision. In this regard, the Chamber would emphasize that the scope of the present decision is limited to the determination of the content of the gravity threshold under article 17 (1) (d) of the Statute when it must be applied to a case arising from the investigation of a situation.[5]

National legislators have not always paid sufficient attention to the distinction between situations and cases when drafting national laws on co-operation with the ICC. This distinction is, in particular, often disregarded in relation to a referral of a situation to the ICC Office of the Prosecutor pursuant to Articles 13(a) and 14 of the Statute, a request to the Prosecutor to defer an investigation under Article 18(2) of the Statute, or a challenge to the admissibility of a case under Article 19(2) of the Statute.

As a result, the application of domestic law is likely to raise a number of problems that might hamper the functioning of the Court. The lack of attention to the distinction between situations and cases may, in particular, lead to a loss of valuable evidence or an ineffective application of the complementarity principle due to simultaneous investigations and prosecutions by the Court and national jurisdictions.

This article focuses on the Spanish Organic Law 18/2003 of 10 December 2003 on Co-operation with the International Criminal Court (OLCICC) as a paradigmatic example of the lack of attention to the distinction between situations and cases. It treats problems that are likely to arise in three different areas: (i) the communication of the *notitia criminis* to the Court; (ii) admissibility issues in proceedings under Articles 18 and 19 of the Statute; and (iii) the efficacy of admissibility rulings by the Court at the national level.

It should be noted that these problems are not particular to Spanish legislation. Similar deficits can be identified in a number of national laws or draft national laws on co-operation with the ICC, such as for instance the Colombian and the Argentinean Draft Bills on Co-operation with the ICC. Furthermore, other national laws, such as the 2001 International Criminal Court Act of the United Kingdom or the

4. PTC I's Decision on the Participation of Victim at the Stage of Investigation of a Situation, paras. 66 and 67.
5. *Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58*, ICC-01/04–01/06, issued on 10 February 2006, para. 44. This decision is included as Annex I of the Decision concerning Pre Trial Chamber's I Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04–01/06, issued on 24 February 2006.

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2002 Australian International Criminal Court Act, present similar problems.[6] The deficiencies identified here are therefore of broader relevance to ICC implementing legislation.

2. COMMUNICATION OF THE *NOTITIA CRIMINIS* TO THE COURT ACCORDING TO THE OLCICC

2.1. Referral of a situation by a state party

The Preamble of the OLCICC states that it is one of the goals of the law that the procedure for referrals of situations of crisis by Spain to the Court be regulated with particular care. Article 7(1) of the law vests the government with the competence to make a referral of a situation, since it is the organ responsible for foreign policy under the Spanish Constitution and thus able to make a decision that could affect such policy. The referral of a situation under Articles 13(a) and 14 of the Statute has to be agreed by the Council of Ministers on the basis of a joint proposal of the ministers of justice and foreign affairs. The same procedure must be followed to request the PTC under Article 53(3)(a) of the Statute to review the ICC Office of the Prosecution's decision not to investigate or not to prosecute in accordance with Article 53(1) or (2) of the Statute.[7] This approach is also reflected in Article 7 of the Colombian Draft Bill on Co-operation with the ICC and Article 24 of the Argentinean Draft Bill on Co-operation with the ICC.

Though some scholars have voiced concern with respect to this rule,[8] this author shares the view that there are a number of reasons that support the legislator's choice to leave the decision whether or not to refer a situation under Articles 13(a) and 14 of the Statute in the hands of the government. Articles 13(a) and 14 of the Statute direct states to refer armed conflicts or situations of crisis to the Court that are defined by territorial and temporal (and sometimes also personal) criteria. The referral of a situation automatically initiates the triggering procedure to determine whether or not the Court will activate its dormant jurisdiction regarding the armed conflict or crisis situation in question and, thus, whether the Court will initiate an investigation into the crimes allegedly committed in the situation.[9] Moreover, by referring a situation under Articles 13(a) and 14 of the Statute, Spain becomes a party to the triggering procedure before the Court, and the states concerned by the conflict or situation referred by Spain will probably become opposing parties under Article 18(2) of the Statute. The referral of a situation under Articles 13(a) and 14 of the Statute may therefore have far greater implications for Spanish foreign policy than the transmission of a simple criminal complaint against a particular individual which is tied to a limited set of acts.

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6. The lack of specific provisions dealing with the three areas which are the focus of this article in the co-operation laws of Australia and the United Kingdom has been highlighted by H. Brady, 'Australia', in C. Kress, B. Broomhall, F. Lattanzi, and V. Santori, *The Rome Statute and Domestic Legal Orders*, Vol. II: *Constitutional Issues, Co-operation and Enforcement* (2005), at 11–12; and P. Lewis, 'The United Kingdom', ibid., at 460.
7. Article 7(1) OLCICC.
8. See, *inter alia*, L. Bujosa Vadell, *La Cooperación Procesal de los Estados con la Corte Penal Internacional* (2006), Section 4.3, 183–4.
9. H. Olásolo, *Corte Penal Internacional: Dónde Investigar?*, (2003), 107 and 391–403.

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2.2. The transmission of communications under Article 15 of the Statute

Article 7(2) OLCICC directs Spanish judicial organs, public prosecutors, and ministerial departments to abstain from taking any action when the *notitia criminis* is communicated to them or when they receive a criminal complaint or request concerning crimes within the jurisdiction of the Court allegedly committed by non-nationals outside Spain. In such circumstances Spanish authorities shall inform the persons or entities filing the criminal complaint or request solely of their right to communicate the matter to the ICC Office of the Prosecutor. Judicial organs and public prosecutors are also barred from acting ex officio regarding such crimes. The only exception to this rule is included in the Third Additional Disposition of the OLCICC, which allows such action with respect to (i) the jurisdiction of judicial organs of the Spanish military over actions or omissions carried out by Spanish troops outside Spain; or (ii) the exercise of jurisdictional functions by the judicial military organs accompanying Spanish military troops outside Spain.[10]

At the same time, Article 7(2) OLCICC contains an important safeguard that allows competent judicial organs and public prosecutors to adopt urgent preliminary measures aimed, *inter alia*, at avoiding the loss of evidence. Furthermore, Article 7(3) OLCICC provides an option to bring criminal complaints or requests before competent Spanish judicial organs, public prosecutors, or ministerial departments if the Court declines to act because no investigation is initiated by the ICC Office of the Prosecutor or there is a declaration of inadmissibility. This system was introduced in order to ensure that the principle of universal jurisdiction can be

10. During the parliamentary debate, some pointed out that this provision restricted the scope of the principle of universal jurisdiction as enshrined in Article 23.4 of the Spanish Organic Law 6/1985 of the Judicial Power in such a way as to make it no longer applicable by the Spanish judicial organs regarding crimes within the jurisdiction of the Court. As a result, the creation of the ICC would entail a decline of the principle of universal jurisdiction in Spain (see Proposed Amendment 1 to the Draft OLCICC, presented in the Congress of Deputies by B. Lasagabáster, of the Mixed Parliamentarian Group). Others affirmed that this proposal was not in line with the object and purpose behind the creation of a permanent international criminal court which operates on the basis of the principle of complementarity. In their view, the Court is not supposed to substitute any of the mechanisms in place at the national or international level to fight against impunity in relation to the most serious crimes of concern to the international community. On the contrary, the Court constitutes an additional mechanism aimed at providing States with the necessary incentives to make the existing mechanisms more effective, and it only takes direct action when national jurisdictions have shown themselves unwilling or unable to properly fight against impunity. Therefore, the creation of Court could not be interpreted as supporting the restriction of some of the mechanisms available under Spanish law to investigate and prosecute the crimes within the jurisdiction of the Court. Quite the opposite, the creation of the Court should promote their more effective exercise. This position was supported by important voices in doctrine, including Bujosa Vadell, *supra* note 8, Section 2.5, 97–102; M.P. Pozo Serrano, 'Medidas Nacionales Medidas nacionales adoptadas para la ratificación y la aplicación del Estatuto de la Corte Penal Internacional: Un balance provisional', in *Anuario de Derecho Internacional* (2003), 299–346 and 345; J. Pueyo Losa, 'Un nuevo modelo de cooperación internacional en materia penal: entre la justicia universal y la jurisdicción internacional, in Álvarez González and Remacha y Tejada (eds.), *Cooperación jurídica internacional* (2001), 141–203 and 145. However, the great majority of Spanish parliamentarians favoured an understanding of the formal primacy of Spanish jurisdiction in accordance with the principle of complementarity as limited to those crimes committed in Spanish territory or by Spaniards abroad. This position has also been supported by some scholars, including A. Sánchez Legido, *Jurisdicción Universal Penal y Derecho Internacional*, (2004), 394; and F. Lattanzi, 'Compétence de la Cour pénale internationale et consentement des états', (1999) 3 RGDIP, 425–44 and 430–1.

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exercised with regard to the crimes within the jurisdiction of the Court, but only in those circumstances where the Court fails to act.

One problem of the Spanish approach (which is also reflected in Article 7 of the Colombian Draft Bill on Co-operation with the ICC[11]) is that the second and third paragraphs of Article 7 OLCICC have inverted the meaning of the relationship of complementarity between the Court and Spanish jurisdiction. The duty to stop proceedings and inform complainants of the possibility of communicating the matter to the ICC Office of the Prosecutor is based on the idea that the Court serves as a substitute for Spanish judicial organs. Even if the Spanish legislator intended to base its choice on the recent jurisprudence of the Spanish Supreme Court's Penal Chamber, by establishing the necessity of the intervention of Spanish jurisdiction as a prerequisite for the application of universal jurisdiction, the legislator did not lend enough weight to the difference between the *ultima ratio* jurisdiction of the ICC and the primary responsibility of national jurisdictions to investigate and prosecute crimes committed on their territory.

Moreover, Article 7(2) OLCICC has been drafted on the premise that the Court can directly open an investigation against a particular individual for a well-defined set of acts under the Rome Statute. This assumption is misguided. It conflicts with the general distinction between situations and cases under the Statute and the fact that situations (as opposed to cases) form the object of the triggering procedure of the Court and the object of separate investigations. As a consequence, a scenario may occur under which

(i) an initial criminal complaint or administrative request is filed with a Spanish judicial organ, public prosecutor, or ministerial department;

(ii) the organ with which the criminal complaint or administrative request is filed informs the complainant of his or her right to transmit the *notitia criminis* to the ICC Office of the Prosecutor;

(iii) the complainant sends a communication to the ICC Office of the Prosecutor pursuant to Article 15(1) of the Statute;

(iv) the ICC Office of the Prosecutor, pursuant to Article 15(2) of the Statute, carries out a preliminary examination of the situation in the context of which the acts object of the said communication have allegedly taken place;

(v) after the preliminary examination of the overall situation, the ICC Office of the Prosecutor, unless the gravity of the systematic and/or widespread crimes allegedly committed in the said situation otherwise requires, decides not to request authorization from PTC to initiate the investigation of the situation under preliminary examination;

(vi) the ICC Office of the Prosecutor, according to Article 15(6) of the Statute, informs the complainant of its decision not to request the authorization to initiate the investigation of the said situation;

11. Similar provisions lack, however, in the Argentinian Draft Bill on Co-operation with the ICC.

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(vii) the complainant, at this point, can only file a new criminal complaint or administrative request with the Spanish judicial organ, public prosecutor, or ministerial department with which it filed years before his or her first criminal complaint or administrative request; and

(viii) according to Article 7(3) OLCICC, only now could the relevant acts be investigated by the competent Spanish authorities.

As a consequence, the very same Spanish judicial or prosecutorial organs which must abstain from acting after receiving the first criminal complaint may be forced years afterwards to investigate the relevant acts pursuant to the principle of universal jurisdiction embraced by Article 23(4) of the Spanish Organic Law 6/1985 of the Judicial Power (OLJP). It is evident that this sequence of events (caused by (i) the inversion of the meaning of the relationship of complementarity between the Court and Spanish jurisdiction; and (ii) the disregard for the distinction between situations and cases when drafting the OLCICC) compromises the efficiency of proceedings, since investigations can only be started years after the first criminal complaint is filed.

The danger is even greater in those cases in which Spanish judicial or prosecutorial organs acquire *notitia criminis* in relation to the alleged commission of crimes by non-Spaniards outside the territory of Spain when acting *proprio motu*. In such cases, Spanish authorities are even prevented from taking the necessary investigative steps pursuant to the principle of universal jurisdiction under Article 7(2) OLCICC. Furthermore, insofar as the OLCICC does not grant Spanish judicial and prosecutorial organs the power to transmit the *notitia criminis* to the ICC Office of the Prosecutor, they will have to remain inactive; this despite the fact that criminal investigations are guided by the principle of legality (as opposed to the principle of political discretion) under Articles 105 and 299 of the Spanish Code of Criminal Procedure (Ley de Enjuiciamiento Criminal).

3. Admissibility issues in the OLCICC

3.1. Deferral requests under Article 18(2) of the Rome Statute

The Preamble of the OLCICC highlights that it is an important rationale of the law to regulate potential jurisdictional conflicts between the Court and Spanish jurisdiction. Several articles address this matter. Article 8 OLCICC establishes the procedure to decide whether or not to request, pursuant to 18(2) of the Statute, the deferral of the investigation of a situation[12] provisionally initiated by the Court in accordance with Articles 15(4) or 53(1) of the Statute.

12. Proceedings under Article 18 concern situations as opposed to cases. This is *inter alia* reflected in the 'preliminary' character of the admissibility rulings under Art. 18 (2) and (4) of the Statute which are not meant to be final decisions with respect to the admissibility of the case (i.e. the more limited set of acts occurring within the broader context of those situations). Moreover, this conception makes sense in practical terms since the degree of scrutiny exercised with respect to national proceedings concerning a situation cannot be as detailed as the admissibility analysis focused on a single case. For a more detailed explanation of the role of Art. 18 of the Statute proceedings as the second part of the triggering procedure, see H. Olásolo, *The Triggering Procedure of the International Criminal Court* (2005), 72–89.

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Article 8(1) OLCICC establishes that on reception of the notification provided for in Article 18(1) of the Statute, the Ministry of Justice must request information on any investigation or prosecution conducted by Spanish judicial or prosecutorial organs from the attorney general (fiscal general del estado). Similarly, the Ministry of Justice must request information from the attorney general on the jurisdictional basis claimed by Spanish judicial organs to be seised with the crimes allegedly committed in the situation under investigation by the Court.

If the information provided by the Attorney General indicates that Spain has exercised its jurisdiction, is exercising its jurisdiction, or has started an investigation as a result of the notification provided for in Article 18(1) of the Statute, the Ministry of Justice in conjunction with the Ministry of Foreign Affairs must send the proposal to request the deferral of the Court's investigation to the Council of Ministers no later than 20 days after reception of the Court's notification.[13] Although Article 8(3) OLCICC is not completely clear on this point, its Preamble makes it clear that the Council of Ministers has the duty to request the deferral of the Court's investigation, and thus to uphold Spanish jurisdiction. After obtaining clearance from the Council of Ministers, the Ministry of Justice will be responsible for making the deferral request urgently under Article 18(2) of the Statute and Rule 53 of the Rules of Procedure and Evidence (RPE).

It is noteworthy that this procedure is not applicable in relation to crimes allegedly committed by non-Spaniards outside the territory of Spain. Hence the mandate to uphold the formal primacy of the Spanish jurisdiction vis-à-vis the Court contained in the Preamble of the OLCICC is limited to those situations in which Spanish tribunals act pursuant to the principles of territoriality or nationality of the suspect or accused person.[14]

One should not overlook the fact that, according to Article 23 OLJP, the extent of Spanish jurisdiction goes beyond these two principles. Indeed, as provided for in Article 23 OLJP, Spanish tribunals can act pursuant to other jurisdictional bases, such as nationality of the victim, the protective principle, or the principle of universal jurisdiction.

As a result, Spanish legislators have distinguished between jurisdictional bases of first and second class insofar as only the proceedings carried out pursuant to the principles of territoriality and nationality of the suspect or accused person merit being upheld before the Court through a deferral request under Article 18 of the Statute.

Moreover, Article 8 OLCICC is not consistent with the aim of the deferral mechanism provided for in Article 18(2) of the Statute. This mechanism is aimed at avoiding an investigation by the Court when national jurisdictions have already investigated, or are investigating, the crimes within the jurisdiction of the Court allegedly

13. Art. 8 (2) OLCICC.
14. A similar regulation can be found in Art. 8 of the Colombian Draft Bill on Co-operation with the ICC and in Art. 25 of the Argentinean Draft Bill on Co-operation with the ICC. However, it must be highlighted that, according to Art. 8 of the Colombian Draft Bill, the above-mentioned procedure is not applicable with regard to crimes allegedly committed by non-Colombians outside the territory of Colombia, whereas Art. 25 of the Argentinian Draft Bill does not contain such a restriction.

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committed in the situation under scrutiny. It is thus a procedural tool to guarantee the effective application of the complementarity principle so as to ensure that the Court investigates a given situation only when those national jurisdictions concerned are inactive, unwilling, or unable (thus avoiding simultaneous investigations by the Court and national tribunals).

However, if, as in the Spanish case, (i) Article 23 OLJP permits Spanish tribunals to investigate crimes within the jurisdiction of the Court pursuant to the jurisdictional basis of the nationality of the victim, the protective principle, and the principle of universal jurisdiction; and (ii) Article 8 OLCICC ignores this reality, it is likely that the same crimes be simultaneously investigated for months or years by the Court and national tribunals. In fact, such a situation may not be resolved until it is revealed by way of a possible refusal by Spanish authorities to comply with the Court's cooperation request on the basis of the ongoing investigation by Spanish tribunals,[15] or an admissibility challenge by the person against whom a warrant of arrest or a summons to appear has been issued on the ground of an ongoing investigation by Spanish tribunals.[16]

3.2. Admissibility challenges under Article 19(2) of the Rome Statute

Article 9(1) OLCICC entrusts the Spanish Council of Ministers, on the basis of a joint proposal of the Ministries of Justice and Foreign Affairs, with the decision to make a challenge on jurisdiction or admissibility pursuant to Article 19 of the Statute. However, unlike in cases of deferral requests under Article 18(2) of the Statute, the Council of Ministers is not obliged to make an admissibility challenge even if Spanish tribunals are conducting, or have conducted, proceedings with regard to the relevant case. This distinction is grounded, according to the Preamble of the OLCICC, on the recent jurisprudence of the Second and Third Chambers of the Spanish Supreme Court on the duty or right to resort to external judicial organs.

As a result, at the stage of proceedings under Article 18(2) of the Statute, when no admissibility ruling has yet been issued by the Court, the Council of Ministers is obliged to uphold the Spanish jurisdiction. However, once an admissibility ruling has been issued, the duty of the Council of Ministers to uphold the Spanish jurisdiction through an admissibility challenge under Article 19 of the Statute turns into a discretional power.

On the other hand, due to the duty of the Council of Ministers to make a deferral request under Article 8 OLCICC, Spanish legislators have assumed that, after proceedings under Article 18 of the Statute, an admissibility ruling will automatically exist. As a result, Article 9(1) OLCICC leaves the decision to make a challenge on jurisdiction or admissibility pursuant to Article 19 of the Statute at the discretion of the Spanish Council of Ministers.

In the author's view, Spanish legislators have not paid due attention to the fact that Article 18 proceedings concern situations, whereas Article 19 proceedings are

15. Art. 93(3) of the Statute.
16. Art. 19(2)(a) of the Statute.

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related to cases.[17] The object of the Court's analysis of admissibility under Articles 18(2) and 19 varies accordingly. At the time when a case arises pursuant to Article 58 of the Statute, the Court may have declared, at best, the admissibility of the situation in the context of which the case takes place. However, no admissibility ruling concerning any newly arisen case will exist at that time.

A different matter is the practice set out by PTC I and PTC II after the approval of the OLCICC, according to which the issuance of an arrest warrant or of a summons to appear may be subject to a previous finding of admissibility of the case brought forward by the ICC Office of the Prosecutor.[18]

The question arises as to whether the prima facie determination of the admissibility of a case required by PTC II would suffice, according to Article 9 OLCICC, to turn into a discretional power the Spanish government's duty to uphold the Spanish jurisdiction through an admissibility challenge under Article 19 of the Statute. The same question arises when, according to PTC I's practice, an admissibility ruling is made on the basis of the limited information provided for by the ICC Office of the Prosecutor in the context of an application for an arrest warrant or a summons to appear (particularly if such information does not include the proceedings of the Spanish tribunals in relation to the case at hand).

Article 9(1) OLCICC appears to be based on the assumption that an admissibility ruling by the Court (prior to any plausible admissibility challenge by Spain under Article 19(2) of the Statute) will have taken into consideration the proceedings of the Spanish tribunals with regard to the relevant case. However, the practice of PTC I and PTC II shows that it is possible for the Court to declare the admissibility of a case without having analysed the proceedings of Spanish tribunals in relation to that same case.

Hence the author considers that no admissibility ruling should turn the Spanish government's duty to uphold the formal primacy of the Spanish jurisdiction vis-à-vis the Court into a discretional power. On the contrary, Article 9(1) OLCICC should be interpreted in a manner in which such a transformation takes place only when the Court's admissibility ruling has taken into consideration the proceedings of Spanish tribunals with regard to the case at hand. Otherwise, the ultimate aim of the

17. This position has also been defended by M. C. Bassiouni, *Introduction to International Criminal Law* (2003), 518–19; W. A. Schabas, *An Introduction to the International Criminal Court* (2004), 125–6; C. K. Hall, 'Article 19: Challenges to the jurisdiction of the Court and the Admissibility of the Case', in O. Triffterer: *Commentary on the Rome Statute of the International Criminal Court* (1999), at 407; and M. El Zeidy, 'The Ugandan Government Triggers the First Tests of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 2 *International Criminal Law Review*, at 110.

18. The public version of PTC I's decision of 10 February 2006 can be found in Annex I to PTC I's *Decision concerning Pre-Trial Chamber's I Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo*, 24 February 2006. See particularly para. 20 of Annex I. See also *Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*, PTC II, ICC-01/04–01/05–53, public redacted version of 13 October 2005, para. 38; *Warrant of Arrest for Vincent Otti*, PTC II, ICC-01/04–01/05–54, public redacted version of 13 October 2005, para. 38; *Warrant of Arrest for Laska Lukwiya*, PTC II, ICC-01/04–01/05–55, public redacted version of 13 October 2005, para. 26; *Warrant of Arrest for Okot Odhiambo*, PTC II; ICC-01/04–01/05–56, public redacted version of 13 October 2005, para. 28; and *Warrant of Arrest for Dominic Ongwen*, PTC II, ICC-01/04–01/05–57, public redacted version of 13 October 2005, para. 26. For a discussion, see M. El Zeidy, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court', (2006) 19 LJIL, 741–51.

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OLCICC, which is to promote the formal primacy of the Spanish jurisdiction vis-à-vis the Court in application of the complementarity principle, will not be achieved.

A similar interpretation should be adopted under Articles 8 and 9 of the Colombian Draft Bill on Co-operation with the ICC, which contain provisions similar to those under Articles 8 and 9 of the OLCICC.[19]

4. The OLCICC and the efficacy of admissibility rulings at national level

One of the most difficult issues of any law on co-operation is to determine the impact of an admissibility decision by the ICC on the national system that has been under the scrutiny of the Court.

In such circumstances it may be necessary to determine the status of national investigations and prosecutions that do not meet the standards provided for in Article 17 of the Statute and which hence justify an inadmissibility ruling. Morever, there may be a need to define the status of final decisions by national tribunals that, according to the Court, justify an inadmissibility ruling.

Article 10 OLCICC addresses the first question. According to this provision, Spanish tribunals must stay their proceedings if the Court declares the admissibility of the relevant situation or case despite a deferral request or an admissibility challenge by Spain under Article 18(2) or 19(2)of the Statute, and must transfer the record of such proceedings to the Court, if the Court so requires. Article 10 of the Colombian Draft Bill on Co-operation with the ICC and Article 27 of the Argentinian Draft Bill on Co-operation with the ICC have embraced the same approach.

This approach acknowledges the material primacy of the Court vis-à-vis Spanish jurisdiction. However, it presents a number of problems as a result of the disregard of the distinction between situations and cases. For instance, it is not reasonable to require that a ruling on the admissibility of a situation would prevent Spanish tribunals from investigating or prosecuting any of the crimes allegedly committed in the context of that situation.

In the view of the author, the stay of national proceedings and the transmission to the Court of the record of such proceedings is a necessary measure to avoid the paralysis of the Court as a result of the dynamic nature of the complementarity principle. Otherwise, there is a risk that, after an admissibility ruling, the States concerned resurrect their national proceedings in order to subsequently uphold the formal primacy of their national jurisdictions vis-à-vis the Court.

However, one should not forget that the ultimate aim of the complementarity principle (and of the procedural right to challenge the admissibility of a case pursuant to Article 19(2) and (4) of the Statute until just before the commencement of the

19. Note that Art. 26(1) of the Draft Argentinian Bill on Co-operation with the ICC constitutes a remarkable example of the lack of attention to the distinction between situations and cases insofar as it jointly deals with deferral requests under Art. 18(2) of the Statute and admissibility challenges under Art. 19(2) of the Statute as if both had cases as their object.

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trial) is to provide an incentive for national investigations and prosecutions of crimes within the jurisdiction of the Court.

Hence a strict application of Article 10 OLCICC would impede the fulfilment of this aim, because an admissibility ruling at such an early stage of the Court's proceedings as proceedings under Article 18 of the Statute would prevent Spanish tribunals from investigating and prosecuting any of the crimes allegedly committed in the situation which is the object of the said admissibility ruling.

As a consequence, this author considers that the scope of application of Article 10 OLCICC should have been expressly limited to those admissibility rulings made by the Court at the stage of the case pursuant to Article 19 of the Statute. It is precisely in the framework of the criminal procedure before the Court (whose object is a case as opposed to a situation) where the stay of national proceedings and the transmission to the Court of the record of such proceedings as a result of the Court's declaration of the admissibility of a case are fully consistent with the ultimate aim of the complementarity principle.

However, in dealing with this issue it is important to pay attention to the practice of PTC I and PTC II, which shows that proceedings of Spanish tribunals may not always be analysed prior to the issuance of an admissibility ruling by the Court. In this scenario, the stay of national proceedings and the transmission of the record of such proceedings to the Court pursuant to Article 10 OLCICC would be contrary (i) to the principle of the formal primacy of Spanish jurisdiction vis-à-vis the Court; and (ii) to the ultimate aim of the complementarity principle, which aims at promoting national investigations and prosecutions of those crimes which fall within the jurisdiction of the Court. Indeed, if Article 10 OLCICC is applied in this scenario, Spanish tribunals would be bound to stay their proceedings and to transfer the record of such proceedings to the Court without having been declared by the Court to be unwilling or unable in relation to the case at hand.

Therefore, according to the author, Article 10 OLCICC should be applied only after the Court's issuance of a decision under Article 19 of the Statute which (i) declares the admissibility of a case and (ii) shows that due attention has been paid to those proceedings of Spanish tribunals in relation to the case at hand. In the absence of the second prerequisite, the Spanish government, acting pursuant to Article 9(1) OLCICC (as interpreted in the light of the Preamble of the OCCICC), should make a challenge to the admissibility of the said case as soon as is practicable.

Only if, as a result of such a challenge, the Court reaffirms the admissibility of the case due to the unwillingness or inability of the Spanish jurisdiction, should Spanish tribunals stay their proceedings and transmit the record of such proceedings to the Court as provided for in Article 10 OLCICC.

On the other hand, the OLCICC (like many other laws on co-operation with the Court passed to date[20]) is silent on the question of the efficacy of those final national judicial resolutions which are affected by a Court's admissibility ruling.

20. Art. 10 of the Colombian Draft Bill on Co-operation with the ICC, Art. 27 of the Argentinean Draft Bill on Co-operation with the ICC and the 2001 and 2002 International Criminal Court Acts of the United Kingdom and Australia are also silent on this matter.

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The problems arising in this context have already been underscored in the following terms:

> From a purely national perspective, the proceedings of the ICC concerning acts and individuals which have been the object of national final judgments would constitute a violation of the *ne bis in idem* principle as defined in many national systems. In order to avoid this problem it is submitted that the States Parties should incorporate into their national legislation mechanisms depriving of any effect those national final judgments and decisions not to prosecute that for the purpose of the RS are declared ineffective by the ICC's competent organ. Otherwise, it is likely that the violation from a national perspective of the *ne bis in idem* principle will prevent the States Parties concerned, and particularly those in which the *ne bis in idem* principle has constitutional rank, from complying with their obligations to cooperate with the ICC.[21]

In the view of the author, this legislative gap is the result of the reluctance of national legislators to acknowledge the far-reaching effects of the material primacy of the Court vis-à-vis national jurisdictions.

In order to solve this problem it is useful once again to take into consideration the distinction between situations and cases. Indeed, the nullity of final national judicial resolutions must be subject to a decision by the Court under Article 19 of the Statute, which (i) declares the admissibility of a case; and (ii) shows that the national decision concerned has been examined by the Court.

On the basis of this premise, and having regard to the particular characteristics of the Spanish legal system, the author considers it necessary to amend Article 238 OLJP in order to introduce a fifth ground of nullity of final judicial resolutions along the lines set out above.

5. Final remarks

This short essay has shown that Spanish legislators did not pay enough attention to the core distinction between situations and cases when drafting the OLCICC. This shortcoming may be explained by the fact that the distinction had not yet been developed in the Court's jurisprudence at the time of the drafting of the OLCICC. This deficit needs to be addressed in due course, otherwise Spanish authorities and other jurisdictions are likely to face a number of problems in areas such as the communication of the *notitia criminis* to the Court, admissibility issues in proceedings under Articles 18 and 19 of the Statute, and the efficacy of the Court's admissibility rulings at the national level.

The Court has clarified some of the parameters governing the distinction between situations and cases under the Rome Statute in its first practice. The case law has, in particular, identified some of the implications of this distinction in the fields of victim's participation and admissibility analysis. It is therefore necessary and timely to rethink domestic implementing legislation from this perspective.

21. H. Olásolo, *supra* note 12, at 154.

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