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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS  
ON THE CONFORMITY  
OF CERTAIN PROVISIONS OF THE STATUTE  
OF THE INTERNATIONAL CRIMINAL TRIBUNAL  
WITH THE CONSTITUTION  
OF MOLDOVA**

by

**Mr Claus KRESS (Expert, Germany)**

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*\*This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The three questions posed to the Rapporteur are as follows:

**A. Will the present provisions of Article 70(3) and 81 of the Constitution create obstacles in the application of Article 27 of the Statute?**

**B. If so, could the State (Republic of Moldova) co-operate (if necessary) with the International Criminal Court in conformity with Article 89.1 of the Statute, without having to modify Articles 18.2, 70 and 81 of the Constitution?**

**C. Has this subject been dealt with in the case-law and jurisprudence of your country? If so, we would be grateful to receive these decisions.**

Two Preliminary Remarks on the Nature of the Following Legal Opinion

2. This Rapporteur is neither familiar with the history of the Constitution of Moldova nor does he possess an intimate knowledge of the travaux préparatoires of the pertinent constitutional provisions. It is therefore not possible for him to form a conclusive view as to the correct or preferable interpretation of the constitutional provisions at stake; only the Moldovan Constitutional Court will be in a position to decide the matter on the basis of a comprehensive analysis of all relevant materials. For this reason, this legal opinion constitutes no more than the modest attempt to inform the Moldovan Constitutional Court about the legal reasoning that other constitutional courts or constitutional decision-makers developed when faced with similar constitutional challenges. The detailed description of the solution adopted in Germany will be given in the answer to the third question.

3. The opinion takes into account the results of an extensive comparative research project on the national implementation of the Statute of the International Criminal Court<sup>1</sup> (hereafter: ICC Statute). This research has been conducted over the last years by an international group of practitioners and scholars, of whom many were directly involved in the respective national implementation process. The comparative work has resulted in the publication of two volumes that deal, amongst other matters, specifically with the constitutional issues raised by the ratification of the ICC Statute.<sup>2</sup>

#### **Question A:**

4. The English translation of Article 70(3) of the Moldovan Constitution<sup>3</sup> reads as follows:

‘Except in cases of flagrant infringement of law members of Parliament may not be detained for questioning, put under arrest, searched or put on trial without Parliament’s assent, after prior hearing of the member in question.’

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<sup>1</sup> Rome Statute of the International Criminal Court; text of the Rome Statute circulated as document A/CONF/183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

<sup>2</sup> C. Kreß/F. Lattanzi (eds), *The Rome Statute and Domestic Legal Orders. Volume I: General Aspects and Constitutional Issues* (Baden-Baden/Ripa di Fagnano Alto: Nomos Verlagsgesellschaft/il Sirente, 2000); C. Kreß/F. Lattanzi/B. Broomhall/V. Santori (eds), *The Rome Statute and Domestic Legal Orders. Volume II: Constitutional Issues, Cooperation and Enforcement* (Baden-Baden/Ripa di Fagnano Alto: Nomos Verlagsgesellschaft/il Sirente, 2005).

<sup>3</sup> The translation is taken from <http://www.e-democracy.md/en/legislation/constitution> (last visited on 25 September 2007).

Article 81(3) of the Moldovan Constitution reads as follows:

'Based on the majority of at least two thirds of the votes cast by its members, Parliament may decide to indict the President of the Republic of Moldova if the latter commits an offense. In such a case it is the Supreme Court of Justice which has the competence to sue under the rule of law, and the President will be removed from office on the very day that the court sentence convicting him has been passed as definitive.'

Article 27 of the ICC Statute reads:

'(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reducing the sentence.'

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

Article 89 of the ICC Statute reads:

'The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.'

5. Crimes under international law are typically crimes committed by State organs pursuant to a State policy. The persons most responsible for what are - again typically - systemic crimes very often hold the highest positions within the respective State apparatus. At the same time, the holders of such positions are frequently the beneficiaries of immunities under public international law and/or national constitutions. Article 27 of the ICC Statute directly confronts that situation and is therefore one of the central provision of the ICC Statute. Paragraph 1 of the provision clarifies that the application of substantive international criminal law as codified in the ICC Statute is not subject to an exception for certain categories of persons, especially holders of high positions within a State apparatus. Paragraph 2 of the provision adds that the procedural protection afforded by immunities or other special procedural rules cannot be invoked before the ICC. Importantly in the context of this legal opinion, paragraph 2 specifies that it applies not only with respect to immunity rights of States under international law, but also to immunity protections afforded by national constitutions.

6. The phrasing of Articles 70(3) and 81(3) of the Moldovan Constitution do not suggest that these provisions may provide for an exception to the application of substantive (international) criminal law to the categories of persons mentioned therein. Both provisions would rather appear to deal with immunities or special procedural rules protecting Members of Parliament and the President, respectively. The relevant legal question can therefore be defined more narrowly as to whether Articles 71(3) and 81(3) of the Moldovan Constitution are in conflict with Art. 27(2) of the ICC Statute.

7. The conflict would materialise if the ICC requested the Republic of Moldova, after the latter's accession to the treaty, to arrest and surrender a suspect holding a position as defined in the two constitutional provisions concerned. In such case, and assuming admissibility of the international criminal proceedings pursuant to Articles 17 et seq. of the ICC Statute, Moldova would be under the international legal obligation flowing from the second sentence of Article

89(1) of the ICC Statute to arrest and to surrender the suspect concerned and as Article 27(2) of the ICC Statute makes it plain, Moldova could not rely on the immunities or special procedural rules contained in Articles 71(3) or, as the case may be, 81(3) to avoid that obligation.

8. A similar question to the one just pinpointed has arisen in a great many national jurisdictions in the course of the process leading up to the ratification of the ICC Statute. As one learned commentator has put it:

'Of all the constitutional issues that have arisen, the question of immunities has been the most common and the most complex. Many States have been forced to ponder the relationship between, on the one hand, national provisions granting immunities to heads of States, government officials, parliamentarians and others, and, on the other, the obligations to arrest and surrender under the ICC Statute and the 'irrelevance of official position under its Art. 27.'<sup>4</sup>

9. In some States, France being perhaps the best known example<sup>5</sup>, it was decided that a conflict could be avoided only by way of constitutional amendment, a scenario that, in the case of Moldova, appears to be covered by Article 8(2) of the Constitution. As it would appear, though, in the majority of States concerned, it was found possible to interpret the pertinent constitutional provisions in a way that excluded the potential conflict.<sup>6</sup> We shall examine the possible avenues for harmonisation through constitutional interpretation in turn.

10. A first question is whether it can be argued that no normative collision exists in light of the fact that the constitutional immunities enshrined in the Moldovan Constitution are not absolute. A limited number of national jurisdictions would appear to have relied on the relativity of their constitutional immunity protections to deny a legal conflict.<sup>7</sup> On a closer look upon the wording of Article 81(3) of the Moldovan Constitution, such a reconciliatory effort would appear hard to sustain, though, because the only way to lift the protection afforded to the President is proceedings before the Moldovan Supreme Court. The wording of Article 70(3) of the Moldovan Constitution is different and, at first blush, would not appear to preclude proceedings before the ICC once the Parliament has given its assent. However, in order to align Article 70(3) of the Moldovan Constitution with Article 27(3) of the ICC Statute one would have to interpret Article 70(3) in a manner that eliminates any political discretion of the Moldovan Parliament in the decision as to whether or not to give assent once the ICC has requested the arrest and surrender of the person concerned. Whether or not such an interpretation is possible, for example following the logic of Articles 4(1) of the Moldovan Constitution cannot be guessed by an outside observer.

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<sup>4</sup> H. Duffy, 'Overview of Constitutional Issues and Recent State Practice', in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, supra note 2, at 502.

<sup>5</sup> For a full documentation of the French case, see A. Buchet, 'L'intégration en France de la convention portant Statut de la Cour Pénale Internationale. Histoire brève et inachevée d'une mutation attendue', in C. Kreß/F. Lattanzi, supra note 2, at 65, in particular at 67 and 74 et seq.

<sup>6</sup> For two comparative syntheses, see H. Duffy and J. Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations', in C. Kreß/F. Lattanzi, supra note 2, at 29; and H. Duffy, 'Overview of Constitutional Issues and Recent State Practice', in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, supra note 2, at 498.

<sup>7</sup> H. Duffy, 'Overview of Constitutional Issues and Recent State Practice', in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, supra note 2, at 502 et seq.; see also I. Gartner, 'Implementation of the ICC Statute in Austria', in C. Kreß/F. Lattanzi, supra n. 2, at 56 et seq.; and J. Huston, 'Ratification of the Rome Statute in the Principality of Liechtenstein: General Considerations and Constitutional Questions', in C. Kreß/F. Lattanzi, supra note 2, at 144 et seq. (note the very similar wording of Article 56(1) of the Constitution of Liechtenstein on the protection of Members of Parliament).

11. The second and distinct question is whether Articles 70(3) and 81(3) of the Moldovan Constitution do at all apply in case of an ICC request for arrest and surrender under the second sentence of Article 89(1) of the ICC Statute. The experience of other national jurisdictions facing a comparable problem suggests that a negative answer to this question can be explained on two different grounds which can also be combined.

12. First, it is open to doubt whether the two constitutional provisions concerned apply to international criminal proceedings. The wording of Article 81(3) would appear to suggest that its drafters thought only of a national constitutional conflict to be resolved through national criminal proceedings to be initiated before the Supreme Court. The different wording of Article 70(3) is open on the matter. It may be noted that the Constitutional Court of the Ukraine, in its opinion of 11 July 2001, took the view that the respective provisions in the constitution of the Ukraine apply only to national criminal proceedings.<sup>8</sup> The Court held as follows:

'Provisions of the Statute do not prohibit establishment and do not cancel provisions of Ukraine's Constitution referring to immunity of people's deputies of Ukraine, those of President of Ukraine and judges, and only result from the fact, that immunity of those persons concerns national jurisdiction and may not be an obstacle to exercise jurisdiction by international criminal court related to those of them, who committed crimes, stipulated by the Statute.'<sup>9</sup>

13. Furthermore, it may be asked whether the application of the two constitutional provisions in question should be subject to an exception regarding crimes under international law. Such an exception may be explained on the basis of two (alternative or cumulative) considerations: The first consideration would be based on the goal to interpret Article 70(3) and 81(3) of the Moldovan Constitution in line with general customary international law to which Article 8(2) of the Moldovan Constitution accords a prominent place. This argument rests on the premise that general customary international law contains a State duty *aut dedere aut iudicare* in cases of crimes under international law.<sup>10</sup>

14. The existence of such a duty comprising all the crimes under international law, as listed in Article 5 of the ICC Statute is a matter of much recent scholarly debate and it is probably fair to say that no unanimous view exists. However, weighty considerations point to the recent evolution of such a customary rule.

15. Most importantly, the sixth preambular consideration to the ICC Statute recalls that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. This formulation is clearly couched in prescriptive terms and corresponds to the practice of the UN not even to accept amnesties in cases of crimes under international law.<sup>11</sup> The ICC Statute therefore lends strong support to the emergence of a customary duty of the territorial and, where such a jurisdiction principle exists, arguably also the State of the nationality of the alleged offender to investigate and prosecute the crimes in question.

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<sup>8</sup> The relevant part of the opinion has been restated and analyzed by N. A. Safarov, 'The Commonwealth of Independent States (CIS)', in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, *supra* note 2, at 489.

<sup>9</sup> At 2.2.1. of the judgment. The unofficial English translation used in this opinion is taken from the website of the International Committee of the Red Cross; <http://www.cicr.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/11d83b3284a5cc4fc1256bc2004eabfa?OpenDocument> (last visited on 27 September 2007). The *Rapporteur* has refrained from correcting the obvious linguistic errors of the translation.

<sup>10</sup> For a thorough recent study, see C. Maienhöfer, '*Aut dedere – aut iudicare*' (Berlin: Duncker & Humblot, 2006).

<sup>11</sup> See, most recently, the Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict societies*, UN Doc. S/2004/616, 3 August 2004, at § 64.

16. The customary development underlying the statement in the ICC Statute's preamble may be traced back at least to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.<sup>12</sup> Article VI of the Genocide Convention sets forth a duty of the territorial State to try the offender or to surrender the offender to an international criminal court to whose establishment it alluded as a future option.<sup>13</sup> Crucially, in our context, Article IV of the Genocide Convention emphasises that no exception to the duty to punish exists where the offender is a 'constitutionally responsible ruler' or a 'public official'. This provision makes it plain that the drafters of the Convention were already fully aware of the fact that the establishment of a duty to investigate and prosecute must, in the specific case of a crime under international law, extend without exception to the holders of the highest positions in the State apparatus if it is to become effective. It may safely be contended that the treaty regime of Articles IV and VI of the Genocide Convention has over time acquired the status of general customary international law.<sup>14</sup>

17. This idea underlying Article IV of the Genocide Convention can be generalized in light of the fact that 'the most senior leaders suspected of being the most responsible for the crimes'<sup>15</sup> have become the focus of the investigation into and prosecution of crimes under international law in the recent practice of international criminal jurisdictions. This international judicial policy accords with the widely held view that the emerging duty to prosecute crimes under international law is confined to the most responsible persons holding, as a general rule, high-ranking positions.<sup>16</sup> In light of this confirmed teleology of the customary development on the matter, it can therefore be safely argued that it is implicit in any international obligation to investigate and prosecute a crime under international law that it extends to those categories of persons who are usually beneficiaries of constitutional immunity protections.

18. The situation under customary international law is similarly clear regarding those war crimes committed in international armed conflicts which fall within the category of grave breaches under the Geneva Conventions. In those cases, the customary duty *aut dedere aut iudicare* even extends to the State of custody of the suspect, the forum *deprehensionis*. In the absence of a comprehensive treaty clause to that effect, the legal picture is more blurred, however, regarding the other crimes under international law listed in Article 5 of the ICC Statute, i.e. crimes against humanity, those war crimes committed in international armed conflicts not falling within the category of grave breaches and war crimes committed in non-international armed conflicts. While it is not possible to conduct an exhaustive study of the international practice within the framework of this legal opinion it deserves mentioning that ICJ Judges Higgins, Kooijmans and Buergenthal recognized an 'international consensus that the perpetrators of

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<sup>12</sup> 78 United Nations Treaty Series, at 277; for a recent commentary of the Genocide Convention, see J. Quigley, *The Genocide Convention. An International Legal Analysis* (Aldershot: Ashgate, 2006).

<sup>13</sup> On those treaty provisions, see most recently the International Court of Justice, *Case Concerning the Application of the Convention of the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, at § 439 et seq.

<sup>14</sup> The question as to whether or not the customary duty *aut dedere aut iudicare* extends to States other than the territorial or, where applicable, the State of active nationality, goes beyond the scope of this legal opinion.

<sup>15</sup> See ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubango Dyilo, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, ICC-01/04-01/06, at § 50.

<sup>16</sup> L. N. Sadat, 'Exile, Amnesty and International Law', 81 *Notre Dame Law Review* (2006), 955, at 1027-1028; C. Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', 3 *Journal of International Criminal Justice* (2005), 695, at 707.

international crimes should not go unpunished'.<sup>17</sup> This judicial statement adds weighty support to the sixth preambular consideration of the ICC Statute and points to the development of customary international law towards a duty of the territorial State and, where applicable, the State of active nationality to investigate and prosecute the persons most responsible for the crimes under international law listed in Article 5 of the ICC Statute irrespective of any traditional constitutional immunity protections.

19. While it is readily recognized that there is room for legitimate disagreement as to whether or not the legal development towards a State duty to investigate and prosecute as referred to in the preceding paragraph comprehensively covering the crimes listed in Article 5 ICC Statute has fully crystallized into a customary rule, it would appear to be an option for a constitutional court to take this development into account when interpreting constitutional provisions such as Article 70(3) and 81(3) of the Moldovan Constitution. This would lead to the result that the said provisions do not apply in cases of crimes under international law. In the case of the crime of genocide, at least, there is even a strong basis to hold that such an interpretation is required if a conflict with customary international law is to be avoided. It deserves mentioning that the Constitutional Court of the Ukraine has resorted to a very similar interpretative approach in its above cited opinion. The Court held as follows:

'Establishment of responsibility for committing majority of crimes, stipulated by Rome Statute, is an international and legal obligation of Ukraine, according to other international and legal documents, which entered into force for our state (many of them – long before Ukraine's Constitution entered into force).'<sup>18</sup>

20. The second consideration on which an exception for crimes under international law can be based was considered relevant in Spain and, most particularly, as regards the constitutional protection of the Spanish King. The two Spanish authors Yáñez-Barnuevo and Roldán summarize the reasoning underlying the conclusion that no conflict with Article 27 of the ICC Statute exists as follows:

'Certainly, the ICC jurisdiction is not meant for cases of normal institutional functioning. Thus, in the improbable hypothesis of the Monarch committing any of the crimes included in the Statute without an appropriate reaction through the constitutional mechanisms to deal with that kind of situations (in the case of Spain, Art. 59.2 of the Constitution foresees the possibility of the incapacitation of the King), this would represent a real breach or even collapse of the constitutional order, carrying with it also the prerogatives or immunities established with a functional and institutional character.'<sup>19</sup>

21. After having explored the possible avenues for a harmonious interpretation of Articles 70(3) and 81(3) it should perhaps be added that the Constitutional Court may wish to combine a number of considerations to arrive at a ratio decidendi that does not exceed the necessities of the legal question before it. The most narrow conceivable ratio decidendi would consist in the recognition of non-applicability of Articles 70(3) and 81(3) of the Moldovan Constitution to international criminal proceedings for the crimes under international law listed in Article 5 of the ICC Statute. This would leave open the question whether those two provisions do apply to national proceedings even if these proceedings concern crimes under international law.

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<sup>17</sup> International Court of Justice, *Case Concerning the Warrant of Arrest of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, at § 51.

<sup>18</sup> *Supra* note 9, at 2.2.

<sup>19</sup> J. A. Yáñez-Barnuevo and Aurea Roldán, '*Spain and the Rome Statute of the International Criminal Court*', in C. Kreß/F. Lattanzi, *supra* note 2, at 212 et seq.

22. On the basis of the foregoing the general conclusion regarding the first question is that it depends on the interpretation given to Articles 70(3) and 81 of the Moldovan Constitution whether or not these provisions create obstacles in the application of Article 27 of the Statute. A restrictive interpretation avoiding such obstacles would appear to be possible on the basis of the materials available to this Rapporteur. Such a restrictive interpretation would also have the effect that the two provisions concerned would not hinder the Republic of Moldova to meet its obligation flowing from the second sentence of Article 89(1) of the ICC Statute.

### **Question B:**

23. To the extent that this question refers to the interplay of Article 89(1) of the ICC Statute and Article 70(3) as well as Article 81(3) of the Moldovan Constitution the answer has already given when responding to Question A. Therefore, the following considerations will be confined to the interplay of Article 18(2) of the Moldovan Constitution with Article 89(1) of the ICC Statute, i.e. to the problem regarding the possible surrender of a Moldovan national to the ICC.

24. Article 18(2) of the Moldovan Constitution reads as follows:

‘No citizen of the Republic of Moldova can be extradited or expelled from his/her country.’

Article 102 of the ICC Statute (‘Use of Terms’) reads:

‘For the purpose of this Statute:

- (a) “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute;
- (b) “extradition” means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.’

25. Article 18(2) of the Moldovan Constitution contains a prohibition to extradite nationals. At the same time, a State Party, under the second sentence of Article 89(1) of the ICC Statute, must not refuse to comply with a request for arrest and surrender on the ground that the person sought for surrender is one of its nationals. While such a ground for refusal was submitted by a number of delegations in the course of the negotiations on the ICC Statute it was generally accepted at the end, that the retention of such a ground for refusal would be in open contradiction of the system of collective criminal justice for the prosecution of crimes under international law as established by the ICC Statute.<sup>20</sup>

26. It follows that Article 18(2) of the Moldovan Constitution would be in conflict with the second sentence of Article 89(1) of the ICC Statute if this constitutional provision covered the surrender of a Moldovan national to the ICC.

27. Again, the legal issue in question was under consideration in a number of national jurisdictions in the course of the process leading up to these States’ ratification of the ICC

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<sup>20</sup> For an account of the drafting history, see C. Kreß and K. Prost, ‘article 89’, in O. Triffterer, *Commentary of the Rome Statute. Observer’s Notes. Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at 1074, margin number 11; and C. Kreß, ‘article 102’, *ibid.*, at p. 1157, margin number 1; on the inadmissibility of nationality as a ground for refusal, see also G. Sluiter, ‘The Surrender of War Criminals to the International Criminal Court’, 25 *Loyola of Los Angeles International and Comparative Law Review* (2003), 605, 612; and B. Swart, ‘International Cooperation and Judicial Assistance: Arrest and Surrender’, in A. Cassese/P. Gaeta/J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court. Volume II* (Oxford: Oxford University Press, 2002), at 1682 et seq.



Statute. A learned commentator summarizes the comparative experience collected so far as follows:

'A second issue, frequently arising, relates to the compatibility of the obligations to arrest and surrender to the ICC with the prohibition on the extradition of nationals in many Constitutions around the world. This has led States such as Germany<sup>21</sup> and Slovenia to amend the Constitution. However, once again, this approach appears to be adopted by a minority of States, with others taking the view that amendment is unnecessary, on the basis that, as the Supreme Court of Costa Rica noted, the prohibition is not as absolute as might at first appear.'<sup>22</sup>

28. The legal question to be decided by the Moldovan Constitutional Court is whether or not the concept of 'extradition' within the meaning of Article 18(2) of the Moldovan Constitution extends beyond inter-State extradition to the surrender of suspects to the ICC. The wording of Article 18(2) would not appear to directly settle the issue. Instead, it would seem to leave room for both an extensive and a restrictive construction. As the grammatical interpretation does not exhaust the matter, the Moldovan Constitutional Court will, in all likelihood, decide the question on the basis of a comprehensive analysis of a number of relevant materials. While some materials, such as the travaux préparatoires of Article 18(2) may reveal national peculiarities, other considerations are of a more general nature and may apply, mutatis mutandis, to all national jurisdictions faced with the constitutional challenge in question. The following are considerations of the latter kind.

29. The constitutional prohibition to extradite nationals is less common than the constitutional immunity protections of Members of Parliament and Heads of State.<sup>23</sup> So, for example, one only rarely encounters a rigorous prohibition to extradite nationals in the world of the common law and also within the Commonwealth of Independent States the prohibition under consideration, while widespread, is not recognized throughout.<sup>24</sup> This result of a comparative analysis may be taken as a first indication in order not to give the concept of 'extradition' the broadest scope possible too hastily.

30. A second indication may be derived from the ICC Statute itself and from its Article 102, in particular. It should be clearly stated, though, that the constitutional question under consideration cannot be decided by sole reference to Article 102 of the ICC Statute. This provision purports to draw a conceptual distinction between inter-State extradition and the 'vertical' surrender of a person from a State Party to the ICC. This Rapporteur has already had the occasion to comment on the intention behind Article 102:

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<sup>21</sup> On Germany, see the considerations *infra* on question C.

<sup>22</sup> H. Duffy, 'Overview of Constitutional Issues and Recent State Practice', in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, *supra* note 2, at 503 et seq.

<sup>23</sup> For a comparative overview, see C. Rinio, 'Die Auslieferung eigener Staatsangehöriger. Historische Entwicklung und neuere Tendenzen', 108 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1996), at 354.

<sup>24</sup> For a comparative overview, see N. A. Safarov, 'The Commonwealth of Independent States (CIS)', in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, *supra* note 2, at 482 et seq., mentioning the examples of the Republic of Kazakhstan and Georgia. For a commentary on the legal situation in Georgia, see M. Turava, 'Georgia', in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, *supra* note 2, at 113: 'As we can see, the *Constitution* prohibits surrender to another country and not to the ICC, which was created with the participation of Georgia. The Constitution envisages the possibility of surrender in cases foreseen by international treaties. Surrender to the ICC is distinct from surrender to another State. Furthermore, such surrender derives from an international treaty applicable to Georgia, i.e. the *Rome Statute*. For these reasons there are no inconsistencies of a constitutional character with respect to the *Rome Statute*.

'When it became apparent that no viable alternative existed to the rejection of a ground for refusal to surrender nationals some delegations expressed the wish to make it very explicit that they did not hereby consent to extradite nationals in general but accepted such an obligation only in the very specific context of the Court. The idea then emerged to clarify that point by contrasting (interstate) extradition and (State to Court) surrender by way of definition. Such a clear distinction at the terminological level should, as was the underlying thinking, at the same time contribute to a growing awareness on the national level for the substantial differences between horizontal and vertical cooperation (emphasis in the original).'<sup>25</sup>

Cautioning against an overemphasis of the legal significance of Article 102 for the constitutional issue under consideration is not, however, to completely disregard this provision in the constitutional context. As this Rapporteur stated, the legal relevance of Article 102 of the ICC Statute can be described as follows:

'[A]rticle 102 does not oblige States Parties to make use of the same terminological distinction in their respective national legislation. This is made clear by the opening wording "for the purpose of this Statute". Finally, it remains a matter of interpretation of the respective national constitution whether article 102 is referred to in order not to apply an existing prohibition on the extradition of nationals to the surrender of persons to the Court. To point to article 102 as one argument in this respect would certainly – seen from the perspective of the Statute – be legitimate.'<sup>26</sup>

A comparative constitutional analysis provides for examples of using Article 102 of the ICC Statute as one of several arguments to narrowly define the constitutional concept of 'extradition'. The Constitutional Court of the Ukraine held as follows:

'Therefore, the international legal documents and special literature consider, that delivery of a person to another equally sovereign state differs in principle from delivery of a person to the Court, established pursuant to international law with participation and agreement of interested states.'<sup>27</sup>

The reference to Article 102 of the ICC Statute may thus provide the Moldovan Constitutional Court with one more argument to give a narrow interpretation to the concept of 'extradition', but it will hardly be used by that Court to conclusively answer the question in and of itself.

31. Many considerations have been advanced in the course of the historic evolution of the law in the different countries concerned in order to explain the constitutional prohibitions to extradite are manifold.<sup>28</sup> The most important reasons would appear to be the constitutional duty to protect its nations from foreign criminal proceedings, the uncertainty about the human rights standards applicable in the foreign criminal jurisdiction and the resulting mistrust, the notion of the national judge as the 'natural judge' and the perceived loss of national dignity in the case of delivering up one's own national to a foreign jurisdiction. All these considerations are subject to criticism already in the inter-State context, but this discussion is one of legal policy and need not be further pursued for the limited purpose of this opinion. What crucially matters for a teleological interpretation of provisions such as Article 18(2) of the Moldovan Constitution, is

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<sup>25</sup> C. Kreß, 'article 102', in O. Triffterer, *Commentary of the Rome Statute. Observer's Notes. Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at 1157 et seq., margin number 2.

<sup>26</sup> C. Kreß, 'article 102', O. Triffterer, *Commentary of the Rome Statute. Observer's Notes. Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at 1158, margin number 7.

<sup>27</sup> *Supra* note 9, at 2.3.1.

<sup>28</sup> For an exhaustive analysis, see Rinio, *supra* note 23, at 381 et seq.

what weight, if any, must be accorded to the traditional rationales underlying the prohibition to extradite when it comes to the surrender of a national to the ICC.

32. It would strike as rather obvious, considerations of 'natural justice' and 'State dignity' do carry minimal weight at best when it comes to international criminal proceedings for 'the most serious crimes of concern to the international community as a whole'<sup>29</sup>. As far as the idea of the national judge as the 'natural judge' is concerned, this holds all the more true in light of the ICC Statute's overarching principle of complementarity under which the national judiciary has a primary right to proceed with the investigation and prosecution.<sup>30</sup>

33. While more relevant at first sight, the need to protect its own national from the exercise of a foreign jurisdiction would appear to be reduced to a very significant extent when it comes to international proceedings before the ICC. The reason for this is as follows: While national criminal proceedings will usually<sup>31</sup> be initiated because of a prosecution interest of the State concerned that may, indeed run counter a protective interest of the State from which extradition of its national is sought, the ICC has been established by the international community to serve a genuine world community interest by ending impunity for crimes that are of direct concern to the international community as such. The ICC is thus not so much the extension of national criminal jurisdictions as is sometimes argued, but a new organ of the international community which is entrusted with the direct enforcement of a truly international *ius puniendi*.

34. There remains the uncertainty of the State from which extradition is sought with respect to the legal landscape of the forum seeking extradition. It cannot be denied that this rational applies, to an extent, also with respect to the surrender of a suspect to the ICC because the latter court constitutes a criminal jurisdiction of its own, legally distinct from the jurisdiction from which surrender is sought, and applying its own procedural law. On the other hand, it is equally true, that the ICC and its procedural law has been devised in a transparent process of open multilateral negotiations and with the full respect to the existing international human rights standards, such as Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights. On that basis, it is fair to say that the uncertainty regarding the international forum is not of a kind as to warrant serious mistrust as may be legitimate in inter-State relations. All in all, the drafters of the ICC Statute had good cause to underline the 'distinct nature of the Court' in Article 91(2)(c) the ICC Statute and Constitutional Courts are certainly entitled to give due consideration to this distinct nature when applying provisions such as Article 18(2) of the Moldovan Constitution.

35. As was indicated earlier<sup>32</sup>, a number of national jurisdictions have decided to narrowly define the concept of extradition for the purpose of constitutional interpretation. In doing so, they have relied on precisely those considerations that have been set out in the foregoing. The following reasoning put forward by the Constitutional Court of Ukraine may serve as one example:

'According to part two of article 25 of Ukraine's Constitution, surrender (extradition) of Ukraine's citizens to other state is prohibited. Therefore this prohibition concerns only national, and not international jurisdiction. It aims to guarantee unbiased judicial review and justice and lawfulness of punishment for its citizens. International Criminal Court cannot be equated to a

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<sup>29</sup> Fourth preambular consideration to the ICC Statute.

<sup>30</sup> See the 10th preambular consideration and Articles 17 to 20 of the ICC Statute.

<sup>31</sup> The hypothesis of criminal jurisdiction by representation (*stellvertretende Strafrechtspflege*) is of no relevance in our context.

<sup>32</sup> *Supra* paragraph 27.

foreign court, as it is being established, as stated before, with participation and by agreement of participating states on the basis of international, and not national law.<sup>33</sup>

A similar approach has been taken, to give one more example, by Switzerland when interpreting Article 25(1) of the Federal Constitution which is worded in a manner very similar to Article 18(2) of the Moldovan Constitution. The reasoning has been aptly summarised by the Swiss writer Michael Cottier:

'More importantly, "surrender" and "extradition" are also substantially different concepts. Based on teleological interpretation, Art. 25(1) does not apply to surrender to the Court because this constitutional provision's objective is not to prevent the delivering up of persons to an international institution of the nature of the Court. Rather, the provision seeks to protect Swiss citizens from exposing them to the risk of discrimination, arbitrariness or abuse of foreign state's sovereign power. Concerns with respect to extradition are misplaced in respect of transfer to the ICC as the Court is bound to high standards of justice, to comprehensive procedural safeguards, and to comprehensive guarantees of independence and due process. Thus, the procedure, sentence and review mechanisms are foreseeable and reliable. Switzerland has furthermore actively participated in the definition of these principles and safeguards. [...] Also, the Rome Statute addresses crimes of a particular nature. Only the "most serious crimes of concern to the international community as a whole" (Preamble) are under the Court's jurisdiction. While the prosecution of such crimes lies in the interest of all states, a single state generally requests an extradition only in its own interest. The objective of Art. 25(1) thus cannot be to prevent surrender to the ICC.

In any event, and from a more practical viewpoint, the Court only has complementary jurisdiction subject to a strict admissibility regime, the states retaining primary prerogative and responsibility to prosecute. Thus, if the Swiss justice system functions appropriately and Swiss citizens responsible for one of the egregious crimes under ICC jurisdiction are genuinely prosecuted, they need not be surrendered to the Court. However, if the Swiss justice system would not function properly and would fail to bring to justice Swiss citizens that committed international core crimes, it would not only be in the interest of the international community of states but likely also be in the interest of the Swiss people that they are made accountable for their acts before the ICC. Also, the objective of the Swiss Confederation to promote a just and peaceful international order, and the goals of the Foreign Policy to promote respect for human rights, democracy, and the peaceful coexistence of nations, argue in favour of a narrow reading of Art. 25(1).

It is therefore submitted that Art. 25(1) of the Swiss Constitution does not hinder surrender to the ICC.<sup>34</sup>

This reasoning has later been confirmed by the Federal Council in its Message of 15 November 2000. The Council argued that Article 25 of the Constitution did not create an obstacle to a potential (albeit rather theoretical) surrender of a Swiss citizen to the ICC. The ratification of the Rome Statute would therefore not necessitate an amendment of the Constitution. In principle, the Council argued that surrender was not comparable to extradition. The relevant passage reads as follows:

'Another question is whether the Statute necessitates an amendment to the Constitution. Under Article 89 of the Statute, a State Party must surrender to the International Criminal Court any person found in its territory, if the Court so requests. Such a person may be one of its own nationals. It is therefore necessary to consider whether this obligation is compatible with Article

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<sup>33</sup> Supra note 9, at 2.3.2.

<sup>34</sup> M. Cottier, 'The Case of Switzerland', in C.Kreß/F. Lattanzi, supra note 2, 219, at 240 et seq.

25 § 1 of the Constitution, which provides that Swiss nationals may not be expelled from the country and may not be extradited to a foreign authority without their consent. It is not possible to make a reservation to the Statute (Article 120 of the Statute); nor is it permitted – contrary to the provisions for co-operation with the two ad hoc tribunals – to make the surrender of a Swiss national absolutely conditional on that person being returned to Switzerland for the enforcement of any sentence that may be handed down. However, it is doubtful whether Article 25 of the Constitution can be applied to the surrender of a person to an international court. The difference between the extradition of a person to a foreign State and the surrender of a person to an international body is not a matter of wording, but a distinction between two concepts which derives from the Statute itself. Article 102 of the Statute draws a clear distinction between surrender, which it defines as the delivering up of a person by a State to the Court, and extradition, which it defines as the delivering up of a person by one State to another. It can therefore be argued that surrender to the Court does not fall within the scope of Article 25 § 1 of the Constitution, since this provision – at least in the German (“dürfen ausgeliefert werden”) and Italian (“possono essere estradate”) versions – refers only to extradition. Whereas, in the case of extradition, a sovereign State hands over one of its citizens to the criminal justice authorities of another sovereign State over whose procedures it has no influence, in the case of surrender, a citizen is handed over to an independent and impartial international body which the requested State Party helped to set up and organise and for which it shares continued responsibility. States parties must ensure that the International Criminal Court at all times meets the requirements of the fundamental rights laid down in the Statute; States must assume this responsibility, for example, through their participation in the Assembly of States Parties. The European Court of Human Rights has also established a distinction between the concept of extradition to another State and that of surrender to an international court (footnote omitted).<sup>35</sup>

36. In conclusion, and on the basis of the materials available to the Rapporteur, it would appear that there is room for an interpretation of Article 18(2) of the Moldovan Constitution which is in compliance with Article 89(1) of the ICC Statute without needing to amend the Moldovan Constitution.

### **Question C:**

37. In the humble view of this Rapporteur, the German experience is probably of lesser significance to the Moldovan Constitutional Court compared with the preceding considerations. In order to exhaustively answer the questions posed to him, the Rapporteur will, however, also summarize the German solutions to the constitutional problems at stake. Importantly, there has not been any judicial analysis of the relevant issues. Rather, the decisions concerned were taken first by the German (constitutional) legislative. The latter’s position, in a nutshell, was as follows: No constitutional amendment was thought necessary regarding the immunity issue. With respect to the question of the surrender of nationals, the text of the constitution was amended, but without a reasoned decision about the latter’s necessity.<sup>36</sup>

38. The immunity protections under the German Constitution (hereafter: Basic Law) apply to Members of Parliament and to the Federal President, the Head of State. Article 46(2) of the Basic Law on the protection of Parliamentarians reads as follows:

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<sup>35</sup> The passage is reprinted in J. Lindemann/O. Thormann, ‘Switzerland’, in C. Kreß/F. Lattanzi/B. Broomhall/V. Santori, supra note 2, 425, at 427 et seq.

<sup>36</sup> For a more detailed analysis of the German practice regarding the ratification of the ICC Statute, see C. Kreß and F. Jarasch, in C. Kreß/F. Lattanzi, supra note 2, at 96; and C. Kreß, ‘Vorbemerkungen zum Statut des Internationalen Strafgerichtshofs’, in H. Grützner/P.-G. Pötz/C. Kreß (eds), *Internationaler Rechtshilfeverkehr in Strafsachen* (Heidelberg: R.v.Decker, 2<sup>nd</sup> ed., loose-leaf, 1980 et seq.), Vor III 26, at 181 et seq, marginal note 366 et seq..

A Member may not be called to account or arrested for a punishable offense without permission of the Bundestag, unless he is apprehended while committing the offense or in the course of the following day.<sup>37</sup>

Article 60(4) of the Basic Law, which deals with the Head of State refers back to Article 46(2). As a result hereof, the same kind of immunity protection is afforded to the Federal President.

Article 24(1) of the Basic Law reads as follows:

'The Federation may by a law may transfer sovereign powers to international organizations.'

The latter provision on the transfer of German sovereign powers to a supranational organization provides the key to the understanding of the view taken by the German legislature that no amendment of Articles 46(2) and 60(4) of the Basic Law was necessary. It is the view of the German legislator that the ICC has supranational facets within the meaning of Article 24(1) of the Basic Law. In particular, a direct legal effect within the German legal order was attributed to the international arrest warrant pursuant to Article 58(1) of the ICC Statute. It was held that this direct legal effect included, with a view to Article 27(2) of the ICC Statute, the inadmissibility of possible constitutional immunity protections. As a result, it was held that the law for Germany's ratification of the ICC Statute (*Vertragsgesetz*) by way of Article 24(1) of the Basic Law allowed the law of the ICC to supersede, where applicable, Articles 46(2) and 60(4) of the Basic Law.<sup>38</sup> In light of this premise, not much thought was given to the precise scope of application of the latter constitutional provisions.

39. Prior to its amendment, Article 16(2) of the Basic Law read as follows:

'No German may be extradited abroad.'<sup>39</sup>

Whether or not this constitutional prohibition applied to the surrender of suspects to the ICC was a matter of controversy among German legal scholars.<sup>40</sup> The German legislator opted, failing a detailed constitutional exegesis, for a constitutional amendment.<sup>41</sup> Amended, Article 16(2) reads as follows:

'No German may be extradited abroad. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles<sup>42</sup> are observed'.

<sup>37</sup> The English translation is taken from [http://bundestag.de/htdocs\\_e/parliament/function/legal/germanbasiclaw.pdf](http://bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf).

<sup>38</sup> *Bundestags-Drucksache* 14/2682, at 7 (cf. annex 1 to this opinion).

<sup>39</sup> In the English translation referred to supra note 37 the words 'to a foreign country' are used instead of the word 'abroad'. The latter word seems to capture the meaning of the German term 'Ausland' more accurately, though.

<sup>40</sup> For an argument that this provision did not apply to the vertical surrender, see W. Bausback, 'Art. 16 II und die Auslieferung Deutscher an den Internationalen Strafgerichtshof', *Neue Juristische Wochenschrift* (1999), at 3319; C. Kreß and F. Jarasch, in C. Kreß/F. Lattanzi, supra note 2, at 101-104; for the opposite position K. Schmalenbach, 'Die Auslieferung mutmaßlicher deutscher Kriegsverbrecher an das Jugoslawientribunal in Den Haag', 36 *Archiv für Völkerrecht* (1998), at 285.

<sup>41</sup> For the pertinent passages in the *travaux préparatoires* of the constitutional amendment bill, see *Bundestags-Drucksache* 14/2668, at 4 (§ 1) (cf. annex 2 to this opinion).

<sup>42</sup> The original German terms are 'rechtsstaatliche Grundsätze'.

The decision to amend the constitution must be seen in a broader context of the legal development on the international cooperation in criminal matters in Europe. This development leading up to the EU framework decision on the European Arrest Warrant undeniably required an amendment of Article 16(2) of the Basic Law. In light of this, the German legislature deemed it preferable to dispel any possible doubt also with respect to the surrender of German suspects to the ICC.

40. It may be worth mentioning on a final note, that the German Constitutional Court (Bundesverfassungsgericht), in passing, touched upon the surrender of German suspects to the ICC in its recent judgment on the European Arrest Warrant. In doing so, the Court took a more favourable view on vertical surrender than on inter-State extradition within the EU stressing both the principle of complementarity and Germany's historic responsibility. The relevant passage reads as follows:

'The statute of the permanent International Criminal Court in The Hague under the law of international agreements (see Act on the Rome Statute of the International Criminal Court (Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs) of 17 July 1998 – ICC Statute Act, Federal Gazette 2000 II p. 1393, entered into force on 1 July 2002, in its version promulgated on 28 February 2003, Federal Gazette 2003 II p. 293) took recourse to these two models [of the ICTY and the ICTR], with the important proviso, however, that international jurisdiction is only established on a subsidiary basis. The States Parties to the Rome Statute have ipso iure the possibility to prevent extradition of their own citizens by adequate national prosecution (as regards the principle of complementary jurisdiction, see Article 1 and Article 17 of the Statute and Article 1 § 1.1 of the Act of 21 June 2002 on the Implementation of the Rome Statute of the International Criminal Court of 17 July 1998 (Gesetz vom 21. Juni 2002 zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs vom 17. Juli 1998), Federal Law Gazette I p. 2144). The responsibility for the punishment of certain offenses is thus divided by a coordinated assignment of competences. Aware of its special responsibility, and also of the historical reasons for it, the Federal Republic of Germany, as a member of the international community of states, integrates in the process of evolution of an international system of criminal justice for crimes against humanity, which began with the trials of war criminals before the tribunals of Nuremberg and Tokyo after the Second World War (on the prosecution of genocide, see the Order of the Fourth Chamber of the First Senate of the Federal Constitutional Court of 12 December 2000 – BvR 1290/99 -, Neue Juristische Wochenschrift 2001, pp. 1848 et seq.).<sup>43</sup>

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<sup>43</sup> Federal Constitutional Court, European Arrest Warrant Case, 2 BvR 2236/04 of 07/18/2005, at § 73; the English translation is taken from [http://www.bverfg.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html) (visited on 27 September 2007) (annex 3 to this opinion).