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(VENICE COMMISSION)

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

by

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The Venice Commission has been requested to assist the Moldovan Constitutional Court in answering the following specific questions:

1. Will the present provisions of Article 70.3 and 81 of the Constitution create obstacles in the application of Article 27 of the Statute ?

2. 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 ?

3. 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.

The task is to examine and to the possible extent to interpret these provisions, comparing them to other similar provisions of other constitutions, too. The interpretation should extend to the context of the relation of domestic legal system to international law.

1. Immunities against the equal application of the Rome Statute

The English translation of Article 70(3) of the Moldovan Constitution[1] on the incompatibilities and immunities of members of Parliament reads as follows:

'The member of Parliament may not be apprehended, arrested, searched or put on trial, except for the cases of flagrant misdemeanour, without the prior consent of the Parliament and after hearing of the member in question.'

Article 81(3) of the Moldovan Constitution on the incompatibilities and immunities of the President of the Republic 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 offence. 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.'

The compelling interests in this question are the immunity of members of Parliament and the Head of State, against the principle of the Rome Statute that its provisions shall apply equally to all persons without any distinction based on official capacity. The historically developed reasons for institutionalize immunity of Members of Parliament are well-known. The legitimate aim of

[1] Translation taken from CODICES (with my own corrections)

defending public persons from allegations and the use of politically motivated penal procedures has to be considered in a different context in the case of international criminal law.
We should note that the emergence of international criminal law has fostered the universal character of criminal law (in contrast with its originally 'parochial' character of).[2] Criminal law typically is limited to the territory of a single State; the mere birth of international criminal law transgresses the boundaries of sovereignty. In this case criminal responsibility is extended, and transferred to the international community. It is another question that these efforts remain in certain aspects unsuccessful. "The notoriously vague and often outright puzzling provisions of the Rome Statute of the International Criminal Court are best read as reflecting negotiated diplomatic compromises rather than some carefully constructed comprehensive view of criminal responsibility."[3]

The Report of the Venice Commission on Constitutional Issues raised by the ratification of the Rome Statute on the International Criminal Court[4] addressed – among others – the problem of immunity of persons having an official capacity (Art. 27), and the obligation for States to surrender their own nationals to the court at its request (Art. 59, 89).

Some European Constitutional Courts have already faced the issue of the incompatibility of the Rome Statute with their constitution.

The Constitutional Council of France in 1999 was the first constitutional court to have ruled on questions raised concerning the compatibility of the Statute with a constitutional text.
In the case of the ICC Statute, the Council identified three areas of non-compliance. One of them was that the criminal liability of the Head of State during his term of office may only be invoked before the High Court of Justice. The President of the Republic enjoys immunity for acts carried out in the exercise of his office except in the case of high treason; furthermore, during his term of office, his criminal liability may only be invoked before the High Court of Justice in accordance with the procedure described in Article 68 of the Constitution. Therefore the Constitutional Council ruled that "the authorization of ratifying the Statute of the International Criminal Court necessitates the revision of the constitution."[5]

The Constitutional Court of the Ukraine, in its opinion of 11 July 2001, declared: stating that "the International Criminal Court... complements the national criminal justice authorities", the Rome Statute of the International Criminal Court is inconsistent with Article 124.1 of the Constitution that prohibits delegating of functions of the courts, or assignment of such functions to any other authority or official.[6] As regards the problem lying before the Moldavian Constitutional Court, the Constitutional Court of Ukraine took the view that the respective provisions in the constitution of the Ukraine apply only to national criminal proceedings. The Court held as follows:

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[2] George P. Fletcher, 'Parochial versus Universal Criminal Law', (2005) 3 *Journal of International Criminal Justice* 20ff.

[3] Markus Dirk Dubber: *Comparative Criminal Law.* In: The Oxford Handbook of Comparative Law. (Eds. Mathias Reimann – Reinhard Zimmermann). Oxford, Oxford University Press. 2006. p. 1307.

[4] CDL-INF(2001)1

[5] „L'autorisation de ratifier le traité portant statut de la Cour pénale internationale exige une révision de la Constitution."

FRA-1999-1-002 (22-01-1999) 98-408 DC

[6] UKR-2001-C-002 (11-07-2001) 3-v/2001

'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.'[7]

In 2002 the Constitutional Court of Albania declared that the activity and functions of the Rome Statute do not violate the constitutional provisions concerning the exercise of State sovereignty. The provisions of the Rome Statute are not in conflict with the Constitution and, as such, this instrument can be incorporated into the domestic law.
With regard to the fact that the Rome Statute, in contrast with domestic law, does not recognise the immunity of certain subjects, the Court found that this was not in conflict with the Constitution, because the immunity granted under domestic law provided protection only from the national judicial power. It could not prevent an international organ, like the International Criminal Court, from exercising its jurisdiction over persons vested with immunity under domestic law.
The Court affirmed that the generally accepted rules of international law are part of domestic law. Thus the lack of immunity against international criminal proceedings for specific crimes is part of the Albanian legal system. The Constitutional Court found it necessary to say that

"Since the generally accepted rules of international law are part of the domestic law, then, even the lack of immunity in international criminal proceedings for heinous crimes, becomes part of the Albanian legal system. The international jurisprudence has elaborated a series of permanent rules so that the perpetrators of these criminal acts would not have the possibility to defend themselves by treating them as acts performed during the exercise of duty (*acta iure imperii*). Going beyond the immunity of the head of State or Government has become a well known practice in public international law, being a leading reference for the courts in order to reinforce the idea that immunity against criminal prosecution for the head of State, of Government and so forth, cannot be applied for crimes of international impact such as the genocide, crimes against humanity, war crimes and aggression."[8]

This – in the opinion of the Court – was already accepted under the Treaty of Versailles, the Charter of the International Military Tribunal of Nuremberg, the Convention on the Prevention and Punishment of the Crime of Genocide and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.[9]

The Armenian Constitutional Court in 2004 identified the same contradiction between the Rome Statute and the constitutional provisions as the Ukrainian court did. The provision that the jurisdiction of the International Criminal Court is complementary to national criminal jurisdiction, set out in part 10 of the Preamble and Article 1 of the Statute, does not conform to Articles 91 and 92 of the Constitution of Armenia insofar as Chapter 9 of the Constitution, which includes provisions on the judiciary and sets out precisely the judicial system of the Republic of Armenia, does not contain any provision that may be taken as a basis for permitting the system of judicial bodies exercising criminal jurisdiction to be complemented with an international judicial body of criminal jurisdiction by way of an international treaty.[10]

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[7] An unofficial English translation is on the website of the International Committee of the Red Cross; http://www.cicr.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/11d83b3284a5cc4fc1256bc2004eabfa!OpenDocument

[8] ALB-2002-3-007 (23-09-2002) 186, chapter II. Immunity in the Criminal Process

[9] ALB-2002-3-007 (23-09-2002) 186

[10] ARM-2004-2-004 (13-08-2004) DCC-502

The Report of the Venice Commission on Constitutional Issues raised by the ratification of the Rome Statute on the International Criminal Court among others refers to example of the Italian constitution. "Under Italian constitutional law immunity from prosecution in national public law is not enforceable against the court, since, as a result of Articles 10 and 11 of the constitution, the domestic legal system is automatically brought into line with Articles 27 and 98 of the Rome Statute. Article 10 in fact states «Italy's legal system shall conform with the generally recognised principles of international law»…"[11]
However, in 2001 the Italian Constitutional Court interpreted Article 10 in the following way:
"In some cases the Constitution itself provides a specific foundation for the incorporation of international law, assigning a particular legal value to the rules introduced into the Italian system. This is the case of Article 10.1 of the Constitution, which lays down that the Italian system 'shall conform' with the generally recognised principles of international law, and Article 11 of the Constitution, which mentions the founding treaties and standards of international organisations ensuring 'peace and justice between nations'. However, in both cases the incorporation of such standards into the domestic legal system is subject to respect for the 'fundamental principles of the constitutional system' and the 'fundamental human rights'.
On the other hand, where there is no specific constitutional basis, convention-based international legal standards take on the legal force of the domestic implementing instrument in the national system. Consequently, when the Court is asked to consider the constitutionality of the law introducing the treaty into the domestic system, it will do so as it would with any other piece of domestic legislation.
Analysis of the constitutionality of the law implementing the treaty provides a good idea of the constitutionality of the treaty itself (see e.g. Judgments nos. 183 of 1994, 446 of 1990 and 20 of 1966), and can lead to a declaration of unconstitutionality vis-á-vis the part of the implementing law that introduces rules incompatible with the Constitution into the domestic legal system (Judgments nos. 128 of 1987 and 210 of 1986)."[12]

The interpretation of the relation of domestic and international law by the Moldavian Constitutional Court in cases known for us can be summed up as follows. The relevant constitutional provisions read:

Article 4 Human Rights and Freedoms
(1) Constitutional provisions for human rights and freedoms shall be understood and implemented in accordance with the Universal Declaration of Human Rights, and with other conventions and treaties endorsed by the Republic of Moldova.
(2) Wherever disagreements appear between conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations.
Article 8 Observance of International Law and International Treaties
(1) The Republic of Moldova pledges to respect the Charter of the United Nations and the treaties to which she is a party, to observe with her relations to other states the unanimously recognized principles and norms of international law.
(2) The coming into force of an international treaty containing provisions contrary to the Constitution shall be preceded by a revision of the latter.

The Constitutional Court in 2003 declared that the provisions of the European Charter of Local Self-Government, which, under Articles 4 and 8 of the Constitution, are to prevail over any national laws which are contrary to the international acts to which the Republic of Moldova is a party.[13]

[11] CDL-INF(2001)1

[12] ITA-2001-1-003 (19-03-2001) 73/2001

[13] CODICES MDA 2003-2 - 007

In 2005 the Constitutional Court recalled that according to Article 4 of the Constitution, the constitutional provisions concerning human rights and freedoms are interpreted and applied in accordance with the Universal Declaration of Human Rights and the international covenants and treaties to which the Republic of Moldova is a party. In case of a lack of accordance between Moldova's laws and the international covenants and treaties concerning human fundamental rights to which the Republic of Moldova is a party, priority shall be given to the international regulations.[14]

As a conclusion the analogous interpretations given by other Constitutional Courts open the way to the following possible solutions:
1. Interpretation of the relevant provisions of the constitution of Moldova as submitted to the international rules that would be in line with previous decisions by the same court.
2. Interpretation of the relation of domestic and international law similarly to that of the Constitutional Court of Ukraine, based on the argument that the immunity of the persons privileged by immunity concerns national jurisdiction and may not be an obstacle to exercise jurisdiction by international criminal court related to those of them.
3. However, the most definite solution would be the amendment of the constitution. The Report on Constitutional Issues raised by the ratification of the Rome Statute on the International Criminal Court[15] suggested to facilitate or make possible the ratification of the Statute of Rome the "systematic revision of all constitutional articles that must be changed to comply with the Statute".

2. The constitutional ban on extradition and the Rome Statute

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 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.'

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.'

It is necessary to make a distinction between the vertical and horizontal effect of the obligation to 'surrender or extradite'. The constitutional prohibition of extradite a citizen to another country refers to the vertical relation of those countries. In the case of "surrendering" a citizen to a vertically higher authority namely the International Criminal Court is a different matter.

[14] CODICES MDA 2005-1-002

[15] CDL-INF(2001)1

The wording of Article 89 of the Statute is not a new invention, it had been used literally the same way by the statutes establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY - article 29), and the International Criminal Tribunal for Rwanda (ICTR - article 28). All these statutes use the expression surrender instead of extradition. Extradition means traditionally a horizontal cooperation among sovereign states, while surrender refers to a vertical cooperation among sovereign states and international criminal courts.[16] This idea was reflected in 1997 by the appellate trial chamber of ICTY in case *Prosecutor v. Tihomir Blaskić*.[17]

The language of Article 18(2) of the Moldovan Constitution is very explicit. It is stronger than the wording of other constitutions. It does not simply prohibit the extradition to foreign States but from the State generally. For example, the original text of the German Basic Law was much more limited in its scope: *'No German may be extradited abroad.'* [Article 16(2)].

Article 25 of the constitution of Ukraine reads:
(1) A citizen of Ukraine shall not be deprived of citizenship and of the right to change citizenship.
(2) A citizen of Ukraine shall not be expelled from Ukraine or surrendered to another state.
The Constitutional Court of Ukraine interpreted the above provisions:
"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 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."

Art. 25 of the Swiss constitution in the paragraph on "Protection against expulsion, extradition, and removal by force" states that Swiss citizens may not be expelled from the country; they may be extradited to a foreign authority only with their consent.[18] This provision aims at to protect Swiss citizens from exposing them to the risk of discrimination, arbitrariness or abuse of foreign state's sovereign power.

The *EU Council Framework Decision 2002/584/JAI of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* raises a similar conflict between two legal orders.

The Constitutional Court of Poland interpreted the relevant constitutional provisions in 2005. According Article 9 of the constitution:

"The Republic of Poland shall respect international law binding upon it."

The prohibition on extradition (Article 55.1 of the Constitution: *"The extradition of a Polish citizen shall be forbidden."*) expresses the right for Polish citizens to be held criminally liable before a Polish court. Surrendering a citizen to another EU Member State, on the basis of a European Arrest Warrant, would entirely preclude enjoyment of this right and would infringe its essence, which is impermissible in light of Article 31.3 of the Constitution establishing the principle of proportionality. Therefore, the prohibition on extraditing Polish citizens is absolute in nature and the personal right of these citizens on this basis may not be subject to any limitations.

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[16] Plachta, M., „*Surrender" in the context of the International Criminal Court and the European Union*. In: International Criminal Law: Quo Vadis? Association Internationale de Droit Penal. 2004. No. 19. 465.

[17] Judgement 29 oct. 1997 of Trial Chamber II in *Prosecutor v. Tihomir Blaskić*, par 47.

[18] Art. 25 : Protection contre l'expulsion, l'extradition et le refoulement : Les Suisses et les Suissesses ne peuvent ętre expulsés du pays; ils ne peuvent ętre remis á une autorité étrangére que s'ils y consentent.

In the merit of the case, the Constitutional Court interpreted Art. 55 of the Constitution, and ruled that the relevant provision of the Criminal Procedure Code, insofar as it permits the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European Arrest Warrant, does not conform to Article 55(1) of the Constitution. But the Court ruled that the loss of binding force of the challenged provision shall be delayed for 18 months following the day on which this judgment was published in the official gazette. [19] As a consequence the constitution was amended by Act of 8th September 2006 that added two detailed paragraphs to Article 55 of the constitution.[20]

The German Federal Constitutional Court in 2005 ruled that with its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizen's special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association. When adopting the Act implementing the framework decision on the European arrest warrant, the legislature was obliged to implement the objective of the framework decision in such a way that the restriction of the fundamental right to freedom from extradition was proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, had to see to it that the encroachment upon the scope of protection provided by it was proportionate. In doing so, the legislature had to take into account that the ban on extradition was precisely supposed to protect the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition. The European Arrest Warrant Act did not come up to this standard. It encroached upon the freedom from extradition in a disproportionate manner. When implementing the Framework Decision, the legislature failed to take sufficient account of the especially protected interests of German citizens; in particular, the legislature had not exhausted the scope afforded to it by the framework legislation.[21]

In the Czech Republic, members of parliament asked the Constitutional Court to examine the provisions of the Criminal and Criminal Procedure Codes, which were amended to implement the Framework Decision of the EU Council on the European Arrest Warrant. They contended that these amended provisions conflict with that part of Article 14.4 of the Charter ("*No citizen may be forced to leave his or her country.*").[22]
The Constitutional Court ruled that the surrender of a citizen for a limited period of time for criminal proceedings taking place in another EU Member State, with a view to their subsequent

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[19] Judgment of 27th April 2005, P 1/05 APPLICATION OF THE EUROPEAN ARREST WARRANT

TO POLISH CITIZENS

[20] „*2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:*

1) was committed outside the territory of the Republic of Poland, and

2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

3. Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an inter-national treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body."

[21] GER-2005-2-002 (18-07-2005) 2 BvR 2236/04

[22] CZE-2006-2-006 (03-05-2006) Pl. US 66/04

return to their homeland, does not and cannot constitute forcing them to leave their homeland within the meaning of Article 14.4 of the Charter.
The Court noted that there may be very exceptional circumstances where the application of the European Arrest Warrant might conflict with the Czech Republic's constitutional order, for instance where a crime committed elsewhere constitutes a criminal act under the law of the requesting state, but would not constitute one under Czech criminal law.

As a conclusion one cannot deny that there is a room for the applicability of the Rome Statute in Moldova without amending the constitution. This can be justified by the distinction between surrender and extradition. However, stronger arguments can be formulated in favour of the necessity of the constitutional revision of Article 18 of the constitution. The analogue cases – especially the decision of the Polish Constitutional Court interpreting a constitutional provision very similar to the Moldavian one – support this conclusion. However, the fulfilment of the international obligation cannot be put in question by this procedure: a contracting State cannot excuse herself from an international obligation by referring to the constitution.[23]

3. The Hungarian case-law

The Hungarian constitution does not prohibit the extradition of the Hungarian citizens; the issue is regulated at statutory level. The impeachment of the Head of State is the jurisdiction of the Constitutional Court.[24] Members of Parliament are granted immunity, in accordance with the provisions of the statute on the legal status of Members of Parliament.[25]
Therefore a conflict between the Rome Statute and the Hungarian constitution is less probable than in the cases examined above. As regards the Rome Statute, Hungary has ratified it, but has not promulgated it yet.

The Hungarian constitution contains a rather vague provision on the relation to international law:

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[23] This principle of international law was established by the Permanent International Court of Justice (PCIJ), 4 February 1932, Series A/B, no. 44. European Arrest Warrant

[24] *Article 31/A.*

(1) The person of the President of the Republic is inviolable; his protection under the criminal law shall be provided for in a separate statute.

(2) Should the President of the Republic violate the Constitution or any other law while exercising his office, a motion supported by one-fifth of the Members of Parliament may propose that impeachment proceedings be initiated against him.

(3) A majority of two-thirds of the votes of the Members of Parliament is required to initiate impeachment proceedings. Voting shall be held by secret ballot.

(4) From passage of this resolution by the Parliament until the conclusion of the impeachment proceedings, the President of the Republic may not exercise his powers.

(5) The Constitutional Court shall have jurisdiction to rule upon the case.

(6) Should the Constitutional Court determine that the law was violated, it shall have the authority to remove the President of the Republic from office.

[25] Article 20(3)

Article 7. (1) The legal system of the Republic of Hungary accepts the generally recognized rules of international law, and shall further ensure the harmony between domestic law and the obligations assumed under international law.

The Constitutional Court in its jurisprudence worked out the following principles:
- the generally recognized rules of international law should apply in domestic law; the legislator is obliged to enact the pieces of legislation necessary for the fulfilment of international obligations;[26]
- the generally recognized rules of international law are part of Hungarian law even without transformation;[27]
- the Constitutional Court examine the constitutionality of the law promulgating an international treaty. The constitutional review covers the examination of unconstitutionality of the international treaty promulgated by law. If the Constitutional Court holds that the international treaty or any provision of it is unconstitutional, it declares the unconstitutionality of the law promulgating the international treaty. The decision of the Constitutional Court declaring unconstitutional the international treaty or any provision thereof has no effect on the obligations assumed by the Republic of Hungary under international law.[28]
Finally, one should mention that the Constitutional Court emphasizes that even the legislation aimed at fulfilling the obligation deriving from international treaties has to pass the constitutional standards of the protection of basic rights.[29]

[26] HUN-1993-1-006 (12-03-1993) 16/1993

[27] HUN-1993-3-015 (13-10-1993) 53/1993

[28] HUN-1997-1-001 (22-01-1997) 4/1997

[29] Judgement of the Constitutional Court No. 18/2004. (V. 25.) AB