Strasbourg, 31 October 2007

CDL-AD (2007)038

Opinion no. 450 / 2007

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

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

by

Mr Ledi BIANKU (Member, Albania)
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Endorsed by the Commission
at its 72nd plenary session
(Venice, 19-20 October 2007)

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1 INTRODUCTION

1. On 10 September 2007, the Chairman of the Constitutional Court of Moldova requested the Venice Commission to prepare an amicus curiae opinion on the conformity of certain provisions of the Statute of the International Criminal Court with the Constitution of Moldova. He put the following three specific questions:

- *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.*

2. These questions were also conveyed to the Liaison Officers of the other European Constitutional Courts through the Venice Forum (the Forum for exchanges among Constitutional Courts). Several replies were received and conveyed to the Constitutional Court of Moldova.

3. Messrs Ledi Bianku and Peter Paczolay, members of the Commission, and Mr Clauss Kress, expert, were designated as rapporteurs. Their comments (CDL(2007)095, 094 and 085 respectively) were sent to the Chairman of the Moldovan constitutional court and subsequently endorsed by the Venice Commission at its 72nd Plenary Session (Venice, 19-20 October 2007).

2 COMMENTS BY MR LEDI BIANKU

2.1 Question A

4. Article 27 of the International Criminal Court 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."

5. Whereas Article 70.3 of the Constitution of the Republic of Moldova reads:
"3. 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."

6. Article 81 of the Constitution of the Republic of Moldova reads:
"1. The office of the President of the Republic of Moldova is incompatible with holding another remunerated position.
2. The President of the Republic of Moldova will enjoy immunity from civil action for any personal opinions expressed while in the execution of his mandate.

3. 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."

7. The question of the immunities has been one of the most widely discussed in the framework of the process of ratification of the International Criminal Court Statute. The concern raised by the Moldova Constitutional Court has been considered by a considerable number of other Constitutional Courts of European countries[1]. At first sight the analysis of these three provisions gives rise to concerns over the possible effective application of Article 27 of the International Criminal Court Statute. The application of Article 27 of the International Criminal Court Statute seems to be fully conditioned by the immunity of the Moldavian MP's and President of the Republic. In both cases the political will of the Moldova Parliament to remove their immunity or to indict the President and the decision of the Supreme Court seem to determine in case by case basis the application of Article 27 of the International Criminal Court Statute.

8. In analysing the immunity question and the compatibility of Article 27 of the Rome Statute with the above-mentioned Moldavian Constitutional articles the Constitutional Court might have to consider the following elements:

2.1.1 The analysis of the concept of the immunity

9. Many commentators of the immunity issue appearing on most of the national constitutions do question whether this concept covers all acts committed by the person enjoying criminal, civil and administrative jurisdiction immunity or only acts normally to be considered as falling within their normal acts of their duty or function. There are many authors arguing that a clear *ratione materiae* does apply in relation to the protection by the immunity of officials' acts[2]. This perception could bring to the conclusion that the persons enjoying immunity at the domestic or international sphere do not enjoy it for acts falling outside the exercise of their normal duties and functions. Therefore it might also be argued that immunity does not include acts constituting genocide, war crimes or crimes against humanity. Persons committing acts included within the jurisdiction of the International Criminal Court Statute could not be considered as enjoying immunity under national legislation, including here constitutions, in states which proclaim as their guiding constitutional principles the peace among nations and human rights. The Nuremberg Tribunal declared that state immunities do not apply to crimes under international law[3]. The Pinochet judgement reiterates and even strengthens further this

[1] The report of the Venice Commission on "Constitutional issues raised by ratification of the Rome Statute of the International Criminal Court" in 2nd page does mention that similar provisions with the one of Articles 70.3 and 81 of the Moldova Constitution do appear on Article 46 of the Constitution of Germany, Articles 57, 58 and 96 of the constitution of Austria, Article 76 of the Constitution of Estonia, Articles 26, 68 and 68-1 of the Constitution of France, Article 75 of the Constitution of Georgia, Article 49 of the Constitution of Greece, Article 20 of the Constitution of Hungary, Article 7 of the Constitution of Liechtenstein, Articles 64, 83 and 89 of the Constitution of "the former Yugoslav Republic of Macedonia", Article 42 of the Constitution of the Netherlands, Article 130 of the Constitution of Portugal, Articles 54 and 65 of the Constitution of the Czech Republic, Articles 69 and 84 of the Constitution of Romania, Articles 83 and 100 of the Constitution of Slovenia, Articles 83 and 85 of the Constitution of Turkey and Articles 80 and 105 of the Constitution of Ukraine. Articles 73 and 90 of the Albanian Constitution do include similar provisions as well.

[2] For instance Paola Gaetta in *"The Rome Statute of the International Criminal Court: A Commentary – Volume I"* ed. by Cassese, Gaeta, Jones, Chapter 24.3. "Official Capacity and Immunities" pg. 975

[3] "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this contention] must be rejected. . . . The principle of international law, which under certain circumstances protects the representative of a state, cannot be applied to acts

conception in modern times and outside situations of international conflicts[4]. Following the latest international jurisprudence developments, especially the International Court of Justice judgement of February 23, 2006 on the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v. Serbia and Montenegro)*, it might be argued that international responsibility of the state would be engaged if genocide, or more in general we might dare, international crimes, are not prevented and punished because of immunity of the perpetrators[5].

2.1.2 The specific nature of the acts punished by the International Criminal Court Statute

10. This moment has to do with the legal interpretation of the immunity concept but I think it goes much further in supporting the conclusion achieved in the foregoing paragraph. The qualification of acts of genocide, war crimes and crimes against humanity indispensably requires the subjective element of crime. This means that the persons accused to having committed such crimes must have had the clear intention of committing them. Thus, it might also be accepted the argument that the state officials that are accused of committing these acts should have taken deliberatively the decisions to commit them, knowing though that by their actions they were not acting in conformity with their constitutional duties. This might also mean that these officials consciously have been acting beyond their functions and duties, in violation of their constitutional obligations. Therefore these officials could not pretend for constitutional protection through immunity for acts deliberatively committed in violation of the Constitution.

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which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings" Judgment of the International Military Tribunal for the Trial of German Major War Criminals - Nuremberg 30th September and 1st October 1946, Cmd. 6964, Misc. No.12 (London: H.M.S.O 1946), pp. 41-42*)*

[4] In this regard Lord Nicholls of Birkenhead, at the Appellate Committee judgment on the case of Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division in the case of said (see [1998] 3 W.L.R. 1456 at p. 1500C-F) interestingly underlines:: *"In my view, article 39(2) of the Vienna Convention, as modified and applied to former heads of state by section 20 of the Act of 1978, is apt to confer immunity in respect of functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution. This formulation and this test for determining what are the functions of a head of state for this purpose are sound in principle and were not the subject of controversy before your Lordships. International law does not require the grant of any wider immunity. And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."*

[5] See paragraphs 425-450 of the ICJ judgement and especially paragraph 449 where the ICJ states:

> *"But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "international penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld."*

11. Another argument that could be used in this regard is the one relating to the gravity of the acts included in the jurisdiction of the International Criminal Court. These acts, already foreseen by Article 6 of the Charter of the International Military Tribunal at Nuremberg[6], by Article 4 of the UN Genocide Convention[7] and other acts do endanger the mere foundations of our societies and are considered as crimes under international law, conventional[8] and even customary[9]. It would be senseless, therefore, that a state pretending to conduct peaceful and normal relations with the international community and with other states grants immunity to perpetrators of acts which to endanger the very sense of the world society.

2.1.3 Immunity from which court?

12. Many commentators of this question due argue that the very concept of the immunity does intend to protect the persons enjoying it from the abuses and threats of other national institutions or other states or actors in international relations in the case of diplomatic immunities. This is being the position taken during the last years by the international courts as well. Thus, in its 2002 *Arrest Warrant* judgement[10] the ICJ makes a distinction between the high governmental officials' immunity from the criminal jurisdiction of the courts of another state and their immunity from jurisdiction of the International Criminal Court as a judicial body. It held that immunity from jurisdiction of the courts of other states continues to exist in international law précising at the same time that such immunities may not exist under the Statutes of the International Criminal Tribunal for the former Yugoslavia or for Rwanda, and the International Criminal Court Statute.

13. Another distinction could help for making in evidence that in the case of cooperation with International Criminal Court we are not in the same situation as with the one of cooperation between different national jurisdictions. Thus Article 89 § 1 of the International Criminal Court statute does foresee arrest and surrender and does not mention extradition. On the other side Article 102 of the International Criminal Court statute does make a clear distinction on the definitions of surrender and extradition[11]. As it is pointed out from other experts in their opinion

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[6] See also Principle VI of the Nuremberg Principles adopted by the UN General Assembly in 1950

[7] UN General Assembly Res. 96 (I) (1946). See also *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. Rep. 15.

[8] For crimes against humanity see the Declaration of France, Great Britain and Russia on 24 May 1915; the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented to the 1919 Preliminary Peace Conference; Article 6 (c) of the Charter of the International Military Tribunal at Nuremberg (1945) (Nuremberg Charter); Allied Control Council Law No. 10 (1946); Article 6 (c) of the Charter of the International Military Tribunal for the Far East (1946); the UN Genocide Convention *(supra)*, Article 2 (10) of the Draft Code of Offences against the Peace and Security of Mankind (1954); Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (1993); Article 3 of the International Criminal Tribunal for Rwanda (1994); Article 18 of the UN Draft Code of Crimes against the Peace and Security of Mankind (1996).

[9] For example the UN Secretary-General in his report to the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia, which has jurisdiction over crimes against humanity, made clear that "the application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise" (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34). He also stated that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law" includes the Nuremberg Charter (Ibid., para. 35).

[10] Judgement of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement, (ICJ, 14 Feb. 2002), para. 61.

[11] Article 102 of the International Criminal Court Statute, entitled "Use of terms" foresees:

"For the purposes of this Statute:

on the same question[12], "extradition" deals with delivering the accused person to another national jurisdiction whereas "surrender" is a term adopted and used by the Rome Statute with the precise intention of creating a special legal obligation for the cooperating states. This intention could have included the purpose or at least the effect of non-application of concepts of immunity and extradition of nationals in the situation included within the International Criminal Court jurisdiction.

2.1.4 Guiding principles of the International Criminal Court Statute and the national constitutions and legal orders

14. The functions and duties of Moldova's officials, either President of the Republic or MP's, are the ones of respecting the national Constitution and its principles. The Moldovan Constitution clearly provides in its Preamble:

> *"…*
> *JUDGING the rule of law, the civic peace, democracy, human dignity, the rights and freedoms of man, the free development of human personality, justice and political pluralism to be supreme political values,*
> *BEING AWARE of our responsibility and duties towards the past, present and future generations,*
> *REASSERTING our devotion to overall human values, and our wish to live in peace and harmony with all the peoples of this world, in accordance with the unanimously acknowledged principles and norms of international law,*
> *we herewith adopt for our country this Constitution, and proclaim it to be the SUPREME LAW OF OUR SOCIETY AND STATE."*

15. Furthermore, Article 1 paragraph 3 of the Moldovan Constitution provides:

> *"3. Governed by the rule of law, the Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the open development of human personality, justice and political pluralism represent supreme values, that shall be guaranteed."*

16. Therefore, if the Moldovan Constitution provides the primary duties of the state officials within the above mentioned principles, it would be legally questionable to accept the constitutional immunities cover also acts – like genocide, war crimes and crimes against humanity – which clearly do encounter the Moldovan Constitutional principles. In this regard a constitutional guarantee such as the immunity would not apply for acts in breach of the same constitution. Persons committing these acts could not argue they have committed them as part of their official duties in a state that, like Moldova or the other European countries, have plainly stated in their Constitutions or through participation in international treaties the incompatibility of these acts with the principles of organization of their societies[13].

> *(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."*

[12] Claus Kreß – "Legal Opinion in the Matter of the Conformity of the Constitution of Moldova with the Rome Statute of the International Criminal Court submitted to the Venice Commission" see paragraph 12 referring to the Ukrainian Constitutional Court judgement of 11 July 2001. See also the non-paper of the Human Rights Watch on "The compatibility of the International Criminal Court Statute with Certain Constitutional Provisions around the World", pg 2.

[13] See in this regard in the Nuremberg Principles:

2.2 Question B

17. "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?"

18. In consideration of the above answers to the first question there are in principle two possible solutions for ensuring an effective implementation of the International Criminal Court Statute and national authorities' cooperation with the International Criminal Court.

2.2.1 Interpretation of the Constitution

19. There are several countries that have adopted the solution of interpreting their own Constitution for resolving the doubts of incompatibilities of the national legislation, including constitution. This, where applied[14], has been the preferred procedure considering no constitutional changes were to be taken. But on the other hand this choice has been opted for only by guarantying an authoritative and final interpretation of the Constitution. More importantly this interpretation should guarantee for an effective implementation of the Rome Statute and efficient cooperation with the State Parties with the International Criminal Court. In these situations, where the constitutional compatibility is declared by an authoritative interpretation of a competent and preferably the highest jurisdiction in interpreting the Constitution, no more doubts should in principle exist. This final and authoritative interpretation of the Constitution would avoid all eventual future uncertainties and misinterpretations of the International Criminal Court and constitutional provisions. In this regard, if this would be the position to be taken by the Moldova's Constitutional Court it would be in the interest of justice to have e thorough analysis of all questionable situations in order to not leave any room for uncertainties.

20. This is one of the possibilities also in the case of Moldova, if its Constitutional Court, in the light of the latest international law developments and some other states practices, finds sufficient elements to decide on the compatibility of the provisions of the Rome Statute with the Moldova's Constitution. As our analysis to the first question shows, but more importantly and thoroughly as majority of commentators dealing with this issue over the past decade suggest, normally the domestic constitutions' provisions in democratic states do not collide in their meaning with provisions of the International Criminal Court Statute.

"Principle III - The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle IV - The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

[14] The case of Albania where the Constitutional Court decided on the constitutional compatibility of the Rome Statute with a judgement of 23.09.2002, of Swiss Federal Council with its message of 15 November 2000 or Ukraine where the Constitutional Court adopted the same conclusion in a judgement of 11.07.2001.

2.2.2 Amendment of the Constitution

21. In some other cases Contracting States have preferred to modify their Constitutions for opening the way to Rome Statute ratification, also under suggestion of their Constitutional Courts. This has been the solution adopted by France followed by other countries as well[15]. To my understanding this operation could be considered only where the effectiveness of the cooperation of the national authorities with the International Criminal Court could be endangered because of the eventual domestic interpretation of the constitutional provisions. In the case of Moldova its Constitutional Court is placed in the most appropriate position to take such a position.

2.3 Question C

22. "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."

23. This subject has been dealt with also in the case of Albania. In April 2002 a group of lawyers wrote a letter to the President of the Republic with the purpose of accelerating the process of the Rome Statute ratification by Albania. In a meeting organised by President Meidani few days later with the participation of representatives from the highest Albanian institutions and international law experts, the suggestion to have an interpretation of the Constitutional Court on this matter was generally supported. The main reason for such choice was the one I briefly describe in paragraph 17 of this Opinion. Following a request by the Albanian Prime Minister on basis of Article 131 b) and 134 b) of the Albanian Constitution, the question of the compatibility of the Rome Statute with the Albanian Constitution was examined. On September 23, 2002 the Albanian Constitutional Court delivered its judgement in concluding that the provisions of the Rome Statute on the International Criminal Court are not incompatible with the relevant provisions of the Albanian Constitution.

24. In its judgement, Albanian Constitutional Court besides analysing the main principles of functioning of the International Criminal Court analyses specific aspects of eventual conceptual and formal incompatibility of the Rome Statute provisions with the Albanian Constitution provisions. Among the most interesting elements considered by the Albanian Constitutional Court were the problem of the jurisdiction of the ICC in relation to the constitutional concepts of sovereignty, the question dealt within this study, as well as Immunities in the Criminal Process and the question of respect for procedural human rights guarantees of the accused in the criminal process, especially the constitutional principle "ne bis in idem". By its conclusion, the Albanian Constitutional Court opened the way for ratification of the Rome Statute by the Albanian Parliament by the Law no. 8984 of December 12, 2002.

3 COMMENTS BY MR CLAUS KRESS

25. Two Preliminary Remarks on the Nature of the Following Legal Opinion

26. 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

[15] For other status following this example see: European Commission for Democracy Through Law (Venice Commission) on "Constitutional Issues raised by Ratification of the Rome Statute of the International Criminal Court" - CDL (2000) 104. pg

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.

27. 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[16] (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.[17]

3.1 Question A

28. The English translation of Article 70(3) of the Moldovan Constitution[18] 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.'

29. 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.'

30. 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.'

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[16] 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.

[17] 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).

[18] The translation is taken from http://www.e-democracy.md/en/legislation/constitution (last visited on 25 September 2007).

(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.'

31. 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.'

32. 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.

33. 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.

34. 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.

35. 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.'[19]

36. In some States, France being perhaps the best known example[20], 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.[21] We shall examine the possible avenues for harmonisation through constitutional interpretation in turn.

37. 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.[22] 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.

38. 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.

39. 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

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

[20] 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.

[21] 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.

[22] 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 July 2001, took the view that the respective provisions in the constitution of the Ukraine apply only to national criminal proceedings.[23] 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.'[24]

40. 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.[25]

41. 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.

42. 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.[26] 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.

43. 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.[27] 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.[28] Crucially, in our context,

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[23] 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.

[24] 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.

[25] For a thorough recent study, see C. Maierhöfer, *'Aut dedere – aut iudicare'* (Berlin: Duncker & Humblot, 2006).

[26] 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.

[27] 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).

[28] 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 Hercegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, at § 439 et seq.

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.[29]

44. 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'[30] 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.[31] 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.

45. 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 judicare 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 international crimes should not go unpunished'.[32] 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.

46. 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

[29] 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.

[30] 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.

[31] 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.

[32] 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.

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 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).'[33]

47. 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 Yánez-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.'[34]

48. 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 provision do apply to national proceedings even if these proceedings concern crimes under international law.

49. 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.

3.2 Question B

50. 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

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[33] Supra note 9, at 2.2.

[34] J. A. Yánez-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.

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.

51. 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.'

52. 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.'

53. 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.[35]

54. 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.

55. 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 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[36] 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.'[37]

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[35] 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.

[36] On Germany, see the considerations infra on question C.

[37] 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.

56. 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.

57. The constitutional prohibition to extradite nationals is less common than the constitutional immunity protections of Members of Parliament and Heads of State.[38] 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.[39] 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.

58. 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:

> '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)'.[40]

59. 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

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[38] 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.

[39] 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*.

[40] 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.

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.'[41]

60. 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.'[42]

61. 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.

62. 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.[43] 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 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.

63. 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'[44]. 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.[45]

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[41] 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.

[42] Supra note 9, at 2.3.1.

[43] For an exhaustive analysis, see Rinio, supra note 23, at 381 et seq.

[44] Fourth preambular consideration to the ICC Statute.

[45] See the 10th preambular consideration and Articles 17 to 20 of the ICC Statute.

64. 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[46] 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.

65. 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.

66. As was indicated earlier[47], 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 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.'[48]

67. 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:

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[46] The hypothesis of criminal jurisdiction by representation (‚stellvertretende Strafrechtspflge') is of no relevance in our context.

[47] Supra paragraph 27.

[48] Supra note 9, at 2.3.2.

> '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.

68. 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 there 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).

69. It is therefore submitted that Art. 25(1) of the Swiss Constitution does not hinder surrender to the ICC.'[49]

70. 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 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

[49] M. Cottier, 'The Case of Switzerland', in C.Kreß/F. Lattanzi, supra note 2, 219, at 240 et seq.

> 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).'[50]

71. 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.

3.3 Question C

72. 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.[51]

73. 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:

> "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.'[52]

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[50] 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.

[51] 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, 2nd ed., loose-leaf, 1980 et seq.), Vor III 26, at 181 et seq, marginal note 366 et seq..

[52] The English translation is staken from http://bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf.

74. 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.

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

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

76. 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 legislative 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.[53] In light of this premise, not much thought was given to the precise scope of application of the latter constitutional provisions.

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

> 'No German may be extradited abroad.'[54]

78. Whether or not this constitutional prohibition applied to the surrender of suspects to the ICC was a matter of controversy among German legal scholars.[55] The German legislator opted, failing a detailed constitutional exegesis, for a constitutional amendment.[56] 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[57] are observed'.

79. 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 legislative deemed

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[53] *Bundestags-Drucksache* 14/2682, at 7 (cf. annex 1 to this opinion).

[54] 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.

[55] 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.

[56] 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).

[57] The original German terms are ‚rechtsstaatliche Grundsätze'.

it preferable to dispel any possible doubt also with respect to the surrender of German suspects to the ICC.

80. 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 fort he 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.).'[58]

4 COMMENTS BY MR PETER PACZOLAY

4.1 Question A: immunities against the equal application of the Rome Statute

81. The English translation of Article 70(3) of the Moldovan Constitution[59] 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.'*

82. Article 81(3) of the Moldovan Constitution on the incompatibilities and immunities of the President of the Republic reads as follows:

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

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

'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.'

83. 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.'

84. 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 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.

85. 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).[60] 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."[61]

86. The Report of the Venice Commission on Constitutional Issues raised by the ratification of the Rome Statute on the International Criminal Court[62] 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).

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

88. 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

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

[61] 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.

[62] CDL-INF(2001)1

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."[63]

89. 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.[64] 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:

> '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.'[65]

90. 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.

91. 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.

92. 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

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[63] „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

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

[65] 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

> 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."[66]

93. 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.[67]

94. 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.[68]

95. 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»…"[69]

96. 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'.

97. 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.

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

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

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

[69] CDL-INF(2001)1

98. 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)."[70]

99. 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.

100. 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.[71]

101. 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.[72]

102. 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.

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

[71] CODICES MDA 2003-2 - 007

[72] CODICES MDA 2005-1-002

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[73] 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".

4.2 Question B: the constitutional ban on extradition and the Rome Statute

103. 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.'

104. 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:
(c) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute;
(d) extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.'

105. 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.

106. 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.[74] This idea was reflected in 1997 by the appellate trial chamber of ICTY in case *Prosecutor v. Tihomir Blaskić*.[75]

107. 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)].

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[73] CDL-INF(2001)1

[74] 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.

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

108. 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.0

109. 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."

110. 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.[76] 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.

111. 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.

112. 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."

113. 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.

114. 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. [77] As a consequence the constitution was amended by Act of 8th September 2006 that added two detailed paragraphs to Article 55 of the constitution.[78]

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[76] 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.

[77] Judgment of 27th April 2005, P 1/05 application of the European arrest warrant to polish citizens;

[78] „*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*

115. 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.[79]

116. 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.*").[80]

117. 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 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.

118. 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.

119. 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

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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."

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

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

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.[81]

4.3 Question C: the Hungarian case-law

120. 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

121. Constitutional Court.[82] Members of Parliament are granted immunity, in accordance with the provisions of the statute on the legal status of Members of Parliament.[83]
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.

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

> *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.*

123. 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;[84]

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[81] 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

[82] *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.

[83] Article 20(3)

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

- the generally recognized rules of international law are part of Hungarian law even without transformation;[85]
- 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.[86]

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.[87]

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

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

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