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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON CONSTITUTIONAL ISSUES
RAISED BY THE RATIFICATION OF THE ROME STATUTE

**Supplement to the Report on constitutional issues
raised by the ratification of the Rome Statute
of the International Criminal Court
(CDL-INF(2001)001)**

on the basis of comments by

Mr Peter PACZOLAY (Member, Hungary)

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

I. Introduction

1. *At its 45th Plenary Session in December 2000, the Venice Commission adopted a report on the constitutional issues which could possibly be raised by the ratification of the Statute of the International Criminal Court (hereinafter "the Rome Statute"). The Rome Statute had been adopted and opened for signature on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries. The report identified several constitutional issues possibly raised by the ratification of the Rome Statute and the Commission suggested possible solutions for states willing to ratify the Statute.*

2. *The present report follows up to the aforementioned report. Mr Paczolay acted as rapporteur and examined to what extent the Commission's conclusions have been confirmed in practice since December 2000. The report examines the decisions by constitutional courts in Europe on this matter, but also takes into account legislative activity in respect of the Rome Statute by the states concerned.¹*

3. *The Rome Statute entered into force on 1 July 2002.*

4. *This report was prepared on the basis of comments by Mr Paczolay and was adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008).*

II. The Venice Commission's conclusions

A. Potential conflicts between constitutional provisions and the Rome Statute

5. In its report, the Venice Commission identified potential problems relating to: (1) immunity of persons having an official capacity, (2) the states' obligation to surrender their own nationals to the International Criminal Court, (3) the possibility for the International Criminal Court to impose a term of life-imprisonment, (4) the exercise of the prerogative of pardon at national level, (5) the execution of requests made by the International Criminal Court's prosecutor, (6) amnesties decreed under national law or the existence of statute of limitations and (7) the fact that the indicted individual will be tried by a panel of three judges and not by a jury.²

B. Possible solutions to those conflicts

a) General remarks

6. The Venice Commission indicated the following possible general solutions for ratifying the Rome Statute if its provisions are at variance with the provisions of the constitution:

- insert a new provision into the constitution which allows to settle the constitutional problems and avoids the need to include exceptions for all the relevant articles;
- revise systematically all constitutional articles which must be changed to comply with the Statute;

¹ Those states are: Albania, Armenia, the Czech Republic, France, Germany, Moldova, Portugal and Ukraine. The decisions of the constitutional courts can be found in the Venice Commission's CODICES database, available at: <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

² CDL-INF(2001)001 Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court, p. 3.

- introduce and/or apply a special procedure of approval by Parliament, as a consequence of which the Statute may be ratified, despite the fact that some articles are in conflict with the constitution;
- interpret certain provisions of the constitution in a way to avoid conflict with the Rome Statute.³

7. The Venice Commission made clear that those suggestions were merely a methodological reflection and that it did not favour one solution over the other. However, the Commission pointed out that the process of amending a constitution was in most cases complicated and often politically sensitive.⁴

b) Specific suggestions for the interpretation of relevant constitutional provisions

8. The Venice Commission made several suggestions for reasoning or interpretation of relevant constitutional provisions that states could rely on. The following reasoning or interpretation have later been used at national level. A detailed overview of each state's conclusions will be provided further below.

aa. Immunity

9. Most constitutions provide for immunity for heads of state and government, members of Parliament or government, elected representatives or government officials. However, the Rome Statute expressly excludes immunity for acts committed in official capacity.

10. The Venice Commission suggested interpreting the relevant constitutional provisions as establishing two-tier responsibility of office-holders, namely at the national and international level. As a consequence, immunities applied at the national level would not necessarily be applicable at the international level.

11. Another possible suggestion for interpretation would be to argue that lifting the immunity of heads of state and government had become a rule of international customary law. In states in which the constitution stipulates that the generally recognised principles of international law are part of domestic law, this principle would therefore apply.⁵

bb. Surrender of nationals as required by the Rome Statute

12. The Venice Commission pointed out that, although most constitutions prohibit the extradition of nationals, the Rome Statute itself offered a distinction between extradition and surrender, thus allowing those states accepting this interpretation to ratify without amending the constitution.⁶

III. Constitutional issues identified at the national level

A. General issues

a) Armenia

13. The Armenian constitutional court found in 2002 that there was no constitutional provision for complementing the national justice system by an international court. It concluded that in light of the state's obligation to protect human rights and fundamental freedoms, Armenia could not assume any obligations not provided for by the constitution. The court held that the only way to

³ Id. at p. 10.

⁴ Id. at pp. 4 and 6.

⁵ Id. at pp. 4-5.

⁶ Id. at p. 6.

adopt the Rome Statute would be an amendment to the constitution allowing that the national justice system be complemented by an international court.⁷ The Armenian constitution was revised in 2005, but no provision allowing for the ratification of the Rome Statute, as suggested by the constitutional court, was included.⁸ The ratification of the Rome Statute therefore appears to be still impossible.

b) Ukraine

14. The Ukrainian constitutional court held in 2001 that the constitution did not provide for a complementary court to the national criminal justice system. It found that this complementarity distinguished the International Criminal Court from the European Court of Human Rights. Moreover, the court pointed out that, contrary to the International Criminal Court, the right to apply to the European Court of Human Rights was stipulated expressly in Article 55.4 of the constitution.⁹

15. At its 75th Plenary Session in June 2008, the Venice Commission examined a draft constitution of Ukraine which contained an "Article 128(3)" stipulating that Ukraine may recognise the jurisdiction of the International Criminal Court on conditions prescribed by the Rome Statute.¹⁰ To date the constitution of Ukraine has not been revised. Therefore, the ratification of the Rome Statute appears to be still impossible in light of the reasoning provided by the constitutional court.

B. Immunity

a) Albania

16. The constitutional court of Albania held in 2002 that the lack of immunity for office-holders as stipulated by the Rome Statute was at variance with the provisions of the constitution. However, the court interpreted the relevant constitutional provisions as only granting immunity in domestic proceedings. Furthermore, the constitutional court held that the lack of immunity for specific crimes was part of the generally recognised principles of international law and therefore part of the Albanian legal order.¹¹ Albania deposited its instrument of ratification with the International Criminal Court on 31 January 2003.¹²

b) The Czech Republic

17. After signing the Rome Statute in April 1999 the government of the Czech Republic prepared a bill to amend the constitution in order to bring it into line with the Rome Statute.¹³ An additional "Article 112 a " was supposed to be inserted to settle the issue of immunity, but to date the constitution has not been amended.¹⁴ The Czech Republic has not ratified the Rome Statute yet.¹⁵ However, the Chamber of Deputies, the lower house of Parliament, is reported to have scheduled the examination of the issue of ratification again for autumn 2008.¹⁶

⁷ Decision of the Armenian constitutional court of 13 August 2004, ARM-2004-2-004 (CODICES).

⁸ See the current version of the Armenian constitution, available at: <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

⁹ Decisions of the Ukrainian constitutional court of 11 July 2001, UKR-2001-C-002, UKR-2001-2-006 (CODICES).

¹⁰ Opinion on the draft constitution of Ukraine (prepared by a working group headed by V.M. Shapoval) (CDL-AD(2008)015)

¹¹ Decision of the Albanian constitutional court of 23 September 2002, ALB-2002-3-007 (CODICES).

¹² <http://www.icc-cpi.int/asp/statesparties.html> (last visited on 18 September 2008).

¹³ CDL-INF(2001)001 Report on constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court.

¹⁴ See the current version of the constitution of the Czech Republic, available at: <http://www.nssoud.cz/en/docs/constitution.pdf> (last visited on 24 September 2008).

¹⁵ <http://www.icc-cpi.int/asp/statesparties.html> (last visited on 18 September 2008).

¹⁶ Newspaper article in the "České noviny" of 16 July 2008, available at: http://www.ceskenoviny.cz/index_view.php?id=323497 (last visited on 24 September 2008)

c) France

18. The French constitutional council was the first constitutional court to rule on issues raised by the ratification of the Rome Statute. It found that the Rome Statute was incompatible with the constitutional provisions on immunity and held that the constitution had to be amended.¹⁷ The constitution was amended on 28 June 1999 by inserting a clause which stated that “the Republic of France may recognise the jurisdiction of the International Criminal Court under the conditions set out in the treaty signed on 17 July 1998”. France deposited its instrument of ratification on 9 June 2000. Although the Venice Commission had already referred to the constitutional council’s decision and the subsequent ratification in its first report in 2000, this decision is nonetheless mentioned again as an illustrative example of inserting a provision to settle all constitutional issues raised.

d) Moldova

19. Moldova signed the Rome Statute in September 2000. Upon the government’s request the constitutional court examined the conformity of certain provisions of the Rome Statute with the constitution of Moldova. In September 2007, at the request of the Chairman of the constitutional court of Moldova, the Venice Commission prepared an opinion on the conformity of certain provisions of the Statute of the International Criminal Court with the constitution of Moldova.¹⁸

20. In its decision of 2 October 2007, the Moldovan constitutional court held that the constitution did not need to be amended to ratify the Rome Statute. In respect of the lifting of immunity of heads of state and government the court established two-tier responsibility distinguishing between immunity at the national and international level.¹⁹ Moldova has not ratified the Rome Statute yet.²⁰

e) Ukraine

21. The Ukrainian constitutional court interpreted the Rome Statute as saying that the regulation of immunity was a matter of national legislation and would not bar the International Criminal Court from prosecuting.²¹

C. The exercise of the prerogative of pardon, amnesties or time-barred offences

a) Armenia

22. The Armenian constitutional court held that persons convicted by the International Criminal Court would be deprived of the possibility of benefiting from a pardon or an amnesty at national level.²²

b) France

23. The French constitutional council held that the obligation to surrender an individual falling under an amnesty or having committed a time-barred offence would infringe the state’s sovereignty and therefore required a constitutional amendment.²³

¹⁷ Decision of the French constitutional council of 22 January 1999, FRA-1999-1-002 (CODICES)

¹⁸ CDL-AD(2008)038 Comments on the conformity of certain provisions of the Statute of the International Criminal Court with the constitution of Moldova.

¹⁹ Decision of the constitutional court of Moldova of 2 October 2007 (an unofficial summary of the decision in French is on file with the Secretariat of the Venice Commission).

²⁰ <http://www.icc-cpi.int/asp/statesparties.html> (last visited on 25 September 2008).

²¹ Decisions of the Ukrainian constitutional court of 11 July 2001, UKR-2001-C-002, UKR-2001-2-006 (CODICES).

²² Decision of the Armenian constitutional court of 13 August 2004, ARM-2004-2-004 (CODICES).

²³ idem

D. Surrendering a national to the International Criminal Court**a) The Czech Republic**

24. The Czech Republic envisaged amending the constitution by including an “Article 112 c” which would read: “the Czech Republic shall release for prosecution by the respective international criminal court its own citizen or foreigner...”. However, as stated above, the constitution has not been amended and the Rome Statute has not been ratified yet.

b) Germany

25. Article 16(2) of the German Basic Law prohibited the extradition of German nationals. Therefore, that provision was amended allowing for an extradition to international courts.²⁴ Germany deposited the instrument of ratification with the International Criminal Court on 11 December 2000.²⁵

c) Moldova

26. The Moldovan constitutional court adopted the distinction between “extradition” and “surrender” as stipulated by the Rome Statute, thereby avoiding any conflict with the constitution.²⁶

d) Ukraine

27. Although the Ukrainian constitution prohibits the extradition of Ukrainian nationals, the constitutional court found that the prohibition applied only to matters of national rather than international jurisdiction.²⁷

E. The International Criminal Court’s Office of the Prosecutor**a) Armenia**

28. The Armenian constitutional court found that the possible investigative activities by the Office of the Prosecutor on Armenian territory, as stipulated by the Rome Statute, did not infringe the State’s sovereignty and were therefore not in conflict with the constitution.²⁸

b) France

29. The French constitutional council considered such investigative acts committed on French territory to be in violation of the state’s sovereignty and therefore held that the constitution had to be amended.²⁹

c) Ukraine

30. The Ukrainian constitutional court did not see any conflict between the Rome Statute and the constitution as regards the co-operation with the International Criminal Court’s Office of the

²⁴ See the current version of the Basic Law for the Federal Republic of Germany, available at: <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

²⁵ <http://www.icc-cpi.int/asp/statesparties.html> (last visited on 18 September 2008).

²⁶ Decision of the constitutional court of Moldova of 2 October 2007 (an unofficial summary of the decision in French is on file with the Secretariat of the Venice Commission).

²⁷ Decisions of the Ukrainian constitutional court of 11 July 2001, UKR-2001-C-002, UKR-2001-2-006 (CODICES).

²⁸ Decision of the Armenian constitutional court of 13 August 2004, ARM-2004-2-004 (CODICES).

²⁹ Decision of the French constitutional council of 22 January 1999, FRA-1999-1-002 (CODICES)

Prosecutor. It held those provisions may be implemented without requiring a constitutional amendment.³⁰

F. Imposing a term of life-imprisonment

Portugal

31. Article 30 of the Portuguese constitution provides that “no sentence or security measure that deprives or restricts freedom shall be perpetual in nature or possess an unlimited or undefined duration.”³¹

32. In order to allow for the ratification of the Rome Statute, which provides for the possibility to impose a term of life-imprisonment, the constitution was amended by inserting a seventh paragraph into Article 7 of the Constitution. It reads: “With a view to achieving an international justice that promotes respect for the rights of both individual human persons and peoples, and subject to the provisions governing complementarity and the other terms laid down in the Rome Statute, Portugal may accept the jurisdiction of the International Criminal Court.”³² Portugal deposited its instrument of ratification with the International Criminal Court on 5 February 2002.³³

IV. Conclusion

33. Although only a few states dealt with constitutional issues raised by the ratification of the Rome Statute, several of the Venice Commission’s conclusions have been confirmed in practice. As predicted, those issues mostly related to the lifting of immunity of heads of state and government by the Rome Statute. The other issues proved problematic were the surrender of nationals to the International Criminal Court, the required co-operation with the International Criminal Court’s Office of the Prosecutor, the exercise of the prerogative of pardon and the imposition of a term of life-imprisonment.

34. Some of the states facing conflicts between their constitutions and the Rome Statute, namely Albania, Moldova and Ukraine favoured solutions which had been suggested by the Venice Commission, in particular the interpretation of constitutional provisions in a way that avoided any conflict. Those states often interpreted the relevant constitutional provisions as only applying at the national level. As regards the issue of immunity, the Albanian, Moldovan and Ukrainian constitutional courts applied the reasoning provided by the Venice Commission, *i.e.* establishing two-tier responsibility and thus distinguishing between the national and the international level. The Albanian constitutional court also referred to the lifting of immunity of heads of state and government as a generally accepted principle of international law as pointed out by the Venice Commission. Portugal inserted a new provision which allows to settle the constitutional issues.

35. As far as constitutional amendments are concerned, the Venice Commission had already stated that the process was complicated and often politically sensitive, thus rendering amendments difficult to achieve. This appears to have been confirmed in practice since the majority of the aforementioned states which required or envisaged constitutional amendments have not ratified the Rome Statute yet.

³⁰ Decisions of the Ukrainian constitutional court of 11 July 2001, UKR-2001-C-002, UKR-2001-2-006 (CODICES

³¹ <http://www.tribunalconstitucional.pt/tc/crpen.html> (last visited on 22 October 2008)

³² *idem*

³³ <http://www.icc-cpi.int/asp/statesparties/country&id=79.html> (last visited on 22 October 2008)