



Strasbourg, 12 October 2007

CDL (2007)095*
Engl. only

Opinion no. 450 / 2007

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by

Mr Ledi BIANKU (Member, Albania)

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

A. Preliminary remarks

1. In a request for assistance to the Venice Commission, the Chairman of the Moldovan Constitutional Court posed three questions to be dealt within the framework of this opinion. The three questions posed to the rapporteur in this regard are:

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

II. 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?

III. 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. In this opinion I will try to offer an *a priori* legal interpretation on the concerns raised by the President of the Moldova Constitutional Court, respecting the Court's jurisdiction and ability to deliver the judgment over these issues.

B. Analysis

I. First question: "Will the present provisions of Article 70.3 and 81 of the Constitution create obstacles in the application of Article 27 of the Statute?"

3. 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."

4. 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."

5. 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."

6. 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 countries¹. 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.

7. 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:

a) *The analysis of the concept of the immunity*

8. 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' acts². 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 law³. The Pinochet judgement reiterates and even strengthens further this conception in modern times and outside situations of international conflicts⁴. Following the

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 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

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 perpetrators⁵.

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

9. 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 deliberately 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 deliberately committed in violation of the Constitution.

10. 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 Nuremberg⁶, by Article 4 of the UN Genocide Convention⁷ and other acts do endanger the mere foundations of

(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."

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.

our societies and are considered as crimes under international law, conventional⁸ and even customary⁹. 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.

c) Immunity from which court?

11. 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* judgement¹⁰ 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.

12. 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 extradition¹¹. As it is pointed out from other experts in their opinion on the same question¹², "extradition" deals with delivering the accused person to another

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:

(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

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.

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

13. 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.”

14. 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.”

15. 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 societies¹³.

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:

“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.”

II. Second question: “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?”

16. 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.

a. *Interpretation of the constitution*

17. 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 applied¹⁴, 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 a thorough analysis of all questionable situations in order to not leave any room for uncertainties.

18. 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.

b. *Amendment of the Constitution*

19. 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 well¹⁵. 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.

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.

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

III. Third question: “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.”

21. 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.

22. 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.