# Active personality and non-extradition of nationals in international criminal law at the dawn of the twenty-first century : adapting key functions of nationality to the requirements of International Criminal Justice

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# Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court

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**[156]**

ABSTRACT

To help states parties circumvent domestic prohibitions on, *inter alia*, the extradition of nationals, the ICC Statute formally distinguishes 'surrender' of individuals to the Court from interstate 'extradition'. The European Arrest Warrant contains a similar solution. As (successful) constitutional challenges by nationals to be surrendered under a European arrest warrant indicate, such a (semantic) distinction may not suffice. Despite considerable differences between surrender within the EU and to the ICC, these cases offer useful guidance to domestic legislatures occupied with implementing obligations arising under the ICC Statute so that they can ensure that ICC requests concerning the surrender of nationals can be honoured.

KEYWORDS

constitution; European Arrest Warrant; extradition; International Criminal Court; nationals; surrender

## 1 INTRODUCTION

Distinguishing 'surrender' from 'extradition' for relevant purposes, Article 102 of the Statute of the International Criminal Court (ICC) reflects a major political compromise central to its state co-operation regime. Following lengthy debates about the applicability of traditional grounds for refusing extradition to the transfer of indictees to the ICC, the drafting impasse was resolved at the last minute through the insertion of the following clause, specifying that

> 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.[1]

**[157]** This provision, together with Article 86 of the Statute and the *travaux préparatoires* of these articles, make it unambiguously clear that states parties may not invoke domestic rules (even of a constitutional rank) prohibiting the extradition of nationals in order to deny compliance with the Court's request for surrender. There is a general consensus that by denying co-operation on that ground, a state party would violate its international obligations under the Statute, rendering it internationally responsible.

It must be noted, moreover, that Article 102 was formally not necessary to impose an international obligation on states parties to surrender even their own nationals to the ICC. Articles 86–89 of the Rome Statute impose an obligation on states parties to co-operate. While this obligation is not an absolute one, these provisions do not expressly permit reliance on any substantive grounds established in domestic law as an excuse for a failure to comply with the Court's request for surrender.[2] These factors, together with relevant rules of customary international law, are sufficient to render the nationality exception inapplicable.

Customary international law does not oblige states to deny extradition of their nationals but merely recognizes their freedom to reserve themselves the right to do so in international agreements. The Rome Statute does not claim to deviate from customary international law in any relevant respects. It does not expressly permit states to invoke the nationality of the offender as an excuse and it does not allow states to attach reservations.[3] Accordingly, since states have not expressly reserved themselves the right under the Rome Statute to invoke the nationality of the accused in relation to the ICC, they cannot decline co-operation in cases where the Court requests surrender of a national.

Several commentators have emphasized that Article 102 itself has little legal significance.[4] Clearly, it does not oblige states to adopt the same distinction between 'surrender' and 'extradition' under domestic law, nor does it impose a specific duty on states with a constitutional prohibition against the extradition of nationals to interpret that rule as compatible with the obligation to surrender nationals to the ICC or to amend that provision. All it is, is a politically inspired statement, included in the hope of helping states ratify the Statute without a constitutional amendment. However, the final decision regarding the need for such an amendment would be up to the respective state authorities.

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[1] Art. 102 of the Rome Statute of the International Criminal Court (UN Doc. A/Conf.183/9* (1998), (1998) 37 *ILM* 999 (hereinafter ICC Statute or Rome Statute)). It should be noted that this provision is modelled on a similar solution adopted in the context of the ad hoc Tribunals for Yugoslavia and Rwanda. See Statute of the International Criminal Tribunal for the former Yugoslavia ((1993) 32 *ILM* 1159), Art. 29; Statute of the International Criminal Tribunal for Rwanda ((1994) 33 *ILM* 1598), Art. 28; in combination with Rule 58 (National Extradition Provisions) of the ICTY's Rules of Procedure and Evidence available at http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf, and Rule 58 of the ICTR's Rules of Procedure and Evidence, available at http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf. *Cf., e.g.,* A. H. J. Swart, 'Arrest and Surrender', in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1639, at 1664–70.

[2] Whereas Art. 89 confirms the applicability of 'domestic procedures' to surrendering persons to the Court, the Statute does not contain any similar references to substantive (extradition) law. It thus does not permit the invocation of traditional substantive grounds for refusing co-operation, such as the non-extradition of nationals, dual criminality, and the political offence exception (see, *e.g.*, C. Kreß and K. Prost, 'Article 89', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), 1071 at 1074; Swart, *supra* note 1, at 1681).

[3] ICC Statute, *supra* note 1, Art. 120.

[4] C. Kreß, 'Article 102', in Triffterer, *supra* note 2, 1157 at 1158; G.-J. A. Knoops, *Surrendering to International Courts: Contemporary Practice and Procedures* (2002), 13–15, 195–7; P. Rabbat, '*Aut Dedere Aut Judicare*: Constitutional Prohibitions on Extradition and the Statute of Rome', (2002) 15 *Revue québécoise de droit international* 179, at 197, 201–2.

**[158]** It is, however, open to question whether this semantic distinction will serve its purpose, enabling states to co-operate with the Court without amending domestic provisions. Some initial commentaries were optimistic as to the possibility of interpreting (constitutional) prohibitions consistently with the Rome Statute. Pointing to various possibilities, Duffy, for instance, argued in a widely cited study that most constitutions of the world prohibiting the extradition of nationals do not need to be amended to permit the respective state to comply with ICC requests for the surrender of nationals; they could be interpreted as not prohibiting co-operation.[5] However, experience in other fields may suggest otherwise.

Three years after the adoption of the Rome Statute, the use of the term 'surrender' as opposed to 'extradition' was central again to accomplishing what had been seen as impossible in continental Europe with its predominantly civil law traditions:[6] the circumscription of the non-extradition of nationals under the EU Council Framework Decision on the European Arrest Warrant (EAW or Framework Decision).[7] While the semantic distinction was adopted *inter alia* for the purpose of enabling domestic implementation of the Framework Decision without constitutional amendment, several EU member states considered it necessary to amend the constitution to be able to accommodate their obligation to surrender nationals.[8] Moreover, shortly after its entry into force, constitutional challenges were mounted in several EU member states against the provisions of the domestic statutes implementing the rules of the Framework Decision permitting the surrender of nationals. The complaints were allowed in Poland, Germany, and Cyprus, but rejected in Greece and in the Czech Republic.

The relevant decisions touched on issues that may have to be addressed in relation to surrendering indicted nationals to the ICC, should similar challenges be brought in that context. Accordingly, it appears valuable from the perspective of the effective functioning of the ICC state co-operation regime to assess the relevance of the central arguments of the decisions rendered on this issue in the context of the EAW. Should those arguments be found to apply in the ICC context, this fact may be invoked to send a timely message to states parties that have not amended their constitutional ban on the extradition of nationals to do so.

Against this background this study aims to draw on the central arguments in the EAW surrender decisions to identify lessons for domestic implementation of the obligation to surrender nationals to the ICC. To this end, the next section of the article reviews the EAW experience related to its regime concerning the surrender of nationals to other EU member states. The central analysis of the study, in turn, seeks to determine whether arguments invoked in the EAW context may be adopted by domestic courts to deny the surrender of nationals to the ICC under domestic law. The study concludes with a list of factors that may play a role in the ICC context, **[159]** and advocates that these be taken up in the course of reviewing domestic legislation for the purposes of implementing the ICC Statute.

## 2 EAW Experience related to the Obligation to Surrender Nationals

The purpose of the Council Framework Decision on the European Arrest Warrant[9] was to simplify the extradition between the member states of the EU of individuals accused or

[5] H. Duffy, 'National Constitutional Compatibility and the International Criminal Court', (2001) 11 *Duke Journal of International Law* 5.

[6] Civil law legal systems commonly prohibit the extradition of nationals. See, *e.g.*, I. A. Shearer, *Extradition in International Law* (1971), 94–132; M. C. Bassiouni, *International Extradition: United States Law and Practice* (2002), 682–9.

[7] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States ((2002/584/JHA), *Official Journal* L 190, 18 July 2002, at 1).

[8] See section 2, *infra.*

[9] See note 7, s*upra*.

convicted of certain types of serious criminal acts. As a consequence, it deviates from classical extradition rules, procedures, and terminology in many respects.[10] Significantly, the only remnant of the traditional freedom of states to (reserve themselves the right to) decline extradition of their nationals is a conditional exception. This permits refusal to surrender nationals for enforcement of a sentence if the state of nationality undertakes to enforce the sentence in accordance with its own laws.[11] Implicit in this provision appears to be the assumption that in the absence of such an undertaking, surrender of nationals must be permitted.

The provision on 'Guarantees to be given by the issuing Member State in particular cases' in turn contains an indirect but unambiguous obligation to extradite nationals for prosecution:

> The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:
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> …
>
> 3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.[12]

Prior to the EAW, 14 of the 25 current EU member states' constitutions contained provisions prohibiting or at least limiting the extradition of nationals.[13] The EAW has brought about some change. Germany, Portugal, Slovakia, and Slovenia undertook constitutional amendment to accommodate the obligation to surrender nationals under the EAW (and under the ICC Statute).[14] Finland, in turn, adopted **[160]** the implementing act through a special procedure known as 'exceptive enactment' (*i.e.* the adoption of a statute incompatible with constitutional provisions, requiring the same majority as is prescribed for constitutional amendment).[15] In addition, another four of the 14 constitutions (those of Estonia, Italy, Lithuania, and the Netherlands) permit extradition of nationals pursuant to treaty obligations. Still, in at least five member states the obligation to surrender nationals under the EAW was introduced into domestic law in spite of conflicting constitutional prohibitions. In yet others (*e.g.* France, Greece, and Luxembourg) the duty to surrender nationals under the EAW was codified in domestic law in the face of conflicting prohibitions of a statutory rank. It may

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[10] See text accompanying notes 23–5, *infra*.

[11] EAW, *supra* note 7, Art. 4(6).

[12] Ibid., Art. 5. Cf. Zs. Deen-Racsmány and R. Blekxtoon, 'The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant', (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 317, for a criticism of the EAW related to the surrender of nationals.

[13] Austria, Cyprus, Czech Republic, Estonia, Finland, Germany, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovakia, Slovenia. Cf. Zs. Deen-Racsmány, 'The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges', (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice*, section 271, at 293-299.

[14] See Art. 16(2) of the German Basic Law (hereinafter BL), available at http://www.oefre.unibe.ch/law/lit/the_basic_law.pdf (This provision was amended in 2000, primarily to accommodate Germany's obligations under the ICC Statute. However, due to noticeable developments in the EU in the field of judicial co-operation at the time, an opening was made for exceptions within Europe as well.); Art. 33(3) of the Constitution of Portugal, available at http://www.parlamento.pt/ingles/cons_leg/crp_ing; Art. 23(4) of the Constitution of Slovakia, available at http://www.vop.gov.sk/en/legal_basis/constitution.html; Art. 47 of the Slovenian Constitution, available at http://www.oefre.unibe.ch/law/icl.

[15] T. Ojanen, 'The European Arrest Warrant in Finland: Taking Fundamental and Human Rights Seriously', in E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (2006), 89, at 94.

therefore not come as a surprise that (constitutional) challenges were initiated in several member states shortly after the entry into force of the EAW.

The resulting decisions – pronounced by constitutional or other domestic high courts in Poland, Germany, Cyprus, Greece, and the Czech Republic – on the extradition of nationals under the EAW demonstrate a great deal of dissimilarity in terms of the legal considerations central to them. It is nonetheless possible to identify some arguments which have played a significant role in more than one of them, or which can be expected to be invoked in other member states. These considerations may be summarized as follows:[16]

1. surrender under the EAW is in essence the same legal institution as extradition or it is a sub-category thereof;
2. surrender/extradition of nationals in spite of a constitutional ban cannot be justified with reference to other provisions of the constitution (*e.g.*, guarding *ordre public*);
3. conflicting international obligations (here specifically ones flowing from the Framework Decision or from EU law in general) cannot justify derogation from the constitutionally guaranteed right against extradition; **[161]**
4. surrender/extradition is impossible if the constitution does not permit arrest of a national on any grounds other than those specified therein, and none of these apply to the case;
5. surrender/extradition of nationals is not permissible if it would violate the rule of law (*e.g.*, *ne bis in idem*, non-retroactivity, availability of appeal); and
6. the condition of obtaining guarantees of enforcement of the sentence in the state of nationality does not meet the level of protection enshrined in the constitutional ban on extradition.

In contrast, it appears that

7. provisions on the non-extradition of nationals contained in extradition acts or codes of criminal procedure, unsupported by a similar prohibition of a constitutional rank, are unlikely to prevent surrender of nationals under the EAW; and
8. constitutional provisions prohibiting expulsion and deportation of nationals but not explicitly referring to extradition may be interpreted as not preventing surrender of nationals under the EAW.

## 3 THE APPLICABILITY TO THE ICC OF EAW SURRENDER CHALLENGES

The applicability of the above factors to the ICC surrender regime will be considered in this section in the light of the differences between 'surrender' as envisaged under the ICC Statute as opposed to its regulation under the EAW.

This analysis presumes for the sake of argument that, in spite of an unambiguous international obligation on states parties to surrender even their nationals to the Court if so

[16] Considerations 1–5 and 7 were reached by the author (following a review of the Judgment of 27 April 2005 by the Polish Constitutional Tribunal (hereinafter PCT) (File reference No. P 1/05; an unofficial English translation of the decision is available at http://www.trybunal.gov.pl/eng); the Judgment of the German Federal Constitutional Court (hereinafter GFCC) of 18 July 2005 (BVerfG, 2 BvR, Absatz-Nr.(1 - 201), available at http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html); Decision No. 295/2005 of the Supreme Court of Cyprus (hereinafter SCC) (Council Document No. 14281/05, 11 November 2005, Ann. B, available at http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=545&id=138); and Decision No. 591/2005 of the Areios Pagos (Council Document No. 11858/05, 9 September 2005, Ann. A, available at http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=545&id=78)) in Deen-Racsmány, *supra* note 13. Considerations 6 and 8, on the other hand, flow from the decision of the Czech Constitutional Court (hereinafter CzCC) in a similar case (NO. Pl. ÚS 66/04 of 3 May 2006, available at http://www.eurowarrant.net).

requested,[17] domestic courts will not always be inclined or able to co-operate. It is assumed that ICC co-operation will resemble the EAW context in this respect where, despite serious commitments made by governments to co-operate at a level previously unknown, domestic courts failed to follow suit. Pertinently, an expert explained the generally negative – conscious or unconscious – attitude of domestic courts to surrendering nationals under the EAW with reference to negative experience with judicial co-operation in the EU and resulting gloomy expectations, lack of trust in, and lack of respect for each other's judicial system.[18]

It is can only be hoped that the ICC experience will convince states of the fairness of proceedings conducted by the Court. Still, a closer look at the ICC regime of complementarity suggests that overall prospects for the surrender of nationals to the ICC are not bright. Under this system, states parties have the primary right to prosecute crimes falling under the ICC's jurisdiction.[19] In general, only when states **[162]** fail (or are found by the Court unable or unwilling) to prosecute does ICC jurisdiction come into play.[20] In cases where the Court makes a finding of unwillingness (defined as conduct of national proceedings in order to shield the accused, unjustified delay or partiality, and lack of independence in the proceedings), it is not unlikely that domestic courts will stop co-operating in good faith with the ICC. It may then be expected that constitutional courts or other competent instances will grasp any opportunity that will enable them to interpret the constitution as prohibiting the extradition of nationals, thereby indirectly confirming the sovereignty of the nation which probably feels itself offended by the ICC decision.[21]

Moreover, even assuming that local courts and authorities will nonetheless continue co-operating in good faith, as indicated by the EAW decisions to be discussed below, their possibilities may be limited by the constitution.

### *3.1 Surrender versus Extradition*

The drafters of the EAW[22] have done their utmost to distinguish the new legal institution established under the Framework Decision from classical extradition. Most pertinently, the EAW establishes a simplified procedure for surrender (*i.e.* direct transmission of arrest warrants between competent judicial authorities, rather than through diplomatic channels or ministries) and prescribes considerably reduced deadlines.[23] To emphasize the novel nature of the legal institution established under it, the Framework Decision uses the term 'surrender' instead of 'extradition' and deviates from traditional extradition vocabulary on several counts.[24] Moreover, arguably thanks at least in part to its procedural innovations, it abolishes

[17] See Introduction, *supra*.
[18] E. Guild, 'Introduction', in Guild, *supra* note 15, at 8–9.
[19] It may be argued that, in the light of the obligation placed on states under customary international law and applicable treaties to prosecute those who commit international crimes, confirmed also in the preamble of the ICC Statute (*supra* note 1), states parties are under an obligation to exercise primary jurisdiction.
[20] Ibid., Arts. 17–18. See too ibid., Art. 1. It should, however, be noted that the first situations investigated by the ICC Prosecutor were referred to by the territorial state itself, not raising issues of complementarity. On this phenomenon not explicitly foreseen under the Statute, see, *e.g.*, C. Kress, '"Self-referrals" and "Waivers of Complementarity": Some Consideration in Law and Policy', (2004) 2 *Journal of International Criminal Justice* 944; P. Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?', (2004) 2 *Journal of International Criminal Justice* 949.
[21] In most instances where the ICC makes a finding of inability, it follows from the relevant criteria stated in Art. 17(3) of the Rome Statute that national authorities will not be able to surrender the indictee either.
[22] *Supra* note 7.
[23] Ibid., preambular para. 9; Arts. 3, 4, 7, 9, 15; and Art. 17, respectively.
[24] In contrast to traditional extradition terminology, the EAW refers to 'executing state' where extradition treaties refer to 'requested state', and to 'issuing state' instead of 'requesting state'. Moreover, the 'executing judicial

or considerably circumscribes the applicability of classical excuses to extradition such as the political offence exception, dual criminality, and non-extradition of nationals.[25]

It has nevertheless been drawn into question whether 'surrender' as envisaged under the EAW differs sufficiently from 'extradition' as to permit the execution of European arrest warrants concerning nationals in spite of relevant constitutional prohibitions. Consequently, the Polish Constitutional Tribunal (PCT) considered **[163]** at length whether 'surrender' of a national for prosecution abroad under the act implementing the EAW was permissible in spite of the existence of a constitutional ban. The arguments in favour of constitutional compatibility relied on the clear distinction between 'surrender' and 'extradition' under the EAW and on the reference to 'surrender' in the Polish implementing act. In its analysis of the law, the PCT took into consideration the *travaux préparatoires* of the Polish constitutional prohibition on the extradition of nationals, recalling the intention not to permit derogation from the rule even in the case of international treaty obligations. Moreover, it emphasized that 'When interpreting constitutional concepts, definitions formulated in legal acts of a subordinate order cannot have meanings that bind and determine the mode of their interpretation.'[26] Accordingly, it found the statutory distinction between 'extradition' and 'surrender' insufficient to justify derogation from the constitutional prohibition on the extradition of nationals.

In the view of the PCT, an answer to the question whether the prohibition on 'extraditing' nationals also applied to 'surrender' under the EAW implementing statute had to be given based on a comparison of the two legal institutions.[27] On this point the PCT concluded that as the core of both statutory institutions was the handing over of persons to a foreign state for prosecution or enforcement of a sentence, 'surrender' in this case was nothing other than a particular form of extradition, falling under the prohibition expressed in Article 55(1) of the Polish Constitution.[28]

Moreover, the Tribunal rejected the argument in the case before it that reference in the constitutional prohibition to the traditional mode of extradition did not preclude the introduction of a similar new institution not covered by this prohibition. It rather observed that as surrender under the EAW

> is a more painful institution than that of extradition [both in its material and procedural aspects] … the same prohibition applies even more to surrender based on the EAW, which is realised for the same purpose (*i.e.* essentially identical) and is subject to a more painful regime.[29]

In addition, the PCT denied the argument that the prohibition was meant to ensure the right to an open and fair trial. The Tribunal found that the essence of the right guaranteed by Article 55(1) of the Constitution goes beyond this right (which is constitutionally guaranteed also for non-nationals). Rather, the constitutional prohibition

> expresses the right of the citizen of the Republic of Poland to penal liability to a *Polish court of law*. … From this point of view it should be recognised that the prohibition of extradition of a Polish citizen … is of the absolute kind, and the subjective personal right of the citizens

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authority' is equal to 'the authorities of the requested state' in classical extradition terminology. On the role of and problems with these semantic innovations in the Framework Decision see N. Keijzer, 'The European Arrest Warrant Framework Decision between Past and Future', in Guild, *supra* note 15, 13 at 25–6.

[25] It is sometimes claimed that the concept of EU citizenship rather than the novel nature of co-operation established under the EAW justifies the deviation from the non-extradition of nationals under the EAW. For a convincing criticism of this position, see F. Impalà, 'The European Arrest Warrant in the Italian legal system: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice', (2005) 1 *Utrecht Law Review* 56, at 67 and the judgment of the PCT, *supra* note 16, at 20, para. 4.3.

[26] Judgment of the PCT, *supra* note 16, at 14, para. 3.3.

[27] Ibid., at 15, para. 3.4.

[28] Ibid., at 17, para. 3.6. The Polish Constitution is available at http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[29] Judgment of the PCT, *supra* note 16, at 18, para. 3.6.

> stemming from it cannot be subject to any limitations, as their introduction would make it impossible to exercise that right.[30]

**[164]** Accordingly, the PCT ruled against the constitutional compatibility of the provision of the EAW implementing act permitting (conditional) surrender of nationals for prosecution abroad.[31] This interpretation of Article 55(1) of the Polish Constitution was subsequently confirmed by the Czech Constitutional Court.[32]

Does this example related to the EAW have any relevance to the ICC surrender regime? Admittedly, the ICC Statute attributes a different definition to 'surrender' and places it in a truly different framework: in the context of a court established by an international treaty to prosecute the most heinous international crimes.

Yet the distinction between 'surrender' and 'extradition' is less substantive here. Unlike the EAW, apart from proscribing a (semantic) distinction between 'extradition' and 'surrender' in Article 102,[33] the ICC Statute does not evidence any intention to establish substantially new procedures. Indirectly, it even confirms the applicability of procedures existing under domestic (extradition) law to surrendering the accused to the Court: Article 89 requires co-operation with an ICC surrender request in accordance with domestic procedures.[34]

In addition, Article 91 on the 'Contents of request for arrest and surrender' merely specifies that the request for arrest and surrender issued by the Pre-Trial Chamber

> shall contain or be supported by:
>
> …
>
> (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that *those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court*.[35]

Judging from these provisions, it is difficult to see why 'surrender' should be accepted by domestic courts as substantially and sufficiently different from 'extradition'. There is thus little in the ICC Statute to deny the relevance of the arguments (and conclusions) of the PCT on the lack of a substantive distinction between the two concepts in this context.

Admittedly, the *travaux préparatoires* of the Rome Statute provide ample evidence that the intention of the drafters of Article 102 was precisely to exclude substantive grounds of refusal and hence ensure co-operation even with regard to surrendering **[165]** accused nationals to the Court. However, this was also the aim of the drafters of the EAW, and this fact did not convince the Polish Constitutional Tribunal of the validity of the distinction.

On the other hand, even some of the most vehement opponents of the circumscription of the extradition of nationals under the EAW based on new terminology have acknowledged

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[30] Ibid., at 19, para. 4.2 (emphasis added).

[31] It should be noted that while finding the contested provision unconstitutional, in the light of the importance of Europe-wide co-operation in criminal matters and EU obligations, the PCT deferred the cessation of its validity for 18 months from the date of the publication of its decision, permitting the government to undertake necessary constitutional amendments. Ibid., at 21, para. 5.1. et seq.

[32] Decision of the CzCC, *supra* note 16, at 29, para. 77.

[33] *Supra* note 1.

[34] Ibid., Art. 89(1). Article 88 in turn establishes an obligation to ensure the availability of necessary procedures. There is, however, no reason to interpret this provision as requiring the adoption of new procedures where those regulating interstate extradition may apply to surrendering the accused to the ICC. Cf., *e.g.*, K. Prost, 'Article 88', in Triffterer, *supra* note 2, 1069 at 1070, interpreting this provision as 'requir[ing] State Parties to review their national law and procedures, and *where necessary*, introduce … procedures in their domestic regimes to meet the co-operation obligations' (emphasis added).

[35] Ibid., Art. 91(2) (emphasis added).

that 'surrender' to the ICC is a qualitatively and substantially different means of co-operation, to which classical extradition rules do not apply. Accordingly, whereas Plachta ridiculed the EAW model, comparing it with a hypothetical new form of co-operation ('hulagula'), established 'in order to circumvent constitutional restraints imposed on extradition',[36] he did recognize the existence of a fundamental difference between 'extradition' and 'surrender' of a person to the ICC. He submitted that

> The primary difference between 'extradition' and 'surrender' lies in the level of the relation between parties: while extradition can only be considered between states, the surrender has been created only recently for the relationship between a state and an international criminal tribunal (court).[37]

In his argument, Plachta – like other proponents of the ICC surrender regime – attributed a great significance to the distinction between a 'horizontal' model of co-operation (between sovereign states) and a 'vertical' one (between a state and an international criminal tribunal or court). Following this line of argument one does not need to look for procedural and substantive differences to distinguish 'surrender' from 'extradition'. We would have to take the nature of the ICC (an international court) as sufficient justification for the deviation from domestic prohibitions on extradition.

Such a justification often starts out from the assumption that the ICC–state-co-operation model is a vertical one, or at least vertical in relevant respects. Due to this feature, considerations of state sovereignty are claimed not to apply in relation to the ICC, in effect also rendering inapplicable – traditional – substantive grounds for refusing surrender.[38]

To be able to judge the validity of this assumption, we need to recall the statement of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Blaškić*, which serves as the origin of the horizontal/vertical distinction in the contemporary terminology of international co-operation in criminal matters. Central to its argument, the chamber pointed to factors such as the establishment of the ICTY by the UN Security Council under Chapter VII of the UN Charter, its primacy over national courts, and its ability to issue binding orders to states, to justify the conclusion that the ICTY–state-co-operation model was a vertical one.[39]

**[166]** Clearly, the ICC does *not* resemble these aspects of the ICTY. It is nonetheless generally acknowledged that the ICC is a mixture of the horizontal and vertical models, bearing signs of both.[40] The vertical aspect is commonly claimed to be brought about by the absence under the ICC Statute of traditional grounds for denying extradition.[41]

Claiming, in turn, as Plachta does, that due to this vertical aspect of the state–ICC co-operation regime the surrender of nationals should be permitted, renders the argument terminally circular (*i.e.* the ICC–state co-operation is vertical as it does not permit invocation of traditional grounds of refusing extradition, and due to its vertical nature, it does not permit the invocation of traditional grounds of refusing extradition such as the non-extradition of nationals). Accordingly, the vertical–horizontal distinction does not appear to provide domestic courts with a convincing and valid ground for adopting the distinction stated in Article 102 of the ICC Statute.

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[36] M. Plachta, '"Surrender" in the context of the International Criminal Court and the European Union', in 'International Criminal Law: Quo Vadis? Proceedings of the International Conference held in Siracusa 2002', (2004) 19 *Nouvelles études pénales*, 465 at 494.
[37] Ibid., at 494.
[38] Duffy, *supra* note 5, at 22–3; Plachta, *supra* note 36, at 473, 475.
[39] *Prosecutor v. Tihomir Blaškić*, Judgement on the Request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, A. Ch., 29 October 1997, para. 47.
[40] *E.g.*, A. Cassese, *International Criminal Law* (2003), 358; A. H. J. Swart, 'General Problems', in Cassese *et al*., *supra* note 1, 1589 at 1594–8.
[41] *E.g.*, Swart, *supra* note 40, at 1596; Plachta, *supra* note 36, at 473, 476-7.

There are, however, other arguments that may be invoked to justify the distinction. For one, a classical reason for refusing the extradition of nationals is to protect them from an unfair foreign trial. Admittedly, there may be less room for concern with discrimination and unfair trial before the ICC than would be the case before certain domestic courts. It might even be true that the state has more influence on the fairness of proceedings than would be the case in traditional interstate co-operation.[42] However, as indicated by the decision of the PCT, the protection against extradition goes well beyond the scope of constitutionally protected fair trial guarantees (the latter generally granted irrespective of nationality).[43]

It is sometimes argued that 'extradition', by definition, takes place between states. Accordingly, taking the part of the definition that extradition constitutes the delivery of a person to a foreign state seriously, it could be argued that surrender to the ICC (an international court established by treaty) does not fall under this definition. Such a conclusion would be permitted even in the light of the PCT decision.

However, it should not be forgotten that definitions of extradition in use today originate from the not-so-distant past when no international criminal jurisdiction existed. The case of Slovenia illustrates vividly that the state versus international organization/court argument may not convince. Until its 2003 amendment, the Slovenian Constitution prohibited extradition of nationals specifically to a foreign country. The Government Office for Legislation nonetheless concluded that an obligation to surrender nationals to the ICC would be in conflict with this provision. Accordingly, Slovenia amended its constitution to ensure that it would be able to grant such a request in accordance with its obligation under the ICC Statute.[44]

**[167]** In addition, whereas the Czech Republic implemented the EAW without amending the constitutional provision stated in Article 14(4) of the Czech Charter of Fundamental Rights and Basic Freedoms[45] confirming the right of nationals not to be forced to leave the homeland, the government did propose its amendment.[46] Moreover, the Czech Minister of Justice has proposed to amend the same provision, in response to an unsuccessful attempt to ratify the ICC Statute, exactly because of this issue.[47]

It is not the intention of the author to argue that the interpretations presented here are the sole correct ones, and that all domestic courts will or even should follow these examples. However, as suggested by the Polish case, even states wishing to co-operate in good faith may be forced to refuse extradition of their nationals following an unfavourable decision by a constitutional court. The point made is thus not that such problems will certainly arise in all states with a constitutional ban on the extradition of nationals, rather that failure to amend such prohibitions bears an inherent risk of the state's inability to co-operate and fulfil international obligations assumed under the Rome Statute.[48]

On the other hand, as indicated by the EAW decisions, there are arguments and factors that may help constitutional courts to preserve the integrity of the constitution while permitting the fulfilment of relevant international obligations. The validity and applicability of these considerations in the context of the ICC will be considered below.

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[42] Plachta, *supra* note 36, at 476; Duffy, *supra* note 5, at 22; H. Duffy and J. Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations', in C. Kreß and F. Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders* (2000), Vol. 1, 29 at 45.

[43] See PCT decision, *supra* note 16, at 19, para. 4.2. Cf. text accompanying note 30, *supra*; Rabbat, *supra* note 4, at 197, for an expression of a similar view in the ICC context long before the PCT rendered its decision in relation to surrendering nationals under the EAW.

[44] Rabbat, *supra* note 4, at 201. Cf. Slovenian constitution, *supra* note 14; Deen-Racsmány, *supra* note 13.

[45] Of a constitutional rank, available at http://test.concourt.cz/angl_verze/rights.html.

[46] See CzCC decision, *supra* note 16, at 7, para. 3.

[47] See ibid., at 13, para. 25.

[48] See Rabbat, *supra* note 4, at 201–2, for a similar argument.

### *3.2 Constitutional Rules Permitting Restrictions on Fundamental Rights*[49]

It was argued before the PCT that Article 31(3) of the Polish Constitution would permit deviation from the prohibition on the extradition of nationals.[50] This rule provides that

> Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.[51]

Admittedly, the severity and international implications of several of the crimes covered by the EAW (*e.g.* participation in a criminal organization, terrorism, money laundering and counterfeiting currency, environmental crime, illicit trafficking in nuclear and radioactive materials, and even '*crimes within the jurisdiction of the* **[168]** *International Criminal Court*'[52]) would appear readily to justify invocation of this provision. Yet the PCT denied its applicability to the case before it. It rather emphasized that, in accordance with the second sentence, such limitations may not violate the essence of fundamental freedoms and concluded that 'surrender on the basis of the EAW to another EU member state … would be an infringement of such substance'.[53]

Nearly all constitutions permit deviation from (certain) constitutionally guaranteed rights and freedoms in certain cases. The majority of provisions allowing limitations or restrictions to be imposed on (certain) rights protected by that constitution concern states of emergency and are hence of not much general relevance to this study. However, provisions like the Polish one, permitting restrictions to be imposed on broader grounds, are also included in several other constitutions.[54] Significantly, the identified provisions all contain a final sentence providing that the essence, basic meaning, (essential) content, and so on of constitutionally protected rights may not be infringed by such restrictions. There is, moreover, a significant chance that – for the sake of preserving the internal consistency of the constitution – even without such a final proviso, a rule permitting deviation from fundamental rights protected by the constitution would be interpreted as allowing restrictions to be imposed only within these reasonable confines.[55]

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[49] See the decision of the CzCC (*supra* note 16, at 26, paras. 68–9) on the historical evolution of the principle of non-extradition of nationals, transforming from a rule for the protection of sovereign interests through individual right to finally become an element of fundamental freedoms.

[50] PCT decision, *supra* note 16, at 5, para. 2.4.

[51] Polish Constitution, *supra* note 28.

[52] Art. 2(2) EAW, *supra* note 7 (emphasis added).

[53] PCT decision, *supra* note 16, at 19, paras 4.1–4.2. Cf. ibid., at 23, para. 5.2, on the role of this consideration in deferring the loss of force of the provision found unconstitutional.

[54] *E.g.*, the Czech Charter on Fundamental Rights and Basic Freedoms, *supra* note 45, Art. 4(4), and the constitutions of Hungary (available at http://www.oefre.unibe.ch/law/icl/), Art. 8; Portugal, *supra* note 14, Art. 18; Romania (available at http://www.oefre.unibe.ch/law/icl/), Art. 53; Germany, *supra* note 14, Art. 19.

[55] It may be noted that, addressing the compatibility with Article 16(2) BL (*supra* note 14) with the provision of the EAW implementing legislation that permitted the surrender of nationals under the EAW for prosecution in another EU member state, the GFCC decision (*supra* note 16) did distinguish serious crimes with an extraterritorial impact to which the prohibition should not apply. This fact may be read to imply that the GFCC was ready to permit an exception in accordance with Article 19 BL (*supra* note 14).
Significantly, however, the distinction was made in a different context. Article 16(2) BL was amended in 2000 to permit surrender (referred to as 'extradition') of nationals within the EU and to the ICC. As an infringement was thus explicitly permitted within the confines specified in the provision (*i.e.* 'soweit rechtsstaatliche Grundsätze gewahrt sind', commonly translated as 'as long as the rule of law is upheld', or as 'provided that constitutional principles are respected'.), the GFCC did not address Article 19(2) BL prohibiting the infringement of the essence of fundamental rights. Accordingly, rather than finding that the extradition of Germans per se would be

Accordingly, it can be concluded that provisions permitting exceptions to fundamental rights are unlikely to serve as a panacea to the problem of constitutional compatibility of the obligation to surrender nationals to the ICC in the face of constitutional rules prohibiting the extradition of nationals.

**[169]**

### *3.3 Recognition of International Obligations under the Constitution*

The PCT had to address another relevant argument, namely that Article 9 of the Polish Constitution, confirming that '[t]he Republic of Poland shall observe the international law binding upon it', could justify deviation from the constitutionally guaranteed right of nationals against extradition. The PCT dealt with and declined this argument within the unique EU context, with reference to the EU-law principle of pro-European or consistent interpretation and to its limits established by the European Court of Justice.[56] The specifics of EU law render these arguments hard to translate to the ICC. However, later in its judgment, the Tribunal found itself compelled to take note of this provision in a context other than the discussion of the internal limits of the rights established by the constitution. Rather, it located its implications in the domain of obligations imposed on the legislature, finding that Article 9 would render it

> *indispensable to change the law* in force in such a manner as to enable not only full implementation of the [EAW], but also such as to assure its conformity with the Constitution.[57]

Even more relevantly, the recent decision of the Czech Constitutional Court (CzCC) on the surrender of nationals under the EAW indicates that constitutional provisions reinforcing international obligations (such as Article 1(2) of the Czech Constitution[58]) assumed by the state may not suffice indirectly or tacitly to modify the constitution. Admittedly, the Court confirmed at the outset that, in the light of its Article 1(2), 'the Constitution should … principally be interpreted in a conformist way from the perspective of international law'.[59] Even more importantly, however, it concluded that 'Article 1 Paragraph 2 of the Constitution is not a provision capable of freely changing the meaning of any other explicit constitutional provision.'[60]

Moreover, whereas the adoption of the Finnish legislation implementing the EAW was made possible through an 'exceptive enactment' despite its inconsistency with the constitutional prohibition on the extradition of nationals, the Constitutional Law Committee 'strongly hinted' that constitutional reform was required in order that Finland could better

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unconstitutional, the GFCC found that in implementing the EAW the legislator failed to make maximal use of its discretion to limit the infringement of the right protected by Article 16(2) in accordance with rule of law principles, including proportionality. (GFCC decision, *supra* note 16, at 14, paras. 77–80.) One way indicated by the Court to use that discretion would have been to differentiate between crimes with a significant domestic connecting factor (*Inlandsbezug*) and cases without such a factor (*Auslandsbezug*). In the first, local prosecution must be ensured and extradition would be disproportionate. In the latter, the protection traditionally guaranteed under Article 16(2) BL was not considered necessary and extradition would be justified (ibid., at 15, paras. 83–86). Interestingly, whereas the Court referred to international terrorism and organized trafficking in drugs and human beings as examples of cases with potential *Auslandsbezug*, it failed to mention crimes under the ICC Statute. (Cf. text accompanying note 52, *supra*.) Admittedly, the list of crimes cited by the GFCC appears non-exhaustive.

[56] PCT decision, *supra* note 16, at 15, para. 3.4.

[57] Ibid., at 21, para. 5 (emphasis added).

[58] Available at http://www.oefre.unibe.ch/law/icl/.

[59] CzCC decision, *supra* note 16, at 29, para. 79.

[60] Ibid., at 30, para. 82.

comply with its international and European obligations related to extradition of its nationals. This reform is currently under way.[61]

These cases indicate that such provisions are unlikely to affect the position of a constitutional court inclined to protect the integrity of its constitution and hence the right against extradition of nationals to the ICC.[62] Nonetheless, in a widely cited study published long before the EAW challenges, Duffy argued specifically to the **[170]** contrary. She claimed that provisions confirming the international obligations of a state could solve the problem of constitutional incompatibility of surrendering nationals with obligations arising from the ICC Statute.[63] Due to the central importance thus attributed to these rules in the ICC discourse, the argument will be explored in more detail.

Duffy has reviewed constitutional provisions ranging from declaring particular ratified treaties – relating to human rights – superior to domestic laws, through those placing such treaties on a constitutional rank, to that of Paraguay, 'admitting a supranational legal system'.[64] Following a short overview, she concluded in passing that

> Therefore, in many circumstances there may be strong arguments that, upon ratification, there would be no inconsistency between the constitutional order and the Rome Statute, as the Statute would itself form part of that constitution or take precedence over inconsistent parts of it.[65]

In the view of this author, this position is overly simplified and exaggeratedly optimistic. True, constitutions may provide for the pre-eminence of ratified treaties over domestic law. Duffy correctly refers to the Slovak and Czech constitutions in this context. However, the full text of the Slovak rule provides that

> International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, *provided that they secure a greater extent of constitutional rights and liberties*.[66]

The italicized part may be interpreted as reinforcing the right not to be extradited, stated in Article 23 (placed in the section entitled 'Basic Human Rights and Liberties') of the same constitution.

Moreover, even where such provisions merely confirm that 'Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law,'[67] it is still at best unclear, based on a textual reading of these provisions, whether their hierarchically higher status extends even to constitutional rules, or is in fact limited to domestic statutes. The CzCC decision clearly rejects any suggestions to this effect.

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[61] Ojanen, *supra* note 15, at 95–6, cf. text accompanying note 15, *supra* on the adoption of the Finnish EAW implementing act. According to Ojanen, the Finnish Constitutional Law Committee 'went so far as to note that the draft EAW derogated from the fundamental right of every Finn not to be extradited to such a degree that the wording of the relevant constitutional provision (Section 9, subsection 3) would no longer at all reflect the factual circumstances appropriately'.

[62] Moreover, as has been argued in the context of the EAW,

> it remains possible to contend that if the EAW [or an international treaty] makes the surrender of a person from one state to another easier, then the level of protection, as a counterbalance, would have to be raised. It should not be possible to evade a constitutional guarantee whereby a legal instrument which is hierarchically superior to the law is required – not one that is qualitatively very different – so as to offer protection to the person to be surrendered. (Impalà, *supra* note 25, at 67)

[63] Duffy, *supra* note 5.

[64] Constitution of Paraguay (available at http://www.oefre.unibe.ch/law/icl), Art. 145.

[65] Duffy, *supra* note 5, at 8.

[66] *Supra* note 14, Art. 11 (emphasis added). Cf. note 62, *supra*.

[67] Czech Constitution, *supra* note 58, Art. 10. Cf. text accompanying notes 58–60 on the relevant part of the decision of the CzCC.

Moreover, even provisions giving ratified (human rights) treaties a constitutional rank merely lead to an internal inconsistency within the constitution between the obligation to co-operate with the ICC and the obligation not to extradite nationals. **[171]** Such conflict, in turn, is likely to be resolved with reference to the thesis that limitations imposed on constitutional rights may not affect the core of the right, confirming the right against extradition/surrender.

It is difficult to address here the relevance to the question under consideration of Duffy's unelaborated contention that Belgian jurisprudence (rather than the constitution itself) establishes the pre-eminence of self-executing treaties over the internal legal order, including the constitution. Similarly, a thorough knowledge of the law and jurisprudence of Paraguay would be required to address whether Article 145 of the Constitution of Paraguay is likely to solve the problem of internal inconsistency. As correctly cited by Duffy, it provides that 'The Republic of Paraguay, on an equal footing with other states, admits a supranational legal system that guarantees the enforcement of human rights, peace, justice, and cooperation, as well as political, socioeconomic, and cultural development.'[68]

In any case, the question whether it is meant to render such treaties and norms superior to the constitution is at best confused by the next sentence, stating that 'These decisions can be adopted only through an absolute majority vote by each house of Congress'[69] and by Article 137(1), providing that

> The Constitution is the supreme law of the Republic. The Constitution, the international treaties, conventions, and agreements that have been approved and ratified by Congress, the laws dictated by Congress, and other related legal provisions of lesser rank make up the national legal system, in descending order of preeminence, as listed.[70]

In sum, it is likely that such provisions will not convince domestic (constitutional) courts to rule in favour of permitting surrender to the ICC, despite constitutional prohibitions against the extradition of nationals. Duffy's optimism is in any case clearly contradicted by the EAW experience in Poland, the Czech Republic, and Finland.

### *3.4 No Ground for Arrest and Other Special Provisions related to Nationals*

In the relevant challenge brought before the Supreme Court of Cyprus[71] it was claimed that since the Constitution of Cyprus prohibits the extradition of nationals, surrender of nationals under EAW scheme was similarly excluded. Albeit touching briefly on the issue of a distinction between surrender and extradition, the Court reached the conclusion of unconstitutionality of such surrender based on the fact that the Constitution of Cyprus contains an exhaustive list of cases wherein a person may be arrested.[72] Consistent with the prohibition on the extradition of nationals, arrest for extradition is mentioned only with regard to aliens.[73] Accordingly, the Court found that surrender – necessitating the arrest – of a national would be unconstitutional.

**[172]** Cyprus appears to be the sole EU member with such a provision, and it is unlikely that a significant number of ICC states parties would face this specific obstacle to co-operation. However, the Cyprus case illustrates that where the extradition of nationals is constitutionally prohibited, procedures may not be available for arrest and surrender, or extradition/surrender may have other practical limits.

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[68] *Supra* note 64, Art. 145(1).
[69] Ibid., Art. 145(2).
[70] Ibid., Art. 137(1). This constitution apparently does not contain a rule prohibiting the extradition of nationals.
[71] *Supra* note 14.
[72] *Supra* note 16, at 15.
[73] Constitution of Cyprus (available at http://www.oefre.unibe.ch/law/icl), Art. 11(2).

The ICC regime is likely to differ from the EAW in this respect. Next to the general obligation to co-operate, it is hoped that states parties will comply with the obligation under Article 88 of the Statute to adopt procedures under domestic law necessary for co-operation with the ICC.[74] The Cypriot case demonstrates, however, that legislatures may fail to identify all provisions that need to be amended or adopted. It is thus worth emphasizing that required amendments should not be limited to the very provision banning extradition of nationals, but would also have to concern procedural aspects regulated under the constitution. In other words, constitutions should be reviewed and revised in a comprehensive manner so as to permit identification of amendments necessary to enable co-operation with the ICC.

### *3.5 The Rule of Law*

Since the EAW explicitly rules out the applicability of the dual criminality requirement (*i.e.* that the act must constitute a crime in both jurisdictions) in the context of EAW surrender decisions, persons may be surrendered for the (alleged) commission of acts that do not constitute a crime in the surrendering state, where the acts may have taken place. For this reason, the German Federal Constitutional Court (GFCC) and the CzCC had to address the effect of the principle of *nullum crimen sine lege* on the constitutional compatibility of the statutory provisions implementing the obligation to surrender nationals for prosecution under the EAW.

In addressing the impact of the constitutional provisions guaranteeing the 'rule of law' and the 'principle of legality', respectively, both courts confirmed that the *nullum crimen sine lege* principle would (have to) prevent surrender of nationals under the EAW in certain cases. At the outset, it was recognized in both cases that this principle (or the principle of retroactivity or legality) applies to material criminal law and not to changes of criminal procedure, to which extradition law belongs.[75] Hence the lack of a dual criminality condition in relation to extradition as such would not violate it.

Looking at the question in more detail, both courts distinguished between cases with primarily domestic connecting factors and transnational crimes. The GFCC concluded that in the latter type of case, this defence is plainly out of place. It found, however, that the situation is different for cases where Germans who previously enjoyed an absolute protection from extradition were to be extradited for acts that lack a significant foreign connection and had not been penalized under German law at the time of their commission. Here, the situation would be comparable to a retroactive change of material law.[76] These cases would fall under Article 4(7) of **[173]** the EAW[77] that permits the refusal of extradition if the crime was committed in the state to which the warrant of arrest was transmitted. However, this exception was not implemented in the German statute. The Court considered that this failure may lead to violations of the *nullum crimen* principle.[78]

In spite of the lack of a specific reference to the rule of law in relevant provisions of the Czech Constitution, the applicable rules and basic assumptions of the Czech decision were very similar. Here, the principle of legality, confirmed in Article 39 of the Charter on Fundamental Rights and Basic Freedoms, providing that 'Only a law may designate the acts

[74] *Supra* note 1.
[75] GFCC decision, *supra* note 16, at 19, para. 98; CzCC decision, *supra* note 16, at 34, paras. 101–2.
[76] Ibid., at 19, para. 98.
[77] *Supra* note 7.
[78] Ibid., at 18, para. 94. See note 55, *supra*, on the specific final proviso in this article confirming the rule of law, and the different nature of the questions posed in the German decision in the light of the fact that the relevant constitutional ban permits exceptions to the extradition of nationals within the EU and to an international court.

which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them,'[79] was found to impose relevant restrictions. Relevantly, the Czech legislature, too, has failed to implement Article 4(7) of the EAW that has been central to the German argument. Irrespective of these similarities, the CzCC reached a different conclusion, confirming the constitutional conformity of surrendering nationals for prosecution under the EAW in spite of the – liberally interpreted – constitutional prohibition, based on two central assumptions:

1. that the Czech statute would in any case be interpreted in accordance with Article 4(7) of the EAW,[80] and
2. that surrender of Czech nationals would be considered only if the conduct in question took place wholly abroad.[81]

These assumptions were found to provide sufficient guarantees against violations of the principle of retroactivity/legality.[82]

Constitutions commonly contain provisions on fundamental rights of individuals in criminal proceedings. Many of these rights (*nullum crimen sine lege*, *ne bis in idem*, presumption of innocence, right to be tried without undue delay, etc.) are confirmed in the Rome Statute. In fact, the Rome Statute is often perceived as going further than many legal systems in protecting the rights of the accused. However, the specific requirements under domestic law and the ICC Statute may differ. For instance, *nullum crimen sine lege* is confirmed in the Rome Statute only as far as the jurisdiction of the ICC itself is concerned.[83] The ICC may thus request surrender of a national of a state for the prosecution of crimes that were not penalized in that state – and may even have been committed there – at the time of their commission or even at the time of the request.

Admittedly, states parties are expected to implement the ICC Statute – including penalization of the crimes under domestic law – in good faith. This is necessary **[174]** for an effective operation of the principle of complementarity,[84] which forms a cornerstone of the ICC Statute. This would render the problem of *nullum crimen* void of significance. Let us, however, assume for the moment that some states parties fail to penalize (certain) crimes covered by the Statute or do not do so in a timely manner.

It is often contended that the exceptionally serious and heinous nature of the crimes falling under the ICC's jurisdiction renders the (lack of) criminalization of the acts under domestic law irrelevant in the context of the ICC. Even Article 7 of the European Convention on Human Rights and Article 15(2) of the International Covenant on Civil and Political Rights laying down the principle of non-retroactivity provide that

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[85]

Admittedly, the reference to general principles of law renders this provision somewhat ambiguous.[86] However, it is clear that the intention of the drafters was exactly to prevent the invocation of this principle in the case of crimes such as those covered by the ICC Statute.

It is, moreover, commonly argued that – unlike in traditional extradition but similarly to the EAW – dual criminality is not to be tested in surrendering persons to the ICC.[87] At least

[79] *Supra* note 45, Art. 39.
[80] CzCC decision, *supra* note 16, at 37, para. 111.
[81] Ibid., at 37, paras. 110–12.
[82] Ibid., at 33, paras. 97–117.
[83] *Supra* note 1, Art. 22.
[84] See note 20 *supra* and accompanying text.
[85] 999 *UNTS* 171. Cf. *ETS* No. 5, as amended by Protocol No. 11 (*ETS* No. 155) for Art. 7(2) of the European Convention.
[86] Cassese, *supra* note 40, at 149.

states (parties) are arguably not required or permitted to do so under *international law and the ICC Statute*.

Yet the execution of an ICC surrender request may be inconsistent with a domestic *nullum crimen sine lege* rule (distinct from the same principle of international criminal law!) that prohibits retroactive application of the criminal laws of the state in question.[88] This should in principle not be relevant in the context of extradition and surrender, which form part of criminal procedure. Yet, as the German – and indirectly even the Czech – decisions demonstrate, a constitutional court may find that it would be violated by surrender of a national when the request concerns crimes committed within its own territory and which do not have a significant foreign connecting factor other than its severity. It is noteworthy that the German and Czech decisions failed to specify crimes covered by the ICC as a category of cases to which the domestic *nullum crimen sine lege* prohibition does not apply. For these reasons, implementation of the obligations flowing from the ICC Statute may arguably need to include an amendment or clarification of the domestic *nullum crimen* provisions.

**[175]** Another problem related to fundamental rights that has been raised in the EAW context and that may be invoked in connection with the ICC is the availability of appeal against the granting decision. The GFCC cited the lack of appeal to surrender decisions under the EAW as an example of the failure by the legislature to exhaust the discretion granted to it under the Framework Decision to render the restriction on the right of nationals against extradition (otherwise permitted by the Basic Law in the case of co-operation within the EU and ICC) proportionate and to render it in accordance with the 'rule of law'.[89] Similarly, the CzCC considered it necessary to review whether there are possibilities of appeal (including appeal against the decision of the competent court granting surrender and even constitutional appeal, both capable of suspending extradition proceedings) in order to permit the conclusion that surrender of a national for prosecution in another EU member state would not violate the constitution.[90] It accordingly appears crucial that the right of appeal against surrendering nationals to the ICC be confirmed in domestic statutes on co-operation with the ICC.

### *3.6 Requirement of Return*

Article 4(6) of the EAW[91] permits the state of nationality to require guarantees prior to surrendering a national for prosecution in another member state that, on conviction, the person will be returned for the enforcement of the sentence. It was hoped that this feature of the EAW provision on the surrender of nationals would dispel claims of constitutional incompatibility. What is wrong with prosecution abroad if the national is subsequently returned to serve the sentence near his family and friends, where chances of his successful resocialization would be much better? – so the argument went.

The possibility of return following prosecution (together with the fact that here surrender of a national for enforcement of a sentence abroad was only permitted following consent by the national concerned) played a central role in the decision of the CzCC

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[87] G. Sluiter, 'The Surrender of War Criminals to the International Criminal Court', (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 605, at 638–40; Swart, *supra* note 1, at 1652–3, 1681–2; Knoops, *supra* note 4, at 105.

[88] Art. 39 of the Czech Charter of Fundamental Rights and Basic Freedoms (*supra* note 45), for instance, provides that 'Only a law may designate the acts which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them.'

[89] GFCC decision, *supra* note 16, at 19, paras. 101–15. Cf. note 55 *supra* on the different nature of the questions that had to be answered by this court.

[90] CzCC decision, *supra* note 16, at 31, para. 90.

[91] See text accompanying note 11 for this article.

confirming the permissibility of surrendering nationals under the EAW in spite of Article 14(4) of the Czech Charter of Fundamental Rights and Basic Freedoms.[92] However, it must be emphasized that, rather than referring to extradition, this provision prohibits the state from forcing nationals to leave the homeland. Accordingly, rather than finding that the ban on extradition is not violated by temporary surrender, the Court ruled merely that such conditional temporary surrender 'does not and cannot amount to an obligation to leave the homeland, in the sense of Article 14 Paragraph 4 of the Charter'.[93]

On the other hand, although addressed only in passing, the condition of return was received less favourably by the GFCC. Since the German Basic Law permits **[176]** extradition of nationals in specified circumstances, this issue was not central to the decision. Yet the Court expressed criticism of the fact that such guarantees protect the individual only from foreign enforcement of a sentence imposed, not from prosecution. In addition, and probably less relevantly for the ICC, it noted with concern the failure to settle the problem that domestic enforcement may not be possible due to the lack of criminalization of the acts in the state of nationality.[94]

In addition, the conclusion of the PCT that the purpose of the constitutional prohibition was to guarantee responsibility before Polish courts of law[95] (rather than to guarantee enforcement of a sentence in Poland) and the finding of unconstitutionality of the contested provision in spite of the condition concerning guarantees of return[96] may well be taken to imply that the PCT too found the requirement of return insufficient to ensure compatibility with the Constitution.

A proposal to permit similar conditions to be made in order to enable states with a constitutional prohibition on the extradition of nationals to co-operate was made in the context of the ICC surrender regime at the Rome Conference. However, the proposal was dropped in the end, and the ICC Statute accordingly does not permit any exceptions to the obligation to surrender (even nationals).[97] Yet Article 103 of the Statute, referring to humanitarian interests, arguably renders such an outcome possible.

Several authors have proposed or defended the obligation to surrender nationals to the ICC.[98] Sluiter advocated this possibility, pointing to 'a trend toward a more flexible interpretation of the non-extradition of nationals rule. For example, certain states may extradite their nationals on the condition that the nationals serve their sentences in the requested state.'[99]

But even if Sluiter's assumption that the Rome Statute permits states to require such guarantees of return is correct, would this really help states parties to resolve potential constitutional conflicts? Sluiter is no doubt correct in observing a trend towards more flexibility in this respect. Next to the Dutch Extradition Act cited by him and the EAW, the Nordic Arrest Warrant[100] also provides for a similar solution, and parties to this convention are in the process of amending their constitutions to accommodate this regime.[101] However,

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[92] *Supra* note 45.
[93] CzCC decision, *supra* note 16, at 27, para. 72.
[94] GFCC decision, *supra* note 16, at 19, para. 100.
[95] PCT decision, *supra* note 16, at 19, para. 4.2. See text accompanying note 30, *supra*.
[96] Art. 607(t.1) of the Polish Code of Criminal Procedure. An unofficial translation of the provisions of this code which transpose the EAW is available at http://www.eurowarrant.net.
[97] Swart, *supra* note 1, at 1683.
[98] *E.g.*, Knoops, *supra* note 4, at 151; Sluiter, *supra* note 87, at 641.
[99] Sluiter, *supra* note 87, at 641. Reference to Dutch extradition act omitted.
[100] Konvention om överlämnande mellan de nordiska staterna på grund av brott (Nordisk arresteringsorder) (Convention on Surrender for Crime between the Nordic States (Nordic Arrest Warrant)) adopted on 15 Dec. 2005, copy (in Swedish and Danish) on file with the author.
[101] Cf. Deen-Racsmány, *supra* note 13, Section 5.

the trend appears to be limited to Europe at the moment. Moreover, a series of German judgments from the 1930s onwards, interpreting 'extradition' as submission to foreign jurisdiction where such jurisdiction was previously not possible, indicates that the prohibition of extradition **[177]** may extend to surrender for the purposes of prosecution.[102] These facts suggest that whereas certain countries will probably be inclined to accept such guarantees as sufficient, a more conservative majority may well find that, lacking protection from the exercise of foreign jurisdiction and from foreign trial, a requirement of guarantees of return does not render an otherwise incompatible statutory provision permitting extradition/surrender of nationals consistent with the essence of the right protected by the constitutional prohibition. If the intention of the legislature is to permit conditional surrender, an exception to the general prohibition must thus be made explicit in the constitution.[103]

### *3.7 Relevant Prohibition in an Extradition Act or a Code of Criminal Procedure*

Extradition acts or codes of criminal procedure of most EU member states without a constitutional ban[104] do prohibit the extradition of nationals. Conflicts between such statutory provisions and the obligation to surrender to the ICC are expected to cause fewer problems than do similar prohibition of a constitutional rank. This assumption is supported by a recent Greek Areios Pagos (Supreme Court) ruling. The court ruled that relevant prohibitions contained in the extradition act – and declarations attached to international extradition instruments maintaining the right to refuse extradition of nationals – but not confirmed in the constitution could not prevent the surrender of a national under the EAW for prosecution abroad.[105]

As argued above, states parties to the ICC Statute are under an international obligation to surrender their nationals to the Court. Since a significant share of all constitutions reinforce international obligations binding on the state, it is expected that extradition will be legally permissible in most cases in spite of relevant prohibitions contained in domestic statutes. In this context, the status and purpose of the ICC may help to justify deviation from domestic statutory prohibitions. Furthermore, the relative ease with which domestic statutes – as opposed to constitutions – may be amended is likely to weigh in favour of this option.

**[178]**

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[102] *In re Utschig*, Germany, Supreme Court for Criminal Matters, *Annual Digest* (1931–2), at 296; *Extradition of German National Case*, Germany, Federal Supreme Court, 1954 *International Law Reports* 232; *Extradition (Germany) Case*, Germany, Federal Constitutional Court (1959), 28 *International Law Reports* 319; *German – Swiss Extradition Case (2),* Germany, Federal Supreme Court (1968), 60 *International Law Reports* 314. Cf. Deen-Racsmány, *supra* note 13, at 276-8.

[103] This exception does not need to be specific. The solution adopted by the Netherlands is a good example of a general solution. The constitution specifies in the provision related to citizenship that 'Extradition may take place only pursuant to a treaty. Further regulations concerning extradition shall be laid down by Act of Parliament.' (Art. 2(3) of the Dutch constitution, available at http://www.oefre.unibe.ch/law/icl.) The Extradition Act, in turn, provides that the general prohibition on the extradition of nationals expressed therein does 'not apply if extradition of a Dutch national is requested for the purpose of prosecuting him, and in Our Minister's opinion there is an adequate guarantee that, if he is sentenced to a custodial sentence other than a suspended sentence in the requesting state for offences for which his extradition may be permitted, he will be allowed to serve this sentence in the Netherlands.' (Art. 4(2) of the Dutch Extradition Act (last amended in 1995), reproduced in A. H. J. Swart and A. Klip (eds.), *International Criminal Law in the Netherlands* (1997), 268.)

[104] *E.g.* Denmark, Finland, France, Greece, and Luxembourg.

[105] Decision of the Areios Pagos, *supra* note 16.

### *3.8 Provisions Prohibiting expulsion and Deportation but not Explicitly Referring to Extradition*

A number of constitutions do not explicitly refer to 'extradition' in the relevant prohibition, but establish a right not to be expelled,[106] deported,[107] or compelled to leave or abandon national territory.[108] Alternatively, they may confirm the right of nationals to remain in their state of nationality.[109] Such provisions may also be interpreted as being inconsistent with an obligation to 'surrender'.

The CzCC addressed this question in its decision on the compatibility of surrendering nationals for prosecution under a European arrest warrant to another EU member state with Article 14(4) of the Charter of Fundamental Rights and Basic Freedoms, which provides in the second sentence that 'No citizen may be forced to leave his homeland.'[110]

The CzCC found itself compelled to refer to the *travaux préparatoires* of this provision including the intention of the drafters as evidenced by the historical context wherein the provision was adopted (*i.e.* the wish to prevent a reoccurrence of the communist practice of 'decontamination').[111] In the light of this specific intent, the CzCC could have concluded that the provision of the EAW implementing act permitting surrender of nationals under the EAW for prosecution abroad was not incompatible with this constitutional prohibition. Yet it found that this conclusion was justified only after identifying the objective contemporary meaning of the prohibition and invoking a number of distinct arguments (*i.e.* fair trial standards in Europe, high mobility in Europe, temporary nature of the surrender permitted).[112] This fact suggests that a mere literal reading of such provisions is inconclusive, thus permitting a constitutional court to rule that surrender under the EAW or surrender to the ICC too is prohibited.

In addition, the last two arguments – central to the CzCC's reasoning – clearly do not apply to the ICC. Whereas friendly courts may find other valid arguments to permit the surrender of nationals to the ICC,[113] the Czech decision could be looked at by anti-ICC majorities as a precedent to prevent surrender invoking such provisions.

**[179]**

## 4 CONCLUSION

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[106] *E.g.* the Albanian constitution (available at http://www.oefre.unibe.ch/law/icl), Art. 39(1), providing that 'No Albanian citizen may be expelled from the territory of the state.' It should, however, be noted that the second paragraph of this provision further states that 'Extradition may be permitted only when it is expressly provided in international agreements, to which the Republic of Albania is a party, and only by judicial decision.' It is unclear if this provision would permit extradition of nationals under these conditions, or only of non-nationals.

[107] *E.g.* Egyptian constitution (available at http://www.egypt.gov.eg/english/laws/constitution/index.asp), Art. 51, providing that 'No citizen may be deported from the country'.

[108] *E.g.* Constitution of Costa Rica (available at http://sanjose.usembassy.gov/engcons4.htm), Art. 32, providing that 'No Costa Rican may be compelled to abandon the national territory'; Art. 14(4) of the Czech Charter of Fundamental Rights and Basic Freedoms, *supra* note 45.

[109] *E.g.* Canada's Charter of Rights and Freedoms (available at http://lois.justice.gc.ca/en/charter/index.html #libertes), Section 6(1), providing that 'Every citizen of Canada has the right to enter, remain in and leave Canada.'

[110] *Supra* note 45.

[111] CzCC decision, *supra* note 16, at 25, para. 66.

[112] Ibid., at 26, paras. 67–72.

[113] The Ontario Court of Appeals, for instance, considered in the case of a war criminal that the infringement through extradition of the right to remain in Canada constituted 'a reasonable [limit] demonstrably justified in a free and democratic society'. *Re Federal Republic of Germany v. Rauca,* Canada, Ontario Court of Appeal, 1983, 88 *International Law Reports* 278, at 298. See too M. Plachta, '(Non)-Extradition of Nationals: A Neverending Story?', (1999) 13 *Emory International Law Review* 77, at 110–11.

The aim of the present study has been to analyse the experience of European states relating to the surrender of nationals under the EAW, and to draw lessons therefrom for implementing the obligation on ICC states parties to surrender their nationals to the Court. In spite of the apparent and considerable differences between the two regimes, it would seem that many of the arguments raised in domestic EAW surrender challenges may be directly invoked in the ICC context or may be adapted to the ICC regime.

In the view of the author, as a result of the above analysis the following points emerge that should be considered by legislatures when implementing the obligation to surrender (nationals) to the ICC so as to prevent future problems when surrender requests are received.

1. The semantic distinction between 'surrender' and 'extradition', the fact that the ICC is not a state, or even the nature and purpose of the ICC may not suffice to render a constitutional ban on the extradition of nationals inapplicable.
2. Constitutional provisions permitting restrictions to be imposed on fundamental rights are also likely to be insufficient to ensure co-operation with the ICC, as surrender of nationals to the Court may be argued to infringe the essence of their constitutional right against extradition.
3. Recognition within the constitution of international obligations binding on the state are likely to be interpreted as incapable of prevailing over other constitutional provisions, or as permitting infringement of the essence of other rights guaranteed by the constitution.
4. Where constitutional provisions implement or build on the prohibition on the extradition of nationals (*e.g.* permitting arrest for extradition only in the case of non-nationals), these should also be reviewed and, if necessary, amended.
5. Domestic penalization of the crimes under the ICC Statute (enabling domestic prosecution) and possibilities of appeal against the decision on surrender will help prevent to challenges related to rule of law principles.
6. Requiring guarantees that nationals surrendered to the ICC will be returned for domestic enforcement of the sentence may not suffice to ensure co-operation without a constitutional amendment making such a limitation on the right against extradition explicit.
7. While it is desirable to amend relevant prohibitions of a statutory rank, these are expected to pose fewer problems.
8. It is desirable that the interpretation of prohibitions not specifically referring to extradition or surrender (but to the right to remain in the territory, not to be deported or expelled, etc.) be settled beforehand, so as to permit timely amendment of these provisions to enable co-operation with the ICC, if necessary.

**[180]** Several of these conclusions may be seen as being overly careful or too pessimistic about the prospects of state co-operation with the ICC. Clearly, states parties are under an international obligation to comply with the Court's requests for surrender, even if those concern nationals. On the other hand, the general thread of the EAW-related rulings confirms that one cannot assume successful co-operation based on the fact that the state has signed on to an international obligation to surrender even nationals. Constitutional courts are set up not for the protection of the international legal order but to guard (the supremacy of) the constitution. Constitutional realities may force courts and other designated authorities to deny ICC surrender requests and bear the consequences (*i.e.* international responsibility, with possible sanctions) of non-compliance.

Even if all domestic actors co-operate in good faith, the settlement of contentious issues in the course of constitutional appeal proceedings may take a considerable time. If the contention proves well founded, several years may pass before surrender becomes possible

through amendment.[114] This may block or considerably weaken the ICC, for instance through causing loss of evidence required for other ongoing or planned trials, reduced efficiency due to the inability of the court to cluster trials related to specific situations, and so on.

Findings by the ICC of unwillingness may, moreover, push domestic courts towards interpreting applicable provisions restrictively – in good or bad faith. As the above analysis suggests, there will be enough factors in nearly all states with a constitutional ban on the extradition of nationals to invoke for this purpose. If amendments needed to ensure co-operation are not completed at the time when relations are friendly, it is less likely, to say the least, that necessary changes will be made following a finding of unwillingness or inability.[115]

Since the ICC lacks the capacity to enforce compliance with its requests and even the Assembly of States Parties has no effective means of doing so, the Court may be powerless and remain unable to proceed without Security Council intervention,[116] thereby losing credibility. It is therefore crucial that relevant provisions be reviewed and, if necessary, amended as comprehensively as possible and as soon as is feasible. States parties and projects that provide assistance to states parties in the process of implementing obligations flowing from the ICC Statute should not lose sight of or underestimate the importance of these issues.

[114] See, however, note 31, *supra*.
[115] In the latter case, amendments are unlikely where relevant domestic institutions have collapsed.
[116] On the relevant powers of the ICC, the Assembly of States Parties, and the Security Council, see, for instance, A. H. J. Swart, 'The Obligation to Cooperate', in Cassese *et al*., *supra* note 1, 1607 at 1636. See too Art. 63 of the ICC Statute, *supra* note 1, requiring the presence of the accused during the trial.