Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE CONCERNING THE CONSTITUTIONALITY OF THE OBLIGATIONS PRESCRIBED BY THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT SIGNED ON 17 JULY 1998

Yerevan 24 March 2023

The Constitutional Court, composed of A. Dilanyan (presiding), V. Grigoryan (rapporteur), H. Tovmasyan, A. Tunyan, Y. Khundkaryan, H. Hovakimyan, E. Shatiryan, S. Safaryan, and A. Vagharshyan,

with the participation (in the framework of the written procedure) of:

the representative of the Government, Y. Kirakosyan, the Representative on international legal matters,

pursuant to Article 168(3) and Article 169 § 3 of the Constitution, as well as Article 23 § 1, Article 40 § 1, and Article 74 of the Constitutional Law on the Constitutional Court,

examined in a public hearing through a written procedure the case concerning the constitutionality of the obligations prescribed by the Rome Statute of the International Criminal Court signed on 17 July 1998.

By the Decision N 2097-A of 29 December 2022, the Government approved the legislative initiative on the draft law on the ratification of the Rome Statute of the International Criminal Court signed on 17 July 1998, and on the adoption of the declaration of acceptance of exercise of jurisdiction by the International Criminal Court in accordance with the Article 12-3 of the Rome Statute of the International Criminal Court signed on 17 July 1998, and decided to apply to the Constitutional Court to determine the constitutionality of the obligations prescribed by the international treaty.

This case was initiated by the application of the Government submitted to the Constitutional Court on 3 January 2023.

Having examined the Rome Statute of the International Criminal Court (original text of the Statute in English and the official Armenian translation), and other documents in the case file, the Constitutional Court **FOUND:**

1. International treaties subject to Constitutional review

The Rome Statute of the International Criminal Court (hereinafter also referred to as "the Statute") signed on 17 July 1998, was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, in Rome, and entered into force on 1 July 2002.

1.1. The Republic of Armenia signed the Statute on 1 October 1999, with a further declaration while ratification that states as follows:

"*In accordance with Article 124 of the Statute of the International Criminal Court, the Republic of Armenia declares that for a period of seven years after the entry into force of the Statute for the Republic of Armenia, the Republic of Armenia does not accept the jurisdiction of the Court over the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.*

In accordance with Article 103 of the Statute of the International Criminal Court, the Republic of Armenia declares that the Republic of Armenia is willing to accept persons convicted by the Court if they are nationals of the Republic of Armenia or persons permanently residing in the Republic of Armenia."

1.2. By the Decision N 2097-A of 29 December 2022, the Government approved the legislative initiative on the draft law on the ratification of the Statute, and, within the framework of this case, informed the Constitutional Court on 17 March 2023, about the absence of intention to make the declaration of 1 October 1999, mentioned in the previous paragraph.

1.3. According to the draft law approved by the same Decision of the Government, the Republic of Armenia plans to adopt a declaration of acceptance of the exercise of jurisdiction by the International Criminal Court, according to which: "*The Republic of Armenia retroactively accepts the exercise of the jurisdiction by the International Criminal Court in accordance with the Article 12-3 of the Rome Statute of the International Criminal Court signed on 17 July 1998, with respect to the crime of genocide, crimes against humanity, and war crimes, as prescribed by the Articles 6, 7, and 8 of the Rome Statute of the International Criminal Court, starting from 00:00 on May 10, 2021*".

1.4. So far, the Statute was amended as follows:

(a) on 10 June 2010 (Article 8-2-e) was supplemented with Articles 8-2-e)xiii), 8-2-e)xiv) and 8-2-e)xv);

(b) on 11 June 2010 (Article 5-2 was removed, Article 8*bis* was added after Article 8, Article 9-1 was supplemented by adding a reference to Article 8*bis*, Articles 15*bis* and 15*ter* were added after Article 15, Article 20-2 was supplemented by adding a reference to Article 8*bis*, and Article 25 was supplemented with Article 25-3*bis*);

(c) Article 124 was removed by the amendment of 26 November 2015 (the amendment has not yet entered into force);

(d) on 14 December 2017 (Article 8-2-b) was supplemented with Article 8-2-b)xxvii, and Article 8-2-e) was supplemented with Article 8-2-e)xvi);

(e) on 14 December 2017 (Article 8-2-b) was supplemented with Article 8-2-b)xxviii , and Article 8-2-e) was supplemented with Article 8-2-e)xvii);

(f) on 14 December 2017 (Article 8-2-b) was supplemented with Article 8-2-b)xxix, and Article 8-2-e) was supplemented with Article 8-2-e)xviii);

g) on 6 December 2019 Article 8-2-e) was supplemented with Article 8-2-e)xix).

1.5. The Republic of Armenia has not signed any amendment to the Statute.

1.6. Thus, the Government applied to the Constitutional Court to review the constitutionality of the obligations prescribed by the Statute (original text without amendments) and the declaration of acceptance of the exercise of jurisdiction by the International Criminal Court in accordance with Article 12 § 3 of the Statute.

2. Decision DCC-502 of the Constitutional Court of 13 August 2004

2.1. On 12 July 2004, the President of the Republic applied to the Constitutional Court in accordance with the Article 101 § 1(1) of the Constitution of 1995 to review the compliance of the obligations prescribed by the Statute (with the attached declaration) with the Constitution of 1995. In the case "*Concerning the Compliance with the Constitution of the Republic of Armenia of the Obligations Prescribed by the Treaty on the Statute of the International Criminal Court signed in Rome on 17 July 1998 (with the attached declaration)*", the Constitutional Court adopted the Decision DCC-502 on 13 August 2004, which states:

1. The obligation prescribed by the Treaty on the Statute of the International Criminal Court signed in Rome on 17 July 1998 (with the attached declaration) – according to which the International Criminal Court complements the national criminal jurisdiction of the Republic of Armenia (paragraph 10 of the Preamble and Article 1 of the Statute) – does not comply with Articles 91 and 92 of the Constitution of the Republic of Armenia.

2. The obligations undertaken under the provisions of Article 105 of the Statute of the International Criminal Court – by which the exercise of the right to pardon and opportunity for amnesty for convicted persons through domestic procedures are precluded – do not comply with the requirements of Article 40, Article 55 (17), and Article 81 (1) of the Constitution of the Republic of Armenia.

2.2. In the reasoning of Decision DCC-502, the Constitutional Court, in particular, stated:

…

The Statute sets forth the basic principle of the jurisdiction of the Court, i.e. by exercising jurisdiction over persons responsible for the commission of grave crimes, as prescribed by the Statute, the Court complements national criminal jurisdictions. The content of this principle underlying the Court's jurisdiction is particularly revealed in Article 17 of the Statute, according to which the Court shall have the authority to administer justice over the offences envisaged by the Statute only in the case where the State is unwilling or unable genuinely to carry out the investigation or prosecution over the offences envisaged by the Statute. The same Article also clearly defines the factors that serve as an objective basis for assessing the State's unwillingness to carry out the investigation or prosecution in each specific case in accordance with the relevant procedural norms recognized by international law. Article 17-3 of the Statute also defines the objective grounds for assessing the State's inability to carry out the investigation or prosecution in each specific case. In addition, Article 19 of the Statute enables a State that has jurisdiction over a given case to challenge the admissibility of the case and the jurisdiction of the Court on the ground that the State is investigating or prosecuting or has investigated or prosecuted the case. The complementary nature of the Court to national criminal jurisdictions is also manifested in the fact that the Statute also provides for the possibility of the Prosecutor's deferral to the competent State with regard to the investigation of certain persons when the given State informs the Court

within the period specified by the Statute that it is conducting or has completed an investigation regarding those persons.

However, the provision on the complementarity prescribed by paragraph 10 of the Preamble and Article 1 of the Statute does not stem from the norms prescribed by Articles 91 and 92 of the Constitution of the Republic of Armenia. Administration of justice is the exclusive competence of the courts. As for the national judiciary, according to Article 91 of the Constitution of the Republic of Armenia, in the Republic of Armenia, justice is administered only by courts in accordance with the Constitution and laws. According to Article 92 of the Constitution, the courts exercising general jurisdiction, including criminal jurisdiction, in the Republic of Armenia are the first instance courts, appeal courts, and the Cassation Court.

Chapter 9 of the Constitution of the Republic of Armenia concerning the judiciary, while clearly defining the judiciary of the Republic of Armenia, does not prescribe any provision permitting to supplement (by the force of an international treaty) the judicial authorities exercising criminal jurisdiction, as prescribed by the Constitution of the Republic of Armenia, with an international judicial authority of criminal jurisdiction.

15. The provisions of Article 54-2, Article 57-3-d), and Article 99-4 of the Statue also relate to the key issue of the relationship between the principle of sovereignty and the jurisdiction of the Court. These provisions authorize the Prosecutor to directly take specific investigative measures within the territory of a State Party without having secured the cooperation of that State or without the presence of the authorities of that State.

The mentioned provisions of the Statute and other provisions of Articles 54, 57 and 99 vest the Prosecutor with sufficiently broad powers, and, at the same time, provide several guarantees that take into account the sovereignty of the state and would not allow the Prosecutor to abuse his authority.

(…)

Thus, Article 54-2, Article 57-3-d), and Article 99-4 of the Statute are derived from the principle of complementarity that forms the basis for the Court's activity and – being interpreted in the context of that principle being prescribed by the Constitution – cannot jeopardize the sovereignty of the State Party.

(…)

According to Article 105 of the Statute, the Court's sentence of imprisonment shall be binding on the States Parties, which cannot modify it in any case. This provision implies that persons under the jurisdiction of the Republic of Armenia who are convicted by the Court for the crimes prescribed by Article 5 of the Statute cannot receive a pardon or any release from or reduction of their sentence on amnesty, and,

accordingly, in relation to those persons the President of the Republic of Armenia cannot exercise the right to grant pardon to convicts, as prescribed by Article 55(17) of the Constitution of the Republic of Armenia, and the National Assembly of the Republic of Armenia cannot exercise the right to declare amnesty, as prescribed by Article 81(1) of the Constitution of the Republic of Armenia.

If the national courts of the Republic of Armenia exercise criminal jurisdiction over the persons who have committed the crimes under Article 5 of the Statute, the persons sentenced to imprisonment by the latter may seek pardon or release from or reduction of the sentence on amnesty. Meanwhile, in accordance with the requirements of Article 105 of the Statute, persons under the jurisdiction of the Republic of Armenia who are convicted by the Court (as a body complementing the national criminal jurisdiction) for the same crimes are deprived of the right to pardon prescribed by Article 40 of the Constitution of the Republic of Armenia and the opportunity for amnesty prescribed by Article 81 of the Constitution of the Republic of Armenia.

In pursuance of the guarantees of protection of human rights and freedoms assumed by Article 4 of the Constitution of the Republic of Armenia, the Republic of Armenia cannot undertake obligations of restriction of human rights not provided for by the Constitution that would create a less favourable situation for the persons under the jurisdiction of the Republic of Armenia in terms of guaranteeing the rights and freedoms defined by the Constitution of the Republic of Armenia.

2.3. The Constitutional Court notes that the subject matter of the examination by the Constitutional Court in Decision DCC-502 were the obligations prescribed by the Statute and that there is a difference between the title of the Statute and the title of the Statute mentioned in the Decision DCC-502 of 13 August 2004. However, taking into account that the mentioned difference is a result of the distinction between the official texts of the 2004 Armenian translation of the Statute (according to which the Statute is titled: "*Treaty on the Statute of the International Criminal Court, signed in Rome on 17 July 1998*") and that of 2023, the said inconsistency does not entail a legal discrepancy in terms of the purposes of the current examination.

3. Government's submission

3.1. In their written submission of 3 February 2023 the Government stated that the purpose of the Statute is the establishment of the International Criminal Court (which is complementary to national criminal jurisdictions, exercises its jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes) to exclude the impunity of the persons having committed the most serious crimes mentioned therein and thus contribute to

the prevention of those crimes. The Government also commented on the provisions of the Statute on the reasons for initiation of and preconditions to the exercise of the International Criminal Court's jurisdiction under the Statute.

The Government noted that the text of the Statute submitted to the Constitutional Court is the original version of the document signed on 17 July 1998 and that the Government applied to the Constitutional Court to determine the constitutionality of the provisions of the Statute based on the original text of the Statute signed on 17 July 1998, which, upon undergoing the necessary domestic procedures prescribed by the Constitution and the Law on International Treaties, and in the case being declared as complying with the Constitution, would be submitted to the National Assembly for ratification.

According to the Government, after the Constitutional Court's 2004 decision, constitutional amendments took place in the Republic of Armenia, resulting in fundamental changes to the Constitution. The Government notes that the legal and social developments of the last decade make it possible to conclude that "*(...) the legal obstacles prescribed by the Constitutional Court's 2004 decision are now removed, and, accordingly, there is a need to review the constitutionality of the Statute in the light of the current Constitution of 2015*."

Referring to the jurisdiction of the International Criminal Court, the Government notes that it is based on the principle of complementarity, according to which the International Criminal Court acts as a subsidiary instance and interferes with the investigation of criminal cases of very serious crimes defined by the Statute only under certain conditions. The Government considers that the aforementioned principle stems from the need for the internal sovereignty of the State, respect for its competent authorities, and the priority of their jurisdiction, taking into account, inter alia, the fact that said authorities, possessing the evidence base and having adequate resources, may more effectively investigate the case.

The Government notes that the International Criminal Court shall be involved and shall perform its functions only where the national legal system of the State does not ensure a proper investigation of the case, including where the ongoing investigation is of a formal nature, and the State is unwilling or unable to properly carry out the investigation. The Government submits that the purpose of the principle of complementarity is to preserve the jurisdiction of the International Criminal Court over irresponsible States that refuse to prosecute those who commit the most serious international crimes. The mentioned principle balances supranational jurisdiction, on the one hand, and the sovereign rights of States to prosecute their citizens without external interference, on the other.

The Government states that the crime of genocide, crimes against humanity, war crimes, and the crime of aggression are prohibited by *jus cogens* norms of general international law. It is noted that the peremptory norms of international law regarding the prohibition,

prevention, and accountability for such crimes entail unconditional commitments for States, which are directed to the entire international community (*erga omnes*), and States are obliged, at all levels of international relations, to be governed by peremptory norms, to prevent the violations thereof, and, in the event of such violations, to prosecute in good faith those who committed such violations.

The Government considers that the International Criminal Court was established out of the need to ensure the enforcement of *jus cogens* norms and that the primary meaning of the principle of complementarity is that the International Criminal Court intervenes only in cases in which a State is unwilling or unable to prosecute and hold accountable individuals who have committed the crimes in question, in violation of the *erga omnes* obligation arising based on the *jus cogens* norms. The international obligation to prosecute and hold criminally accountable persons responsible for the crimes provided by the Statute is not only based on *jus cogens* norms but also directly follows from several international treaties ratified by the Republic of Armenia.

The Government submitted that "*(...) the issue of the constitutionality of the complementarity should be considered from this starting point because the Constitution of the Republic of Armenia cannot be construed in a vacuum, isolated from international law, especially when it comes to the peremptory* (*jus cogens) norms of general international law*."

The Government concludes that the provisions of the Constitution prescribing the system of the judiciary (Articles 91 and 92 of the Constitution of 1995, Articles 162 and 163 of the Constitution with the amendments of 2015) do not in any way exclude the establishment of international courts operating under an international treaty, the joining of the Republic of Armenia to such a treaty, and the exercise of jurisdiction of those courts. According to the Government, the International Criminal Court does not replace the national judiciary of the Republic of Armenia but rather complements it, and, moreover, only in the event when the State, through its judiciary, evades the fulfilment of its most serious international commitments.

Submitting Articles 40, 55(17), and 81(1) of the Constitution of 1995, as well as Articles 70, 117 and 135 of the Constitution with the amendments of 2015 (regulating the same issues), the Government notes that comparison shows that the provisions related to the institutions of pardon and amnesty do not have the same content and have undergone qualitative changes.

The Government notes that the comparative analysis of Articles 40, 55(17), and 81(1) of the Constitution of 1995 and Articles 70, 117 and 135 of the Constitution with the amendments of 2015 (regarding the issues of pardon and amnesty) shows that, according to the Constitution, the regulation of the institutions of pardon and amnesty is currently reserved to the law, and the application of pardon or amnesty to persons who have committed the most

serious international crimes per se contradicts *jus cogens* norms of general international law, and that such a prohibition is also reflected in Articles 91 and 92 of the Criminal Code of the Republic of Armenia adopted on 5 May 2021.

3.2. In response to the request submitted by the Justice-Rapporteur of the Constitutional Court in this case, by the letter submitted to the Constitutional Court on 17 March 2023 the representative of the Government regarding the intention of the Government of the Republic of Armenia regarding the draft declaration mentioned in paragraph 1.1 of this Decision, submitted that: "*The Government of the Republic of Armenia does not intend to make any declaration on the above Articles of the Statute*."

4. Obligations undertaken by the Statute

Referring to the merits of the issue of the constitutional review of the obligations prescribed by the Statute, the Constitutional Court notes that the Republic of Armenia undertakes, *inter alia*, the following obligations under the Statute:

(a) Accepting the jurisdiction of the International Criminal Court – as an instance complementary to national criminal jurisdictions – with respect to persons who committed crimes of concern to the international community, which are referred to in Article 5 of the Statute (Article 1 read in conjunction with Article 12-1, and Article 5-2);

(b) Accepting the jurisdiction of the International Criminal Court to exercise its functions and powers, as provided in the Statute, on the territory of the Republic of Armenia (Article 4-2);

(c) Refraining from trying a person for the crimes referred to in Article 5 of the Statute, for which that person has already been convicted or acquitted by the International Criminal Court (Article 20-2);

(d) Applying the Statute equally to all persons without any distinction based on official capacity, as well as guaranteeing that immunities or special procedural rules which may be attached to the official capacity of a person, whether under national or international law, shall not bar the International Criminal Court from exercising its jurisdiction over him/her (Article 27);

(e) Guaranteeing that the International Criminal Court shall enjoy in the territory of the Republic of Armenia such privileges and immunities that are necessary for the fulfilment of its purposes (Article 48-1);

(f) Guaranteeing that the Judges, the Prosecutor, the Deputy Prosecutors, and the Registrar of the International Criminal Court shall, when engaged on or with respect to the

business of the International Criminal Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity (Article 48-2);

(g) Having received a request for provisional arrest or arrest and surrender, immediately take steps to arrest the person in question in accordance with the law of the Republic of Armenia and the provisions of Part 9 of the Statute, immediately bring the person arrested before the competent judicial instance of the Republic of Armenia which shall determine, in accordance with the law of the Republic of Armenia, that:

- The warrant applies to that person;

- The person has been arrested in accordance with the due process; and

- The person's rights have been respected (Article 59-1 and Article 59-2);

(h) Notifying the Pre-Trial Chamber of any request for interim release to competent authorities of the Republic of Armenia of the person arrested pending surrender to the International Criminal Court, and giving full consideration to recommendations of the former in that regard, including any recommendations on measures to prevent the escape of the person, before rendering its decision (Article 59-5);

(i) Immediately after rendering a decision on the surrender of the person to the International Criminal Court, delivering the person to the International Criminal Court as soon as possible (Article 59-7);

(j) Accepting the jurisdiction of the International Criminal Court over the offences against its administration of justice when committed intentionally, which are referred to in Article 70-1 of the Statute, and extending the criminal law of the Republic of Armenia penalizing offences against the integrity of its own investigative or judicial process to such offences, committed on the territory of the Republic of Armenia, or by the nationals of the Republic of Armenia (Article 70-1 and Article 70-4-a);

(k) Giving effect to a decision rendered by the International Criminal Court under Article 75 of the Statute relating to reparations to or in respect of victims, including restitution, compensation and rehabilitation, without prejudice to the rights of *bona fide* third parties, and in accordance with the procedure of the national law of the Republic of Armenia, and transferring to the International Criminal Court the property obtained as a result of the enforcement of that decision (Article 75-5 read in conjunction with Article 109);

(l) In accordance with the provisions of the Statute, cooperating fully with the International Criminal Court in its investigation and prosecution of crimes within the jurisdiction of the Court (Article 86);

(m) As a requested State, keeping confidential the International Criminal Court's request for cooperation and any supporting documents, except for to the extent that the disclosure is necessary for the execution of the request (Article 87-3);

(n) Ensuring that there are procedures available under the national law of the Republic of Armenia for all of the forms of cooperation which are specified under Part 9 of the Statute (Article 88);

(o) Complying with the International Criminal Court's request for the arrest and surrender of a person, in accordance with the provisions of Part 9 of the Statute and the procedure under the national law of the Republic of Armenia (Article 89-1);

(p) Where the person sought for surrender brings a challenge before a national court based on the principle of *ne bis in idem* as provided in Article 20 of the Statute, as a requested State immediately consulting with the International Criminal Court to determine if there has been a relevant ruling on admissibility and if the case is admissible, proceeding with the execution of the request (Article 89-2);

(q) In urgent cases, giving effect to the International Criminal Court's request for the provisional arrest of the person sought, pending submission of the request for surrender and the supporting documents as specified in Article 91 of the Statute (Article 92-1 read in conjunction with Article 86);

(r) In accordance with the provisions of Part 9 of the Statute and under procedures of national law of the Republic of Armenia, complying with requests to provide assistance to the International Criminal Court in relation to investigations or prosecutions which are referred to in Article 93-1of the Statute (Article 93-1);

(s) Assist, **w**here it is necessary, for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, as well as doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or another public place, and recognizing the authority of the International Criminal Court's Prosecutor to directly fulfil that requirement in the territory of the Republic of Armenia in accordance with the procedure set forth in Article 99-4 of the Statute (Article 99-4);

(t) As a requested State, bearing the ordinary costs for execution of requests in the territory of the Republic of Armenia, except for those specified in Article 100-1 of the Statute (Article 100-1).

5. Assessment by the Constitutional Court of the constitutionality of the obligations prescribed by the Statute

The Constitutional Court states that this case has the peculiarity that the Constitutional Court has already rendered the Decision DCC-502 on the compliance of the obligations prescribed by the Statute, which are subject to the examination of constitutionality in the present case, with the Constitution of 1995.

5.1. In this regard, the Constitutional Court states that the following essential differences exist between the circumstances of the examination of the constitutionality of the obligations prescribed by the Statute in this case and the ones of the examination of the constitutionality of the obligations prescribed by the international treaty in the case of the Decision DCC-502 of 13 August 2004:

(a) In this case, the task of the Constitutional Court is to determine the compliance of the obligations prescribed by the Statute with the Constitution with the amendments of 2015, while by Decision DCC-502, the examination of the obligations prescribed by the Statute was conducted for the determination of their compliance with the Constitution of 1995;

(b) The recognition of the Preamble of the Constitution as a non-amendable provision of the Constitution in the Decision DCC-1590 of the Constitutional Court of 29 April 2021 has led to a new understanding of the constitutional provisions applicable in the process of examination of the constitutionality of the obligations prescribed by the Statute, which is of decisive importance in interpreting the provisions of the Constitution for the purpose of the examination of the constitutionality of the obligations prescribed by the Statute; and

(c) The Republic of Armenia is acceding to the Statute and adopting a declaration based on Article 12-3 of the Statute, without declaring in accordance with Article 103 of the Statute its willingness to accept persons sentenced by the International Criminal Court for the purpose of enforcement of a sentence.

5.2. The non-inclusion of the reasoning prescribed by Article 29 § 2 of the Constitutional Law on the Constitutional Court in the Procedural Decision PDCC-1 of 10 January 2023 on accepting this case for examination was due to the fact that by taking into account the essential circumstances mentioned in the above-mentioned sub-paragraphs (a) and (b), the Constitutional Court did not consider the issue of determining the constitutionality of the obligations prescribed by the Statute as “an issue raised in an application submitted with

regard to cases referred to Article 168(1-5) of the Constitution" in the sense of Article 29 § 1(3) of the Constitutional Law on the Constitutional Court.

During further examination of this case, the Constitutional Court did not reveal any circumstance that would serve as a basis for deviating from the finding in the Procedural Decision PDCC-1 of 10 January 2023, and the Court reiterates its assessments that the issue of determining the constitutionality of the obligations prescribed by the Statute is not "an issue raised in an application submitted with regard to cases referred to Articles 168(1-5) of the Constitution" in the sense of Article 29 § 1(3) of the Constitutional Law on the Constitutional Court.

5.3. Considering the above-mentioned findings and examining this case as one related to issues that were not previously raised in any application, the Constitutional Court considers that the obligations prescribed by the Statute are in harmony with the respective provisions of the Constitution, they are not problematic from the point of view of their compliance with any provision of the Constitution and comply with it.

5.4. At the same time, for the reasons mentioned in paragraphs 6-7 of this Decision (*i.e.* to prevent possible uncertainty given the legal positions set forth in Decision DCC-502), the Constitutional Court considers it necessary to address specifically the issue of the constitutionality of the obligations prescribed by paragraph 10 of the Preamble and Articles 1 and 105 of the Statute.

6. On the constitutionality of the obligations prescribed by paragraph 10 of the Preamble and Article 1 of the Statute

Due to the considerations mentioned in paragraph 5.4 of this Decision, the Constitutional Court finds it necessary to address separately the issue of compliance of the principle of complementarity declared by the Statute (that is at the core of the exercise of the jurisdiction of the International Criminal Court) with Article 162 § 1 and the first sentence of Article 163 § 1 of the Constitution in the light of the principles and values prescribed in the Preamble and Articles 1 and 2 of the Constitution.

6.1. According to paragraph 10 of the Preamble of the Statute, the State Parties to the Statute have accepted that "*the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*."

The principle of complementarity prescribed in the Preamble of the Statute was subsequently reflected in Article 1 of the Statute regarding the status of the International Criminal Court, though its legal content is detailed in Article 17 of the Statute, according to which the International Criminal Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, except for the cases where the State is unwilling or unable genuinely to carry out the investigation or prosecution; or

(b) The case has been investigated by a State which has jurisdiction over it, and the State has decided not to prosecute the person concerned, except for the cases where the decision resulted from the unwillingness or inability of the State genuinely to prosecute; or

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the International Criminal Court is not permitted under Article 20-3; or

(d) The case is not of sufficient gravity to justify further action by the International Criminal Court.

Articles 17-2 and 17-3 of the Statute describe the decisive circumstances required to conclude on the absence of willingness or ability of the State effectively to investigate crimes within the jurisdiction of the International Criminal Court.

An analysis of paragraph 10 of the Preamble and Article 1 of the Statute in conjunction with the provisions of Article 17 of the Statute makes it obvious that the rules of the Statute regarding the admissibility of a given case restrict the possibility of the exercise of jurisdiction of the International Criminal Court by the effective exercise of national criminal jurisdiction. It follows from the analysis of the mentioned provisions of the Statute in conjunction with paragraph 6 of the Preamble of the Statute (according to which "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*") that for the purposes of the Statute, the jurisdiction of the International Criminal Court does not prevail over national criminal jurisdiction, and was not established for such purposes and is solely complementary, in the case of unwillingness or inability to effectively exercise national criminal jurisdiction.

6.2. The Decision DCC-502 of the Constitutional Court on the contradiction to the Constitution of the obligations stipulated in paragraph 10 of the Preamble and Article 1 of the Statute is based solely on conclusions regarding the International Criminal Court not being considered as an authority administering justice in the Republic of Armenia under Articles 91 and 92 of the Constitution of 1995 and the lack of possibility of complementing the criminal jurisdiction of the Republic of Armenia with an international judicial authority based on an international treaty (Decision DCC-502, paragraph 14).

In relation to the fact that the obligations stipulated in paragraph 10 of the Preamble and Article 1 of the Statute contradict the Constitution (as prescribed by the Decision DCC-502 of the Constitutional Court), the Constitutional Court considers it necessary to begin the

examination of the constitutionality of the obligations prescribed by the Statute by examining the purposes of the adoption of the Constitution and the Statute, as well as the common values protected thereof.

In this regard, the Constitutional Court notes that the interpretation of any constitutional norm deviates from its axiological course if it is incompatible with the purposes, values, and principles declared in the Preamble and other non-amendable provisions of the Constitution. By the Decision DCC-1590 of 29 April 2021, the Constitutional Court has already stated that "*(...) the non-amendable provisions of the Constitution are the fundamental and central axis that serves as the basis for the formation and development of the legal system of the Republic of Armenia*," at the same time ranking the Preamble of the Constitution among the non-amendable provisions of the Constitution.

In the Preamble of the Constitution, the Armenian People adopted the Constitution, among other aspirations and principles, by "*assuring the allegiance to universal values*." The indication of this assurance in the Preamble of the Constitution makes the constitutional term "universal values" the primary guideline for the purposeful interpretation of the norms of the Constitution.

6.3. The Statute is the legal basis for the functioning of the International Criminal Court, which was adopted recognizing and mindful of the fact that during the century preceding the adoption of the Statute, "*millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity*" (paragraph 2 of the Preamble of the Statute), and that "*such grave crimes threaten the peace, security and well-being of the world*" (paragraph 3 of the Preamble of the Statute).

It follows from the Preamble of the Statute that the States accepting the Statute had a steady position that "*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*" (paragraph 4 of the Preamble of the Statute). The driving force behind the adoption of the Statute was the fact that the States were determined "*to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*" (paragraph 5 of the Preamble of the Statute).

In order to achieve the above-mentioned objectives and for the sake of present and future generations, an independent International Criminal Court was established, with jurisdiction over the most serious crimes of concern to the international community as a whole (paragraph 9 of the Preamble of the Statute).

6.4. The Constitutional Court notes that the above-mentioned values prescribed in the Preamble of the Statute, in particular, the peace, security and well-being of the world, are

universal values established and protected also by the United Nations Charter (United Nations Charter, paragraphs 1-2 of the Preamble, and Articles 1-1, 1-3) and the Universal Declaration of Human Rights (Universal Declaration of Human Rights, paragraph 1 of the Preamble), and unequivocally constitute the core of the "universal values" stated in the Preamble of the Constitution. Therefore, the commitment of the Republic of Armenia to the realization of the objectives prescribed by the Statute – aimed at the protection and preservation of those values – is fully consistent with the affirmation of the commitment of the Armenian People to universal values, as prescribed by the Preamble of the Constitution.

6.5. The Constitutional Court emphasizes that the basis of the constitutional imperative to consider the commitment of the Armenian People to universal values, as prescribed by the Preamble of the Constitution, especially with regard to their relation to the fight against the grave crimes and impunity that threaten the peace of the world, as a value guideline for the interpretation of the provisions of the Constitution also includes the historical, ethical and civilizational criterion that the importance of the fight against such grave crimes and related impunity, as prescribed by the Preamble of the Statute, was already stated in the process of Armenian independence with the declaration of support for the task of achieving international recognition of the Armenian Genocide (Declaration of Independence of Armenia, paragraph 11). The provision on supporting the international recognition of the Armenian Genocide, as prescribed by the Declaration of Independence of Armenia, is not only aimed at retroactive recognition of the historical reality, but even more so, it is of a civilizational commitment to participate in international efforts aimed at the protection of the peace and security of the world through the fight against such grave crimes and related impunity in the future.

Therefore, in considering the issue of the constitutionality of the obligations prescribed by the Statute, the Constitutional Court will examine the constitutionality of the components of the international criminal jurisdiction prescribed therein (in particular, the complementary nature of the jurisdiction of the International Criminal Court) also in the light of the civilizational commitment (mentioned in this paragraph) of the Armenian People as the author of the non-amendable provisions of the Constitution of the Republic of Armenia.

6.6. The list of crimes falling under the jurisdiction of the International Criminal Court prescribed by Article 5-1 of the Statute includes the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

The Constitutional Court emphasizes that the Republic of Armenia acceded to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 even before the entry into force of the Constitution (on 10 December 1991, by the Decision N N-0467-I of the Supreme Council of Armenia). In acceding to this Convention, which was adopted "(...) *[h]aving considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under*

international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world," and "*[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity,* and "*[b]eing convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required*" (Preamble of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948), the Republic of Armenia undertook the obligation to prevent genocide and to punish persons committing genocide (Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948).

In addition, the Constitutional Court emphasizes that the Republic of Armenia has consistently supported the fight against other crimes of concern to the international community by acceding to several international treaties related to international cooperation efforts in this regard, in particular (but not limited to):

(a) The Geneva Convention of 26 November 1968, on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (the Republic of Armenia acceded to the Convention on 31 March 1993, by the Decision H.N-0788-I of the Supreme Council);

(b) The Agreement on the Problems Connected with Restoration to the Rights of the Deported Persons, National Minorities and Peoples (entered into force for the Republic of Armenia on 19 October 1993), and the Protocol attached to the Agreement which was signed on 30 May 2003, and was ratified on 27 April 2004, by the Decision N-093-3 of the National Assembly (DCC-474));

(c) The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed in Strasbourg on 26 November 1987 (the Convention was ratified by the Republic of Armenia on 7 November 2001, by the Decision N-216-2 of the National Assembly (DCC-332), Protocol No. 1 was ratified on 15 May 2002, by the Decision N-280-2 of the National Assembly (DCC-355), Protocol No. 2 was ratified on 15 May 2002, by the Decision N-281-2 of the National Assembly (DCC-354), and the Optional Protocol ratified on 31 May 2006, by the Decision N-282-3 of the National Assembly (DCC-618));

(d) The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, signed in Geneva (the Republic of Armenia acceded on 31 March 1993, by the Decision H.N-0786-I of the Supreme Council);

(e) The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed in Geneva on 17 June 1925 (the Republic of Armenia ratified the Protocol on 18 October 2017, by the Law HO-127-N (DCC-1345)).

6.7. Having indicated the axiological congruence in the foundations of the Constitution and the Statute, the task of the Constitutional Court is to examine whether the principle of complementarity underlying the exercise of the jurisdiction of the International Criminal Court prescribed by the Statute is compatible with the constitutionally prescribed principle that in the Republic of Armenia, justice shall be administered solely by the judiciary stipulated by the Constitution.

6.8. According to Article 162 § 1 of the Constitution, in the Republic of Armenia, justice is administered only by courts in accordance with the Constitution and laws, and according to Article 163 § 1 of the Constitution, the Constitutional Court, the Cassation Court, appellate courts, and general jurisdiction first instance courts, as well as the Administrative Court and specialized courts established in cases provided by law, are the courts that operate in the Republic of Armenia.

According to Article 17 of the Statute, no case, having regard to paragraph 10 of the Preamble and Article 1, may be admitted if the State having jurisdiction over the case has exercised or is exercising its jurisdiction. Exceptions to this general rule are cases where the State which has jurisdiction over the given case is unwilling or unable genuinely to carry out a proper investigation or prosecution (Articles 17-1-a) and 17-1-b) of the Statute).

In other words, Article 17 by the force of the imperative rule that "*the Court shall determine that a case is inadmissible*" (paragraph 1 of the same Article), directly limits the jurisdiction of the International Criminal Court on the basis of the exercise of the national jurisdiction of the State over the given case, considering possible the exercise of the jurisdiction of the International Criminal Court only in cases of failure (unwillingness or inability) of effective implementation of the national jurisdiction. Thus, the exercise of its jurisdiction by the International Criminal Court does not replace national jurisdiction systems and does not interfere with the scope of national jurisdiction, but rather complements the latter insofar as they fail to fulfil the aim pursued.

6.9. Bearing in mind the importance of the fundamental objectives and values prescribed by the Constitution and the Statute, as described in paragraphs 6.2-6.5 of this Decision, and their overlap with the intention to ensure the peace and well-being of the world through the prosecution of the gravest international crimes, the Constitutional Court states that the existence of the judiciary as prescribed by the Constitution – in particular the existence of the system of criminal justice, the combination of conditions and regulations designed for it to exercise the criminal jurisdiction of the Republic of Armenia, as well as the requirement of its exclusivity in the exercise of the criminal jurisdiction of the Republic of Armenia – may not be interpreted distinctly from the objectives of the constituent power to form and define such a system. Introduced and guaranteed by the Constitution, the system of criminal jurisdiction of the Republic of Armenia is designed to ensure the protection, among other

values prescribed by the Constitution, also of "*universal values*" in the sense of the Preamble of the Constitution, which, in addition to being a primary constitutional imperative, is also an obligation for any State by *jus cogens* norms.

Therefore, the failure of the criminal jurisdiction of the Republic of Armenia for any reason (unwillingness or inability) to ensure the protection of the peace and well-being of the world through the effective investigation and prosecution of those who commit the gravest international crimes of concern to the international community, such as the crime of genocide, crimes against humanity, war crimes, as prescribed by Articles 5-8 of the Statute is, in essence, an unconstitutional situation, and the exercise of the complementary jurisdiction aimed at returning it to the constitutional path by the International Criminal Court (as an authority pursuing the aims consistent with the objectives prescribed by the Preamble of the Constitution) cannot be assessed as an unconstitutional interference with the sovereign criminal jurisdiction of the Republic of Armenia.

The combined analysis of paragraph 10 of the Preamble, and Articles 1 and 17 of the Statute indicates that the jurisdiction of the International Criminal Court complements the national jurisdiction insofar as the latter is unable or unwilling to serve the objectives prescribed by the Statute, which, on one hand, as already mentioned by the Constitutional Court in paragraphs 6.2-6.4 of this Decision, coincide with the universal values the Armenian People affirmed commitment to when adopting the Constitution, and, on the other hand, are already pursued by *jus cogens* norms.

Therefore, in the light of the Preamble of the Constitution, the interpretation of the provisions of Article 162 § 1 and Article 163 § 1 of the Constitution – as a description of the national system of criminal jurisdiction prescribed by the Constitution – does not exclude the possibility of complementing the sovereign criminal jurisdiction of the Republic of Armenia with the jurisdiction of the International Criminal Court within the limits and on grounds prescribed by the Statute.

The contrary interpretation of the constitutional norms leads to an unacceptable contradiction between the objective of the sovereignty of the Republic of Armenia and the affirmation of the commitment to the "*universal values*" declared by the Armenian People in the Preamble of the Constitution: this is not only a misunderstanding of the constitutional axiology, but also directly contradicts the objective of the exclusivity of the jurisdiction of the Republic of Armenia.

6.10. Therefore, the Constitutional Court,

(a) Taking into account the conformity of the aims pursued by the Constitution and the Statute, as well as the compatibility of the axiology laid in their foundations;

(b) Bearing in mind that the core of the principle of complementarity underlying the jurisdiction of the International Criminal Court (as prescribed by paragraph 10 of the Preamble and Article 1 of the Statute, and detailed in Article 17 of the Statute) is respect for the primacy of the criminal jurisdiction of a State Party to the Statute and that the jurisdiction of the International Criminal Court arises only in case of failure of the system of criminal jurisdiction system of the given State in pursuing its objectives; and

(c) Emphasizing that the affirmation of the allegiance to the "*universal values*" by the first constituent power of the Republic of Armenia, the Armenian People, unequivocally includes its civilizational commitment to participate in international efforts aimed at the protection of the peace and security of the world through the fight against the gravest crimes of concern to the international community and related impunity;

Finds that the obligations prescribed by paragraph 10 of the Preamble and by Article 1 of the Statute given the reasoning expressed in this Decision comply with the Constitution.

7. On the constitutionality of the obligations prescribed by Article 105 of the Statute

The particular reference made by the Constitutional Court in this paragraph to the issue of the constitutionality of the obligations prescribed by Article 105 of the Statute – as in the case of the reference in paragraph 6 of this Decision to the issue of the constitutionality of paragraph 10 of the Preamble and Article 1 of the Statute – is also due to the need to prevent possible uncertainty regarding the conclusion reached in this case in the context of the legal position expressed by the Constitutional Court in the Decision DCC-502 about the contradiction of the provisions of Article 105 of the Statute to the Constitution.

7.1. The reasoning of the Decision DCC-502 of the Constitutional Court on the contradiction of the obligations prescribed by Article 105 of the Statute to the Constitution is based on the finding according to which: *"(...) In the event that the national courts of the Republic of Armenia exercise criminal jurisdiction over the persons who have committed the crimes under Article 5 of the Statute, the persons sentenced to imprisonment by the national courts may seek pardon or release from or reduction of a sentence through amnesty. Meanwhile, under the requirements of Article 105 of the Statute, persons under the general jurisdiction of the Republic of Armenia convicted by the Court (as a body complementing the system of the national criminal jurisdiction) for the same crimes are deprived of the right to pardon, as prescribed by Article 40 of the Constitution of the Republic of Armenia, and opportunity of amnesty, as prescribed by Article 81 of the Constitution of the Republic of Armenia*."

As a result of interpreting and applying Article 4 of the Constitution of 1995 based on the above judgment, the Constitutional Court declared the obligations prescribed by Article 105 of the Statute contradictory to the Constitution as restrictive of human rights in a manner not prescribed by the Constitution, which would result in a less favourable situation for persons under the jurisdiction of the Republic of Armenia sentenced to imprisonment.

In this regard, prior to the analysis by the Constitutional Court of the current constitutional norms related to the legal regulation of relations governed by the norms of Article 40, Article 55(17), and Article 81(1) of the Constitution of 1995 and the determination of the issue of compliance with those norms of the obligations prescribed by Article 105 of the Statute, the Constitutional Court considers it necessary to refer to the nature of the obligation prescribed by Article 105 of the Statute and the conditions of its emergence, for the purpose of clarifying whether Article 105 of the Statute envisages "*obligations prescribed*" by the Statute in the sense of Article 168(3) of the Constitution.

7.2. The provisions of Part 10 of the Statute, titled "*Enforcement*" regulate the relations concerning the enforcement of sentences of the International Criminal Court, in particular, assuming the status of a State designated to enforce sentences of imprisonment (Article 103 of the Statute) and the enforcement of such sentences (Article 105 of the Statute).

According to Article 105 of the Statute, the sentence of imprisonment within the framework of the conditions specified by a State and accepted by the International Criminal Court in relation to accepting a convicted person for the purpose of serving a sentence (as prescribed by Article 103-1-b) of the Statute) is binding on the State Party accepting the sentenced person, which shall in no case modify it.

According to Article 103-1-a) of the Statute, a sentence of imprisonment shall be served by a person sentenced by the International Criminal Court in a State designated by the International Criminal Court from a list of States which have indicated to the International Criminal Court their willingness to accept sentenced persons. In accordance with Article 103-1-b) of the Statute, at the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the International Criminal Court and in accordance with Part 10 of the Statute. Moreover, according to Article 103-1-c) of the Statute, a State designated by the International Criminal Court in a particular case as a State of enforcement only undertakes the obligation (as prescribed by Article 105) to enforce the judgement in respect of the given sentenced person by informing the International Criminal Court of its agreement to the designation.

In turn, according to Rule 200-2 of the Rules of Procedure and Evidence of the International Criminal Court, the Presidency of the International Criminal Court cannot include a state on the list of states willing to enforce the sentence of a person sentenced by the

International Criminal Court provided for in Article 103-1-a) of the Statute, if it does not accept the conditions that such a State attaches to the enforcement of the sentence of a sentenced person. In accordance with sub-rule 5 of the same rule, the International Criminal Court may enter into bilateral treaties with States with a view to establish the order of the acceptance of prisoners sentenced by the International Criminal Court, which is a practice developed by the International Criminal Court[1].

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[1] See, in particular, the practice of concluding international treaties between the International Criminal Court and the relevant State of enforcement, e.g.

(1) International Agreement ICC-PRES/01-01-05 with the Federal Government of Austria signed on October 27, 2005 (see https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/975246DC-383B-42EF-A78B-D0773BEB20A4/140155/ICCPRES010105_en.pdf, last accessed on March 24, 2023);

(2) International Agreement ICC-PRES/28-01-22 with the Republic of Slovenia signed on December 7, 2018 (see https://www.icc-cpi.int/sites/default/files/2022-05/20220401-Agreement-on-the-Enforcement-of-Sentences-ICC-Slovenia-ENG.pdf, last accessed on March 24, 2023);

(3) International Agreement ICC-PRES/29-02-22 with the Republic of Colombia signed on May 17, 2011 (see https://www.icc-cpi.int/sites/default/files/2022-10/Agreement-Republic-Colombia-ICC-Enforcement-of-Sentences-ENG.pdf, last accessed on March 24, 2023);

(4) International Agreement ICC-PRES/27-01-19 with the Government of Georgia signed on January 24, 2019 (see https://www.icc-cpi.int/sites/default/files/itemsDocuments/190124-oj-sa-Georgia_ENG.pdf, last accessed on March 24, 2023);

(5) International Agreement ICC-PRES/07-01-11 with the Government of the Republic of Finland signed on June 1, 2010 (see https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/F21AB53F-7257-45C8-A5EB-42B17D86B65B/283222/SentencingAgreementwithFinland.pdf, last accessed on March 24, 2023);

(6) International Agreement ICC-PRES/12-02-12 with the Kingdom of Denmark signed on June 1, 2010 (see https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D9462230-4163-4747-BC7C-CB0141C5004B/284720/SentencingagreementwithDenmarkEng.pdf, last accessed on March 24, 2023);

(7) International Agreement ICC-PRES/16-03-14 with the Government of the Kingdom of Belgium signed on December 8, 2014 (see https://www.icc-cpi.int/sites/default/files/iccdocs/oj/ICC-PRES-16-03-14-Eng.pdf, last accessed on March 24, 2023);

(8) International Agreement ICC-PRES/11-01-12 with the Government of the Republic of Mali signed on January 13, 2012 (see https://www.icc-cpi.int/sites/default/files/2022-10/Agreement-Republic-Mali-ICC-Enforcement-of-Sentences-ENG.pdf, last accessed on March 24, 2023);

(9) International Agreement ICC-PRES/18-02-16 with the Kingdom of Norway signed on July 7, 2016 (see https://www.icc-cpi.int/sites/default/files/iccdocs/oj/Agreement_on_the_enforecement_of_sentences_with_NorwayEng.pdf, last accessed on March 24, 2023);

(10) International Agreement ICC-PRES/09-03-11 with the Republic of Serbia signed on January 20, 2011 (see https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/FAFDAF32-B24C-429D-855B-9918D7CF43DE/283411/SentencingAgreementwithSerbia.pdf, last accessed on March 24, 2023);

(11) International Agreement ICC-PRES/20-02-17 with the Government of Sweden signed on April 24, 2017 (see https://www.icc-cpi.int/sites/default/files/itemsDocuments/170424-oj-sa-Sweden.pdf, last accessed on March 24, 2023);

7.3. Therefore, the obligation prescribed by Article 105 of the Statute titled "*Enforcement of the sentence*", namely, the enforcement of the sentence by accepting the finality and immutability of the sentence of imprisonment within the framework of the conditions prescribed by Article 103-1-b) of the Statute, shall apply only to a State which:

(a) Has indicated its willingness to accept a sentenced person for enforcing the sentence of the International Criminal Court (Article 103-1-a of the Statute, and Rules 200-1, 200-2 of the Rules of Procedure and Evidence); and

(b) Has agreed with the International Criminal Court on the conditions for the enforcement of a sentence in respect of a sentenced person (Rule 200-5 of the Rules of Procedure and Evidence); and

(c) In the event of a corresponding judgment, is designated by the Presidency of the International Criminal Court to enforce the sentence, (Articles 103-1-103-3, of the Statute); and

(d) Has agreed to the designation by the Presidency of the International Criminal Court as a State of enforcement (Article 103-1-c) of the Statute).

In other words, the obligation of a State under Article 105 of the Statute in relation to enforcing the sentence of a person sentenced to imprisonment by the International Criminal Court does not rise directly by ratification of the Statute but rather is an obligation voluntarily undertaken by a State Party to the Statute, which is undertaken where all the terms prescribed by the above-mentioned subparagraphs (a)-(d) are met.

7.4. The power of the Constitutional Court to examine the application submitted in this case and to determine the constitutionality of the obligations prescribed by the Statute derives from Article 168(3) of the Constitution, according to which, the Constitutional Court under the procedure prescribed by the Constitutional Law on the Constitutional Court "*prior to the ratification of an international treaty*, *determines the constitutionality of the obligations prescribed therein*"

The procedure of preliminary mandatory verification by the Constitutional Court of the constitutionality of the obligations prescribed by an international treaty subject to ratification

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(12) International Agreement ICC-PRES/04-01-07 with the Government of the United Kingdom of Great Britain and Northern Ireland signed on November 8, 2007 (see https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C540B3EF-F3FF-4AD0-93F5-DA85E96B1522/0/ICCPres040107ENG.pdf, last accessed on March 24, 2023);

(13) International Agreement ICC-PRES/19-01-17 with the Argentine Republic signed on April 18, 2017 (see https://www.icc-cpi.int/sites/default/files/itemsDocuments/170418-oj-sa-Argentine.pdf, last accessed on March 24, 2023).

derives from the power of the Constitutional Court, as prescribed by Article 168(3) of the Constitution, taking into account the rank of legal norms ratified by an international treaty in the hierarchy of legal norms (as prescribed by Article 5 § 3 of the Constitution), by virtue of which, in case of conflict between those norms and the norms of laws, the norms of the international treaty shall apply.

7.5. Referring to the arguments presented in the Government's position regarding the compliance of the obligation prescribed by Article 105 of the Statute with the norms provided for by Articles 70 and 117 of the Constitution bearing in mind the circumstances and procedures mentioned in paragraph 7.3 of this Decision, the Constitutional Court considers that in the event that the obligation prescribed by Article 105 of the Statute is undertaken in accordance with the procedure envisaged by Article 103-1 of the Statute and rule 200 of the Rules of Procedure and Evidence, the mentioned obligation may concern the individual right to pardon, as prescribed by Article 70 of the Constitution, and the power of the National Assembly to adopt a law on amnesty, as prescribed by Article 117 of the Constitution.

However, the obligation prescribed by Article 105 of the Statute does not arise from the ratification of the Statute, but only under the respective international treaty between the International Criminal Court and the Republic of Armenia to be included on the list of States willing to accept sentenced persons, in accordance with the abovementioned procedure.

7.6. Applying the analysis in this Decision on the origin and nature of the obligations prescribed by Article 105 of the Statute to resolve the issue of the constitutionality of the obligations prescribed by the Statute as an international treaty subject to verification, the Constitutional Court takes note of the official assurance of the representative of the Government submitted in the letter of 17 March 2023, to the request of the Constitutional Court, stating that the Government does not intend to make a declaration on accepting persons, whom the International Criminal Court sentenced, for the enforcement of the sentence, as prescribed by Article 103 of the Statute (paragraph 3.2 of this Decision).

7.7. Therefore, the obligations prescribed by Article 105 of the Constitution may not be considered as "*obligations prescribed*" within an international treaty in the sense of Article 168(3) of the Constitution, since these obligations will not arise for the Republic of Armenia upon the ratification of the Statute, but only by force of an international treaty to be concluded in accordance with the described procedure, which are not the subject matter of this application.

8. With regard to the obligations prescribed by the declaration on retroactive recognition of the jurisdiction of the International Criminal Court based on Article 12-3 of the Statute, the Constitutional Court states that the mentioned declaration does not contain any obligations

different from those prescribed by the Statute. The legal content of that declaration proposed to the National Assembly refers exclusively to the recognition of the jurisdiction of the International Criminal Court starting from the moment specified in the same declaration as a result of the recognition of the jurisdiction of the International Criminal Court with respect to the crime of genocide, crimes against humanity, and war crimes, as prescribed by Articles 6-8 of the Statute, starting from 00:00 on 10 May 2021.

Therefore, reiterating the assessment of the constitutionality of the obligations prescribed by the Statute presented in paragraphs 5-6 of this Decision, the Constitutional Court considers that the obligations prescribed by the declaration on the retroactive recognition of the jurisdiction of the International Criminal Court based on Article 12-3 of the Statute comply with the Constitution.

Based on the results of the examination of the case and subject to Article 168(3), Article 169 § 3, and Article 170 §§ 1 and 4 of the Constitution, as well as guided by Articles 63 and 64, Articles 74 §§ 1-5, and § 6(1) of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. The obligations prescribed by the Rome Statute of the International Criminal Court signed on 17 July 1998, and by the declaration on retroactive recognition of the jurisdiction of the International Criminal Court based on Article 12-3 of the Rome Statute of the International Criminal Court comply with the Constitution.

2. Pursuant to Article 170 § 2 of the Constitution, this Decision shall be final and shall enter into force upon its promulgation.

PRESIDENT

A. DILANYAN

24 March 2023

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