

## **The Debate on Constitutional Compatibility with the ICC**

By Helen Duffy and Brigitte Suhr

*June 2000*

In the nearly two years since the adoption of the Rome Statute, the movement towards global ratification has gained considerable momentum. At the time of writing, ninety-seven states have signed the treaty, eleven have completed ratification and many more are in the process of doing so. In many countries, this ratification process has generated considerable debate on the compatibility of the ICC Statute with domestic constitutions.

While different constitutions give rise to different questions, three issues have arisen with particular regularity. As explained in more detail below, these relate to the compatibility of the ICC Statute with prohibitions on the extradition of nationals, provisions on immunities, and prohibitions on life imprisonment. In many countries, after close analysis of the ICC Statute together with the relevant constitutional provisions, initial concerns have given way to the view that the statute and the constitution can in fact be read harmoniously. This approach, which might be termed the 'interpretative approach', and the ideas and arguments circulating in distinct parts of the world in support of it, are the focus of this paper.

Before considering this interpretative approach, it should be acknowledged that it is not the only approach that has been adopted to date. A small number of states have decided instead to amend their constitutions. France, for example, has completed its constitutional amendment procedure, such that Article 53.2 reads: "[t]he Republic may recognize the jurisdiction of the ICC within the agreed upon conditions contained in the treaty approved July 18, 1998." Brazil is currently debating an amendment which would have a similar effect. Importantly, Belgium has decided to take the amendment route, but to do so only after ratification, thus taking a critical step to ensuring that amendment will not affect the ability to ratify without delay.

### Extradition

Some constitutions prohibit the extradition of nationals. Given that the ICC will not prosecute in absentia, the Court must gain physical control over the suspect for the trial to take place, and states are correspondingly obliged to cooperate with the Court in the arrest or surrender of persons, be they nationals or not.

The apparent tension between the constitutional prohibition and the ICC obligation dissipates when one recognizes the difference between surrender to an international criminal court and extradition. The Statute distinguishes the two, defining "surrender" as "the delivering up of a person by a State to the Court" and extradition as "the delivering up of a person by one State to another." This is not merely a difference in terminology. The ICC is the negotiated product of states, and states will become part of the Assembly of States Parties upon ratification. Moreover, the ICC is an institution which must, as set out in its statute, meet the highest standards of fairness and due process. Surrender to the ICC is therefore quite different from extradition to another sovereign state, in whose

creation the sending state has no investment, and over whose standards it has had no control. Thus, concerns which underlie the constitutional prohibition on the extradition of nationals do not apply to surrender of a national to the ICC.

In some cases, the constitutional prohibition may be cast more broadly than prohibiting 'extradition,' such as in the Costa Rican constitution, which states that "no Costa Rican may be compelled to leave national territory." However, other provisions of the statute have been invoked to dispel any perception of potential conflict, including with constitutional prohibitions framed in this way. The principle of complementarity in Article 17, which provides that the ICC will be able to act only when the national justice system has not investigated or prosecuted, has been considered of central importance. A state can itself investigate a crime committed by one of its nationals, and therefore avoid being called upon to surrender him or her to the Court.

In this respect it has also been noted that many states have already recognized the duty to prosecute or extradite for many of the crimes under the Rome Statute, namely torture, grave breaches of the Geneva Conventions and genocide, by virtue of their ratification of the relevant international treaties. Therefore, compatibility issues which arise with ICC ratification should not be new. If a national commits these crimes, the state would be obliged by virtue of other treaties to prosecute on the domestic level.

## 2) Immunities

Many national constitutions grant certain state actors a degree of immunity from prosecution. The scope and extent of such immunities vary greatly, with some constitutions strictly limiting immunity to certain acts, such as utterances in parliament, and others framing the immunity more broadly, granting immunity from any penal process.

Article 27 of the ICC Statute, on the other hand, establishes that the Statute "shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute." It goes on to state that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

It has been suggested that such immunities only apply to domestic proceedings, and not to those before the ICC, an international court which was certainly not contemplated at the time the constitutional provisions were drafted. It has been suggested further that regard should be had to the underlying objective of any such immunities, which was not to guarantee impunity for genocide, crimes against humanity and war crimes. Rather, immunity provisions were often intended to protect the beneficiary of the immunity from undue interference in the exercise of his or her functions, even if the immunities were not expressly limited in this way. As the possibility of politically motivated interference is

addressed by the multiple checks and balances provided in the ICC Statute, there is no need for immunity to address this concern.

The commission of the egregious crimes within the Court's purview would constitute a profound rupturing of the very constitutional framework which provides for the immunity. As such, it has been suggested that the immunity provisions should not be rigidly interpreted to provide impunity in respect of those crimes, as this could not have been the intention when the constitution was drafted. This is particularly so when such an interpretation would be inconsistent with the international obligations of the state.

To build on this point, it is often highlighted that these compatibility issues should already have been resolved if the state has recognized the duty to prosecute or extradite, regardless of the official status of the accused, through ratification of other international treaties that establish this duty.

Finally, in certain contexts, constitutional immunities are subject to waiver by the parliament or other entity. Thus the immunity can be lifted, either in a particular case or, as some have suggested, on a permanent basis, through the parliamentary vote on ratification. It has been suggested that this removes any inherent tension between the obligations and the immunity.

### 3) Life imprisonment/"perpetual imprisonment"

The third issue relates to the constitutional prohibition on life imprisonment, which arises primarily in Latin America. Some constitutions prohibit life imprisonment outright, such as the Salvadoran Constitution, which provides in Article 27 that "[p]erpetual penalties are prohibited." Others provide that punishment involving restriction of liberty may not exceed a maximum number of years. The Statute on the other hand allows for the imposition of life imprisonment, "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."

Life imprisonment by the ICC will therefore not be the norm, but the exception reserved for the most egregious of the serious cases that will come before the ICC.

Moreover, it has been noted that a mechanism in the statute ensures that no one will be subject to imprisonment for 'life,' without the possibility of liberation. A mandatory review process under Article 110 obliges the Court to "review the sentence to determine whether it should be reduced" once a person has served 25 years. If the Court decides not to reduce the sentence, further hearings will take place, as established by the draft rules of procedure, at which the Court will consider evidence as to the behavior, rehabilitation and other circumstances of the convicted person.

It is critical to recall that the Statute makes clear in Article 80 that it does not in any way affect the penalties provided for, or prohibited, on the national level. Moreover, in no circumstances will a state be obliged to enforce a 'life sentence' handed down by the Court; a state party can attach conditions to any agreement to enforce sentences on its

territory. Potential difficulties can only therefore arise when the state has custody of a suspect and receives a request from the Court to surrender that suspect. However, as set out above, if the state investigates or prosecutes the egregious crimes itself (irrespective of the fact that it will not impose a life sentence), the ICC will defer to the state's prosecution, in accordance with the complementarity regime in the statute. The issue is thus avoided.

## Conclusion

The ICC will play a decisive role in the enforcement of human rights, the deterrence of future crimes and the strengthening of the very principles upon which many, if not all, constitutions of the world are based. It is therefore unsurprising that, as indicated by the debate in different corners of the world, which this article seeks merely to highlight, 'constitutional issues' have not proven to be 'constitutional obstacles.' Rather, there is reason to hope that the rich discussion on these issues around the world has deepened understanding of the complementary nature of this unique institution, and will translate into many more ratifications in the very near future.

This article was written for publication in the Coalition for an International Criminal Court's publication, *The Monitor*, by Helen Duffy and Brigitte Suhr. Both are serve as counsel to the International Justice Program, Human Rights Watch.