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Questions Raised by the Technical Services of the Legislative Assembly of Costa Rica Regarding the Rome Statute of the International Criminal Court

120 states voted in favor of the Rome Statute on July 17, 1998 at the diplomatic conference in Rome and that, as of August 5, 2000, 98 states have signed and 14 states have ratified the Rome Statute. (see Annex 1)

The Rome Statute is the result of complex negotiations by more than 150 countries in the world and embodies a delicate balance of the world's divergent legal systems. At one point in the negotiations, it became clear that if each country insisted that the Rome Statute exactly reflect the standards of its own domestic system, it would be impossible to gain the necessary consensus to push the Statute to completion. Therefore, the world's nations were willing to make compromises such that the Statute embody the highest legal standards while not replicating the particular features of each nation's national legal system. This remarkable effort was made in recognition of the greater goal to be achieved by the creation of the International Criminal Court—an independent, fair and impartial court worthy of the support of the international community.

1. As a general matter, does Article 4 of the Statute violate the sovereignty of its State Parties?

Response:

· Article 4 of the Statute states that "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State." As the authors of the "Technical Report" recognize, any State may consent to restrictions on its sovereignty by becoming party to international treaties in accordance with the terms of its Constitution and/or domestic laws. Consensual limitations on sovereignty are the prerogative of the State in its contraction of international obligations.

2. With regard to the sovereignty concern, could the Court authorize in situ investigations without the permission of the State Party?

Response:

· The general rule is that where the Court wishes to conduct an in situ investigation, it is to first make a request for cooperation to the relevant State Party (art. 87). All States Parties, in turn, are obliged to fully cooperate with the Court in matters of investigation and prosecution. (art. 86)

· If a State Party "fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute" the Court does not simply proceed with an investigation in situ. Instead, there is a particular procedure for resolving the dispute: the Court may make a finding of non-cooperation and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. (art. 87(7))

· In extremely rare circumstances, the Statute allows for in situ investigations without having secured the cooperation of the State. According to article 57(3)(d), in order for the Pre-Trial Chamber to authorize such an investigation, it must have determined beforehand that "the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9." Such an investigation would take place only in the most exceptional circumstances, and not as a matter of course.

· In addition, the Prosecutor may take certain "non-compulsory measures" such as interviewing a voluntary witness without the presence of state authorities where that is essential. (art. 99(4)) The Prosecutor must first, however, make "all possible consultations" with the requested State Party.

3. Would foreign authorities engaging in in situ investigations be armed or have the power to detain suspects?

Response:

· There is nothing in the Statute that would suggest that such authorities would be armed. It should be remembered that the Court's authorities will work in cooperation with the state authorities. The state authorities may or may not be armed depending on security needs and national law.

· The Prosecutor and the Court have the power to request that the State produce individuals to be questioned, or that it arrest or surrender individuals who are suspects. (arts. 93, 91) State authorities, not Court authorities, would perform these functions except in the extraordinary situation where the State is in complete disarray - the Article 57(3) condition of the "unavailability of any authority or any component of its judicial system" - a very high standard.

4. Are the crimes in Article 5 (and by reference Articles 6, 7, 8) of the Statute defined precisely enough to satisfy the principle of legality?

Response:

· The crimes under the jurisdiction of the Court are largely drawn from existing international law.

· The definition of genocide (Article 6) under the Statute mirrors exactly the definition in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and therefore notwithstanding any differences between the Statute and domestic law, the definition in the Statute should be seen as adequate.

· Crimes against humanity (Article 7): The precedents on which the definitions of crimes against humanity are based include the Nuremberg and Tokyo Charters, Allied Control Council Law No. 10, and the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), among others. Although these definitions have been applied without due process concerns by the ICTY, ICTR, and national criminal courts, some delegates to the negotiations of the Rome Statute wished to bring greater specificity and precision to the definitions in the Rome Statute. All delegates were convinced of the need to draft concise and precise definitions while adequately reflecting developments in international law in this area. Adoption of Article 7 by consensus is evidence that these concerns were fully met in the final text. Furthermore, as a result of a suggestion by the United States, a supplementary document, Elements of Crimes, was drafted by the Preparatory Commission and was approved on June 30, 2000 by consensus. This document is non-binding on the Court but does provide guidance to the Court in the interpretation and application of Articles 6, 7, and 8. Costa Rica has been actively participating in those negotiations.

5. Article 8: War crimes. Is the conduct described in this article vague and repetitive? Is the list of crimes intended to be exhaustive, and if not, would that violate the principle of legality?

Response:

· The crimes contained in the Statute are derived almost verbatim from the four Geneva Conventions of 1949. The apparent repetitiveness is explained by the overlap and similarity of crimes that fall into four distinct categories: for international armed conflicts, "grave breaches," and other serious war crimes, and for non-international armed conflicts, "serious violations of article 3 common to the four Geneva Conventions" and other serious war crimes.

· The language of Article 8(1) to the effect that the Court shall have jurisdiction of war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" was questioned as vague. This language does not define some "catch-all" crime or even require this as an element of all war crimes, but rather makes clear the objective to prioritize the most serious crimes for ICC prosecution.

· The Statute gives the Court jurisdiction over an exhaustive list of war crimes, with separate lists for international and non-international conflicts. The exhaustive nature of the list is made clear under (b) and (e) by the use of the word "namely, any of the following acts." It does not contain a generic formulation giving the Court the possibility of exercising jurisdiction over

other crimes that may emerge as crimes under customary law in the future. Furthermore, Article 22(2) states that "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." For the Court to have jurisdiction over crimes beyond those set out in the statute, there would have to be an amendment to the statute which, as noted in the amendment section below, would be difficult to achieve and in any case would apply only to states that accept the amendment. (Article 121)

6. How would Article 17 and the provisions on complementarity work?

Response:

· One of the most important aspects of the statute is what is called its "complementarity" provision. "Complementarity" refers to the relationship between the ICC and national legal systems and makes clear the ICC will not replace national courts in the prosecution of the crimes under ICC jurisdiction. The principle of complementarity gives assurance to governments, legislatures and members of the judiciary that the ICC will not block, interfere or otherwise undermine national courts. Rather, the ICC will have jurisdiction to take cases only where the national courts are "unable" or "unwilling" to do so, as enshrined in article 17 of the statute.

· A definition of what constitutes inability and unwillingness is provided in the statute. In order to determine whether a state was unwilling to prosecute in a particular case, the Court will have to consider whether: a) the national proceedings were undertaken or the national decisions were made for the purpose of shielding the accused from criminal responsibility, b) there has been an unjustified delay which is inconsistent with an intent to bring the person to justice or c) the proceedings were not conducted independently or in a manner consistent with an intent to bring the person to justice. (art. 17(2))

· On the second prong of complementarity, for a court to determine that the national courts are unable to prosecute, "the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." (art. 17(3))

· Therefore, if the state refuses to act, the ICC will be able to step in. It is important to note that the standard under this principle of complementarity is quite high. The ICC will not act as an appellate court to the national system nor will it have the power to step in if it would have acted differently from the national prosecutor or judge. If challenged, the ICC prosecutor must prove there was intent to shield the individual from justice on the part of the state.

7. Are the penalties under Article 77 of the Statute consistent with the principle of legality?

Response:

· While careful consideration was given to the view that the Statute or its Rules should set out more detailed sentencing guidelines, as is often done in domestic penal systems, it was determined that the Statute had to preserve a measure of flexibility; this latitude should not violate the principle of legality in view of the fact that all crimes under the Court's jurisdiction are exceptionally serious crimes under international law. The guidelines provided in Article 77, together with Article 23 which recognizes the principle nulla poena sine lege, limit the discretionary powers of the Court, which can impose only those penalties set forth in the Statute. The Court will have further guidance by considering the aggravating and mitigating circumstances of the individual crime as foreseen in the Rules of Procedure and Evidence. It is likely that the Court will adopt public sentencing guidelines, based in part on the Rules of Procedure and Evidence concerning aggravating and mitigating circumstances.

8. Immunities- See attached document on constitutional questions

9. Is Article 28 on command responsibility consistent with Article 30 regarding the mental element?

Response:

· Article 28 is consistent with Article 30. Article 30 states that "unless otherwise provided, a person shall be criminally responsible and liable for the punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." Article 28, with its provision on the responsibility of commanders and other superiors, makes use of the "unless otherwise provided" language in Article 30 to set out a different standard for criminal responsibility that the default standard contained in Article 30.

10. Does Article 53 give too much discretion to the Prosecutor in determining whether to open an investigation? If the Prosecutor fails to open an investigation, what recourse is available to the victims?

Response:

· First, as is required for the impartial and credible administration of justice, Article 42 establishes that the Office of the Prosecutor shall be independent. Nonetheless, the Statute contains safeguards against prosecutorial overreach and manages to strike a very positive balance between adequate prosecutorial powers and judicial review.

· The prosecutor may, according to Article 15 and Article 53, make determinations as to whether there is a "reasonable basis" to proceed with an investigation. Under Article 15, the Prosecutor can investigate allegations of crimes on the basis of information from victims, non-governmental organizations or any other reliable source. If the Prosecutor decides that the case should not proceed, he or she must go back and inform the source of the original information. The victims or anyone else may make new facts or information available to the Prosecutor and the Prosecutor may then reconsider the decision whether to open an investigation (art. 15 (6)).

· If the Prosecutor decides that there is a reasonable basis to proceed with an investigation, s/he will request authorization to proceed with such investigation from the Pre? Trial Chamber. Victims have a right to make representations to the Pre-Trial Chamber at the stage of this preliminary review, in accordance with the Rules of Procedure and Evidence drawn up by the Preparatory Commission.

· According to Article 53(2), 'if, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution" the Prosecutor must inform the Pre-Trial Chamber and the referring states or the Security Council. Under Article 53 (3) the referring State or the Security Council may request the Pre-Trial Chamber to review the decision of the Prosecutor and request him/her to reconsider the decision not to proceed. The Pre-Trial Chamber may additionally review the Prosecutor's decision on its own initiative if the Prosecutor claims there are "substantial reasons to believe an investigator would not serve the interests of justice." (art 53. (30 (b))

11. Life imprisonment: see attached document

12. Extradition: see attached document

13. Does Article 55 (2) (c) adequately guarantee the right to defense, particularly in light of its language that the accused has a right "to have legal assistance of the person's choosing, or, (…) to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it."

Response:

· The language in the Statute is consistent with Article 14 (3) (d) of the International Covenant on Civil and Political Rights which states that persons charged with a criminal offense are "to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." It is also consistent with the American Convention on Human Rights article 8(2)(d) and (e). According to Otto Triffterer's Commentary on the Rome Statute of the International Criminal Court "the decision to include the right to assigned counsel in any case 'where the interests of justice so require' (…) was included in the Rome Statute because the delegates wished to be sure that persons suspected of the worst possible crimes, who would in many cases be unpopular clients, would be able to obtain counsel."

Annex 1:

List of Rome Statute Signatories as of September 21, 2000

1.	Albania	18 July 1998
2.	Andorra	18 July 1998
3.	Angola	7 October 1998
4.	Antigua and Barbuda	23 October 1998
5.	Argentina	8 January 1999
6.	Armenia	1 October 1999
7.	Australia	9 December 1998
8.	Austria	7 October 1998
9.	Bangladesh	16 September 1999
10.	Barbados *	8 September 2000
11.	Belgium	10 September 1998
12.	Belize	5 April 2000
13.	Benin	24 September 1999
14.	Bolivia	17 July 1998
15.	Bosnia and Herzegovina	17 July 2000
16.	Botswana *	8 September 2000
17.	Brazil	7 February 2000
18.	Bulgaria	11 February 1999
19.	Burkina Faso	30 November 1998
20.	Burundi	13 January 1999
21.	Cameroon	17 July 1998
22.	Canada	18 December 1998
23.	Central African Republic	7 December 1999
24.	Chad	20 October 1999
25.	Chile	11 September 1998
26.	Colombia	10 December 1998
27.	Congo (Brazzaville)	17 July 1998
28.	Costa Rica	7 October 1998
29.	Cote d'Ivoire	30 November 1998
30.	Croatia	12 October 1998
31.	Cyprus	15 October 1998
32.	Czech Republic	13 April 1999
33.	Democratic Republic of the Congo	8 September 2000
34.	Denmark	25 September 1998
35.	Djibouti	7 October 1998
36.	Dominican Republic *	8 September 2000
37.	Ecuador	7 October 1998
38.	Eritrea	7 October 1998
39.	Estonia	27 December 1999
40.	Fiji	29 November 1999
41.	Finland	7 October 1998
42.	France	18 July 1998
43.	Gabon	22 December 1998
44.	Gambia	7 December 1998

45.	Germany	10 December 1998
46.	Georgia	18 July 1998
47.	Ghana	18 July 1998
48.	Greece	18 July 1998
49.	Guinea	8 September 2000
50.	Guinea-Bissau	12 September 2000
51.	Haiti	26 February 1999
52.	Honduras	7 October 1998
53.	Hungary	15 December 1998
54.	Iceland	26 August 1998
55.	Ireland	7 October 1998
56.	Italy	18 July 1998
57.	Jamaica *	8 September 2000
58.	Jordan	7 October 1998
59.	Kenya	11 August 1999
60.	Kuwait *	8 September 2000
61.	Kyrgyzstan	8 December 1998
62.	Latvia	22 April 1999
63.	Lesotho *	30 November 1998
64.	Liberia	17 July 1998
65.	Liechtenstein	18 July 1998
66.	Lithuania	10 December 1998
67.	Luxembourg	13 October 1998
68.	Macedonia, Former Yugoslav Rep.	7 October 1998
69.	Madagascar	18 July 1998
70.	Malawi	3 March 1999
71.	Mali	17 July 1998
72.	Malta	17 July 1998
73.	Marshall Islands *	6 September 2000
74.	Mauritius	11 November 1998
75.	Mexico	7 September 2000
76.	Monaco	18 July 1998
77.	Morocco *	8 September 2000
78.	Namibia	27 October 1998
79.	Netherlands	18 July 1998
80.	New Zealand	7 October 1998
81.	Niger	17 July 1998
82.	Nigeria	1 June 2000
83.	Norway	28 August 1998
84.	Panama	18 July 1998
85.	Paraguay	7 October 1998
86.	Portugal	7 October 1998
87.	Poland	9 April 1999
88.	Republic of Korea	8 March 2000
89.	Republic of Moldova	8 September 2000
90.	Romania	7 July 1999

91.	Russian Federation *	13 September 2000
92.	Samoa	17 July 1998
93.	San Marino	18 July 1998
94.	Senegal	18 July 1998
95.	Sierra Leone	17 October 1998
96.	Slovakia	23 December 1998
97.	Slovenia	7 October 1998
98.	Solomon Islands	3 December 1998
99.	South Africa	17 July 1998
100.	Spain	18 July 1998
101.	St. Lucia	27 August 1999
102.	Sudan	8 September 2000
103.	Sweden	7 October 1998
104.	Switzerland	18 July 1998
105.	Tajikistan	30 November 1998
106.	Trinidad and Tobago	23 March 1999
107.	Uganda	17 March 1999
108.	Ukraine	20 January 2000
109.	United Kingdom	30 November 1998
110.	Venezuela	14 October 1998
111.	Zambia	17 July 1998
112.	Zimbabwe	17 July 1998

* Signatures that took place during the Millennium Summit

List of Ratifications as of September 21, 2000

1.	Senegal	2 February 1999
2.	Trinidad and Tobago	6 April 1999
3.	San Marino	13 May 1999
4.	Italy	26 July 1999
5.	Fiji	29 November 1999
6.	Ghana	20 December 1999
7.	Norway	16 February 2000
8.	Belize	5 April 2000
9.	Tajikistan	5 May 2000
10.	Iceland	25 May 2000
11.	Venezuela	7 June 2000
12.	France	9 June 2000
13.	Belgium	28 June 2000
14.	Canada	7 July 2000
15.	Mali	16 August 2000
16.	Lesotho	6 September 2000
17.	New Zealand	7 September 2000
18.	Botswana	8 September 2000
19.	Luxembourg	8 September 2000
20.	Sierra Leone	15 September 2000

The Compatibility of the ICC Statute with Certain Constitutional Provisions around the Globe

This paper focuses on the compatibility of the ICC statute with particular constitutional provisions. While constitutions and the issues they give rise to vary, the questions identified in this paper are among the most common and the most complex, which have given rise to considerable debate in recent months in capitals around the world.

The first question relates to the compatibility of the obligation to surrender to the ICC with a constitutional prohibition on the extradition of a state's own nationals, which is being considered in several parts of the world, including Brazil, parts of Central Europe, Finland and Germany. A second issue is how to marry constitutional immunities with the duties to arrest and surrender under the statute. This again is under discussion in several states in Western, Central and Eastern Europe and across parts of Latin America. Thirdly, there is the question of the compatibility of the constitutional prohibition on life imprisonment with the statutory provisions on penalties, which is currently subject to intense debate in several Latin American capitals, as in Portugal and Spain.

In a number of countries the ICC statute currently lies before parliament or other body, awaiting determination of these issues. The coming months therefore represent an important window of opportunity for the Court's supporters to assist those governments, parliamentarians and other interested people who are committed to finding a solution consistent with early ratification. Regional coordination initiatives are one crucial tool. But in addition, states which have themselves grappled with these constitutional questions are well placed to reach out and work in partnership with others, as they seek the most constructive solutions for their country.

In particular, those states that have come to the view that the constitutional provisions and the statute are consistent and amendment unnecessary, could allow others to benefit from the development of thought underlying that view. For states that have decided to amend, also, outreach may ensure that those decisions are not misinterpreted. It should be recalled that the first decisions that states take on these issues, and the way they are perceived by the outside world, could have a powerful impact, for better or worse.

The focus of this paper will be a brief exploration of arguments as to how constitutional provisions might be interpreted consistently with the ICC statute. While it is recognized that it may not always be possible to rely on such an interpretative route, in certain countries the procedural burdens and political realities are such that a requirement of constitutional amendment may lead to excessive delays and seriously hamper the ratification effort. If this can be avoided by creative interpretation of the constitutional provisions consistently with the treaty, this deserves the serious attention of the ICC's proponents.

The following are some of the preliminary ideas and arguments that are circulating as to how the constitutional provisions identified above, which were generally drawn up before an ICC was contemplated, can be read harmoniously with the statute. While research and discussion in this

field remains at a very preliminary stage, it is hoped that the ideas that have emerged to date might provoke creative thinking and constructive debate on these questions.

1 EXTRADITION OF NATIONALS

The first question that arises is whether the well known prohibition in many constitutions on the extradition of a state's own nationals to a foreign jurisdiction is consistent with the obligations of state parties to surrender suspects to the ICC. This prohibition spans the globe, appearing in constitutions of Western European, Central and Eastern European and Latin American states.

Extradition vs. Surrender

The most popular and perhaps most convincing way of approaching this provision consistent with statute involves an understanding of the qualitatively different nature of 'surrender' and 'extradition'. Art 102 of the statute distinguishes between surrender, which is "the delivering up of a person by a State to the Court", and extradition, which is "the delivering up of a person by one state to another…." While some have questioned the significance of 'terminology', the distinction reflects the important underlying principle that transfer to another equal sovereign state is fundamentally different from transfer to the ICC, an international body established under international law, with the involvement and consent of the state concerned.

Distinguishing extradition from surrender or transfer, has become well established through the practice of the ad hoc tribunals. 'Extradition' does not appear in the Security Council Resolutions, or in the statutes or Rules of the tribunals. Rather, indictees are 'transferred' or 'surrendered', and in its reports the Tribunals have called on states not to apply to their requests, by analogy, existing legislation or bilateral conventions governing extradition.

A Foreign Court?

Some observers have gone so far as to suggest that the ICC can properly be considered an extension of domestic jurisdiction. Whether or not so conceptualized, many feel that the ICC is not in fact a 'foreign court' or 'foreign jurisdiction' as anticipated in the various constitutional prohibitions. When the constitutions prohibited extradition to foreign jurisdictions they clearly contemplated national not international jurisdiction. An international court which states set up, in accordance with international law, and in which they will fully participate as state parties, from financing it to the appointment and removal of judges, for example, is not comparable to any foreign national court. Just as normal extradition procedures and the concerns that such proceedings seek to protect--being to ensure the fairness of the proceeding and the legitimacy of the charges- do not apply to surrender to the ICC, nor should this prohibition on the extradition of a state's own nationals.

The Nature of the Crimes and International Law

The third set of issues which should be explored in assessing whether there is any potential constitutional conflict is based on the nature of crimes within the ICC's jurisdiction. These are crimes which the preamble refers to as 'the most serious crimes of concern to the international community as a whole.' The duty of states to investigate and prosecute certain serious

international crimes should also be borne in mind. Specific international instruments such as the Convention against Torture, the Genocide Convention, the Geneva Conventions enshrine this duty explicitly. This is reflected in the preamble to the Statute itself which provides that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'.

Constitutional provisions should be interpreted consistently with international law obligations. It may be that, where there is a clear conflict between constitutional and international law, national law determines the hierarchy between the two. But the constitutional provisions in question, rather than explicitly conflicting with the requirements of international criminal jurisdiction - which was not even anticipated at the time of their creation - are silent on the matter. Where they permit of differing possible interpretations, with one consistent with international law and the other not, there is a strong argument in favor of construing the constitution and international law consistently. (This argument is not of exclusive relevance to the interpretation of the extradition provisions and applies to all the potential issues, perhaps most pertinently to the immunities issue discussed below)

Impunity and Complementarity

Reference has also been made to the fact that the objective of the prohibition on the extradition of nationals was not to guarantee impunity for these egregious crimes. For this reason, it is interesting to note that many of the systems that have such a prohibition also have legislation that enables them to exercise jurisdiction over their nationals for crimes committed anywhere in the world. And where they do so, in accordance with the complementarity provisions of the statute, the Court will not have jurisdiction and no obligation to surrender to the Court arises.

Complementarity is therefore the fourth frequently invoked argument as to why there is no real constitutional conflict. The ICC will only prosecute where no state is willing or able to do so. If a state party with a prohibition on the extradition of nationals does not want to transfer the individual to the ICC, it simply has to carry out a genuine investigation on the national level and the issue is avoided.

2 IMMUNITIES

Many constitutions provide some sort of immunity from criminal process for a head of state, president, government officials and/or parliamentarians. As is well known, the question that has arisen relates to the compatibility of such immunities with Article 27 of the statute, entitled 'irrelevance of official capacity' and the obligation to arrest and transfer suspects to the Court. Immunities are not homogenous; they vary between states and as between the different types of privilege they afford. In some cases the scope of conduct covered by the immunity is limited on the face of the provision. In others it is absolute on its face, apparently guaranteeing the inviolability of the person.

The Nature of the Crimes and International Law

The arguments in favor of construction in accordance with a state's international obligations are particularly pertinent here. States are prohibited from guaranteeing immunity for certain types of crimes under international law. For example, the Genocide Convention explicitly states that the provision for persons committing genocide to be punished applies "whether they are constitutionally appointed leaders, public officials or private individuals". Moreover, as set out above, states have duties under international law to investigate and prosecute certain serious crimes, without regard to the status of the person committing the crimes; providing immunity for these crimes is clearly at odds with that duty.

Purposive Limitation

A second and related argument that arises is whether such immunities are, in any event, limited as to their purpose. In other words, the argument is that the constitutional immunities should be understood as either explicitly or implicitly limited to the exercise of the functions associated with the office to which they attach. Some constitutions specifically provide, for example, for the immunity of parliamentarians >for utterances in parliament...= Others expressly exclude conduct 'manifestly not connected the political activity of the member in question,' or which is of a particularly grave nature.

But whether or not explicitly so limited, it has been suggested by some that regard should be had to the objective of the provision, which would seem to be to enable the beneficiary of the immunity to carry out his or her functions unhindered. It was not to facilitate or to guarantee impunity for genocide, crimes against humanity or war crimes. With a purposive approach, it can easily be argued that such crimes, not constituting the official functions of any parliamentarian, government official or head of state, fall outside the scope of the immunity. This of course echoes some of the rationale of the Pinochet case: that, as the immunity for a former head of state under the applicable national law only extended to the exercise of official functions, and torture was not a sovereign function, there was no entitlement to immunity in respect of it.

Preventing Political Interference

In this respect it has been noted that a key constitutional objectives in granting immunity was to prevent frivolous or politically motivated interference with the governance of a country. While some would argue that these concerns are valid on the national level, it has been pointed out that they are not valid in relation to the ICC statute, with its complex review and admissibility procedure which provides multiple safeguards against unwarranted interference.

Waiver of Immunities

Another issue which has been discussed relates to the waiver of immunities. Certain states provide, for example, for parliament to waive the immunity and consent to prosecution. Some have suggested that, if immunities can be waived, this has an impact on the question of compatibility of the constitution and ICC statute. Needless to say, if the foregoing arguments as to the inapplicability of immunities to these crimes are accepted, then the question of waiver

need not arise. However, some have argued that where such a faculty to waive exists, there is no inherent contradiction between the immunity and the statute. Upon an ICC request for surrender of the person, parliament would have to waive the immunity. Parliament would be expected to exercise its powers consistent with the international obligations of the state (although if it refused to do so, it could ultimately result in non-compliance and a breach of the state's obligations). A second and perhaps more extreme suggestion is that it may be possible to get a waiver by parliament in respect of ICC proceedings on a one-off basis, thereby averting concerns as to the internal difficulties that could arise in the event of consent being withheld in any particular case.

3 LIFE IMPRISONMENT

In several countries, particularly in parts of Europe and Latin America, the constitutional provisions on penalties have raised questions as to the compatibility of the prohibition on life imprisonment with the penalties provisions of the ICC statute. Some constitutions contain an express prohibition on 'life' or 'perpetual' imprisonment, while others specify maximum periods of imprisonment. In certain contexts this is presented as a matter of constitutional right, with the underlying principle being the right of the convicted person to rehabilitate him or herself. This is a difficult issue on which debate and thinking is perhaps less developed than in relation to the other two issues identified. Some preliminary ideas that have been discussed in various contexts are set out below.

Life Imprisonment in the State in Question

Firstly, it is recalled that, as provided for in Article 80, the penalties provisions of the statute will not affect the inclusion or prohibition of particular penalties in national law. State party cooperation with the Court would therefore never involve the obligation to enforce a judgment of life imprisonment. To safeguard this, Article 103 of the statute specifically provides for a state to attach conditions to its acceptance of sentenced persons for enforcement purposes. This ensures that states with such a prohibition will never be required to execute a sentence of life imprisonment on its territory.

Non applicability to an International Court

Nevertheless, it has been pointed out that this guarantee does not circumvent the more difficult situation where a state is asked to transfer a suspect to the Court, with the possibility that a sentence of life imprisonment will be imposed. In this respect, however, it has been argued in certain contexts that the prohibitions that apply in the domestic context and, by association, to extradition to foreign courts are inapplicable to an international court. The objective of the constitutional provisions was to enshrine certain protections in the domestic context, and to ensure that where someone was extradited to a foreign court, those courts would meet similar standards. With an international court exercising international jurisdiction over crimes which are international in nature, those national standards are no longer the relevant criterion.
Certain commentators have referred to the human rights objective of these constitutional provisions. In the ICC context, the internationally recognized human rights of the accused are absolutely guaranteed.

Mandatory Review

An alternative approach which has been discussed in various contexts focuses on the relevance of the review mechanism in Art 110 of statute. This provides for mandatory review when the person has served two thirds or 25 years of his or her sentence. It has been suggested, therefore, that the imprisonment imposed by the Court will not in fact be for 'life' or indefinite, despite the reference to life imprisonment in Article 77. The list of factors to be taken into account by the Court in deciding whether to release, as set out in the statute, is non exhaustive and is likely to be elaborated upon in the Rules of Procedure and Evidence.

Rules of Procedure and Evidence

In addition, some have noted that the Rules of Procedure currently being negotiated at the ICC Preparatory Commission may be relevant in this regard. Proposals have been submitted in relation to Article 77 and Article 110, concerning the factors that the Court will take into account in determining the sentence and in exercising its review functions. Some hope that negotiations on these issues may result in Rules which clarify the exceptional nature of life imprisonment (consistent with Article 77 of the statute) and the fact that the Court will have regard at appropriate stages to various factors including the rehabilitation of the convicted person, which is the principle that the constitutions in question seek to protect.

International Standards and the Principle of Rehabilitation

It has also been pointed out that under the statute the Court will apply international treaty law, and in applying the statute and other sources of law, it will do so consistently with internationally recognized human rights law (Article 21(1) and (3)). As such, the Court will therefore have regard, for example, to the International Covenant on Civil and Political Rights which provides, at Article 10(3), that the essential objective of a penitentiary system should be rehabilitation. It has been suggested therefore that in the review process and the application of the non exhaustive list of factors identified in Art 110(4), the Court would consider the underlying principle of rehabilitation.

4 CONSTITUTIONAL REFORM AND RATIFICATION

The foregoing focuses on ways to read the ICC statute harmoniously with the constitutional provisions in question. However, if this is not possible, and the view is taken that the tensions cannot be resolved through interpretation, then amendment must be made. The importance of the ICC --its enormous potential to limit impunity and deter atrocities -- is such that, whatever the political or procedural difficulties that may exist, they are not an excuse for failure to ratify. If amendments are to be made, the challenge would then become how this can most effectively be done, and whether the experience of other states, such as France which has already completed its constitutional amendment, might present a valuable model that can be tailored for use by others. Another question that would arise is when it must be done. In this respect, some interesting experience has emerged in recent months. A number of states have long taken the view that implementing legislation can be enacted after ratification. Recently, in respect of constitutional

reform also, it has been suggested that ratification can come first, with amendment as soon as the national procedure allows. Provided amend takes place before the Court becomes operational, any potential conflict is avoided. This experience will be particularly important in those states where national procedures are lengthy and likely otherwise to lead to excessive delays in ratification.