

## **Non-Paper**

### **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.

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.

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.