Articles

NATIONAL CONSTITUTIONAL COMPATIBILITY AND THE INTERNATIONAL CRIMINAL COURT

HELEN DUFFY*

I. INTRODUCTION

The early stages of negotiations towards the establishment of a permanent International Criminal Court (ICC or "the Court") were characterized by the struggle between diverse legal systems for representation and accommodation in the Statute of the Court. It was in this context that questions first surfaced, albeit tentatively, as to the potential incompatibility of various draft statutory provisions with national constitutions. During the final Rome Diplomatic Conference, a number of states sought a statute that would specifically accommodate their own particular domestic constitutions. The impossibility of creating a statute that could do this expressly, while garnering the support of the majority of states, soon became apparent. The vying of delegations subsided in recognition of the *sui generis* nature of the international justice system being created—a system that carries the imprimatur of many legal systems and closely resembles none. Settling for assurances short of the express exclusion of potential constitutional issues, the overwhelming majority of states participating in the Rome Conference voted in favor of the Treaty establishing the International Criminal Court ("the Statute" or "Rome Statute") on July 17, 1998.[1]

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* Legal Director, Interights. At the time of writing, the author was Counsel to Human Rights Watch. The author is grateful to the many contributors that provided information on state practice in their own countries. She acknowledges the valuable review by Indira Rosenthal, assisted by Chimène Keitner, and the helpful contributions provided by Brigitte Suhr and Jonathon Huston.

1. *See* Rome Statute of the International Criminal Court, *adopted and opened for signature* July 17, 1998, by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998) [hereinafter Rome Statute], *reprinted in* 37 I.L.M. 999 (1998).

Since then, the process of ratifying the Statute has gained momentum,[2] and debate has shifted from United Nations negotiating halls to capitals. The ratification process has involved a thorough analysis of the Statute in light of the domestic legal order, which, in many countries, has led to intense debate on the compatibility of the Rome Statute with national constitutions.

II. THE CONSTITUTIONAL ISSUES

While constitutions and the questions they give rise to vary, three issues have emerged recurrently in countries around the globe, most particularly in Europe and Latin America. The first issue is the compatibility of a state's constitutional prohibition on the extradition of its nationals with the absolute obligation on state parties to the Rome Statute to arrest and surrender suspects to the Court. The second relates to the consistency of constitutional immunities, such as those conferred on heads of states or parliamentarians, with the duty imposed on state parties to arrest and surrender suspects, irrespective of their official status. The third issue concerns the compatibility of constitutional prohibitions on life imprisonment with the Statute's provisions on penalties, which allow the ICC to impose a life sentence in exceptional circumstances.

Several factors heighten the significance of the debate on potential constitutional incompatibility. First, the Statute does not permit reservations (Article 120 of the Statute). Therefore, constitutional "difficulties" cannot be circumvented by entering a reservation in relation to the contentious provision.[3]

A second factor is the procedural and political reality of amending a constitution. In some circumstances, the decision to amend a constitution may be uncontroversial and the amendment procedure straightforward. However, this is very rarely the case. More commonly, the procedure is specifically designed to be burdensome and

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2. As of December 31, 2000, the final day on which the Statute was open for signature, 139 states had signed the treaty, and 15 had completed ratification. Many more were in the process of doing so. Updated information on the status of ratification can be obtained from the website of the Coalition for an International Criminal Court [hereinafter CICC] at <http://www.igc.org/icc/>.

3. As recently noted before the Belgian Senate, "[l]a difficulté ne pourrait être tournée par la formulation d'une réserve puisque l'article 120 du Statut interdit cette pratique." *Examen de Projet de Loi portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998", Projet, 2-329/1, presented by the Belgian Government to the Senate of the Kingdom of Belgium*, 2d Sess., Doc. No. 2-329-1 (Feb. 3, 2000) (adopted at a Plenary session of the Belgian Chamber of Representatives, Doc. No. 50 0492/003)(Apr. 27, 2000).

thereby guard against the ready overturning of constitutional guarantees. A detailed comparative analysis of constitutional amendment procedures falls outside the scope of this Article. However, it is sufficient to recall the common requirement of super-majority vote,[4] the additional requirement in some constitutions that the parliament be dissolved and reconvened before the amendment is adopted,[5] and the popular referendum requirement that appears in others.[6] Beyond procedural obstacles, the process may also be fraught with political difficulties, and amendment may be resisted for fear of opening a political Pandora's box.

An important factor on which the implications of any potential inconsistency will depend is, of course, the relationship between international treaty law and the constitution in any particular domestic legal system. Many constitutions provide that certain ratified treaties, particularly those relating to human rights, take precedence over domestic laws.[7] Others afford such treaties constitutional rank[8] or provide, in certain circumstances, for them to have preeminence over certain constitutional provisions.[9] Exceptionally, some national consti-

4. Typical examples include the German constitution, which requires two-thirds majorities in each house of parliament (GRUNDGESETZ [Constitution] [GG] ch. VII, art. 79(2) (F.R.G.)), while the Brazilian constitution requires a three-fifths majority to be satisfied in each of two rounds of voting in each chamber of Congress (REPÚBLICA FEDERATIVA DO BRASIL CONSTITUIÇÃO tit. IV, ch. I, § VIII(II), art. 60(III) (Braz.)).

5. *See* the Belgian constitution (LA CONSTITUTION COORDONNÉE tit. VIII, art. 195 (Belg.)), and the Spanish constitution (CONSTITUCION ESPAÑOLA tit. X, art. 168 (Spain)) (requiring the approval of two consecutive parliaments).

6. The constitution of the Republic of Ireland, for example, calls for a popular referendum on all constitutional amendments. (BUNREACHT NA HÉIREANN [Constitution] art. 46(2) (Ir.)).

7. *See, e.g.*, article 11 of the constitution of Slovakia (ÚSTAVA SLOVENSKEJ REPUBLIKY [Constitution] ch. II, § I, art. 11 (Slovk.)), and article 10 of the constitution of the Czech Republic (ÚSTAVA ČESKÉ REPUBLIKY [Constitution] ch. I, art. 10 (Czech Rep.)).

8. See, for example, the constitution of the Republic of Argentina (CONSTITUCIÓN DE LA NACIÓN ARGENTINA pt. II, tit. I, § I, ch. IV, art. 75(22) (Arg.)), which confers constitutional rank on specific treaties, including, inter alia, the Convention on the Prevention and Punishment of Genocide, the American Convention on Human Rights, and the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. The same provision states that, "[o]ther treaties and conventions on human rights, after being approved by Congress, shall require the vote of two-thirds of the totality of the members of each Chamber in order to enjoy standing on the same level as the Constitution."

9. Belgian law establishes the preeminence of "self-executing" treaties over the internal legal order, including the constitution. This principle is not explicit in the consitution itself (LA CONSTITUTION COORDONÉE) but in jurisprudence, such as Cass., 27 Mai 1971 inz. Belgische Staat t. N.V. Fromagerie Franco-Suisse le Ski, Pas., 1971, I, 886, *JT* 1971, 460 in 1. Dupont, Belinselen van Strafrecht Bockdeel 1, Acco 1994, pg. 31. This article does not address the complex question of which treaties may be considered "self-executing."

tutions go as far as that of Paraguay, which provides that the country "accepts a supranational legal system that would guarantee the enforcement of human rights, peace, justice, and cooperation, as well as political, socioeconomic, and cultural development."[10] Therefore, in many circumstances there may be strong arguments that, upon ratification, there would be no inconsistency between the constitutional order and the Rome Statute, as the Statute would itself form part of that constitution or take precedence over inconsistent parts of it. Whatever the hierarchical relationship between international law and domestic constitutional law, states considering ratification have also wanted to consider whether the letter and spirit of their constitution are consistent with the obligations they would undertake upon ratification.

A. Emerging State Responses to the Three Issues

Broadly speaking, state reactions to these constitutional issues fall into two camps. The first is, to date, a relatively small group of states that have decided to amend their constitutions to ensure that they are in line with the Rome Statute. The second camp is a growing number of states that have concluded that their constitutional provisions are consistent with the Statute, and thus amendment is unnecessary. In these cases, closer analysis of the Rome Statute together with the relevant constitutional provisions has led to an abeyance of initial concerns about compatibility, in favor of the view that the Statute and the constitution can in fact be read harmoniously.

B. Scope of this Article

This Article first sketches out the experience to date of the small group of states that has opted for the "constitutional amendment approach." It then focuses on the many others that have decided amendment is unnecessary, which will be referred to as the "interpretative approach." Reflecting the process in many states, this Article explores arguments as to how the constitutional provisions identified can, or should, be read consistently with the Statute. Many of the considerations set out below emanate from discussions in governments, parliaments, and civil society around the world. In some countries, decisions have been made and can be cited, whereas in others, ideas have not yet crystallized into formal decisions and cannot be attributed for reasons of confidentiality. Little time has elapsed since

10. CONSTITUCION DE LA REPUBLICA DEL PARAGUAY pt. II, tit. I, ch. II, art. 145 (Para.).

the adoption of this landmark treaty and these deliberations are naturally ongoing. At the time of writing, the Statute lies before parliaments or similar bodies in a number of countries, awaiting determination of these issues. Therefore, this analysis of state practice and thinking is necessarily preliminary. The focus of this Article, however, is on interpretative approaches which will be relevant to domestic ratification processes for some time.

III. THE CONSTITUTIONAL AMENDMENT APPROACH

A. Early State Experiences

A small number of states have decided to amend their constitutions, and there are variations as to the manner, timing and underlying rationale of amendment. France was the first state to decide to amend its constitution, following a decision of the Conseil Constitutionnel issued on January 22, 1999.[11] It has now completed its constitutional amendment procedure and has ratified the Statute.[12] While the decision of the Conseil Constitutionnel concerns three distinct aspects of the constitution,[13] the amendment adopted is general in nature and does not specify the constitutional provisions to which it is intended to relate. Article 53.2 of the French constitution, as amended, now reads: "The Republic may recognize the jurisdiction of the International Criminal Court under the conditions specified by the treaty signed on July 18, 1998."[14]

There are indications that other countries deciding to opt for the amendment route may follow the French example in elaborating a general provision referring to the ICC. For example, in Brazil, where, at the time of writing, an amendment with similar effect is under discussion, providing that "[t]he Federal Republic of Brazil shall be able to recognize the jurisdiction of the International Criminal Court as foreseen in the Statute approved in Rome the 17th of July, 1998."[15]

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11. *See* Decision No. 98-408 DC, 1999 J.O. (20) 1317. *See also* Paragraph 14 of the Preamble of the Constitution of the Fourth Republic of Oct. 27, 1946 (CONSTITUTION DE 1946 préambule (Fr.) (reaffirmed in the préambule de la CONSTITUTION DU 4 OCTOBRE 1958)) (providing that the French Republic, faithful to its traditions, abides by the rules of international law).

12. Ratification completed on June 9, 2000. *See supra* note 2.

13. *See* Beate Rudolf, *International Decision: Statute of the International Criminal Court, Decision No. 98-408 DC, 1999 J.O. 1317*, 94 AM. J. INT'L L. 391 (2000) (providing a summary of the decision of the French Conseil Constitutionnel).

14. CONSTITUTION DU 4 OCTOBRE 1958 tit. VI, art. 53(2) (Fr.) (as amended by Loi Constitutionnelle. No. 99-568, 1999 J.O. (157) 10175).

15. The chair of the Human Rights Committee of the Chamber, Dep. Nilmario Miranda,

Similarly, Belgium proposes to amend its constitution to provide that "the State adheres to the statute of the international criminal court, drawn up in Rome on 17 July 1998."[16] In each of these states, it was not considered necessary to address the specific provisions that gave rise to the constitutional compatibility question. Rather, the amendment provides or clarifies that the treaty would take precedence over other constitutional provisions in the event of any conflict.[17]

A somewhat different approach can be seen in Germany, for example, which is proposing to amend one particular provision of the German Constitution (the "Basic Law") relating to the extradition of German nationals.[18] The proposed amendment would add a paragraph to that provision, which currently prohibits the extradition of nationals, stating that: "[a] regulation in derogation of this may be made by statute for extradition to a member state of the European Union or to an international criminal court."[19]

B. The Rationale for Amendment: Some Observations

The rationale underlying the decisions of these states to amend their constitutions, rather than relying on the interpretative considerations that have satisfied many other states with parallel constitutional provisions,[20] is not always clear. The answer undoubtedly lies in a complex medley of legal and policy considerations, many of which

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introduced a Constitutional amendment bill on February 9, 2000. (Dep. Chamber #203-2000). *See Bem-vindo ao Conselho da Justica Federal* (visited Dec. 1, 2000) <http://www.cjf.gov.br/ >.

16. The Examen du Projet presented by the Belgian government to the Senate on Feb. 3, 2000 refers to the following proposed amendment: "L'Etat adhére au statut de la Cour pénale internationale, fait à Rome le 17 juillet 1998." The issues for Belgium, as identified in the Project du Loi, were: the exclusive competence of the Court of Appeal over crimes committed by Ministers of State during their term of office (art. 103 of the Belgian constitution); immunities (art. 88); and the power of the King to grant pardon (art. 110 and 111). The Project du Loi addresses the following issues in this order: 1. Indépendance de la justice belge; 2. Immunités et privilèges de juridiction; and 3. Les articles 110 et 111 de la Constitution consacrent le droit de grâce du Roi. (LA CONSTITUTION COORDONNÉE tit. III, ch. III, § I, art. 88; tit. III, ch. III, § II, art. 103; tit. III, ch. III, § III, art. 110, 111 (Belg.)).

17. Note, for example, the Belgian legal position, *supra*, note 9.

18. See article 16(2) of the German Basic Law, which currently reads "No German may be extradited to another country." (GRUNDGESETZ [Constitution] [GG] ch. I, art. 16(2) (F.R.G.))

19. The Federal Cabinet adopted the Act of Ratification of the Statute of the International Criminal Court and the Act Amending Article 16 of the Basic Law. They passed through the Bundestrat unanimously and, at time of writing this Article, were before parliamentary committees in the Bundestag, having been introduced to that Chamber on February 24, 2000. *See* Summary of the Ratification and Implementation of the Rome Statute of the International Criminal Court by Germany (distributed in English by the German delegation during the June 2000 ICC Preparatory Commission session) (on file with author).

20. *See* Section on The Interpretative Approach, *infra* pp. 113-37.

will be peculiar to the circumstances or constitutional traditions of a particular state. While this Article does not seek to address those considerations, it does offer some preliminary observations.

First, the constitutional amendment and interpretative approaches are not necessarily incongruous or mutually exclusive. Amendment does not necessarily indicate rejection of the arguments for harmonious interpretation. In some cases, states appear to have taken the view that constitutional amendment was indeed necessary for consistency with the Statute.[21] In others, however, amendment may have been considered the preferable—rather than the strictly necessary—route. There may have been profoundly divergent views within the state, followed by a decision to amend the state's constitution in order to minimize the possibility of future challenges or perceptions of inconsistency.[22] The objective may have been to clarify beyond doubt the state's ability to cooperate with the ICC and to remove any potential obstacles to full and timely cooperation with the Court.

The constitutional amendment approach is more likely to prevail where amendment neither hampers, nor excessively delays, ratification. In this respect, it is pertinent to note that this approach has generally been adopted in states where amendment procedures are relatively straightforward and unlikely to lead to inordinate delays. In such circumstances, the ICC may present a welcome opportunity to improve outdated constitutional provisions.

Among the amending states discussed above, only Belgium has a complex and time-consuming amendment procedure.[23] Since its constitutional amendment procedure is burdensome, Belgium has adopted a creative approach that merits specific consideration. It has decided to take the amendment route, but to do so only after ratification.[24] The time lapse between ratification and the court's establish-

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21. The decision of the French Conseil Constitutionnel on January 22, 1999, *supra* note 11, would appear to be expressed in terms that would support such an interpretation.

22. *See* Dr. Winfried Bausback, *Keine Wiederaufnahme nach EGMR-Urteil*, 52 NEUE JURISTISCHE WOCHENSCHRIFT 2483 (1999).

23. *See* LA CONSTITUTION COORDONNÉE tit. VIII, art. 195 (Belg.).

24. This decision in respect to the timing of constitutional amendment reflects the approach and rationale adopted by certain other states in relation to their national implementing legislation. Several states have decided to enact any changes in domestic legislation after ratification. In some cases, such as Switzerland, this represents a departure from normal legislative practice. *See* Michael Cottier, *Implementation of the Rome Statute in Switzerland*, *in* THE IMPLEMENTATION OF THE INTERNATIONAL CRIMINAL COURT STATUTE IN DOMESTIC LEGAL SYSTEMS, Roundtable, University of Teramo, Nov. 12-13, 1999 (on file with *Duke Journal of Comparative & International Law*).

ment is likely to leave ample time for constitutional amendment, before any request could be received from the Court and any potential conflict arise in practice. It should be noted that a violation of the Statute will not occur from the adoption of the Statute itself, but from any failure to cooperate with a request from the Court or failure to ensure that procedures are in place to enable compliance with such requests.[25] Therefore, the question of compatibility becomes crucial once the Court is operational.

The decision to ratify before amending the constitution was critical to ensure that any proposed amendment would not affect the ability to ratify without delay.[26] This initiative may provide a useful reference point for states that decide, notwithstanding the arguments for an interpretative approach set out below, that amendment is the preferable approach for them.

Finally, it should be noted that decisions to amend a constitution to expressly accommodate the ICC may have also been motivated by reasons not exclusively ICC-related. For example, where constitutional reform is underway, it may be considered timely in the context of that process to include the ICC within the revised constitution. The ICC amendments may constitute one of a number of changes, or it may be that the same constitutional amendment is justified by other factors. The German amendment, for example, provides not only for cooperation with the ICC, but also for "extradition to a member state of the European Union."[27] In this respect, the Federal Minister of Justice noted in her speech to the Bundestag that the amendment would enable Germany to "meet the standard set within Europe and . . . match our partners in the European Union in relation to extradition between Member States."[28] External considerations may

25. Note, however, that Article 88 of the Statute obligates states to "ensure that there are procedures available under their national law for all of the forms of cooperation" specified in Part Nine of the Statute on International Cooperation and Judicial Assistance. Rome Statute, *supra* note 1, art. 88.

26. Belgium ratified the Rome Statute on June 28, 2000. *See supra* note 2 (discussing the current status of ratification).

27. Summary of the Ratification and Implementation of the Rome Statute of the International Criminal Court by Germany, *supra* note 19.

28. Prof. Dr. Herta Däubler-Gmelin, German Federal Minister of Justice, Address to the German Bundestag (Feb. 24, 2000) (explaining that "the constitutional amendment also authorizes parliament to make provision for the extradition of German nationals to Member States of the European Union," and noting that this amendment would also apply to the ICTY and ICTR) (transcript in English distributed by the German delegation during the June 2000 ICC Preparatory Commission session) (on file with author).

therefore have been relevant to the desire to amend the constitution in Germany.

IV. THE INTERPRETATIVE APPROACH

As noted above, in many countries, initial concerns have given way to the view that the Rome Statute and the constitution can in fact be read harmoniously.[29] This approach has emerged after rigorous domestic analysis and debate of the Statute and relevant constitutional provisions. Of the many considerations brought to bear in this process, some are of a general nature and applicable to the interpretation of any of the constitutional issues in question. Others are specific to particular constitutional rights or powers and the corresponding provisions of the Statute.

A. The Interpretative Approach: Considerations of a General Nature

Naturally, the manner in which a constitution is interpreted will depend in large part on domestic constitutional theory and practice. However, the following considerations are thought to be of sufficiently broad application to merit consideration here.

1. *An Evolving Interpretation*. The vast majority of constitutions of the world were drafted long before the notion of the International Criminal Court was conceived. Thus, in assessing their compatibility with the Rome Statute, it is particularly important that constitutional provisions are not construed statically, but interpreted to embrace scenarios not contemplated by their creators.

In the eloquent words of one commentator,

> [The] Constitution is a living document which reflects the aims, aspirations, genus and genesis, temper and thinking of the people. Constitution is not merely an imprisonment of the past, but is also alive to the unfolding of the future. Therefore, the language of the Constitution should be interpreted in a broad and liberal spirit.[30]

Another commentator has noted that constitutional interpretation "emerges not as exegesis, but as a process by which each generation

29. *See, e.g.,* the Costa Rican, Danish, Ecuadorian, Norwegian, Spanish, and Venezuelan approaches mentioned in this Article.

30. SHAUKAT MAHMOOD & NADEEM SHAUKAT, CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1973 13 (3d ed. 1996).

gives formal expression to the values it holds fundamental."[31] Others have emphasized that "the constitution must serve life, [and] that its interpretation cannot be dated, reactionary, [or] static."[32]

If the constitution can be interpreted to embrace changing circumstances, it may be that "a liberal interpretation of the constitution and its principles so as to bring it in conformity with the needs of the time would make amendments and revolutionary changes in it[] unnecessary."[33] In the context of the debate regarding the ICC, it has been said that a nation's constitution must be able to "embrace new concepts that modify . . . the material content of constitutional norms, insofar as they are not in conflict with the basic principles of the system."[34] This has been described as "a path of constitutional mutation that does not entail a formal amendment."[35]

2. *The Object and Purpose Argument: Interpretation Consistent with Constitutional Values*. It is widely accepted that a constitution should be interpreted consistently with its own object and purpose. While the plain meaning of a constitution's terms must not be ignored, its provisions should not be interpreted in a manner that leads to absurd results or to effects that are at odds with the framers' objectives.[36] It has been observed that "the pole star in the construction of a Constitution is the intention of its makers and adopters."[37] On the one hand, consideration of the object and purpose of the constitution entails mindfulness of the original intent underlying any particular constitutional provision. On the other hand, it also entails interpreting provisions consistently with the constitution's fundamental norms, around which the constitutional order takes form.

Consideration of basic constitutional values and objectives and their compatibility with those of the Rome Statute has formed a sig-

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31. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068 (1981).

32. LUIS CARLOS SACHICA, LA CORTE CONSTITUCIONAL Y SU JURISDICCION [THE CONSTITUTIONAL COURT AND ITS JURISDICTION] 35 (1993). The original text states, "Es imposible entonces ignorar esa corriente simbiótica sociedad-Estado, realidad-normatividad, que aporta vigencia, eficacia, positividad, a una Constitución. Se afirma así que el derecho debe servir a la vida, que su interpretación no puede ser inactual, reaccionaria, estacionaria."

33. MAHMOOD & SHAUKAT, *supra* note 30.

34. Sylvia Steiner, *Life Imprisonment and the Statute of the ICC* (abridged version), CICC MONITOR, Dec. 1999, at 7. The author is judge of the Third Region Federal Tribunal of Brazil and was commenting on the compatibility of the Statute with the Brazilian Constitution.

35. *Id*.

36. *See* MAHMOOD AND SHAUKAT, *supra* note 30, at 16.

37. *Id*.

nificant component of deliberations on the Court's constitutionality. The ICC preamble provides an insight into the values underpinning the Statute, which include protection of the "peace, security and well-being of the world," enforcement of justice and the rule of law, and protection of human rights.[38] One commentator has noted that "[t]he purposes and functions of a permanent international criminal court combine humanistic values and policy considerations which are not only essential to the attainment of justice, redress, and prevention, but also to the preservation, restoration, and maintenance of peace."[39]

These are, in essence, the same objectives and values enshrined in many constitutions of the world, as constitutions are commonly framed, explicitly or implicitly, around human rights principles.[40] Many of the newer constitutions, of Latin America and Eastern Europe for example, which have given rise to the constitutional issues discussed here, are quite explicit in this respect, and contain more comprehensive bills of human rights than constitutions drawn up at earlier stages.[41]

Indeed, the particular provisions that have given rise to questions of constitutional compatibility are often themselves concerned with human rights. These constitutional prohibitions seek to enforce what are considered to be important human rights protections in the national context, such as protection from life imprisonment. They also seek to ensure that if a person were to be extradited to a foreign court, that court would meet standards similar to those of domestic courts. However, with an international court exercising international jurisdiction over crimes which are international in nature, national standards are no longer the relevant criteria. Rather, the standard becomes *internationally recognized* human rights. These international rights, which have already been enshrined and safeguarded in interna-

38. Rome Statute, *supra* note 1, preamble. For a discussion of the elaboration of the preamble, see Tuiloma Neroni Slade & Roger S. Clark, *Preamble and Final Clauses*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 421, 425-429 (Roy S. Lee ed., 1999).

39. M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1 (1998).

40. *See, e.g.*, S. FAROOQ HASSAN, THE ISLAMIC REPUBLIC: POLITICS, LAW AND ECONOMY 106, 117 (1984) (commenting on the "Shariah: Basic Constitutional Concepts" that "[i]t is not only an offense but is also a sin to injure or damage the rights of other individuals").

41. *See, e.g.*, S.E. Finer, *Five Constitutions*, *in* COMPARATIVE LEGAL TRADITIONS 70 (Mary Ann Glendon et. al. eds., 2d ed. 1994) (discussing the human rights provisions of Eastern European Constitutions); COMPARATIVE LEGAL TRADITIONS 72 (Mary Ann Glendon et. al. eds., 2d ed. 1994), *quoting* Gerard Casper, *European Convergence,* 58 U. CHI. L. REV. 441, 444-46 (1991) (discussing the human rights provisions of Eastern European constitutions).

tional human rights treaties, are reflected in the Rome Statute.[42] Therefore, the concerns as to the protection of the human rights of an accused that may arise in extradition proceedings do not arise to the same degree in relation to proceedings before the ICC.

Moreover, the contribution that the ICC will make to the advancement of human rights cannot be ignored, and it has been suggested that the relevant concerns about constitutional compatibility should be analyzed in the light of the totality of the values at stake.[43] Constitutions and the values they represent would be better served by ratification of the Statute than not. Any interpretation of the constitution that militates against the ability to hold accountable before the law those responsible for genocide, war crimes, and crimes against humanity may therefore be inconsistent with that constitution's own basic objectives.

3. *Interpretation Consistent with International Law Obligations*. Another principle of constitutional construction that is relevant to all of the constitutional issues covered in this Article is that constitutional provisions should be interpreted consistently with international law obligations.[44] It may be that where there is a clear conflict between constitutional and international law, national law determines the hierarchy between the two. However, the concept of international criminal jurisdiction was not even anticipated when the constitutions were drafted. As a result, constitutional provisions in question in the ICC context do not explicitly conflict with the requirements, but instead are simply silent. Where constitutional provisions permit differing possible interpretations, both consistent and inconsistent with international law, there is a strong argument in favor of construing the constitution and international law consistently.

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42. *See* Håkan Friman, *Rights of Persons Suspected or Accused of a Crime, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 38, at 247, 255-261.

43. *See* Steiner, *supra* note 34.

44. For example, commentators have noted that "the constitutional principle of an interpretation and application of the municipal law in conformity with international law requests that German courts refrain from recognizing either foreign laws which violate general international law or the general reservation of the international *ordre public*, even where international law itself does not proscribe such an application." INTERNATIONAL LAW: CASES AND MATERIALS 155 (Louis Henkin et. al. eds., 3d ed. 1993), *quoting* Luzius Wildhaber & Stephan Breitenmoser, *The Relationship Between Customary International Law and Municipal Law in Western European Countries*, 48 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 163, 182 (1988).

The ICC can prosecute "the most serious crimes of concern to the international community as a whole,"[45] namely genocide, war crimes, and crimes against humanity.[46] These are crimes in respect of which international law imposes certain obligations on states to investigate and prosecute. State parties to specific international instruments that enshrine this duty, such as the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture),[47] the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention),[48] and the 1949 Geneva Conventions on the Laws and Customs of War,[49] have agreed to prosecute these crimes in the circumstances provided in each of these treaties. The International Covenant on Civil and Political Rights[50] also contains provisions which have been authoritatively interpreted as obliging state parties to investigate and prosecute serious violations of human rights, such as torture, "disappearances" and extra-judicial executions.[51]

There are also growing indications of state practice and *opinio juris* developing in relation to the principle *aut dedere aut judicare*, the obligation to prosecute or extradite.[52] In addition to the widely ratified treaties referred to above, the U.N. Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions provide that governments shall either bring persons accused of extra-legal arbitrary and summary executions to justice or cooperate to extradite them to other countries wishing to exercise ju-

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45. *See* Rome Statute, *supra* note 1, preamble.

46. *See* Rome Statute, *supra* note 1, arts. 5-8.

47. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

48. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278.

49. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; *and* Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; *and* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; *and* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

50. *See* International Covenant on Civil and Political Rights, registered ex officio Mar. 23, 1976, 999 U.N.T.S. 171.

51. *See, e.g.*, Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 24, 29-30 (Naomi Roht-Arriaza ed., 1995).

52. *See generally* M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE*: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

risdiction.[53] The Preamble to the Statute itself, approved by 120 states at the conclusion of the Rome Diplomatic Conference, reflects growing recognition that "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes."[54]

The same compatibility issues under discussion in relation to ICC ratification also apply to the ratification of other international treaties. By ratifying treaties such as the Convention against Torture, states have already accepted the duty to prosecute or extradite, notwithstanding any constitutional provision prohibiting such actions. In the majority of cases, states have not made reservations to this duty.[55] Ratification of these treaties without reservations may indicate that relevant constitutional provisions, such as those granting immunities, did not apply to the prosecution of the crimes addressed by the treaties.[56] The contrary view, invoking a strict interpretation of constitutional provisions, such as those guaranteeing immunities, could bring a state into conflict with international obligations which it has already undertaken beyond the context of the ICC.

4. *Complementarity of the ICC and National Jurisdiction*. The "complementarity" provisions at Articles 17 to 19 of the Statute are central to any debate on the implications of the ICC. The discussion on constitutional compatibility of the Court is no exception. Defining the relationship between national authorities and the ICC, Article 17 limits ICC investigation to those situations where there is no state willing or able to investigate or prosecute. If a state carries out a genuine investigation on the national level, the ICC will not have jurisdiction, thereby avoiding many of the potential constitutional difficulties.

The complementarity provisions of the Statute accordingly enshrine a very high degree of deference to national proceedings and thereby

53. *See* E.S.C. Res. 1989/65, *Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, U.N. ESCOR, 1st Sess., Supp. No. 1, at 52-53, U.N. Doc. E/RES/1989/65/E/1989/INF/7 (1989); G.A. Res. 44/162, *Human Rights in the Administration of Justice*, U.N. GAOR 3d Comm., 44th Sess., Supp. No. 49, at 235-236, U.N. Doc. A/RES/44/162 (1990).

54. Rome Statute, *supra* note 1, preamble.

55. *See generally* DOCUMENTS ON THE LAWS OF WAR 189-192 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (listing reservations made to the Genocide Convention).

56. It is interesting to note that when the Philippines made such a reservation to the Genocide Convention, on the basis of the immunity of the head of state, several states objected. *See* Beate Rudolf, *International Decisions: Statute of the International Criminal Court*, 94 AM. J. INT'L L. 382, 395 (2000).

provide considerable comfort to state actors currently considering possible scenarios of constitutional conflict. The Court cannot, for example, "overrule" a national investigation it deems unsatisfactory, unless the ICC Prosecutor can satisfy the Court that the national authorities can not or will not do justice in the particular situation or case.[57] Multiple opportunities exist for challenge and review to safeguard the primacy of national courts.[58] As such, complementarity provides an escape clause from potential constitutional difficulties, provided the state itself investigates or prosecutes.

In order to ensure that they will be able to utilize the complementarity provisions in all circumstances, many states are currently engaged in bringing about wide-reaching changes to their domestic legislation. The need for such changes depends on the state of existing national law. In many cases, the process of implementation of the Rome Statute has involved enshrining the crimes within the jurisdiction of the ICC into the domestic legal order. This allows, for example, the prosecution of crimes against humanity as such rather than as ordinary crimes more commonly contemplated in domestic law.[59] In other cases, implementation has involved extending the jurisdiction of domestic courts to cover crimes committed outside the territory of the state.[60] States that provide for this extended jurisdiction have the comfort of knowing that they are able to prosecute any individual appearing on their territory who is accused of crimes against humanity by invoking complementarity.

Complementarity is not the solution to constitutional issues that may present impediments to domestic prosecution, such as immunities. However, it does ensure that a state seeking to avoid being called upon to surrender a suspect to the Court, either because of the suspect's nationality or because of the possibility of a life sentence

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57. *See* John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 38, at 41, 74-75. *See also* Richard Dicker & Helen Duffy, *The International Criminal Court and National Courts*, VI:1 BROWN J. OF WORLD AFF. 53, 58-59 (1999).

58. *See id.*

59. The German Government, for example, has announced a comprehensive revision of the German criminal code to include all the crimes within the Rome Statute. *See* Summary of the Ratification and Implementation of the Rome Statute of the International Criminal Court by Germany, *supra* note 19.

60. For example, the implementing legislation for both Canada and New Zealand provides, to varying degrees, for universal jurisdiction. *See* Crimes Against Humanity and War Crimes Act, Statutes of Canada 2000, c.24, ¶ 6 (royal assent June 29, 2000); New Zealand "International Crimes and International Criminal Court Bill," introduced by the Hon. Phil Goff (on file with author).

being imposed, can avoid doing so by itself investigating the alleged crime.

B. The Interpretative Approach: Issue-Specific Considerations

1. *Extradition Of Nationals*. The first question that arises when considering constitutional prohibitions on extradition of nationals to a foreign jurisdiction is whether such prohibitions are consistent with the obligation of state parties to surrender suspects to the ICC. Because the ICC will not prosecute *in absentia*,[61] the Court must gain physical control over a suspect for a trial to take place. State parties' obligations to cooperate with the Court in the arrest or surrender of persons,[62] be they nationals or not, are therefore essential to the Court's ability to function. Although some exceptions may apply with respect to the duty to provide "other forms of cooperation," as in the case of national security in Article 93(4),[63] there are no exceptions to the Statute's arrest and surrender obligations.

The constitutions of various European and Latin American countries contain provisions that appear at first sight to interfere with this duty. The most straightforward cases are those where the prohibition is expressly qualified. For example, in the Estonian constitution of 1992, extradition of Estonian citizens is permitted in cases prescribed by an international agreement.[64] As the Statute is such an international instrument, narrowly formulated prohibitions such as this are unlikely to present any difficulties. However, this is the exception rather than the rule.

More commonly, the provisions take the form of a direct bar on extradition such as Article 47 of the Slovenian constitution, which provides that "no citizen of Slovenia may be extradited to a foreign country;"[65] Article 69 of the Venezuelan constitution, which states that "the extradition of Venezuelans is prohibited;" or Article 5 of the Brazilian constitution, which states "No Brazilian may be extradited,

61. *See* Håkan Friman, *supra* note 42.

62. *See* Rome Statute, *supra* note 1, at art. 89(1).

63. *See* Rodney Dixon & Helen Duffy, *Article 72: The Protection of National Security Information, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 937, 946 (Otto Triffterer ed., 1999).

64. *See* Mart Rask, Minister of Justice of the Republic of Estonia, Address Before the Seminar on Establishment of the International Criminal Court, Helsinki (Feb. 23, 2000), Publications for the Ministry for Foreign Affairs, Oy Edita Ab, Helsinki 2000, ISSN 0358-1489, ISBN951-724-308-1.

65. USTAVO [Constitution] art. 47 (Slovenia).

except naturalized Brazilians [in circumstances specified in the constitution].”[66] Occasionally, the constitutional prohibition is cast more broadly than solely prohibiting “extradition.” The Costa Rican constitution, for example, states that “no Costa Rican may be compelled to abandon the national territory.”[67] Despite the apparent contradictions that such formulations give rise to, a number of states, including Venezuela and Costa Rica, are proceeding with, or have completed, their ratification processes without constitutional amendment.[68]

Among the considerations that make such reconciliation between the Statute and broadly formulated constitutional provisions possible, are the following.

a. Extradition vs. Surrender. The apparent tension between constitutional prohibitions against extradition of nationals and ICC obligations diminishes upon a closer examination of the fundamental conceptual differences between “surrender” to an international criminal court and “extradition” to another state.[69]

Article 102 of the Statute defines “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.”[70] Commentators involved in negotiations have noted that states in this way made it

> very explicit that they did not hereby consent to extradite nationals in general but accepted such an obligation only in the very specific context of the Court . . . Such a clear distinction at the *terminological* level should, as was the underlying thinking, at the same time contribute to a growing awareness on the national level for the *substantial* differences between *horizontal* and *vertical* cooperation.[71]

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66. REPÚBLICA FEDERATIVA DO BRASIL CONSTITUIÇÃO [Constitution] art. 5 (Braz.).

67. CONSTITUCIÓN [Constitution] art. 32 (Costa Rica).

68. Venezuela ratified the Statute on June 7, 2000 without constitutional amendment. *See Coalition for an International Criminal Court* (visited Dec. 1, 2000) <http://www.iccnow.org>. Costa Rica signed the Statute on October 7, 1998, and the ICC ratification bill was approved by the plenary of the Parliament for a first reading on September 26, 2000. A review by Sala Cuarta (the Constitutional Court) found that the Statute is compatible with the Costa Rican Constitution. *See id.*

69. *See* Report of the Ecuadorian Corte Constitucional, Informe del Sr. Hernan Salgado Pesantes en el caso No. 0005-2000-Cl sobre el “Estatuto de Roma de la Corte Penal Internacional,” Mar. 6, 2001, at Point 7. It notes the “semantic nuanced difference” between the two, but goes on to note that as extradition applies only between states, the prohibition on the extradition of nationals does not apply to transfer to the ICC.

70. Rome Statute, *supra* note 1, at art. 102.

71. Claus Kress, *Article 102: Use of Terms, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1157, 1157-58 (Otto Triffterer ed., 1999).

This distinction between extradition and surrender therefore is not merely semantic but substantive.[72]

An illustration of this substantive distinction is the difference between foreign courts and the ICC. A historical analysis of particular constitutions would likely reveal that at the time of crafting the constitutional prohibitions against extradition, the creators of the constitution contemplated "horizontal cooperation" between national courts and not "vertical cooperation" with an international court. As the ICC is not a "foreign court" or "foreign jurisdiction," but rather an international one, the constitutional prohibitions against extradition may not apply.

A related substantive distinction between extradition and surrender concerns the fundamentally different relationship between a state and the ICC and that between two states. The ICC is the product of states. The majority of states participated in the statutory negotiations and the elaboration of detailed supplemental documents that define the Elements of Crimes within the Court's jurisdiction and its Rules of Procedure and Evidence.[73] This state involvement will continue upon ratification, as states become members of the Assembly of State Parties, and accordingly share responsibility for, *inter alia*, management of the Court, dealing with situations of non-cooperation by other state parties,[74] and appointing and removing judges[75] and the Prosecutor.[76]

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72. *See* Eva Tomic, Remarks at the International Conference Towards Ratification of the Statute of the ICC (Oct. 2, 1999), Budapest (explaining that "the Foreign Ministry of Slovenia is of the view that the amendment of the Slovene constitution is not required as there is a substantial differentiation between the two institutes [of extradition and transfer] . . . . The Foreign Ministry finds that the qualitative distinction is further supported by the Article 102 of the Rome Statute."); (transcript on file with author).

73. The negotiation of the Rome Statute took five years and involved the participation of the majority of states of the world. It culminated in the Rome diplomatic conference from June 15 to July 17, 1998, in which approximately 160 states participated. *See generally* Roy S. Lee, *The Rome Conference and Its Contributions to International Law*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 38, at 1. Its draft Rules of Evidence and Procedure and Elements of Crimes were completed by the Preparatory Commission on the establishment of the ICC on June 30, 2000, as mandated by Resolution F of the Rome Conference, and will be submitted to the Assembly of States Parties for approval. For an analysis of the ICC Rules, see Fabricio Guariglia, *Investigation and Prosecution, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 38, at 227.

74. *See* Rome Statute, *supra* note 1, at art. 112(2)(b) and 112(2)(f).

75. *See* Rome Statute, *supra* note 1, at art. 36(2).

76. *See* Rome Statute, *supra* note 1, at art. 42(4).

b. Underlying Concerns as to State Sovereignty. Notions of state sovereignty (which underlie, at least in part, constitutional problems concerning extradition of nationals[77]) are inapplicable in relation to the issue of surrender to the ICC. This Court is an international entity established with the consent of states participating in its establishment and agreeing to be bound by it through ratification, in exercise of their sovereign functions. In the words of one participant in the negotiations:

> in the case of the "extradition" the state hands over its national to another state, i.e., to a subject of international law, created independently from the extraditing state, while in the case of the "surrender" to the ICC that state hands over to a supranational judicial entity, established by the consent of the state party.[78]

Some observers have even gone so far as to suggest that the ICC can properly be considered an extension of a state's own domestic jurisdiction.[79] Whether or not so conceptualized, surrender should be viewed as different from extradition to another sovereign state, in whose creation the sending state has no investment, and over whose standards it has no control.

c. Underlying Concerns as to Due Process Guarantees. Leaving aside what may be outdated state sovereignty concerns,[80] the remaining issue underlying the prohibition against extradition involves guaranteeing the due process rights of the accused and guarding against unfair treatment in foreign courts.[81] Here again, however, concerns that may be legitimate in the context of extradition to another state are unfounded in relation to the ICC.

The human rights of the accused were considered at length during the negotiation of the Rome Statute and the Rules of Procedure and Evidence.[82] As a result, the ICC is an institution which, by its procedural safeguards, can be expected to meet the highest standards

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77. *See* Michael Plachta, (*Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77, 79 (1999).

78. Tomic, *supra* note 72.

79. *See* Cherif Bassiouni, *Observations on the Structure of the (Zutphen) Consolidated Text, in* OBSERVATIONS ON THE CONSOLIDATED ICC TEXT 12 (Leila Sadt Wexler ed., 1998). The author states that "the surrender process in this case is akin to a transfer from one part of the national legal system to the international extension of that national system which would be the ICC."

80. *See* Plachta, *supra* note 77.

81. *See* Plachta, *supra* note 77, at 86-88.

82. *See generally* Friman, *supra* note 42, and Guariglia, *supra* note 73.

of fairness and due process. In addition to the statutorily defined procedural rights of suspects or persons accused before the ICC, Articles 55 and 67 specifically encompass the range of human rights guarantees found in international human rights treaties.[83] In the unlikely event that the Court would violate the human rights of suspects or accused persons, such an act would violate its own Statute and would be a matter within the jurisdiction of the Assembly of States Parties. On this point, the French Conseil Constitutionnel found that there were sufficient guarantees for the protection of the basic rights of accused persons.[84]

d. The Practice of the International Criminal Tribunals and Surrender. Support for the distinction between extradition and surrender or transfer can be seen in the practice of the *ad hoc* criminal tribunals (the International Criminal Tribunal for the Former Yugoslavia or "ICTY," and the International Criminal Tribunal for Rwanda or "ICTR"). "Extradition" is not the formulation used in either the Security Council Resolutions[85] or the Statutes or Rules of the Tribunals.[86] Rather, indictees are "transferred" or "surrendered;" in their reports, the Tribunals have called on states not to apply by analogy existing legislation or bilateral conventions governing extradition. It has been recognized that the standard constitutional limitations on extradition that states rely upon so as to block surrender of a suspect are "either unnecessary or inappropriate when applied to the very serious violations of international humanitarian law over which the Tribunals exercise jurisdiction."[87]

This same rationale applies equally to the ICC. Indeed, the concerns underlying those standard bases, as set out above, may be less

83. *See* Håkan Friman, *supra* note 42, at 248-253 (stating the articles were based closely on the international covenant on Civil and Political Rights).

84. *See* Paragraph 14 of the Preamble of the Constitution of the Fourth Republic of Oct. 27, 1946, *supra* note 11.

85. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 29, U.N. Doc. S/RES/827 (1993); *see* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 15, U.N. Doc. S/RES/955 (1994).

86. *See* Statute of the International Tribunal (of the Former Yugoslavia) (June 20, 2000) <http://www.un. org/icty/basic/statut/statute.htm>. *See also* Kenneth Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557 (1994).

87. *See* Robert Kushen and Kenneth J. Harris, *Current Development: Surrender of Fugitives by the United States to the War Crimes Tribunals For Yugoslavia and Rwanda*, 90 AM. J. INT'L. L. 510, 512 (1996).

applicable to the permanent ICC than to its *ad hoc* predecessors. In this respect it is important to note that the participatory nature of the process which culminated in the establishment of the ICC differed substantially from the *ad hoc* criminal tribunals, whose Statutes were framed by Security Council resolution, and whose Rules were adopted by the Tribunals' judges.[88] Moreover, in terms of the end result of those processes, the degree to which the rights of the accused and principles of criminal law were specifically enshrined and guaranteed in the Rome Statute far exceeds the relatively skeletal provisions in the Statutes and Rules of the ICTY and ICTR.[89]

e. Differently Formulated Provisions and Further Arguments. Some of the foregoing arguments may appear more readily applicable to those provisions which refer specifically to "foreign courts" or to "extradition." The historic and purposive analysis, however, is also relevant to more broadly formulated provisions like that within the Costa Rican constitution, which states "no Costa Rican may be compelled to abandon the national territory."[90]

Other provisions of the Statute have been invoked to dispel any potential conflict with such broadly framed constitutional prohibitions. In particular, the complementarity provisions indicate that to avoid any request for surrender to the Court the state need only investigate the crime itself; the ICC will only prosecute where no state is willing or able to do so.[91] Given that many of the crimes within the Court's jurisdiction are crimes for which international law mandates state investigation, states should be able to meet these obligations and prosecute their own nationals.

Many of the legal systems that prohibit the extradition of nationals also have legislation that enables them to exercise jurisdiction over their nationals for crimes committed anywhere in the world. This ensures that they will be able to avail themselves of the complementarity route, wherever the crime was committed. Moreover, this legislative practice provides further support for the view that it was never the objective of the prohibition on the extradition of nationals to

88. *See* Guariglia, *supra* note 73.

89. *See id.*

90. CONSTITUCIÓN [Constitution] art. 32 (Costa Rica). *See also* The Report of the Ecuadorian Corte Constitucional, *supra* note 69, at Point 7 (noting that the objective of the prohibition of extradition of nationals is to protect nationals, on the basis that it is better for a national to be tried in his or her own country than in a foreign country).

91. *See* Dicker & Duffy, *supra* note 57.

guarantee impunity for these egregious crimes, and thus the provision should not be interpreted to have such an effect.

f. The Prohibition on the Extradition of Nationals: A Dated Concept? Finally it should be noted that there may be a trend away from rigid adherence to the letter of extradition prohibition.[92] This has been demonstrated by certain Nordic states' abandonment of the prohibition because of their apparent confidence in the criminal justice systems of the other states involved.[93] The 1996 Convention Relating to Extradition Between the Member States of the European Union[94] also states that "extradition may not be refused on the ground that the person claimed is a national."[95] While reservations to this rule are permitted under the Convention, they are limited to five years. It has been said that this limitation was framed with the intention of encouraging "governments to take steps toward abandoning the rule of non-extradition of nationals."[96]

The existence of such a trend further supports the adoption of a flexible approach that reflects developments in law and practice, and militates against a strict construction that fails to take account of the objectives of the constitution and the unique nature of the ICC.

2. *Immunities*. Many national constitutions grant specified state actors varying degrees of immunity from prosecution.[97] Beneficiaries of these immunities vary, from heads of states and presidents to government officials and parliamentarians. The scope and extent of such immunities also vary. The constitutions of some

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92. *See* Kress, *supra* note 71, at 1157 (stating that although states had not formerly consented to general extradition of nationals, they would accept "such an obligation only in the very specific context of the Court").

93. *See* Plachta, *supra* note 77, at 99. *See generally* Philip B. Heymann, *Two Models of National Attitudes Toward International Cooperation in Law Enforcement*, 31 HARV. INT'L L.J. 99 (1990).

94. *See* 1996 O.J. (C 313) 02. The Convention was signed on Sept. 27, 1996.

95. European Convention on Extradition, 1996 Art. 7(1); *see also* Prof. Dr. Herta Däubler-Gmelin, German Federal Minister of Justice, Address to the Bundestag, *supra* note 28 (stating that "the EU Extradition Convention of 1996 has long posited extradition of a state's own nationals within EU member states as the normal case. Germany always had to claim an exception for itself. That is going to change."

96. Plachta, *supra* note 77, at 103.

97. This issue is distinct from the grants of immunity to foreign government officials and accredited diplomats, contemplated in Article 98(1) of the Statute of the ICC. Note, however, that the Canadian bill implementing the Statute restricts the immunity of such persons with respect to serious international crimes. *See* Crimes Against Humanity and War Crimes Act, *supra* note 60.

countries, such as Norway, Spain, and Belgium, broadly characterize official immunity, granting extensive immunity from the penal process and thus seemingly guaranteeing personal inviolability.[98] Less problematic are those immunities which explicitly limit the scope of conduct covered. For example, some constitutions strictly limit immunity to certain acts, such as utterances in parliament.[99] Other countries' constitutional provisions expressly exclude from the scope of immunity certain types of serious crimes, as in the Republic of Argentina,[100] or preclude immunity for crimes that carry prison penalties exceeding a specified number of years, as in Slovenia.[101] Such provisions preclude individuals from being shielded by immunity when they perpetrate egregious crimes within the Court's purview.

The constitutional provisions of immunity for state actors have given rise to questions concerning the compatibility of such immunities with the unqualified obligation to arrest and transfer suspects to the Court under Article 89 of the Statute.[102] Alongside Article 89, Article 27 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.[103]

The Statute continues, "immunities or special procedural rules which may attach to the official capacity of a person, whether under national

98. *See* GRUNDLOV [Constitution] art. 5. (Nor); LA CONSTITUTION COORDONNÉE (Belg.), *supra* note 23. S*ee generally* Dictamen del Consejo del Estado, no. 1.374/99 (discussing the compatibility of the Spanish Constitutional provisions and the Statute).

99. *See* CONSTITUTION art. 162(1) (Switz.) ("The members of the Federal Assembly and the Federal Council, as well as the Federal Chancellor may not be held responsible for their statements in the chambers and before parliamentary organs.").

100. *See* CONSTITUCION pt II, ch. 3, art. 69 (Arg.) ("No Senator or Deputy, from the day of his election until he leaves office, may be arrested, except in case of his being caught *in flagrante* in the commission of a capital or other infamous or grave crime, in which case a summary report of the facts shall be made to the appropriate chamber.").

101. *See* USTAVO [Constitution] art. 83 (Slovn.), *noted in* Tomic, *supra* note 72. ("Delegates may not be placed in custody nor may a criminal process be initiated against them if they claim immunity, except with the permission of the state assembly, unless they have been convicted of a criminal act for which a punishment of imprisonment for more than five years is envisaged.")

102. *See* Rome Statute, *supra* note 1, at art. 89(1).

103. Rome Statute, *supra* note 1, at art. 27.

or international law, shall not bar the Court from exercising its jurisdiction over such a person."[104]

Compliance with the Rome Statute and its immunity provisions for state actors initially appeared to be at odds. Emerging state practice, however, suggests otherwise. For example, the Norwegian Constitution provides an absolute immunity for the King of Norway.[105] Despite this provision, the Parliamentary Committee considering Norwegian ratification of the Statute took the view that "the Statute of the International Criminal Court does not conflict with the Norwegian Constitution."[106] Consequently, Norway was one of the first states to ratify the Treaty, on February 16, 2000.[107] Similarly, Venezuela ratified the Statute after deciding that there was no incompatibility with the provisions of its constitution concerning immunities.[108] Similar views have been adopted in other states that are engaged in the process of ratification. Such countries include Spain, where the constitution provides for absolute immunity of the King. The Spanish government, however, on the advice of the State Council (C*onsejo del Estado*), has taken the view that ratification does not require a constitutional amendment.[109]

In practice, the immunity issue is unlikely to arise. Constitutional immunities, such as those that attach to monarchs in Spain or Norway, for example, cover persons who are not, de facto, in positions of greatest power, military command, or control within the state. The sovereign's power is in practice quite limited, and as such, the likelihood of a monarch being accused of crimes under the Rome Statute may be so minimum as to be hypothetical.[110] Thus, when a

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104. Rome Statute, *supra* note 1, at art. 89(1).

105. *See* GRUNDLOV [Constitution] art. 5 (Nor.) ("The King's person is sacred; he cannot be censured or accused. The responsibility rests with his Council.").

106. Recommendations to the *Storting* from the standing committee, Proposition No. 94 (1999-2000).

107. Press release of the Permanent Mission of Norway to the United Nations (February 17, 2000).

108. Venezuela ratified the Statute on June 7, 2000, despite Articles 19, 143, 200, and 282 of its constitution, which provide immunity for senators, congresspersons and others. *See Coalition for an International Criminal Court* (visited Dec. 1, 2000) <http://www.iccnow.org>.

109. Spain ratified the Statute on Oct. 25, 2000. *See id*. *See also* Andres Ortega, *Ratifíquenlo!*, EL PAIS (Barcelona), Apr. 17, 2000, at Internacional 11; Javier Pradera, *Los Cuerpos del Rey*, EL PAIS (Barcelona), May 24, 2000, at Esp. 20.

110. On October 4, 2000, the Danish government presented the Danish ICC ratification bill for Parliamentary approval. The government proposes ratification without the need for constitutional amendment, despite the absolute immunity of the Queen enshrined in Article 13 of its Constitution. The Explanatory Memorandum presented to the parliament notes that it must be considered extremely hypothetical that the Queen would ever be accused of such crimes and, as

country contemplates ratifying the ICC, the limited threat of a potential conflict must be weighed against the considerable benefits and important constitutional values advanced by ICC ratification, and a pragmatic approach to adoption is recommended. The proceeding sections of this paper will consider the question of whether, as a matter of law, a constitutional conflict could arise.

a. The Nature of the Crimes and International Law. The arguments in favor of constitutional construction in accordance with a state's international obligations are particularly pertinent here. A range of international treaties and other instruments either expressly or impliedly bar grants of immunity from prosecution for serious crimes such as those covered by the Rome Statute. Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide states: "persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[111] The 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly does not provide any exceptions to the obligation to extradite or prosecute the perpetrators of acts of torture, attempts to commit torture, and acts "by *any person* which constitute complicity or participation in torture."[112] Indeed, the definition of torture in Article 1 of the Convention encompasses "pain or suffering [which] is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,"[113] without any exceptions based on a state actor's status or seniority.

There are indications that the body of customary international law in this field is developing beyond the specific treaties which bind states. The inclusion of Article 27 of the Statute is the most recent affirmation of the view initially expressed in the Charter of the Nuremberg Military Tribunal that immunity should not apply to the egre-

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such, her immunity should not prevent ratification. In support of this proposition, it cites a similar approach adopted by the Norwegian Parliament, which completed its process of ratification on February 16, 2000. *See* Udenrigsministeriet (Royal Danish Ministry of Foreign Affairs), *Forslag til lov om Den Internationale Straffedomstol* (visited Dec. 1, 2000) <http://www.um.dk/udenrigspolitik/jura/lovforslag.asp>.

111. Convention on the Prevention and Punishment of the Crime of Genocide, (Dec. 9, 1948), art. IV, 78 U.N.T.S. 278, 280

112. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Dec. 10, 1984), pt. 1, art. IV, para. 1, 1465 U.N.T.S. 85, 114.

113. *Id.*

gious international crimes within the Treaty's purview.[114] The Charter states that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[115] The Statutes and practice of the ad hoc Tribunals for Rwanda and the Former Yugoslavia reaffirm this principle,[116] as do the range of widely ratified international treaties above. The U.N. Principles on the Effective Prevention and Investigation of Extra-legal Arbitrary and Summary Executions, in enumerating a state's obligation to bring criminals to justice or to cooperate in their extradition, states, "This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."[117] These Principles may provide further indication of *opinio juris* concerning the non-applicability of immunity to the gravest international crimes. In summary, were constitutional immunity provisions interpreted to guarantee absolute immunity from domestic prosecutions and surrender to the ICC, they would contradict already established international obligations.

b. Purposive Limitation. The purpose of constitutional immunities may be explicit or implicit. As mentioned above, some immunities cover only the functions associated with the office to which they attach, while others expressly exclude particularly grave conduct, or conduct independent of a member's political activities. Whether or not explicitly so limited, it has been suggested that in interpreting a constitutional provision, regard must be given to the objectives of the provision.[118] It has been noted that constitutional provisions of immunity are aimed "not to provide immunity for persons with a special status upon the commission of crimes, but to enable them to perform important state functions unhindered and

114. *See* Charter of the International Military Tribunal, art. 7, 59 Stat. 1548 (1945).

115. *Id.*

116. *See* International Criminal Tribunal for Rwanda, *ICTR – Statute of the Tribunal* (visited Dec. 1, 2000) <http://www.ictr.org/ENGLISH/basicdocs/statute.html>; *see also* Initial Indictment, Prosecutor v. Milosevic, No. IT-99-37 (Int'l Crim. Trib. Former Yugo., Trial Chamber, May 24, 1999).

117. E.S.C. Res 65, Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. ESCOR, 1st Sess., 15th plen. mtg., at 66, U.N. Doc E/RES/1989/65/Ann. 18 (1989).

118. See Section on The Object and Purpose Argument: Interpretation Consistent with Constitutional Values, *infra* pp. 114-16.

without the danger of falling victim to biased and politically oriented criminal charges."[119]

To the extent that immunities were intended to enable the beneficiary to carry out his or her functions unhindered, they should not protect those who perpetrate criminal acts. Crimes do not constitute the official functions of any parliamentarian, government official or head of state and therefore fall outside of the scope of immunity. The Pinochet case reaffirmed this proposition: because immunity granted to a former head of state under the applicable national law only extended to the exercise of official functions, and because torture and conspiracy to commit torture are not sovereign functions, Pinochet was not entitled to immunity from extradition.[120]

Provisions designed to assure a state actor personal inviolability contradict the view that the immunity only covers that actor's "official functions." Yet, such unqualified immunity initially aimed to facilitate good governance of a state and prevent frivolous or politically motivated interference.[121] This consideration, however, should not affect a state's willingness to surrender individuals to the ICC. This is because concerns about political interference—while valid on the national level—largely do not bear on justice before the ICC. The Rome Statute and Rules enshrine a complex screening and review mechanism, along with multiple opportunities for states and accused persons to challenge admissibility. These measures provide ample safeguards against unwarranted prosecution.[122] Allowing the provision to be interpreted so as to guarantee impunity for genocide, crimes against humanity, or war crimes would undermine the Statute's goal of promoting good governance and would defeat the object and purpose of granting immunity.

c. The Rupturing of the Constitutional Order by the Commission of Heinous Crimes. Moreover, in situations where genocide, crimes against humanity, or serious war crimes are committed by a head of state or other beneficiary of immunity, the

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119. Mart Rask, *supra* note 64.

120. *See* Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte [2000] 1 App. Cas. 147 (H.L. 1999).

121. Mart Rask, *supra* note 64.

122. *See* Rome Statute, *supra* note 1. (The Rome Statute mandates that the Pre-Trial Chamber review the prosecutor's request to initiate an investigation (art. 15, §3), and conversely that the Pre-Trial Chamber be notified when the prosecutor finds that there is no basis for an investigation (art. 53, §2). The Rome Statute also details which cases are admissible (arts. 17-19)).

very constitutional framework of the state is likely to have been profoundly ruptured. A perpetrator who, in the commission of a crime covered by the Statute, violates constitutional principles cannot expect to rely on that constitution for protection. Any other interpretation would render the constitution a facilitator of its own demise. It is not a notion foreign to constitutional law and practice that one may forfeit constitutional protections if one flagrantly abuses a constitution's most basic principles.[123]

d. Waiver of Immunities. Another issue relevant to this discussion concerns the waiver of immunities. Certain states enable their parliaments to waive a state actor's immunity, thereby consenting to his or her prosecution. If the foregoing arguments concerning the inapplicability of immunities to these crimes are accepted, then the question of such a waiver need not arise. However, where the possibility of such a waiver exists, there is no inherent contradiction between the immunity and the Statute. For example, after the ICC requests a state to surrender an individual, the state's parliament would have to waive the immunity.[124] A parliament would be expected to act in accordance with its state's international obligations. A refusal to do so could ultimately result in non-compliance and a breach of the state's obligation to arrest and surrender.[125]

For a sovereign to rely on a future waiver may be "wishful thinking," given the variability of future political will.[126] To provide greater certainty, a parliament could "waive" in respect of ICC proceedings on a one-time basis so as to avert concerns about the internal difficulties that might arise in the event of consent being withheld in any particular case. The parliamentary legislative procedure to approve the Treaty before ratification could itself constitute a waiver of those constitutional provisions found to contradict the Treaty, without necessitating constitutional amendment.

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123. *See, e.g.,* GRUNDGESETZ [Constitution] art. 18 (F.R.G.) (establishing that a person who abuses elemental freedoms, i.e. that of assembly, press, association, privacy, property, or asylum, so as to undermine the democratic order, shall thereby forfeit them).

124. The Explanatory Memorandum presented to the Danish parliament provided that, "considering the crimes which the ICC will prosecute, parliament would, of course, consent to waiver of the immunity" that attaches to parliamentarians under Article 57 of the Constitution. *See* Udenrigsministeriet (Royal Danish Ministry of Foreign Affairs), *supra* note 110.

125. *See* Rome Statute, *supra* note 1, at art. 89(1).

126. Michael Plachta, Remarks at the International Conference Towards Ratification of the Statute of the ICC (Oct. 2, 1999) Budapest (transcript on file with author).

3. *Life Imprisonment*. The third issue relates to the constitutional prohibition on life imprisonment. Some constitutions contain an express prohibition on "life" or "perpetual" imprisonment. For example, the Portuguese constitution provides that "[n]o one may be subjected to a sentence or security measure that involves deprivation or restriction of liberty for life or for an unlimited or indefinite duration."[127] Similarly, the Brazilian constitution provides that "[t]here shall be no penalties: . . . of perpetual character."[128] In other Latin American countries, certain constitutional provisions broadly prohibit "*penas perpetuas*", or unending penalties.[129] Finally, other constitutional provisions prohibit punishments involving restrictions of liberty which exceed a maximum number of years.[130] In certain contexts this is presented as a matter of constitutional right, with the underlying principle being the prohibition on cruel and inhuman forms of punishment[131] or the right of the convicted person to rehabilitate himself or herself.[132]

"Life imprisonment" is one of the penalties contemplated in the Rome Statute.[133] During the negotiations, several states opposed the inclusion of this penalty, while a number of others were insistent on the inclusion of the death penalty. This would have rendered the

127. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA pt. I, tit. II, ch. I, art. 30, no. 1 (Port.).

128. REPÚBLICA FEDERATIVA DO BRASIL CONSTITUIÇÃO tit. II, ch. I, art. 5, XLVII(b) (Braz.).

129. *See* CONSTITUCION DE LA REPUBLICA DE EL SALVADOR tit. II, ch. I, § 1, art. 27 (El Sal.) (which provides that "se prohibe: . . . penas perpetuas" or "unending penalties are prohibited"); s*ee also* CONSTITUCÍON POLÍTICA DE LA REPÚBLICA DE COSTA RICA tit. IV, art. 40 (Costa Rica).

130. *See* CONSTITUCION DE LA REPUBLICA DE HONDURAS tit. III, ch. II, art. 97 (Hond.) (the maximum is 20 years, or 30 in the case of cumulative sentences); *see also* CONSTITUCION POLITICA tit. IV, ch. I, art. 37 (Nicar.) (stipulating a maximum penalty of 30 years).

131. *See*, e.g., the Venezuelan Constitution, which states that "Freedom of the person is inviolable. As a result. . . life imprisonment or defamatory punishments are prohibited" and "Liberty and security of the person is inviolable. As a result. . .no-one may be punished by a life or defamatory penalty." (Venez.). *See also* CONSTITUCION DE LA REPUBLICA DE EL SALVADOR tit II, ch. I, § 1, art. 27 (El Sal.).

132. *See, e.g.,* CONSTITUCIÓN POLITICA DE LA REPÚBLICA DEL ECUADOR, art. 208 (Ecuador) ("The penal system and confinement will have as its objective the education of the convicted person and his preparation for work, with a view to his rehabilitation and reinsertion into society" (Author's translation).) *See also* Report of the Ecuadorian Corte Constitucional, *supra* note 69, at pt. 6 (noting that the objection that may be raised to the Statute's provision on life imprisonment is that it impedes the rehabilitation of the convicted person and does not permit his or her reinsertion into society, but going on to note the automatic review mechanism in Article 110 of the Statute, and finding the Statute compatible with the Constitution).

133. *See* Rome Statute, *supra* note 1, at art. 77.

Court entirely unacceptable to the majority of states.[134] Eventually, the delegates at the Rome Conference reluctantly accepted terms of life imprisonment.[135] As a result, the Statutes and Rules of both the ICTY and ICTR authorize possible sentences of life imprisonment.[136]

a. An Exceptional Penalty. Unlike the *ad hoc* tribunals, however, the ICC qualifies a sentence of life imprisonment by allowing it to be imposed only "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[137] Therefore, life imprisonment is not the established norm, but the exception reserved for the most egregious cases. This reflects the awareness during the negotiating process of the sensitivity of the issue for a number of states. The exceptional nature of the life sentence should be kept in mind, particularly in the context of certain states—such as Brazil—that contemplate exceptional penalties in exceptional circumstances.[138]

b. Life Imprisonment in the State in Question. Pursuant to Article 80, the penalty provisions of the Statute will not affect the inclusion or prohibition of particular penalties under national law.[139] Moreover, a state will never be required to execute a sentence of life imprisonment on its territory, pursuant to Article 103 of the Statute, which allows a state to attach conditions to its acceptance of sentenced persons for enforcement purposes.[140] With this in mind, the recent "Dictamen" of the Spanish Council of State concerning the compatibility of the Rome Statute and Spanish domestic law concludes with an additional clause authorizing Spain to receive convicted persons, provided the penalties imposed do not exceed those recognized in Spanish legislation.[141]

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134. *See* Int'l Crim. Trib. Former Yugo., R.P. Evid. 101(a) (providing that a convicted person may be sentenced to "imprisonment for a term up to and including the remainder of the convicted person's life."); *see also* Int'l Crim. Trib. Rwanda, R.P. Evid. 101(a).

135. *See* Rolf Einer Fife, *Penalties*, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 38, at 319, 337-38.

136. *See id*.

137. Rome Statute, *supra* note 1, at art. 77.

138. *See*, e.g., REPÚBLICA FEDERATIVA DO BRASIL CONSTITUIÇÃO tit. II, ch. I, art. 5, XLVII(a) (Braz.) (reserving the application of the death sentence for certain serious military crimes, which resemble many of those within the ICC's jurisdiction).

139. *See* Rome Statute, *supra* note 1, at art. 80 ("Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.").

140. *See* Rome Statute, *supra* note 1, at art. 103.

141. *See* Dictamen del Consejo del Estado, *supra* note 98.

As state party cooperation with the Court would never involve an obligation to enforce a judgment of life imprisonment, potential difficulties arise only when a state has custody of a suspect and receives a request from the Court to surrender that suspect. Certain constitutions, such as that of Portugal, expressly prohibit extradition in circumstances where life imprisonment may be imposed.[142]

c. "Extradition" and Life Imprisonment. The question of whether "surrender" to the ICC is comparable to "extradition" becomes relevant here.[143] For example, in relation to Portugal's implementation of the Rome Statute, one commentator noted that

> it is always possible to argue that extradition provisions do not apply in the context of an International Criminal Court and, therefore, that the constitutional limitations on the length of sentences apply merely to those that are to be carried out in Portugal, thus making the application of arts. 103 and 106 [of the Statute] . . . fully adequate to solve the problem.[144]

It is noteworthy that the prohibition on extradition to states which may impose life imprisonment may not be as absolute as it first appears. For example, in exceptional circumstances Portugal permits extradition to states where life imprisonment is a possibility, provided that certain guarantees, such as the existence of a review mechanism, are provided.[145] Prosecution by an international court for grave international crimes must surely be one such exceptional circumstance. The extent to which the Rome Statute provides similar guarantees to those specified in Portuguese legislation as justifying an exception to the general prohibition also deserves careful consideration.

d. Mandatory Review: the Statute and the Rules. A mechanism exists in the Statute to ensure that, despite the "life imprisonment" language of the penalties section, no one will in fact be subject to imprisonment for "life" without the possibility of

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142. *See* CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA pt. I, tit. II, ch. I, art. 33, no. 5 (Port.) (providing that "extradition in respect of offenses punishable, under the law of the requesting state, by deprivation of liberty or detention order for life or an indeterminate term, shall only be permitted on condition of reciprocity based on an international agreement and provided that the requesting state gives an assurance that such sentence or detention order will not be imposed or enforced.").

143. *See* Section on Extradition of Nationals, *infra* pp. 120-26.

144. Paula Escarameia, "Notes on the Implementation of the Rome statute in Portugal," in *The Implementation of the International Criminal Court Statute in Domestic Legal Systems*, *supra* note 24.

145. *See* Portuguese Law No. 144/99 of Aug. 31, 1999.

liberation. A mandatory review process provided for under Article 110 of the Statute obliges the Court to "review the sentence to determine whether it should be reduced" once a person has served 25 years.[146] The Draft Rules of Procedure and Evidence provide that a three judge panel of the Appeals Chamber shall hold a hearing, at which the sentenced person, with the assistance of counsel, shall participate.[147]

Some concern has been expressed that this review does not involve automatic reduction of the sentence and that there are no absolute guarantees of release under the mandatory review mechanism. The stringent provisions in the Statute and the Rules of Procedure negotiated at the ICC Preparatory Commission do, however, provide substantial comfort to those concerned about the life imprisonment issue. In large part due to mindfulness of the "life imprisonment" issues, the rules inserted in both Article 77 and Article 110 direct the Court to take into account additional factors such as the behavior, rehabilitation and other circumstances of the convicted person when exercising its sentencing and review functions.[148] If release is denied, further review will be held by a three-judge panel every three years, or earlier if circumstances so justify.[149] These rules further clarify the principle, expressed in the Statute, of the exceptional nature of life imprisonment.[150]

e. The Principle of Rehabilitation, International Human Rights, and Life Imprisonment. Rehabilitation is the core principle of this constitutional issue. It is important to note that, in addition to the Rules noted above, Articles 21(1) and (3) of the Statute also ensure that the Court will have regard for rehabilitation, in addition to other human rights concerns.[151] These Articles require the ICC to apply international treaty law, and in applying the Statute and other sources of law, to do so consistently with internationally-recognized human rights law.[152] Thus, the Court will have regard, for example, the International Covenant on Civil and Political Rights, which provides

146. Rome Statute, *supra* note 1, at art. 110.

147. *See* Rules of Procedure and Evidence, PCNICC/2000/INF/3Add. 1, Rule 244(1).

148. *See* Rules of Procedure and Evidence, PCNICC/2000/INF/3Add. 1, Rules 145(2) and 223.

149. *See* Rules of Procedure and Evidence, PCNICC/2000/INF/3Add. 1, Rule 223.

150. *See* Rome Statute, *supra* note 1, at art. 77; *see also* Rules of Procedure and Evidence, PCNICC/2000/ INF/3Add. 1, Rule 145(3).

151. Rome Statute, *supra* note 1, at art. 21.

152. *See id*.

that the essential objective of a penitentiary system should be rehabilitation.[153] Consequently, this reinforces the principle enshrined in the Draft Rules that in the application of the provisions on sentencing and review, the Court will have regard for the principle of rehabilitation, as well as broader human rights concerns.

The underlying objectives of constitutional prohibition on life imprisonment are human rights-oriented.[154] They seek to recognize the fact that life imprisonment is considered a violation of human rights in certain national systems, although it is questionable whether this is so on the international level. The prohibition should not, therefore, apply to international prosecutions that enshrine internationally (as opposed to nationally) recognized human rights standards.[155] As noted above, the Statute enshrines those human rights standards relating to the rights of suspects and accused persons that form part of international human rights law. Moreover, in the context of ICC discussions, attention has been drawn to the human rights "principles" of a constitution, which militate in favor of—not against—ICC ratification. Some argue that in this context, these human rights principles should prevail over specific human rights based rules, such as the prohibition on life imprisonment, on the basis that "principles always prevail against rules."[156]

C. Complementarity

The principle of complementarity has been cited in the context of discussions on life imprisonment. The ICC will defer to the state's investigation or prosecution of an egregious crime, irrespective of whether or not the state imposes a life sentence.[157] In accordance with the complementarity regime in the Statute, domestic investigation therefore remains a key consideration that will, in practice, avoid any issue of surrender to the ICC.

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153. *See* International Covenant on Civil and Political Rights, *supra* note 50.

154. *See* Report of the Ecuadorian Corte Constitucional, *supra* note 69.

155. *See generally* Dirk Van Zyl Smit, *Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective*, 9 Crim. L.F. 5 (1999); *IST DIE LEBENSLANGE FREIHEITSSTRAFE VERFASSUNGSWIDRIG? DOKUMENTATION ÜBER DIE MÜNDLICHE VERHANDLUNG VOR DEM BUNDESVERFASSUNGSGERICHT AM 22.UND 23.MARZ.1977* (Hans-Heinrich Jescheck & Otto Triffterer eds., 1978).

156. Steiner, *supra* note 34, at 7.

157. *See* Steiner *supra* note 36, and Escarameia, *supra* note 140.

V. CONCLUSION

This Article has sketched out some of the current practice and thinking regarding questions of constitutional compatibility with the Rome Statute. The approach to these issues reflects states' commitment to the Statute itself. Following the support for the Treaty expressed in the final vote at the Diplomatic Conference in Rome, the majority of Member States of the United Nations have become signatories to the Treaty, expressing their desire to ratify.[158] States that are able to ratify promptly and are among the first 60 states to do so, will constitute the original Assembly of State Parties. One common element in the diverse approaches adopted with respect to domestic legal complexities has therefore been the desire to ensure that the state can ratify without delay and be recorded in history as one of the permanent Court's founding members.[159]

The ICC has been broadly acclaimed as critical to the enforcement of human rights and the deterrence of future crimes, and as such to the strengthening of the principles upon which many constitutions of the world are based. Therefore, it is perhaps unsurprising that questions of constitutional compatibility have thus far been treated as challenges that must be addressed, and not as constitutional obstacles to impede early ratification.

158. *See supra* note 2 (as of August 20, 2000 there are 98 signatories to the Rome Statute). *See also* Vienna Convention on the Law of Treaties, May 23, 1969, pt. II, § 1, art. 18, 1155 U.N.T.S. 331 (on the legal significance of signature).

159. *See* Rome Statute, *supra* note 1, at art. 126.