ICRC

ADVISORY SERVICE

ON INTERNATIONAL HUMANITARIAN LAW

Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Courts and Councils of State

01/2010

This document contains a summary of methods that have been used by States to incorporate the Statute of the International Criminal Court of 1998 in full accordance with their respective constitutional frameworks governing criminal proceedings. Examples relate to judicial interpretation (Part A) and provisions included in the constitutions (Part B).

PART A

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FRANCE

Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) [*Décision 98-408 DC du 22 janvier 1999 (Traité portant statut de la Cour pénale internationale)*], *Journal officiel*, 24 January 1999, p. 1317.

INTRODUCTION

The president and the prime minister jointly requested the French Constitutional Council to rule whether ratification of the Rome Statute required revision of the constitution. Under Article 54 of the French constitution, if the Council declares that a provision of an international agreement is contrary to the constitution, the ratification or approval of the agreement may be authorized only after the constitution has been amended.

The French Constitutional Council examined a number of issues and concluded that ratification of the Statute required a revision of the constitution. The constitution was subsequently amended by inserting a new article stipulating that "the Republic may recognize the jurisdiction of the International Criminal Court as provided for in the treaty signed on 18 July 1998". France ratified the Rome Statute on 9 June 2000.

SUMMARY OF THE CONSTITUTIONAL COUNCIL'S OPINION

Irrelevance of official capacity (ICC Art. 27)

The Constitutional Council found that given the particular regimes for penal responsibility on the part of the French president, members of government and members of the Assembly as set out in Articles 26, 68 and 68-1 of France's constitution, Article 27 of the Rome Statute was incompatible with the constitution.

Complementary jurisdiction of the ICC (ICC Art. 1, 17 and 20)

The Council examined the provisions of the Rome Statute restricting application of the principle of "complementarity", in particular Article 17, which stipulates that the Court may hear cases where the State is unwilling or genuinely unable to carry out the investigation or prosecution. It considered that the restriction of the principle of "complementarity" to cases where a State deliberately evaded its obligations was derived from the *pacta sunt servanda* rule (a treaty is binding on the parties and must be executed in good faith) and was clear and well defined. As a result of those limitations, the principle did not infringe national sovereignty. Other circumstances, such as the collapse or unavailability of the national judicial system (Art. 17[3]), were similarly deemed not to infringe the exercise of national sovereignty.

Statutory limitations and amnesty

With regard to statutory limitations and amnesty, the Constitutional Council determined that since the Rome Statute allows the Court to hear cases because the application of a time bar or an amnesty has impeded prosecution at the national level, France (in circumstances other than an unwillingness or inability to investigate or prosecute) would be obliged to arrest and surrender a person for acts covered under French law by the time bar or an amnesty. Such an obligation would restrict the exercise of national sovereignty.

The ICC prosecutor's powers of investigation in the territory of a State Party (ICC Art. 54 and 99)

The Council examined the provisions of the Rome Statute on State cooperation and assistance and judged that the provisions of Chapter IX did not infringe the exercise of national sovereignty. It was also of the opinion that Article 57(3), which allows the prosecutor to take investigative steps within the territory of a State party when, in the opinion of the pre-trial Chamber, the State is clearly unable to execute a request for cooperation, does not infringe the exercise of national sovereignty. However, it considered that the powers of investigation on national territory assigned to the prosecutor under Article 99(4) were incompatible with the exercise of national sovereignty to the extent that the investigations may be carried out without the presence of French judicial authorities, even in the absence of circumstances justifying this.

Enforcement of sentences (ICC Art. 103)

Since the Statute allows States to attach conditions to their acceptance of sentenced persons for imprisonment, the Constitutional Council considered that France would be able to make its acceptance conditional on the application of national legislation on the enforcement of sentences and to state the possibility of a total or partial exemption of a sentence derived from the right of pardon. The Rome Statute's provisions on the enforcement of sentences therefore did not infringe the exercise of national sovereignty.

BELGIUM

Opinion of the Council of State of 21 April 1999 on a bill approving the Rome Statute of the International Criminal Court [Avis du Conseil d'Etat du 21 avril 1999 sur un projet de loi "portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998"], Parliamentary Document 2-239 (1999/2000), p. 94.

INTRODUCTION

Except for certain specific cases, ministers are required by law to request the opinion of the Council of State on all legislative proposals. The opinions rendered by the Council are not, however, binding in law. The opinion on the bill to approve the ICC Statute was issued following a request from the minister of foreign affairs. The proposal under review contained a provision stating that "the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, shall have full and complete effect" [*Le Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998, sortira son plein et entier effet*]. In its opinion, the Council of State examined several constitutional issues raised by the ratification of the ICC Statute and concluded that the Rome Statute was inconsistent with a number of constitutional provisions. In order to avoid amending several scattered provisions which would render the constitution difficult to understand, it suggested adding a new provision: "The State embraces the Statute of the International Criminal Court adopted in Rome on the 17 July 1998."

The Belgian government chose to ratify the Statute before the constitution was amended. It felt that since ratification by 60 States was required for the entry into force of the Statute, it had time to make the necessary constitutional and legislative adaptations if needed and that, in any case, if Belgium ratified the Statute, its provisions would have direct effect in domestic law and would prevail over any contrary legal provisions, including constitutional provisions (*Rapport fait au nom de la Commission des relations extérieures et de la défense, Exposé introductif du Vice-premier Ministre et Ministre des Affaires étrangères*, Doc. Parl. 2-329/2 [1999/2000], p. 1-5).

The Law approving the Rome Statute of the International Criminal Court adopted in Rome on 17 July 1998 [*Loi portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998*] was adopted on 25 May 1998. Belgium ratified the ICC Statute on 28 June 2000.

SUMMARY OF THE OPINION OF THE COUNCIL OF STATE

Complementary jurisdiction of the ICC (ICC Art. 1)

The Council of State noted at the outset that under Belgium's constitution a Belgian court cannot relinquish its competence in favour of the ICC. The constitution stipulates that no one may be removed against his will from the jurisdiction that the law has assigned to him ("*Nul ne peut être distrait, contre son gré, du juge que la loi lui assigne*." [Art. 13]).

Deferral of an investigation by a decision of the UN Security Council (ICC Art. 16)

The Council of State was of the opinion that if the power of the Security Council to request the deferral of an investigation or prosecution before the ICC for a renewable period of 12 months under ICC Article 16 was construed as extending to investigation and prosecution by national authorities, it would be contrary to the principle of judicial independence. It would be contrary to that principle if a non-judicial body could intervene to prevent Belgian judicial authorities from investigating or prosecuting cases. In addition, such deferral could irremediably compromise the public prosecution (in particular with regard to the collection of evidence) and imperil the right of the accused to be tried within a reasonable period.

In its explanatory notes on the draft law (*Exposé des motifs*, Doc. parl. 2-329/1, 1999/2000, p. 7), the Belgian government stated that ICC Article 16 was not to be interpreted as applicable to proceedings before national courts. On the contrary, if proceedings before the ICC were suspended, nothing would prevent competent national authorities from acting in its place.

Limitation on the prosecution of other offences (ICC Art. 108)

Similarly, the Council of State held that if ICC Article 108 was to be construed as submitting for approval by the ICC the prosecution and conviction of persons already convicted by the ICC for offences committed before their trial, that provision would be contrary to the principle of judicial independence, which is protected by Article 14 of the UN Covenant on civil and political rights (1966) and Article 151 of the Belgian constitution.

In its explanatory notes on the draft law (*Exposé des motifs*, Doc. parl. 2-329/1, 1999/2000, p. 7), the Belgian government noted that this difficulty could be overcome by adding a provision to the constitution to the effect that the State adheres to the Rome Statute.

Irrelevance of official capacity (ICC Art. 27)

The Council of State also examined the compatibility of ICC Article 27 (irrelevance of official capacity) with the immunity regimes for the King and for members of parliament, and the special procedures established for the arrest and prosecution of a member of parliament or of government (*privilèges de juridiction*). Under Belgian constitutional law, the immunity of the King is absolute. It covers both acts performed in the course of his duties and those performed outside the framework of those duties (Art. 88 of the constitution states that "la personne du Roi est inviolable ..."). Members of parliament enjoy immunity from civil and criminal responsibility for the opinions they express or votes they cast in the performance of their duties. The Council judged that ICC Article 27 was contrary to the immunities established by the Belgian constitution.

As for the *privilèges de juridiction*, the Council pointed out that the constitution required that prosecuting a member of the Chamber of Representatives or of the government must be authorized by parliament. ICC Article 27 would be inconsistent with such constitutional requirements. With regard to the penal responsibility of ministers, the Council observed that ICC Article 27 was not contrary to the constitutional provision (Art. 103) requiring that ministers be tried before the Court of Appeal, since such jurisdiction could be transferred to an institution of public international law. Nonetheless, the arrest of a minister or a summons for him to appear before the Court of Appeal required authorization by the Chamber of Representatives. A refusal by suspect's duties was final. It was practically equivalent to perpetual immunity, and thus would prevent the trial of a minister before the ICC.

In its explanatory notes on the draft law (*Exposé des motifs*, Doc. parl. 2-329/1, 1999/2000, p. 7), the Belgian government noted that adapting the constitution to accommodate ICC Article 27 could be included in the next constitutional revision, the difficulty being overcome by adding a provision to the constitution stating that the State accedes to the Rome Statute.

Enforcement of sentences: The right of pardon

The Council considered that the King's right of pardon, as provided for in Articles 110 and 111 of the Belgian constitution, was not inconsistent with the ICC Statute. Royal pardon is territorial in nature: the King may exercise his right only with regard to penalties imposed by Belgian courts.

LUXEMBOURG

Opinion of the Council of State on the draft law concerning the approval of the Rome Statute on the International Criminal Court [Avis du Conseil d'Etat portant sur un projet de loi portant approbation du Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998], 4 May 1999, No. 44.088
Doc. parl. 4502.

INTRODUCTION

The opinion on the draft law concerning the approval of the Rome Statute was issued pursuant to a request from the prime minister. The Council of State's opinion is required by law on all legislative proposals (except for urgent matters) but is not binding.

The law under review was drafted by the Ministry of Foreign Affairs and contained a single provision: "The Rome Statute of the International Criminal Court, done in Rome on 17 July 1998, is approved" [*Est approuvé le Statut de Rome de la Cour Pénale Internationale, fait à Rome, le 17 juillet 1998*]. In setting out its opinion, the Council of State examined several constitutional issues raised by ratification of the Statute and concluded that some of its provisions were contrary to the constitution. The Statute could only be ratified after a constitutional revision.

The constitution of Luxembourg was revised by the Law of 8 August 2000, on which the Council of State had issued a positive opinion on 21 March 2000. A new provision was added, stipulating that "the provisions of the constitution do not hinder approval of the Statute of the International Criminal Court, done in Rome on 17 July 1998, or actions to meet the obligations arising from the Statute according to the conditions provided therein". The law approving the Rome Statute was adopted on 14 August 2000 (*Loi du 14 août 2000 portant approbation du Statut de Rome de la Cour pénale internationale, fait à Rome, le 17 juillet 1998, Mémorial [Journal officiel du Grand-Duché de Luxembourg]*, A - No. 84, 25 August 2000, p. 1968). The Rome Statute was ratified on 8 September 2000.

SUMMARY OF THE OPINION OF THE COUNCIL OF STATE

Irrelevance of official capacity (ICC Art. 27)

The first issue addressed by the Council of State relates to the compatibility of ICC Article 27 (irrelevance of official capacity) with the immunity granted to the Grand Duke and members of parliament (*immunités*) and the special procedures for the arrest and prosecution of a member of parliament or government set forth in the constitution (*privilèges de juridiction*). With regard to the *privilèges de juridiction*, the Council pointed out the constitution's stipulation that the arrest or prosecution of a member of parliament or of government must be authorized by parliament, thus creating a potential conflict with the Rome Statute if parliament were to refuse to authorize his/her arrest or prosecution. A revision of those constitutional procedures would thus be required. With regard to the immunity of the Grand Duke, which is absolute, the Council was not entirely convinced by the view that the Grand Duke not holding powers of decision was sufficient to ensure conformity with the Rome Statute. The same would hold for the immunity of members of parliament in respect of opinions or votes expressed in the performance of their duties.

Powers of investigation of the prosecutor in the territory of a State Party (ICC Art. 54 and 99)

Unlike the French Constitutional Council, Luxembourg's Council of State was of the opinion that, given that the prosecutor's powers of investigation are based on consultations with the State concerned and in particular involve voluntary interviews, there was no incompatibility between the constitution and the Rome Statute.

Amendments to the Statute (ICC Art. 122)

With regard to the amendment procedure provided for in ICC Article 122, which does not require that amendments adopted by the Assembly of State Parties be ratified for their entry into force, the Council held that this was not incompatible with the assignment of legislative power as established in the constitution since ICC Article 122 lists exactly which provisions can be amended, and they are of an institutional nature.

SPAIN

Opinion of the Council of State of 22 August 1999 (on the Rome Statute) *[Dictamen del Consejo de Estado de 22 de Agosto de 1999 (sobre el Estatuto de Roma)*], No. 1.37499/99/MM. n° 1.374/99/MM.

INTRODUCTION

The opinion was rendered by the Standing Commission of the Council of State. The opinions of the Council of State are not binding. Under Article 95 of the Spanish constitution, the constitution must be revised before any treaty is concluded that contains provisions contrary to it.

The Council of State was of the opinion that the constitution did not constitute an obstacle to ratification of the Rome Statute, but that the *Cortes Generales* (Congress) had to authorize ratification by adopting an organic law. An organic law authorizing ratification of the Rome Statute was adopted on 4 October 2000 (*Ley orgánica 6/2000 del 4 de octubre, por la que se autoriza la ratificación por España del Estatuto de la Corte Penal Internacional*). Spain ratified the Statute on 24 October 2000.

SUMMARY OF THE OPINION OF THE COUNCIL OF STATE

Ne bis in idem (ICC Art. 17 and 20)

The ICC can determine that a case is admissible where the State is unwilling or unable to genuinely carry out the investigation or prosecution. The Council of State considered that this could be considered a transfer to the ICC of the jurisdictional powers which are the exclusive domain of the national judges and courts under the Spanish constitution. Such transfer, which is provided for in Article 93 of the Spanish constitution, implies recognition of international intervention in the exercising of the powers derived from the constitution. In particular with regard to the transfer of judicial powers, this amounts to acknowledging the existence of a jurisdiction superior to that of Spanish jurisdictional bodies, which previously had ultimate power to state the law ("*decir el derecho*").

The Council raised the issue of the application of the principle of *ne bis in idem*. This principle is considered to be protected under Article 24(1) of the Spanish constitution, which stipulates that everyone has the right to effective judicial protection for the exercise of their rights and legitimate interests. According to the Council, that right is not limited to the protection afforded by the Spanish courts but extends to jurisdictional bodies whose competence is recognized in Spain. The transfer of judicial competence to the ICC enables the ICC, in the circumstances and for the reasons provided in its governing law (duly incorporated into the Spanish legal order), to modify the decisions of Spanish bodies without infringing the constitutional right to judicial protection.

Irrelevance of official capacity (ICC Art. 27)

With regard to ICC Article 27, the Council distinguished between immunities and privileges of jurisdiction. Regarding privileges, the Council considered that transferring the exercise of jurisdictional powers to an international institution was permitted under Article 93 of the constitution. It therefore felt that non-application of the special procedural rules attached to the official capacity of persons was not contrary to the constitution, in particular Article 71, which establishes the legal status of members of the Assembly. Concerning the immunity of Assembly members with respect to their opinions expressed or votes cast within the Assembly, the Council of State judged that there was little likelihood of a clash given the nature of the crimes over which the ICC has jurisdiction, with the possible exception of direct and public incitement to genocide.

The Spanish constitution stipulates that the person of the King is inviolable and cannot incur responsibility (Art. 56). The Council observed that while the King is relieved of responsibility, all public acts performed by him have to be countersigned. It is the countersigning official who bears individual penal responsibility. Parliamentary monarchies should not, the Council felt, be seen to depart from the objectives and purposes of the Rome Statute or from the terms defining the ICC's jurisdiction. Those terms should be applied in the context of the political system of each State Party.

Life-imprisonment (ICC Art. 77, 80, 103 and 110)

ICC Article 77 stipulates that the ICC may impose a sentence of life imprisonment when this is justified by the extreme gravity of the crime and the individual circumstances of the convicted person. That provision could be considered contrary to Article 25(2) of the Spanish constitution, which stipulates that sentences restricting personal liberty must be oriented towards rehabilitation and social reintegration.

At the outset, the Council observed that ICC Article 80 stipulates that the Statute's provisions on penalties do not preclude the application of the penalties as prescribed by national law. In the case of a sentence being enforced in Spain, this clause would ensure that the constitutional principles set forth in Article 25(2) of the constitution remained unaffected. Further, ICC Article 103 allows a State to attach conditions to its acceptance of sentenced persons.

It was doubtful that the application of these precepts would prevent life sentences being handed down on Spanish nationals, especially if Spain was not the enforcing State. Nonetheless, the mechanism established in Article 110 for the review of sentences denoted a general principle tending to put a temporal limit on penalties. Thus, the constitutional requirements were met.

Powers of investigation of the prosecutor in the territory of a State Party (ICC Art. 54 and 99)

The Council considered that the powers of the prosecutor as defined in Articles 99(4), 54(2) 93 and 96 of the Rome Statute were the prerogative of the national judicial authorities. The transfer of those powers to an international organization or institution was permitted under Article 93 of the constitution.

COSTA RICA

Mandatory review of the constitutionality of the bill to approve the Rome Statute of the International Criminal Court [Consulta preceptiva de constitucionalidad sobre el proyecto de ley de aprobación del "Estatuto de Roma de la Corte Penal Internacional"], Exp. 00-008325-0007-CO, Res. 2000-09685, 1 November 2000.

INTRODUCTION

The Supreme Court's opinion was requested by the president of the Legislative Assembly pursuant to Article 96 of the *Ley de la Jurisdiccion Constitucional*. The Supreme Court's opinion is mandatory for draft constitutional amendments and draft laws ratifying international treaties.

The Court examined several ICC provisions that raised constitutionality issues. It concluded that the ICC Statute was consistent with the constitution of Costa Rica. The ICC Statute was approved by the Legislative Assembly in March 2001 (*La Gaceta*, *Diario oficial*, 20 March 2001), and Costa Rica ratified the ICC Statute on 7 June 2001.

SUMMARY OF THE SUPREME COURT'S OPINION

Extradition of nationals (ICC Art. 89)

The Court first examined the question of extraditing nationals. Under Article 32 of the constitution of Costa Rica: "no Costa Rican may be compelled to leave the national territory." The Court asserted that while the detention or extradition of aliens did not violate the constitution, the constitutionality of extraditing nationals was more doubtful. It nonetheless held that the constitutional guarantee laid down by Article 32 of the constitution was not absolute and that to determine its extent, it must be established what would be reasonable and proportionate to uphold the guarantee. In the spirit of the constitution, recognition of this guarantee should be compatible with the development of international human rights law, and the constitution should not been seen as in opposition to new developments but rather as an instrument for their promotion. The Court concluded that the new international order established by the ICC Statute to protect human rights was not incompatible with the constitutional guarantee in Article 32.

Irrelevance of official capacity (ICC Art. 27)

The second issue examined by the Court concerned the immunity enjoyed by members of the Legislative Assembly regarding the opinions that they express there (Art. 110[f] the constitution) and the required authorization of the Assembly for the prosecution of members of government for acts carried out in the performance of their duties (Art. 121[9] of the constitution). The Court held that, given the nature of the crimes contemplated in the Statute, these constitutional provisions could not be considered so sacrosanct as to impede the proceedings of an international tribunal such as the ICC. Thus, there would be no need to wait for a pronouncement by the Legislative Assembly to initiate proceedings. The Court therefore concluded that Article 27 of the Statute did not run counter to the constitution.

Life imprisonment (ICC Art. 77 and 78)

The third issue addressed by the Court concerned the sentence of life imprisonment. Article 40 of the Costa Rican constitution states that no one may be subject to lifetime punishments. Articles 77 and 78 of the Statute would, at first sight, contradict Article 40 of the constitution. However, Article 80 of the Statute also states that "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." Since the application of the penalties regulated by the Statute are thus subject to national domestic law, the constitutionality of Articles 77 and 78 ICC can be maintained. However, the extradition of a person likely to be sentenced to life imprisonment would violate constitutional principles and thus would not be possible.

ECUADOR

Report by Dr Hernan Salgado Pesante in the case No. 0005-2000-CI on the "Rome Statute of the International Criminal Court [Informe del Dr. Hernan Salgado Pesante en el caso No. 0005-2000-CI sobre el "Estatuto de Roma de la Corte Penal Internacional"], 21 February 2001.

INTRODUCTION

The request that the constitutionality of the ICC Statute be examined was presented on the basis of Articles 276(5) and 277(5) of the constitution. On 6 March 2001, the Court issued a decision stating that the ICC was compatible with the constitution. The report presented by a member of the first chamber of the Court was adopted by the Court.

SUMMARY OF REPORT PRESENTED TO THE COURT

Ne bis in idem (ICC Art. 20)

The principle of *ne bis in idem* is protected under Article 24(16) of the Ecuadorian constitution, which states that "no one shall be tried more than once for the same cause." The rapporteur was of the opinion that ICC Article 20(3), which in certain circumstances allows a person tried before a national court to be retried before the ICC, did not contradict the constitutional principle involved. It was considered that the general principles underlying the ICC Statute support the principle of *ne bis in idem* while opposing impunity. An accused who had been tried according to the rules of due process would be tried a second time by the ICC only in exceptional circumstances, i.e., those cases provided for in Article 20.

Life imprisonment (ICC Art. 77, 78 and 110)

The second issue examined was that of life imprisonment. The Ecuadorian constitution does not explicitly prohibit the imposition of life sentences. However, such a penalty could be regarded as contrary to Article 208 of the constitution, which states that the main objectives of the penal system are to reform convicts, rehabilitate them and make possible their reintegration into society. The rapporteur considered that, since ICC Article 110 provided for an "automatic" review of sentences, the sentences imposed would not be, in practice, for life or indefinite. The rapporteur also felt that, pursuant to its Statute, the ICC would have to consider treaties, principles and norms of applicable international law and interpret the Statute in accordance with human rights law. In particular, it would have to take into account the UN Covenant on civil and political rights, which establishes the principle that the main objective of a prison system is to rehabilitate. The report concluded that these provisions of the ICC Statute were compatible with the constitution of Ecuador.

Extradition of nationals (Art. 89)

Article 25 of the Ecuadorian constitution prohibits the extradition of nationals. The report noted that the main objective of this prohibition was to protect the accused. It was better for an accused person to be tried before a court in his own country than before a foreign court. Nonetheless, the ICC is not a foreign court – it was an international tribunal which represented the international community and had been set up with the consent of the States party to its Statute. Furthermore, the surrender of persons and their extradition were different legal processes. ICC Article 89 therefore did not contradict the constitution.

The prosecutor's powers of investigation in the territory of a State Party (ICC Art. 54)

The report noted that as a general rule, the Statute considers the investigation and prosecution of crimes as belonging to the duties of the public prosecutor. The powers of the ICC Prosecutor to investigate in the territory of a State Party could be viewed as a transfer to an international authority of the powers of the public prosecutor. Nonetheless, the report concluded that the prosecutor's powers of investigation must be considered as a form of international judicial cooperation.

UKRAINE

Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, 11 July 2001.

INTRODUCTION

The request for an examination of the Rome Statute's constitutionality was made by the president of Ukraine pursuant to Article 151 of that country's constitution. The president contended that several provisions of the Rome Statute were not in conformity with the Ukrainian constitution, in particular the provisions concerning the principle of complementarity, the irrelevance of official capacity, the transfer of Ukrainian citizens to the Court and the enforcement of sentences in third States. In contrast, the Ministry of Foreign Affairs argued that the Statute did not contradict the constitution.

The Court concluded that most provisions of the Rome Statute were in conformity with the constitution, except for paragraph 10 of the Preamble and Article 1, which states that the jurisdiction of the ICC "shall be complementary to national criminal jurisdictions". Under Article 9 of the constitution, the conclusion of international treaties not in conformity with the constitution can take place only after the constitution's amendment.

SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

Complementary jurisdiction of the ICC (ICC Art. 1, 17 and 20)

Article 124 of the Ukrainian constitution states that the administration of justice is the exclusive competence of the courts and that judicial functions cannot be delegated to other bodies or officials. The constitutional Court noted that the jurisdiction of the ICC under the Rome Statute was complementary to national judicial systems. However, under Article 4(2) of the Rome Statute, the ICC could exercise its functions and powers on the territory of any State Party, and under Article 17 the ICC could find a case to be admissible if the State was unwilling or unable genuinely to carry out the investigation or prosecution. The Court concluded that jurisdiction supplementary to the national system was not contemplated by the Ukrainian constitution. The constitution must therefore be amended before the Statute could be ratified.

Article 125 of the Ukrainian constitution prohibits the creation of "extraordinary and special courts". The Court held that, given that the Rome Statute was based on respect for individual rights and freedoms and included mechanisms to ensure impartial justice, the ICC could not be viewed as an "extraordinary or special court", the latter being national courts which replace ordinary courts and which do not apply established legal procedures.

The Court also held that the Rome Statute was not contrary to Article 121 of the Ukrainian constitution, which entrusts the public prosecution service with prosecuting cases on behalf of the State, since that provision concerned only the prosecution of cases before the national courts. There was no need for constitutional amendment since the provisions of the Rome Statute on cooperation and assistance could be implemented through ordinary legislation.

Irrelevance of official capacity (ICC Art. 27)

The Ukrainian constitution sets forth immunities from prosecution for the president, members of the Assembly and judges. The Court was of the opinion that Article 27 of the Rome Statute was not contrary to the immunities granted by the constitution, since the crimes subject to the jurisdiction of the ICC were crimes under international law recognized by customary law or provided for in international treaties binding on Ukraine. The immunities granted by the constitution were applicable only before national jurisdictions and did not constitute obstacles to the jurisdiction of the ICC.

Surrender of nationals (ICC Art. 89)

Article 25 of the Ukrainian constitution prohibits the surrender of nationals to another State. The Court noted that international practice distinguished between the extradition to a State and the transfer to an international tribunal. Article 25 prohibits only the surrender of a national to another State and is not applicable to a transfer to an international court, which could not be considered as a foreign court. The aim of the prohibition – the guarantee of a fair and unbiased trial – was met in the case of the ICC by means of the Statute's provisions, which were largely based on international human rights instruments and ensured a fair trial.

Enforcement of prison sentences (ICC Art. 103, 124)

Lastly, the Court examined the possibility that Ukrainian citizens serving sentences in another State may enjoy fewer human rights guarantees than those provided by the Ukrainian constitution. Article 65 of the Ukrainian constitution states that "constitutional human and citizens' rights and freedoms shall not be restricted, except in cases envisaged by the constitution of Ukraine." The Court was of the opinion that the risk of the rights and freedoms of Ukrainian citizens serving sentences in another State being more limited than those guaranteed by the Ukrainian constitution could be diminished by means of a declaration stating Ukraine's willingness to have sentenced Ukrainian citizens serve their sentences in Ukraine. It also noted the criteria to be taken into account by the Court in designating the enforcing State: the application of widely accepted international treaty standards governing the treatment of prisoners, and the views and the nationality of the sentenced person.

HONDURAS

Opinion of the Supreme Court of Justice of 24 January 2002 [*Dictamen de la Corte Suprema de Justicia del 24 de enero de 2002*].

INTRODUCTION

The opinion of the Supreme Court of Justice was issued at the request of the minister of foreign affairs.

The Court examined several provisions of the Rome Statute to determine their conformity with the constitution of Honduras, in particular the surrender of nationals, the principle of *ne bis in idem* and the immunities granted to State officials. It concluded that none of the provisions stood in the way of approval and ratification of the Statute, concerning which it consequently expressed a favourable view.

SUMMARY OF THE OPINION OF THE SUPREME COURT OF JUSTICE

The Court began by highlighting the development of international justice since the First World War and the significance of establishing the ICC, in particular with regard to the principle of *nullum crimen sine lege*. The adoption of the Rome Statute would ensure that those who in future committed acts subject to the jurisdiction of the ICC would do so in full cognizance of the unlawfulness of their conduct and would be tried pursuant to rules that were known and well established. It further observed that the crimes that came under the ICC's jurisdiction were of such gravity that they could be punished by any State regardless of the place where they had been committed, provided domestic law allowed this. If no proceedings were initiated at the national level owing to a lack of resources or political will, the crimes in question would be subject to the jurisdiction of the ICC.

Surrender of nationals (ICC Art. 89)

Article 102 of the constitution of Honduras stipulates that no Honduran national may be exiled or surrendered by the authorities to a foreign State.[1] The Court examined whether the surrender of a Honduran national to the ICC under Article 89 of the Statute would violate that provision. It concluded that it would not, since Article 89 concerned the surrender of an individual to a supranational court to whose jurisdiction Honduras would be subject after ratification of the Statute, and not the surrender of an individual to another State. In that sense, surrender of an individual to the Court could not be considered as a form of extradition.

Ne bis in idem (ICC Art. 20)

Article 95 of the Honduran constitution stipulates that no one may be tried twice for the same offence.[2] The Court examined whether there was any antinomy between that provision and Article 20(3) of the Statute, which in specified circumstances allows for trial by the ICC even if the person has already been prosecuted by a national court. It concluded that there was no antinomy, noting that the constitution clearly prohibited trial of a person twice for the same offence by a national court, but not trial by a supranational court, whose jurisdiction was different. It added that, under the Rome Statute, prosecution for an offence already tried by a national court could only take place in the cases specified in the Statute, i.e. where the proceedings had not been conducted independently or impartially in accordance with the norms of due process and had been conducted in a manner, precisely, to elude justice.

Irrelevance of official capacity (ICC Art. 27)

The Court noted that although Article 27 of the Rome Statute appeared to contradict the immunities granted to public officials by the Honduran constitution, this was not necessarily the case. If a public official was

[1] *Ningún hondureño podrá ser expatriado ni entregado por las autoridades a un Estado extranjero.*
[2] *Ninguna persona será sancionada con penas no establecidas previamente en la Ley, ni podrá ser juzgada otra vez por los mismos hechos punibles que motivaron anteriores enjuiciamientos.*

present in Honduras and was handed over after all the procedures for prosecution under domestic law had been followed, there would be no constitutional breach.

GUATEMALA

Advisory opinion of the Constitutional Court of 25 March 2002 [*Opinión consultiva de la Corte de Constitucionalidad del 25 de marzo de 2002, expediente N° 171-2002*.]

INTRODUCTION

In view of Guatemala's desire to ratify the Rome Statute, the Guatemalan president asked the Constitutional Court to issue an advisory opinion as to whether the Statute was in any way contrary to the country's constitution or to any other provision of domestic public law. The opinion issued by the Court was based on Articles 171 and 172 of the *Ley de Amparo, Exhibición Personal y de Constitucionalidad*.

The Court concluded that the Statute did not contain any provisions that could be considered incompatible with the constitution of Guatemala, in particular since the ICC was based on the principle of complementarity with national jurisdictions and its purpose was to punish anyone who undermined the peace and security of mankind, the twin pillars on which the international community – including Guatemala as an active member of that community – was founded.

SUMMARY OF THE OPINION OF THE CONSTITUTIONAL COURT

The Court noted at the outset that one of the main features of the Rome Statute was that it covered violations of both international humanitarian law and human rights law. As a multilateral treaty relating to human rights, the Statute would become part of domestic law upon its ratification and, as stipulated in Article 46 of the Guatemalan constitution, would then take precedence over all other domestic law. Thus the Statute's conformity with domestic law was entirely a matter of its compatibility with the constitution. An opinion on the compatibility of the Statute with any other norms would be irrelevant.

Complementary jurisdiction, legal status and powers (ICC Art. 1, 4, 17 and 20)

The first issue examined by the Court was the apparent contradiction between the Rome Statute and Article 203 of the constitution stipulating the exclusive exercise of judicial power by the Supreme Court of Justice and other courts set up by law.

If Guatemala accepted the possibility that it might come under the jurisdiction of an international court, it would indeed relinquish part of its sovereignty as defined in Article 171(l, 5) of the constitution. The fact that the States had empowered the ICC to exercise its jurisdiction over individuals constituted a small step forward in the development of international criminal law. However, the possibility of Guatemala coming under the jurisdiction of an international court must be construed in a manner acknowledging the fact that the State is not only a subject of international law but also a separate society, with all the accompanying features, including the system whereby justice is administered. Moreover, under the principle of complementarity laid down in its Statute, the ICC would have jurisdiction only in cases where a State was unable or unwilling to prosecute. In other words, if Guatemala duly complied with its obligation to administer justice as laid down in its constitution, the ICC would have no reason to exercise jurisdiction over it.

With regard to Article 4(2) of the Rome Statute, the Court noted that by allowing a subject of international law, in this case the ICC, to carry out its functions in the national territory, States voluntarily gave up a measure of their sovereignty. Therefore, the issue could be examined only to the extent that Guatemala was not a party to the Statute, that the Statute was in force and that a crime that came under the ICC's jurisdiction had been committed. The Court added that the ICC's jurisdiction was complementary to national jurisdictions and thus did not replace them. Article 149 of the constitution was also relevant since it stated that Guatemala must conduct its relations with other States in conformity with international principles, rules and practice.[3] Among those was recognition of subjects of public international law other than States.

[3] ***ARTICULO 149. De las relaciones internacionales.*** *Guatemala normará sus relaciones con otros Estados, de conformidad con los principios, reglas y prácticas internacionales con el propósito de contribuir al mantenimiento de la*

Jurisdiction of the ICC and the principle of legality (ICC Art. 5, 11 and 23)

The Constitutional Court noted at the outset that its opinion concerned only the crime of genocide, crimes against humanity and war crimes, and not the crime of aggression, since the latter would come under the jurisdiction of the ICC only once its definition had been agreed on by the Assembly of States Parties and the Statute consequently amended.

The crime of genocide, crimes against humanity and war crimes were outlawed and regarded by society as reprehensible in both the international and domestic realms. The Court did not feel the need to assess whether crimes falling within the jurisdiction of the Court were punishable under Guatemalan law since the Rome Statute guaranteed the principle of legality. The ICC would only have jurisdiction over cases arising after the entry into force of the Statute. Thus, the Rome Statute was perfectly compatible with Articles 15 and 17 of Guatemala's constitution, which guaranteed the non-retroactivity of criminal law and the principle of legality.

Judicial guarantees (ICC Art. 11, 20, 22, 23 and 66)

The Court then examined whether the judicial guarantees provided by the ICC were comparable to those granted under the constitution to all persons residing in Guatemala. It noted that the Rome Statute included the principles of *ne bis in idem*, *nullum crimen sine lege, nulla poena sine lege*, *in dubio pro reo*, non-retroactivity, the presumption of innocence, the right to cross-examine witnesses and other rights afforded the accused in order to ensure a genuine and effective defence, and guarantees of due process. Those provisions were in line with the rights protected under the constitution. Furthermore, the guarantees and rights incorporated into the Statute corresponded to those established in international human rights treaties which Guatemala had ratified and which expanded on the rights recognized under Article 44 of the constitution.

Enforcement of sentences (ICC Art. 77, 79 and 103)

It was argued before the Court that the provisions of the Statute empowering the ICC to order the forfeiture of proceeds, property and assets deriving directly or indirectly from a crime and their transfer to the Trust Fund were contrary to Article 41 of the Guatemala's constitution,[4] which prohibited the confiscation of property for reasons related to political activities or offences.

The Court considered, however, that those provisions of the Statute were not contrary to Article 41 since domestic law recognized that the commission of a crime gave rise to civil responsibility. On that account, the forfeiture of proceeds, property and assets deriving from a crime did not constitute a limitation on the right to property enshrined in the constitution. Similarly, the power of the ICC to transfer to the Trust Fund such proceeds, property and assets on behalf of the victims was no more than a simple way to ensure reparation of injury or prejudice suffered as the result of a crime.

Surrender of nationals (ICC Art. 89)

Although it did not refer to the "surrender" of persons to an international tribunal, the constitution did state the following in Article 27: "Extradition is governed by the provisions of international treaties. Guatemalan nationals may not be extradited for political offences. In no circumstances shall they be handed over to a foreign government, except in cases provided for in treaties and conventions with regard to crimes against humanity or breaches of international law."[5] *[ICRC translation]* The provisions of the Rome Statute were not, therefore, incompatible with the constitution.

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paz y la libertad, al respeto y defensa de los derechos humanos, al fortalecimiento de los procesos democráticos e instituciones internacionales que garanticen el beneficio mutuo y equitativo entre los Estados.

[4] ***ARTICULO 41. Protección al derecho de propiedad.*** *Por causa de actividad o delito político no puede limitarse el derecho de propiedad en forma alguna. Se prohíbe la confiscación de bienes y la imposición de multas confiscatorias. Las multas en ningún caso podrán exceder del valor del impuesto omitido.*

[5] ***ARTICULO 27. Derecho de asilo.*** *Guatemala reconoce el derecho de asilo y lo otorga de acuerdo con las prácticas internacionales. La extradición se rige por lo dispuesto en tratados internacionales.*

Availability of procedures under domestic law (ICC Art. 88)

Article 88 of the Rome Statute requires the States to ensure that there are procedures available under domestic law for all the forms of cooperation with the ICC specified in the Statute. The Court felt that such a provision was not unusual in the realm of international customs and practices. States frequently agreed to adopt legislation with respect to specialized international organizations such as the WTO and WHO. They also concluded such agreements at the national level, as Guatemala had during the peace process. Therefore, such a provision – which came as no surprise – was not contrary to the constitution.

Por delitos políticos no se intentará la extradición de guatemaltecos, quienes en ningún caso serán entregados a gobierno extranjero, salvo lo dispuesto en tratados y convenciones con respecto a los delitos de lesa humanidad o contra el derecho internacional. No se acordará la expulsión del territorio nacional de un refugiado político, con destino al país que lo persigue.

CHILE

Decision of the Constitutional Court regarding the constitutionality of the Rome Statute of the International Criminal Court of 7 April 2002 [*Decisión del Tribunal Constitucional respecto de la constitucionalidad del Estatuto de Roma de la Corte Penal Internacional, 7 de abril de 2002*]

INTRODUCTION

The Constitutional Court handed down its decision following a request submitted by 35 members of parliament representing more that one fourth of the Assembly, as provided for in Article 82(2) of the Chilean constitution. The Court had been asked to declare the Rome Statute as a whole unconstitutional.

With regard to the status of human rights treaties under domestic law, the Court reaffirmed, on the basis of a systematic and coherent examination of the relevant constitutional norms, that there was no validity to the argument that such treaties had the effect of amending provisions of the constitution that were incompatible with them or of providing an equal counterweight to such provisions. If a treaty contained provisions contrary to the constitution, it could only be validly incorporated into domestic law by means of constitutional reform.

Having concluded that the Rome Statute contained provisions that were incompatible with the Chilean constitution, the Court ruled that constitutional reform was required before the Statute could be approved by the National Congress and ratified by the president.

SUMMARY OF THE OPINION OF THE CONSTITUTIONAL COURT

Complementary jurisdiction (ICC Art. 1, 17 and 20)

The Court noted that, although Article 1 of the Statute stated that the ICC's jurisdiction was complementary to national criminal jurisdictions, the Statute did not define the nature of that complementarity. It was argued before the Court that the principle of complementarity meant that the Statute gave preference to States which, in accordance with the principles of nationality or territoriality, were in a position to exercise their domestic criminal jurisdiction to punish the crimes mentioned in the Statute. The Court noted, however, that a close examination of the Statute showed that the ICC could challenge the findings of national courts and, consequently, overturn their decisions and, in certain specific circumstances where national courts were not genuinely prosecuting, act as a substitute.

The Court therefore concluded that the jurisdiction established by the Statute, one which entitles the ICC to review national court decisions or substitute for national jurisdictions, was more than complementary. In fact, the Statute had set up a new jurisdiction that was not provided for in the Chilean constitution. Other international courts set up by treaties, such as the American Convention on Human Rights and the Statute of the International Court of Justice, did not exercise any supervisory powers over the decisions of national courts. It therefore appeared that the ICC's characteristics were those of a supranational court. For the ICC to be considered a court competent to try crimes committed in Chile, therefore, its powers should be incorporated into domestic law through a constitutional amendment.

Pardon and amnesty

The Court noted that Chile's constitution expressly designated the authorities empowered to grant pardons and amnesties. In that respect, the Statute was incompatible with the Chilean constitution since it restricted the power of the country's president to grant individual pardons and deprived the legislature of its ability to adopt laws granting general pardons or amnesties in connection with war crimes that were subject to the ICC's jurisdiction. A constitutional breach could thus occur if the ICC did not recognize pardons or amnesties granted or decreed by the competent national authorities.

Irrelevance of official capacity (ICC Art. 27)

Regarding the constitution's provisions on the privileges of parliamentarians and the prerogatives of both magistrates of superior courts and the public prosecutor (and his regional representatives), the Court found that these would be without effect under the Statute since the system of privileges and prerogatives would disappear if proceedings took place directly before the ICC. Such a result would be incompatible with the Chilean constitution.

Powers of investigation of the prosecutor in the territory of a State Party (ICC Art. 54 and 99)

The Court found that the Statute gave the ICC prosecutor certain powers to investigate in the territory of a State Party, to collect and examine evidence, to summon and question victims, witnesses and any other persons whose testimony was relevant to the investigation. Those provisions were contrary to the provisions of the constitution, which vested the public prosecutor's office with the sole and exclusive power to direct investigations of acts that constituted criminal offences.

ALBANIA

Decision No. 186 of 23 September 2002 of the Constitutional Court of the Republic of Albania.

INTRODUCTION

The Constitutional Court of the Republic of Albania decided that the constitution was in conformity with the Rome Statute of the International Criminal Court. It analysed issues pertaining to sovereignty, complementarity, immunity and the principle *ne bis in idem*. Albania ratified the Rome Statute on 31 March 2003.

SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

Irrelevance of official capacity (ICC Art. 27)

Immunities for the head of State and other State employees exist in the Albanian constitution and even though the Rome Statute does not allow such immunities, the Constitutional Court found that the Statute did not contradict the Albanian constitution in this respect. The immunity provided in the constitution was intended to protect government officials only from domestic jurisdiction. Therefore the Constitutional Court saw no problem in the ICC exercising jurisdiction for crimes covered by the Rome Statute over people enjoying immunities under national law.

The Constitutional Court added that the generally accepted rules of international law were implicitly part of the domestic law of Albania. Absence of immunity for the most heinous crimes now being recognized by international jurisprudence and by the Rome Statute, such absence was consequently and implicitly part of Albanian legislation.

Complementary jurisdiction of the ICC (ICC Art. 1, 17 and 20)

The Constitutional Court stated that the Rome Statute did not undermine the sovereignty of the Republic of Albania. In fact, the Court affirmed that the power to contract international constitutional commitments was an attribute of the exercise of State sovereignty. In Albanian constitutional law, international treaties ratified by the State were directly incorporated into national law and these treaties had priority over domestic law where the two were incompatible (Art. 122 of Albania's constitution). The Constitutional Court added that the transfer of some legal capabilities to a specific field of international interest (prosecution of serious crimes such as genocide, war crimes and crimes against humanity) did not infringe Albania's sovereignty, especially since Albania was continuously making efforts to be part of international and ''European-Atlantic structures''.

Ne bis in idem (ICC Art. 20)

The Constitutional Court found that the principle *ne bis in idem*, which was reflected in the Rome Statute, was compatible with Albania's constitution. In fact, the same principle was present in Article 34 of the constitution. Even though this article stipulated that a person could be tried again if so decided in a lawful manner by a higher court, the Constitutional Court concluded that the ICC had the character of a court of review (Art. 20 [3], a and b) and therefore constituted a highest court with regard to the crimes under its jurisdiction.

COLOMBIA

Ruling C-578/02 – Review of Law 742 of 5 June 2002 " ratifying the Rome Statute of the International Criminal Court, adopted in Rome on the 17th day of July of 1998" [*Sentencia C-578/02 - Revisión de la Ley 742 del 5 de junio de 2002 "Por medio de la cual se aprueba el Estatuto De Roma de la Corte Penal Internacional, hecho en Roma el día diecisiete (17) de julio de mil novecientos noventa y ocho (1998)"*].

INTRODUCTION

Under Article 241/10 of Colombia's constitution, the Constitutional Court must examine all international treaties signed by the executive and their respective approval laws passed by Congress. The Court exercises this function before ratification, but also after approval by Congress and the executive. It is a necessary step for the final ratification by Colombia of any international treaty.

In the case of the Rome Statute, this constitutional supervision was affected by Congress, when – as part of the process towards ratification – decided to amend the constitution, passing Legislative Act No. 2 of 2001 (27 December 2001). The Act accepts the jurisdiction of the ICC and amends Article 93 of the constitution of 1991 as follows:

"The Colombian State recognizes the jurisdiction of the International Criminal Court in the terms provided for in the Rome Statute adopted on 17 July 1998 by the United Nations Conference of Plenipotentiaries and, consequently, ratifies this treaty in accordance with the procedure laid down in this constitution.

The different approach taken by the Rome Statute to substantial matters relating to constitutional guarantees shall be accepted only in the areas governed by the Statute".

["El Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución.
"La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto a las garantías contenidas en la Constitución tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él"].

The effect of this provision is that any differences in substance between the Rome Statute and the constitution, as long as they fall within the ambit regulated by the Statute, must be deemed acceptable under Colombian law. In its judgment, therefore, the Court found it unnecessary to dwell on potential conflict between norms, but limited itself to identifying and describing those provisions in the Statute that take a "different approach" to certain constitutional guarantees, followed by confirmation of their lawfulness on the basis of Legislative Act No. 2 of 2001. The Court identified seven such differences, as follows.

SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

The principle of legality

Articles 6, 7 and 8 of the Rome Statute, which establish the international crimes over which the ICC has jurisdiction, were found to lack the "precision, certainty and clarity" required by Colombian law in order to satisfy the requirements of the principle of legality. The Constitutional Court acknowledged that this standard was lower in international law than it was in national systems. It also noted that the Elements of Crimes, not yet published at the time, would provide some of this detail.

Irrelevance of official capacity (ICC Art. 27)

Under Article 27 of the Statute, no public official may enjoy immunities before the ICC. This provision was deemed to take a "different approach" to that found in the laws on immunities enjoyed by Congressmen as well as those relating to the investigation and prosecution of other high officials.

Command responsibility (ICC Art. 28)

Article 28 of the Rome Statute established criminal responsibility for superiors, for acts or omissions, and extended that responsibility to both military and civilian authorities, *de jure* or *de facto*. This extended the command responsibility doctrine beyond the scope attained by Colombian law, which explicitly provided only for direct responsibility, and then only for official military commanders. The Court found a basis in case law for accepting the application of command responsibility to omissions, and in Legislative Act 2 for extending it to civilian authorities.

Statute of limitations (ICC Art. 29)

Crimes under the jurisdiction of the ICC may not be subject to statutes of limitations. The Court found that this rule contradicted Article 28 of the constitution and decided that such "different approach" must be applicable only when the ICC exercises its jurisdiction over such crimes, even if those same crimes would be covered by the statutes of limitations under domestic law.

Defences (ICC Art. 31[1c] and 33)

The Court found differences between Article 31(1c) of the Rome Statute – specifically on the defence of property as grounds for excluding criminal responsibility for war crimes – and Statute Article 33 on superior orders. Regarding the former, the Court referred to the four conditions set out in the Statute for its applicability: (1) the act in question must be a war crime; (2) the property defended must be "essential" for the survival of the person accused or another person or for the success of a military mission; (3) the defence must be against an unlawful and imminent use of force; and (4) the defence must be proportionate. These were found to be compatible with international humanitarian law.

As for Article 33 of the Rome Statute on superior orders, Article 91 of the constitution explicitly exonerates military personnel from criminal responsibility arising out of following an order to act. In such cases, responsibility will be borne only by the person giving the order. The Court noted, however, that Colombian jurisprudence had previously stated that Article 91 does not apply to international crimes, as this would be incompatible with international humanitarian law.

Life sentences (ICC Art. 77 [1b])

Article 34 of the constitution prohibits the imposition of life sentences. Article 77(1b) of the Rome Statute allows such penalties. Although authorized for the ICC, the Court ruled that Legislative Act No.2 must not be interpreted to allow national judges to impose life sentences for crimes falling under ICC jurisdiction.

Legal counsel (ICC Art. 61[2b] and 67[1d])

The Court interpreted Articles 61(2b) and 67(1d) of the Rome Statute as meaning that the ICC could determine whether it was in the interests of justice for an accused person to be represented by legal counsel or not. Under the Colombian constitution, however, all persons had the right to have legal counsel at all times during proceedings.

CÔTE D'IVOIRE

Constitutional Council Decision No. 002/CC/SG of 17 December 2003 on the compatibility of the Rome Statute of the International Criminal Court with the Ivorian Constitution [*Décision Conseil Constitutionnel N°002/CC/SG du 17 décembre 2003 relative à la conformité à la Constitution du Statut de Rome de la Cour pénale internationale*].

INTRODUCTION

Côte d'Ivoire signed the Rome Statute on 30 November 1998. On 11 June 2003, pursuant to Article 95 of the constitution, the Ivorian president sent a letter to the Constitutional Council requesting its opinion as to the compatibility of the Rome Statute with the constitution of 1 August 2002. According to Article 86 of the constitution, if the Constitutional Council declares that an international agreement contains a provision contrary to the constitution, a constitutional review is required before authorization to ratify it can be given.

After reviewing the provisions of the Rome Statute, the Constitutional Council concluded that the Statute was not compatible with the constitution of 1 August 2002. Consequently, the treaty could be ratified by Côte d'Ivoire only after amendment of the constitution to incorporate the Rome Statute into Ivorian law.

SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

Irrelevance of official capacity (ICC Art. 27)

The Constitutional Council took the view that Article 27 of the Rome Statute was contrary to the Ivorian constitution. According to the Constitutional Council, since the Rome Statute was applicable to everyone without any distinction based on official capacity, it was incompatible with Articles 68, 93, 109, 110 and 117 of the constitution, which provide immunities from prosecution, privileges of jurisdiction or special procedures on the basis of a person’s official capacity.

Complementary jurisdiction of the I CC, statutes of limitation and amnesty (ICC Art. 17[2])

The Constitutional Council took the view that the ICC's ability to declare admissible and try a case already pending before a national court if the ICC found that the State authorities were unable to institute proceedings (ICC Art. 17[2]) was a violation of State sovereignty. The Constitutional Council found that this provision constituted a restriction of national sovereignty since such an inability on the part of the State to prosecute might arise from the sheer legal impossibility of prosecuting, owing for example to an amnesty or a statute of limitations.

Powers of investigation of the prosecutor in the territory of a State Party (ICC Art. 54 and 99[4])

The Constitutional Council took the view that the powers conferred on the ICC prosecutor in Articles 54(2) and 99(4) of the Rome Statute to carry out investigations on the territory of a State, interview persons being investigated and visit places within that State without the knowledge of that State’s authorities would deprive the laws of that State of all effect on its own territory. Moreover, it held that this provision potentially deprived the State of any initiative and the opportunity to act in certain criminal proceedings, and that the provision therefore interfered with the exercise of national sovereignty.

Ad hoc recognition of the ICC's competence

Côte d'Ivoire has not ratified the Rome Statute. Nevertheless, in September 2003 it recognized the competence of the International Criminal Court in respect of crimes falling under its purview committed in Côte d'Ivoire since 19 September 2002. This date corresponds to the start of the armed conflict in that country. Recognition of the ICC's competence was an act performed by the executive and occurred after 11 June 2003, the date on which the president had sought the opinion of the Constitutional Council, and before 17 December 2003, when the Council issued its decision.

ARMENIA

Decision DCC-502 of 13 August 2004 taken by the Constitutional Court of the Republic of Armenia on the conformity of the obligations laid down in the Statute of the International Criminal Court (signed on 17 July 1998 in Rome) with the constitution of the Republic of Armenia.

INTRODUCTION

Armenia's president asked the country's Constitutional Court to review the constitution's conformity with the obligations laid down in the Rome Statute. Armenia signed the Statute on 2 October 1999 but has yet to ratify it.

The Constitutional Court ruled that in order to be able to comply with the obligations stated in the Rome Statute, Armenia needed to amend its constitution. Consequently, the constitution was amended on 27 November 2005. However, the president of Armenia retained the power to grant pardons and the National Assembly the power to declare amnesty. As a result, Armenia has still not ratified the Rome Statute.

SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

Complementary jurisdiction of the ICC (ICC Preamble, Part 10, and Art. 1)

Chapter 6 of Armenia's 1995 constitution contains provisions on the country's judicial organization. Article 91 stipulates that the judicial system must be administered solely by the courts in accordance with the constitution and the laws. Article 92 states that these courts are the courts of first instance, the courts of Appeal and the Court of Cassation. The Constitutional Court therefore concluded that the 1995 constitution did not allow "an international treaty to complement the system of judicial bodies exercising criminal jurisdiction with an international judicial body exercising criminal jurisdiction." Under the 1995 constitution, therefore, the ICC could not constitute a jurisdiction complementary to the Armenia courts . The Constitutional Court concluded that the constitution needed to be amended, and this was done on 27 November 2005. Article 92 was amended to include the complementarity of national courts with the ICC.

Enforcement of sentences and amnesty (ICC Art. 103 and 105)

The Constitutional Court found that the 1995 constitution was not compatible with the Rome Statute regarding amnesty and the enforcement of sentences.

Armenia's 1995 constitution empowers the president to grant pardons and the National Assembly to declare amnesty (Art. 55[17] and Art. 81[1]). Under the Rome Statute, the States are bound by the sentence given by the Court and may under no circumstances amend it. Therefore, the Constitutional Court concluded that persons under the territorial jurisdiction of Armenia but convicted by the ICC could not enjoy the right to pardon, reduced sentence or amnesty, and that it was therefore contrary to the Armenian constitution, whereas persons convicted for crimes existing in the ICC Statute but convicted by Armenian courts could enjoy such privileges.

Even though the constitution was amended on 27 November 2005, the Armenian president still has power to grant pardons (Art. 55 [17]) and the National Assembly to declare amnesty (Art. 81 [1]).

Powers of investigation of the prosecutor in the territory of a State Party (ICC Art. 54, 57[3b] and 99)

The Constitutional Court concluded that the Rome Statute did not endanger Armenia's national sovereignty and that even though the ICC prosecutor had fairly wide powers, sufficient guarantees were provided to prevent any kind of abuse.

MADAGASCAR

Decision No. 11-HCC/D1 of 21 March 2006 regarding Law No. 2005-35 authorizing ratification of the Rome Statute of the International Criminal Court [*Décision n°11-HCC/D1 du 21 mars 2006 relative à la loi n°2005-035 autorisant la ratification du Statut de Rome de la Cour Pénale Internationale*].

INTRODUCTION

The president of Madagascar asked the High Constitutional Court to examine the conformity of the Rome Statute with Madagascar's constitution before promulgation of Law No. 2005-035 authorizing the ratification of the Rome Statute.

The High Constitutional Court concluded that there was a need to review the constitution of Madagascar in order for it to be in conformity with the Rome Statute. It suggested either that the incompatible articles be changed or that an additional article be added prescribing that the Rome Statute is entirely applicable in Madagascar for crimes under the jurisdiction of the ICC.

The High Constitutional Court decided that the prescriptions not in conformity with the constitution were those related to immunity and statute of limitations. The constitution was therefore amended on 27 April 2007 and Madagascar ratified the Rome Statute on 14 March 2008.

SUMMARY OF THE HIGH CONSTITUTIONAL COURT'S OPINION

Irrelevance of official capacity (ICC Art. 27)

The High Constitutional Court decided that Article 27 of the Rome Statute was not in compliance with Madagascar's constitution because the latter stipulates immunities for those acting in official capacity (Art. 69, 81, 113 and 114 of the 1998 constitution). The 1998 constitution, therefore, needed to be amended in order to remove those immunities. This was done on 27 April 2007.

Statute of limitations (ICC Art. 29)

The High Constitutional Court considered that the setting aside of statutes of limitation stipulated in Art. 29 of the Rome Statute was not contrary to the constitution's spirit and that since it applied only to the crimes falling under the jurisdiction of the ICC, it was not incompatible with the constitution and did not require any change.

MOLDOVA

Decision for the control of the conformity with the constitution with certain provisions of the International Criminal Court, No. 22, of 2 October 2007 [*Hotarire pentru controlul constitutionalitati unor prevederi din Statutul Curtii Penale Internationale nr. 22 din 02.10.2007*].

INTRODUCTION

The government of Moldova asked the Constitutional Court on 16 July 2007 to give an opinion on whether certain provisions of the Rome Statute were in accordance with the Moldovan constitution. The Court therefore limited its opinion to the issues it was asked to consider.

After comparing the provisions of the Rome Statute with the constitution, the Constitutional Court concluded that the Rome Statute was compatible with the Moldovan constitution.

SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

Complementarity (ICC Art. 1, 4[2], 27, 81[1])

Moldova's constitution does not permit extraordinary courts. However, the Constitutional Court concluded that the ICC was not an extraordinary court. The ICC had jurisdiction over international crimes, but this did not prohibit Moldova from prosecuting the same crimes at a national level. The ICC was complementary to the Moldovan courts and would prosecute the crimes set out in the Rome Statute only if Moldova's justice system was unable or unwilling to do so. Article 18(2) of the Rome Statute also allows the State Party to ask the ICC prosecutor to hand over a case.

Irrelevance of official capacity (ICC Art. 27)

The constitution stipulates that Moldova's president, judges and members of parliament all enjoy immunity (Art. 81[2], 70[3] and 116). Nevertheless, the Constitutional Court found that the Rome Statute did not exclude or limit immunities in national law for the period during which those officials were in office or for crimes not covered by the ICC's jurisdiction.

Extradition (ICC Art. 89[1])

Moldova's constitution does not allow Moldovan citizens to be extradited. Nevertheless, the Constitutional Court drew a distinction between extradition and surrender: since the States Parties did not have to extradite people but surrender them to the ICC, this was not incompatible with the constitution.

Summary table

Issues raised regarding the Rome Statute	State	Point-by-point summary of the opinions rendered
Complementary jurisdiction of the ICC (ICC Art. 1)	**Belgium:**	The Council of State observed that a Belgian court could not relinquish its competence to the ICC since the Belgian constitution stipulated that no one may be removed against his will from the judge that the law assigned to him.
	France:	**Compatible.** That the ICC may prosecute cases in the event of a State being unwilling or unable to prosecute itself did not infringe national sovereignty.
	Ukraine:	**Incompatible.** The administration of justice was the exclusive preserve of the courts and judicial functions could not be delegated to other bodies or officials. An ICC jurisdiction supplementary to the national system was not contemplated by the Ukrainian constitution. Therefore, an amendment of the constitution was required before the Statute could be ratified.
	Guatemala:	**Compatible.** Under the principle of complementarity laid down in its Statute, the ICC would have jurisdiction only in cases where a State was unable or unwilling to prosecute. If Guatemala duly complied with its obligation to administer justice as provided for in its constitution, the ICC would have no reason to exercise jurisdiction over it.
	Chile:	**Incompatible.** The Statute had set up a new jurisdiction that was not provided for in the Chilean constitution. It appeared that the characteristics of the ICC were those of a supranational court. Therefore, for the ICC to be considered as a court competent to try crimes committed in Chile, its powers should be incorporated into domestic law by means of a constitutional amendment.
	Albania:	**Compatible.** The Court affirmed that the power to contract international constitutional commitments was an attribute of the exercise of State sovereignty. In Albanian constitutional law, international treaties ratified by the State were directly incorporated into national law and these treaties had priority over domestic law where the two were incompatible (Art. 122 of Albania's constitution). The Constitutional Court added that the transfer of some legal capabilities to a specific field of international interest (prosecution of serious crimes such as genocide, war crimes and crimes against humanity) did not infringe Albania's sovereignty.
	Côte d'Ivoire:	**Incompatible.** The ICC's ability to declare admissible and try a case already pending before a national court if it found that the State authorities were unable to carry out the proceedings (ICC Article 17[2]) was a violation of State sovereignty. It constituted a restriction on national sovereignty because such an inability to prosecute might be due to legal impossibility caused, for example, by an amnesty or a statute of limitations.
	Armenia:	**Incompatible.** The 1995 constitution did not allow "an international treaty to complement the system of judicial bodies exercising criminal jurisdiction with an international judicial body exercising criminal jurisdiction." The constitution therefore needed to be amended, and the new constitution of 27 November 2005 was amended to specify the complementarity of national courts with the ICC.
	Moldova:	**Compatible:** Moldova's constitution did not permit extraordinary courts. However, the ICC was not an extraordinary court. It had jurisdiction over international crimes but this did not prevent Moldova from prosecuting

		the same crimes at the national level. The ICC was complementary to the Moldovan courts and would prosecute the crimes set out in the Rome Statute only if those courts were unable or unwilling to do so. Article 18(2) of the Rome Statute also allowed the State Party to ask the ICC prosecutor to hand over a case.

Irrelevance of official capacity (ICC Art. 27)	**Belgium:**	**Incompatible.** Article 27 of the Statute contradicted the immunity regimes laid down by the constitution for the King and for members of parliament, as well as the penal responsibility regime for ministers.
	Costa Rica:	**Compatible.** Given the nature of the crimes covered by the ICC's jurisdiction, the penal immunity established in the constitution for members of parliament could not prevent a court such as the ICC from instituting proceedings.
	France:	**Incompatible.** Article 27 of the Statute was contrary to the particular penal responsibility regimes provided for the president and members of government and of the Assembly.
	Luxembourg:	**Incompatible.** Article 27 of the Statute was contrary to the constitution's provisions concerning arrest of members of parliament and penal immunity for the Grand Duke.
	Spain:	**Compatible.** Article 27 did not affect the exercise of immunity privileges for members of parliament, but was rather a transfer of powers to the ICC. This was permitted by the constitution. The King's immunity should not be regarded as contrary to the Statute since official acts had to be countersigned to become effective. The countersigning officials would bear individual responsibility. Parliamentary monarchies should not be viewed as departing from the objectives and purposes of the Rome Statute nor from the terms defining the ICC's jurisdiction. Those terms should be applied in the context of the political system of each State Party.
	Ukraine:	**Compatible.** Article 27 was not contrary to the immunities of the president, members of the Assembly and judges, since the crimes covered the ICC's Statute were crimes under international law and the immunities granted by the constitution were applicable only vis-à-vis national jurisdictions. They did not constitute obstacles to the ICC's jurisdiction.
	Honduras:	**Compatible.** If an official was present in Honduras and was handed over after all the procedures for prosecution under domestic law had been followed, there would be no breach of the constitution.
	Chile:	**Incompatible.** The constitution's provisions on the privileges of parliamentarians and the prerogatives of superior court judges and the public prosecutor would be without effect under the Statute since that system would disappear if proceedings took place directly before the ICC. Such a result would be incompatible with the Chilean constitution.
	Albania:	**Compatible.** The immunity provided in the constitution provided protection only from domestic jurisdiction. Therefore, there was no problem with the ICC exercising jurisdiction for crimes set out in the Rome Statute over people enjoying immunities under national law.
	Colombia:	Article 27 provided a "different approach" vis-à-vis the one found in the laws on immunity enjoyed by congressmen as well as laws governing the investigation and prosecution of other high officials. The Court did not rule on the compatibility of Article 27 owing to a previous ad hoc amendment of the constitution passed by Congress.
	Côte d'Ivoire:	**Incompatible.** Since the Rome Statute was applicable to everyone without any distinction based on official capacity, it was incompatible with Articles 68, 93, 109, 110 and 117 of the constitution, which provided for immunities from prosecution, privileges of jurisdiction and special procedures on the basis of a person’s official capacity.

	Madagascar:	**Incompatible.** The Rome Statute was incompatible with the 1998 Madagascar constitution because the latter prescribed immunities for those acting in an official capacity. The 1998 constitution therefore had to be amended to abolish those immunities. This was done on 27 April 2007.
	Moldova:	**Compatible.** The constitution stated that Moldova's president, judges and members of parliament all enjoyed immunity. Nevertheless, the Rome Statute did not exclude or limit immunities in national law for the period during which those officials were in office and for crimes not covered by the ICC's jurisdiction.

Surrender of persons to the ICC (ICC Art. 89)	**Costa Rica:**	**Compatible.** The constitutional guarantee that prohibited compelling a Costa Rican to leave the national territory against his will was not absolute. To determine the extent of its validity, it must be established what measures were reasonable and proportionate to uphold the guarantee.
	Ecuador:	**Compatible.** The extradition of nationals was prohibited under the constitution, but surrendering persons to an international tribunal was a different legal process.
	Ukraine:	**Compatible.** The surrender of nationals to another State was prohibited under the constitution. This was not, however, applicable to a person's transfer to the ICC. International practice distinguished between extradition to another State and transfer to an international court.
	Honduras:	**Compatible.** Since Article 89 concerned the surrender of an individual to a supranational court to whose jurisdiction Honduras would be subject after ratification of the Statute, and not the surrender of an individual to another State, surrender to the ICC could not be considered a form of extradition.
	Guatemala:	**Compatible.** The constitution did not refer to the "surrender" of persons to an international court. Therefore the provisions of the Rome Statute were not incompatible with the constitution.
	Moldova:	**Compatible:** Moldova's constitution did not allow Moldovan citizens to be extradited. However, there was a difference between extradition and surrender. Since States Parties were not required to extradite people to the ICC but rather to surrender them, this was not incompatible with the constitution.

Life imprisonment (ICC Art. 77, 80, 103 and 110)	**Costa Rica:**	**Compatible.** Since application of the penalties regulated by the Rome Statute were subject to national domestic law, the constitutionality of ICC Articles 77 and 78 could be maintained. However, the extradition of a person likely to be sentenced to life imprisonment would violate constitutional principles and would thus not be possible.
	Ecuador:	**Compatible.** Article 110 of the Statute allowed an automatic review of the penalties, thus avoiding in practice the imposition of life or indefinite imprisonment.
	Spain:	**Compatible.** Article 80 of the Statute stipulated that the Statute's provisions on penalties did not preclude the application of the penalties prescribed by national law. In addition, ICC Article 103 allowed a State to attach conditions to its acceptance of sentenced persons. The mechanism established in Article 110 for the review of sentences denoted a general principle tending to put a temporal limit on penalties.
	Colombia:	**Compatible.** Article 34 of the constitution prohibited life sentences whereas Article 77(1b) of the Rome Statute allowed them. Colombia's Legislative Act No. 2 could therefore not be interpreted to allow national judges to impose life sentences for crimes falling under jurisdiction of the ICC.

Powers of investigation of the ICC prosecutor in the territory of a State Party (ICC Art. 54 and 99)	**Ecuador:**	**Compatible.** Investigations by the ICC prosecutor must be considered as a form of international judicial co-operation.
	France:	**Incompatible.** The ICC prosecutor's powers of investigation on the national territory were incompatible with the constitution to the extent that the investigations could be carried out without the presence of French judicial authorities, even without circumstances that justified that absence.
	Luxembourg:	**Compatible.** The ICC prosecutor's powers of investigation on the national territory were compatible with the constitution to the extent that they were carried out after consultation between the ICC prosecutor and authorities of the State Party.
	Spain:	**Compatible.** Although the powers of the ICC prosecutor as defined in Articles 99(4), 54(2) 93 and 96 of the ICC Statute were similar to those of the national judicial authorities, Article 93 of the constitution allowed the transfer of such powers to international institutions.
	Chile:	**Incompatible.** The ICC prosecutor's powers of investigation were contrary to the provisions of the constitution, which vested the public prosecutor's office with the sole and exclusive power to direct investigations of acts constituting criminal offences.
	Côte d'Ivoire	**Incompatible.** The powers conferred on the ICC prosecutor by Articles 54(2) and 99(4) of the Rome Statute to carry out investigations on the territory of a State, interview persons being investigated and visit places within that State without the knowledge of that State's authorities would deprive the laws of that State of all effect on its own territory. Moreover, these provisions potentially deprived the State of any initiative and the opportunity to act in certain criminal procedures. They therefore interfered with the exercise of national sovereignty.
	Armenia:	**Compatible.** The Rome Statute did not pose a danger for Armenian sovereignty, and even though the ICC prosecutor had fairly broad powers, sufficient guarantees were provided to prevent any kind of abuse.

Review of the Statute (Art. 122)	**Luxembourg:**	**Compatible.** Article 122 of the Statute listed precisely which provisions could be amended, and they were of an institutional nature.

Statute of limitations (Art. 29)	**France:**	**Incompatible.** That cases could be brought before the ICC involving acts which were time-barred under national law – and without the failure to prosecute before that time bar took effect resulting from lack of will or ability to act on the State's part – constituted a basic infringement of national sovereignty.
	Colombia:	**Compatible**. Even though Article 29 of the Rome Statute contradicted Article 28 of the constitution, this "different approach" would be applicable only when the ICC exercised its jurisdiction over such crimes, even if they were covered by the statutes of limitations in domestic law.
	Madagascar:	**Compatible.** Despite the fact that the exclusion of a statute of limitations infringed both Madagascar's sovereignty and the constitutional and legal protection of the human rights and freedoms of its citizens, this exclusion applied only to crimes under the ICC's jurisdiction and therefore was not contrary to the spirit of Madagascar's constitution, which recognized the primacy of human rights and the need for impartial international justice.

Amnesty	**France:**	**Incompatible.** That cases could be brought before the ICC involving acts which were subject to amnesty under national law – and without that amnesty being due to any lack of will or ability to act on the State's part – constituted a basic infringement of national sovereignty.

	Chile:	**Incompatible.** The Statute was incompatible with the Chilean constitution since it restricted the president's power to grant individual pardons and deprived the legislature of its ability to adopt laws granting general pardons or amnesties regarding war crimes that came under the ICC's jurisdiction.
	Armenia:	**Incompatible.** Persons under Armenian territorial jurisdiction but convicted by the ICC could not enjoy both amnesty and pardon. This was contrary to Armenia's constitution, whereas persons convicted for crimes set out in the ICC Statute but convicted by national courts could enjoy these privileges. Even though the constitution was amended on 27 November 2005, the Armenian president still had power to grant pardon, while the National Assembly of Armenia had the power to declare amnesty.

Ne bis in idem *(ICC Art. 17 and 20)*	**Ecuador:**	**Compatible.** An accused person who has been tried according to the rules of due process would be tried a second time by the ICC only in exceptional circumstances. The objective of the Statute was to avoid impunity.
	Spain:	**Compatible.** The principle *ne bis in idem* was part of the constitutional right to effective judicial protection. This right was not limited to the protection afforded by Spanish courts but extended to jurisdictional bodies whose competence was recognized in Spain. The transfer of judicial competence to the ICC enabled the ICC to amend the decisions of Spanish bodies without infringing the constitutional right to judicial protection.
	Honduras:	**Compatible.** Under the Rome Statute, prosecution for an offence already dealt with by a national court could take place only in the cases specified in the Statute, i.e. where the proceedings had not been conducted independently or impartially in accordance with the norms of due process and had been conducted in a manner, precisely, to elude justice.
	Albania:	**Compatible**. The principle *ne bis in idem* was present in the constitution. Article 34 of the constitution stipulated that a person could be tried again if so decided by a higher court in accordance with the law. The ICC had the character of a court of review and therefore constituted the highest court with regard to the crimes under its jurisdiction.

Judicial guarantees *(ICC Art. 11, 20, 22, 23 and 66)*	**Guatemala:**	The judicial guarantees provided by the ICC were in line with the rights protected under the constitution. Furthermore, the guarantees and rights incorporated into the Statute corresponded to those laid down in international human rights treaties which Guatemala had ratified and which expanded the rights recognized under Article 44 of the constitution.
(ICC Art. 61[2b] and 67[1d])	**Colombia:**	Articles 61(2b) and 67(1d) of the Rome Statute were interpreted as allowing the ICC to determine whether or not it was in the interests of justice for an accused person to be represented by legal counsel. Under the Colombian constitution, all persons were entitled to legal counsel at all times during proceedings.

Deferral of an investigation by a request of the Council of Security *(ICC Art. 16)*	**Belgium:**	It was contrary to the constitutional principle of judicial independence that a non-judicial body could intervene to prevent Belgian judicial authorities from investigating or prosecuting cases. If the power of the Security Council to request the deferral of an investigation or prosecution before the ICC was construed as extending to investigation and prosecution by national authorities, it would be contrary to the principle of judicial independence.

Limitation on the prosecution or punishment of other offences (ICC Art. 108)	**Belgium:**	**Incompatible.** It was contrary to the constitutional principle of judicial independence that the ICC's approval was required to prosecute and punish other acts after a person had been tried by the ICC.

Enforcement of sentences (ICC Art. 103)	**Belgium:**	**Compatible.** The King's pardon could be granted only with regard to sentences imposed by Belgian courts.
	France:	**Compatible.** Since the Statute allowed States to attach conditions to their acceptance of sentenced persons for incarceration on their territory, France would be able to make its acceptance conditional on the application of national legislation on the enforcement of sentences and to state the possibility, derived from the right of pardon, of a sentence being totally or partially exempted.
	Ukraine:	**Compatible.** The risk that Ukrainian citizens serving sentences in another State could enjoy fewer human rights guarantees than those provided by the Ukrainian constitution could be diminished by means of a declaration stating Ukraine's willingness to have sentenced Ukrainian citizens serve their sentences in Ukraine.
	Guatemala:	**Compatible.** The provisions of the Rome Statute empowering the ICC to order the forfeiture of proceeds, property and assets deriving directly or indirectly from a crime and their transfer to the Trust Fund did not constitute a limitation on the right to property enshrined in the constitution. Similarly, the ICC's power to transfer to the Trust Fund such proceeds, property and assets on behalf of the victims was no more than a simple way to ensure reparation of injury or prejudice suffered as the result of a crime.
	Armenia:	**Incompatible.** Persons under the territorial jurisdiction of Armenia but convicted by the ICC could not benefit from the reduction of sentences provided for in the constitution. ICC Art. 103 was therefore contrary to Armenia's constitution.

Principle of legality (ICC Art. 6, 7 and 8)	**Colombia:**	Articles 6, 7 and 8 of the Rome Statute lacked the "precision, certainty and clarity" required by Colombian law to accord with the principle of legality, though the standard for this was lower in international law than in national systems. However, the Elements of Crimes would provide some of the required detail.

Command responsibility (ICC Art. 28)	**Colombia:**	Article 28 of the Rome Statute extended the command-responsibility doctrine beyond the scope attained by Colombian law, the latter explicitly providing only for direct responsibility, and then only for official military commanders. The Constitutional Court found a basis in case law for accepting the application of command responsibility to omissions, and in Legislative Act 2 for extending it to civilian authorities.

Defences (ICC Art. 31[1c] and 33)	**Colombia:**	**Compatible**. There were differences between Article 31(1c) of the Rome Statute on the defence of property as grounds for excluding criminal responsibility for war crimes and Article 33 of the Rome Statute on superior orders. For the former, Colombia's Constitutional Court referred to the four conditions found in the Statute for its applicability: (1) the act concerned must be a war crime; (2) the property defended must be "essential" for the survival of the person accused or another person or a military mission; (3) the defence must be against an unlawful and imminent use of force; and (4) the defence must be proportionate. These were found to be compatible with international humanitarian law. As for Article 33 of the Rome Statute on superior orders, Article 91 of the constitution explicitly exonerated military personnel from responsibility for criminal acts arising from an order to commit those acts. In such cases, responsibility would fall only on the person giving the order. However, Colombian jurisprudence had previously stated that Article 91 did not apply to cases of international crimes, as this would be incompatible with international humanitarian law.

PART B - CONSTITUTIONAL PROVISIONS RELATING TO THE ICC STATUTE

COLOMBIA:	**Article 93-3 and 4.** Colombia can recognize the jurisdiction of the International Criminal Court in the terms provided for in the Rome Statute adopted on 17 July 1998 by the UN Conference of Plenipotentiaries and may, as a result, ratify that treaty in conformity with the procedure laid down in the Colombian constitution. Accepting a different approach to substantial issues by the Rome Statute with respect to guarantees contained in the constitution shall have effect exclusively within the ambit of the matter regulated in it [the Statute].
FRANCE:	**Article 53-2.** France may recognize the jurisdiction of the International Criminal Court as provided for by the treaty signed on 18 July 1998.
IRELAND:	**Article 29-9.** The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998.
LUXEMBOURG:	**Article 118.** The provisions of the constitution do not hinder the approval of the Statute of the International Criminal Court, done in Rome on 17 July 1998, and the performance of the obligations arising from the Statute according to the conditions provided therein.
MADAGASCAR:	**Article 131.** The provisions of the constitution do not hinder the ratification of the Statute of the International Criminal Court, done in Rome on 17 July 1998, and the performance of the obligations arising from the Statute according to the conditions provided therein.
PORTUGAL:	**Article 7-7**. With a view to achieving international justice that promotes respect for the rights of both individuals and peoples, and subject to the provisions governing complementarity and the other terms laid down in the Rome Statute, Portugal may accept the jurisdiction of the International Criminal Court.