ICRC

ADVISORY SERVICE

ON INTERNATIONAL HUMANITARIAN LAW

Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State

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This document contains a summary of the most important issues of constitutionality raised by different national judicial and quasi-judicial bodies with regard to the ratification of the Statute for the International Criminal Court of 1998.

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INTRODUCTION

The President and the Prime Minister jointly requested the French Constitutional Council to rule whether ratification of the Rome Statute required a 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 providing that: "the Republic may recognize the jurisdiction of the International Criminal Court as provided 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 (Art. 27 ICC)

The Constitutional Council considered that, in view of the particular regimes of penal responsibility of the President of the Republic, members of Government and members of the Assembly established in Articles 26, 68 and 68-1 of the French Constitution, Article 27 of the Rome Statute was contrary to the Constitution.

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

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

Statutory limitations and amnesty

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

Powers of investigation of the Prosecutor in the territory of a State party (Arts. 54 and 99 ICC)

The Council examined the provisions of the Rome Statute on State cooperation and assistance and considered that the provisions of Chapter IX did not infringe on 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 on the exercise of national sovereignty. However, it considered that the powers of investigation on national territory attributed 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 such steps.

Enforcement of sentences (Art. 103 ICC)

Since the Statute allows States to attach conditions to their acceptance of sentenced persons, 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. Hence, the provisions of the Rome Statute relative to the enforcement of sentences do not infringe on the exercise of national sovereignty.

BELGIUM

Opinion of the Council of State of 21 April 1999 on a legislative proposal approving the Rome Statute on 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 draft law on approval of 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 adheres to 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 reckoned 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 (Art. 1 ICC)

The Council of State noted at the outset that under the Belgian Constitution a Belgian court cannot relinquish its competence in favour of the ICC. The Constitution provides that no one may be subtracted against its will from the judge 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 (Art. 16 ICC)

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 twelve months under Article 16 ICC 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 Article 16 ICC was not to be interpreted as applicable to proceedings before national tribunals. 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 (Art. 108 ICC)

Similarly, the Council of State held that if Article 108 ICC was to be construed as subjecting to the approval of 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 (Art. 27 ICC)

The Council of State also examined the compatibility of Article 27 ICC (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 committed in the performance of its duties and acts committed outside (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 was of the opinion that Article 27 ICC was contrary to the immunities established by the Belgian Constitution.

As for the *privilèges de juridiction*, the Council pointed out that the Constitution requires that the prosecution of a member of the Chamber of Representatives or of Government must be authorized by Parliament. Article 27 ICC would be inconsistent with such constitutional requirements. With regard to the penal responsibility of ministers, the Council observed that Article 27 ICC was not contrary to the constitutional provision which requires that ministers be tried before the Court of Appeal (Art. 103 of the Constitution), 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 is subject to authorization by the Chamber of Representatives. A refusal by the Chamber to grant such authorization when the acts have been committed in the performance of the suspect's duties is final. It is 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 the adaptation of the Constitution to accommodate Article 27 ICC could be provided for in the next declaration of constitutional revision. The difficulty could be 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 exercising 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 its opinion, the Council of State examined several constitutional issues raised by ratification of the Statute and concluded that some provisions thereof 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, providing that "[T]he 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", was added. 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 (Art. 27 ICC)

The first issue addressed by the Council of State relates to the compatibility of Article 27 ICC (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 that the Constitution provides 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 such 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 that the view that the Grand Duke does not hold 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 (Arts. 54 and 99 ICC)

Departing from the opinion of the French Constitutional Council, the Council was of the opinion that, given that the Prosecutor's powers of investigation were based on consultations with the State concerned and concerned in particular interviews of persons on a voluntary basis, there was no incompatibility between the Constitution and the Rome Statute.

Amendments to the Statute (Art. 122 ICC)

With regard to the amendment procedure provided for in Article 122 ICC, 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 attribution of legislative power as established in the Constitution since Article 122 ICC 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.

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 thereto.

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 the 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 (Arts. 17 and 20 ICC)

The Council of State first considered that the fact that the ICC can determine that a case is admissible where the State is unwilling or unable genuinely to carry out the investigation or prosecution 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 the recognition of international intervention in the exercise of the powers derived from the Constitution. This signifies acknowledgement, in particular with regard to the transfer of judicial powers, of the existence of a jurisdiction superior to that of Spanish jurisdictional organs, which previously had ultimate power to state the law ("*decir el derecho*").

In that context, the Council raised the issue of the application of the principle of *ne bis in idem*. The principle is considered to be protected under Article 24 (1) of the Spanish Constitution, which provides 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 organs 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 organs without infringing the constitutional right to judicial protection.

Irrelevance of official capacity (Art. 27 ICC)

With regard to Article 27 ICC, the Council distinguished between immunities and privileges of jurisdiction. In the latter case, the Council considered that the transfer of the exercise of jurisdictional powers to an international institution was permitted under Article 93 of the Constitution. Hence, the non-application of the special procedural rules attached to the official capacity of persons was not contrary to the Constitution, in particular Article 71 thereof, which establishes the legal status of members of the Assembly. With regard to the immunity of Assembly members in respect of their opinions or votes expressed within the Assembly, the Council of State reckoned 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 provides that the person of the King is inviolable and cannot incur responsibility (Art. 56). The Council observed, however, that the King was relieved of responsibility, but all public acts done by him had to be countersigned. It is the countersigning official who bears individual penal responsibility. Parliamentary monarchies should not 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 rather be applied in the context of the political system of each State party.

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

Article 77 ICC provides that the ICC may impose a sentence of life imprisonment when 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 provides that sentences that restrict personal liberty shall be oriented towards rehabilitation and social reintegration.

At the outset, the Council observed that Article 80 ICC provides that the provisions of the Statute 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, Article 103 ICC allows a State to attach conditions to its acceptance of sentenced persons.

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

Powers of investigation of the Prosecutor in the territory of a State party (Arts. 54 and 99 ICC)

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 of the competence of national judicial authorities. The transfer of those powers to an international organization or institution is permitted under Article 93 of the Constitution.

COSTA RICA

Reference on the constitutionality of the bill relative to the approval of 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 handed down as a result of a request from the President of the Legislative Assembly pursuant to Article 96 of the *Ley de la Jurisdiccion Constitucional*. The request for the advice of the Supreme Court 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 (Art. 89 ICC)

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 abandon 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 (Art. 27 ICC)

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 committed 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 (Art. 77 and 78 ICC)

The third issue addressed by the Court related to 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 condemned to life imprisonment would violate constitutional principles and thus would not be possible.

ECUADOR

Report of 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 (Art. 20 ICC)

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 Article 20(3) ICC, which in certain circumstances allows a person tried before a national court to be re-tried before the ICC, did not contradict the constitutional principle involved. It was considered that the general principles that underlie the ICC Statute support the principle of *ne bis in idem* while opposing impunity. An accused who has been tried according to the rules of due process will be tried a second time by the ICC only in exceptional circumstances, i.e., those cases provided for in Article 20.

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

The second issue examined is 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 Article 110 ICC provided for an "automatic" review of sentences, the sentences imposed would not be, in practice, life or indefinite sentences. 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 penitentiary system is the rehabilitation of convicted persons. The Report concludes that these provisions of the ICC Statute are compatible with the Constitution of Ecuador.

Extradition of nationals (Art. 89)

Article 25 of the Ecuadorian Constitution prohibits the extradition of nationals. The report notes that the main objective of the prohibition on the extradition of Ecuadorian nationals is to protect the accused. It is 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 is an international tribunal which represents the international community and has been set up with the consent of the States party to its Statute. Furthermore, the surrender of persons and their extradition are different legal institutions. Thus, Article 89 ICC does not contradict the Constitution.

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

The Report notes 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 may be seen as a transfer to an international authority of the powers of the Public Minister. Nonetheless, the Report concludes that the Prosecutor's powers of investigation must rather 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 amendment of the Constitution.

SUMMARY OF THE CONSTITUTIONAL COURT'S OPINION

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

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 is complementary to national judicial systems. However, under Article 4(2) of the Rome Statute, the ICC may exercise its functions and powers on the territory of any State party, and under Article 17, the ICC may find a case to be admissible if the State is 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. Hence, the amendment of the Constitution is required before the Statute can 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 procuracy with prosecuting cases on behalf of the State, since that provision concerns 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 (Art. 27 ICC)

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 (Art. 89 ICC)

Article 25 of the Ukrainian Constitution prohibits the surrender of nationals to another State. The Court noted that international practice distinguished between the extradition of a person to a State and the transfer of a person 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 – is met in the case of the ICC by means of the Statute's provisions, which are largely based on international human rights instruments and ensure a fair trial.

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

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 State of enforcement: 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 of the International Criminal Court (ICC) 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 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 for 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 provides that no Honduran national shall 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 Constitution of Honduras provides that no one shall be tried again 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 allowed for trial by the ICC even if the person had already been prosecuted before 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 officials in the Constitution of Honduras, this was not necessarily the case. Indeed, if an official was present in

[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.*

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 wish to ratify the Rome Statute of the International Criminal Court (ICC), the President of the Republic requested 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 as 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 – and Guatemala as active member thereof – 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 provided for in Article 46 of the Constitution, would thenceforth take precedence over all other domestic law. Thus, the conformity of the Statute with domestic law revolved solely around 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 Arts 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 of Guatemala providing for 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 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 relation to the State not only as a subject of international law but also as a social entity with all the elements thereof, including the system whereby justice was administered within its territory. 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 provided for 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 exercise its functions in the national territory, States voluntarily gave up a measure of their sovereignty. Hence, the issue could only be examined 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 would conduct its relations with other States in conformity with international principles, rules and practice.[3] Among those was the 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 Arts 5, 11 and 23)

The Constitutional Court noted at the outset that its opinion only concerned 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 legally and socially condemned in both the international and domestic realms. The Court did not feet the need to assess whether crimes coming 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, there was perfect agreement with Articles 15 and 17 of the Constitution of Guatemala, which guaranteed the non-retroactivity of criminal law and the principle of legality.

Judicial guarantees (ICC Arts 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 Arts 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 Constitution of Guatemala,[4] which prohibited the confiscation of property for reasons related to political activities or offences.

The Court considered, however, that the said 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 provide, in Article 27, the following: "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]* On the basis of the foregoing, the provisions of the Rome Statute were not 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.*
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

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

Article 88 of the Rome Statute required States to ensure that there were procedures available under domestic law for all the forms of cooperation with the ICC specified in the Statute. 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 like WTO or WHO; they also concluded such agreements at the national level, as Guatemala did during the peace process. Thus, such a provision – which came as no surprise – was not contrary to the Constitution.

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 on the constitutionality of the Rome Statute of the International Criminal Court (ICC) 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 unconstitutional as a whole.

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 one could not maintain that such treaties amended contrary constitutional provisions or were equal in rank to such provisions. If a treaty contained norms contrary to the Constitution, it could only be validly incorporated into domestic law through 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 of the Republic.

SUMMARY OF THE OPINION OF THE CONSTITUTIONAL COURT

Complementary jurisdiction (ICC Arts 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 thus concluded that the jurisdiction established by the Statute, one which entitles the ICC to revise 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 or the Statute of the International Court of Justice, did not exercise any supervisory powers over the decisions of national courts. From the foregoing, it appeared that the characteristics of the ICC were those of a supranational court. Hence, for the ICC to be considered as a court competent to try crimes committed in Chile, its powers should be incorporated into domestic law through a constitutional amendment.

Pardon and amnesty

The Court noted that the Constitution of Chile expressly designated the authorities empowered to grant pardons and amnesties. In that respect, the Statute was incompatible with Chilean constitutional norms since it restricted the power of the President of the Republic to grant individual pardons and deprived the legislature of its ability to adopt laws granting general pardons or amnesties in relation to 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)

The Court found that the provisions of the Constitution on the privileges of parliamentarians and the prerogatives of magistrates of superior courts and the public prosecutor and his regional representatives 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.

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

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 norms 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.

Recapitulative table

Issues raised with regard to the Rome Statute	State	Some points of the opinion rendered
Complementary jurisdiction of the ICC (Art. 1 ICC)	**Belgium:**	The Council of State observed that a Belgian tribunal cannot relinquish its competence in favour of the ICC under the Belgian Constitution which provides that no one may be subtracted against its will from the judge that the law assigned to him.
	France:	**Compatible.** That the ICC may admit cases where the State is unwilling to prosecute or unable to carry out proceedings, does not infringe on the exercise of national sovereignty.
	Ukraine:	**Incompatible.** The administration of justice is the exclusive competence of the courts and judicial functions cannot be delegated to other bodies or officials. The jurisdiction of the ICC, when supplementary to the national system, was not contemplated by the Ukrainian Constitution. Hence, the amendment of the Constitution is required before the Statute can 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. Hence, for the ICC to be considered as a court competent to try crimes committed in Chile, its powers should be incorporated into domestic law through a constitutional amendment.
Irrelevance of official capacity (Art. 27 ICC)	**Belgium:**	**Incompatible.** Article 27 of the Statute contradicts the constitutional regimes of immunity for the King and for members of Parliament, as well as the penal responsibility regime of ministers.
	Costa Rica:	**Compatible.** The penal immunity of members of Parliament established in the Constitution cannot prevent the institution of proceedings by a tribunal such as the ICC given the nature of the crimes subject to the jurisdiction of the ICC.
	France:	**Incompatible.** Article 27 of the Statute is contrary to the particular regimes of penal responsibility of the President, members of Government and of the Assembly.
	Luxembourg:	**Incompatible.** Article 27 of the Statute is contrary to the provisions concerning the arrest of members of Parliament and the penal immunity of the Grand Duke.
	Spain:	**Compatible.** Article 27 does not affect the exercise of immunity privileges of members of Parliament, but consists of a transfer of powers to the ICC, which is permitted by the Constitution. The immunity of the King should not be regarded as contrary to the Statute since official acts have to be countersigned to become effective. The countersigning officials would bear individual responsibility. Parliamentary monarchies should not be seen as departing from the objectives and purposes of the Rome Statute nor from the terms defining the ICC's jurisdiction, those terms should rather be applied in the context of the political system of each State party..

	Ukraine:	**Compatible.** Article 27 is not contrary to the immunities of the President, Members of the Assembly and judges, since the crimes subject to the jurisdiction of the ICC are crimes under international law and the immunities granted by the Constitution are only applicable before national jurisdictions. They do not constitute obstacles to the jurisdiction of the ICC.
	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 constitutional breach.
	Chile:	**Incompatible.** The provisions of the Constitution on the privileges of parliamentarians and the prerogatives of magistrates of superior courts 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.

Surrender of persons to the ICC *(Art. 89 ICC)*	**Costa Rica:**	**Compatible.** The constitutional guarantee that prohibits compelling a Costa Rican to leave the national territory against his will is not absolute and that to determine its extent, it must be established what measures were reasonable and proportionate to uphold the guarantee.
	Ecuador:	**Compatible.** The extradition of nationals is prohibited under the Constitution, but the surrender of persons to an international tribunal is a different legal institution.
	Ukraine:	**Compatible.** The surrender of nationals to another State is prohibited under the Constitution. That provision is, however, not applicable to the transfer of person to the ICC. International practice distinguishes 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. In that sense, surrender of an individual to the Court could not be considered as a form of extradition.
	Guatemala:	**Compatible.** The Constitution did not refer to the "surrender" of persons to an international tribunal. Hence, the provisions of the Rome Statute were not incompatible with the Constitution.

Life imprisonment *(Art. 77, 80, 103 and 110 ICC)*	**Costa Rica:**	**Compatible.** Since the application of the penalties regulated by the Statute are 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 condemned to life imprisonment would violate constitutional principles and thus would not be possible.
	Ecuador:	**Compatible.** Article 110 of the Statute allows an automatic revision of the penalties, thus avoiding in practice the imposition of life or indefinite imprisonment.
	Spain:	**Compatible.** Article 80 of the Statute provides that the provisions of the Statute on penalties do not preclude the application of the penalties prescribed by national law. In addition, Article 103 ICC allows a State to attach conditions to its acceptance of sentenced persons. The mechanism established in Article 110 for the review of sentences denotes a general principle tending to put a temporal limit on penalties.

Powers of investigation of the Prosecutor in the territory of a State party (Art. 54 and 99 ICC)	**Ecuador:**	**Compatible.** Investigations by the Prosecutor must be considered as a form of international judicial co-operation.
	France:	**Incompatible.** The Prosecutor's powers of investigation on the national territory are incompatible with the Constitution to the extent that the investigations may be carried out without the presence of French judicial authorities, even in the absence of circumstances justifying such steps.
	Luxembourg:	**Compatible.** The Prosecutor's powers of investigation on the national territory are compatible with the Constitution to the extent that they are carried out after consultations between the Prosecutor and authorities of the State party.
	Spain:	**Compatible.** Although the powers of the Prosecutor as defined in Articles 99 (4), 54(2) 93 and 96 of the ICC Statute are of the competence of national judicial authorities, Article 93 of the Constitution allows the transfer of such powers to international organizations or institutions.
	Chile:	**Incompatible.** The Prosecutor's powers of investigation are contrary to the norms 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.

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

Statute of limitations	**France:**	**Incompatible.** That the Court could be seized where the acts are time-barred under national law, and without it being the result of lack of will or capacity of the State, infringes the essential conditions of the exercise of national sovereignty.

Amnesty	**France:**	**Incompatible.** That the Court could be seized where the acts are covered by amnesty under national law, and without it being the result of lack of will or capacity of the State, infringes the essential conditions of the exercise of national sovereignty.
	Chile:	**Incompatible.** The Statute was incompatible with Chilean constitutional norms since it restricted the power of the President of the Republic to grant individual pardons and deprived the legislature of its ability to adopt laws granting general pardons or amnesties in relation to war crimes that were subject to the ICC's jurisdiction.

Ne bis in idem (Art. 17 and 20 ICC)	**Ecuador:**	**Compatible.** An accused who has been tried according to the rules of due process will be tried a second time by the ICC only in exceptional circumstances. The objective of the Statute is to avoid impunity.
	Spain:	**Compatible.** The principle *ne bis in idem* is part of the constitutional right to an effective judicial protection. Such right is not limited to the protection afforded by Spanish courts but extends to jurisdictional organs whose competence is recognized in Spain. The transfer of judicial competence to the ICC enables the ICC to modify the decisions of Spanish organs without infringing the constitutional right to judicial protection.
	Honduras:	**Compatible.** 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.

Judicial guarantees (Arts 11, 20, 22, 23 and 66 ICC)	**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 established in international human rights treaties which Guatemala had ratified and which expanded on the rights recognized under Article 44 of the Constitution.

Deferral of an investigation by a request of the Council of Security (Art. 16 ICC)	**Belgium:**	It is contrary to the constitutional principle of judicial independence that a non-judicial body may 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 independence of justice.

Limitation on the prosecution or punishment of other offences (Art. 108 ICC)	**Belgium:**	**Incompatible.** It is contrary to the constitutional principle of independence of justice that the approval of the ICC is required for the prosecution and punishment for other acts after a person has been tried before the ICC.

Enforcement of sentences (Art. 103 ICC)	**Belgium:**	**Compatible.** The King's pardon can only be exercised with regard to sentences imposed by Belgian courts.
	France:	**Compatible.** Since the Statute allows States to attach conditions to their acceptance of sentenced persons, France will 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.
	Ukraine:	**Compatible.** The risk that Ukrainian citizens serving sentences in another State may 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 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 do 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.