

AUT DEDERE AUT JUDICARE: CONSTITUTIONAL PROHIBITIONS ON EXTRADITION AND THE STATUTE OF ROME

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Article abstract

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The prohibition on extradition sits at the extreme end of a spectrum of provisions relative to mobility rights afforded to citizens within a great number of national constitutions. These dispositions vary in intensity. While some simply assert the citizens' right to move about the national territory and to enter or leave it freely, others aim explicitly at shielding citizens from prosecution in external jurisdictions. After examining the respective ways in which States have addressed potential impediments to the surrender of individuals to the ICC, the author makes a case for constitutional amendment in order to ensure full compliance.

AUT DEDERE AUT JUDICARE: CONSTITUTIONAL PROHIBITIONS ON EXTRADITION AND THE STATUTE OF ROME

*By Paul Rabbat**

In many States, the ratification of the Rome Statute of the International Criminal Court raises the issue of the statute's compatibility with certain dispositions of the national constitution. The potential issues of constitutional incompatibility are generally within one of the following categories: prohibitions on extradition, constitutional immunities from criminal prosecution, prohibitions on life imprisonment and concerns as to due process. The scope of this paper is limited to the first of these issues. The ICC will not prosecute individuals in absentia and will rely heavily on State cooperation to gain physical custody of suspects. In the author's view, this reality renders the removal of impediments to prosecution all the more essential.

The prohibition on extradition sits at the extreme end of a spectrum of provisions relative to mobility rights afforded to citizens within a great number of national constitutions. These dispositions vary in intensity. While some simply assert the citizens' right to move about the national territory and to enter or leave it freely, others aim explicitly at shielding citizens from prosecution in external jurisdictions. After examining the respective ways in which States have addressed potential impediments to the surrender of individuals to the ICC, the author makes a case for constitutional amendment in order to ensure full compliance.

Dans plusieurs États, la ratification du Statut de la Cour pénale internationale a soulevé la question de la compatibilité du Statut avec certaines dispositions de la constitution nationale. Les dispositions constitutionnelles susceptibles de donner lieu à une incompatibilité se retrouvent généralement dans l'une des catégories suivantes : prohibition de l'extradition, immunités de poursuites pénales, prohibition de l'emprisonnement à perpétuité et garanties dans la procédure pénale. Cet article traite de la première de ces catégories. Le Statut de la CPI exige de façon impérative la présence de l'accusé à son procès. Le succès de la Cour dépendra fortement de la coopération des États et nécessite donc l'élimination de toutes entraves potentielles à l'exercice de la compétence de la Cour.

La prohibition de l'extradition se situe à l'extrême d'un échelon de droits relatifs à la mobilité des citoyens présents dans plusieurs constitutions nationales. Ces dispositions sont d'une intensité variable. Alors que certaines ne font qu'affirmer le droit du citoyen de se déplacer ou de s'établir à l'intérieur de son État et d'y entrer ou sortir librement, d'autres visent expressément à le soustraire de toutes poursuites pénales dans une juridiction externe. Après avoir examiné les différentes approches adoptées par les États visant à éliminer les obstacles constitutionnels à une pleine coopération avec la CPI, l'auteur plaide en faveur de l'amendement constitutionnel.

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I. Introduction

International criminal law moved a step closer towards adulthood with the entry into force of the Statute of the International Criminal Court on the 1st of July 2002. The Statute provides for the creation of a permanent forum in which the perpetrators of the "most serious crimes of concern to the international community as a whole"¹ will be brought to justice.

The drive towards what has been termed a "culture of accountability" which seemed to be gaining momentum in the wake of the Nuremberg and Tokyo trials, was one of the most significant casualties of the Cold War. In a world so ideologically and politically polarized, stuck in a struggle in which the developing world held the balance of power, an initiative such as the creation of an International Criminal Court was unthinkable. Governments of both sides of the East and West block were more intent on forming coalitions to consolidate their respective positions than with taking appropriate steps to combat atrocities in distant lands (when they were not of course, contributing to such atrocities).

This Cold War *realpolitik* led Western democracies to court rather questionable bedfellows and in exchange for their support, to turn a blind eye to flagrant human rights abuses. Once the Cold War had ended, the issue of punishing those responsible for atrocities slowly resurfaced². The advent of ethnic conflict in the former Yugoslavia and Rwanda reminded the international community of the horrors of the past and the promise of "never again" relegated to the *oubliettes* during the Cold War.

In the aftermath of the horrific events in these two countries, the Security Council faced with growing international concern, created two *ad hoc* tribunals to bring those responsible to justice. The growing success of these bodies further galvanized the push for the creation of a permanent tribunal. The shortcomings of the ICTY³ and ICTR⁴, namely their lack of legitimacy in the eyes of many, profoundly influenced the form the new court would take.

Despite some politically motivated criticism, it is hoped that the International Criminal Court will not only serve a punitive function, but will also deter the commission of future crimes not only through the action of the ICC itself, but through an increased commitment by State Parties to prosecute internally. However, as Bassiouni has pointed out:

¹ *Rome Statute of the International Criminal Court*, 17 July 1998, U.N. Doc. A/CONF.183/9, preamble [*Rome Statute*].

² William Schabas, *Introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 2001) at vii [Schabas].

³ *International Criminal Tribunal for Yugoslavia*, SC Res. 808, UN SCOR, 48th Sess., Annex, at 20, UN Doc. S/23274 (1993) [ICTY].

⁴ *International Criminal Tribunal for Rwanda*, SC Res. 955, UN SCOR, 49th Sess., UN Doc. S/Res/955 (1994) [ICTR].

[...] general deterrence is only as effective as the likelihood of prosecution and punishment. The latter however depend upon the existence of a forum of prosecution and an enforcing authority to carry out the eventual sanctions meted out to convicted offenders and that means an international criminal jurisdiction and/or universal jurisdiction to be exercised by national criminal justice systems.⁵

The States participating in the Rome Conference leading to the adoption of the Statute had a significant barrier to overcome, that of reconciling their vastly divergent legal systems in a cohesive manner that would lead to consensus. This was all the more important since the Statute explicitly prohibits reservations⁶. This, take it or leave it, approach placed a larger onus on States to cooperate and to make the necessary concessions to arrive at consensus. The result is, in the words of Helen Duffy: “[...] a system that carries the imprimatur of many legal systems and closely resembles none”⁷.

The very fact that an agreement was reached at all is impressive considering that at the opening of the diplomatic conference on the 15th of June 1998, the draft proposal was riddled with over 1 400 square brackets indicating potential points of disagreement⁸. It also bears noting that the Statute was able to garner broad based support, having been adopted by a margin of 120 votes for, 7 against and 21 abstentions. This speaks to the determination of the delegates and the genuine resoluteness of participating States not to leave Rome empty handed. It further underscores the importance that the International Community ascribes to bringing to justice those who would otherwise go unpunished and be allowed to pursue their reprehensible policies with complete impunity.

The debate over many of the issues of contention that were raised during the negotiating phase resurfaced in national capitals throughout the world as the ratification process began. In many instances, the ratification of the ICC Statute presented certain difficulties in signatory States with regard to its compatibility with certain provisions of the national constitution⁹.

The potential issues of constitutional incompatibility were numerous but were generally within one of the following categories: prohibitions on extradition, constitutional immunities against criminal prosecution, prohibitions on life imprisonment and concerns as to due process such as the absence of trial by jury¹⁰. At

⁵ Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (The Hague: Kluwer Law International, 1999) at 217-218.

⁶ *Rome Statute*, *supra* note 1 at art. 120.

⁷ Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, (2000) 11 Duke J. Comp. & Int'l L. 6 [Duffy].

⁸ Sharon Williams, *The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond*, (2000) 38 no.2 Osgoode Hall L. J. 305 [Williams].

⁹ Duffy, *supra* note 7 at 6; Council of Europe, Venice Commission, 2000 45th Plenary Meeting, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court*, CDL-INF (2001) 1.

¹⁰ *Ibid.* at 2.

the time of writing, 87 States have ratified the Rome Statute¹¹. Of these State Parties, a significant number were faced with one or more potential incompatibilities between the Statute and its national constitution.

Of the issues cited above, we have chosen to focus on the issue of national constitutional prohibitions on extradition as it relates to ratification of the Statute of Rome. The ICC will not prosecute *in absentia*¹². The cooperation of States is therefore paramount in ensuring that the Court gains physical custody of the suspect. The ICC's success is therefore inextricably linked to the cooperation of State Parties.

With this in mind, the question arises as to how the absolute obligation that State Parties have to cooperate with the Court can be reconciled with an inability to grant it custody of accused individuals because of constitutional prohibitions on extradition.

Numerous States have been grappling with this issue since the conclusion of the negotiations in Rome. The ways in which they have modified (or circumvented) constitutional provisions in apparent conflict with the Statute, therefore allowing them to ratify, are varied.

As we shall see, using specific examples, numerous factors have influenced the particular approach States have chosen to adopt. Among these are: the *sui generis* nature of the ICC; the ease with which the national constitution can be amended; the wording of the potentially incompatible constitutional disposition; the role ascribed to treaties in the internal legal order (particularly those related to human rights) as well as a variety of policy related considerations¹³.

In order to fully appreciate the issue of incompatibility between national constitutions and the Statute of Rome, it is first imperative to outline certain fundamental characteristics of the Statute and of the judicial body it creates, as well as the nature and the historical underpinnings of constitutional prohibitions on extradition. We shall then examine selective examples, which serve to illustrate the diffuse approach adopted by ratifying States.

II. The Compatibility of National Constitutions with the Rome Statute

A. Fundamental Characteristics of the Rome Statute

The Rome Statute provides that the Court shall have jurisdiction over the crime of genocide, crimes against humanity, war crimes as well as the crime of aggression once the Assembly of State Parties adopts a definition thereof.

¹¹ As of January 1st, 2003.

¹² *Rome Statute*, *supra* note 1 at art. 63 (1): "The accused shall be present at the trial".

¹³ Duffy, *supra* note 7; see *infra* note 14 at 80.

There was a strong desire among certain States attending the Rome Conference to include "treaty based crimes" such as terrorism and drug trafficking in the list of crimes within ICC jurisdiction. It was however agreed that, due to the limited time frame of the negotiations and the complexity of these issues, the inclusion of these crimes would be decided upon by the Assembly of State Parties at a subsequent review conference¹⁴. Although the Court will not have jurisdiction over crimes which occurred before the Statute's entry into force¹⁵, there is no statute of limitation for the prosecution of crimes committed thereafter¹⁶. The Statute also applies to both conflicts of an international and internal nature.

Article 89 imposes an unqualified obligation upon State Parties to fully cooperate with the Court in the arrest and transfer of suspects to The Hague. Article 27 affirms that immunities from prosecution stemming from an official capacity of any kind may not be used to escape criminal responsibility, nor does the presence of such an immunity, whether in national or international law, relieve the State Party of its obligation under article 89.

This approach is consistent with that of other international instruments. The Charter of the Nuremberg Tribunal states: "The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment"¹⁷. The Genocide Convention provides that: "Persons committing genocide shall be punished whether they are constitutionally responsible rulers, public officials or private individuals"¹⁸. The Convention against Torture also does not provide exceptions to the obligation to extradite based on official rank by including in the definition of torture "pain or suffering [...] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"¹⁹. This is also the position taken in the respective Statutes of the two *ad hoc* tribunals²⁰. The Statutes of both the ICTR and the ICTY state that: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment"²¹.

Article 27 must however be read with article 98, which provides that the Court cannot proceed with a request for surrender or assistance, where such a request

¹⁴ Bruce Broomhall, "The International Criminal Court: Overview and cooperation with States" in Cherif Bassiouni, dir., *ICC Ratification and National Implementing Legislation* (New York: Nouvelles Études Pénales, 1999) at 45 and 61 [Broomhall].

¹⁵ *Rome Statute*, *supra* note 1 at art. 11.

¹⁶ *Ibid.* at art. 29.

¹⁷ *Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 280 at art. 7.

¹⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 278 at art IV.

¹⁹ *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 113 at art. I.

²⁰ See also Indictment, *Prosecutor v. Milosevic*, (1999) Case No. IT-99-37 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

²¹ *ICTY*, *supra* note 3 at art. 7 (2); *ICTR*, *supra* note 4 at art. 6 (2).

would oblige the requested State to act in violation of its international obligations with respect to diplomatic or State immunity of a third State. In order to do so, the Court must first obtain a waiver of the immunity from the accused person's State of nationality. Rather than breaking with the general rule of the irrelevance of official capacity for the *prosecution* of crimes, this disposition simply imposes certain conditions in the *arrest* and *transfer* of accused individuals to the ICC. Article 98 reasserts the principle of diplomatic immunity as set forth in the Vienna Convention on Diplomatic and Consular Relations²², which states *inter alia*:

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. [...]

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.
[...]
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity [...] may be waived by the sending State.
2. Waiver must always be express.

This framework does not preclude a State Party from arresting and surrendering an individual having diplomatic immunity to The Hague but rather imposes an obligation upon it to do so in a manner consistent with international law. Article 98 is therefore not intended as a means for an accused individual to escape prosecution, but rather as a safeguard for the maintenance of effective diplomatic relations between States.

This finality of diplomatic immunity was notably reaffirmed by the ICJ in *Democratic Republic of Congo v. Belgium*²³:

In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. [...] [A] Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is

²² *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95-239.

²³ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, [2002] I.C.J. Rep. 837 [Republic of Congo v. Belgium].

recognized under international law as representative of that State solely by virtue of his or her office.²⁴

In this case, the Court quashed a Belgian arrest warrant against the Minister of Foreign Affairs of Congo for alleged grave breaches of the Geneva Conventions and additional protocols. Belgium had contended that international law had evolved in such a way as to create an exception to the general immunity from criminal jurisdiction with regard to war crimes and crimes against humanity. This interpretation was rejected by the Court, which ruled that international customary law did not provide for such an exception where national courts were concerned²⁵.

In its judgment, the Court warned against equating immunity from national prosecutions with impunity. It referred to circumstances in which an individual benefiting from such immunities could nonetheless be brought to trial. Among them, was the possibility of prosecution before the ICC because, as the Court observed, article 27 of the Statute affirms the irrelevance of official capacity²⁶. As Cassese aptly points out:

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.²⁷

It is however important to note that while the procedural/substantive dichotomy exposed by Cassese seems sound, one must also consider the practical implications of jurisdictional immunities. Indeed, the theoretical distinction between what is substantive and what is procedural may, in practice, appear blurred when

²⁴ *Ibid.* at para. 53.

²⁵ *Ibid.* at para. 58: Although *Congo v. Belgium* was seen as innovative in so far as it defined the scope of the jurisdictional immunities conferred upon a Foreign minister, the decision sparked much debate in scholarly circles. Certain issues addressed by the Court were particularly controversial. Among them: the existence of an exception to jurisdictional immunity before national courts in the context of grave international crimes; the distinction between acts committed in an 'official capacity' as opposed to a 'private capacity', and; whether the ICJ should have ruled on the validity of the exercise of 'universal jurisdiction' by national courts. See for example: Antonio Cassese, "When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case", online : European Journal of International Law <<http://www.ejil.org/journal/curdevs.html#TopPfPage>> [Cassese "Some Comments"]; Joe Verhoeven, "Mandat d'arrêt international et statut de ministre", online : Actualités et droit international (RIDI) <<http://www.ridi.org/adi/articles/2002/200205ver.htm>> ; Virgile Renaudie, "Quelques réflexions suite à la lecture de l'arrêt de la CIJ du 14 février 2002", online : Revue de l'actualité juridique française <http://www.rajf.org/article.php3?id_article=508>; Jean-Pierre Quéneudec, "Un arrêt de principe : l'arrêt de la CIJ du 14 février 2002", online : Actualités et droit international <<http://www.ridi.org/adi/articles/2002/200205que.htm>>.

²⁶ *Republic of Congo v. Belgium*, *supra* note 23 at paras 60 and 61.

²⁷ Cassese "Some Comments", *supra* note 25.

excessive procedural impediments significantly affect the likelihood and viability of prosecution.

1. COMPLEMENTARITY

One of the most important features of the Statute of Rome is the principle of complementarity. The inclusion of this concept was an essential tool in avoiding potential gridlock in the negotiations owing to concerns relating to State sovereignty.

Complementarity is perhaps among the most striking differences between the two *ad hoc* tribunals and the ICC. While the former are *primary* jurisdictions²⁸ for the prosecution of individuals involved in atrocities in Yugoslavia and Rwanda, the latter will have jurisdiction in a purely "*complementary* capacity". Thus, primary responsibility to prosecute the crimes provided for in the Statute remains that of the State Party and not, as is the case with the ICTR and ICTY, in the hands of the Court.

William Schabas has observed that the term "complementarity" may not accurately describe the dynamic set forth in the Rome Statute as:

[W]hat is established is a relationship between international justice and national justice that is far from complementary. Rather, the two systems function in opposition and to some extent, hostility with respect to each other.²⁹

Indeed, the ICC may only exercise jurisdiction when States are "genuinely unable or unwilling" to do so themselves³⁰. The relationship between national legal orders and the ICC can be seen as mutually exclusive and somewhat antagonistic. Barring the scenario of a "sham trial", the exercise of State jurisdiction will preclude the ICC from acting.

This also allows the State Party choosing to prosecute domestically a certain flexibility in affording its nationals specific constitutional guarantees, which may not be included in the Statute, most notably with regards to criminal procedure and sentences³¹.

²⁸ *ICTY*, *supra* note 3 at art. 9(2) of the Statute of the ICTY; *ICTR*, *supra* note 4 at art. 8(2) which states: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

²⁹ Schabas, *supra* note 2 at 67.

³⁰ *Ibid.* at 68: Former Prosecutor Louise Arbour, has expressed concerns about the potential for inequity in the application of art 17. She contends it would be easier to challenge the adequacy of legal systems in the Developing World in the prosecution of accused individuals in developing States.

³¹ Examples of this are numerous. The Statute does not provide for trial by jury, which is explicitly enshrined in many national constitutions. The State choosing to prosecute an individual within the domestic legal order would therefore theoretically be able to grant that individual such a trial whereas

Many States participating in the Rome Conference felt that the gravity of the crimes within the Court's purview warranted the explicit inclusion of capital punishment in the array of possible sentences. Others were not only opposed to the death penalty but also to the inclusion of life imprisonment, a sanction forbidden by their constitutional legislation. The result of this ideological tug of war was article 80, which provides that States are free to apply penalties prescribed in the national law. Thus, because of complementarity, many substantial issues of contention, which could have led to the collapse of the negotiations, were circumvented. The compromise achieved through the inclusion of complementarity was at the expense of granting the ICC primary jurisdiction which would undoubtedly have led to a greater effectiveness in the prosecution of the crimes within its mandate.

The viability of complementarity rests on the assumption that States will be able to prosecute individuals internally and if there is an impediment to them doing so, they will fully cooperate with the ICC to ensure the surrender of that individual to The Hague.

Legal publicists such as Cassese argue that complementarity may potentially hamper the efficiency of the ICC:

Complementarity might lend itself to abuse. It might amount to a shield used by states to thwart international justice. This might happen with regard to those crimes (genocide, crimes against humanity) which are normally perpetrated with the help and assistance, or the connivance or acquiescence, of national authorities. In these cases, state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons.³²

This dire prediction would allow accused persons to escape justice with the help of State officials. We need to keep in mind however, that article 17 provides that:

Article 17

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

[...]

- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

[...]

ICC would not. As per applicable sentences, the death penalty was consciously omitted in the list of sanctions at the disposal of the Court at *Rome Statute*, *supra* note 1 at art. 77.

³² Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 E.J.I.L. 159.

Article 17(2) enumerates factual circumstances, which having regard to international law standards of due process, may lead to a finding of unwillingness to prosecute:

Article 17

2. [...]

- (a) The proceedings were or are being undertaken or the national decision was made for the person of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner in which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Although Cassese's fears may well be warranted, the Statute provides for safeguards which allow the Court to appraise the legitimacy of the national prosecution at the request of the prosecutor. If it is found that a "sham" trial was conducted, the prosecutor will need to convince the Court of the State's refusal to genuinely prosecute in order for it to assume jurisdiction. In order to conduct a trial however, the Court will need to gain physical custody of the suspect for, as previously mentioned, art. 63(1) of the Statute prohibits prosecutions *in absentia*. This may be problematic as one might safely assume that a State wishing to shield a particular individual from prosecution will no doubt be very reluctant to hand that individual over to the ICC.

This brings to light a fundamental weakness of the Rome Statute, namely the fact that the ICC will not have universal jurisdiction. Ratner and Abrams explain universal jurisdiction in the following terms:

[T]he universality principle permits a State to exercise jurisdiction over perpetrators of certain offences considered particularly heinous or harmless to mankind, regardless of any nexus the State may have with the offence, the offender, or the victim.³³

³³ Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law; Beyond the Nuremberg Legacy*, (New York: Oxford University Press, 2001) at 161; Lyal S. Sunga, *The Emerging System of International Criminal Law; Developments in Codification and Implementation*, (The Hague: Kluwer Law International, 1997) at 252 and 253 [Ratner and Abrams].

The ICC will not have jurisdiction in the absence of a nexus³⁴. Article 12 provides that the Court may exercise jurisdiction if either the State on the territory of which the crimes allegedly occurred or the State of nationality of the accused is a State Party to the Statute³⁵. Universal jurisdiction was therefore another unfortunate casualty of compromise. The exclusion of the custodial State in article 12 will presumably render enforcement significantly more difficult.

The enforcement-related lacunae in the Statute renders the removal of obstacles to the cooperation of State Parties of the utmost importance as without them the Court will be powerless. As it has already been said: "*Le juge sans gendarme n'est qu'un pauvre rêveur*"³⁶. Constitutional incompatibilities of any kind must therefore be remedied, especially those related to extradition, given the imperative presence of the accused at the trial. We shall now turn our attention to an overview of national constitutional provisions related to extradition.

B. Mobility Rights and National Constitutional Prohibitions on Extradition

As the Supreme Court of Canada held in the *Cotroni* case :

The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. [...] The only respect paid by the international criminal community to national boundaries is when they can serve as a means to frustrate the efforts of law enforcement and judicial authorities.³⁷

Although this case related to different offenses rather than those within the purview of the ICC, the reality it exposes can be universally applied to all criminal conduct having an international dimension. It is arguably in the prevention and repression of grave criminal acts that the need for international cooperation is most evident, yet many States still refuse to extradite their nationals.

The prohibition on extradition sits at the extreme end of a spectrum of provisions relative to mobility rights afforded to citizens within a great number of

³⁴ Broomhall, *supra* note 14 at 65; Notwithstanding referrals from the Security Council or Non-State Parties in *Rome Statute*, *supra* note 1 at art. 12 (3).

³⁵ *Rome Statute*, *supra* note 1 at art. 12 which however provides for ad hoc cooperation of non-State Parties.

³⁶ Olivier Lanotte, *Répression des crimes de guerre: espoir ou utopie?*, (Brussels : Groupe de recherche et d'information sur la paix et la sécurité, 1995) at 9.

³⁷ *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469: In this case the Supreme Court of Canada ruled that although extradition to the United States violated Cotroni's right, pursuant to section 6 of the Canadian Charter of Rights and Freedoms, to remain in Canada, extradition was nonetheless justified in a "free and democratic society". In its judgment, the court exposed the importance of international cooperation in the repression of criminal behavior having an international component.

national constitutions. These dispositions vary in intensity. While some simply assert the citizen's right to move about the national territory and to enter or leave it freely, others aim explicitly at shielding citizens from prosecution in external jurisdictions. The more constitutional dispositions rest at the higher end of this scale, the more the need for constitutional amendment is theoretically required in order to ensure full cooperation with the ICC.

The historical origins of the constitutional prohibition on extradition of nationals stem from the somewhat outdated premise that the accused person's State of nationality is the best place to guarantee that person an equitable trial. It illustrates a mistrust of foreign Courts and the extreme reluctance of some States to submit their citizens to an unknown jurisdiction in which the rights and procedural safeguards offered might differ from those enshrined in their national constitution. As Gilbert points out: "The refusal to extradite nationals is an indiscriminate protection, unsuitable to the needs of mutual assistance in law enforcement"³⁸.

This attitude towards extradition is more common in Civil Law legal systems than it is in Common Law jurisdictions³⁹. Such provisions are widespread in Latin America and continental Europe⁴⁰. Hence, any discussion on the international rendition of suspects to a foreign jurisdiction would be incomplete were it not to address the vastly divergent approaches espoused respectively by Common Law and Civil Law jurisdictions.

Common Law States have historically relied on the territorial basis of jurisdiction in the enforcement of their criminal laws. This is to say, "the right of the State to prescribe and apply its law over acts committed within its territorial boundaries"⁴¹. This notion has been expanded over time to include cases where the entire offence is not committed on the State's territory but where there is a sufficient territorial nexus either in regard to a constituent part of the offence or to one of its immediate effects⁴². The Common Law approach therefore does not generally distinguish between the citizen and non-citizen in criminal prosecutions and more significantly for the purpose of the current study, in extradition matters. Criminal laws are not generally given an extraterritorial scope.

In contrast to the Common Law approach, the dominant historical basis of criminal jurisdiction in Civil Law States is that of nationality. According to Ratner and Abrams the nationality principle applies, "where a State exercises jurisdiction

³⁸ Geoff Gilbert, *Aspects of Extradition Law*, (Dordrecht: Martinus Nijhoff Publishers, 1991) at 96 [Gilbert].

³⁹ *Ibid.* at 98.

⁴⁰ Constitution of Ecuador art. 25; German Basic Law art. 16; Constitution of Cyprus art. 11(2) f) and 14; Constitution of Croatia art. 9; Constitution of Estonia art. 36; Constitution of Georgia art. 13; Constitution of Hungary art. 69; Constitution of Lithuania art. 13; Constitution of Macedonia art. 4; Constitution of Slovakia art. 23; Constitution of Slovenia art. 47; Constitution of Poland art. 55; Constitution of the Czech Republic art. 12; Constitution of Romania art. 19; Constitution of Russia art. 61; Constitution of Finland art. 12.

⁴¹ Ratner and Abrams, *supra* note 33 at 161.

⁴² *Ibid.*

over an offender who is one of its nationals, regardless of the situs of the conduct”⁴³. Although certain Civil Law States have considerably moderated this principle over time, many Civil Law constitutions still preclude the extradition of their nationals to stand trial in a foreign jurisdiction⁴⁴. This can potentially be very problematic with regard to cooperation with the ICC.

The Civil Law reliance on “nationality” means that the criminal laws in Civil Law systems are generally inherently extraterritorial in their application. Assuming that national criminal laws criminalize the same conduct, the Civil Law State will prosecute its citizen internally rather than transfer him or her to a foreign jurisdiction to stand trial.

Extradition is usually based on reciprocity. Common Law States have generally not required Civil Law States to exercise that reciprocity by extraditing their nationals and have generally considered that internal prosecutions were an adequate alternative as they provided a certain degree of reciprocity⁴⁵. The basic premise behind this reasoning is that an individual who commits a crime should not escape prosecution regardless where that prosecution occurs. In the context of the ICC, this is in many ways the underlying idea behind the concept of complementarity.

From the outset, it is interesting to note that the Statute itself seeks to circumvent the potential conflict between constitutional restrictions on extradition and the absolute obligation of *aut dedere aut judicare* by adopting a somewhat unique terminology. Indeed, article 102 of the Statute provides that:

Article 102

Use of terms

For the purpose of this Statute:

- (a) “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute.

⁴³ *Ibid.*

⁴⁴ Scandinavian States have, in recent years, abandoned strict adherence to their constitutional prohibitions on extradition. This can chiefly be explained by an increased confidence in the legal orders of other democratic States. It is also noteworthy that a *European Convention on Extradition* was concluded between European Union Members States in 1996. This Convention explicitly outlaws citizenship as a grounds for refusal of an extradition request emanating from another member State; *Convention on simplified extradition procedure between the Member States of the European Union*, 30 March 1995, Official Journal: C 078 (source: www.europa.int) (Not yet in force) at art. 7. Although reservations are permitted, their validity is limited to a 5-year term. The trend among European countries has been to recognize the importance of extradition, the antiquated nature of certain extradition related constitutional provision and to take positive steps to facilitate inter-State cooperation in this regard.

⁴⁵ Gilbert, *supra*, note 38 at 18 ; see also *Re Federal Republic of Germany and Rauca*, (1983) 4 C.C.C. 3(d) 385 (Ont. C.A.) where Rauca sought to contest extradition to Germany on the grounds that Germany did not extradite its nationals and that Canada should not either in light of the lack of reciprocity. The Ontario Court of Appeal held that there was ‘reciprocity in substance’ if not in form; cited in: Anne Warner La Forest, *Extradition to and from Canada*, 3rd ed. (Aurora: Canada Law Books Inc., 1991) at 108.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

This may *a priori* appear a rather contrived distinction, a transparent attempt to bypass the object of a clear constitutional prohibition. A more in depth analysis, however, may reveal the difference between the terms "extradition" and "surrender" in the ICC context to be substantive rather than exclusively semantic. As Duffy points out, the terminology that is often advanced to illustrate this substantive dichotomy is that of the horizontal versus the vertical model of cooperation⁴⁶.

The horizontal model of cooperation describes the relationship between two independent States, the requesting State and the requested State, which for various reasons ranging from multilateral extradition agreements to comity, will cooperate to ensure the extradition of individuals. In a context such as this, concerns such as the ones explained above regarding the non-existence, or lesser importance of certain rights guaranteed by the requested State may arise. The requested State may therefore decide in the interest of protecting these rights, that it will prosecute the individual in the national legal system rather than sending him or her off to face an alien system of justice, in which these rights may be violated.

The surrender of an individual to the ICC cannot be equated to extradition to an alien jurisdiction as in most cases the State Party will have directly contributed to the drafting of the Statute's provisions. The fears as to the violation of certain basic fundamental rights, which may be cause for concern in a horizontal dynamic, will therefore to a large extent be dispelled⁴⁷. The ICC is therefore arguably an extension of national jurisdiction. In addition, the ICC is a complementary jurisdiction. Primary responsibility for prosecution still rests predominantly in the hands of State Parties. The State has three obvious choices: it can prosecute internally, opt for an interpretation consistent with article 102 of the Statute, or modify its constitution.

It may *a priori* appear that the most obvious way for States having prohibitions on extradition in their Constitution would be to prosecute internally which will ensure that the State is respecting its international obligations by bringing the individual to trial. As we shall see, this approach might seem ideal but is laden with pitfalls.

When certain fundamental differences are taken into account, they cannot but strengthen the horizontal versus vertical cooperation dichotomy: Indeed, the first of such considerations is the nature of the crimes within the ICC jurisdiction. Most extradition treaties between States aim at combating criminal infractions of a relatively lesser gravity and scale whereas the ICC is competent exclusively for the most serious international crimes, namely, in matters of genocide, crimes against humanity, war crimes and aggression once it is defined. In addition to the seriousness

⁴⁶ Duffy, *supra* note 7 at 21.

⁴⁷ Broomhall, *supra* note 14 at 87.

of the crimes, it can be argued that as the ICC is an international Court which has jurisdiction over crimes which are international in nature, national standards are no longer a relevant reference point⁴⁸. The applicable standard should therefore be the internationally recognized human rights, which are provided for in the Rome Statute. This reality argues in favour of recognition of the substantive difference between “extradition” and “surrender”.

For the purpose of this study, we have chosen to divide mobility related constitutional provisions into four categories: strict mobility rights, conditional bans on extradition, absolute prohibitions on extradition and prohibitions on forced removal from the national territory. The importance of this distinction lies in appreciating the potential risk of conflict between such provisions and the Statute, and accordingly, the need to amend them. As the constitutional disposition moves away from one that simply aims at protecting the mobility of citizens to one which bars their forcible removal from the national territory, the potential for conflict increases as does the national legislator’s need to intervene to prevent such a conflict. This is due to the fact that while the extradition and surrender dichotomy may remedy constitutional incompatibility with the Statute when the disposition in question is at the lower end of the scale, it may not be of help for those at the higher end. The more stringent the constitutional prohibition is, the less relevant this dichotomy will be and the more complementarity will have to be relied upon. As we shall see however, complementarity is not always ideal in avoiding a jurisdictional void.

1. STRICT MOBILITY RIGHTS

For countries whose mobility related rights are confined to the free movement of persons across internal and external borders, the ratification of the Rome Statute is not hindered by the presence of constitutional provisions conflicting with the Statute’s absolute obligation to arrest and surrender.

At first glance, of the categories enumerated above, the most suited to describe the situation of Canada is the first. Indeed, section 6 of the Canadian Charter guarantees Canadians certain mobility-related rights but stops well short of imposing a prohibition on extradition:

2. MOBILITY RIGHTS

6 (1) Every citizen of Canada has the right to enter, remain and leave Canada [...]

⁴⁸ Duffy, *supra* note 7 at 29.

Since the Canadian Charter does not contain an explicit prohibition on extradition, there is no conflict in this regard with the obligation under article 89 to arrest and surrender. Reliance on “surrender” defined at article 102 is therefore not necessary to ensure compliance in States having only strict mobility rights in their constitution⁴⁹.

It is however interesting to note that attempts have been made to use section 6 as a *de facto* ban on the extradition of Canadians to foreign jurisdictions. In the *United States v. Burns*⁵⁰, in which the extradition of two Canadian citizens was sought by the State of Washington, counsel for the accused argued that the sentences provided for in State legislation, namely the death penalty or life imprisonment without possibility of parole, violated their clients’ right to return to Canada. The British Columbia Court of Appeal accepted the appellant’s argument to the effect that their mobility rights guaranteed by section 6 had been violated and ruled against extradition. The Crown appealed the decision to the Supreme Court where the argument based on section 6 failed.

The Court held that:

[...] efforts to stretch mobility rights to cover the death penalty controversy are misplaced. The real issue here is the death penalty. The death penalty is overwhelmingly a justice issue and only marginally a mobility rights issue.⁵¹

Indeed, when comparing section 6 of the Canadian Charter with mobility related constitutional provisions from around the globe, the motives of the B.C. Court of Appeal seem somewhat tenuous. If the drafters of the Canadian Constitution aimed at shielding nationals from extradition to foreign jurisdictions, they would no doubt have used a more adamant language. Section 6 is *prima facie* more a way of protecting inter-provincial and international mobility than an explicit ban on extradition. It must be noted however that the Supreme Court’s ruling in *Burns* has imposed the obligation upon the Minister of Justice to seek assurances that the death penalty will not be applied before extraditing requested individuals to retentionist States. Canada therefore has a *de facto* ban on extradition when the possible outcome is the application of the death penalty. This prohibition does not however stem from the mobility rights under section 6 but rather the right to life, liberty and security of the person enshrined in section 7 of the Canadian Constitution. As the death penalty is not a sentence provided for by the Statute of Rome, the issue is not a contentious one. It is noteworthy however that judicial review of ministerial extradition decisions has led to an implicit conditional prohibition on extradition.

⁴⁹ As we have seen this is mainly the case in Common law States.

⁵⁰ *United States of America v. Burns*, [2001] 1 S.C.R. 283.

⁵¹ *Ibid.* at para. 48.

In the event where the Statute of Rome provided for the possible application of the death penalty, the situation in Canada would be different given the Supreme Court's ruling in *Burns*. Canada would then have a "conditional ban on extradition" with regards to situations where the death penalty could possibly be applied. This brings us to the second degree of mobility related constitutional provision.

3. CONDITIONAL PROHIBITIONS ON EXTRADITION

The nature of the conditional prohibition on extradition is that some constitutions, which generally allow extradition, explicitly prohibit the extradition of nationals under certain circumstances. These circumstances are generally related to either concern as to due process or more commonly to potentially applicable sentences. As we have seen in our discussion of the *Burns* case, Canada now cannot extradite individuals to retentionist States if there is a possibility that the death penalty will be applied, without first seeking assurances according to which these individuals, if convicted, would not be executed. In the Canadian context, this conditional prohibition is a result of judicial interpretation of a general section of the Constitution⁵². In other States however, the prohibition on extradition, when certain sentences are possible, is explicitly provided for in the very text of the Constitution.

Brazil, Spain and Portugal, to name but three, have constitutionally outlawed life imprisonment. There are generally two main motives for doing so: First, life imprisonment is considered by these States as constituting a "cruel and unusual form of punishment". Second, the imposition of a life sentence violates the right of the condemned individual to rehabilitation. Such a position conflicts with article 77 of the Statute, which allows the Court to impose a term of life imprisonment. It must however be noted that the imposition of this sentence is reserved to the most egregious of cases. Pursuant to article 77, life imprisonment is therefore an exceptional penalty applied only when: "[...] justified by the extreme gravity of the crime and the individual circumstances of the convicted person". It can theoretically be argued that since these provisions are related to "extradition", they do not apply to the ICC since States will not "extradite" individuals to the Court but rather "surrender" them. Proponents of this interpretation will argue that the issue is resolved by article 103 of the Statute, which provides that States, in accepting to enforce sentences on their territory, may attach certain conditions to their acceptance of sentenced persons. This was notably the case of Spain which at the time of ratification issued a declaration to the effect that it would accept convicted individuals on the condition that their sentence did not exceed those provided for in Spanish law.

A more realistic way of avoiding conflict with the Statute would be for the State in question to prosecute the individual domestically. By virtue of article 80, which provides the right of prosecuting State Parties to impose sentences in their

⁵² The Supreme Court of Canada relied heavily upon section 7 of the Canadian Charter which states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

domestic legislation, the State could simply apply a punishment other than life imprisonment.

If the Court and State Parties do not hand down the same sentences for crimes of the same gravity and where the accused individual has the same degree of criminal responsibility, this creates a fundamental in justice and leads to a two-tiered administration of justice. This is not an issue that is unique to the ICC. One only needs to consider the Rwandan situation where domestic courts can apply the death penalty whereas the ICTR, theoretically competent over more serious offenses, cannot⁵³.

The disparity of sentence will likely be an unfortunate by-product of complementarity. One must however only consider the alternative; allowing the individual to escape prosecution, to see that in certain circumstances compromise is necessary.

The fact that the States having conditional prohibitions are not entirely opposed to the extradition may also be of importance. Portugal, for example, which as previously noted, has a constitutional ban on extradition in cases where there is the possibility of the imposition of perpetual imprisonment, and may be inclined to waive this prohibition as long as review mechanisms are available. Such a procedure is provided for in the Statute at article 110 which provides for a mandatory review of the sentence after one third has been served or after 25 years in the case of life imprisonment⁵⁴.

As we have seen, conflicts between the conditional prohibition on extradition and the Statute can, in some cases, be circumvented through the application of the surrender or extradition dichotomy or through the exercise of national jurisdiction. This is made possible in large measure by the conditional and not absolute nature of the prohibition. The fact that the State is generally disposed to surrender individuals as long as certain conditions are met allows certain flexibility in ensuring that the individual does not elude prosecution.

4. ABSOLUTE PROHIBITIONS ON EXTRADITION

As we have seen, numerous national constitutions, mostly European or Latin American impose an explicit and unconditional prohibition on the extradition of nationals to a foreign jurisdiction. Thus, States such as Germany, Brazil, Venezuela and Slovenia all have such provisions in their Constitutions. The question which again surfaces is how these dispositions can be reconciled with the Statute?

Once again the most obvious approach is either to rely on the vertical model of cooperation or "surrender" to preclude the application of these constitutional norms

⁵³ The proportionality of sentences is recognized as an important sentencing principle within many domestic legal orders. See for example *Criminal Code*, R.S. C. 1985, c. C-46 part XXIII; Constitution of Ecuador art. 24 (3).

⁵⁴ Duffy, *supra* note 7 at 21.

to accused individuals or to use complementarity to prosecute nationally. There are other drawbacks than sentence discrepancies to this approach.

If a State Party chooses to exercise national jurisdiction in accordance with the international obligations imposed upon it by the Statute, certain obstacles must be avoided. Firstly, the State must have legislation and or mechanisms that allow it to prosecute the crimes outlined in the Statute. Canada has had first hand experience with this in the *Finta*⁵⁵ case where the acquittal of an individual accused of having assisted in the deportation of Jews to concentration camps during the Second World War was attributed by many to inadequate Canadian penal legislation⁵⁶.

The national definitions of these crimes must be sufficiently broad to allow for a crime over which the ICC would ordinarily have jurisdiction to be prosecuted. As Broomhall points out, States are not barred by the ICC Statute from adopting broader definitions for crimes within their internal legal order. If however, the definitions adopted by the State are too narrow, thus allowing the accused to escape prosecution, a fundamental conflict arises⁵⁷. It would therefore be wise for States choosing to prosecute internally to reproduce, possibly verbatim the infractions provided for in the Rome Statute, and to give their national penal legislation an extra-territorial scope of application.

As we have stated, the extradition or surrender dichotomy appears at first to be an artificial distinction. This perception may be dispelled by the reliance on the vertical versus horizontal model of cooperation. The argument can also be made however, that the distinction is merely a question of semantics. Is not the common result of both surrender and extradition the forced physical transfer of an individual to an alien jurisdiction? Would this transfer, no matter what it is termed, not be the violation of the object of a clear constitutional prohibition? Assuming a State Party failed to take positive steps to guarantee the ICC's jurisdiction and relied exclusively on this distinction, there would be no impediment to a national judge finding that extradition and surrender are one and the same. By arriving at this conclusion, he or she could consequently give full effect to the constitutional ban on extradition and thereby effectively deny the ICC the physical custody it requires to conduct a trial.

Another scenario is that in which a State's constitution provides for a prohibition on extradition as well as constitutional immunities from prosecution. Because of these immunities, the State would be unable to prosecute and would also be unable to surrender the individual to the ICC to stand trial. Such a combination of factors would lead to the State clearly violating the unqualified obligation it has to prosecute or extradite and the accused individual to benefit from a *de facto* immunity.

⁵⁵ *R. v. Finta*, [1994] 1 S.C.R. 701.

⁵⁶ See also: Christopher Amerasinghe, "The Canadian Experience" in Cherif Bassiouni (dir.), *International Criminal Law: Enforcement*, vol. III, (New York: Transnational Publishers Inc., 1999) at 243 and 265; Because of the fact that juries do not reveal the rationale behind their decisions, and the presence of other issues at stake in *Finta* which cast doubt on the defendant's guilt, it is impossible to conclusively attribute *Finta*'s acquittal to shortcomings in the legislation. The inadequacy of the impugned legislation is however a recurring concern in certain commentaries of the case.

⁵⁷ Broomhall, *supra* note 14 at 81.

Such realistic hypothetical situations illustrate that although complementarity may, in some cases be an effective tool in assuring the prosecution of accused individuals with minimum impairment to rights enshrined in national constitutions; it is by no means a universally applicable remedy. It is therefore paramount, if the ICC is to be effective, that State Parties having conflicting constitutional provisions act in order to remove obstacles to the ICC exercise of jurisdiction.

5. FORCIBLE REMOVAL FROM THE NATIONAL TERRITORY

All the concerns listed above relating to the absolute prohibition on extradition apply equally to prohibitions on the forcible removal of nationals from the national territory. There is however an additional problem. Where countries having absolute prohibitions on extradition are able to rely on the extradition or surrender dichotomy to avoid conflict with the Statute, those having explicit bans on the forcible removal of citizens from the national territory are not. Whether the transfer of an individual from such a State to the ICC is termed extradition or surrender is irrelevant. The result is the same; the individual in question is compelled against his will to abandon the territory of their State. This is notably the case of the Costa Rican Constitution which provides that: "No Costa Rican may be compelled to leave the national territory"⁵⁸. It is therefore useless to rely on a terminological distinction and *a priori* the only way in which a Costa Rican citizen can be tried in The Hague is if the territorial State consents to ICC jurisdiction and there is another way for the individual to be transferred to the Court.

It is clear that in most cases, some sort of positive action is required by State Parties if they are to respect their obligation to arrest and surrender. Let us now turn our attention to specific approaches adopted by ratifying States to deal with this problem. The ways in which States have dealt with the issue are extremely diverse. This diversity stems *inter alia* from the unique nature of the ICC, the relative facility or difficulty with which the national constitution can be amended, the importance ascribed to international law in the internal legal order – both generally with particular regards to human rights – and a host of policy related considerations.

III. State Reactions: The Interpretive and Constitutional Amendment Approaches

State reactions to ratification generally fit into one of two categories; the interpretive approach, favored by a majority of States, and the constitutional amendment approach.

⁵⁸ Constitution of Costa Rica art. 32.

A. The Interpretive Approach

The interpretive approach consists in interpreting potentially conflicting provisions of the national constitution as being compatible with the Rome Statute. In some instances, this can be done relatively easily. The Estonian and Italian Constitutions provide for an exception to the rule of the non-extradition of nationals when extradition is prescribed by an international agreement. Estonia signed the Statute on the 27th of December 1999, and ratified the 30th of January 2002. The international agreement exception allowed for ratification without the need for constitutional amendment on the extradition question. This is also the approach taken by Italy which ratified the Rome Statute without constitutional amendment.

Beyond the wording of the constitutional disposition, it is noteworthy that some legal orders afford preeminence to human rights-related international law over certain select constitutional provisions. Thus Paraguay's constitution stipulates that the country "accepts a supranational legal system that would guarantee the enforcement of human rights, peace, justice, and cooperation, as well as political, socio-economical and cultural development"⁵⁹. This illustrates the important place of human rights in the constitutions of many States, predominantly in Latin America and Eastern Europe, which have had tragic experiences under brutal regimes and now grant human rights a privileged place within the internal legal order.

Some have argued that an individual who has committed heinous crimes such as those set out in the Statute has "ruptured the constitutional order" and should not be able to rely on that very same constitution as a means of shielding him or herself from prosecution⁶⁰. This view must be distinguished from the interpretive approach. Rather than promoting a harmonious interpretation of constitutional norms with the ICC Statute, it seeks instead to deny accused individuals these constitutional rights solely on the basis of the gravity of the crimes of which they are accused. It must not be forgotten that in the context of a criminal prosecution, the accused person must benefit from a presumption of innocence⁶¹ and must therefore in no way be barred from using whatever means of defense available within the internal legal order of the prosecuting State to mount a full and effective defense. As long as the national legislator has not acted to modify certain constitutional provisions, all accused persons must be able to invoke them in a court of law. A different approach would skew the fairness of the trial and profoundly affect the Court's credibility.

Another argument in support of a reading of the constitution harmoniously with the Statute is that, the constitution should benefit from an interpretation which is consistent with the State's international obligations. As noted, a failure to extradite or prosecute the crimes within the jurisdiction of the ICC would not only exclusively lead to a violation of the Statute of Rome but a variety of other international instruments as well.

⁵⁹ Duffy, *supra* note 7 at 7.

⁶⁰ *Ibid.* at 19.

⁶¹ See for example: *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 14 (2).

As Duffy noted, the interpretive approach is usually favored in States having particularly long or burdensome constitutional amendment procedures as a means of ensuring a quicker and simpler ratification process⁶². This method rests on the concept of an evolving constitution, the living tree doctrine. The basic premise of this doctrine is that the constitution must be interpreted as a living document, capable of adaptation to changing realities facing the State. When a set of constitutional norms is elaborated it is impossible for its drafters to anticipate and accordingly provide for different innovations that may emerge after the constitution's inception. It is therefore paramount, if the constitution is to remain a pertinent reference point and a reflection of current national values, that constitutional provisions be interpreted in a liberal and evolving manner. The importance of this notion is clear in the context of the ICC for as Williams has noted: "When we neither punish nor reproach evil doers we are not simply protecting their trivial old age but ripping the foundation of justice from beneath the new generation"⁶³.

National courts choosing to retain a static rather than dynamic interpretation of the national constitution would arguably contribute to a stagnation of the constitutional order, due to its inability to adapt to changing realities on the global stage. When initiatives such as the repression of the most serious crimes of concern to humanity are stunted by an excessively literal interpretation of constitutional norms, one is brought to question the role of the constitution as the guarantor of fundamental freedoms.

Reliance upon constitutional provisions must also not be used towards a purpose inconsistent with the general object and aims of the constitution. Although this is generally an unwritten principle, some constitutions give explicit guidelines as to the manner in which constitutional guarantees should be interpreted. This is notably the position espoused by the Ecuadorian Constitution which provides that:

Article 18

The rights and guarantees determined by this Constitution and by the international instruments in force are directly and immediately applicable before any judge tribunal or authority. *The interpretation of constitutional rights and guarantees that most favors their effective enforcement shall be used. [...]*

In many States, it was the evolving conception of the constitution that allowed for ratification of the Statute of Rome without the need for constitutional amendment and despite the seemingly incompatible nature of certain constitutional dispositions with the Statute. This was notably the case in Spain and Norway. For a while, the respective Constitutions of these two States provided absolute immunities for the monarch, the Statute was ratified without the need being felt for amendment⁶⁴.

⁶² Duffy, *supra* note 7 at 10.

⁶³ Williams, *supra* note 8.

⁶⁴ Constitution of Norway art. 5; Constitution of Spain art. 56.

The question of royal immunity was deemed to be essentially academic as there is little likelihood that the monarchs of these two democratic States would commit crimes within the purview of the ICC. Pursuant to article 95 of the Spanish Constitution, the “conclusion” of an international treaty which contains stipulations contrary to the Constitution requires “constitutional revision”. The existence of such a conflict is appreciated by the *Consejo del Estado*. The Spanish State Council concluded that there was no conflict between the immunities afforded to the King and the Rome Statute which led to ratification without amendment.

It is interesting to note that Costa Rica which has a prohibition on forced removal from the national territory also chose to ratify without amendment. Venezuela which has an absolute prohibition on the extradition of nationals⁶⁵ has also ratified the Statute without amending this seemingly conflicting constitutional norm. These States have opted for a liberal interpretation of their constitutions, a reliance on internal prosecutions, the extradition or surrender dichotomy as well as the nature of the Statute of Rome. The Venezuelan Constitution for example, provides at article 23 that treaties relative to Human Rights ratified by Venezuela have constitutional rank and take precedence in the internal legal order, so long as they allow a “more favorable” exercise of the rights provided for in the Constitution⁶⁶.

Although the interpretive approach has been used in the States listed above to circumvent a potentially long and demanding constitutional amendment process, it must be noted that virtually identical constitutional provisions relative to extradition have led to vastly divergent conclusions as to the existence of a conflict with the Statute.

Article 47 of the Slovenian Constitution imposes a prohibition on extradition of citizens to a “foreign country”. Since the ICC is not a foreign country and moreover transfer of individuals to the Court is “surrender” and not “extradition” one might expect ratification to proceed smoothly, barring impediments of another nature. This was however not the view taken by the Slovenian *Government Office for Legislation* which concluded that there was a conflict between article 47 and the ICC Statute’s obligation to surrender. Following this finding, Slovenia had no choice but to modify its constitutional prohibition on extradition. This discrepancy illustrates a fundamental flaw in the interpretive method, namely its inherent uncertainty and dependence upon judicial cooperation.

In cases where the ratification of the Statute is contingent upon a prior finding of constitutional compatibility by the competent constitutional jurisdiction, the problem is less obvious. When ratification has not been subjected to such scrutiny and the State has simply chosen to ratify despite potential extradition related contradictions, a fundamental conflict may surface down the road. National courts

⁶⁵ Constitution of Venezuela art. 69 which states that: “The extradition of Venezuelans is prohibited”.

⁶⁶ The original Spanish text of article 23 reads: “*Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y la ley de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público.*”

may give full effect to the extradition prohibition and thereby block the surrender of an individual to the ICC, having found that the Rome Statute violates the constitution. As we shall see, the amendment approach has the merit of resolving the issue by eliminating ambiguities left looming by the interpretive method.

B. The Constitutional Amendment Approach

There are several factors that argue heavily in favor of the amendment of constitutional dispositions which are potentially incompatible with the Rome Statute. The first is the issue of uncertainty. By amending anti-extradition provisions to reflect the will of the State to fully cooperate with surrender requests, the ratifying State closes the door on accused individuals seeking to profit from a jurisdictional vacuum. Constitutional amendment is particularly useful in States where the ratification of the Rome Statute is controversial. By amending the national constitution, cooperation with the ICC is less vulnerable to a potential change in political leadership in favor of a less ICC friendly government.

The choice of the amendment approach is more common in States having a relatively straightforward and rapid amendment process⁶⁷. Some States have chosen the amendment approach for reasons of consistency with the Rome Statute. It is interesting to note that while some ratifying parties have chosen to address specific provisions of their constitutions which are thought to be incompatible with the Statute, others have opted for a more general approach.

France was the first State to decide to amend its Constitution. Rather than address each of the potentially conflicting articles in the French Constitution, it was decided that cooperation with the ICC would best be achieved by the insertion of article 53-2 which reads : “*La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998*”⁶⁸. Brazil, faced with a slew of potential incompatibilities on issues ranging from surrender to sentences and immunities, is also contemplating a general constitutional amendment which would state: “The Federal Republic of Brazil shall be able to recognize the jurisdiction of the ICC as foreseen in the Statute approved in Rome the 17th of July 1998”⁶⁹.

In cases where the Statute would possibly conflict with the national Constitution, on more than one question, it may appear as though the general amendment approach is more effective than an issue specific modification of the Constitution. This approach also has the merit of settling the question of

⁶⁷ A notable exception to this rule is Belgium, which has a fairly arduous constitutional amendment process but chose to ratify (thereby accelerating the creation of the ICC) and then proceed with amendments to its Constitution.

⁶⁸ *Loi constitutionnelle No. 99-568 du 8 juillet 1999 insérant au titre VI de la Constitution un article 53-2 et relative à la Cour pénale Internationale*, online : Il Sirente <http://www.sirente.com/catalogue/rsdlo_i/lex/fr/fr_2.html>.

⁶⁹ Country Information – Brazil, online: Coalition for the International Criminal Court <<http://www.iccnw.org/countryinfo/theamericas/brazil.html>> [Coalition for the International Criminal Court].

incompatibilities that may only surface after the State has ratified. The general constitutional amendment therefore provides that the Statute will take precedence over all constitutional provisions including those related to extradition in the event of any conflict. One might say that it is the constitutionalization of the interpretive approach encourages a harmonious reading of the Constitution with the Statute of Rome, while avoiding the uncertainty inherent to the interpretive method.

While some States seem to have preferred the general amendment method, others have chosen an issue specific approach. In terms of extradition, the most obvious example of this is that of Germany. Article 16(2) of the *Grundgesetz* reads: "No German may be extradited abroad"⁷⁰. Although Germany was among the most ardent proponents of a strong and effective ICC, it chose not to rely on the extradition or surrender dichotomy and therefore thought it necessary to amend article 16(2) of its Basic Law adding: "[a] regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an International Criminal Court". The German decision to amend its previously absolute prohibition on extradition was not only a by-product of its support for the ICC but also a way of ensuring that it would be able to meet its international obligations under the *European Convention on Extradition*. As stated above, Slovenia opted for a similar approach in choosing to adopt an extradition specific amendment⁷¹.

The drawback of the issue, specific to constitutional amendments is that it fails to provide for the possibility of other incompatibilities with the Statute that may not be obvious at the time of ratification. However, in terms of the extradition issue such an amendment is adequate to ensure full cooperation with the ICC in the event of a surrender request.

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The atrocities which have plagued the twentieth century are in large measure the result of the international community's failure to bring to justice those who perpetrated them. In speaking of the immunities granted to Turkish officials responsible for the Armenian Genocide during the First World War, Adolf Hitler remarked: "Who after all is today speaking about the destruction of the Armenians?"⁷². The tyrants of the past century have effectively been given *carte blanche* to decimate entire civilian populations. It is in the hope that this century will be spared from such widespread carnage that the International Criminal Court was created. Whether the Court will serve as an effective deterrent to the commission of future atrocities remains to be seen. What is certain however is that the creation of an international criminal jurisdiction is long overdue.

⁷⁰ *Kein Deutscher darf an das Ausland ausgeliefert werden* at art. 16 (2).

⁷¹ Coalition for the International Criminal Court, *supra* note 69.

⁷² Cited in: Michael P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 *Cornell Int'l L.J.* 514.

Now that the Statute has received the required 60 ratifications, the ICC must be granted the tools it needs to function effectively. Otherwise, the creation of the court will have been for naught. A lame tribunal would only vindicate its detractors and lend credence to the notion that concerted action on this front is doomed to failure. With this in mind, it is to be hoped that those States wishing to be recorded in history as having taken a stand against impunity will take all necessary steps to ensure full and unconditional cooperation with the ICC. One of the most significant stumbling blocks to this cooperation is the outdated prohibition on extradition. As we have seen in the course of this paper the cooperation of State Parties is essential if the Court is to be viable and effective. At the ratification stage, this need for cooperation argues strongly in favor of constitutional amendment.

The more, national constitutions contain provisions which could potentially hamper the arrest and surrender of individuals to the Court, the more States need to act in modifying these provisions are pressing. An excessive reliance on the extradition or surrender dichotomy and internal prosecutions must be weighed against the potential loopholes inherent to such an approach. This is not to say that States should refrain from prosecuting individuals accused of such crimes themselves, on the contrary the complementary nature of the ICC affords an important role to State prosecutions. Those State Parties choosing to prosecute internally must however ensure the existence of comprehensive legislation ideally extra-territorial in nature.

Although the interpretive approach does have some merits, particularly in providing for a quick and relatively easy ratification process, its inherent degree of uncertainty may eventually impede the State Party's ability to fulfill its international obligations. Amending conflicting constitutional provisions is the most effective way of addressing this issue. Although an exclusively extradition-related amendment is a step in the right direction, States may find the insertion of a general amendment better suited in circumventing possible contradictions apparent at the time of ratification as well as those surfacing at a later date.

Currently the Rome Statute of the ICC has 139 signatories and 87 ratifications⁷³.

⁷³ For the latest details, please consult <<http://www.iccnw.org>>.