Strasbourg, 15 January 2001
<cdl\doc\2001\cdl-inf\001-Inf-E.doc>

CDL-INF (2001) 1

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPORT

ON CONSTITUTIONAL ISSUES RAISED BY THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

adopted by the Commission at its45th Plenary Meeting (Venice, 15-16 December 2000)

At its 43rd Plenary meeting the Venice Commission decided to study the constitutional issues raised by the ratification of the Rome Statute of the International Criminal Court. A working group composed of Messrrs Robert, Özbudun, Hamilton, Van Dijk, Luchaire, Ms Livada, Err and Mr Vogel prepared a draft report in Paris on 1 December 2000. The present report was adopted by the European Commission for Democracy through Law at its 45th Plenary Meeting in Venice, on 15 to 16 December 2000.

Following the Second World War, the powers which emerged victorious established the Nuremberg and Tokyo tribunals in order to bring to account the perpetrators of the most abhorrent crimes that had been committed. The ensuing Cold War did not permit to continue this precedent to be followed in the decades thereafter. It was not until the end of the East-West confrontation that the establishment of two *ad hoc* tribunals became possible: one for the crimes committed in the Former Yugoslavia and one for those in Rwanda. Both these tribunals were established by virtue of Security Council resolutions in application of Chapter VII of the UN Charter.

However, although regional conflicts take place in many parts of the world, it would be impossible to continuously establish *ad hoc* tribunals to bring the perpetrators of such crimes in each area to account. It was thus considered that the creation of such *ad-hoc* tribunals through Security Council resolution could not be regarded as an adequate practice in the long run. It was under such circumstances that the idea of establishing a permanent international criminal court to deal with such crimes committed in all areas of the world was revived. It thus became possible for a Diplomatic Conference held in Rome under the auspices of the UN to adopt in July 1998 the Statute of the International Criminal Court.

This new international court will be an important means of countering impunity and respecting humanitarian law and human rights. It will be used to bring to trial all those who commit genocide, crimes against humanity, war crimes and the crime of aggression.[1] However, to enter into force the statute must be ratified by at least sixty states. The members of both the European Parliament[2] and the Parliamentary Assembly of the Council of Europe[3] have called on their countries to ratify the statute as soon as possible. By 1 January 2001, it had been ratified by 27 states, 11 of which are European[4].

Ratifying this type of instrument can pose a number of problems under national law, particularly at a constitutional level. The constitutional problems raised derive first of all from the effect of transfer of sovereignty resulting from the ratification. This question of a general nature, that several European States have already dealt with in the context of the process of European integration (not only in respect of accession to the European Union but also in respect of ratification of some Council of Europe treaties) will not be dealt with in this report, unless where closely connected with specific constitutional problems raised by the ratification of the Statute of Rome. These specific problems relate to: immunity of persons having an official capacity[5]; the obligation for states to surrender their own nationals to the

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[1] In the case of this crime, the Court will exercise its jurisdiction only when a provision will adopted in accordance with articles 121 and 123 of the Statute of Rome. (see, Article 5 of the Statute of Rome).

[2] *See EU Bulletin 12-1999 (en): 1.1.11.*

[3] *See Recommendation 1408 (1999), Official gazette of the Council of Europe - May 1998.*

[4] Austria, Belgium, Finland, France, Germany, Iceland, Italy, Luxembourg, Norway, San Marino and Spain. It should be noted that since the adoption of this report, on 15 December 2000, two other countries, members of Council of Europe(Austria and Finland), ratified the Statute of Rome.

[5] *Article 27 of the Rome Statute.*

court at its request[6]; the possibility for the court to impose a term of life imprisonment[7]; exercise of the prerogative of pardon; execution of requests made by the court's Prosecutor[8]; amnesties decreed under national law or the existence of a national statute of limitations[9]; and the fact that persons brought before the court will be tried by a panel of three judges rather than a jury[10].

This report sets out to analyse the reasoning and interpretations that may be relied on by governments to solve these problems and enable their countries to ratify the Rome Statute. Obviously, this reasoning and interpretation are not restrictive and are given simply as indications. They represent merely a methodological reflection and do not commit the European Commission for Democracy Through Law, which does not favour any one solution over the others.

States may consider several solutions for the ratification of the Statute of Rome, despite the presence of constitutional problems. These may include, for example:

- insertion of a new article in the constitution, which allows all relevant constitutional problems to be settled, and avoids the need to include exceptions for all the relevant articles, this is the measure used in particular by France and Luxembourg.
- systematic revision of all constitutional articles that must be changed to comply with the Statute.
- introduce and/or apply a special procedure of approval by Parliament, as a consequence of which the Statute may be ratified, despite the fact that some articles are in conflict with the Constitution [11].
- interpreting certain provisions of the constitution in a way to avoid conflict with the Statute of Rome

[6] *Idem, Articles 59 and 89.*
[7] *Idem, Article 77 (1) (b).*
[8] *Idem, Article 99.*
[9] *Idem, Article 29.*
[10] *Idem, Article 39 (2) (ii).*
[11] See, *in particular, Article 91 (3) of the Constitution of Netherlands.*

1. Immunity of Heads of State or Government and others persons having an *"official capacity"*

One of the constitutional problems raised by the ratification of the Rome Statute concerns the immunity which most European countries' constitutions grant to the head of state or government, a member of a government or parliament, an elected representative or a government official[12]. Such immunity may contravene Article 27 (1) of the statute, which provides «*This Statute shall apply equally to all persons without any distinction based on official capacity.*». Their official status in no way exempts these persons from criminal responsibility under the statute, nor does it constitute, per se, a ground for reduction of sentence. The second paragraph adds «*Immunities … which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*». In other words, where they commit a crime coming within the jurisdiction of the International Criminal Court, political leaders cannot evade their responsibility by pleading immunity before either that court or their country's own courts[13].

A number of solutions to this problem of immunity can be envisaged. Firstly, a state has the possibility of amending its constitution to bring it into line with the statute[14]. This approach has been followed, inter alia, by France and Luxembourg. Both countries added a clause to their constitution providing in the case of France «*the French Republic may recognise the jurisdiction of the International Criminal Court under the conditions set out in the treaty signed on 18 July 1998*[15]»[16] and in that of Luxembourg «*no provision of the Constitution shall constitute an obstacle to approval of the Statute of the International Criminal Court … and to fulfilment of the obligations arising therefrom under the conditions set out in that Statute.*»[17]. These clauses are worded in such a way as to permit these countries to avoid creating an exception or exceptions to specific articles of their constitution.

The process of constitutional amendments will also be used by the Czech Republic, where the bill amending the constitution contains the following provision Article 112a): « *As regards crimes, where a ratified and promulgated international treaty binding the Czech Republic provides for the jurisdiction of an international criminal court; a) neither the special conditions provided for the prosecution of deputy, senator, the President of the*

[12] See, in particular, Article 46 of the Constitution of Germany, Articles 57, 58 and 96 of the constitution of Austria, Article 76 of the Constitution of Estonia, Articles 26, 68 and 68-1 of the Constitution of France, Article 75 of the Constitution of Georgia, Article 49 of the Constitution of Greece, Article 20 of the Constitution of Hungary, Article 7 of the Constitution of Liechtenstein, Articles 64, 83 and 89 of the Constitution of "the former Yugoslav Republic of Macedonia", Article 42 of the Constitution of the Netherlands, Article 130 of the Constitution of Portugal, Articles 54 and 65 of the Constitution of the Czech Republic, Articles 69 and 84 of the Constitution of Romania, Articles 83 and 100 of the Constitution of Slovenia, Articles 83 and 85 of the Constitution of Turkey and Articles 80 and 105 of the Constitution of Ukraine.

[13] States may provide in their national law that the national courts shall be competent to try a leader who has committed crimes within the jurisdiction of the International Criminal Court. This is possible because the statute is based on the principle of complementarity, but, whatever solution is adopted, perpetrators of such crimes cannot plead immunity.

[14] This solution could be adopted by the Czech Republic, Greece, Hungary, Portugal and Turkey.

[15] Constitutional Law No. 99-568 of 8 July 1999.

[16] On this subject, see, in particular, the article by CLERCKY Jocelyn, "Le Statut de la Cour pénale internationale et le droit constitutionnel français", Rev. Trim. Dr. h. (2000), p. 641-681; Benoît Tabaka, «Ratification du Statut de la Cour pénale internationale: révision constitutionnelle française et rapide tour du monde des problèmes posés», http://jurisweb.citeweb.net/articles/17051999.htm.

[17] Law of 8 August 2000 amending Article 118 of the constitution, A- No. 83, 25 August 2000, page 1965.

Republic, and judge of the Constitution Court, nor the right of deputy, senator, and judge of the Constitutional Court to refuse to give testimony on facts that he gathered in connection with his seat or function shall apply; ….»[18]. However, amendment of the constitution is often a cumbersome, complicated process, and may even be a politically sensitive issue.

It has been suggested that, to avoid amending their constitutions, states could choose to interpret the relevant constitutional provisions in such a way a to avoid conflict with the statute. In that case those provisions should be construed as conferring immunity, by reason of a person's «*official capacity*», only in the national - and not the international - courts. This amounts to establishing two tiers of responsibility of office-holders, at the national and the international levels. Although superimposed, those responsibilities would be separate one from the other. In other words, where responsibility was subject to exceptions at national level, these would not necessarily apply at the international level.

A state could also maintain that a tacit exception from immunity was inherent in its constitution. In the case under consideration here, it might be conceived that, where the court required a state to surrender one of its leaders enjoying immunity, the state could justify handing that person over by interpreting the relevant constitutional provisions in the light of their intended purpose. Since the court's principal task is to combat impunity for perpetrators of «the most serious crimes of concern to the international community as a whole», a head of state or government who committed such a crime would probably violate the fundamental principles of his or her own constitution and could therefore be surrendered to the court, despite the protection normally guaranteed by the constitution.

Another possible interpretation in the same direction would be to maintain that lifting the immunity of heads of state or government has become a customary practice in public international law. In the House of Lords decision on General Pinochet's immunity, three of the five Law Lords confirmed this trend in international law. Lord Nicholls expressed the majority opinion in the following terms: «*International law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else. The contrary conclusion would make a mockery of international law*.» This decision led some scholars[19] to conclude that the fact that an individual is acting in an official capacity can never be an impediment to prosecution. They contend that for the past half-century it has been a well-established principle, repeatedly relied on by the courts, that the immunity from prosecution of incumbent or former heads of state or government cannot apply to crimes under international law. He makes specific reference to the *Versailles Treaty*[20], *Charter of the Nuremberg Tribunal*[21], the *Convention on the Prevention and Punishment of the Crime of Genocide*[22], the work of the International Law Commission[23] and the Statutes of the

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[18] Government Bill (extract) on the constitutional law amending the constitutional law of the Czech National Council No. 1/1993 Coll., Constitution of the Czech Republic, as amended by constitutional law no. 347/1997 Coll.

[19] DAVID E., cited in THEMIS, « L'affaire Pinochet ou le crépuscule des dictateurs ? », http://www.ulb.ac.be/assoc/elsaulb/themi2.htm.

[20] Article 227 of the *Versailles Treaty*.

[21] Article 7 of the *Charter of the International Military Tribunal, Nuremberg*.

[22] Article IV of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

[23] Principle III of the Principles of International Law recognised in the *Charter of the Nuremberg Tribunal* and in the Judgment of the Tribunal, 1950, International Law Commission; Article 2 of the *Draft Code of Offences against the Peace and Security of Mankind*, 1954, International Law Commission; Article 7 of the *Draft Code of Crimes against the Peace and Security of Mankind*, 1996, International Law Commission.

International Criminal Tribunal for the Former Yugoslavia[24] and the International Criminal Tribunal for Rwanda[25]. A number of states with monistic tradition could moreover be said to give this principle tacit recognition, in that their constitutions expressly state that the generally recognised principles of international law are part and parcel of their national law[26].

This point of view can be substantiated by the example of Italy. Under Italian constitutional law immunity from prosecution in national public law is not enforceable against the court, since, as a result of Articles 10 and 11 of the constitution, the domestic legal system is automatically brought into line with Articles 27 and 98 of the Rome Statute. Article 10 in fact states «*Italy's legal system shall conform with the generally recognised principles of international law*» and Article 11 that Italy «*shall agree, on condition of reciprocity, to such limitations of sovereignty as may be necessary to a legal system ensuring peace and justice between nations*»[27]. Article 9 of the Austrian constitution has virtually the same effect[28] [29].

In some constitutions, in particular in those of Central and Eastern Europe, provisions of international treaties in the field of Human Rights take precedence over conflicting provisions of the Constitution. This could facilitate the ratification of the Statute of Rome.

Finally, it should be noted that some States have a specific ratification procedure, permitting to ratify international treaties by qualified majority even though their content is deemed to be in conflict with other provisions of the constitution. Article 91 para 3 of the Constitution of the Netherlands allow to ratify a treaty, by two thirds majority of the members of both chambers, even though it seems that there could be conflicts between the treaty and the Constitution.

2. Surrender of Persons

Article 89 of the Rome Statute provides «*The Court may transmit a request for the arrest and surrender of a person … to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.*» This surrender procedure, which applies irrespective of the nationality of the person concerned, may be at variance with the ban on extraditing or expelling nationals to be found

[24] Articles 1 and 6 of the statute, adopted on 25 May 1993 and amended on 13 May 1998. It should not be forgotten that the Prosecutor of this ad hoc tribunal indicted Slobodan Milosevic when he was still in power as head of state. http://www.un.org/icty/indictment/english/mil-ii990524e.htm.

[25] Articles 1 and 5 of the statute of the tribunal. It should be noted that this tribunal has, inter alia, sentenced Jean Kambanda, the former Prime Minister of the interim government, to life imprisonment.

[26] See, in particular, Article 25 of the Constitution of Germany, Article 3 of the Constitution of Estonia, Articles 2 and 28 of the Constitution of Greece, Article 7 of the Constitution of Hungary, Article 135 of the Constitution of Lithuania, Article 3 of the Constitution of Andorra, Article 9 of the Constitution of Poland and Articles 8 and 16 of the Constitution of Portugal.

[27] Article 11 of the italian constitution.

[28] This article of the constitution provides: «*(1) The generally recognised rules of international law shall be regarded as an integral part of federal law. (2) The Federation may, by legislation or a treaty requiring approval in accordance with Article 50 (1), transfer specific federal competencies to intergovernmental organisations or their organs and may make the activities of foreign states' organs inside Austria and Austrian organs abroad subject to the rules of public international law*».

[29] On this subject see Constantin Economides, «The relationship between international and domestic law», in the Science and Technique of Democracy Collection, European Commission for Democracy through Law, Council of Europe, 1993.

in many countries' constitutions[30]. To get around this problem and facilitate ratification, the statute's authors inserted Article 102, which differentiates between surrender and extradition. The article states that for the purpose of the statute: «a) '*Surrender' means the delivering up of a person by a State to the Court, pursuant to this Statute; b) 'Extradition' means the delivering up of a person by one State to another as provided by treaty, convention or national legislation*». This differentiation between extradition and surrender has enabled a number of countries to ratify the statute without amending their constitutions, and will permit other countries to do so in the future. On ratifying the statute, some states will choose to incorporate this distinction into their domestic law with higher legal value. However, some other states will have no other choice than to proceed with a constitutional amendment, as their domestic law does not admit this interpretation or because they wish to avoid any confusion on this subject in their national legal system.

Countries choosing to adopt the interpretation proposed in the statute, which may include Poland, Slovakia and Slovenia, will follow in the footsteps of Italy and Norway, which have already ratified it. On this issue, Italy took the view that there was no constitutional impediment[31], since extradition existed only in inter-state relations and the concept did not apply to a state's relations with the court. Norway arrived at the same conclusion by holding that the transfer of nationals to the Court must be distinguished from extradition to another state, which is in fact prohibited by the constitution.

A number of other states[32] will probably proceed by amending their constitutions. Some, such as Germany and the Czech Republic, have already prepared bills of amendment. Germany proposes to add to Article 16 (2) of its Basic Law, which states «*No German may be extradited to a foreign country*», a provision to the effect that «*A regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an international court*»[33]; and the Czech Republic intends to incorporate an Article 112c, providing: «*… c) the Czech Republic shall release for prosecution by the respective international criminal court its own citizen or a foreigner, …*»[34] The advantage of this approach lies in the fact that it will undoubtedly eliminate all possibility of conflict with the rules of domestic law and ensure that the national courts comply with the obligations imposed by the statute, despite their reluctance to allow a national to be tried under another legal

[30] See, in particular, Article 19 of the Constitution of Germany, Articles 11(2f) and 14 of the Constitution of Cyprus; Article 9 of the Constitution of Croatia; Article 36 of the Constitution of Estonia; Article 13 of the Constitution of Georgia; Article 69 of the Constitution of Hungary; Article 13 of the Constitution of Lithuania; Article 4 of the Constitution of "the former Yugoslav Republic of Macedonia"; Article 23 of the constitution of Slovakia; Article 47 of the Constitution of Slovenia; Article 55 of the Constitution of Poland; Article 12 of the Constitution of the Czech Republic; Article 19 of the Constitution of Romania; Article 61 of the Russian Constitution and section 7 of the Finnish Constitution.

[31] Article 26 of the Italian Constitution provides: «*Extradition of a citizen may be permitted only where it is expressly provided for in international conventions. In no instance shall extradition be granted for political offences*».

[32] This could be the case of Cyprus, Lithuania, Malta, Portugal, "the former Yugoslav Republic of Macedonia" and Turkey.

[33] Summary of the implications of ratification and implementation of the Rome Statute of the International Criminal Court by Germany, CONSULTATION ON IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Strasbourg, 16-17 May 2000, Consult/ICC (2000) 18.

[34] Government Bill (extract) on the constitutional law amending the constitutional law of the Czech National Council no. 1/1993 Coll., Constitution of the Czech Republic, as amended by constitutional law no. 347/1997 Coll..

system. Its main drawback is - as already outlined above - that amending the constitution is a long and difficult process in some countries.

3. Sentencing

The third constitutional problem that can arise from the ratification of the Rome Statute concerns the sentences which may be imposed by the court. Under Article 77 of the statute, the penalties to which a person found guilty is liable include imprisonment for a term of thirty years and life imprisonment, where justified by the extreme gravity of the crime and the individual circumstances of the convicted person. This provision is at variance with a number of constitutions, which prohibit the imposition of a life sentence[35] or a prison term as long as thirty years.

As far as the underlying reason for this is that such penalties allow no chance of rehabilitation, it should be pointed out that the statute nonetheless makes provision for the possibility of rehabilitation, since Article 110 (3) requires the court to review the sentence to determine whether it should be reduced «*when the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment.*»

To the extent that the prohibition is based on the concept that these penalties expose the individual to a treatment prohibited in an absolute manner by the constitution, an amendment to the latter seems necessary. Such an amendment might simply consist in establishing an exception by providing that, where the court imposed a term of life imprisonment in accordance with the statute, this would not be anti-constitutional. Alternatively, it might provide that the country can surrender an accused person to the court despite the possibility that a life sentence may be pronounced[36].

In any event, for the vast majority of states no constitutional problem arises with this provision. It is also important to note that, by virtue of Article 80 of the statute, states parties are not obliged to prescribe the same penalties for similar offences in their national law[37].

The solution to another aspect of the same problem may lie in Article 103 of the Rome Statute, which defines the role of states in enforcing prison sentences. This article provides that sentences shall be served in a state designated by the court from a list of states which have indicated their willingness to accept sentenced persons. A state may make its acceptance subject to conditions, which must be agreed with the court and also be compatible with the provisions of Part 10 of the statute, which concerns enforcement. The state can also inform the court of any circumstances which could materially affect the terms or duration of imprisonment, and the court will then take a decision on this change under a well-defined procedure. States are therefore able to specify that they will not accept sentenced persons for periods longer than the maximum sentence permissible under national law. This is the approach followed by Spain, where the law ratifying the statute reads: «*Spain declares that, at the right moment, it will be prepared to receive persons condemned by the International Criminal Court, on the condition that the length of time of the imposed penalty does not exceed the highest maximum established for any crimes under Spanish legislation.*».

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[35] See, in particular, Article 30 of the Portuguese Constitution.

[36] On this subject, see, in particular, the Manual for the Ratification and Implementation of the Rome Statute, http://209.217.98.79/pdf/Icc-guide-english%20(PDF%20format).pdf.

[37] The article provides «*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*».

It should be noted that this article may also offer a solution to the problem of the prerogative of pardon, provided for in many countries' constitutions[38]. On this subject, the French Conseil Constitutionnel found «*whereas under Article 103 of the statute, a state which declares its willingness to accept persons sentenced by the International Criminal Court may attach conditions to its acceptance, which must be agreed by the court*; *whereas those conditions could 'materially affect the terms or extent of the imprisonment';*» [39] adding in the next paragraph «*… it follows from the above that, on declaring its willingness to accept sentenced persons, France could attach conditions to its acceptance, in particular concerning the application of national law on the enforcement of prison sentences; that it could also indicate that persons sentenced might be dispensed from serving all or part of a term of imprisonment as a result of exercise of the prerogative of pardon; consequently, the provisions of part 10 of the statute … do not violate the essential conditions of the exercise of national sovereignty, nor Article17 of the Constitution*». Following this interpretation given to Article 103[40], it would seem that states do not need to amend the provisions of their constitution concerning the prerogative of pardon. They are merely required to inform the court of their conditions, in particular the fact that the head of state or government may exercise the prerogative of pardon, or to follow the procedure for modifying the terms or duration of imprisonment laid down in the statute.

4. Other problems

Ratification of the statute may raise other constitutional issues. Apart from immunity, the decision by the French Conseil Constitutionnel addresses two other problems. Article 99 (4) of the statute provides « … *where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State»* according to a well-defined procedure[41].

The French Conseil Constitutionnel issued the following finding with regard to the above paragraph: «*whereas under paragraph 4 of Article 99 of the statute, the Prosecutor may, even in circumstances where a national judicial authority is not unavailable, take certain investigatory measures outside the presence of the authorities of the requested State*

[38] See Article 60 of the Constitution of Germany; Article 1 a) of the Constitution of Andorra; Article 65 of the Constitution of Austria; Articles 103, 111 and 125 of the Constitution of Belgium; Article 98 of the Constitution of Croatia; Article 24 of the Constitution of Denmark; Article 78 of the Constitution of Estonia; section 29 of the Constitution of Finland; Article 17 of the French Constitution; Article 73 of the Constitution of Georgia; Article 47 of the Constitution of Greece; Articles 29/E and 30/A of the Constitution of Hungary; Article 13 of the Constitution of Ireland; Article 87 of the Italian Constitution; Article 45 of the Constitution of Latvia; Article 84 of the Constitution of Lithuania; Article 83 of the Constitution of Luxembourg; Article 84 of the Constitution of "the former Yugoslav Republic of Macedonia"; Article 93 of the Constitution of Malta; Article 20 of the Norwegian Constitution; Article 139 of the Constitution of Poland; Article 62 of the Constitution of the Czech Republic, Article 94 of the Constitution of Romania; Article 102 of the Constitution of Slovakia; Article 107 of the Constitution of Slovenia; Article 87 of the Constitution of Turkey; and Article 106 of the Constitution of Ukraine.

[39] Conseil Constitutionnel, Paris, Decision No. 98-408 DC of 22 January 1999, page 472.

[40] On this subject, see, in particular, F. Luchaire, «La Cour pénale internationale et la responsabilité du chef de l'Etat devant le Conseil Constitutionnel; *Revue du Droit Public* – No 2-1999, page 15.

[41] See Article 99 (4) of the statute.

on the latter's territory; … failing special circumstances, although the measures are in no way compulsory, the authority granted to the Prosecutor to take such measures without the presence of the competent French judicial authorities may violate the essential conditions of the exercise of national sovereignty …»[42].. It therefore held that this provision breached the French constitution of 1958 and ratification necessitated a constitutional amendment.

The Luxembourg Conseil d'Etat reached a conclusion which is different from that of its French counterpart. It held that *«paragraph 4 of Article 99 of the Rome Statute does not result in any conflict with provisions of our Fundamental Law. In so far as application of Article 99 of the Statute could lead to interference with the powers of the judicial authorities, in particular, Article 49bis*[43] *of the Constitution would allow a temporary transfer of powers»*[44].

The second problem identified by the French Conseil Constitutionnel lies in the fact that the International Criminal Court «*could properly have jurisdiction to hear a case merely as a result of the application of an Amnesty Act or a national statute of limitations; in such circumstances, France, without being unwilling or unable, could be obliged to arrest a person and surrender him or her to the Court by reason of offences which, under French law, were covered by an amnesty or a limitation period; this would amount to a violation of the essential conditions of the exercise of national sovereignty*»[45]. France adopted a new constitutional article which solves all the constitutional problems raised. It should be noted that most constitutions say nothing about whether crimes are subject to limitation. However, should a constitution need to be revised, the amendment could provide that limitation or an amnesty would not apply in the event of a request from the court to surrender an individual.

Article 39 (2)b)ii of the Statute may also cause constitutional problems. It provides that accused persons shall be heard by a Trial Chamber consisting of three judges, whereas some constitutions provide for a trial by jury[46]. It should be noted, however, that these constitutional provisions aim at regulating the procedure before the national criminal courts, and do not seem to require, as a general rule, a trial by jury in proceedings outside the national jurisdiction.

It has been claimed that Article 59 paras. 4 and 5 endanger the principle of habeas corpus as outlined specifically within Article 5 of the European Convention of Human Rights. Article 59 paras. 4 and 5 state that when the competent authority deals with a request for an interim release it "*...[may not]...consider whether the warrant for arrest was properly issued in accordance with Article 58, para. 1 (a) and (b)*", it cannot therefore examine whether there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and whether the arrest of the person appears necessary: to ensure the person's appearance at trial; or to ensure that the person does not obstruct or endanger the investigation of the court proceedings or, where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the

[42] Page 472 of the decision by the Conseil Constitutionnel mentioned in footnote 39.
[43] This article provides «*The exercise of powers which the Constitution reserves for the legislature, the executive or the judiciary may be temporarily transferred by treaty to institutions governed by international law*».
[44] Opinion issued by the Conseil d'État on 4 May 1999, page 5.
[45] Page 471 of the decision by the Conseil Constitutionnel mentioned in footnote 39.
[46] See, in particular, Article 38 of the Irish Constitution; Article 150 of the Belgian Constitution and Article 97 of the Greek Constitution.

jurisdiction of the Court and which arises out of the same circumstances.[47] The Pre-Trial Chamber is informed of this request for interim release and shall "*make recommendations, to the competent authority in the custodial State*" which must, before rendering its decision, take such considerations clearly into account.

It must however be emphasised that the character of deprivation of liberty in question is not of the nature foreseen in Article 5 para. 1 (c) of the European Convention of Human Rights, which states that a person may be detained "for the purpose of bringing him before the competent judicial authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". It is rather a deprivation of liberty within the meaning of Article 5 para. 1 (f) which authorises a deprivation of liberty if it is "...the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition." In effect, the surrender of a person to an international organisation can be assimilated in this respect to an extradition[48].

The scope of the obligation contained within Article 5 para. 4 is not identical for each type of deprivation of liberty; indeed this is particularly so as regards the scope of the judicial review required[49]. The Convention requires a review of the necessary conditions for the legality of a deprivation of liberty of an individual in relation to paragraph 1 of Article 5.[50] In respect of Article 5 para. 1 (f), the competent authority is not required to examine whether a "reasonable suspicion" exists to believe that the person arrested and detained has committed a crime, nor whether there is risk of fleeing, collusion or commission of other crimes. These elements are related to police custody and interim detention before criminal trial (envisaged in Article 5 para. 1 (c)). In the context of detention under Article 5 para. 1 (f), the judicial authority must investigate whether the detention was "lawful" with the frame of this provision; it must thus verify whether a procedure of extradition is effectively underway. The competent authority is not therefore asked to look into the elements referred in Article 58 paras. (a) and (b) of the Statute of Rome.

Another issue they may be raised is the question whether Articles 59 and 60 of the Statute are compatible with the constitutional principle that nobody can be deprived of the Court which his national law assigns as the competent court. It is true that, as a consequence of Articles 59 and 60, the accused after surrender to the Court can no longer request release on bail from the competent national judge in the country where he is detained but only from the Pre-Trial chamber. This does not seem to infringe upon the abovementioned principle, though, because after surrender the Pre-Trial Chamber becomes the "lawful court" competent to decide on the conditional release of the accused.

Conclusion

As we have just seen, ratification of the Rome Statute may raise a number of problems of constitutional law. Several constitutional problems can be identified in connection with the ratification of the Statute of Rome. They concern mainly the immunity of Heads of state or Government and persons with "*official status*", the extradition of nationals

[47] Article 58 para. 1 (a) and (b) of the Statute of Rome.
[48] The preceding section of this report contains specific discussion on this point..
[49] See Chahal v. United Kingdom, No. 1 European Court of Human Rights, page 127.
[50] Idem.

and sentences which may be pronounced by the Tribunal. In order to resolve these problems the European states could:

- inserting a provision into the constitution which would allow to settle all constitutional problems, thus avoiding the introduction of exceptions to each article concerned;
- introduce and/or apply a special procedure to ratify a treaty if any of its provisions are deemed to conflict with the Constitutions;
- systematically revising all constitutional provisions which are in conflict with the Statute;
- interpreting certain provisions of the constitution in a way to avoid conflict with the Statute of Rome

Ratification by members of Council of Europe will be necessary for the statute to enter into force. If member states comply with the recommendation[51] of the Parliamentary Assembly of the Council of Europe and the resolution[52] adopted by the European Parliament, ratifying the Rome Statute as quickly as possible, the international criminal court will become one of the architects of a solution putting an end to impunity to violation of humanitarian law and human rights.

[51] Referred to in footnote 3.
[52] Referred to in footnote 2.

A P P E N D I X I

Charter of the International Military Tribunal, Nuremberg, August 1945

Article 7.

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.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, 1950.

Principle 3

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Draft Code of Offences against the Peace and Security of Mankind, 1954, International Law Commission.

Article 3

The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any the offences defined in this Code.

Commentary of Draft code of crimes Against the Peace and Security of Mankind, 1996.

Article 7: Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

European Convention on Human Rights

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

    a. the lawful detention of a person after conviction by a competent court;

    b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

    c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

    d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

    e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

    f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

A P P E N D I X II

Relevant Articles of the Rome Statute

Article 27: *Irrelevance of official capacity*

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 29: *Non-applicability of statute of limitations*

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 39: *Chambers*

[…]

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

[…]

Article 57: *Functions and powers of the Pre-Trial Chamber*

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
[…]
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
[…]
(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the

unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

Article 58: *Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear*

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
(b) The arrest of the person appears necessary:
(i) To ensure the person's appearance at trial,
(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:
(a) The name of the person and any other relevant identifying information;
(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
(c) A concise statement of the facts which are alleged to constitute those crimes;
(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:
(a) The name of the person and any other relevant identifying information;
(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
(c) A concise statement of the facts which are alleged to constitute those crimes.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain: […]

Article 59: *Arrest proceedings in the custodial State*

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
(a) The warrant applies to that person;
(b) The person has been arrested in accordance with the proper process; and
(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 77: *Applicable penalties*

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:
(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 80: *Non-prejudice to national application of penalties and national laws*

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.

Article 89: *Surrender of persons to the Court*

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

[…]

Article 98: *Cooperation with respect to waiver of immunity and consent to surrender*

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99: *Execution of requests under articles 93 and 96*

[…]

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:
(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.
5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 102: *Use of terms*

For the purposes of this Statute:

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

Article 103: *Role of States in enforcement of sentences of imprisonment*

1. (a)A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
(b)At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
(c)A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

Article 110: *Review by the Court concerning reduction of sentence*

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.