The Constitutionality Ratification of the Statute of the Rome by El Salvador

By

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Declaration form

The work I have submitted is my own effort. I certify that all the material in this dissertation which is not my own work, has been indentified and acknowledged. No materials are included for which a degree has been previously conferred upon me

Belisssa Guerrero Rivas,

May 20, 2012.

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Abstract

El Salvador is one of the three Latin American countries that is still not part of the International Criminal Court. (ICC)The International Criminal Court is the first permanent criminal court, which main objective is to prosecute to those who have committed crimes against humanity, war

crimes, genocide and aggression.

The ICC is laid down in the complementary principle. According to this principle, if a State is unwilling or incapable to carry out an investigation or prosecution, then the case can be brought to the ICC. In other words, is *conditio sine quanon* to exhaust the domestic remedies

The ICC has a double dimension: a security dimension, which can be understood as peace-maintaining agent; and be a criminal court as a proper role, prosecute to those who have committed crimes under its jurisdiction.

El Salvador is still not part of this international jurisdiction alleging that becoming part could harm some constitutional dispositions. However in the following dissertation it will be a legal, human rights and analytical discussion on how it is possible to become part of the ICC and do not violate the Salvadorian Constitution.

Key words: El Salvador, International Justice, Statute of Rome, International Criminal Court and Human Rights.

I. Introduction

In the last fifty years, the international community has dealt with the increasing need for an effective system of international justice by creating international war crimes tribunals. According to some academics, "in fifty years since Nuremberg, states have shown little stomach for the international punishment of war crimes, crimes against humanity, and genocide, although treaties and normative canon proscribing such atrocities have been increased". (Mutua, 1997: 169).

Even though more than fifty years have passed since the German holocaust, atrocities against humanity have continued to occur with alarming frequency:

> "…the horror in Cambodia under the Pol Pot, Uganda under Idi Amin, Guatemala under the military and Iraq under Saddam Hussein, among others, did little to punish states to national or international prosecution of heinous crimes against civilian population". (Mutua, 1997:169).

In this context, the creation of the International Criminal Court was necessary to prevent that such crimes from taking place in the world. The establishment of the Ad hoc International tribunals for Rwanda and the Former Yugoslavia accelerated the elaboration of a statute for a universal criminal court. (Pocar, 2004: 304).

The establishment in 2001 of the International Criminal Court helped to ensure "a proper and effective exercise of the jurisdiction over the crimes resulting in serious violation of international humanitarian law and human rights law, with a view of combating impunity for such crimes, even where domestic courts would not be able or willing to do so" (Pocar, 2004: 307).

Ratification of the ICC is still pending in El Salvador. At the present time in Latin American, only El Salvador, Cuba and Nicaragua remain outside this international jurisdiction. The main aim of the following dissertation it is to verify whether or not El Salvador requires constitutional reform in order to become part of this international treaty.

In this respect this study presents a conceptual framework to help explain why countries with poor human rights records are less likely to be part of this international jurisdiction.

Additionally, the reader will find a section detailing the historical, political and legal background to the human rights situation in El Salvador.

As part of the investigation, this study will show how international criminal law and international human rights law are linked, particularly in instances of gross human rights violations such as genocide, crimes against humanity, war crimes and aggression. Likewise, the reader will learn how constitutional reform could be carried out in El Salvador, and how the Salvadorian constitution deals with international treaties.

The main body of the investigation will be found in the chapter titled Constitutional arguments used by El Salvador to reject the Statute of Rome, where the seven obstacles to ratification cited historically in El Salvador are explained, and arguments made in order to dismiss them. Lastly, the conclusions and recommendations of this study are given.

II. Methodology.

II.1 *Aim and research question*

Ratification of the ICC depends of the common agreement between two of the three powers in governmental organs of El Salvador. According to the Constitution of El Salvador Article 131(VIII), the National Congress has the obligation to ratify the international instruments. Article 168 (VI) gives the President of the Republic has the faculty to sing international treaty body.

The Article 147 of the Salvadorian Constitution establishes that in order to ratify an international treat it is necessary to have the votes of the ¾ parts of the Congress in El Salvador.

This dissertation will not take into consideration the political implications of ratifying the Statute of Rome, The concern will only be on the legal perspective. In other words, what the researcher is trying to find is the pure constitutional legal difficulties in order to become part of this international jurisdiction, and analyzed them in the light of international human rights law.

In of short, ratification of the Statute of Rome in El Salvador is definitely contributes to the protection of human rights. However, El Salvador will need to adapt the ICC statute in its national law in order to guarantee the international standards that are present in the Statute of Rome, it will also be necessary to create a collective awareness of the importance of this international law, and how this benefit the country.

During this dissertation the main question to address will be:

"Does El Salvador need a constitutional reform in order to become part of the ICC?"

II.2 *Methodology followed*

The following dissertation will take as its main axis the methodology of comparative law. In order to clearly outline the process of the investigation, the methodology will be divided into four stages:

The first stage will be oriented around the theoretical and legal framework of the study, in order to outline both its conceptualization and legal basis and can be found in the early chapters of the dissertation (*The relationship between International Human Rights Law and International Criminal Law*, and *Previous Considerations*). The purpose of this first stage is to present an introductory exploration of how international human rights law is clearly linked with international criminal law. Additionally, the reader will find an account of El Salvador's background with regard to the ICC and a discussion of the significance for El Salvador of it becoming part of this international jurisdiction.

The second stage applies the law to the concrete cases. In this particular, the main objective will be to detail the main obstacles that would prevent El Salvador becoming part of the ICC. This section uses case studies as its research method - actual constitutional resolutions on legal cases that have been deemed unconstitutional by El Salvador. Certain parameters used by countries such as Costa Rica, Ecuador, Guatemala and Colombia, can be applied to help understand how constitutional obstacles can be dismissed. Additionally, some international conventions will be used as a guide to understanding how international human rights law is applied in the international context. This part of the methodology is found the chapter *Constitutional arguments used to reject the Statute of Rome of the ICC by El Salvador*, particularly in the sections that deal with the diminishment of national sovereignty, extradition and surrender concepts, and national prosecution.

This stage will also examine and analyze some of the national jurisprudence issued by the Salvadorian Constitutional Chamber to understand some of the national fictions in El Salvador and how they can follow the international human rights law. This part of the methodology can be found in section c) of the chapter entitled *Previous Considerations*, which addresses the national adoption of international treaties, and in the chapter *Constitutional arguments used to reject the Rome Statute of the ICC by El Salvador*, in the sections that deal with the diminishment of national sovereignty, the prohibition of life imprisonment, and national prosecution.

The third stage will consider international jurisprudence (the Inter-American Commission on Human Rights, the ICTY and the ICTR) in order to understand how international jurisprudence can be helpful to understanding how some of the hurdles to ICC ratification claimed by El Salvador can be overcome. This can be found in the section that deals with the prohibition of life

imprisonment.

This study will consider conventions, human rights treaties, academic literature, amicus curiae, and journalistic investigation in its exploration of the topic and demonstration of how ICC jurisdiction can be approved by the Salvadorian State without any constitutional reform.

The sources will be divided into primary sources and secondary sources. Conventions, human rights treaties and international and comparative law cases will be the primary sources, while academic literature and journalistic investigation will be considered secondary sources.

This study did not conducted interviews, as this dissertation is not intended to be a field investigation, and, since there is no national position regarding this topic, no national authorities are able to give an official position.

The aim of this study is that of a legal and academic investigation, where the analysis will be based on how the international community could help to solve the constitutional problems faced by El Salvador in this context through the interpretation of international conventions, jurisprudence in the area, relevant academic investigation, and some national and comparative jurisprudence.

III. Conceptual Framework

The International Criminal Court (hereafter ICC or the Criminal Court) was established in 2001, as the first permanent international criminal court in the world. Its main objective was to prosecute those who committed war crimes, genocides, crimes against humanity and the crime of aggression[1].

However, as any other international court, in order to adjudicate on these kinds of cases, it is *conditio sine quanon* to assume jurisdiction - that the State involved has to be part of the Statute of Rome, which was the international treaty that created the ICC.

The idea of establishing a permanent international court is by no means a recent idea. The adoption of the Convention against Genocide itself implies creating the means by which that crime should be prosecuted. Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter "Convention against Genocide") envisaged means why which those who commit this crime would be "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

The draft provisions of the international criminal court were considered by the UN International Law Commission (hereafter referred to as the ILC). In 1994 the ILC presented its final draft to the UN General Assembly and recommended a conference of plenipotentiaries to negotiate a Statute. The UN General Assembly established an Ad-Hoc Committee on the Establishment of an Intentional Criminal Court, in 1995[2].

The Assembly then convened the UN Conference of Plenipotentiaries on the Establishment of the ICC at its fifty-second session to finalize and adopt a convention on the establishment of this Criminal Court. The Rome Conference took place from 15 June to 17 July 1998, with 160 countries participating in the negotiations. After five weeks of intense negotiations, 120 nations voted in favor of the adoption of the Statute of Rome, with seven nations voting against the

[1] According to Article 5 of the Statute of Rome: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; and (d) The crime of aggression."

[2] See Coalition for the Internacional Criminal Court, "History of the ICC" http://www.iccnow.org/?mod=icchistory

treaty (including the United States, Israel, China, Iraq and Qatar) and twenty one states abstaining. El Salvador was one of the States that voted in favor[3].

III.1Background

El Salvador is one of five Central American countries that are out of the International Criminal Court's reach. During the 1980s, the country experienced internal armed conflict that lasted twelve years. In January 1992, peace accords were signed in Mexico, ending the internal armed conflict in the country. The parties to this peace deal were the Government and the guerrilla group the *Frente Farabundo Marti para la Liberacion Nacional*- FMLN, which was created in 1980 through the merger of five armed dissident groups.

El Salvador did not sign the International Criminal Court (ICC) Statute, but participated actively in the Rome Conference in 1998. Since the ICC came into effect, El Salvador has not participated in the meetings and has adopted a negligent attitude towards the Court, including the adoption of a bilateral agreement with the U.S. by which both parties agreed that their nationals would not be transferred to the ICC if they commit crimes under the Court's jurisdiction. (Guerrero Rivas and Rodriguez-Pareja, 2012:1).

III.2 Becoming part of the ICC

The ICC is the first permanent international criminal court established to end the impunity previously enjoyed by many of those responsible for gross human rights violations such as genocide, crimes against humanity, war crimes and aggression.

The ICC is laid down in the complementary principle, which means that "ICC prosecutors can only bring a case if the State is unwilling or unable to prosecute covered crimes domestically; compliance requires a State to commit to having relatively good domestic law enforcement institutions" (Dutton, 2009:10).

Despite the importance of becoming part of this international court, there are some countries, like El Salvador, that are yet to become part of this institution. Dutton explains that States with strong domestic enforcement institutions are more likely to join an international court than the ones with poor human rights records. (Dutton, 2009:3).

[3] See http://www.contrapunto.com.sv/columnistas/corte-penal-internacional-ahora-si

Particularly, Dutton acknowledges that "democratic states may be more likely than authoritarian states to commit to international human rights regimes because the norms embodied in such regimens are likely also already part of their domestic policies, practices, law and institutions- meaning that compliance cost will be minimal" (Dutton, 2009:6).

Consequently, it is possible to predict that States with better human rights practices will be more likely to ratify human rights conventions, not only because it will find compliance with treaty norms easy and, accordingly, less costly. (Dutton, 2009:6).

Nevertheless, States that "generally embrace and promote norms favoring good human rights practices, but have a larger military presence within the world community may also find that their nationals could be more likely targets of an ICC prosecution. Because the crimes covered by the ICC include 'war crimes' states with a greater military presence may be more at risk for prosecution of their citizens- and therefore view ICC ratification as more costly[4]- than states with smaller military presence" (Dutton 2009,:7)

On the other hand, States with poor human rights practices and records often join human rights regimes, but do not alter their poor practices, perhaps due to a lack of concrete and substantial enforcement mechanisms that would induce compliance (Dutton, 2009:6).

In conclusion, States with poor human rights records are less likely to ratify the ICC, while States with strong domestic law enforcement institutions are more likely to join it (Dutton, 2009: 20).

[4] "For example, the United States argued during the negotiation that its military forces should be exempted from the ICC jurisdiction because those forces were present throughout the world […]" (Dutton, 2009:7).

IV. The relationship between International Human Rights Law and International Criminal Law.

Human rights are seen by modern societies as principles to which they aspire in their construction of democracy and the rule of law. However, the objective that powers the principles of human rights is that they are "practical and effective and not theoretical and illusory". (Eur Court of Human Rights. *Airey v Ireland*, 1979, para. 24).

When deciding to become part of an international human rights system, such as the European System, the Inter-American System, the African System and the Universal System, States must comply with the obligations established by these Systems. Human rights systems enshrine the "obligation to ensure criminal law protection of the most fundamental Convention rights and freedoms can clearly not be limited to enactment of criminal provision destined to remain a dead letter; those who contravene them must, in addition be actually prosecuted, tried and punished". (Tulkens, 2011:587).

In short, human rights have both a defensive and offensive role, when neutralizing and triggering criminal law (Tulkens, 2011: 579). Traditionally, from a defensive perspective, human rights were conceived to afford protection from, criminal law. On the other hand, from an offensive perspective, criminal law "is called into play to protect human rights". In other words, criminal law provisions are intended to preserve public order and protect the State. Criminal law could also be used to protect individual freedoms. (Rivero, 1971: 317).

The offensive role gives the State two types of obligations. The first is the substantive obligation. The European Court of Human Rights has acknowledged this kind of obligation when

interpreting Article 2 (the right to life) of the European Convention on Human Rights. The right to life is protected by law in the European Court, which, points out that the States positive obligation is to have "effective criminal law provision to deter commission of offenses against the person" (Eur. Court of Human Rights Kilic v Turkey, 2000. Para. 62). In other words, human rights require criminal provision in order to be protected.

The second kind of obligation is the procedural one, which means that the State "must set up an effective judicial system which, in some circumstances, must include recourse to the criminal law" (Eur. Court of Human Rights Edwards v United Kingdom, 2002. Para 69).

The investigation needs to satisfy a number of requirements, which should be evident in "each stage of the criminal law process: criminalization in primary legislation (definition of proscribed conduct)[5], interpretation of the criminal law[6], the form of prosecution[7], the availability and choice of investigative measures to clarify the faces in issue[8], the classification by the courts being punished[9], sentencing[10], and last but not least execution of the sentence[11]". (Tulkens, 2011: 587).

To sum up, the criminal process is the 'criminal arm' used to prevent and when necessary punish infringements of fundamental rights occurring in a State's jurisdiction, whether they are committed by state agents or private individuals. (Tulkens, 2011: 587).

In contrast, civil procedures are not capable of protecting human rights. Thus the European Court of Human Rights has acknowledged that "a civil action is incapable without the benefit of

[5] See Eur. Court of Human Rights. Siliadin V France. Appl.No. 73316/01, 26 of July 2005.
[6] See Eur. Court of Human Rights. M.C. v Bulgaria. Appl No. 39272/98, 4 December2003.
[7] See Eur. Court of Human Rights. Sandra Jankovic v Croatia. App. No. 38468/05, 5 March, 2009.
[8] See Eur. Court of Human Rights. K.U. v Finland Appl. No. 2872/02. 2 December 2008.
[9] See Eur. Court of Human Rights. Oneryldiz v Turkey Appl. No. 48939/99. 30 November 2004.
[10] See Eur. Court of Human Rights Oneryldiz v Turkey Appl. No. 48939/99. 30 November 2004.
[11] See Eur. Court of Human Rights Branko Tomasic and Other v. Croatia. Appl. No. 46598-06, 15 January 2009.

the conclusions of a criminal investigation, of making any meaningful finding as to perpetrators of fatal assaults, and still les to establish responsibility" (Eur. Court of Human Rights. Khashiyev and Akayeva, 2005, para 121).

In other words, criminal procedures constitute *par excellence* the most appropriate remedy for satisfying the procedural requirements of the protection and promotion of human rights in a State.

To conclude, "[w]hile the human rights have been able to contribute to profound humanization of the criminal law, through the 'bad conscience' they have engendered for almost two centuries in relation to its application, they have also contributed to strengthening of the criminal law, through the 'good conscience' they give it in ensuring the protection of such rights". (Tulkens, 2011: 593).

Consequently, the relationship between these two types of law is very close particularly in instances of such crimes as genocide, crimes against humanity and war crimes. At first, these crimes can be classified as violations of international human rights law, but they can also be prosecuted by international criminal law.

For example, the International Human Rights law, through the Universal or Regional System of Protection, will determine that a State has violated human rights, in situations such as genocide, crimes against humanity, etc. However, it cannot determine self responsibilities, which is the duty of the International Criminal Law through different international tribunals, such as the ICC, the International Criminal Court for the Former Yugoslavia (ICTY), the International Court for Rwanda (ICTR), and the Special Tribunal for Lebanon, etc.).

V. The importance of the ICC for El Salvador

V.1 Background

El Salvador is one of the five Central American countries that is out of reach for the International Criminal Court. During the 1980s, this country suffered from an internal armed conflict that lasted twelve years. It was one of the most violent non-international conflicts in Latin America that left 75 thousand dead, and featured enforced disappearances, extrajudicial executions, and outright massacres.

In January 1992, peace accords were signed in Mexico, ending the internal armed conflict in the country. The parties to this peace deal were: a) the Government and b) the guerrilla (*Frente Farabundo Marti para la Liberacion Nacional*- FMLN), which was created in 1980 through the merger of five armed dissident groups.

The signing of the Peace Accords was followed by the establishment of the United Nations Commission on the Truth for El Salvador (hereafter "the Truth Commission") to investigate the human rights violations that took place during the conflict. In its Report[12], published in March 1993, the Truth Commission described the both violations of human rights and humanitarian laws that had taken place, and indicated the individual responsibility for these violations.

One of the most well-known and responsible persons for atrocities was Major Roberto D'Aubuisson, who, according to the Truth Commission Report, was the head of the death squads in El Salvador and principal author of various human rights violations including the murder of

[12] UN Security Council, *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, S/25500, 1993, pp. 5-8

the Archbishop of San Salvador, Monsignor Oscar Arnulfo Romero, on March 1980[13].

To the dismay of the victims, the National Congress of El Salvador decreed a General Amnesty Law on March 20, only five days after publication of the Truth Commission Report. On March 26, 1993, President Alfredo Cristiani approved this Amnesty Law [14].

It is important to mention that it was Major Roberto D'Aubuisson who in 1981 formed a political party called ARENA (National Republican Alliance), a right wing party that governed El Salvador from 1989 to 2009. Perhaps understandably, the Arena Government was resistant to the acceptance of the Statute of Rome, fearing that atrocities committed in the war could be judged by this international court, and claiming that such a situation may undermine the spirit of reconciliation that is needed to govern the State. In addition, they also advanced other alleged constitutionality issues that would have hindered the acceptance of the ICC jurisdiction.

V.2 The importance for El Salvador.

As stated before, El Salvador experienced a non-international armed conflict in which numerous violations of human rights and humanitarian law took place. At the present time, there are a variety of processes of redress the country underway for the atrocities committed during that conflict[15].

The constitutional ratification of the Statute of Rome in El Salvador is a very important matter for Salvadorian society. The country failed to guarantee human rights, and in particular justice

[13] . UN Security Council, *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*. IV. Cases and Patterns of Violence. D. Death squad assassinations. 1. Illustrative case: Archbishop Romero (1980) S/25500, 1993, 5-8

[14] IACHR (Inter-American Commission on Human Rights).Monsignor Oscar Arnulfo Romero y Galdamez. El Salvador. Report Nº 37/00. April 13, 2000. Para.131

[15] The president of the Republic has ask for a public pardon in different occasions, and has encouraged to promote judicial process to punish the ones who had committed human rights violations. See Public Speech of the President during of the 20 years of the signing of the peace accords celebration http://www.presidencia.gob.sv/index.php/novedades/discursos/discursos/item/92-18-aniversario-de-la-firma-de-los-acuerdos-de-paz.html

in the aftermath of human rights violations, when the internal conflict took place.

The ICC is an international court capable of bringing to justice those responsible for the type of atrocities described in the Statute of Rome. Preventative and dissuasive elements are laid down in the ICC. If a State is a member of the ICC, its nationals will think twice before committing crimes falling under the court's jurisdiction. A country with a violent history, like El Salvador, should have a minimal legal mechanism in order to prevent that the atrocities committed in the past are not repeated. The very existence of the ICC could thus be an important tool in the guaranteeing of human rights for future generations.

Humanity has travelled a long and arduous road in the struggle for peace, justice and human rights in a world as full of conflicts as ours. Keeping in mind that there can be no peace without justice, no justice without law, and no law without a court to enforce it, humanity has finally achieved the remarkable goal of establishing an impartial, competent and permanent tribunal that might serve as a deterrent for international crimes, to the extent that any deterrent exists for criminal acts.

Hence if El Salvador becomes a State Party of the ICC by joining the Statute of Rome, future generations have an extra layer of protection from crimes against humanity, war crimes, genocide and crime of aggression. Moreover, such a move will also help to ensure that those situations never again occur in El Salvador, and should they do so, an international, independent, and competent tribunal will be on hand to adjudicate on those crimes when the national jurisdiction is incapable of doing so.

In short, ratification of the Statute of Rome in El Salvador would definitely contribute to the protection of human rights. However, El Salvador will need to adapt its national law to the ICC

statute in order to guarantee the international standards that are present in the Statute of Rome. It will also be necessary to create a collective awareness of the importance of this international law, and how it will benefit the country.

VI. Previous Considerations

The following dissertation aims to verify whether constitutional reform is necessary in El Salvador before it can become a State Party to the Statute of Rome, the treaty that created the International Criminal Court (ICC).

VI.1.Background and actual situation in El Salvador.

El Salvador is one of the two Central American States[16] that have still not accepted the international jurisdiction of the ICC. In El Salvador, Arena, the party which ruled the country between 1989 and 2009, chose to decline the invitation to ratify the Statute of Rome. This decision was justified by the concern that atrocities committed in the Salvadorian war (1980-1992) could be adjudicated on by this international court, which it was claimed could have undermined the spirit of reconciliation that was necessary at that time for the State. The Salvadorian government also advanced other constitutionality issues that it deemed a hindrance to the acceptance of the ICC's jurisdiction.

At the present time, the situation remains essentially unchanged. Although Arena left power in 2009, the present government has made no moves to incorporate El Salvador into this international jurisdiction. On September 2011, the President of the National Congress urged to the President of the Republic, Mauricio Funes, to present the Statute of Rome before the National Congress for approval[17]. However, an answer to this request is yet to be given by the Executive. In that sense, it can be said that the Executive has not shown any readiness to accept

[16] At the present time Guatemala, Costa Rica, Honduras and Panama are State Parties of the Statute of Rome. Nicaragua and El Salvador are still pending.

[17] In that respect see http://www.lapagina.com.sv/nacionales/55619/2011/09/07/Sigfrido-Reyes-reta-a-Funes-para-permitir-que-Corte-Penal-Internacional-tenga-jurisdiccion-en-el-pais , visited 11.16.11.

the Statute of Rome.

Due the lack of an official position from the Salvadorian Government outlining the hurdles that are obstructing El Salvador from joining this international court, the following dissertation will based on those cited by Arena Government. These were collated by Enrique Argumedo into a document named *"Constitucionalidad y Corte Penal Internacional"* (Constitutionality and International Criminal Court), which was published in 2004.

VI.2. Constitutional Reform Process

Article 248 of the Salvadorian constitution envisages the process for constitutional reform in El Salvador. To reform the constitution, half of the congresspersons plus one are required to vote in favor of this reform. The next period of National Assembly has then to ratify this reform with the votes of two thirds of its elected congresspersons. As a National Assembly period in El Salvador lasts three years, in that sense it would take least six years to reform the constitution.

In that regard, the following dissertation aims to verify whether or not constitutional reform is needed in El Salvador in order for it to become a State Party of the ICC, or whether the State can became part of this international jurisdiction without constitutional reform.

VI.3. National adoption of International treaties

In Article 144, the constitution acknowledges that the international treaties ratified by El Salvador are laws of the Republic. In case of conflict between national legislation and an international treaty ratified by El Salvador, the latter will take precedence the last one will be applied.

El Salvador does not recognize the 'constitutional block', which means that the international treaty bodies dealing with human rights are given the same hierarchical import as the constitution. In El Salvador, the Constitution is a supreme norm; no other norm is at the same level or above. Some other Latin American countries have envisaged the constitutional block principle[18].

Nevertheless, the Constitutional Chamber of the Supreme Court of El Salvador in the Unconstitutionality process 52-2003/56-2003/57-2003 of April 2004 stated that "Article 144(2) implies a mandate directing the legislator to refrain from issuing law contrary to the meaning, criteria and principals of international law that develop fundamental rights; resulting, should the legislator fail to comply, in unconstitutionality on the basis of not respecting the criteria detailing hierarchical predominance prescribed in Article 144 (2).(Constitutional Chamber, Unconstitutionality process 52-2003/56-2003/57-2003. April 2004:113).However, the legislator can violate the constitution when promoting laws that are contrary to the ratified international treaty bodies on human rights, according to the interpretation of the Constitutional Chamber.

For all the described above, El Salvador is a country that follows the monist theory, which means that the "State establishes with other States. If the international law coerces the State it happens because the State has agreed to limit its sovereignty: the State self-imposed limitations by its freely complied will take part in the treaties and by the freely acceptance of the customary international law". (Blumann and Dubois, 2005:536).

[18] Colombia, Costa Rica, Argentina. Venezuela.

VII. Constitutional arguments used to reject the Rome Statute of the ICC by El Salvador.

This chapter examines the constitutional issues that are said to hinder El Salvador in joining the International Criminal Court (ICC). Argumedo (2004:27) affirms that according to some leaders of El Salvador, there are at least seven constitutional obstacles preventing the country from ratifying the Statute of Rome and therefore the ICC. Hence, it is said that ratification could *per se* violate the Salvadorian constitution.

VII.1. Diminishment of National sovereignty

Article 83 of the Salvadorian Constitution defends the principle of national sovereignty. According to this provision, El Salvador is a sovereign State. The principle of Sovereignty is based on the principle *suma postestas o maniestas,* which guarantees independence from foreign powers and the exercise of full power by the nation. (Zuppi 2001:1. El Concepto de Jurisdicción Universal).

The Constitutional Chamber of the Supreme Court of El Salvador acknowledges that sovereignty has an external manifestation, which means independence from foreign state powers. In other words, it is not possible for another state to exercise jurisdiction inside El Salvador (Constitutional Chamber: Unconstitutional Process 3-91:7).

However, Salvadorian national legislation recognizes that international courts can exercise jurisdiction within the country. Article 89 of the Salvadorian constitution envisages the existence

of international organizations with supranational functions[19]. This Article implies the acceptance of the rule of international law in the country.

The existence of the international jurisdiction of international courts is not a new to El Salvador. In 1992, the Tegucigalpa Protocol, which created the Central American Court of Justice, was ratified by El Salvador. El Salvador also accepted the jurisdiction of the Inter-American Court of Human Rights in 1995.

Acceptance of ICC jurisdiction should not be understood as a diminishment of national sovereignty. Which has been understood in international law as entailing voluntary transfer of sovereignty (Supreme Court of Guatemala, Advisory Opinion regarding the constitutionality ratification of the Statute of Rome File 171-2002:10).

As stated in a resolution by the Senate of the Republic of Colombia the "the International Criminal Court does not affect a State's authority and sovereignty in the execution of its jurisdictional control within its respective territory and over its inhabitants or citizens, due to the fact that the subsidiary character of the ICC demands that all internal judicial avenues are exhausted before a case is placed before the jurisdiction of the ICC."(Senate of Republic of Colombia File Nº 014 of 2001).The more a State participates in international law, the more its sovereignty will be eroded as a result of this participation (Zuppi, 1993 781-794) A State does

[19]Art. 89 El Salvador promotes the human, economical, social and cultural integration with the American Republics, especially with those in Central America. Integration could be made through international treaties, **which could create international organs with supranational functions**. Bold fonts are not part of the original text. Translated by the author.

not diminish its sovereignty due to the existence of international organizations. It only assumes voluntarily the international obligations, those that are not incompatible with its sovereignty.

Assuming international obligations are compatible with national and international law (Constitutional Chamber of El Salvador, unconstitutionality process 33-37/2000A 2000:46). Additionally, the Statute of Rome respects sovereignty. Its preamble acknowledges that "it is not the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", before emphasizing that "the International Criminal Court […] shall be complementary to the national criminal jurisdictions".

Bernhardt elaborates on this concept by underscoring that "[…] the true function of complementary in the proposed system of international criminal jurisdiction should be to encourage the competent national courts to carry out their duties, but if they failed to do so, to ensure that there was no escape for the perpetrators of atrocities" (Bernhardt, Rudolf UN Doc. A/CONF.183/SR.3, 1998 para. 100).

In short, when a state accepts the international jurisdiction of an international court such as the ICC, its sovereignty does not necessarily diminish. Issues related to international human rights law which in the past were exclusively part of state jurisdiction have now become part of the international community (i.e. crimes against humanity, genocide, etc) (Zuppi 2001: I El Concepto de Jurisdiccion Universal).

Crimes falling under the jurisdiction of the ICC could be investigated internationally under the universal jurisdiction principle, since they affect the whole international community (Zuppi 2001: I El Concepto de Jurisdiccion Universal). In that sense, there are no reasons to believe that Salvadorian sovereignty will be diminished by accepting the international jurisdiction of the ICC.

It can be concluded, therefore, that should it opt to become a State Party to the Statute of Rome El Salvador would not need to reform its constitution in order to protect its national sovereignty.

VII.2. National obligation of administrating justice

Another concern has been expressed it should that El Salvador accept ICC jurisdiction, its nationals could be prosecuted when committing the crimes falling under the Court's jurisdiction. From a narrower perspective in human rights this eventuality could be seen to run contrary to the national obligation of administrating justice as stipulated in Article 172 of the Salvadorian constitution.

Article 172 acknowledges that the Supreme Court, National Chambers and National Tribunals are part of El Salvador's judicial organ, which has the power to administer justice in the country. In that sense, this constitutional provision grants the judicial organ the power to administer justice in Salvadorian territory.

Firstly, it is important to indicate that the ICC does not act as a substitute for national jurisdiction in a state. As the Court functions on the basis of two principles, complementarity and subsidiarity, it can only examine cases that have been investigated and prosecuted at local level, or in situations where the state is incapable of doing so (Article 17 of the Statute of Rome). The objective of international law is not to replace the national jurisdictional systems, but rather to prosecute crimes when national tribunals are not capable of doing so (Chamorro, Fernando, 2001: 4.Los Derechos Humanos y la Corte Penal Internacional).

Secondly, the constitution assigns the jurisdiction to make and execute judgments to the Salvadorian judicial system. The jurisdiction of the ICC can only be activated in order to prosecute crimes described in the Statute of Rome, in cases where domestic remedies have been exhausted.

Article 146(3) of the Salvadorian constitution can be interpretated as an exception to the rule described in the article 172. Article 146(3) establishes the possibility of signing international treaties and, in disputed cases, the possibility of submitting the decision under consideration to an international court. The Salvadorian constitution recognizes the jurisdiction of international courts. In case of the violation of an international treaty to which the Salvadorian State is party to, there remains an open provision for pursuing this violation through an international court.

Consequently, the obligation to administer justice – to prosecute and adjudicate on crimes – is not absolute (Argumedo 2004: 28) and has exceptions. Since El Salvador has appeared before

international courts[20], the same situation can apply once the country has accepted the jurisdiction of the ICC. In the context of *sub judice* considerations, there is no need El Salvador to reform its constitution for it to become part of the ICC.

VII.3. The prohibition of life imprisonment

Life imprisonment, which is regulated in the Statute of Rome, in Article 77(1)(b) may appear to create another hurdle for ratification of the Statute of Rome by El Salvador. This is because the Constitution of El Salvador expressly forbids life imprisonment in Article 27(2).

Although life imprisonment is one potential outcome of a ICC prosecution, this punishment is an exception to the general rule. According to the Statute of Rome, the ICC will apply the life imprisonment penalty when justified by the extreme gravity of the crime and the individual circumstances of the convicted person (Article 77(1)(b)) . In such a case, the ICC will also consider the "[r]ules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person" (Article 78 of the Statute of Rome).

[20]In the International Court of Justice, El Salvador has appeared in the following processes: Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) JUDGMENT OF 11 SEPTEMBER 1992 ((1986-1992) y *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening) *(El Salvador v. Honduras)* JUDGMENT OF 18 DECEMBER 2003. In the Inter-American Court of Human Rights, El Salvador has appeared before in the following judgments: I/A Court H.R., Case of the Serrano-Cruz Sisters v. El Salvador. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118; Case of García-Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2007. Series C No. 168 and Case of Contreras et al. v. El Salvador. Merits, Reparations and costs. Judgment of August 31, 2011. Series C No. 232.

VII.3.1. mitigation and aggravating circumstances

Procedure 145 establishes the mitigating and aggravating circumstances. In mitigating, the Court will consider the following: substantially diminished mental capacity or duress; and the person's conduct after the act, including their efforts to compensate the victims and any cooperation they have shown with the Court.

In the case of aggravating circumstances, the Court will take into consideration the following: any relevant prior criminal convictions under the jurisdiction of the Court or a comparable judicial body; abuse of power or an official capacity; commission of a crime where the victim is particularly defenseless; commission of a crime with particular cruelty or one where there were multiple victims; and commission of a crime for any motive involving discrimination on any of the grounds referred to in Article 21, paragraph 3.

VII.3.2 the review process

The Statute of Rome, in Article 110(3), provides for a penalty review process. For example, "when the person has served two thirds of the sentence, or twenty five 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".

Under the same article, and Rule 223[21] of Procedures and Evidence of the Statute of Rome (Suhr, 2001), the Court is also required to take into consideration evidence regarding conduct and rehabilitation, and any other circumstances of the convicted person.

VI.3.3. human rights and the hierarchical application to the life imprisonment penalty

It is important to take into consideration the hierarchical application as regulated by Article 21 of the Statute of Rome. According this provision the Court shall apply: "a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; c) Failing that, general principles of law derived by the Court from the national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".

[21]Rule 223
Criteria for review concerning reduction of sentence
In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria:
(a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;
(b) The prospect of the resocialization and successful resettlement of the sentenced person;
(c) Whether the early release of the sentenced person would give rise to significant social instability;
(d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release;
(e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age

Article 21(3) establishes how the law should be applied by the Court. The interpretation of the law it should be done having under consideration "the internationally recognized human rights" (Zuppi,2001. 3 Derecho applicable y principios generals)

Article 10 (3) of the International Covenant on Political and Civil Rights (hereafter ICPR) acknowledges that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". In other words, the principle of reformation and rehabilitation should be used as guide when the need to restrict liberty Life imprisonment as a penalty is not compatible with the reformation and social rehabilitation of the convicted. (Constitutional Court of Ecuador, File Nº 005-2000, 2001:8).

Schabas is correct in stating that "the application and interpretation of law pursuant to this article [21(3)] must be consistent with internationally human recognized human rights, and with any adverse distinction founded on grounds such as gender as defined in the Article 7 […]" (Schabas, 2010:397-400)

The application of life imprisonment as a penalty by the ICC should take into consideration the principles of human rights, which are based on the reformation and rehabilitation of the convicted. The use of international human rights law in International Criminal Courts is not a new development. For example, the International Criminal Tribunal for Rwanda (ICTR) described the international jurisprudence developed by several international courts as creating" persuasive authorities which may be of assistance in applying and interpreting the Tribunal's

applicable law". The ICTR continued: "Thus they are, however, authoritative as evidence of international custom". (ICTR 97-19-AR72, 1999: para. 40).

As example of how other international criminal courts have applied the human rights principles, the International Criminal Tribunal for the former Yugoslavia (ICTY) has established that "[t]he general principle of respect for human dignity is basic underpinning and indeed the very raison *d'etre* of international humanitarian law and human rights law; indeed in modern time it has become of such paramount importance as to permeate the whole body of international law" (IT-95-17/1-T, 1998: para. 183).

The ICTY has recognized that it "has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of the resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field […]" (IT-96-23/1-T, 2001: para. 467).

To sum up, the possibility of life imprisonment it is not realistically applicable under the procedures of the ICC. Firstly, as explained above, the Court will conduct a penalty review process, during which the Court will apply the Statute of Rome in the light of other international human rights treaty bodies. Secondly, the International human rights treaty bodies take rehabilitation, rather than life imprisonment, as a guiding principle (Argumedo, 2004:29). In that sense, it is clear that, in the context of international human rights law, it is difficult for the ICC to apply the penalty of life imprisonment.

VII.3.4. Applying life imprisonment

In the particular case of El Salvador, Article 80 of the Statute of Rome affirms that "nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part". El Salvador would not, therefore, be forced to change its criminal penalties in order to become part of the ICC. Moreover, Article 103 (1) states that "[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".

El Salvador would not be impelled to accept ICC convicts into its penitentiary system. In short, a State will not be obliged to apply a life imprisonment penalty in its territory when it is not willing to do so (Surh 2001:3-4). In other words, El Salvador will never be obliged to violate its own constitutional law in order to realize a sentence of life imprisonment in its territory.

VII.3.5. *Salvadorian situation regarding life imprisonment*

Particular attention should be given to the life imprisonment issue in El Salvador. Article 71 of the Criminal Code establishes that in case of real concurrence of criminal offenses, the judge will punish the crimes committed by totaling up the penalties, starting with the most severe penalty. The whole sum cannot exceed the 75 years of imprisonment.

According to the 2010 Report of the United Nations Development Program (UNDP) for El Salvador, the life expectancy of a Salvadorian is 72 years. (UNPD Report of Human

Development El Salvador 2010: 303). In that sense, as a penalty of 75 years exceeds the average Salvadorian life expectancy, the application of the maximum ICC penalty in El Salvador would constitute a *de facto* life imprisonment penalty for one of its citizens.

Representations were made before the Constitutional Chamber of the Supreme Court of El Salvador to the effect that this situation was unconstitutional. The Chamber, in its unconstitutional process 5-2001 *et al*, recognized that the penalty of 75 years would be contrary to the Constitution, and can be assumed to constitute life imprisonment in El Salvador. Consequently National Congress was ordered to review the national legislation and adopt the reforms necessary to bring it into accordance with the prohibition of life imprisonment as is acknowledged by the Salvadorian Constitution. (Constitutional Chamber, Unconstitutional Process 5-2001 *et al*, 2010: 96-97 and 187).

While the unconstitutional process 5-2001 *et al* was held on December 23, 2010, at the present time, the National Congress has taken a decision over the process of bringing legislation into line with the constitutional prohibition of life imprisonment. They decided that in case of case of real concurrence of criminal offenses the penalty will be sixty years of prison[22]. Having in mind that to apply the criminal code, a person should be at least eighteen years old, the sixty years of punishment is over the life expectancy of a common Salvadorian.

[22] see http://www.abc.es/agencias/noticia.asp?noticia=1113595

Even the Constitutional Chamber has acknowledged that Article 71 of the Salvadorian Criminal Code, which establishes a penalty of 60 years in prison, violates the principle of prohibition of life imprisonment (Article 27(2) of the Constitution)

From the arguments outlined above, it is clear that the imposition of life imprisonment by the ICC is not a real impediment to the ratification of the Statute of Rome by El Salvador. Life imprisonment is, at any rate, an exceptional penalty in ICC procedures.

VII.4. Extradition and Surrender concepts

Another potential obstacle preventing El Salvador from ratifying the Statute of Rome stems from the terms *extradition* and *surrender*, concepts which are still unclear in El Salvador.

Extradition agreements are traditionally viewed as interstate arrangements to be enforced by state parties only (Dugard and Van den Wyngaert, 1998: 187). El Salvador is a State party to the Inter-American Convention on Extradition. Article 1 of this convention describes extradition as surrendering to other States Parties that request extradition of those who are subject to prosecution, are to be tried, have been convicted or have been sentenced to a penalty involving deprivation of liberty.

Extradition should take place when "(i.) an extradited person may be prosecuted for a punishable act committed by him [her] prior to his [her] extradition, but not specified in the demand therefore, only if the government from which his [her] extradition was obtained gives its

consent expressly for the special case in question. (ii) That this consent should not be refused, unless the new punishable act constitutes a political offence, or a contravention of the laws of customs or impost. Consent should otherwise be given, without regard to the degree of the penalty with which the act is punishable, or to the fact whether the offence is found in the number of those for which extradition may be demanded". (Moore 1896: 758)

Salvadorian law recognizes extradition in Article 28(2) (3) and (4) of the Constitution. The objective is to extradite Salvadorians when they commit crimes in other countries. In that sense, having in mind that the extradition is legal fiction, it is important to understand its difference with the term "surrender".

According to the Constitutional Court of Guatemala, the term surrender is a new term in positive law (Constitutional Court of Guatemala, Nº 171-2002:17). It is the act submitting those accused of committing gross human rights violations to an international court that represents the concert of nations and has the mandate of prosecuting him/her in accordance to due process of law principles. (Constitutional Court of Ecuador, File 005-2000, 2001:7).

The principle of extradition, based on the aphorism *aut dedere, aut iudicare*[23] (prosecute or extradite) is well established in several international treaty bodies, such as: the Geneva Conventions[24]; the Convention against torture and other cruel, inhuman or degrading treatment

[23]This principle indicates that "if a State has into its jurisdiction a person claimed of committed a war crime under the international law; the State has to surrender or judge him or her in its own jurisdiction". BASSIOUNI, M. Cherif & WISE, Edward M., Aut Dedere Aut Judicare - The Duty to Extradite or Prosecute in International Law, M. Nijhoff, Dordrecht (NL), 1995.

[24] Convention for the Amelioration of the condition of the Wounded and Sick in Armed forces in the Field (1949) 75 UNTS 31, Art. 50; Convention for the Amelioration of the condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1950) 75 UNITS 85, Art. 51; Convention Relative to the Treatment of Prisoners of War

or punishment[25]; the International Convention for the Protection of all person from Enforced Disappearance[26]; and the Convention on the Prevention and Punishment of the Crime of Genocide[27]. El Salvador is a State Party to all these international instruments, which means that they are legally binding in Salvadorian territory[28].

According to Henckaerts and Doswald-Beck, State practice establishes a customary legal rule by which war crimes, whether they are committed in international or non-international armed conflict, can be investigated and prosecuted (Henckaerters and Dowsald-Benck, 2005:607).

In light of this and as there are no legal impediments preventing the extradition of Salvadorians, there will be also no legal impediments to surrender Salvadorians to the ICC jurisdiction, particularly because in the past El Salvador joined several human rights treaties that oblige the State to the principle of *aut dedere, aut iudicare.*

Additionally, to surrender someone to the ICC implies putting at the disposition of this International Court a person who has committed gross human rights violations. Unlike in the case of extradition, this Court is not a State, but was created by States, and which also participates in the regulations and accountability processes as member states of the General Assembly of the United Nations (Trujillo, Cesar 2001:2).

(1950)75 UNITS 135 Art. 130; Convention Relative to the Protection of Civilian Person in the Time of War (1950) 75 UNITS 287, Art. 147.

[25] Arts.5 and 7.

[26] Arts. 9 and 11.

[27] Art. 5.

[28]Convention on the Prevention and Punishment of the Crime of Genocide: Sept. 28, 1950; Geneva Conventions: Jun, 17, 1953; Convention against torture and other cruel, inhuman or degrading treatment or punishment: Jun. 11, 1996.

As a conclusion, it is necessary to mention that in El Salvador, extradition represents a legal fiction in the national legislation. Consequently, the surrender of Salvadorians cannot be an impediment to the country becoming part of the ICC, as El Salvador is State Party to other treaties where this kind of surrender is also established. It can be concluded that there is no need for a constitutional reform in this regard.

VII.5. National prosecution

Article 193 (3) and (4) of the Salvadorian constitution envisages that the Salvadorian General Prosecutor of El Salvador is in charge of developing the prosecution in the country.

As stated above, the ICC is based on complementary and subsidiary principles, which means that the ICC will only prosecute a case when "national jurisdictions are not capable or willing to prosecute the people who are had committed crimes punished by the Statute of Rome" (Constitutional Chamber of Costa Rica, Advisory Opinion regarding the ratification of the Statute of Rome Exp: 00-008325-0007-CO, Res: 2000-9685, 2002:10). The ICC Prosecutor will only investigate a case when the national investigation has failure, because the ICC will be the *ultima ratio.*

In El Salvador, the Constitutional Chamber has acknowledged that some actions (i.e. detention, localization, monitoring of drug trafficking) undertaken by USA officials in the Comalapa military base do not violate national sovereignty. In that regard, the Constitutional Chamber stated that those actions "help to control the drug trafficking in El Salvador, obtaining sufficient

evidence to prosecute a crime […] [besides] the Comalapa military base activity is based on the international collaboration between two States" (Constitutional Chamber, Unconstitutional 33-37/2000A 2000:50).

This bears out, in this respect, the conclusion envisaged by Argumendo (2004:30), namely that if the Comalapa military base activity doesn't affect the Salvadorian Constitution; neither will do the prosecution of the ICC prosecutor.

Additionally, the Salvadorian Criminal Code doesn't establish that the General Prosecutor is the only authority in charge of criminal investigation. According to Article 95, some crimes in El Salvador can be prosecuted by the victims and their legal advisors. Hence, there is no violation to the constitution when a third person undertakes a prosecution in the national legal system.

Any possible prosecution carried out by the ICC Prosecutor does not violate the constitutional command of the General Prosecutor in El Salvador. As stated above, El Salvador has previously allowed non-Salvadorian prosecutors to investigate within national territory, a decision which has not been alleged to be unconstitutional.

The ICC prosecutor investigation is exceptional to the rule. In other words, this will take place "when a State seeks to remove the accused from legal responsibility, or does not administer the legal process in an independent or impartial manner, or when, due to the circumstances of the case, the trial is proven to have been undertaken in a manner incompatible with the intention of submitting the accused to the process of justice […] circumstances which cannot occur in a

democratic State applying the Rule of Law, in which its judicial institutions act independently and impartially and apply the guarantees stipulated by the basics of due process of law" " (Constitutional Tribunal of Ecuador Case Nº 005-2000, Regarding the Statute of Rome of the ICC, 2001:5).

From all the evidence described above, it is clear that prosecutions carried out by the ICC Prosecutor do not violate Article 193 of the Salvadorian Constitution.

VII.6. Prohibition of amnesty laws

In its Article 131, the Salvadorian constitution envisages that amnesty laws can be decreed by the National Assembly to pardon political offences, common offences or offences committed by at least twenty people. While the Statute of Rome does not explicitly mention this kind of official pardon "this silence cannot be understood as an acceptances or reject of this laws" . Additionally, it has been stated that "amnesty law cannot be against the principles (i.e truth, and criminal responsibility) of the Statute of Rome" (Lawyers Committee for Human Rights, 2003: Amnestia y otros perdones).

During admissibility analysis, the Court, according to Article 17[29] of the Statute of Rome, should examine "if this kind of benefits (amnesty laws), implies that the State is not willing to

[29] 1.Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a)The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;(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;(c)The person concerned has already been

investigate or prosecute the person who could have been committed crimes of the ICC jurisdiction". (Lawyers Committee for Human Rights, 2003:Aminstias y otros perdones).

Amnesty laws in El Salvador are not new legal phenomena[30]. However, this kind of official pardon can only be granted for political or common offences. Neither war crimes, nor crimes against humanity and genocide are considered by international law as political or common offences.

The Salvadorian Criminal Code envisages in its Article 21 that political offences are referred to the constitutional system and are related with the security of the State, while the common offences are the ones related with politic offences.

It is important to mention that according to Article 7 of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide and the other acts enumerated in Article 3[31] "shall not be considered as political crimes for the purpose of extradition".

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tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;(d)The case is not of sufficient gravity to justify further action by the Court.
2.In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
(a)The proceedings were or are being undertaken or the national decision was made for the purpose 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 which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3.In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

[30] El Salvador has a General Amnesty Law decreed by the General Assembly on March 20, 1993. This Amnesty Law has been acknowledged as "absolute and unconditional in favor of all people who had committed politic offences, common offences before January 1, 1992. General Amnesty Law. Legislative Decree N 486, March 20, 1993.

[31] The following acts shall be punishable:
(a) Genocide;

"Political crimes neither are nor have been punished using this type of instrument [the Convention on the Prevention and Punishment of the Crime of Genocide], taking political crimes to be violations of established law and order which are committed with the motivation of the total or partial modification of the political regime or law and order […] In conclusion, genocide can be treated as a political crime neither from the perspective of internal / domestic law nor from the perspective of international law. The pursuance of genocide does not involve the violent taking of power, which can ultimately be considered a political act, except that it is comprised of acts realized with the aim of totally or partially destroying religious or national groups." (Guevara, et al, 2001: 1.2 El Caracter no politico del delito de genocidio).

Neither crimes against humanity nor war crimes are categorized as political crimes. "Even those crimes, cannot be committed in cases of war or conflict, neither could be alleged as politic crimes […] in case of understand these crimes as politic crimes, it will imply to recognize these ones as pacific and legal ways to modify a government" (Guevara, et al, 2001: 1.3 El Caracter no politico de los delitos de tortura y terrorismo).

In that sense, the National Assembly of El Salvador cannot grant "[…] amnesty laws for crimes of war, crimes against humanity, or crimes of genocide and aggression" (Argumedo 2004:31). However, El Salvador has in the past created this kind of legislation, which has then coincided by a policy (deliberate or otherwise) that declines to bring human rights violations to justice.

(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

This amnesty law has been highly critized by the international community[32], due to the impunity it seems to foster. In sum, the crimes punished by the ICC cannot be beneficiary with amnesty laws

It is important to mention what the UN has said regarding amnesty laws. In its report on the establishment of the Special Court for Sierra Leone, acknowledged that "amnesty [law] is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes such as genocide, crimes against humanity or other serious violations of international humanitarian law" (Report of Secretary General on the Establishment of a Special Court for Sierra Leone, 2000: 22).

The same understanding held sway in the European Court of Human Rights in the case *Ould Dah*, where it acknowledged that amnesty laws were in general not compatible with the State's duty to prosecute such acts as genocide and crimes against humanity - including those prosecuted on the basis of universal jurisdiction. (Eur Court of Human Rights *Ould Dah v France*).

As a conclusion, the Constitution of El Salvador envisages the possibility of the granting of amnesty laws for certain offences, which are ones not included in the crimes targeted by the ICC. In that sense, there no need for constitutional reform regarding amnesty laws.

[32] The Inter-American Commission on Human Rights in the case Ellacuria et al, has stated that:
This law was adopted in order to prevent the punishment or prosecution of serious human rights violations committed prior to January 1, 1992, including those examined by the Truth Commission, to which the present case relates. The effect of the amnesty extended to crimes such as summary execution, torture and forced disappearance practiced by agents of the State. Some of the crimes covered by this decree have been considered so serious by the international community that they have led to the adoption of special Conventions on the matter, and the inclusion of specific measures to avoid impunity, including the invoking of universal jurisdiction and suspension of the statute of limitations. IAHCR, Ellacuria et al, Report 136/99. Case 10.488. December 22, 199. Para. 209.

VII.7. Prohibition of Immunities

Historically the prohibition of immunities has been present in the International Criminal Court Statutes. Thus, the Charter of the Nuremberg International Military Tribunal envisages the following in Article 7: "[t]he 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".

The ICTY Statute also acknowledges the prohibition of immunities. Article 7(2) establishes "[t]he 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". The ICTR Statute states exactly the same as the ICTY Statute on this issue[33].

The Statute of Rome remarks on the irrelevance of official capacity, its Article 27 stating that the Statute "shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. […]Immunities or special procedural rules which may attach to the

[33] Article 6(2): 2. 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.

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

The Salvadorian constitution, in Article 236, envisages a situation in which some official authorities[34] can be granted immunity. However, these cases should be brought before the National Assembly, and if the National Assembly estimates that there are sufficient grounds for a criminal prosecution, the investigation is sent to the General Prosecutor, who will then prosecute the individual as a common person.

The Salvadorian Constitution does not contemplate whether its immunities can be claimed before international tribunals. They can only be claimed in the national jurisdiction. The objective of immunities in the Salvadorian legislation is to have preliminary investigation and have no interference with the functions as state agent.

The Salvadorian constitution concurs with some academics when they state that "immunities can only be applied in the domestic jurisdiction" (Surh, 2001: II Inmunidades) because the objective of immunities is to "avoid any political intervention that can obstruct the normal development of the authority's activity" in the domestic field. (Comision Andina de Juristas, 2001: 127).

"Article 27 of the Statute of Rome doesn't forbid the immunities or special procedures for national authorities within the national legislation, however, it doesn't matter what kind of immunity can be applied in the national legislation, this will be irrelevant when the ICC

[34] The President, Vice President of the Republic, the Congressperson, the Ministries and Vice Ministries, President and Judge of the Supreme Court and the Chambers, the General Persecutor, the General Attorney, The Ombudsperson, the President and Judges of the Superior Electoral Tribunal, the Diplomats, etc.

prosecute a situation" (Lawyer Committee for Human Rights, 2003: Improcedencia del cargo oficial y las inmunidades).

The House of Lords, in its decision on the Pinochet case, acknowledged that gross human rights violations (i.e. genocide, crimes against humanity, etc) are not part of the individual's function as state agents. Particularly the House of Lords stated that torture is not part of function of Head of State; consequently it did not recognize his immunity as a former head of State. (Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet -On Appeal from a Divisional Court of the Queen's Bench Division- 1999. IV State Immunity).

El Salvador is a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide, which in its Article IV states that "persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Additionally Article V of the same convention establishes that "the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III".

As a State Party, El Salvador has committed itself internationally to prosecute and punish any person who has committed genocide in its territory. According to this Convention, immunities are not applicable.

The immunities envisaged in the Salvadorian Constitution do not therefore pose a legitimate obstacle to the prosecution of a case through the ICC's jurisdiction, because, as explained, these kind of immunities are intended to be applied soley within the domestic Salvadorian jurisdiction. However, The ICC will find inadmissible "those [immunities] that do not count on the proper mechanisms in their withdrawal in light of certain conduct, [due to] being found directly in conflict with the Statute of Rome, in that they […] impede the prosecution of a trial before national tribunals". (Lawyers Committee for Human Rights, 2003: Improcedencia del cargo oficial y las inmunidades).

In the Salvadorian context, immunities cannot be granted to the crimes that fall within ICC jurisdiction, due to the international obligations such as the ones indicated before. Additionally, immunities could also be removed when a case is prosecuted in compliance with the complementary[35]principle, where the national jurisdiction has the first obligation to prosecute, and international jurisdiction is only applied should this fail. In conclusion, the prohibition of immunities is not real obstacle to the ratification of the Statute of Rome in El Salvador.

[35]"[…] recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crime" Preamble of the Statute of Rome.

VIII. Conclusions

The main aim of this dissertation has been to prove why El Salvador does not need constitutional reform to become incorporated into ICC jurisdiction. As with any other international tribunal that promotes human rights, this cannot be seen separate to the *corpus iuris* of international human rights law.

In this regard, it is important to mention that there is a link between international human rights law and international criminal law. Criminal law is both protects and threatens fundamental rights and freedoms. (Delmas-Marty, 1996: 368). In other words, criminal law has a double dimension; being laws that protect, but ones from which protection is required (Koering-Joulin &Suvic, 1998: 106). To sum up, human rights are as both "the shield and the sword of criminal law" (Roth, 2001:437).

Having established this concept, it is necessary to understand why an international jurisdiction that prosecutes and punishes crimes such as genocide, crimes against humanity, war crimes and aggression is important for a country like El Salvador.

As has been stated above, El Salvador suffered from one of the most violent non-international conflicts in Latin American history. However, becoming part of an international court like the ICC could be a step forward to protect and promote human rights. For the countries who have suffered from this kind of conflict, the ICC has a special importance because it helps engender a broader peacebuilding strategy after a conflict (Sthan, 2011: 196). To some academics, the ICC "encompasses two dimensions: A security dimension: that is the role as peace-maintenance; and the role a criminal court adjudicating 'individual guilt'" (Robinson, 2008:21).

Becoming part of the ICC would be an important step for El Salvador in that it would consolidate its willingness to promote and protect human rights within its territory. The establishment of international courts and tribunals "is aimed at ensuring a proper and effective exercise of criminal jurisdiction over crimes resulting in serious violation of international humanitarian and human rights law, with a view to combating impunity for such crimes, even where domestic courts would not be able or willing to do so"(Pocar, 2004:307).

This study has shown how the Statute of Rome, which established the ICC, is absolutely

compatible with the Salvadorian constitution; particularly in terms of its national sovereignty, where, as stated before, the ratification of the Statute would entail a voluntary transfer of sovereignty. Every decision by a State to become part of international jurisdiction entails a voluntary transfer of sovereignty. In the past, El Salvador has become part of other international courts (such as the Inter-American Court of Human Rights and the Central American Court of Justice.) and no sovereignty issues have been claimed. Hence, the same situation could be applied here were El Salvador to become part of the international jurisdiction of the ICC.

Regarding the national obligation to administrate justice, as outlined in this dissertation, the national legislation envisages exceptions. Those exceptions were those used when El Salvador become part of other international courts, such as the Inter-American Court of Human Rights, the Central American Court of Justice, and the International Court of Justice.

One of the most important hurdles for the ratification of the Statute of Rome by El Salvador is the constitutional prohibition of life imprisonment, which is regulated in the Statute of Rome in Article 77(1)(b). However, as discussed in this dissertation, this kind of punishment is an exception to the general rule and mitigation and aggravating circumstances have special importance in this penalty.

Additionally, the Statute of Rome, in Article 110(3), provides for a penalty review process, and also highlights why this kind of penalty is an exception to the rule, stating:

"…when the person has served two thirds of the sentence, or twenty five 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".

Moreover, in the particular case of El Salvador, Article 80 of the Statute of Rome affirms that "nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part". El Salvador would not, therefore, be forced to change its criminal penalties in order to become part of the ICC. Article 103 (1) states that "[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".

Lastly, regarding life imprisonment it is necessary to say that even though the Salvadorian constitution forbids this kind of penalty, in the national legislation this is a common practice. In 2010, the Constitutional Chamber ordered the National Assembly to review the national legislation and adopt the reforms necessary to bring it into accordance with the prohibition of life imprisonment as stipulated by the Salvadorian Constitution.

At the present time, the National Assembly decided that the maximum criminal penalty in El Salvador will be sixty years. However, it is important to mention that to apply criminal law in El Salvador the accused must be eighteen years old or over. The maximum criminal penalty of sixty years would exceed by six years the average Salvadorian life expectancy of seventy two years.

In relation to surrender and extradition, the latter is a legal fiction recognized in Salvadorian law in Articles 28(2) (3) and (4) of the Constitution. Hence, as there are no legal impediments preventing the extradition of Salvadorians, there will be also no legal impediments to surrender Salvadorians to ICC jurisdiction, particularly because in the past El Salvador joined several human rights treaties that oblige the State to the principle of *aut dedere, aut iudicare.*

In relation to the carrying out of national prosecution, it is important to take into consideration the complementary and subsidiary principles. Those principles indicate that before a crime can

be prosecuted by the ICC, the domestic remedies must first be exhausted. The State's duty is to carry out a diligent investigation when a crime is committed in its territory. However, the ICC Prosecutor will only investigate a case when the national investigation has failed, because the ICC will be the *ultima ratio.*

Any possible prosecution carried out by the ICC Prosecutor does not violate the constitutional command of the General Prosecutor in El Salvador. As stated in this dissertation, El Salvador has previously allowed non-Salvadorian prosecutors to investigate within its national territory, a decision which has not been alleged to be unconstitutional.

Regarding the prohibition of amnesty laws, while the Statute of Rome does not explicitly mention this kind of official pardon, this silence cannot be understood as an acceptance or rejection of these laws. However, amnesty law cannot be against the principles (i.e truth, and criminal responsibility) of the Statute of Rome. In El Salvador, amnesty laws are not new legal phenomena[36]. Moreover, this kind of official pardon can only be granted for political or common offences. Neither war crimes, crimes against humanity, nor genocide are considered by international law as political or common offences.

As with amnesty law, the prohibition of immunities is not expressly forbidden in the Statute of Rome. Nevertheless, this instrument affirms that immunities or special procedural rules which

[36] El Salvador has a General Amnesty Law decreed by the General Assembly on March 20, 1993. This Amnesty Law has been acknowledged as "absolute and unconditional in favor of all people who had committed political offences, common offences before January 1, 1992. General Amnesty Law. Legislative Decree N 486, March 20, 1993.

may be attached to an individual's official capacity, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such an individual.

Lastly, the Salvadorian Constitution does not contemplate whether its immunities can be claimed before international tribunals. They can only be claimed in national jurisdiction. The objective of immunities in the Salvadorian legislation is to ensure a preliminary investigation and have no interference with the functions as State Agent.

To sum up, the protection of human rights is no longer a domestic matter. The international community has acknowledged, through the international tribunals, the importance of the complementary and subsidiary principles. The ICC is one of these international tribunals that El Salvador is declining to join. The ICC should be seen as extra tool in the struggle to promote human rights and challenge impunity, and not as an obstacle to the judicial organ in El Salvador.

IX. Recommendation

The general recommendation is to exhort to State of El Salvador ratify the Statute of Rome. The ratification is possible if State understand that human rights are a transversal axe in the national Constitution, and there is no need of reform the Constitution. Having understood that the Constitution can be analyzed in the light of human rights, the ratification is not only possible but also needed in order to protect and guarantee human rights in El Salvador.

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