

## **Implementation of the Rome Statute in Costa Rica**

### Background

In Costa Rica, the legitimacy of the principle of universal jurisdiction is directly reflected in the support that the State has given from the outset to the process of international adoption and internal ratification of the Rome Statute establishing the International Criminal Court.

Costa Rica is firmly convinced that sustainable peace is only possible if the rule of law is upheld and good governance is practised, where human rights are respected and justice results in accountability and is impartial in protecting and recognising rights, along with the entitlement to reparation attaching to them.

The Rome Statute of the International Criminal Court is an instrument of international law designed to prevent impunity in the face of recurring widespread violations of Human Rights and International Humanitarian Law.

The International Criminal Court is the latest solution conceived by the International Community in an attempt to achieve fairer societies founded on the fight against impunity and access to justice.

Against this background, and contrary to other visions of a court with limited or restricted universal jurisdiction, Costa Rica considers that the processes of peace and justice are complementary and not mutually exclusive, and that both are necessary in order to build fairer societies where impunity is prevented and human rights are protected. The only way in which to fully meet these objectives is to create Courts with universal jurisdiction.

### The process of ratification in Costa Rica

Costa Rica signed the Rome Statute on 7 October 1998. The Legislative Assembly subsequently submitted a draft law on the Statute to the Constitutional Chamber for a preliminary mandatory check on constitutionality; the latter ruled favourably pursuant to a resolution dated 1 November 2000, at 2.56 pm. In that resolution, in addition to issues relating to the process within the Legislative Assembly, the Chamber considered certain substantive aspects of the Rome Statute and of its application in light of Costa Rican law.

The Rome Statute was finally approved by the Legislative Assembly under Law No. 8083 of 7 February 2001; on 7 June of the same year, the instrument of ratification was deposited with the Secretary-General of the United Nations.

As mentioned above, and in accordance with article 96(a) of the Law on Constitutional Jurisdiction and article 10 of the Political Constitution, the Draft Law on Adoption of the Rome Statute was submitted to the Constitutional Chamber of the Supreme Court of Justice for a mandatory check on constitutionality, which is required for approval of any international convention or treaty by the legislature.

The objective of that review, as set out in article 1 of the above Law, is to [TRANSLATION] *“safeguard the supremacy of the rules and principles of the Constitution, and of international or community law in force in the Republic, and their consistent interpretation and application, as well as the fundamental rights and liberties enshrined in the Constitution or under international Human Rights instruments in force in Costa Rica”*. Under article 98 of the said Law, the mandatory review is carried out after the draft law has been approved on initial reading, and prior to final adoption.

Notwithstanding that Costa Rica did manage to complete the ratification process without any major obstacles and that, according to constitutional jurisprudence, international instruments, *“whilst having similar value to the Political Constitution, may take precedence over it insofar as they bestow greater rights or guarantees upon individuals”* (Judgment 2313-95), certain topics of significant importance contained in the Rome Statute called for particular comment on the part of our constitutional judges, in particular those relating to immunities and life imprisonment.

With regard to immunities — i.e. the application of the Statute to all, irrespective of their official position, which is contrary to article 110 of the Constitution on the immunity of members of the Supreme Powers [*Supremos Poderes*] — the Constitutional Chamber considered that a privilege of this type is in no sense a bar to the initiation of proceedings before the International Criminal Court and concurrently, at the domestic level, of a procedure to withdraw privileges. Accordingly, the International Criminal Court is not required to wait for a decision of the Costa Rican Legislative Assembly before it can initiate proceedings.

In this regard, the Constitutional Chamber considered that immunity *“enjoyed by the members of the Supreme Powers, while it constitutes an obstacle to the regular course of criminal prosecution at national level... should not be overemphasised to the point of impeding the conduct of proceedings before a Court such as the International Criminal Court for offences of the kind provided for in the Statute. Hence a decision of the Legislative Assembly is not a prerequisite for the initiation of its proceedings...”*

The only caveat that needs to be made is that the International Criminal Court may not convict the “accused” in absentia, as that would be a violation of the constitutional protections that appear repeatedly in Human Rights Instruments of International Law, in particular in order to guarantee a fair trial, which implies that the accused must be present to defend him or herself against the Prosecution, or to supervise the examination of witnesses.

Nothing other than the above precludes the International Criminal Court from initiating proceedings, whether or not the accused is physically present.

Concerning life imprisonment, which is provided for in articles 77 and 78 of the Rome Statute of the International Criminal Court, the Constitutional Chamber solved the conflict arising out of article 40 of the Political Constitution, which outlaws life imprisonment, by reference to article 80 of the above Statute, which provides that nothing in this Part affects the application by States of their national law on penalties.

In this regard, the Chamber considered that: *“(...) the procedure must give precedence to the Costa Rican procedure, meaning that life imprisonment cannot be applied if our Constitutional Legal Code does not prescribe it. That interpretation clearly implies that it must be considered that(...) to surrender persons summoned by the International Criminal Court, not only the nationality of the individual summoned must be considered, but also the possible sentence to be handed down to the individual if found guilty of the charges raised against him or her, which must not carry life imprisonment or other sanctions such as capital punishment which are not enshrined in the Costa Rican Legal Code, as these would violate constitutional principles and hence preclude any surrender”*.

With regard to article 89 of the Rome Statute, which empowers the Court to request States Parties to detain and surrender accused persons to be tried before the International Court, and which is incompatible with article 392 of the Constitution, according to which: *“No Costa Rican can be compelled to abandon the national territory”*, the Chamber traced back the origins of this rule to the historical context in which the Constitution was drafted, and determined that its objective is to protect citizens from being expatriated on political grounds, thus acting as a safeguard against arbitrary action by the Executive Power. The Constitutional Chamber went on to consider the evolution of the Political Constitution in the area of fundamental rights:

*“(...) [it] clearly strengthens safeguards such as that laid down in article 32, but at the same time reshapes them, in the course of this unfinished struggle for human liberty and dignity, ensuring that such a safeguard cannot become so effective that in itself it impedes or prevents the objectives of that struggle from being achieved. It reshapes and restricts that safeguard, which is thus not an absolute one in the sense described above, but rather coexists with other forms of protection of fundamental rights, and yields its literal claim to unlimited duration to the need to uphold the values and principles of justice that inspire it...”*

Based on the above line of reasoning, the Constitutional Chamber concluded:

*“Interpreted in light of the above, the provisions of article 89 of the Statute do not violate article 32 of the Constitution. In other words, the correct interpretation of article 32 is as a limited safeguard, not an absolute one; its scope must be determined so as to be reasonable and proportionate to the ends which it is to serve, and, in the spirit of the Constitution, it should be recognised in a manner compatible with the still novel, increasingly advanced and refined, methods, means or instruments designed to safeguard Human Rights.”*

#### Concerning the process of implementation of the Rome Statute

During the process of implementation of the Rome Statute of the International Criminal Court, the Executive Power presented a Draft Law entitled “Criminal Prosecution. Punishment for War Crimes and Crimes against Humanity”.

In 2002, pursuant to the above Draft Law, Costa Rica added two types of crime under articles 378 and 379 of the Criminal Code — described as war crimes and crimes against humanity — pursuant to Law

No. 8272, adopted by the Legislative Assembly on 2 May 2002. The crime of genocide has been in the Criminal Code since it was promulgated in 1970.

It is worth mentioning that articles 378 and 379 do not directly define war crimes and crimes against humanity, but refer instead to the international treaties and instruments on the matter that Costa Rica is party to; article 379 expressly mentions the Rome Statute.

Likewise, Law 8272 amended article 7 of the Criminal Code in order to characterise as international crimes those international humanitarian law violations provided for in the international treaties signed by Costa Rica; in consequence, Costa Rican courts have been given jurisdiction to punish these crimes even if they are committed outside its borders, and independently of the nationality of the perpetrator.

Thus for some years the Costa Rican criminal justice system has already been accepting properly qualified cases. The principle of territoriality of criminal laws (*Principle of universal jurisdiction*) has been applied both to offences against Human Rights, as well as to those contained in the United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances signed in Vienna on 19 December 1988, which is applicable as a law of the Republic, inasmuch as, irrespective of the author and location of a crime of the kind defined in the above Convention, any State may prosecute and try it in accordance with the principle of universal justice.

In a similar effort towards openness and cooperation, the executive power supported accession to the Agreement on Privileges and Immunities of the International Criminal Court (APIC), which was unanimously approved on 26 November 2009 and submitted to the Plenary of the Legislative Assembly on 24 June 2010.

These past few months, efforts have been stepped up to include the APIC in the list of priorities of the above legislative body.

By the same token, the work of the Costa Rican Commission on International Humanitarian Law (CCDIH), created pursuant to Executive Decree No. 32077-RE of 21 May 2004, and which is part of the Ministry of Foreign Affairs and Religion, deserves to be highlighted.

Since its creation, the CCDIH has striven to amend relevant domestic law by increasing standards of protection and by further defining criminal-law concepts using the appropriate legal techniques.

On 17 July 2007, during a ceremony to commemorate the IX<sup>th</sup> anniversary of the adoption of the Rome Statute, the CCDIH submitted to the Deputies a proposal complementing Draft Law 16272, entitled "Addition to part II of the Criminal Code, Law No. 4573, for a new Section XVIII, Crimes against Persons and Property Protected under International Humanitarian Law". The draft is currently with the Special Commission on Human Rights of the Legislative Assembly for review and decision.

With regard to the characterisation of the crimes enshrined in the Rome Statute, it is worth noting that the draft amends articles 375, 378 and 379 cited above, which do not define the offence, but refer to the text of the Rome Statute; instead, crimes against humanity and war crimes are now defined in detail.

The draft considerably increases the penalties applicable to crimes of genocide, crimes against humanity and war crimes. Thus, prison sentences ranged from 10 to 25 years, and the amendments raise them to between 25 and 40 years:

**Article 378. GENOCIDE.** *Prison sentences ranging from 25 to 40 years shall be given to persons who commit one of the following acts with intent to destroy, in whole or in part, a national, ethnical, racial, religious, political or trade-union group, or a group having a specific identity, created for reasons of gender, sexual orientation, culture, social objectives, age, disability or health:*

1. *Intentional murder of one or more group members;*
2. *Torture, forced disappearance, deprivation of liberty, sexual violence, forced pregnancy with intent to change the ethnic composition of the group, inhumane or degrading treatment or serious harm to physical or mental integrity of one or more group members. For the purpose of this paragraph, deprivation of liberty and sexual violence shall be defined as provided in this Code, in accordance with their gravity.*
3. *Intentionally depriving one or more group members of resources which are essential to their survival; seriously compromising their health; systematically evicting them from their homes or inflicting upon them conditions of life likely to impede their reproduction or give rise to the total or partial physical destruction of the group.*
4. *Imposing measures intended to prevent births within the group.*
5. *Transferring one or more members of the group to another group by force or under duress, or displacing the group from its place of settlement.*

*For the purpose of this article, murder, torture, forced disappearance and forced pregnancy shall be understood to have the meaning provided in the following article.*

**Article 379 CRIMES AGAINST HUMANITY.** *Prison sentences of between 25 and 40 years shall be given to individuals who commit or order, as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, any of the following acts:*

1. *Murder; murder being understood in accordance with the definition of that offence provided in this Code.*
2. *Extermination. "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;*
3. *Enslavement; "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.*

4. *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
5. *Torture; torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the State or of an organisation; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.*
6. *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity; for the purpose of the article, "forced pregnancy" is understood to mean the illegal confinement of a woman who has been made pregnant by force.*
7. *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender grounds. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to Human Rights by reason of the identity of the group or collectivity;*
8. *Enforced disappearance of persons; "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. The crime of enforced disappearance shall be considered to constitute an ongoing crime as long as the fate or whereabouts of the victim have not been established. The judge may consider the following circumstances as mitigating the crime of enforced disappearance of persons: a) releasing the person unharmed within less than 10 days; b) providing information or intervening to enable or facilitate the appearance of the disappeared person alive.*
9. *Deportation or forcible transfer of population; "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.*
10. *The crime of apartheid; "The crime of apartheid" means inhumane acts of a character similar to those referred to in this article, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;*
11. *Other inhumane acts of a similar character to those set out in this article intentionally causing great suffering, or serious injury to body or to mental or physical health.*

*For the purpose of this article, "an attack against a civilian population" shall be understood to mean a course of conduct that involves the commission of multiple acts as listed in this article against a civilian*

population, in accordance with the policy of the State, or of an organisation, aimed at committing such acts or promoting that policy.

### **War crimes**

#### **Article 380. Intentional murder of a protected person**

A prison sentence of 25 to 40 years shall be given to any person who, in connection with, or in the course of, an armed conflict, causes the death of a person protected under the international treaties on Human Rights ratified by Costa Rica.

For the purpose of this article and other rules of this chapter, protected persons are defined as follows, in accordance with International Humanitarian Law:

- 1) Members of the civilian population.
- 2) Persons who do not participate in hostilities and civilians in power who belong to the opposing side.
- 3) Wounded, sick or shipwrecked persons placed hors de combat.
- 4) Healthcare or religious workers or persons hors de combat.
- 5) Journalists on mission or war correspondents.
- 6) Combatants who, having been captured or having surrendered, or for other similar reasons, have laid down their arms.
- 7) Any person considered to be stateless or a refugee before the commencement of hostilities.
- 8) Any other person with that status pursuant to the First, Second, Third or Fourth Geneva Conventions of 1949 and to the First and Second Additional Protocols of 1977, as well as any other instruments ratified in the same context.

Likewise, the amendments cover **cooperation** with the International Criminal Court by providing:

#### **Article 415. Scope of Application - Conditions of Extradition**

1. The crimes and offences characterised under articles 375, 378 and 379 and under Chapter XVIII shall apply in relation to:

A) Crimes and offences committed, or intended to take effect, on the territory of the Republic or in areas which fall under its jurisdiction or which have been committed against Costa Rican nationals.

B) Crimes and offences committed abroad by Costa Rican nationals, including members of the public service, whether civilian or military, provided the accused has not been acquitted or convicted abroad or, in the latter case, has not served his or her sentence.

2. Where a person suspected of having committed one of the crimes or offences characterised in articles 375 and 378 to 411 of this Code is present on the territory of the Republic or in places that fall under its jurisdiction, in the absence of a request for surrender to the International Criminal Court or of an agreement for extradition, the Costa Rican State shall be under an obligation to take the necessary measures to exercise its jurisdiction over the said crime or offence, and must take action to prosecute it as if the crime or offence had been committed on the territory of the Republic, irrespective of the place of its commission and of the nationality of the suspect or victims.

3. **National jurisdiction shall not be exercised where:**

**A) Concerning crimes or offences which fall under the jurisdiction of the International Criminal Court**

**a) The International Criminal Court has issued a request for surrender.**

**b) The State having jurisdiction over the matter has requested extradition pursuant to the international treaties or conventions in force for the Republic.**

**c) Extradition is requested by the State having jurisdiction over the matter and that State has no treaty or convention in force with the Republic; in which case, and without prejudice to other legal requirements, in order for extradition to be accorded, the applicant State must have ratified the Rome Statute of the International Criminal Court.**

**B) In the event of concurrent requests for surrender to the International Criminal Court and requests for extradition by third party States, in which case article 90 of the Rome Statute shall apply.**

**C) If extradition is requested by the State having jurisdiction and the crimes or offences do not fall within the jurisdiction of the International Criminal Court.**

4. The crimes or offences characterised under articles 375 and 378 to 411 of this Code shall not be considered political offences or ordinary offences connected to political offences, or offences whose prosecution is politically motivated.

5. It shall be prohibited to grant pardon or amnesty in respect of crimes of an international nature under this Code, or of crimes committed against persons and property protected under international law in accordance with articles 375 and 378 to 411 of this Code.

Moreover, **assistance** to the Court may be envisaged under the following conditions:

**Article 416 - If the International Criminal Court or any of its organs makes a request for assistance or cooperation or a request for surrender, such request shall be submitted to the Supreme Court of Justice within 48 hours.**



*Review of compliance with the formal requirements for a request for cooperation or assistance shall be the responsibility of the Executive and the Supreme Court of Justice. The final decision on such requests shall be the prerogative of the Court.*

Finally, the draft will add an article to the Code of Criminal Procedure, which will provide that criminal prosecution of the crimes characterised in articles 375, 378 and 379 (offences defined in the Rome Statute) shall not be subject to any statutory limitation, irrespective of their date of commission.

The International Committee of the Red Cross (ICRC) provided advice in the preparation of the draft. Likewise, official and informal consultations were held inter alia with experts from specialised organisations, independent consultants and national criminal lawyers. In the case of war crimes, the ICRC provided consultancy services, and an expert from Amnesty International was informally contacted concerning crimes against humanity.

Moreover, and strictly in keeping with the process of implementation of the Rome Statute, the Ministry of Foreign Affairs and Religion (DGPE), through the Directorate-General for Foreign Policy and jointly with the CCDIH, submitted two pledges in which Costa Rica reiterated its firm willingness to pursue its cooperation with the Court, in particular in regard to the effective application of the sentences which it hands down.

In this context, in May 2010, Costa Rica submitted the following pledges to the Secretariat of the Assembly of States Parties:

1. The Republic of Costa Rica hereby pledges to make every effort to foster greater awareness of and to promote the International Criminal Court, as well as to increase its support and recognition amongst other public institutions. It will also participate in and support academic activities to promote international criminal justice.
2. The Republic of Costa Rica hereby pledges to cooperate with the International Criminal Court in accordance with the provisions of the Rome Statute and the relevant resolutions of the Assembly of States Parties. With this end in view, it hereby pledges to adopt a "National Agreement on Cooperation with the International Criminal Court" to implement, inter alia, the provisions of Part 9 of the Rome Statute. The "Agreement" will list national focal points (the Department of Foreign Policy (MREC), the Department of Legal Affairs (MREC), and the Humanitarian International Law Commission of Costa Rica) and set out the role of the various national institutions that the International Criminal Court has called upon to cooperate at the judicial level. Furthermore, it will lay down the procedure that shall apply from the moment the Legal Department of the Ministry of Foreign Relations and Religion receives a request until it is carried out. The document will contain the definition of the principles of complementarity, surrender of persons, immunity and life imprisonment enshrined in the Rome Statute and their relation to the national constitutional framework. Finally, it will consider the issues relating to national implementation that still need to be addressed, and the possibility of doing so in the medium or long term.

Currently, the DGPE and the CCDIH organize workgroups and adopt concrete measures to fulfill their commitments. A special commission has been established for that purpose, which is charged with providing support and follow up in order to assess the progress made on this matter.

In conclusion, it must be emphasized that, in addition to the mechanisms for the promotion and implementation of the Rome Statute, Costa Rica has participated in regional meetings and in each and every international forum calling upon States to ratify the Statute and to adopt implementing legislation.

The momentum of the International Criminal Court and respect for International Humanitarian Law are central priority themes in Costa Rican foreign policy. As such, multilateral diplomacy has been used to promote respect for the principles, guarantees and rights contained in the Political Constitution, which are the basis of its loyal and traditional belief that all human beings are born free with equal dignity and rights, and that any violation thereof may not go unpunished.

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