

RATIFICATION OF THE ROME STATUTE IN THE TIME OF GEOPOLITICAL AND LEGAL RECONSIDERATION: MISSION IS (IM)POSSIBLE

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Abstract. The article examines legal and political narratives regarding the accession of Ukraine to the Rome Statute of the International Criminal Court. Ukraine signed it in 2000 but has not ratified it till now (April 2023) due to political tensions and legal (legislative) disparities. The spectrum of applied methods in this research is extensive. The primary research methods used in this article to highlight essential circumventions regarding Ukraine's full participation in the International Criminal Court's activities are descriptive and qualitative to comparative.

In this article, the author outlines the importance for every democratic country (which guarantees human rights, the rule of law, and fairness) to be party-state to the International Criminal Court; the paper analyzes its strong and weak sides, challenges, and threats of ratification. Its ratification should revitalize constitutional values (democracy, the rule of law) and human dignity in Ukraine. There reason to conclude that the initiative to create a separate international tribunal should reflect the rule of law principle application *de facto* and *de jure*. Justice must be done; it is not only about the susceptible slogans of the Ukrainian leaders addressing our partners but massive and effective legal, legislative, and diplomatic actions. It is about routine war crimes' investigatory work on a day-to-day basis to identify those who have allegedly committed mass atrocity crimes (i.e., genocide, crimes against humanity, war crimes, and crimes of aggression) in Ukraine since 2014, specifically after the full-fledged invasion in 2022, and all perpetrators of international crimes committed in Ukraine should be brought to justice.

Keywords: the rule of law, human rights protection, crime of aggression, the Rome Statute, Ukraine

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Universal Declaration of Human Rights (1948), Art. 5

"An individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value."

Constitution of Ukraine (1996), Art. 3(1)

INTRODUCTION

For decades, international criminal justice was commonly represented (or even imagined) as a regular range of prescriptions safely put beyond the scope of politics. However, times and narratives changed, reflecting a strenuous political battle over the nature of the worldwide legal order. Human rights protection, democracy, and the rule of law were in the focus of the architects of constitutionalism and global order after World War II (Megret, 2018). The national legal system should create a comprehensive tool kit (full of mechanisms and instruments) to counter impunity and safeguard human rights. However, in all cases where national legal mechanisms cannot be applied to defend effectively against infringements, it should be possible to use available procedures and mechanisms established globally. Proper enforcement of national and international human rights standards envisages efficient global scrutiny, exercised not only by international organizations but also by international judicial bodies, particularly the European Court of Human Rights and International Criminal Court (further - the ICC).

The COVID-19 pandemic has an essential impact on every person worldwide. Governments of all democratic states take urgent (legitimate, proportionate) measures to curb its spread and safeguard public health. They act to defend human rights (declared internationally and nationally, prescribed in basic laws). Inevitably, these measures limit fundamental human rights to an extent rarely experienced in peacetime. It is vital to ensure that such measures (limitations) are consistent with the constitutions as our legal safeguards; furthermore, their impact on particular groups of people is adequately considered (proportionate, non-biased and non-discriminative).

The fact of Russia's aggression against Ukraine is undeniable; almost all international organizations have condemned its illegality (Pinzauti & Pizzuti, 2018). It (crime of aggression) has been a primary crime committed by Russia in Ukraine since 2014. The other criminal acts (genocide, crimes against humanity, war crimes) were not considered to be derivatives but outcomes. Russian propaganda is responsible for the incitement to carry out all the mass atrocity crimes in Ukraine against Ukrainians.

Primary sources on correlation between constitutionalism, human rights, legislative norms, global humanitarian law can be found in the Rome Statute of the ICC (Schabas, 2012). The ICC is an international tribunal founded in 1998 to investigate and prosecute individuals guilty of genocide, war crimes, and crimes against humanity; however, the concept to create such an international institution came up after the Second World War. The fact of adoption the Rome Statute highlighted an essential stage of the trajectory of global law development (Triffterer, 2008). It also framed a great number of issues on the

compatibility of national constitutional law with the articles of the aforementioned international treaty. Some countries applied to their constitutional review bodies (constitutional courts or councils, supreme courts, state councils, etc.) for conclusions on ambiguous and complex issues related to the Rome Statute. Relevant authorities of constitutional review in many European countries, including Belgium, France, Luxembourg, Spain, and Ukraine, provided conclusions on the compatibility of national constitutions with the Rome Statute (Gnatovsky, 2016). The Venice Commission made a proposal to make amendments the constitution (even it is a 'cumbersome, complicated process and maybe a politically sensitive issue') to have an essential legal basis to ratify the Rome Statute (Constitutional issue, 2000). Many European Union member-states faced similar constitutional challenges: the necessity to amend the constitution to ratify the Rome Statute, and they did it (like France (Art. 53-2), Ireland (Article 29.9), Portugal (Art. 7), Luxembourg (Art. 118), etc.).

In Ukraine, the Constitutional Court of Ukraine (hereinafter: CCU) is the only body whose primary aim is to guarantee the protection as well as the supremacy of the Constitution of Ukraine (1996), to be its real guarantor, to examine the validity and constitutionality of legal acts, and to review the compatibility of the normative legal acts with the Constitution (Pankevych & Sofinska, 2019). According to the most recent version of the Law of Ukraine "On the Constitutional Court of Ukraine" (2017), the CCU make decisions and resolutions related to ensure, upon the application by the President of Ukraine or at least forty-five Members of the Parliament (deputies of Verkhovna Rada) or the Cabinet of Ministers of Ukraine, opinions on conformity to the Constitution of Ukraine of applicable international treaties of Ukraine or those international treaties that are submitted to the Verkhovna Rada of Ukraine for its consent to their binding nature (Art. 7 p. 3).

The CCU noted for the first time in 2001 that we should amend the Constitution of Ukraine (1996) to ratify the Rome Statute (On Conformity of the Constitution of Ukraine, 2001). Secondly, in 2016 the provisional law on amendments to the Constitution of Ukraine (1996) conformed with it. However, the ratification was postponed for three years, with weak pros from policymakers and public opinion influencers and strong contras from members of academia. In Ukraine are not many fundamental pieces of research regarding the interrelations of constitutional law, international (humanitarian) law, criminal law, and human rights (Hultai, 2021). Final ratification of the Rome Statute brings Ukraine much closer to the standards of the United Nations, the Council of Europe, and the European Union regarding the procedure of law application and respect for human rights while combatting serious crimes that threaten peace, security, and prosperity and are of concern to the entire international community.

MATERIALS AND METHODS

Besides the conventional scholarly research methods (synthesis, analysis, analogy, generalization, and prognosis), other research methods were used, notably data-analyzis, statistical, and comparative methods, to consider legal effects of the Rome Statute of the ICC ratification since it underpins wider and more complicated interconnection of international criminal justice to peace, democracy and the rule of law. All these methods help to depict a trend

to construe the advancements in international criminal justice as a ongoing narrative globally. The historical and legal approach enabled to scrutinize specifics of the ICC foundation and the Rome Statute drafting to promote human rights, respect democracy and human dignity, and reflect the rule of law globally. The sociological method is used to formulate the clear position in relation to international mass atrocity crimes (i.e., genocide, crimes against humanity, war crimes, and crimes of aggression) and the mission of the ICC via the Rome Statute to bring all the perpetrators to justice for their commitments.

Another specific method applied in the paper is system analysis. This method made it possible to highlight the interdependence between constitutionalism, criminal law, and international justice. Therefore, this article uses a data-driven approach to show how many countries worldwide have applied to the ICC (state-parts to the Rome Statute and not). Using this method, we show the trajectory of work in progress on ratification of the Rome Statute: it was signed in 2000, the President of Ukraine appealed to the CCU on its conformity with the Constitution of Ukraine (1996), the CCU decided the issue in 2001, and subsequently in 2016, the Constitution of Ukraine (1996) was respectively amended in 2016 (however postponed to 2019), but the law on possible ratification of the Rome Statute adopted in 2021 is still not signed by the President of Ukraine).

Numerous treaties, conventions, and declarations, were ratified worldwide after WWII which are connected with the stated problem (UN Declaration of Human Rights 1948, Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Rome Statute 1998). A great many internationally guided permanent courts (the ICJ, ICC) are established and work (successfully or not really) in the field of human rights protection, democracy and the rule of law promotion, compliance with the peace, etc. Finally, the ratification of the Rome Statute of the ICC is a crucial issue for Ukraine since it is foreseen in a few Articles of the Association Agreement with the EU (2014) and is a vital question after the attack on Ukraine's independence and sovereignty, peace, and human dignity in 2022.

RESULTS AND DISCUSSION

1. The International Criminal Court and the Rome Statute

Focusing on avoiding war after World War II was not exclusive; it was more about criminalizing crimes against peace and humanity. The ICC is the first international criminal tribunal to operate permanently (Zadorozhny, 2015). For example, the International Criminal Tribunal for the former Yugoslavia was established by UN Security Council Resolution 827 on May 25, 1993, and worked in The Hague till December 31, 2017. The ICC began work in July 2002 after 60 countries ratified the Rome Statute. Actual ICC tasks lies within the increase of the national capacity to investigate crimes, bring perpetrators to justice and establish it (Commentary on the law, 2017). Procedurally, the ICC cannot automatically prosecute any crime.

The ICC can hear cases only referring to three occasions. The first condition is related to the situation when a state signed and ratified the Rome Statute (155 states signed; however, only 123 ratified; therefore, they are parties to the Rome Statute of the Court). Certain countries, which are not party-states to the Rome Statute now: were party-states to the Rome Statute before but

withdrew, the other signed but did not ratify or subsequently withdrew their signatures, and finally, the UN member-states and observers neither signed nor acceded to it. Those countries, which are not party-states to the Rome Statute, often participate in war conflict (not only on their territory). The next situation occurred when the UN Security Council transferred the case to the ICC; this has happened only twice during the twenty-three years of the ICC's history, in the case of South Sudan 2005 (Resolution 1593) and Libya 2021 (Resolution 1970). And finally, when a party-state of the Rome Statute initiates a case before the ICC (like Georgia (2008), or Ukraine (2014)).

The Rome Statute is an international treaty established by the ICC. The Rome Statute was signed on July 17, 1998; textually, it was corrected by *procès-verbaux* every year before it took in force on July 1, 2002 (Korotky & Nedilko). The Rome Statute gives the ICC the right to consider the following international crimes (Art. 5¹):

Art. 6 - genocide (intention to exterminate a specific national, racial, ethnic, or religious group);

Genocide is always about brutality and is rooted in most influent factors of the contemporary world (both of the XX and XXI centuries): race and nation (Weitz. 2015). Genocide¹ was for the first time recognized as a crime in line with the international law by the United Nations General Assembly (1946); it declares that:

'Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations'.

In 1948, it was codified as an independent crime in the Convention on the Prevention and Punishment of the Crime of Genocide (so-called the 'Genocide Convention') (Abtahi & Webb, 2008). The Genocide Convention entered into force on January 12, 1951. All forms of genocide are foreseen in Art. 2 of Genocide Convention:

- a. killing members of the group;
- b. causing serious bodily or mental harm to members of the group;
- c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. imposing measures intended to prevent births within the group;
- e. forcibly transferring children of the group to another group.

152 States worldwide are parties to the Genocide Convention (as of January 7, 2022). Ukraine signed it on December 16, 1949, and ratified it on November 15, 1954 (therefore, it is a party-state to it). The International Court of Justice (hereinafter: ICJ) has stressed that Genocide Convention represents an essential element of general customary international law (van Shaak, 1997).

¹ The word "genocide" was used for the first time by Polish and American lawyer Raphael Lemkin in 1943 in preface to his literary work 'Axis Rule in Occupied Europe' (1944). This term was defined as mass destruction of particular (national, ethnic, racial, or religious) groups of people not within a single country but on entire continent (Chapter IX). So far it appeared in print as continuation of his Madrid Proposal (1933) as additional explication to the report presented to the 5th Conference for the Unification of Penal Law in Madrid (14–20 October 1933). In 1933, living in Warsaw, R. Lemkin called this crime 'act of barbarity', while ten years later (probably in 1943) he composed (coined) term 'genocide' (from Greek γένος (génos) 'family, clan, tribe' combined with -cide (from Latin: -cidium 'killing')).

It denotes that irrespective of the fact of ratification the Genocide Convention by States (party-states to it), they should follow the principle that genocide is a crime prohibited in line with international law. It is also stressed by ICJ that the prohibition of genocide is a peremptory (axiomatic) norm of international law (or *jus cogens*), and therefore, no derogation from it is allowed. The first state ever and parties to be found in breach of the Genocide Convention 1948 were the federation of Serbia and Montenegro and a vast number of Bosnian Serb leaders (see the ruling of the International Court of Justice provided in 2007).

Art. 7 - crimes against humanity (large-scale persecution of civilians);

It is somewhat unclear what context the term 'crimes against humanity' was firstly developed (in late 18th, early 19th century, or during the WW I). Crimes against humanity were not codified in a special international law treaty (as distinct from genocide and war crimes). However, serious attempts to do so took place. We should note that the prohibition of crimes against humanity, like the ban of genocide, were seen as a peremptory norm of international law. Any derogation is not allowed, and this applies to every State.

When we talk about crimes against humanity we enlist atrocity crimes from murder, extermination, enslavement, deportation or transfer of peoples, imprisonment or other deprivation of physical liberty in contravention of major norms of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, persecution against any group on political, racial, national, ethnic, cultural, religious, gender, to enforced disappearance of people, the crime of apartheid, other inhumane deeds of the same nature purposefully causing suffering, or injury to body or mental or physical health.

Unlike genocide, there is no need for crimes against humanity to target special (national, ethnic, racial, or religious) groups of people. Instead, the victims of the attack might be any civilian people, whatever its affiliation or identity is. The next significant difference is that in the case of crimes against humanity, there is no need to evidence a specific intent. It is sufficient to be a simple intent to commit any acts mentioned, except for the act of persecution, which presupposes extra discriminatory intent.

Art. 8 - war crimes (violation of the laws or customs of war (for example, the treatment of prisoners of war or the usage of prohibited weapons);

The construct of war crimes advanced mainly in the late 19th century - early 20th century (Hague Conventions 1899 and 1907). At this time when international humanitarian law, also referred to as the law of armed conflict, was codified. Considering this concept, war crimes can be divided into a few segments:

- Severe breaches of the Geneva Conventions, attributable to international armed conflict (1949);
- Grave violations of the laws and customs used in international armed conflict;
- Violations of Article 3 common to the four 1949 Geneva Conventions, referring to armed conflict, which is not of international nature;
- Violations breaches of the laws and legislative norms used in armed conflict of no international character.
- From a pure substantive view, all war crimes might be classified into

such groups:

- war crimes against people, who are in need of special protection;
- war crimes against the persons giving humanitarian assistance and peacekeeping operations;
- war crimes against property and other rights; d) prohibited methods of warfare; and
- prohibited means of warfare.

Contrary to genocide and crimes against humanity, war crimes can be committed against various victims, either combatants or non-combatants, depending on the type of crime. In international armed conflicts, victims include: wounded and sick members of armed forces in the field and at sea; prisoners of war and civilian persons (Lonne, 2023).

If non-international armed conflicts occur, protection is granted only to people who did not participate in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness wounds, detention, or any other cause. In such conflicts, protection is also granted to medical and religious personnel, humanitarian workers, and civil defense staff. War crimes have no time limitations under international law; time of conviction in many cases is longer than for murder, torture, rape; life imprisonment is a reasonably common sentence. Amnesty does not apply to war criminals, and it is not the state that is responsible but the individuals who have ordered to commit these crimes.

Art. 8 bis - crimes of aggression (planning or execution by a person who controls the security forces of an act of aggression, which violates the UN Charter 1945).

'Crime of aggression' denotes the planning, preparation, initiation or execution, by an individual empowered to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the UN Charter. In this context, 'act of aggression' implies the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the UN Charter of the United Nations (regardless of a declaration of war) (Ruys, 2018). Traditionally, crimes of aggression is called leadership crime, i.e., the crime of leaders who, by position or function, can (have the ability) to issue orders regarding aggression committed by the state and the conduct of an aggressive war.

In this case, the ICC might be limited by the Kampala Amendments (2010). The question raised recently is if the ICC has jurisdiction over citizens (nationals) of a country which has not ratified the Kampala Amendments (2010) to Article 8 of the Rome Statute but is alleged to have committed any act of aggression on the territory of a state which has accepted so-called the 'aggression amendments' (Akande & Tsanakopoulos, 2018).

As for now, we can list 27 countries who applied to the ICC since 2002 (while not all of them are party-states to the Rome Statute), more cases and defendants.

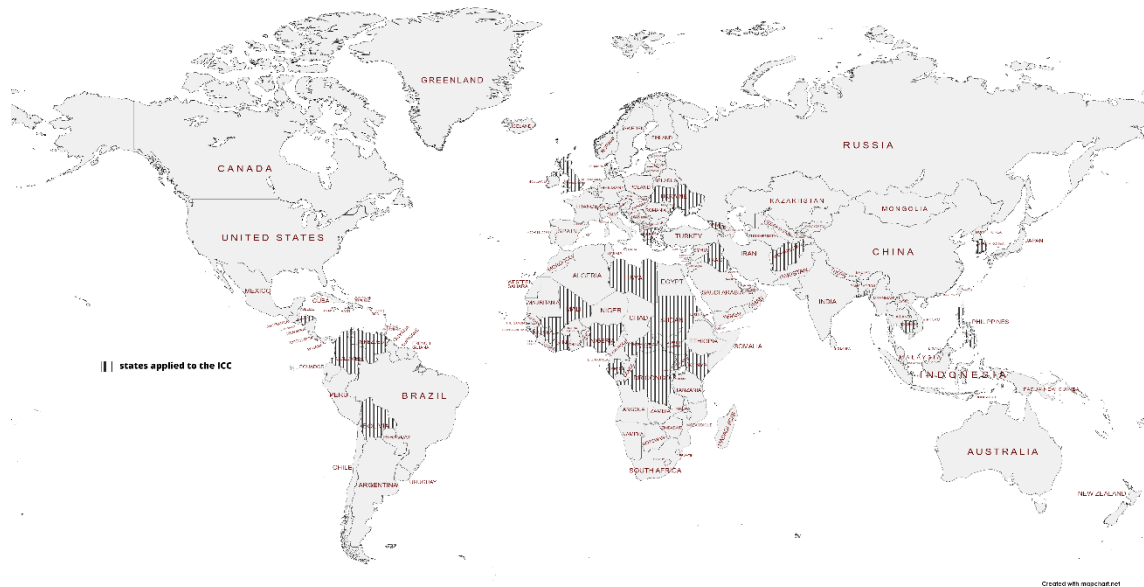


Fig. 1. World map of states-applicants to the ICC

The ICC is an impartial, apolitical court, so investigations and arrest warrants are conducted solely based on evidence collected and independently analyzed by the ICC's Office of the Prosecutor (further - the OTP). To do this, at the preliminary examination stage, anyone (even non-party-states to the Rome Statute) can provide evidence to the ICC.

2. *Rome Statute and Ukraine: constitutional constraints and the rule of law*

Ukraine signed the Rome Statute on January 20, 2000 on initiative of President of Ukraine, but has not ratified it until now (March 4, 2022). The Constitution of Ukraine (1996) in Article 85, paragraph 32 stipulates that the Verkhovna Rada of Ukraine agrees to be bound by international treaties. The parliament carries out the ratification of international treaties by adopting the law on ratification, an inseparable component of which is the text of an international treaty (Art. 9(1) (1) of Law of on International Treaties of Ukraine).

After signing this document, the state policy of Ukraine (represented by the President and pro-government majority in the parliament) changed because of the increasing influence of pro-Russian influence (in fact, gas price blackmail). It was President, who had previously authorized the signing of the Rome Statute, now has remarked on its constitutionality (Art. 151(1) of Constitution of Ukraine, Art. 13(2) and 41 of Law on Constitutional Court of Ukraine) (Selivon, 2003; Skomorokha, 2003). Leonid Kuchma, the President of Ukraine (1994–2005), appealed to the Constitutional Court of Ukraine in order to provide an opinion on the compliance of the Rome Statute of the International Criminal Court with the Constitution of Ukraine (so-called the *Rome Statute* case) (On conformity of the Constitution, 2001).

In its opinion in *Rome Statute* case, the Constitutional Court of Ukraine, in fact, declared legally null and void the vast majority of presidential arguments on the unconstitutionality of the Rome Statute. This Opinion of the Constitutional Court of Ukraine in *Rome Statute* case dated July 11, 2001, declared that “the International Criminal Court may not be assigned to extraor-

dinary and special courts, the establishment of which is not allowed following part five of Art. 125 of the Constitution of Ukraine (1996)".

State's administration of Ukraine has been afraid of this phrase in the preamble of the Rome Statute for a few decades, that the Court complements the national judiciary, will take over national courts, or most of their powers. However, this is a wrong understanding used in a populist way. The complementary nature of the Court's activity makes it clear and precise that it will not seize the judiciary or take over its powers. The Constitutional Court of Ukraine adopted the Opinion in the *Rome Statute* case in 2001 when no experience of applying the principle of complementarity to the International Criminal Court itself (it became functional only in 2003) was available, and there were no interpretations by the Assembly of States Parties. This conception of complementarity guarantees against the unlawful interference of the International Criminal Court in the jurisdiction of national courts. It was intended not to limit the scope of state sovereignty but, on the contrary, to protect it. Thus, it is possible to consider the wording of Art. 31 (1 and 2) of the Vienna Convention on the Law of Treaties (1969) regarding the principle of complementarity.

Surprisingly, but till now (Mai 2023), the Opinion of the Constitutional Court of Ukraine in *Rome Statute* case (2001) remains its only decision adopted based on Art. 151 (1), Constitution of Ukraine (1996):

'The Constitutional Court of Ukraine, on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature'.

There appeared well-founded fears that further ratification of the Rome Statute would pave the pathway for prosecuting top officials who enjoy the right to immunity under national law. Within this framework, the Constitutional Court of Ukraine stressed the inviolability of a particular category of state officials can not be considered as the privilege; it is related to the implementation of essential functions of the state. Following the Constitution of Ukraine (1996) and Ukraine's international legal obligations, it is not deemed to guarantee their impunity. The inviolability of MPs, the President of Ukraine, judges provides special conditions for criminal responsibility.

The Constitutional Court of Ukraine also ignored the President's arguments about the impossibility to transfer Ukrainian citizens to the Court. The conclusion of the Constitutional Court of Ukraine states on differentiation in contextual and legal meaning between 'transfer,' used in the Rome Statute ("bringing a person to the Court) and 'extradition, characterized by getting a person to another state. The only thing is, that the Constitutional Court of Ukraine stated that, according to certain provisions, the Rome Statute does not comply with the Constitution of Ukraine (the provisions of para. 10 of the preamble and Art. 1 of the Rome Statute). Meanwhile, the Constitutional Court of Ukraine established that some provisions of the document could be implemented within the scope of domestic laws of Ukraine without amending the Constitution of Ukraine (1996).

Paragraph 10 of the preamble and Article 1 of the Rome Statute are not consistent with the provisions of parts I and III of Article 124 of the Constitution of Ukraine (1996). Ukraine's accession to the Rome Statute following Part II of Article 9 of the Constitution of Ukraine (1996) is possible after appropriate

amendments (Tsiukalo, 2014).

In 2007, the Minister of Justice of Ukraine had finalized a draft law to amend the Constitution of Ukraine (1996), which would allow ratifying the Rome Statute of the ICC. In May 2008, Ukraine received and accepted recommendations by a few countries worldwide (Austria, Mexico, and Portugal), urging it to ratify the Rome Statute as soon as possible. However, that draft law was never submitted to Verkhovna Rada of Ukraine due to a severe parliamentary crisis in Ukraine. I am convinced it is better to have a precise presidential or parliamentary republic because in this case we have a clear vision of separation of power and a balance between them regarding functions, scrutiny and responsibility. For a semi-presidential republic, the concurrence between parliament (pro-government majority leads by the head of government) and the head of state from different political backgrounds and electoral colors is distinctive and ineffective.

Finally, the Revolution of Dignity, which started in late November 2013, transformed the situation. The aggression of the Russian Federation is indistinguishably linked with the need to bring to justice the leaders of the Russian Federation, the Russian military, and mercenaries for organizing and committing crimes against humanity and war crimes in Ukraine (since February 20, 2014). In cases where the national legal mechanisms and instruments cannot ensure this, it is possible to use them at the supra levels.

Ratification of the Rome Statute is a crucial issue for Ukraine: it is prescribed in few Articles of the Association Agreement with the EU (2014), particularly in:

- Art. 8 ('the Parties shall cooperate in promoting peace and international justice through ratifying and implementing the Rome Statute of the ICC of 1998 and its related instruments') and
- Art. 24 (3) ('as regards judicial cooperation in criminal matters, the Parties shall seek to enhance arrangements on mutual legal assistance and extradition. This would include, where appropriate, accession to, and implementation of, the international instruments of the United Nations and the Council of Europe, as well as the Rome Statute of the ICC of 1998 as referred to in Article 8 of this Agreement, and closer cooperation with Eurojust').

On February 25, 2014, the Verkhovna Rada of Ukraine lodged the Declaration № 790-VII in line with Article 12(3) of the Rome Statute, which recognized the jurisdiction of the Court under Art. 7 of the Rome Statute (crimes against humanity) during 'Revolution of Dignity' - peaceful protests in the period from November 21, 2013, to February 22, 2014.

On February 4, 2015, the Verkhovna Rada of Ukraine adopted the resolution "On the Declaration of the Verkhovna Rada of Ukraine "On the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity and war committed by senior officials of the Russian Federation and leaders of terrorist organizations "DNR" and "LNR", approving the Statement on recognizing the jurisdiction of the ICC under Articles 7 (crimes against humanity) and 8 (war crimes) starting from February 20, 2014, and without an exact end date. Due to the official information provided by the ICC, on April 17, 2014, the Cabinet of Ministers (the government of Ukraine) lodged the First declaration under Article 12(3) of the Rome Statute (dated April 9, 2014) accepting the ICC jurisdiction over alleged atrocity crimes committed on its territory during 'Revolution of Dignity (from November 21, 2013, to February 22, 2014). Primary Ukrainian

domestic atrocity crime legislation is the Ukrainian Criminal Code (Chapter 20): genocide (Art. 442), aggression (Art. 437), and war crimes (Art. 438).

Having received the declaration, the OTP started a preliminary examination. Fatou Bensouda, the chief prosecutor of the ICC, made a resolution to commence a preliminary examination of the situation in Ukraine to define if the Rome Statute criteria for opening an investigation are complied with (Art. 53(1) of the Rome Statute provides that the OTP shall review basic issues of jurisdiction, admissibility and the interests of justice). On September 8, 2015, the government (Cabinet of Ministers) of Ukraine submitted the Second declaration (dated September 8, 2015, signed by P. Klimkin, Minister of Foreign Affairs). It accepted the ICC jurisdiction over alleged atrocity crimes committed on its territory since February 20, 2014 (date of occupation of Crimea and Sevastopol). After the second declaration, the OTP started a preliminary arusy of the situation at hand focused initially on the so-called “Maidan” events and extended the temporal scope of the preliminary examination.

In late November 2015, Petro Poroshenko, the President of Ukraine (2014-2019), submitted a draft law to the Verkhovna Rada of Ukraine on amending the Constitution of Ukraine (1996) to permit the ratification of the Rome Statute. On January 12, 2016, the Constitutional Court of Ukraine started working on the draft law. On January 30, 2016, it issued the Opinion (without any reservations), where it declared the law to be compatible with the procedural provisions of Articles 157 and 158 of the Constitution of Ukraine (1996). On January 12, 2016, the Constitutional Court of Ukraine commenced its hearing on the draft law. On January 30, 2016, it issued the Opinion (without any reservations), where it declared the draft law to be compatible with the procedural provisions of Articles 157 and 158 of the Constitution of Ukraine (1996).

To eliminate the final obstacles to the further ratification of the Rome Statute determined by the Constitutional Court of Ukraine, the Law of Ukraine № 1401-VIII “On Amendments to the Constitution of Ukraine (concerning justice)” was adopted by the parliament on June 2, 2016. Art. 124 (6) of the Constitution of Ukraine is set out in a new wording, where it is declared that ‘*Ukraine may recognize the jurisdiction of the International Criminal Court under the conditions determined by the Rome Statute of the International Criminal Court*’. Meanwhile, the ratification of the Rome Statute has been postponed for three years. Due to the Final and Transitional Provisions of this Law, Art. 124(6) of the Constitution of Ukraine shall enter into force three years after the day following its publication (starting from July 1, 2019).

In November 2016, the preliminary examination of Ukraine is in the subject-matter jurisdiction assessment phase. The OTP reported that the it would pursue its assessment to identify cases in the jurisdiction of the ICC. To finalize Rome Statute’s ratification, Ukraine needs to bring its domestic (national) legislation (including the Criminal Code of Ukraine) according to the provisions of the Rome Statute. On December 11, 2020, Fatou Bensouda, the chief prosecutor of the ICC, declared the closing of the preliminary examination of the situation in Ukraine and stated that ‘*there was a reasonable basis to believe that war crimes and crimes against humanity were committed*’. Crimes committed after February 20, 2014 in East Ukraine and Crimea, by various parties to the conflict were serious enough, both quantitatively and qualitatively, to call for a preliminary investigation. Three large victimization groups have already been identified:

- crimes committed in the context of hostilities;
- crimes committed during detentions;
- crimes committed in Crimea.

The jurisdiction of the ICC, according to the statements of Ukraine and the Rome Statute, extends:

1) to the territory of Ukraine within internationally recognized borders (including occupied territories of Crimea and eastern Ukraine);

2) for any war crimes and crimes against humanity committed in the territory of Ukraine;

3) in the period from November 21, 2013, without any time limit;

4) in respect to all individuals who have committed war crimes and crimes against humanity in the territory of Ukraine without distinction as to their belonging to one or another party to the conflict.

It means that with the ratification of the Rome Statute by Ukraine, the ICC's personal and territorial jurisdiction over Ukraine concerning war crimes and crimes against humanity will not change in any way. Due to domestic experts on international humanitarian law, now it is high time to open a criminal case (against people, but not a State) and launch an investigation. It complements the national criminal justice system (art. 1, 17 of the Rome Statute), so Ukraine is not relieved of the obligation to investigate crimes committed on its territory. Ratification of the Rome Statute is a rather formal procedure that should confirm the seriousness of Ukraine's intentions to fight the impunity of criminals (Zakirova, 2021).

Finally, on June 30, 2019, abovementioned Art. 124(6) of the amended Constitution of Ukraine (1996), which provides for the possibility of ratification of the Rome Statute, entered into legal force; however, till now (April 2023), the issue of ratification remains open. The draft law № 2689 of December 27, 2019, was aimed to do this and was adopted by the parliament on May 20, 2021. On June 7, 2021, it was sent to the President of Ukraine to obtain a signature. However, till now, it has neither been signed by the President nor vetoed (therefore, it cannot finally enter into force). We observe more populism than genuine desire to ratify it (finalize its ratification), including the Kampala Amendments (2010) (Megret, 2018).

On February 24, 2022 (4 a.m. Kyiv time), Ukraine and all people, who live, study, and work there, faced an act of aggression by Russia (non-declared war with a pretext of false self-defense and protection of the Russian national minority in Ukraine). Under the attacks on Ukrainian cities and towns, the Russian troops bombed and attacked civilians in Kyiv, Sumy, Kharkiv, Chernihiv, Zhytomyr, Kherson, Mykolaiv, Dnipro, their downtowns, suburbs and other regions, we remember about the importance and effectiveness of the Rome Statute of the ICC. Ukrainian scholars (professionals in constitutional and international law), human rights activists, and other influencers wrote several petitions asking President of Ukraine to sign the draft law № 2689 to make it effective to ratify the Rome Statute.

On February 26, 2022, Ukraine has filed a lawsuit against Russia before the ICC. This lawsuit regarding the interpretation, application, and fulfillment of the Genocide Convention (1948) was legally based on Articles 36(1) and 40 of the Rome Statute of the ICC. Together with an application, Ukraine requested provisional measures urging the ICJ to order Russia to immediately cease its military operation launched two days earlier (on February 24, 2022). Russia has

explicitly sought to 'justify' its military intervention in Ukraine on false allegations of 'genocide' being committed by Ukraine against the Russian national minority in occupied Luhansk and Donetsk regions of Ukraine (a 'justification', by the way, which without doubt has no legal basis and validity in international law). Ukraine argued that this is essentially a dispute over the interpretation and application of the Genocide Convention (1948).

Since there is no other possible legal basis for the ICC's jurisdiction over this situation, Ukraine has brought the case to the ICJ under Article 9 of the Genocide Convention (1948), considering that Russia and Ukraine are state parties. In other words, Ukraine claims its right not to be subjected to Russian 'special military operations' based on its false claims of violations of the Genocide Convention (1948). While this is a novelty (creative jurisdictional argument), that is why I believe it might work effectively, and we need to wait a little bit. We'll see the outcomes, at least for purposes of granting Ukraine's request for provisional measures, i.e., ordering Russia to cease all illegal military operations by its own and Russian-controlled non-State forces. I doubt that Russia will readily respect the ICJ's orders adopted on March 16, 2022, but any such decision will carry a strong symbolic and argumentative power for the future.

Regarding the statement dated back to February 28, 2022, the ICC's chief prosecutor, Karim A.A. Khan (elected on February 12, 2021), has decided to open an investigation of alleged crimes (Marchuk, 2022) under the jurisdiction of the ICC committed in Ukraine since 2014 and begin collecting evidence after 39 countries worldwide, including Canada, France, Italy, Poland, and the United Kingdom, referred the case to the ICC. Addressing the situation in Ukraine to Pre-Trial Chamber II was signed on March 2, 2022.

Finally, a cooperation agreement on the establishment of an ICC country office in Ukraine was signed. Currently, there are accusations of one crime - regarding the illegal removal and deportation of children, because this crime is the easiest to prove, and there are relevant legal acts. In March 2023, the ICC judges issued headline-grabbing arrest warrants against top Russian officials responsible for the war crime of unlawful deportation of the population (children) and unlawful transfer of people (children) from occupied areas of Ukraine to the Russian Federation. This crime is easiest to prove, and the relevant legal base is foreseen.

As far as I know, Ukraine is already considering the third application to accept the jurisdiction of the International Criminal Court (the first two applications were made in 2014 and 2015). It is a strange situation when the top officials invite the International Criminal Court to investigate the crimes committed in Ukraine to convict the perpetrators. Still, we do not recognize the jurisdiction of the ICC, and we neither want to ratify the Rome Statute. The delay in the ratification of the Rome Statute is still related to fears formed by pro-Russian propaganda during the last decades that the International Criminal Court will start investigating cases against the Ukrainian military (defense forces); however, such fears are groundless since international crimes are extremely severe and gross crimes that are not typical for the Ukrainian military defense forces to commit. It serves a reasonable purpose to gloss over these differences.

CONCLUSIONS

After researching on trajectory of modern constitutional justice in Ukraine we would like to sum it up:

1. The International Criminal Court is the most real opportunity (instrument and mechanism) at the international level to conduct an independent investigation into the events that occurred in the occupied Crimea, parts of South and Eastern Ukraine, regardless of how much time and resources we need to succeed in. An acceptable way out of the situation in the period of armed aggression is the proper conduct of international policy (by the President of Ukraine, government, and MPs). The ratification of the Rome Statute is one of its core elements. The participation of Ukraine in the Rome Statute would mean that our country has joined the community of those states, which recognize the essence of the permanent ICC as an essential instrument and mechanism to combat impunity and ensure respect for humanitarian law, fundamental rights, and human freedoms.

2. Moreover, the ICC can only act in situations where states under international law have to implement their criminal jurisdiction over the crimes under investigation (usually the state on whose territory the crime was committed) are unwilling or often unable to carry them out. The public's expectations that the ICC will be functional and will do all the activities instead of the relevant national authorities of Ukraine are far from reality. The extremely high cost of the ICC proceedings and the length of their implementation in practice limit the possibility of its application only to horrific and large-scale violations of international law. All EU member states are parties to the Rome Statute. The EU promotes accession to the Rome Statute of those European countries that have concluded an Association Agreement with this supranational body. The only possible solution for Ukraine was to amend the Constitution of Ukraine (1996) to ratify the Rome Statute, which will allow it to take full advantage of the ICC's jurisdiction and perform its obligations in line with Article 8 of the EU-Ukraine Association Agreement (2014). The pathway has been chosen by many European countries that have faced similar constitutional problems (like France, Ireland, Luxembourg, Portugal, etc.). And we did it in 2016. On March 1, 2022, the European Parliament adopted a resolution that called on the EU institutions to grant the country EU candidate status (p. 37) according to Article 49 of the TEU (European Parliament Resolution: 2022).

3. Since 2019 we (the Verkhovna Rada of Ukraine) have been ready to ratify the Rome Statute of the International Criminal Court: every constitutional constraint was removed. Hence, the draft law № 2689 on ratification of the Rome Statute was submitted in time to the parliament and adopted. A delay in ratifying the Rome Statute sends a negative signal about Ukraine's selective attitude to the norms of international law; seeking support from other states, Ukraine itself must demonstrate a genuine commitment to these norms. Currently, Ukrainian scholars, human rights activists, and other civil society institutes demand the President of Ukraine to move from populist declarations to tangible actions to bring to justice those who committed international crimes in Ukraine in 2014 and 2022.

4. In case of successful ratification of the Rome Statute, we could participate in budgeting for investigations because today, no budget is provided and allocated for investigations in Ukraine (keeping in mind the justice

ministers meeting in London in March 2023). We could delegate a judge to the International Criminal Court; that fact would have significant procedural effects on certain cases' course and speed up the consideration timeline. We would have many more practical tools (instruments) to influence the International Criminal Court in favor of justice, and the rule of law served in Ukraine. Finally, the ratification of the Rome Statute of the International Criminal Court will strengthen the position of Ukraine in the international arena as a rule-of-law state that supports the system of international criminal justice not only because of its interests but also intending to strengthen the international legal order globally: justice must be served.

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