

# UKRAINE AND THE INTERNATIONAL CRIMINAL COURT: A CONSTITUTIONAL MATTER<sup>1</sup>

## EXECUTIVE SUMMARY

The idea of international criminal justice in the context of the recent events in Ukraine has been highly popular in the domestic political discourse. The dramatic events, which started in November 2013, have brought the issue of Ukraine's cooperation with the International Criminal Court (ICC) to the centre of public attention.

At the same time, the ICC and its powers are widely misunderstood and misrepresented. The ICC does not replace the national courts even when it comes to the most serious crimes under international law falling under its jurisdiction. The main responsibility for prosecuting persons responsible for genocide, crimes against humanity, and war crimes remains with the States.

While the Constitutional Court of Ukraine back in 2001 found the Statute of the International Criminal Court incompatible with the country's Constitution, the EU-Ukraine Association agreement contains a provision obliging Ukraine to ensure that it ratifies the Rome Statute and cooperates with the ICC. The 2001 Opinion of the Constitutional Court, no matter whether one agrees with its contents, requires relevant amendments to the Constitution before the Rome Statute could actually be ratified. While the two declarations made by Ukraine, accepting the ICC's jurisdiction on an ad hoc basis are positive, a number of serious legal issues can only be solved if the Rome Statute is ratified by the Verkhovna Rada. The required amendments have been drafted by the

Constitutional Commission of Ukraine and positively assessed by the Venice Commission. It is however worrying that the draft recently submitted by the President to the Parliament proposes a three-year delay for the entry into force of the relevant provision.

Ukraine has come a long way from the participation in the Diplomatic Conference in Rome in 1998 to the preparation of constitutional amendments enabling it to ratify the Statute of the International Criminal Court. Along this way it has encountered many complicated legal and political issues, which is not surprising in the case of a young democracy with lack of experience in international legal and constitutional matters and a turbulent present-day situation. Nevertheless, one can hope that the final ratification of the Rome Statute and its practical implementation will assist in bringing peace and justice to Ukraine and also strengthen the country as a European democracy that shares the values and principles underpinning the community of European and other like-minded nations.

In order to generate public support and to counter misinformation about this reform, its proponents need to engage in wide public consultations.

## 1. INTRODUCTION

An active participant of the Diplomatic Conference in Rome, which on 17 July 1998 resulted in the adoption of the Statute of the International Criminal Court (hereinafter referred to as the Rome Statute), Ukraine signed this document on 20 January 2000, thereby initiating the process of acceding to this revolutionary international legal instrument establishing, for the first time in history, a permanent organ of

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international criminal justice for the most serious crimes under general international law.

One year later, in 2001, the Constitutional Court of Ukraine issued its opinion on the consistency of the Rome Statute with the Constitution. This Opinion put a barrier to the ratification of the Statute by finding the principle of complementarity, underlying the relationship between the International Criminal Court (ICC) and the domestic legal order, incompatible with Chapter VIII of the Constitution. Despite numerous declarations of intent by the relevant ministries and the Presidential Administration to amend the Constitution to allow for the ratification of the Rome Statute, little had been done in practice and before 2013 the issue was slowly but steadily disappearing from the political agenda.

The situation, however, completely changed during the Revolution of Dignity when Maidan leaders on numerous occasions clearly pledged to achieve the ratification of the Rome Statute without delay in order to bring to justice persons responsible for mass human rights violations during the Maidan events. The issue of accountability for serious international crimes became even more topical for Ukraine following the annexation of Crimea by the Russian Federation and after the beginning of the armed conflict in Donetsk and Luhansk regions in the course of which numerous allegations of war crimes and crimes against humanity have been made.

## 2. WHAT'S THE ICC AND WHAT IT IS NOT?

Since the events of the Revolution of Dignity the topic of the ICC has been recurrent in the Ukrainian political discourse and the media. Incorrectly referred to by many politicians and journalists as «The Hague Tribunal», the ICC has been presented to the public as a panacea capable of virtually anything from holding responsible foreign politicians for their actions against Ukraine to prosecuting corrupt politicians and public servants in the situation of a complete lack of trust in domestic courts of all levels and specialisations. In their public speeches about the Court, many politicians seemed to ignore the fact that its subject-matter jurisdiction is limited to these four crimes against general international law:

- genocide,
- crimes against humanity,
- war crimes,
- and, potentially, the crime of aggression.

Politicians made no mention of other key issues, such as the Court's temporal and territorial jurisdiction or admissibility of cases. Furthermore, if in 2001 the Constitutional Court might have somewhat misunderstood the principle of complementarity, in the recent political discourse its existence seemed to have been completely overlooked.

The ICC does not replace the national courts even when it comes to the most serious crimes under international law

falling under its jurisdiction. The main responsibility for prosecuting persons responsible for genocide, crimes against humanity, and war crimes remains with the States. Indeed, the States are much better placed for conducting criminal prosecutions, especially concerning the crimes committed in their territory, where they can use their own investigatory and law-enforcement agencies. The ICC, on the contrary, will always have to rely on the cooperation of the states concerned.

Furthermore, the ICC will only act in situations when the States that according to international law are supposed to exercise their criminal jurisdiction over the crimes in question (normally this would be the State in the territory of which such crimes were committed) are either unwilling or unable to exercise such jurisdiction. In other words, the public expectation that the ICC can step in and do the work of the relevant national authorities of Ukraine is unrealistic. The very high cost of international legal proceedings and the slow manner in which they are conducted leave them in practice limited to the most heinous and large-scale violations of international law.

Nevertheless, the accession of a State to the Rome Statute is an important indicator of its determination to put an end to impunity for the most heinous crimes against international law and human rights. In this respect, the attitude of the European Union to the Rome Statute is important to be noted. The EU promotes the prevention of crimes of international concern and the ending of impunity for perpetrators of such crimes. It has consistently given strong support – political, financial and technical – to the effective functioning of the ICC and other international criminal tribunals. This has been done through the EU Common Position<sup>2</sup> and an EU Action Plan<sup>3</sup> on the ICC. These documents are based on the understanding expressed in Article 1 of the Common Position that “The International Criminal Court, for the purpose of preventing and curbing the commission of the serious crimes falling within its jurisdiction, is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations”. It is also noteworthy that all EU member states have ratified the Rome Statute. Member States of the European Union are also the main contributors to the ICC budget<sup>4</sup>.

It is therefore not surprising that the EU has been promoting the accession to the Rome Statute by the countries who have entered with it into an Association Agreement. To this end, the Agreement contains a separate provision, Article 8, which stipulates that “[t]he Parties shall cooperate in promoting

<sup>2</sup> Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court. Official Journal of the European Union, 18.6.2003, L 150/67.

<sup>3</sup> Available at: <http://www.consilium.eu.int/uedocs/cmsUpload/ICC48EN.pdf>

<sup>4</sup> See: The International Criminal Court & the fight against impunity [http://ec.europa.eu/external\\_relations/human\\_rights/icc/](http://ec.europa.eu/external_relations/human_rights/icc/)

peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court (ICC) of 1998 and its related instruments”.

### 3. THE ROME STATUTE IN THE CONSTITUTIONAL COURT OF UKRAINE: THE 2001 OPINION

The adoption of the Rome Statute marked a major development in international law, but also raised many questions regarding the compatibility of domestic constitutional law with the provisions of this treaty. It is therefore not surprising that a significant number of States have asked their constitutional courts, supreme courts or councils of state for their opinions on the sensitive and complicated issues posed by the Rome Statute. In particular, the issue of compatibility of the national constitution and the Rome Statute was ruled upon by the respective bodies in more than a dozen countries, including France<sup>5</sup>, Belgium<sup>6</sup>, Spain<sup>7</sup>, and Ukraine<sup>8</sup>. The outcome of such proceedings differed from country to country, but there were a number of recurrent issues highlighted in most decisions, such as irrelevance of official capacity of perpetrators (Article 27 of the Rome Statute) versus immunities accorded to certain officials by the constitutions, obligation of nationals to surrender (Article 89 of the Rome Statute) versus the constitutional prohibition to extradite own citizens, the ICC prosecutor's powers of investigation in the territory of a State Party (Articles 54 and 99 of the Rome Statute) versus the constitutional provisions on exclusivity of the powers of domestic prosecutors and investigators stemming from the principle of sovereign equality of the States and so forth.

The Constitutional Court of Ukraine has ruled on the issue in its Opinion of 11 July 2001. Following the structure of the President's application, it examined a number of alleged inconsistencies of the Rome Statute with the 1996 Constitution of Ukraine, including the provisions concerning the principle of complementarity, the irrelevance of official capacity, the transfer of Ukrainian citizens to the Court and the enforcement of sentences in third States. Interestingly, the 2001 Opinion on the Rome Statute remains to date the sole

decision of the Constitutional Court adopted under Article 151(1) of the Constitution<sup>9</sup>.

The Constitutional Court concluded that all contested provisions of the Rome Statute were in conformity with the Constitution, except for paragraph 10 of the Preamble and Article 1, which states that the jurisdiction of the ICC “shall be complementary to national criminal jurisdictions”. Article 124 of the Constitution states that “the administration of justice is the exclusive competence of the courts” and that “judicial functions cannot be delegated to other bodies or officials”. The Constitutional Court noted that the jurisdiction of the ICC under the Rome Statute was complementary to national judicial systems. However, under Article 4(2) of the Rome Statute, the ICC could “exercise its functions and powers on the territory of any State Party”, and under Article 17 the ICC could find a case to be admissible if the State was “unwilling or unable genuinely to carry out the investigation or prosecution”. The Court concluded that jurisdiction supplementary to the national system was not contemplated by the Constitution. Under Article 9(2) of the Constitution the conclusion of international treaties not in conformity with the constitution can take place only after the constitutional amendment. Therefore, the Constitutional Court ruled that the constitution must be amended before the Statute could be ratified.

The Court's conclusion that the principle of complementarity runs contrary to the Constitution was controversial. The travaux préparatoires of the Rome Statute leave little doubt that the main idea behind the principle of complementarity was not to infringe upon the State's sovereignty but, on the contrary, to ensure that it is the State which has the primary competence and responsibility to try persons accused of crimes against international law, provided that the State is in a position to do it (i.e. 'able' in the language of the Rome Statute) and is doing it bona fide (i.e. 'willing', as it is put in the Rome Statute)<sup>10</sup>. However, Ukraine's Constitutional Court was not the only one reaching this conclusion. A similar logic was followed by the constitutional courts of Armenia, Chile, and Cote d'Ivoire while an opposite approach was taken by the respective constitutional bodies of France, Guatemala, Albania, and Moldova.

<sup>5</sup> Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) [Décision 98-408 DC du 22 janvier 1999 (Traité portant statut de la Cour pénale internationale)], Journal officiel, 24 January 1999, p. 1317.

<sup>6</sup> Opinion of the Council of State of 21 April 1999 on a bill approving the Rome Statute of the International Criminal Court [Avis du Conseil d'Etat du 21 avril 1999 sur un projet de loi "portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 juillet 1998"], Parliamentary Document 2-239 (1999/2000), p. 94.

<sup>7</sup> Opinion of the Council of State of 22 August 1999 (on the Rome Statute) [Dictamen del Consejo de Estado de 22 de Agosto de 1999 (sobre el Estatuto de Roma)], No. 1.37499/99/MM.

<sup>8</sup> Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case No. 1-35/2001, 11 July 2001.

<sup>9</sup> The Ukrainian Constitution allows *a priori* and as *a posteriori* constitutional review of international treaties with President or Government being only authorised to request the review. In addition, the Constitutional Court can be asked by at least 45 MPs, President, the Supreme Court of Ukraine, Ombudsman of Ukraine, or the Verkhovna Rada of the Autonomous Republic of Crimea to review the constitutionality of the already valid law on ratification of an international treaty.

<sup>10</sup> See: *Commentary on the Rome Statute of the International Criminal Court. Observer's Notes, Article by Article*. Second Edition. Edited by Otto Triffterer. – München, 2008. – P. 605-625.

## 4. THE POST-MAIDAN DEVELOPMENTS

In the aftermath of the events on Maidan in November 2013 – February 2014 the Verkhovna Rada adopted a declaration recognising the jurisdiction of the ICC pursuant to Article 12(3) of the Rome Statute, which envisages that a State which is not a Party to the Statute may, by declaration lodged with the ICC Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. In April 2014 this declaration reached the ICC, whose Prosecutor opened a preliminary examination of the facts stated in the declaration, in particular concerning a possible commission of crimes against humanity<sup>11</sup>.

In the meantime, high officials of Ukraine confirmed the pledges made on the stage at Maidan, saying that it would not take long to ratify the Rome Statute<sup>12</sup>. Instead of proposing amendments to the Constitution the Minister of Justice mentioned on 14 April 2014 that the Government was going to request the Constitutional Court to provide another opinion on the Rome Statute<sup>13</sup>. However, these plans did not materialise. Then the deputy spokesman of Ukraine's Council of National Security and Defence, who at the beginning of February 2015 expressed the view that the ratification of the Rome Statute is not "the correct approach to the Russian aggression" and that "due to the annexation of Crimea and Russia's aggression in the Donbas region would only make sense if Russia does the same simultaneously"<sup>14</sup>.

In contrast to this negative approach, the Verkhovna Rada adopted the second declaration under Article 12(3) of the Rome Statute, accepting the jurisdiction of the ICC for crimes committed on Ukraine's territory since 20 February 2014. As the initial text of the declaration as adopted by the Parliament could be understood as the desire to extend the ICC's jurisdiction only to anti-Ukrainian forces, the final text of the declaration as submitted to the ICC by Ukraine's Minister for Foreign Affairs on 8 September 2015, makes a clear reference to all crimes and all persons who have committed them regardless of their affiliation or nationality<sup>15</sup>. According to the press-release of the ICC, "following the second declaration, and bearing its legal effect in mind as well as the interconnected nature of the events in Ukraine, the Prosecutor has, accordingly, determined to extend the temporal scope of the existing preliminary examination to include any alleged crimes

committed on the territory of Ukraine from 20 February 2014 onwards"<sup>16</sup>.

## 5. AN AWKWARD SITUATION THAT CAN BE RESOLVED THROUGH RATIFICATION OF THE ROME STATUTE

The second declaration made under Article 12(3) of the Rome Statute has created an awkward situation for a number of reasons:

- De facto Ukraine became an 'associate party' to the Rome Statute, as the ICC has obtained jurisdiction over the major crimes against international law committed in its territory, while Ukraine has not gained any formal status with the Court and cannot enjoy the rights, both organisational and procedural, afforded by the Rome Statute to the States that ratified it.
- Being now fully bound by the provisions of the Rome Statute obliging the State Parties to cooperate with the Court may include surrender of persons to this international institution, but without ratification Ukraine has no domestic legal basis for such a surrender.
- If a Ukraine case came up in the ICC, a defence counsel of a person accused of crimes under the Rome Statute could question whether it was permissible to accept the jurisdiction of an international court, whose Statute had been declared incompatible with the Constitution by the Constitutional Court of Ukraine.
- The criminal code of Ukraine is not aligned to the Rome Statute (especially when it comes to crimes against humanity, which are currently absent from the Criminal Code of Ukraine, and the need to significantly specify various war crimes).

Therefore, the only way forward for Ukraine appears to be amending its Constitution to open the path to the ratification of the Rome Statute, to benefit fully from the acceptance of the ICC's jurisdiction, and to fulfil its obligations under Article 8 of the EU-Ukraine Association agreement. This is the way that has been chosen by a number of countries which encountered similar constitutional issues, such as France, Ireland, Portugal, Luxembourg and others.

It is positive that the issue of bringing the Constitution into accord with the Rome Statute was addressed by the Constitutional Commission of Ukraine. As a result, a provision explicitly allowing for the ratification of the Rome Statute has

<sup>11</sup> Press Release ICC-OTP-20140425-PR999, 25/04/2014: The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr999.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr999.aspx).

<sup>12</sup> See: Yatsenyuk: Ukraine has pledged to ratify the Rome Statute, available at: <http://www.pravda.com.ua/news/2014/03/21/7019893/> (in Ukrainian)

<sup>13</sup> Petrenko: The Government has decided to ratify the Rome Statute without delay, available at: [http://espreso.tv/news/2014/04/14/petrenko\\_uryad\\_vyrishyv\\_nevidkladno\\_ratyfikuvaty\\_rymskyy\\_statut](http://espreso.tv/news/2014/04/14/petrenko_uryad_vyrishyv_nevidkladno_ratyfikuvaty_rymskyy_statut) (in Ukrainian)

<sup>14</sup> Does Ukraine need the ICC as a response to the Russian aggression, available at: <http://mediarbo.org/2015/02/02/chi-potriben-ukrayini-mizhnarodniy-kriminalniy-sud-yak-vidpovid-na-rosiysku-agresiyu/> (in Ukrainian)

<sup>15</sup> See the full text of the declaration at: [http://www.icc-cpi.int/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf](http://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf)

<sup>16</sup> Press Release ICC-OTP-20150929-PR1156, 29/09/2015: ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration, available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr999.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr999.aspx).

been included into the draft amendments to Chapter VIII of the Constitution dealing with the administration of justice, tabled by the President on 25 November 2015. The provision is to be included as paragraph six of Article 124, reading as follows:

*"Ukraine can recognise the jurisdiction on the International Criminal Court under the conditions that are stipulated in the Rome Statute of the International Criminal Court."*

Such a provision, modelled after the French and/or the Irish constitutional amendments<sup>17</sup>, has been strongly welcomed by the Venice Commission in its October 2015 Opinion<sup>18</sup>. It has to be hoped that the adoption of this provision will finally mark the end of the difficult road to the ratification of the Rome Statute by Ukraine.

However, the transitional provisions of the draft law on amendments to the Constitution at the same time stipulate that the above-mentioned clause allowing for the ratification of the Rome Statute shall only enter into force three years after the adoption of those amendments. If accepted by the Parliament, this draft provision, which was neither discussed by the Constitutional Commission nor submitted for review by the Venice Commission, would mark a clear departure by Ukraine from its commitments of both political and legal nature (in particular, envisaged by the EU-Ukraine Association Agreement). The draft's authors offer no explanation to the proposed delay in the explanatory report. It would indeed be a hard task to do so as Ukraine has already unreservedly recognized the ICC's jurisdiction and committed itself to the full cooperation with the Court by submitting the two Article 12(3) declarations to the Hague. Without removing or delaying any obligations for Ukraine, this provision would simply delay the possibility of Ukraine acquiring full rights vis-à-vis the ICC as a State Party to its Statute.

In the light of the above it is all the more important that the promoters of this change engage in wide public consultation and information, to generate sufficient public support for this reform and to avoid disinformation aimed at derailing such a change.

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<sup>17</sup> The Domestic Implementation of International Humanitarian Law: A Manual. Geneva, ICRC, 2013. P. 232.

<sup>18</sup> European Commission for Democracy through Law (Venice Commission) Opinion No. 803/2015 on the Proposed Amendments to the Constitution of Ukraine Regarding the Judiciary as Approved by the Constitutional Commission on 4 September 2015. Adopted by the Venice Commission at its 104th Plenary Session (Venice, 23–24 October 2015), available at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282015%29027-e>