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THE ISSUE OF RATIFICATION OF THE ROME STATUTE BY UKRAINE.AND THE PRINCIPLE OF COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT

On February 28, 2022 the Prosecutor for the International Criminal Court (ICC) Karim Khan announced that he decided to proceed with opening the investigation regarding crimes falling under jurisdiction of the Court on the territory of Ukraine [9]. However, in the said statement the ICC Prosecutor indicated that Ukraine is not a party to the Rome Statute of the International Criminal Court, therefore, cannot itself refer the situation to the ICC. Other ICC State Parties were encouraged to refer the case to the Office. On March 2, 2022, the ICC Prosecutor released a statement confirming the receipt of referrals from 39 ICC States Parties that expedited the process of opening the investigations over alleged «war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person» [10]. However, it should be noted, that the crime of aggression is not included on the list. The reason for this is that the ICC may not exercise its jurisdiction over crime of aggression on the territory of the state that is not a party to the statute.

The role of International Criminal Court was and still is highly misunderstood in Ukraine. However, the tragic events on the territory of Ukraine starting since 2014 renewed the discussion about the ratification of the Rome Statute as one of the potential instruments of justice and human rights protection. The EU-Ukraine Association Agreement signed in 2014 served as another incentive to ratify the Rome Statute. According to the art. 8 of the EU-Ukraine AA there is an obligation to ratify and implement the Rome Statute of International Criminal Court (the Rome Statute) and “cooperate in promoting peace and international justice” [5]. Moreover, the Parliamentary Assembly of the Council of Europe (PACE) Resolution 2133 underlines the concern that neither Ukraine nor Russia has ratified the Rome Statute even though Ukraine have recognized the jurisdiction of the ICC in the individual declaration of 17 April 2014 and 8 September 2015 [8]. The concerns that Russia will not ratify the Rome Statute create the false discourse in which Ukraine is seen as the only one being held responsible for the crimes listed in the Rome Statute.

Nevertheless, the main argument of Ukraine in the context of not ratifying the Rome Statute was the principle of complementarity and its incompatibility with the

Ukrainian Constitution. Thus, it is relevant to analyse the roots of this issue and a possible way to resolve it.

The Constitutional Court of Ukraine has concluded that the Rome Statute of the International Criminal Court «does not comply with the Constitution of Ukraine» [2]. The decision of the Constitutional Court adopted in 2001 analysed the Ukrainian system of justice and underlined that, unlike the European Court of Human Rights (ECtHR) that exercises its jurisdiction under the condition of exhaustion of national legal remedies, in paragraph 10 of the preamble of the Rome Statute and in the art. 1 it is stated that: «International criminal court [...] complements the national criminal justice authorities» [12]. From that time on, the principle of complementarity of the Rome Statute became the subject of the speculations in the Ukrainian public discourse.

A list of factors preceding to the decision of the Constitutional Court shall be taken into account. Firstly, the political context as the jurisdiction of the ICC may expose the governmental officials to international criminal responsibility. As it was rightly pointed out by B. Broomhall the ICC «finds itself within the most jealously guarded precinct of State sovereignty» [1, p. 68]. Secondly, the Constitutional Court despite overall correctly interpreting the compliance with the Rome Statute, the principle of complementarity was misinterpreted also due to the lack of practice of interpretation established by the Assembly of States-Parties to the Statute [13, p. 1016].

In order to ensure the effectiveness of the ICC the provisions of the Rome Statute are designed to maintain the balance between the sensitive issues concerning the state sovereignty and the effective instruments to enforce and protect human rights. In the art. 17 of the Rome Statute the issues of admissibility are listed with an emphasis on states responsibility to investigate crimes and prosecute the person concerned on the basis of the right to fair trial and due process [12]. Therefore, the state has a primary jurisdiction over the crimes on its territory «unless the State is unwilling or unable genuinely to carry out the investigation or prosecution» [12].

This stipulation resonated in the so-called two-step or one-step test problem and was clarified by D. Robinson as one of the drafters of art. 17. In his article he argues that it is “expressly and unambiguously” [3, p. 1] stated in the art. 17 that the ICC will first of all examine if there is a pending or already conducted investigation of the crime within the national judicial system and only afterwards whether the state is willing and able to provide such investigation. Therefore, the mistake of interpretation of the article only as one step test including the unwillingness and inability of the state constitutes a core of the speculations. Thereby, Robinson emphasized that “the requirement of national proceedings is not a gloss or innovation; it is plainly and expressly stated in 55 words of unambiguous, black and white text in Article 17” [3, p. 1].

For instance, this principle can be seen in action on the example of Georgia. Due to the complementarity principle, the ICC could not start to execute its jurisdiction due to the fact that the events in South Ossetia were the subject of an investigation by law enforcement agencies in both Georgia and Russia, and only recently national procedures in Georgia were discontinued [14].

Among the long list of issues connected to the ratification of the Rome Statute the problem of protection of human rights on the territories outside the control of national government shall be addressed within the context of this article. Since the start of the armed conflict, Ukraine took a step forward and a step back towards the ratification of the Rome Statute. The step forward consisted of the fact that Ukraine recognized the jurisdiction of the ICC under art. 12 (1) of the Rome Statute (on the *ad hoc basis*) and extended its mandate to investigate to the undefined term (from 20 February and onwards), thereby recognizing that it is bound by the Rome Statute. Moreover, the Constitutional Commission of Ukraine adopted the provision that was included in the draft law [4] aiming to ratify the Rome Statute and amend the Constitution of Ukraine by accepting the conditions of the Rome Statute of the ICC [6]. The step back was taken by the former President of Ukraine who didn't object to the suggested draft law on the constitutional changes, however, postponed the ratification of the Rome Statute for 3 years. According to the professor M. Gnatovsky this fact puts Ukraine in the «awkward situation» [6] meaning that first of all being associated with the ICC Ukraine doesn't enjoy any procedural rights; second of all, having certain obligations in the context of cooperation with the ICC Ukraine sufficiently lacks the legal basis for such cooperation to effectively operate.

Nevertheless, in order to concentrate on the positive steps, it is important to mention the Report issued by the former Prosecutor of the International Criminal Court Fatou Bensouda which examined the situation in the Eastern Ukraine in 2016. The significance of the Report is that it presents the results of investigations and is currently striving to establish the nature of the conflict whether it is internal or international. Moreover, the role of Russia in the conflict is also closely investigated in the light of its effective control over the self-proclaimed DPR and LPR and the rebels fighting on their side [7]. This is crucial for further qualifications of crimes and as a result the protection of rights of the victims.

In December 2020, Fatou Bensouda issued a statement on the conclusion of the preliminary examination in the situation in Ukraine, indicating that: «a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine» [11]. It should be noted that the alleged violations according to the Report were exercised both by Ukrainian, Russian side and rebels. In the public discourse this fact was among the theories created to explain the postponing of the ratification, however,

doesn't have any legal grounds as Ukraine recognized the jurisdiction of the ICC and will be held liable for the violations equally as any other sides.

The investigation of the ICC is conducted in a very thorough way and is time-consuming. The main prerequisite to facilitate this process is the cooperation of Ukraine in particular, not only in the investigation, but also the information campaign and public discussions where the myths about the nature of ICC may be destroyed. As a result, the Rome Statute shall be ratified leading to the fulfilment of international obligations and implementation of the EU-Ukraine AA and also to the restoration of justice for the grave violations of human rights.

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ZARYS ROZWOJU FOTOREPORTAŻU WOJENNEGO

1. Wprowadzenie

Motywnym przewodnim niniejszego opracowania są losy dziennikarzy, którzy oddali swoje życie na wojnie za prawdę. Ryzykowali wszystko, aby pokazać światu tragedię ludzi żyjących na niespokojnych terenach. Na froncie walczyli nie bronią, lecz aparatem fotograficznym.

Fotoreportaż wojenny narodził się w USA, a jego celem było właśnie utrwalanie na zdjęciach ludzkich problemów⁴. Fotografia ta ma wpłynąć na uczucia, wywołać emocje. Zawdzięczamy jej wiarygodny przekaz z odległych zakątków świata opanowanych przez wojny. Tego typu zdjęcia należy umieć odbierać. Nie są one

⁴ P. Chauvel, *Reporter wojenny*, Warszawa 2005, s. 9-11.