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Rome Statute: Prospects of recognizing jurisdiction of the International Criminal Court

Maksym P. Kutsevych[1]
[1]Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
kutsevych.maxym@univ.kiev.ua

Ruslan A. Volynets[2]
[2]Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
volrus@univ.kiev.ua

Valentyna V. Tkachenko[3]
[3]Taras Shevchenko National University of Kyiv, Kyiv, Ukraine
valentyna_tkachenko@univ.kiev.ua

Nataliya V. Maslak[4]
[4]Yaroslav Mudryi National Law University, Kharkiv, Ukraine
n_maslak@nulau.edu.ua

Abstract

In the article, the author considers the implementation of the Rome Statute of the International Criminal Court in Ukrainian legislation. The importance of such implementation is analyzed, as well as the prospects for recognizing the jurisdiction of the International Criminal Court by national jurisdiction, as well as its authority to administer justice. The author analyzes various approaches and ways of implementing the Rome Statute into national legislation. The experience and ways of implementing the Rome Statute in the national legislation of countries such as the United Kingdom, the Netherlands, the Republic of Korea and Canada are considered.

Keywords: Rome statute, Implementation, Ratification, International criminal court, Jurisdiction.

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Estatuto de Roma: Perspectivas de reconocimiento de la jurisdicción de la Corte Penal Internacional

Resumen

En el artículo, el autor considera la implementación del Estatuto de Roma de la Corte Penal Internacional en la legislación ucraniana. Se analiza la importancia de dicha implementación, así como las perspectivas para reconocer la jurisdicción de la Corte Penal Internacional por jurisdicción nacional, así como su autoridad para administrar justicia. El autor analiza varios enfoques y formas de implementar el Estatuto de Roma en la legislación nacional. Se consideran la experiencia y las formas de implementar el Estatuto de Roma en la legislación nacional de países como el Reino Unido, los Países Bajos, la República de Corea y Canadá.

Palabras clave: Estatuto de Roma, Implementación, Ratificación, Corte penal internacional, Jurisdicción.

1. INTRODUCTION

The adoption of the Rome Statute raised many questions regarding the compatibility of the internal constitutional law of Ukraine and other states with the provisions of this treaty (ŠTURMA, 2019). Crimes of aggression at the national level in states have become one of the main reasons for the adoption of the statute. The Rome Statute provides that the International Criminal Court (ICC) will be an effective tool to put an end to impunity for perpetrators of serious crimes of genocide, crimes against humanity and war crimes through appropriate and effective prosecution. However, the International Criminal Court recognizes the national jurisdiction of each State party to the ICC Statute (HASSAN, 2013).

Most declarations of the Rome Statute upon ratification are an attempt to repeat the provisions or clarify obligations rather than limit the obligations imposed. France, Belgium, Spain and Ukraine turned to the higher courts for clarification on the controversial provisions of the statute (TRIGGS, 2003). Ukraine is not a party to the Rome Statute of the International Criminal Court, therefore, it does not enjoy all the rights of a Member State, for example, such as: sending its judges and other representatives to the Court, participating in the Assembly of States Parties, or seeking help from the Court at any time.

The Constitutional Court of Ukraine made a decision on this issue as of July 11, 2001 (CONSTITUTIONAL COURT OF UKRAINE, 2011). After the President's statement, the court considered a number of alleged inconsistencies of the Rome Statute with the Constitution of Ukraine as of 1996, including provisions that relate to the principle of complementarity, inappropriateness of official authority, transfer of Ukrainian citizens to court and execution of sentences in third states. It is interesting that the Decision as of 2001 on the Rome Statute remains the only decision adopted by the Constitutional Court of Ukraine on the ratification of the Rome Statute (GNATOVSKY, 2016).

The Constitutional Court of Ukraine noted that jurisdiction that could supplement the national system is not provided for by the Constitution. In accordance with the Constitution, the conclusion of international treaties that are not consistent with the Constitution can take place only after amendments to the Constitution. Thus, the

Constitutional Court ruled that the Constitution must be amended before the ratification of the Statute (CONSTITUTIONAL COURT OF UKRAINE, 2011).

It should be noted that currently, the issue of implementing the Rome Statute into national legislation is particularly relevant, because the functioning of the International Criminal Court in Ukraine is still a problem (POLUNINA, 2017). At the same time, due to the lack of experience of Ukrainian courts in prosecuting international crimes and the unprecedented scale of such crimes, the International Criminal Court may be an important mechanism for administering justice in a transitional period for Ukraine. However, there is no formal method or form of implementation required by international law or the Statute, what is important here is the result - comprehensive and effective legislation that reflects the Statute in domestic law (BACIO TERRACINO, 2007).

An important event was the introduction of amendments to the Constitution of Ukraine, in accordance with part 6 of article 24 of the Constitution of Ukraine, Ukraine may recognize the jurisdiction of the International Criminal Court on the terms determined by the Rome Statute of the International Criminal Court. Besides, in 2014 and 2015 there were two major statements of the Verkhovna Rada of Ukraine to the International Criminal Court. With these statements, Ukraine recognized the jurisdiction of the ICC, and also sought help in:

- Investigation of crimes;

- The identification of perpetrators of crimes against humanity under Article 7 of the Rome Statute of the ICC;

- Prosecution of officials who issued and executed clearly criminal orders that may be established by the ICC prosecutor.

In a second statement dated February 4, 2015, the Verkhovna Rada of Ukraine recognized the jurisdiction of the ICC with the aim of prosecution of crimes against humanity under articles 7 and 8 of the Rome Statute of the ICC. Namely, war crimes committed on the territory of Ukraine from February 20, 2014, to the present time by senior officials of the Russian Federation and the leaders of the terrorist organizations "DPR" and "LPR", which will be determined by the ICC prosecutor.

2. METHODOLOGY

HOSSAM EL DEEB (2015) applies the legal approach by examining the interaction between domestic law and international criminal law in general, as well as the provisions enshrined specifically in the Rome Statute. The purpose of this study is to analyze the interrelation of such provisions between each other. Accordingly, this analysis identifies areas where incompatibility arises in order to propose reforms in legal systems, as well as improve the capacity of national judicial systems, especially with regard to international crimes.

Doctrinal legal research is the most appropriate since it provides a solution to the problem and helps to identify legislative gaps and inconsistencies in the relevant provisions of substantive law. Thus, after doctrinal analysis, it is necessary to focus on the interaction between the international aspects of national legal systems and international criminal law. In addition, an analysis of the available implementation methods and their impact on legal systems will provide clearer options for interested states.

In addition to doctrinal legal research, an empirical research method is also used. These two methods work only in combination. Thanks to the empirical research method, some rules of the Rome Statute are analyzed in order to study its compatibility with the legal systems of individual state parties to the Rome Statute.

3. RESULTS AND DISCUSSION

3.1. Problems of interaction between national and international jurisdictions

Despite the creation of the ICC, which is the current international body, national courts remain the main pillar of the entire international criminal justice system (Werle & Jessberger, 2014). The Rome Statute obliges States to ensure that they have provisions in national law to enable them to cooperate with the ICC and respond to requests from the Court. However, the Statute does not contain any

provisions regarding the implementation of substantive law (EL ZEIDY, 2001).

The relationship between international criminal jurisdiction and national jurisdictions can take various forms. To begin with, international jurisdiction is not always mandatory. At a time when such jurisdiction is inalienable, it becomes mandatory for all states without any exceptions. International jurisdiction might become mandatory in case of adoption of the statute, and can be established by the winners of the war or the UN Security Council. In the event that jurisdiction is not mandatory, states in each case have the opportunity to choose under which jurisdiction to consider a particular case.

International jurisdiction may be exclusive or simultaneous. If it is exclusive, then each individual state will not have jurisdiction over crimes that fall under the jurisdiction of the International Criminal Court. In this case, there are no problematic issues in delimiting jurisdictions. Besides, international jurisdiction may be primary or complementary. In the first case, international jurisdiction will take precedence over national, and in the second, on the contrary, it will complement national. International jurisdiction will only apply when national jurisdiction cannot be exercised or will be exercised but contrary to the law. The implementation of the substantive provisions of the Rome Statute allows participating States to exercise primary jurisdiction over the ICC crimes on the principle of complementarity. Thus, states will be able to adopt legislation on the implementation of

the Rome Statute, as well as cooperate in their national legal systems (BIRKETT, 2019).

Based on the foregoing, for the effective application of the Rome Statute in Ukraine, it is necessary to introduce a number of amendments to the Criminal Code of Ukraine regarding the definition of the concepts of crimes provided for by the Rome Statute (BONDAR, 2018). There is an Action Plan for the implementation of the National Strategy for Human Rights for the period until 2020. This Plan determines that one of the measures aimed at observing international law to protect the lives of civilians in the temporarily occupied territory of Ukraine is to analyze the conformity of international humanitarian law and the criminal law of Ukraine. The purposes of this measure are as follows:

- Harmonizing national legislation with international humanitarian law;

- Identifying gaps and inconsistencies (for example, in definitions of war crimes);

- Developing a bill to amend the Criminal Code of Ukraine (and, if necessary, other legal acts) (Cabinet of Ministers of Ukraine, 2015).

At present, the elevated status of national constitutions can be noted. Certain constitutional guarantees often conflict with international criminal law, and this can be a serious obstacle to legal reform. These include the prohibition of the extradition of nationals of

the state, which is usually found in civil law countries, the absence of life imprisonment in the constitutions of certain states, the absence of juries in international courts or tribunals, the role of amnesties or pardons.

Without adopting national implementing legislation, the participating States of the Rome Statute have few opportunities to investigate crimes, prosecute offenders, and cooperate with the Court. At the same time, when the state's domestic criminal law does not criminalize the whole range of activities prohibited by the ICC Statute, the Court may consider that this state is "incapable" of conducting investigations at the national level in accordance with the principle of complementarity (SCHWÖBEL-PATEL, 2018).

The most common obstacles to harmonizing national legislation with international criminal law are statutes of limitations and immunities. Given that the ICC Statute departs from the approach traditionally adopted in national laws, their implementation requires further study (BEKOU & MIARITI, 2017).

3.2. Prospects for the recognition of the jurisdiction of the International Criminal Court

There are several approaches to the implementation of the Rome Statute in national law, the one-act approach, which is characterized by the development of a single comprehensive

legislative act covering all relevant provisions. This approach has certain advantages. A single comprehensive act dealing with all relevant issues creates a single starting point for legal entities in seeking information on international criminal justice issues at the national level. Several states have adopted this approach, including Uganda, Samoa and Ireland.

The second approach - amending. This approach is to incorporate relevant elements into existing legal frameworks by amending criminal law and criminal procedure codes/acts. This method can be applied in cases where national legislation already contains definitions of some basic international crimes - and therefore can be amended to include additional aspects (however, without the need for significant changes). For example, Norway, Senegal, and Spain have already criminalized genocide and war crimes by incorporating the Genocide Convention or the four Geneva Conventions into national legislation. Model approach. Commonwealth Secretariat, South African Development Community and League of Arab States (EL ZEIDY, 2005; RISHMAWI et al., 2015), in particular, tried to prepare model laws to facilitate the implementation of the ICC. They provide a template that states can use when developing their own national implementing legislation (SECRETARIAT, 2011).

The combined approach. The above approaches are not mutually exclusive. States can combine these approaches when incorporating international criminal law into Ukrainian law. For

example, in Canada, a new legislative act was passed to incorporate major international crimes into Canadian law, and existing extradition legislation was amended to implement a cooperation regime with the ICC (BEKOU & MIARITI, 2017). In the process of implementation, states can use examples of laws of other states. National legal systems often have common features, such as Commonwealth states or states of the same geographic region. It may even be advisable for the state to study the legislation adopted by another state, since legislation that has been in effect for some time would probably be reviewed and possibly even amended accordingly (BEKOU, 2006; VENICE COMMISSION, 2008).

A state that decides to amend existing laws may add new provisions containing international crimes listed in the Rome Statute, or it may add a completely new chapter or section specifically for international crimes. Modification of existing laws can be a simple process for the state. The legislator will incorporate substantive international criminal law into existing national laws (ZANDER, 2015).

The 2003 general position endorses the principles and rules of international criminal law of the Rome Statute and defines the priorities and areas in which the European Union and its member states should operate. In this regard, priority is given to universal adherence to the Rome Statute, the implementation of the Rome Statute through measures adopted by the European Union and its member states, and the preservation of the integrity of the Rome Statute (COUNCIL OF

THE EUROPEAN UNION, 2003). Ratification of the Rome Statute is one of the main priorities for the state (HUMAN RIGHTS INFORMATION CENTRE 2016), while messages sent to the Ukrainian public contain completely different information.

The government claims that no state has ratified the Rome Statute during a military conflict and that by delaying membership in the International Criminal Court, the government protects the Ukrainian military who defend the country. However, some politicians believe that there is no need to delay the ratification of the Rome Statute.

Civil society and experts, in general, have a high level of recognition of the jurisdiction of the ICC. They criticize the lack of understanding of the mechanisms of the ICC, as well as the insufficient experience of state bodies in the investigation and prosecution of international crimes committed in Ukraine, corruption and lack of professionalism within national law enforcement agencies. Experts and human rights activists called the adoption of implementing legislation a sign of the democratic development of Ukraine and a means of reforming the corrupt judicial system. Ratification of the Rome Statute can be an incentive to change the norms of Ukrainian criminal law, which do not comply with international criminal law, as well as provide an opportunity to independently investigate international crimes (AMNESTY INTERNATIONAL, 2015).

However, not everyone shares this point of view, it is believed that the ICC is the only chance to punish those who have committed international crimes in Ukraine. The implementation of the Rome Statute has symbolic meaning, because in this way it is possible to prove the Russian intervention in Ukraine. Although the Court cannot prosecute those in Russia, the arrest warrant itself will already be a legal and political victory (POLUNINA, 2017).

It should also be noted that the Rome Statute does not directly recognize the inviolability of the head of state, traditionally provided in accordance with international law. In fact, the treaty cancels any immunity that states can grant to presidential, parliamentary or legislative officials in their internal systems, which means that proceedings before the Court cannot be prohibited by the position of the person in his or her own state. In addition, the ICC focuses on "high-level criminals" (ELDEEB, 2015).

The Court's finding that the principle of complementarity is contrary to the Constitution is controversial. The preparatory materials for the Rome Statute leave no doubt that the main idea of the principle of complementarity is not to encroach on the sovereignty of the state, but, on the contrary, that the state should bear the main competence and responsibility before the court. The state is able to do this (that is, "capable" in the language of the Rome Statute) and does it in good faith (that is, "ready") (TRIFFTERER, 2008). However, the Constitutional Court of Ukraine was not the only one who came to this conclusion. The same logic was followed by the constitutional courts

of Armenia, Chile and Côte d'Ivoire, while the respective constitutional bodies of France, Guatemala, Albania and Moldova took the opposite approach.

The Rome Statute was adopted for two main reasons: the "unwillingness" or "impossibility" of countries to effectively investigate war crimes. For example, Yugoslavia had the necessary legislation, as well as functioning police and judicial system, but had not enough desire to prosecute those responsible.

"Impossibility", basically, meant that the state apparatus was too weak for the guilty to be punished, as a rule, as a result of a destructive conflict. The situation in Rwanda after the 1994 genocide is an example of this. Here, the government was prepared to hold the perpetrators accountable, but genocide led to the collapse of the judiciary and the police, making Rwanda incapable of acting adequately. For example, the UK takes a dualistic approach to international treaties. It was necessary to adopt national law to incorporate the main crimes of the Rome Statute into the British legal system (JACKSON, 1992).

To take advantage of the complementarity clauses in the Rome Statute while investigating and prosecuting the crimes themselves, the United Kingdom had to incorporate the crimes defined by the ICC into its domestic law. This was achieved in part 5 of the Law on the International Criminal Court, which defines genocide, crimes against humanity and war crimes in accordance with articles 6, 7 and 8(2) of

the Rome Statute (INTERNATIONAL CRIMINAL COURT ACT, 2001).

It is interesting to consider the position of the Netherlands regarding the implementation of the Rome Statute and the prospects for its implementation in national legislation. The implementation of the Rome Statute in the Netherlands consisted of three phases. Priority was given to ratification of the treaty, which raised some issues of constitutional compatibility. The government and parliament then passed legislation allowing the Netherlands to provide various types of legal assistance to the Court. Finally, the Dutch government has proposed legislative reforms aimed at prosecuting international crimes in national courts.

Thus, the implementing legislation was prepared and adopted in two separate approaches: firstly, on issues of cooperation, and secondly, on substantive criminal law (KREß, 2005). The legislation was amended and two new laws were adopted: the Law on Cooperation, which entered into force on July 1, 2002 (THE COOPERATION ACT, 2002); and the Act (as of 8 August 2002) that amends the Dutch Penal Code and allows prosecution in the Netherlands of the crimes set out in article 70 of the ICC (DUTCH PENAL CODE, 2002). Based on this, it can be concluded that in the Netherlands, the process of implementing the Rome Statute in national legislation, as well as introducing amendments to the legislation, was quite fast.

4. CONCLUSION

The foregoing makes it possible to conclude that the Court does not usurp the role of national courts in the prosecution of international crimes such as genocide, crimes against humanity and war crimes. Only if the state cannot or does not want to take a lawsuit, the International Criminal Court enters the case. Thus, the International Criminal Court is the body that can hold accountable the person who has committed the crime precisely in those cases when the national courts fail to cope with this task. That is why the introduction of the Rome Statute into national legislation will only increase the effectiveness of the administration of justice in Ukraine (BEKOU & MIARITI, 2017).

The International Criminal Court cannot fully satisfy the public demand for justice in Ukraine, because it focuses only on high-ranking officials who have committed crimes against international law. Besides, it does not have the resources to deal with a much larger number of ordinary criminals in Ukraine. Therefore, the International Criminal Court cannot replace the courts of national jurisdiction, but can only help in the administration of justice.

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