



## International Criminal Law: Problematic situation with regard to the Rome Statute

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**Abstract:** Issues with regards to the Rome Statute: whether is it right to empower the ICC to prosecute the heads of its member states or not? Have some of its member states acted legally when they ratified the treaty.

**Introduction:** since the adoption of the ICC Rome Statute, more than 120 countries have ratified the treaty, as of march 2022<sup>1</sup>. Before the ratification, states undertook attempts to analyze whether it would be lawful for them to join ICC or not. Surprisingly, some of the member states have decided to ratify the treaty even though it would go against their domestic law, particularly, their constitutional norms, while some refused to accede to the treaty taking into account their internal legislation. This paper will analyze the legality of member states' ratification of the treaty, highlighting the current issues regarding the functions of the Court. Also, the question whether the Rome Statute should empower the Court to prosecute the heads of its member states or not will be analyzed.

As we all know, International Criminal Court has jurisdiction on crimes (genocide; crimes against humanity, war crimes and aggression) committed in the territories of its member states without any question. In the article 13 of the Rome Statute, there are three grounds for the Court to exercise its jurisdiction, and according to the norm, ICC can exercise even a universal jurisdiction, with certain requirements that must be met. The question whether the world community should give the Court a power to judge a head of state (article 27) has been in the center of discussion of many scholars in this field since the adoption of ICC. Whether we admit it or not, there is Rome Statute that has already entered into force and is being applied. Therefore, if any of the offences mentioned above happens now, ICC can prosecute whoever responsible for that criminal behavior. At this point, a simple question may arise: if states knew that the Court would be able to prosecute any person (even if he is a President), and joining Rome Statute would be against their constitutional norms, why they did accede? Did they act legally when they made a decision to join?

To analyze these problematic situations, first of all, we can take France as an example. France signed the Rome Statute on 18<sup>th</sup> of July in the year 1998 (the instrument of ratification was submitted on 9 June 2000)<sup>2</sup>. Before the ratification process began, the President and the Prime Minister jointly addressed to the Constitutional Council of France to give an opinion on the matter whether the joining ICC requires amendments to the Constitution. The Council was of the opinion that the ratification of the Rome Statute requires amendments to the Constitution on the ground that article 27 of the treaty would be against articles 26, 68 and 68-1 of the French Constitution<sup>3</sup>. Looking at these articles of French Constitution, we can hold that members of the government, the President and the members of parliament have to be judged only in their internal courts. The constitution was subsequently amended,

<sup>1</sup> <https://asp.icc-cpi.int./states-parties>

<sup>2</sup> <https://asp.icc-cpi.int./states-parties/western-european-and-other-states/france>

<sup>3</sup> <https://www.conseil-constitutionnel.fr/en/decision/1999/98408DC.htm>

adding article 53-2, in which there a provision saying “France may join International Criminal Court”. However, it is also clear that the issue of constitutionality still remained open because those provisions in the constitution are still there and the norms are going against each other. Even so, French leaders decided to join ICC. This similar uncertainty happened in nearly all member states. However, contrary to what happened in France and those countries, the Supreme Court in Costa Rica ruled that the article 27 of the ICC is not inconsistent with the constitution of the country given that the immunity should not be seen as to impede the proceedings of an international tribunal such as ICC<sup>4</sup>. Joining ICC also fueled many discussions on the matter of extradition of nationals in Costa Rica since, in its constitution, there is an express provision in the Constitution of Costa Rica saying that no one is compelled to abandon their country. The opinion of the Constitutional Court of Ukraine was also interesting on this matter. The Court, for the question of official incapacity, held that the article 27 of the Rome Statute is not contrary to the Constitution and the Court based its opinion on the argument that the crimes subject to the jurisdiction of the ICC were crimes under international law recognized by customary law or provided for in international treaties binding on Ukraine<sup>5</sup>. On the one hand this approach may seem reasonable, however, there may also raise a question: where is the rule that is written like “the crimes in the Rome Statute are included in Customary International Law”?

In the opinion of the Constitutional Court of Chile, we can also see an interesting point, which many of the current member states of ICC did not fully consider when they ratified. The court analyzed the “amnesty” provision (in the Constitution of Chile) given to the head of Chile. According to what the court ruled, the Rome Statute is not compatible with Chilean constitutional norms since it restricted the power of the President of the Republic to grant individual pardons<sup>6</sup>.

Therefore, taking into account the abovementioned uncertainties, we cannot say confidently that the ratification of the Rome Statute is not contrary to the constitution of their member states.

The following issues are emerging with regards to ICC:

1. Most of the members states’ constitution has not been amended, they still provide the head of states, members of the parliament with immunity, and this norm cannot be implemented fully if they remain being a state party to ICC.
2. Sometimes, ICC requires the offenders to be taken to the Court, but, in many countries’ constitution, there is a clear wording that “no any citizen is compelled to abandon the country”. If there is a similar rule in the constitution of a member state, the ratification of the Rome Statute cannot be found completely constitutional (similar to this situation in Costa Rica).
3. In some states, the head is given a power to grant pardon for criminals. If this power is given to the head of a state, then it is probable that the ratification of the Rome Statute for those states will be unconstitutional (if this is expressly written in their basic law). Because, in this situation, the head of a state who has that power could not grant pardon for those offenders prosecuted under ICC.

In these cases, there are two main ways to eliminate those uncertainties. Firstly, Member states have to denunciate the Rome Statute. Or, the second option would be to review their constitution and make amendments to stop such illegalities going on.

### **Whether we should give ICC a power to judge the head of states or not?**

As we all know, according to the article 27 of the Rome Statute, ICC, in simple words, “does not care” about the person who committed a crime. The right to prosecute any individual, irrespective of who they are, is given to the Court. On the one hand, one may argue that, in order to make the Court effective institution, we need a strong cooperation, and due to this, countries should give their consent

<sup>4</sup> [Consulta preceptiva de constitucionalidad sobre el proyecto de ley de aprobación del “Estatuto de Roma de la Corte Penal Internacional”], Exp. 00-008325-0007-CO, Res. 2000-09685, 1 November 2000. Retrived from <https://pj.poder-judicial.go.cr/>

<sup>5</sup> <https://ccu.gov.ua/en/dokument/3-v2001>

<sup>6</sup> [https://www.scielo.cl/scielo.php?script=sci\\_arttext&pid=S0718-97532012000100011](https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-97532012000100011)

to empower ICC to judge anyone who is responsible for one of the crimes mentioned in the article 5<sup>1</sup> of the Rome Statute. However, we should not forget about one fact. The heads of states are heads of their countries because of the nations' will. Those leaders are elected directly by the nation. Such persons (Presidents) can be sacked by his nation if they do not perform their duties well. Taking this into consideration, the head of states, even he is involved in such kind of crimes, should not be given away to the hand of the international institution.

To conclude, the ratification of the Rome Statute may not be considered as fully legal since there are still many uncertainties as to the several rights given to persons in each member states' domestic legislation. Those rights are, first of all, immunity given to the heads of a state, right that no one is forced to leave the country, which we see in several constitutions. States, before joining, should have fully respected the rights given to individuals in their territory, otherwise, those abovementioned rights remain not being fully respected. This may lead people to distrust the law system, the rule of law.

Also, the power of the ICC to prosecute any person should be reconsidered. The heads of states, members of the parliaments are the persons who are elected directly by their nation. Therefore, the only subjects who can judge them should be the persons who elected them. There are mainly two options that can be considered: the right of the ICC to prosecute any individual should be restricted, or before giving the offender who has immunity, the consent of the nation should be taken (for instance, by holding a referendum).

#### **REFERENCE**

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