

**CONSTITUTIONALITY OF THE ROME STATUTE IN
UKRAINE**



Ganna Bykova

Supervisor: Nobuo Hayashi

Deadline for submission: September 1, 2008

Number of words: 12,861

27.08.2008

Table of Contents

1. Introduction	3
1.1 Foreword	3
1.2 Movement towards ratification: the Ukrainian perspective	5
1.2.1 Ratification procedure for international treaties under the Ukrainian legislation	5
1.2.2 Constitutional issues raised by the Rome Statute	6
1.3 The principle of complementarity and its compatibility with the Ukrainian Constitution	8
1.3.1 Position of the Constitutional Court and debates concerning Court's opinion	8
1.3.2 Overcoming the inconsistency	12
2. Immunities	15
2.1 Irrelevance of the official capacity under the Rome Statute	15
2.1.1 Article 27 of the ICC Statute	15
2.1.2 States' responses	17
2.2 Conformity with the constitutional provisions	19
2.2.1 Issue of immunities in the Ukrainian Constitution	19
2.2.1.1 President of Ukraine	19
2.2.1.2 People's deputies	20
2.2.2 The opinion of the Constitutional Court	21
3. Surrender of Ukrainian nationals to the ICC	25
3.1 Nature of surrender	25
3.2 Ukraine's response to issue of surrender	27
4. Enforcement of the sentences in third states	32
4.1 The enforcement regime under the Rome Statute	32
4.2 Compatibility of article 103 of the Rome Statute with Ukraine's Constitution	33
5. Conclusion	36
6. Bibliography	40

1. Introduction

Foreword

The idea to create an international criminal court appeared after the Second World War and only fifty years later such a court came into being. The Rome Statute of the International Criminal Court entered into force after attracting the necessary 60 ratifications in July 2002. As of 15 July 2008, the number of ratifications has risen to 107.¹ The International Criminal Court has started its work and it is the first permanent international judicial body that will bring to trial perpetrators of international crimes such as genocide, crimes against humanity, war crimes and the crime of aggression. For the sake of effectiveness of the Court, it is important that ratification efforts continue until the Rome Statute gets universal acceptance. This will ensure the ICC the broadest jurisdiction.

Acceptance of the Rome Statute poses a number of problems under domestic law; particularly ratification of this document raises issues of constitutional compatibility. Various issues have been raised in various countries (though some prove to be common to every state). However most states decided that their constitutions are in compliance with the Statute and ratified it. And only few states decided to amend constitutions.

Ukraine is one of the states that is yet to become party to the Court, and the first step was taken on 20 January 2000, when Ukraine signed the Rome Statute. The main problem that Ukraine encountered on the way towards ratification was compatibility of the Rome Statute with the Ukrainian Constitution. Ukraine found it necessary to amend the Constitution in order to overcome the incompatibility.

The aim of the thesis is to examine critically the constitutional issues that have been raised during the ratification of the Rome Statute by Ukraine. In this connection it will be discussed the opinion of the Constitutional Court of Ukraine on the conformity of the Rome Statute with the Constitution of Ukraine, and its way in managing the constitutional problems in light of international practice and opinions of both international and national scholars.

The thesis focuses on four main issues that questioned the Rome Statute's constitutionality in Ukraine: the principle of complementarity, the irrelevance of official capacity, surrender of Ukrainian citizens to the Court and the enforcement of sentences of

¹ See Rome Statute Ratification Chart by Region (July 15, 2008), available at http://www.iccnw.org/documents/RatificationsbyUNGGroup_18_July_07.pdf

imprisonment in third states. It will be analyzed the nature of every specific problem, applying to provisions of the Statute and provisions of the Constitution of Ukraine.

The thesis consists of five chapters. The first chapter of the thesis deals with general questions of ratification of the Rome Statute in Ukraine. A brief overview of the Ukrainian ratification process of international treaties will be given. Then the issues that raised concern about inconsistency of the Rome Statute with the Constitution of Ukraine will be examined. The second part of the first chapter touches upon the principle of complementarity of the ICC, which was declared inconsistent with the Constitution. The opinion of the Constitutional Court of Ukraine on this issue will be discussed in light of experience of other states and opinions of Ukrainian and international commentators.

Chapter two is focused on absence of immunity for Ukrainian officials under the Rome Statute. Examining both article 27 of the Rome Statute and experience of other states, the rule of irrelevance of official capacity before the ICC will be discussed, and whether it is compatible with constitutional provisions granting immunity to the President of Ukraine and People's Deputies (Members of the Parliament).

Chapter three examines the issue of surrender of Ukrainian nationals to the ICC. The main question that will be discussed here is whether there is an inconsistency between the duty to surrender suspects to the International Criminal Court and constitutional ban on extradition and expulsion of Ukrainian nationals.

Chapter four deals with the question whether Ukrainian nationals serving sentences in another state may enjoy limited human rights guarantees in violation of the Constitution. The opinion of the Constitutional Court of Ukraine will be discussed in conjunction with provisions of articles 103 - 106 of the Statute and principle of complementarity.

Chapter five is conclusion of the thesis. The issues that were not discussed by the Constitutional Court of Ukraine, but which may raise conflict between the Statute and the Constitution in the future will be examined.

1.2 Movement towards ratification: the Ukrainian perspective

1.2.1 Ratification procedure for international treaties under the Ukrainian legislation

According to the Constitution of Ukraine consent to the binding character of international treaties is granted by the Verkhovna Rada of Ukraine² - the Parliament, sole body of legislative power in Ukraine.³

There is no obligation under the national legislation of Ukraine to ratify an international treaty, which has been previously signed, but a treaty that requires ratification, is generally signed by Ukraine with the intention of ratifying it.⁴

According to article 9 (1) of the Constitution, international treaties that are in force, ratified by the Verkhovna Rada of Ukraine, become part of domestic law of Ukraine. Article 9 (2) provides that the conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine. Hence the Constitution of Ukraine is the supreme law of the country and therefore international treaties have no supremacy over it.

While Constitution provides general framework for the ratification procedures, the Law on International Agreements of Ukraine sets the procedure in details. The Law provides that international agreements of Ukraine shall be ratified following the adoption of the relevant law on ratification and the text of international agreement is a part thereof. On the basis of law, signed and officially published by the President of Ukraine, the Speaker of the Verkhovna Rada of Ukraine shall sign the instrument of ratification, which shall be certified by the signature of the Minister of Foreign Affairs of Ukraine, if the agreement provides for exchange of instruments of ratification.⁵

The Constitutional Court of Ukraine makes conclusions on conformity of international agreements being considered by the Verkhovna Rada of Ukraine against the text of the Constitution of Ukraine.⁶ There is no requirement to seek conclusion of the Constitutional Court prior to ratification of a treaty. The Court provides such conclusions

² Konstytuciya Ukrainy [Constitution of Ukraine] art.85.1 (32), the official translation is available at the web site of Verkhovna Rada of Ukraine, at <http://www.rada.gov.ua/const/conengl.htm> [hereinafter Constitution of Ukraine]

³ *Id.*, art.75

⁴ Council of Europe, Treaty Making – Expression of Consent by States to be Bound by a Treaty (2001), 285 (this part of the report is specifically devoted to the treaty-making process in Ukraine)

⁵ Zakon Ukrainy pro Mizhnarodni Dogovory Ukrainy (2004) [Law on International Agreements of Ukraine] art.9, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1906-15> (English translation is my own)

⁶ Constitution of Ukraine art.151

only on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine (article 151 of the Constitution). Decisions and conclusions of the Constitutional Court of Ukraine are final and are not subject to appeal.⁷

As it was mentioned above, in case when international treaties contravene the Constitution, ratification of such treaties is possible only if relevant amendments to the Constitution are introduced. Article 155 of the Constitution provides that a draft law on introducing amendments to the Constitution of Ukraine, previously approved by the majority of the constitutional composition of the Verkhovna Rada of Ukraine, is deemed to be adopted if at the next regular session of the Parliament of Ukraine no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine have voted in favour thereof.

One more important issue that should be mentioned is correlation between international treaties and Ukrainian legislation. The Constitution sets that ratified international treaties become integral part of national legislation, but it is silent on the issue whether treaties or legislation have priority. The answer can be found in article 19 (2) of the Law on International Agreements of Ukraine. According to this law provisions of international agreements ratified by Ukraine shall prevail over domestic law.

1.2.2 The conformity of the Rome Statute with the Constitution of Ukraine

The ratification of the Statute of the International Criminal Court has challenged constitutional provisions in many countries and Ukraine is not an exception. Having signed the Rome Statute on 20 January 2000, Ukraine is on the way to ratify it.

It is important to mention the significance of the debate on potential constitutional incompatibility. First, because the Statute does not provide for reservations (article 120 of the Statute), and therefore constitutional ‘challenges’ cannot be avoided by entering a reservation in relation to the contentious provision. The second factor is the procedural and political reality of amending a constitution.⁸

At the first stage the President of Ukraine pursuant to article 151 of the Ukraine’s Constitution made a request for an examination of the Rome Statute’s Constitutionality.

⁷ Zakon Ukrainy pro Konstytuciynyi Sud Ukrainy (1996) [Law on the Constitutional Court of Ukraine], art.65, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=422%2F96-%E2%F0> (English translation is my own)

⁸ Helen Duffy, National Constitutional Compatibility and the International Criminal Court, 11 Duke J. of Comp. & Int’l L. (2001), 6, available at www.law.duke.edu/shell/cite.pl?11+Duke+J.+Comp.+&+Int'l+L.+5+pdf

The President's position was that the following provisions of the Rome Statute did not comply with the Constitution:

- Surrender of citizens
- Irrelevance of official capacity
- The principle of complementarity of the International Criminal Court
- Enforcement of sentences in third states
- Exercise of the functions and authority of the ICC on the territory of Ukraine
- Empowering Assembly of State Parties to establish the Elements of crimes and introduce amendments to them
 - The rules of procedure and evidence
 - Determination of punishment by the ICC
 - Vesting of the proof of guilt of the accused in Prosecutor elected by members of Assembly of State Parties.⁹

Many issues raised here prove to be common to many States prior to ratification like complementary jurisdiction of the ICC, prohibition on extradition of nationals and immunities of the officials.

On 11 July 2001 the Constitutional Court made a conclusion that most provisions of the Rome Statute were in conformity with the Constitution, except for the part concerning complementarity of the ICC, which was found as not corresponding to the Constitution.¹⁰ Consequently relevant amendments of the Constitution should be introduced before Ukraine ratifies the Statute (article 9 of the Constitution).

The first four issues mentioned above will be discussed in the following chapters. Concerning other issues, the Constitutional Court ruled that they did not contradict the Constitution referring to article 9 of the Ukraine's Constitution. This article provides that international treaties agreed to be binding by the Verkhovna Rada of Ukraine become integral part of national legislation of Ukraine. In its decision the Court mentioned that an international treaty is ratified by the Verkhovna Rada of Ukraine in the form of a law, which, by its legal nature, does not differ from other laws of Ukraine. Therefore Ukraine's adherence to the Statute will not contradict to the requirement of article 75 and item 14 of

⁹ Vysnovok Konstytuciynogo Sudu Ukrainy u Spravi pro Nadannya Vysnovku Schodo Vidpovidnosti Konstytucii Ukrainy Rymського Statutu Mizhnarodnogo Kryminalnogo Sudu [Decision of the Constitutional Court of Ukraine on conformity of the Rome Statute with the Constitution of Ukraine], Case # 1-35/2001, 11 July 2001, paragraph 1, unofficial translation by the ICRC is available at <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/11d83b3284a5cc4fc1256bc2004eabfa!OpenDocument> [hereinafter Decision of the Constitutional Court of Ukraine]

¹⁰ *Id.*, paragraph 2.1

article 92 of the Constitution, according to which the Verkhovna Rada is the sole body of legislative power in Ukraine which determines the judicial system, status of judges, basis of judicial examination, organization and activity of the office of public prosecutor etc. exclusively by laws.¹¹

Interestingly that only less than ten states from all the states that are now parties to the Statute have found it necessary to amend their constitutions.¹² And Ukraine belongs now to this small group of states that decided to amend their constitutions to ensure that they correspond to the Rome Statute.

1.3 The principle of complementarity and its compatibility with the Ukrainian Constitution

1.3.1 Constitutional issues raised by the Rome Statute

After the examination of the Rome Statute the Constitutional Court of Ukraine declared ‘the Rome Statute of the International Criminal Court, signed on behalf of Ukraine on 20 June 2000, submitted to Verkhovna Rada of Ukraine for granting consent in its obligation, as not corresponding to Constitution of Ukraine in the part, concerning the provisions of paragraph ten of the Preamble and article 1 of the Statute, whereas ‘International Criminal Court...complements national organs of criminal justice’.¹³

Some Ukrainian lawyers state that this position of the Court reflects sufficiently general attitude of the Ukrainian law practice towards the international law and its role in Ukrainian legal system.¹⁴

Considering this issue, the Court relied first on the articles 124 and 125 of the Ukrainian Constitution. According to article 124, justice in Ukraine is administrated exclusively by the courts. Judicial proceedings are performed by the Constitutional Court of Ukraine and Ukrainian courts of general jurisdiction. The system of courts of general jurisdiction consists of the Supreme Court of Ukraine, supreme specialized courts, appellate and local courts (article 125). The delegation of the functions of the courts and

¹¹ Decision of the Constitutional Court of Ukraine, *supra* note 9, paragraph 2.4 - 2.8

¹² States’ Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law (Roy S. Lee ed., 2005), xxi

¹³ Decision of the Constitutional Court of Ukraine, *supra* note 9, final conclusion

¹⁴ Dmytro Kuleba, Scho Stalosa z Rym'skym Statutom v Ukraini, 4 Ukrain'skyi Chasopys Mizhnarodnogo Prava (2003), p.39 [hereinafter Kuleba]

also the appropriation of these functions by other bodies or officials is not permitted (article 124(1)). Pursuant to article 125 it is prohibited to establish emergency and special courts.

Referring to paragraph ten of the Preamble and article 1 of the ICC Statute, the Constitutional Court concludes that possibility of such complementarity is not envisaged by Ukraine's Constitution section VIII 'Justice' and do not comply with article 124 of Ukraine's Constitution.¹⁵

In its decision the Court mentioned that nature of the ICC differs significantly from international judicial organs, particularly the European Court of Human rights whereas the right to petition for protection of their rights and freedom is stipulated in part four of article 55 of Ukraine's Constitution. Such international judicial organs initiate investigation only following petitions from persons, whereas the person may petition them only after all national remedies for legal protection have been exhausted. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party (article 4 (2) of the Rome Statute) and accepts for handling not only those cases referred to it by application of the participating state but also on to its own initiative, when 'the state is unwilling or unable genuinely to carry out the investigation or prosecution'.¹⁶

A dissent opinion of two judges (Ivaschenko and Selivon) was added to the conclusion of the Constitutional Court. Though many commentators find this opinion too radical¹⁷, some stands of the opinion should be mentioned.

In the opinion of Ivaschenko and Selivon it lacks common sense to state that paragraph 10 of the Preamble and article 1 of the Statute are not compatible with the Constitution of Ukraine and at the same time to recognize other articles of the Statute which specify complementary character of the Court as compatible.¹⁸ It is difficult not to agree with this opinion. The Constitutional Court mentioned several times¹⁹ in its conclusion that principle of complementarity is reflected in many articles of the Rome Statute. For instance, in paragraph 2.1 the Court mentions that article 4(2) of the Statute specifies complementary character of the ICC.²⁰ Further the Constitutional Court in paragraph 2.4 concludes that article 4(2) is in conformity with the Constitution of Ukraine.

¹⁵ Decision of the Constitutional Court of Ukraine, *supra* note 9, paragraph 2.1

¹⁶ *Id.*

¹⁷ Kuleba, *supra* note 14, at 39

¹⁸ Okrema Dumka Suddiv Konstytuciynogo Sudu Ukrainy Ivaschenka V.I. ta Selivona M.F. Stosovno Vysnovku Konstytuciynogo Sudu Ukrainy u Spravi pro Nadannya Vysnovku Schodo Vidpovidnosti Konstytucii Ukrainy Rymського Statutu Mizhnarodnogo Kryminalnogo Sudu [Dissent opinion of judges Ivaschenko and Selivon] (English translation is my own)

¹⁹ Decision of the Constitutional Court of Ukraine, *supra* note 9, paragraph 2.1, 2.2.3, 2.3.3

²⁰ 'The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party...'

Position of the Court on this point is controversial. Other issues raised in the dissent opinion will be discussed in the following chapters.

The decision of the Constitutional Court is criticized by many Ukrainian lawyers. The Court explaining the reason why the International Criminal Court cannot complement national organs of criminal justice does not consider the nature of complementarity. The expression ‘the ICC shall be complementary’ have been used separately from its content without taking into account the nature of phenomenon which it describes.²¹

A thorough discussion of the nature of the Court’s jurisdiction is not the main objective of this paper, but some analysis here is still necessary.

According W. Schabas explains, ‘the term ‘complementarity’ may be somewhat of misnomer, because what is established is a relationship between international and national justice that is far from ‘complementary’. Rather the two systems function in opposition and to some extent with hostility to respect to each other’.²² Though complementarity emerges explicitly only in paragraph ten of the preamble and in article 1 of the ICC Statute and other articles do not refer directly to it, the central provision regulating complementarity can be found in article 17, which addresses the relationship between national legal systems and the ICC. Moreover, article 17 is not a stand-alone provision and is linked to the complex system of inter-related articles 12 to 15, 18, 19, 20 and 53.²³ Pursuant to article 17 (1) of the Rome Statute a case is inadmissible when it is being investigated or prosecuted by a state that has jurisdiction over it, or when the case has already been investigated and the state has decided not to prosecute. The Court may only proceed when the state is unwilling or unable genuinely to carry such proceedings out.

The ICC is not a supranational court or a court of appeal. It has no competence to overrule or review the decision of any national court and has no precedence over national courts. The Statute encourages states to exercise their jurisdiction over the ICC crimes and stipulates therefore that ‘it is the duty of every state’ to exercise its criminal jurisdiction over those responsible for international crimes.²⁴ Thus, national courts of the state with jurisdiction have priority over the ICC and the Statute crimes. Each state decides when to exercise jurisdiction over the Statute crime. Neither national courts nor the ICC submit to each other and the ICC in no way replaces national courts if they proceed effectively.

Pursuant to article 17 of the Rome Statute, the Court’s jurisdiction is only complementary and may do so when state fails to investigate or undertake judicial

²¹ Kuleba, *supra* note 14, at 39

²² William A. Schabas, *An Introduction to the International Criminal Court* (2d ed. 2004), p.85

²³ Florian Razesberger, *The International Criminal Court: the Principle of Complementarity* (2006), pp.28-29

²⁴ Roy S. Lee, *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations, Results* (1999) pp. 27, 43-74, 127-42

procedures genuinely after an ICC crime has been committed. The ICC may be called a court of last resort, because it can only pursue cases when state fails to do so.

The Constitutional Court of Ukraine, considering constitutional provisions regarding the exclusive competence of national authorities, concluded that this precludes any delegation to a jurisdiction complementary to the national system. In my opinion, these provisions could be interpreted in favor of the Statute. Defining the relationship between national authorities and the ICC, it should be taken into account that the Constitution was adopted before the establishment of the ICC. Besides article 17 provides for inbuilt safeguards that preserve national interests and judicial integrity on the domestic level.²⁵ Primacy of national courts is guaranteed by the Statute and the ICC only assumes jurisdiction where state fails to do so.

Interesting interpretation of the complementarity principle was used by the French Constitutional Council. According to its opinion, the ICC cannot act on a case when a state has decided to act in good faith.²⁶ The Council concluded that the restriction to the principle of complementarity in the case where a state deliberately evaded its obligations was derived from the rule *pacta sunt servanda*.²⁷ Only when state violates its obligations under the Statute, the ICC may intervene. In my opinion such interpretation of the principle is not correct, because the ICC Statute does not obligate states to investigate or prosecute and states are free to choose whether to do this or not. That is why the question is not about *pacta sunt servanda*. The principle of complementarity governs the ICC's jurisdiction.

A part of the conclusion of the Constitutional Court of Ukraine which is criticized by the Ukrainian lawyers is subparagraph 4 and 5 of paragraph 2.1, where the Court mentions difference between the ICC and other international judicial organs, particularly the European Court of Human Rights.

According to article 55 of the Constitution Ukrainian nationals have the right to appeal for the protection of their rights and freedoms to the ECHR. Following the standing of the Court, the difference between the International Criminal Court and other international judicial institutions that do not conflict with the Constitution lies in a way that the latter institutes proceedings: a) by appeal of the person and b) after exhausting all

²⁵ Sharon A. Williams, Article 17: Issues of Admissibility, in *Commentary on the Rome Statute of the International Criminal Court: observer's notes, article by article* (Otto Triffterer ed., 1999), p.384

²⁶ Roy S. Lee, States' Responses: Issues and Solutions, in *States' Responses to Issues Arising from the ICC Statute*, *supra* note 12, at 13

²⁷ The ICRC, Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State 18, *available at* [www.icrc.org/web/eng/siteeng0.nsf/htmlall/59RLJW/\\$FILE/Issues_Raised_with_Regard_to_the_ICC_Statute.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/59RLJW/$FILE/Issues_Raised_with_Regard_to_the_ICC_Statute.pdf) [hereinafter Issues Raised with Regard to the Rome Statute by National Constitutional Courts]

domestic legal remedies. But it is important to take into consideration that the ECHR may also receive applications from States, non-governmental organization and group of individuals.²⁸

Analyzing the opinion of the Constitutional Court, and particularly paragraph 2.1 of this opinion, Ukrainian scholar D. Kuleba comes to conclusion that principle of exhausting of legal domestic remedies and principle of complementarity have the same basis and functions: they function only when national means of legal protection do not render justice because of ineffectiveness, unavailability or unwillingness.²⁹ It seems that both the International Criminal Court and the European Court of Human Rights are ‘supplementary remedies by character for protection of human and citizen’s rights and freedoms’. D. Kuleba states that ‘their nature in relation to the national legal system will be the same: both institutions help systems of national legal means to carry out the functions of every judicial body which is to dispense justice’.³⁰

This position is true from the point of view of justice’s recipient. However, there is still a difference between the ICC and the ECHR. While the European Convention of Human Rights creates substantive obligations upon State Parties, the ICC Statute does not. The ICC tries individuals responsible for the most serious international crimes, and States Parties have only the duty to cooperate with the Court. Consequently, the position of commentators stating that if Ukraine has recognized the ECHR then it is reasonable to recognize the ICC is arguable.

1.3.2 Overcoming the inconsistency

According to the report of the European Commission for Democracy through Law, states may consider several solutions for the ratification of the Statute of Rome. These may include the following:

- insertion of a new article in the constitution, which allows all relevant constitutional problems to be settled, and avoids the need to include exceptions for all the relevant articles (used by France and Luxembourg);
- revision of all constitutional articles that must be changed;

²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, art 33, 34

²⁹ Kuleba, *supra* note 14, at 44

³⁰ *Id.*

- introduce and/or apply a special procedure of approval by Parliament, as a consequence of which the Statute may be ratified, despite the fact that some articles are in conflict with the Constitution;
- interpreting certain provisions of the Constitution in a way to avoid conflict with the ICC Statute.³¹

Pursuant to article 9 of the Constitution of Ukraine, if international treaty does not comply with Ukraine's Constitution, adherence of Ukraine to this treaty is possible only after introduction of corresponding changes into it. Thus the third alternative mentioned above is not an option here. The amendment of the Constitution is the only way for Ukraine to overcome the inconsistency today.

In my opinion, the interpretive approach could be used in earlier stage, when the Constitutional Court of Ukraine considered the Rome Statute for the subject of its compliance to Ukraine's Constitution. Many states have found ways to interpret the relevant provisions in such a way to avoid inconsistencies.³² While judges of the Ukraine's Constitutional Court interpreted provisions concerning immunities and surrender of nationals in a creative way, they concluded that complementarity of the ICC was incompatible with the Constitution without broad argumentation.³³ Now, when the Court has come to conclusion, Ukraine cannot ratify the Statute of Rome without constitutional amendments. However, the law on the Constitutional Court of Ukraine contains specific provision. According to this provision the Court may reconsider the case provided that the new circumstances of the case that existed at the moment the Court considered the case became evident.³⁴ The ratification of the Rome Statute by Ukraine can possibly happen sooner when the Court reconsiders the case rather than changing the Constitution.

The procedure of the constitutional amendment in Ukraine is complicated and lingering³⁵ and some scholars even say that it will be unreal to change the Constitution³⁶. The amendment should be introduced and the issue is how to do it effectively. Some states

³¹ Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the ICC, adopted by the Venice Commission on 45th Plenary meeting (2000), available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)001-E.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-E.asp) [hereinafter Report of Venice Commission] (The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters)

³² Lee, *supra* note 25, at 11

³³ Vyacheslav Manukyan, *Ne Vse Dorogi Vedut v Gorod Gaaga*, 39(249) *Yuridicheskaya Praktika*, original version available at <http://www.yurpractika.com/article.php?id=10004116> (English translation is my own)

³⁴ Law on the Constitutional Court of Ukraine, *supra* note 7, art.68

³⁵ Oleksander Lavrynovych, *Osnovni Problemni Pytannya Implementacii Polozhen Rym'skogo Statutu Mizhnarodnogo Kryminalnogo Sudu do Zakonodavstva Ukrainy ta Shlyahy ih Vyrishennya*, 4 *Ukrainskyi Chasopys Mizhnarodnogo Prava* (2003), p.14

³⁶ Kuleba, *supra* note 14, at 46

could make it possible to change their constitutions and experience of these states is a valuable experience for Ukraine.

France amended its constitution by provision which is general in nature. The constitution was subsequently amended by inserting a new article that provided: ‘The Republic may recognize the jurisdiction of the ICC as provided in the treaty signed on 18 July 1998’.³⁷ Similar approach was taken by Luxembourg. A new provision stating that ‘The provisions of the Constitution do not hinder the approval of the Statute of the International Criminal Court...and the performance of the obligations arising from the Statute according to the provisions provided therein’, was added to the article 18 of the Luxembourg’s Constitution.³⁸

Taking into account the experience of these states and the opinion of the Constitutional Court, Ukrainian experts suggest two options of amending the chapter VIII of the Ukraine’s Constitution. First option is to expand article 124 of the Constitution by inserting a provision of the following content: Ukraine may recognize the jurisdiction of international judicial bodies on the basis of international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine³⁹. Second option is to add provision providing that the International Criminal Court complements courts of general jurisdiction of Ukraine and its functioning is governed by the provisions of the Rome Statute of the International Criminal Court⁴⁰.

Both options are presented in two different draft laws on amendments to the Constitution. Pursuant to article 159 of the Ukraine’s Constitution a draft law on introducing amendments to the Constitution of Ukraine should be considered first by the Constitutional Court of Ukraine in conformity with the draft law within requirements of the Constitution. When a decision on this issue is made one of the draft laws will be considered by the Verkhovna Rada of Ukraine.

Both presented alternatives seem to be acceptable. Provision providing that the ICC complements courts of general jurisdiction and that its functioning is governed by the provisions of the Rome Statute will solve the problem of non-correspondence of the Constitution to the Rome Statute and at the same time outline the legal basis for its activity. But the first alternative gives the opportunity to avoid constitutional amendments in the future, in case of ratification of other similar international treaties.

³⁷ Issues Raised with Regard to the Rome Statute by National Constitutional Courts, *supra* note 27, at 1

³⁸ *Id.* at 5

³⁹ Lavrynovych, *supra* note 35, at 17

⁴⁰ Kostyantyn Gryschenko, *Mizhnarodnyi Kryminalnyi Sud*, 4 *Ukrainskyi Chasopys Mizhnarodnogo Prava* (2003), p.12

2 Immunities

2.1 Irrelevance of the official capacity under the Rome Statute

2.1.1 Article 27 of the ICC Statute

In the context of the individual criminal responsibility for crimes within the jurisdiction of the International Criminal Court⁴¹, often these crimes are committed with direct or indirect participation of persons acting in their official capacity. Hindrances that may arise on the way to international prosecution of these persons are the rules that grant them immunity from persecution. Immunities that may in this case come into play can be divided into three groups: 1) immunities derived from customary international law; 2) immunities granted by international treaty rules; 3) those envisaged in national legislation.⁴²

Today it seems undisputable that senior state officials may be held accountable for acts performed in the discharge of their official duties.⁴³ The principle was confirmed in founding instruments of the Nuremberg Tribunal, Tokio Tribunal, ICTY and ICTR. Today this principle is recognized in the Rome Statute in article 27, which declares that rules in either national or international law that create immunities or otherwise shelter individuals from criminal prosecution are of no effect before the Court.

The actual wording of the article 27 is the following: ‘the Statute shall apply equally to all persons without any distinction based on official capacity...[which] shall in no case exempt from criminal responsibility, nor shall it constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person...shall not bar the Court from exercising its jurisdiction over such person’.

The purpose of this article was to clarify the scope of individual criminal responsibility for crimes under international law.⁴⁴ The main effect of article 27 of the ICC Statute is to establish that the official capacity of a person does not relieve him of

⁴¹ Rome Statute of the International Criminal Court, July 17, 1998, preamble paragraph 9 [hereinafter The Rome Statute]

⁴² See Antonio Cassese, *International Criminal Law* (2003), p.264

⁴³ *Id.* at 267

⁴⁴ Otto Triffterer, article 27: Irrelevance of official capacity, in *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (Otto Triffterer ed., 1999) p.507

individual criminal responsibility and it eliminates a substantive defense that may be put forward by state officials.⁴⁵

The first paragraph of article 27 provides that state officials are subject to prosecution by the Court even if they acted in their official capacity, official status of defendant does not exclude him from the jurisdiction of the ICC.⁴⁶ Thus the first part of article 27 of the Rome Statute deals with substantive responsibility of state officials for international crimes rather than issues of immunity.⁴⁷ The second paragraph contains an explicit denial of international and national law immunities. As Otto Triffterer states in his analysis of this paragraph the special procedural rules mentioned there are those granting exemption from criminal responsibility *ratione personae* and/or *materiae*. It also makes no difference whether such rules exclude criminal responsibility or only protect person by a procedural rule against the exercise of domestic jurisdiction like arrest and prosecution before national courts. Such rules include all national regulations even if they rank as constitutional law and all rules of general and special international law.⁴⁸

Article 27 has therefore two effects: first, no immunity will prevent an individual from being prosecuted for crimes which fall under the jurisdiction of the ICC and the second, no immunity will prevent a person from being surrendered to the ICC on the request of the Court. The intention of the article is to nullify any existing immunities conferred to individuals with official capacity for the purposes of prosecutions before the Court.

Consequently, on the one hand Article 27 constitutes a waiver of national law immunities and States parties are therefore obliged to arrest and surrender their own officials even if those officials would otherwise be entitled to immunity under national law. On the other hand State parties to the Statute must not respect any immunity with regard to nationals of other states parties when complying with the request of the ICC for arrest or surrender.⁴⁹

And as the concluding remark, article 27 of the ICC Statute does not provide for a requirement for the States to abolish immunities provided for in the domestic legislation. States parties to the Statute do not need to eliminate all existing forms of immunity for

⁴⁵ Hazel Fox, *The Law of State Immunity* (2002), pp.429-430

⁴⁶ See Dapo Akande, *International Law Immunities and the International Criminal Court*, 98(3) *Am. J. Int'l L.* (2004), pp.419-420

⁴⁷ *Id.* at 419

⁴⁸ See Triffterer, *supra* note 44, p.512. For more information on the issue of immunities *ratione personae/materiae*, see Cassese, *supra* note 42, at 264-273

⁴⁹ See Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, in *The International Criminal Court* (Olympia Bekou, Robert Cryer ed., 2004), pp.352-353 (The author also points out that the scope of article 27 is limited only to state parties, immunities of non-party states cannot be abrogated by the Statute because of the rule of *pacta tertiis* – a treaty does not create obligations or rights for a third state)

their representatives.⁵⁰ The Rome Statute simply requires an exception to the general rule of the immunity to be provided for by the parties, if they have not already done so.

2.1.2 States' responses

Constitutions of many states contain provisions providing immunities to certain officials, such as head of state, governmental officials, members of the parliament etc. The scope and extent of constitutional immunities may be different: some constitutions grant immunities that are strictly attached to certain acts, others confer immunities from any penal process. Taking into account the fact that most constitutions were drafted before the ICC was established, immunities mentioned in these constitutions may contravene article 27 of the Rome Statute and states find different solutions to this problem.

According to the Manual for the ratification and implementation of the Rome Statute, where there is a concern about inconsistencies between the Statute and national constitutions over immunities, states have taken one of the following steps:

- amending their constitution
- interpreting the national constitution
- leaving the issue for the future when it was judged highly unlikely to have any real application.(the Netherlands, Norway and Spain essentially did this with respect to their monarchs).⁵¹

States, like the Czech Republic, Ireland, Latvia, Belgium, France, Luxembourg and Liechtenstein decided that constitutional amendment is necessary. The French Constitutional Council held that, in view of particular regimes of penal responsibility of the President, members of the Parliament and members of the Assembly established in articles 26, 68 and 68-1 of the French Constitution, article 27 of the Rome Statute was contrary to the Constitution.⁵² As it was mentioned in previous chapter, France introduced a general provision to its Constitution that permitted avoiding changing of every particular article that was not compatible with the Statute. Similar approach was taken by Luxembourg.⁵³

⁵⁰ See The International Centre for Criminal Law Reform and Criminal Justice Policy, International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute (3d ed. 2008), p.21, available at http://www.iccnw.org/documents/ICC_Manual_-_March_2008_-_ICLR.pdf

⁵¹ *Id.* at 21-22

⁵² Issues Raised with Regard to the Rome Statute by National Constitutional Courts, *supra* note 27, at 1

⁵³ See for details Issues Raised with Regard to the Rome Statute by National Constitutional Courts, *supra* note 27, at 5

The Czech Republic made its constitutional amendment by a specific provision, stating that no special conditions provided for the prosecution of deputy, senator, the President of the Republic, and judge of the Constitution Court shall apply as regards crimes mentioned in the ICC Statute.⁵⁴

As Helen Duffy states, amendment does not necessarily indicate rejection of the arguments for harmonious interpretation. While in some states constitutional amendment was indeed necessary for consistency with the Statute, in others amendment may have been considered the preferable – rather than strictly necessary – route. This step was taken in order to minimize the possibility of future challenges or perceptions of inconsistency.⁵⁵

At the same time many states have decided that amendment is not necessary. These states chose the way of authoritative interpretation of the constitutional provisions in order to avoid conflict with the Statute. These are countries like Azerbaijan, Argentina, Brazil, Canada, Cambodia, Finland, New Zealand, Portugal, Ukraine and the United Kingdom⁵⁶.

The Venice Commission examined the practice of states on this issue and suggested three possible ways of interpretation of constitutions. According to the first one, states may interpret the relevant constitutional provisions in a way that those provisions construed as conferring immunity by reason of person's 'official capacity' only in the national and not international courts. This would amount to establishing two tiers of responsibility of office-holders, at the national and international levels. A state may also maintain that a tacit exception from immunity was inherent in its constitution. A head of state or government who commits the most serious crime of concern to the international community probably violates the fundamental principles of his country's constitution, therefore he cannot expect to be protected by the constitution. And the third possible interpretation would be to maintain that lifting the immunity of heads of state or government has become a customary practice in public international law.⁵⁷ This trend in international law was confirmed by the House of Lords in decision on General Pinochet's immunity, as well as in Arrest Warrant case (Congo v. Belgium) by the ICJ.⁵⁸

⁵⁴ See Government Bill on the constitutional law amending the constitutional law of the Czech National Council No. 1/1993 Coll., Constitution of the Czech Republic, as amended by constitutional law no.347/1997 Coll.

⁵⁵ Duffy, *supra* note 8, at 11 (the article explores arguments as to how the constitutional provisions can be read consistently with the Statute)

⁵⁶ For more details in respect of some of these states, see States' Responses to Issues Arising from the ICC Statute, *supra* 12

⁵⁷ See Report of Venice Commission, *supra* note 31

⁵⁸ See *Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet* (on appeal from a Divisional Court of the Queen's Bench Division), the House of Lords, judgement of 25 November 1998; Case Concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium), International Court of Justice, judgment of 14 February 2002, paragraph 56-61

Consequently, practice of states in dealing with the problem of incompatibility of constitutional immunities with article 27 of the Rome Statute is different. Every state chooses its own measures to resolve the problem and this practice may be useful for states that are still resolving the problem.

2.2 Conformity with the constitutional provisions

2.2.1 Issue of immunities in the Ukrainian Constitution

2.2.1.1 President of Ukraine

The President of Ukraine is the guarantor of state sovereignty and the territorial integrity of Ukraine, as well as the Constitution of Ukraine and human and citizens' rights and freedoms.⁵⁹ Realization of these and other constitutional provisions that determine legal status of the President and his responsibilities is impossible without proper legal protection. Such protection is given by article 105 of the Ukraine's Constitution. According to this article 'the President of Ukraine enjoys the right of immunity during the term of office'.

According to the Constitution, the President may be held accountable only on specific conditions. Article 111 stipulates that the Ukrainian President can be discharged from the post by the Verkhovna Rada by the procedure of impeachment in the event that he or she commits state treason or other crime. The issue of the discharging of the President of Ukraine from office by the procedure of impeachment is initiated by the majority of the constitutional composition of the Verkhovna Rada of Ukraine. To carry out the investigation, the Parliament of Ukraine establishes a special temporary investigatory commission whose composition includes a special prosecutor and special investigators. The conclusions and proposals of the temporary investigatory commission are considered in meetings of the Verkhovna Rada of Ukraine. If there is a legal basis the Verkhovna Rada of Ukraine adopts a decision on impeachment of the President of Ukraine if voted for by no less than two-thirds of its constitutional composition.⁶⁰

⁵⁹ Constitution of Ukraine art.102 (2)

⁶⁰ See Constitution of Ukraine art.111

In order to understand the nature of the personal immunity of the President, some decisions of the Constitutional Court of Ukraine should be taken into consideration, because it is the only body that provides the official interpretation of the Constitution of Ukraine.⁶¹

In its decision on immunity and impeachment of the President of Ukraine, the Constitutional Court concluded that the immunity of the President should be understood as part of his constitutional status. It intends to provide conditions for the realization of his responsibilities. The Court has also emphasized that the President's right to immunity ceases when the President steps off the office.⁶²

The Court states that while in office the President cannot be held accountable and no criminal proceeding can be initiated against him. The procedure of impeachment established by the Constitution of Ukraine is the only way to call the President to the constitutional liability. And by its legal nature this constitutional process is extrajudicial and has nothing to do with criminal proceedings.⁶³

Consequently, the immunity of the President of Ukraine is not absolute. He may be deprived of immunity through the impeachment in case of violation of the Constitution.

2.2.1.2 People's deputies and judges

The People's Deputies and judges are the two categories of state officials that are conferred immunity by the Constitution of Ukraine.

Provisions of article 76 of the Constitution of Ukraine stipulate that 'the Verkhovna Rada of Ukraine consists of 450 People's Deputies of Ukraine who are elected for a four-year term'. The immunity of People's Deputies of Ukraine is guaranteed by article 80 of the Constitution. It also provides that deputies 'shall not be held criminally liable, detained or arrested without the consent of the Verkhovna Rada of Ukraine'.⁶⁴

The Constitutional Court of Ukraine addressed the issue of Deputies' immunities in several cases. As the Court explained in its decision on Deputies' immunities, the specific

⁶¹ Constitution of Ukraine art.147 (2): 'The Constitutional Court of Ukraine decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine'

⁶² See Rishennya Konstytuciynogo Sudu Ukrainy u Spravi pro Oficiyne Tlumachennya Polozhen Chastyny Pershoi statti 105, Chastyny Pershoi Statti 111 Konstytucii Ukrainy (Sprava schodo nedotorkannosti ta impichmentu prezydenta Ukrainy), #19-pp/2003 (2003) [Decision of the Constitutional Court of Ukraine on the immunity and impeachment of the President of Ukraine], available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v019p710-03> (English translation is my own)

⁶³ *Id.*

⁶⁴ See Constitution of Ukraine art.80 (1) and 80(3)

purpose of the immunity is to secure that the deputy performs his duties effectively and without obstruction.⁶⁵ The Court also mentioned that Deputies enjoy immunities from the moment they are elected until they resign.

Explaining the nature of the Deputies immunities in the same decision, the Constitutional Court held that immunities of the Peoples' Deputies are not personal privileges of the deputies but of public and legal nature.

The Court interpreted the article 80 of the Constitution of Ukraine as establishing a special procedure of bringing People's Deputies to account, their detention and arrest. Such measures may be applied to the Deputy only with the consent of the Verkhovna Rada.⁶⁶ In its decision on guaranties of Deputy's immunity, the Constitutional Curt held that the aim of deputy's immunity is not only to protect the deputy from unlawful interference in his activity but also to assist the appropriate functioning of the Verkhovna Rada.⁶⁷

Hence the immunity of the People's Deputies is not absolute. They can be held accountable but only on specific conditions.

The Constitution also guarantees immunity of judges according to article 126 of the Constitution. Paragraph 3 of article 126 stipulates that a judge shall not be detained or arrested prior to court's decision is made and only with the consent of the Verkhovna Rada.

2.2.2 The Opinion of the Constitutional Court

Upon the request for an examination of the Rome Statute's constitutionality, the question whether article 27 of the Rome Statute corresponds to paragraphs 1 and 3 of article 80 and paragraph 1 of article 105, as well as paragraphs 1 and 3 of article 126 of the Ukraine's Constitution was raised, which guarantee immunity of the President of Ukraine, People's Deputies and judges.

⁶⁵ Rishennya Konstytuciynogo Sudu Ukrainy schodo oficiynogo Tlumachennya Polozhen' Chastyny Tret'oi Statti 80 Konstytucii Ukrainy (Sprava pro Deputatsku nedotorkannist), # 9-pn/99 (1999) [Decision of the Constitutional Court of Ukraine on Deputy's Immunity], available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v009p710-99> (English translation is my own)

⁶⁶ See *Id.*, part 4

⁶⁷ See Rishennya Konstytuciynogo Sudu Pro Oficiyne Tlumachennya Polozhen Chastyn Pershoi, Tret'oi Statti 80 Konstytucii Ukrainy, Chastyny Pershoi Statti 26, Chastyn Pershoi, Drugoi, Tret'oi Statti 27 Zakonu Ukrainy 'Pro Status Narodnogo Deputata Ukrainy' (Sprava pro Garantii Deputatskoi Nedotorkannosti), # 12-pn/2003 (2003) [Decision of the Constitutional Court of Ukraine on guarantees of Deputy's immunity], available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v012p710-03> (English translation is my own)

In its opinion the Constitutional Court relied on article 18 of the Constitution of Ukraine. Article 18 stipulates that international activities of Ukraine are based on generally recognized principles and norms of international law. The Court has mentioned that one of these principles is the principle of diligent performance of international obligations which aroused in form of international and legal custom 'pacta sunt servanda' and received its reflection in numerous international agreements.⁶⁸

The Court has concluded that 'the establishment of responsibility for committing majority of crimes stipulated by the Rome Statute is an international and legal obligation of Ukraine, according to other international and legal documents that entered into force for [Ukraine]'. Particularly, it is the Convention on prevention and punishment of the crimes of genocide of 9 December 1948, Geneva Convention relative to protection of civilian persons in time of war of 12 August 1949, Geneva Convention relative to the treatment of prisoners of war of 12 August 1949, Convention for the protection of cultural property in the event of armed conflict of 14 May 1954, the International Convention on the suppression and punishment of the crime of apartheid of 30 November 1973, Convention against torture and other cruel, inhuman or degrading treatment of 10 December 1984.

The Constitutional Court observed that 'the Statute reflects the majority of provisions that determine crimes listed in the abovementioned and other conventions Ukraine is part of. Provisions of the Statute prohibiting the crime of genocide, crimes against humanity, war crimes, the crime of aggression are considered nowadays as a customary rule of international law which was recognized by international organs. Therefore, their criminal nature according to article 18 of Ukraine's Constitution does not depend on Ukraine's adherence to the Statute and its entry into force'.⁶⁹

It is the Court's standing that immunities of the President of Ukraine, People's Deputies and judges concern only national jurisdiction and may not be an obstacle to exercise jurisdiction by the International Criminal Court with regard to those who commit crimes stipulated by the Statute. 'It complies completely with international obligations of Ukraine'.⁷⁰ In the view of the Court immunity of official persons is connected with their performance of important state functions, it is not their privilege and therefore it cannot be considered as a guarantee of their impunity. Immunity of the President, People's Deputies

⁶⁸ Decision of the Constitutional Court of Ukraine on the conformity of the Rome Statute with the Constitution of Ukraine, *supra* note 9, paragraph 2.2

⁶⁹ *Id.*

⁷⁰ *Id.*, paragraph 2.2.1

and judges stipulate only specific conditions for instituting criminal proceedings against them.⁷¹

It follows from the Court's position that Ukraine is aware of its obligation of international criminal responsibility for its state officials since the USSR ratified the Genocide Convention back in 1954. According to article 4 of the Genocide Convention 'persons committing genocide...shall be punished whether they are constitutionally responsible rulers, public officials or private individuals'. This compatibility issue has already been resolved when Ukraine ratified other international treaties that establish the duty to prosecute or extradite persons regardless of the official status of the accused. Ukraine is one of the states where the provisions of international treaties in the field of human rights take precedence over conflicting provisions of the Constitution.⁷²

In my opinion, the Court rightly pointed out the objective of immunities of the Ukrainian state officials. Although the Constitution of Ukraine does not stipulate it expressly, immunities of the President, Deputies and judges are there to protect them from interference in the exercising of their functions. But the Constitution does not guarantee impunity for international crimes.

While most Ukrainian lawyers seem to agree with the approach taken by the Court, the judges Ivaschenko and Selivon disagree with the opinion of the Constitutional Court, and expressed their position in their dissent opinion.⁷³

In the view of Ivaschenko and Selivon, any international legal norm should be considered in the light of the supremacy of the Constitution. This principle is envisaged in article 9 (2) of the Constitution. According to it 'the conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine'. In accordance with the principle of supremacy, the Constitution provides for mechanism of preceding and following control of the constitutionality of international treaties. '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'.⁷⁴ Thus, the authors of the dissent opinion say that the application of arguments in support of constitutionality of provisions of the Statute referring to treaties that are binding for Ukraine is possible only in case if the

⁷¹ *Id.*, paragraph 2.2.2

⁷² See Report of Venice Commission, *supra* note 31 (It is mentioned that this situation is peculiar to states of Central and Eastern Europe)

⁷³ See Dissent Opinion, *supra* note 18, paragraph 2

⁷⁴ Constitution of Ukraine art.151

Constitutional Court of Ukraine made a decision on conformity of these treaties with the Constitution.

Another part of the decision of the Constitutional Court that is questioned is the conclusion that immunity of Ukrainian officials concerns only national jurisdiction. Ivaschenko and Selivon argue that following this line of argumentation norms of international law and constitutional norms operate separately from each other and each of them have their own field of application. Following this approach there cannot be any contradictions between national and international laws, and then there is no need in constitutional provisions that provide for interrelation between the Constitution of Ukraine and international treaties.

It is difficult not to agree with the dissent opinion when it comes to the first argument expressed earlier. The Constitution of Ukraine clearly provides for its supremacy. Consequently, interpreting the constitutional provisions the Court may rely only on the international treaties that are in conformity with the Constitution, in other words the Constitutional Court gave the opinion on the conformity of these treaties.

As for the second argument, it is difficult to agree with what was argued in the dissent opinion. What I think the Constitutional Court meant was two different levels of responsibility of state officials – one at the national and the other one at the international levels. And thus this operation of immunities on different levels has nothing to do with the separation of international and domestic law. The matter concerns separation of responsibilities: when responsibility of the official is exception at national level it does not apply at the international level.

3. Surrender of Ukrainian nationals to the ICC

3.1 Nature of surrender

The Rome Statute provides that: ‘The Court may transmit a request for the arrest and surrender of a person...[and] State Parties shall, in accordance with the provisions of this part [of the Statute] and the procedure under their national law, comply with the request for arrest and surrender’.⁷⁵

The surrender of suspects and accused is one of the core obligations of states to the ICC and is significant to its proper functioning. Any state party is obligated to cooperate whenever the arrest or surrender of a person suspected of committing a Statute crime is sought. The surrender procedure applies both to nationals and non-nationals and the issue of compatibility may arise in this case since constitutions of many states prohibit the extradition of nationals. It is clear from provisions of article 89 that states may not use constitutional prohibition against extradition as a ground for refusing surrender.⁷⁶

Three possible options were discussed during the negotiations of the Rome Statute, regarding the term that could refer to the delivery of a person to the ICC: extradition, transfer, surrender. In most states extradition was interpreted to refer to the process for the delivery of individuals to another state for prosecution. The term ‘transfer’ was considered as a process in which the individual is simply arrested and transferred to the ICC. For some states the term ‘extradition’ was unacceptable because of constitutional restrictions, others could not accept the term ‘transfer’ because that would mean restriction of individual’s liberty without safeguards associated with extradition. Eventually the term ‘surrender’ was adopted as a compromise.⁷⁷

Both the definition of surrender and extradition were inserted in article 102 of the Rome Statute for the purpose to ensure that ‘traditional extradition law is not applicable to the special surrender regime’.⁷⁸ The article 102 states: ‘For the purposes of this Statute:

- a) ‘surrender’ means the delivering up of a person by a State to the Court, pursuant to this Statute.

⁷⁵ The Rome Statute art. 89(1)

⁷⁶ See Bert Swart, Arrest and Surrender, in *The Rome Statute Of the International Criminal Court: a Commentary* (Antonio Cassese, Paolo Gaeta, John R W D Jones eds., 2002), p.1680

⁷⁷ See Darryl Robinson, The Rome Statute and its impact on national laws, in *The Rome Statute of the International Criminal Court: a Commentary* (Antonio Cassese, Paolo Gaeta, John R W D Jones eds., 2002), p.1849-1852

⁷⁸ Goran Sluiter, The Surrender of War Criminals to the International Criminal Court, in *The International Criminal Court* (Olympia Bekou, Robert Cryer ed., 2004), 283

- b) ‘extradition’ means the delivering up of a person by one State to another as provided by treaty, convention or national legislation’.

Both notions refer to a state’s delivery of a person to another criminal jurisdiction, but the distinction between them is that surrender refers to the ICC and extradition refers to the prosecution or the enforcement of an individual’s sentence in another state.

Although the purposes of surrender and extradition are the same (to prosecute or to enforce the sentence)⁷⁹, the distinction between them is not merely the difference in terms. During the negotiations of the Rome Statute it was noted that ‘states did not consent to extradite nationals in general but accepted such an obligation only in very specific context of the Court...Such a clear distinction at the terminological level should, as was the underlying thinking, at the same time contribute to a growing awareness on the national level for the substantial differences between horizontal and vertical cooperation’.⁸⁰ Some scholars use ‘horizontal and vertical approach’ stating that the distinction between extradition and surrender refers to different relationship between a state and the International Criminal Court, and that between two states. The argument that the cooperation regime between states is horizontal and the cooperation model between the ICC and states is vertical is questionable. Following the approach of verticality, the ICC may be described as a supranational court. However, according to the Rome Statute the nature of the Court is complementary to national criminal jurisdictions, not supranational. Unlike the ad hoc tribunals ICTR and ICTY, which could request a national court at any stage of its procedure to defer a case to the international level, and national court would be bound to comply with such a request, the ICC may exercise jurisdiction only in case when state fails, unwilling or unable to prosecute genuinely.

Thus the cooperation regime between the International Criminal Court and states is horizontal too, it is not vertical. And many arguments support this view. For instance, according to article 90 of the Rome Statute if state receives a request from the ICC for surrender of person and it also receives request from state not party to the Statute for extradition of the same person and this state party is under the obligation to extradite the person to this state, then the requested state shall determine whether to surrender the person to the Court or to extradite to the requesting state. Consequently the request from the Court does not prevail.⁸¹

⁷⁹ Sluiter, *supra* note 77, p.283

⁸⁰ Claus Kress, Article 102: Use of Terms, in *Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999), pp.1157-58

⁸¹ For more arguments supporting inter-state cooperation model between states and the ICC see Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, in *The International Criminal Court* (Olympia Bekou, Robert Cryer ed., 2004), pp.61-63

The main distinction between surrender and extradition is in the scope of the obligation to surrender to the Court. Two important points should be mentioned here concerning extradition: state does not have any obligation to extradite an alleged criminal to a foreign state and extradition may be refused for instance on the grounds of principle of double criminality⁸² or in case of political offence. At the same time surrender of persons to the ICC is a ‘rigid obligation’⁸³ and no traditional grounds for refusal are applicable in case of request for surrender of persons to the Court.

3.2 Ukraine’s response to issue of surrender

Article 25 of the Constitution of Ukraine provides that citizens of Ukraine shall not be expelled from Ukraine or extradited to another state.

Following the request for an examination of the Rome Statute’s constitutionality made by the President of Ukraine, the question whether article 89 (1) of the Statute is compatible with article 25 of the Constitution was raised.

The Constitutional Court examined ‘international legal documents and special literature’ and noted that terms ‘extradition’ and ‘surrender’ have different legal nature: the former refers to delivery of a person to another state and the latter refers to delivery of a person to an international tribunal.⁸⁴ The Court mentions that this view is also supported in article 102 of the Rome Statute.

The Constitutional Court concluded that the prohibition against extradition of nationals contained in article 25 of the Ukraine’s Constitution ‘concerns only national and not international jurisdiction’. The rationale behind such prohibition is to guarantee unbiased trial and lawful punishment for citizens and the International Criminal Court cannot raise these concerns, it is not a foreign court.⁸⁵

⁸² This principle stipulates that the offence for which extradition is requested is criminal in both the demanding and the requested states.

⁸³ Claus Kress and Kimberly Prost, Article 89: Surrender of Persons to the Court, in *Commentary on the Rome Statute of the International Criminal Court: observer’s notes, article by article* (Otto Triffterer ed., 1999), p.1072

⁸⁴ See Decision of the Constitutional Court of Ukraine on the conformity of the Rome Statute with the Constitution of Ukraine, *supra* note 9, paragraph 2.3.1

⁸⁵ See Decision of the Constitutional Court of Ukraine on the conformity of the Rome Statute with the Constitution of Ukraine, *supra* note 9, paragraph 2.3.2

The final observation made by the Court concerns the complementarity principle. If Ukraine investigates and prosecutes Statute crimes committed by its citizens, the issue of their surrender to the ICC will not arise.

Based on these grounds it was concluded that there is no inconsistency between the ban on extradition of Ukrainian nationals and article 89 (1) of the Rome Statute.

The obligation to surrender nationals to the ICC is one of the most common constitutional issues that arise during the ratification of the Rome Statute. While some states decide to amend constitution in order to clarify the issue⁸⁶, Ukraine found it possible to read constitutional provisions harmoniously with the Statute by way of interpretation. The Constitutional Court of Ukraine chose to adopt interpretation proposed in the Statute, in article 102. Provisions of this article allowed many states to interpret surrender to the ICC as one that does not fall within the scope of prohibition against extradition and to avoid amendment.⁸⁷

Explaining the difference between surrender to the ICC and extradition to other states, the Constitutional Court mentioned that ban on extradition ‘aims to guarantee unbiased judicial review and justice, and lawfulness of punishment for its citizens and the ICC cannot be equated to a foreign court’. This view is supported by many commentators. For instance, Darryl Robinson, suggesting arguments that could be used by states that decide to interpret constitutional provisions mentions that ‘prohibitions on extradition were generally adopted to protect nationals from the uncertainties of foreign prosecution...The procedures of the ICC comply with international standards and numerous safeguards ensure that it will not engage in frivolous prosecutions’.⁸⁸

In support of its statement that the ICC cannot be equated to a court of another country, the Constitutional Court of Ukraine notes that ‘the aim explaining the prohibition to extradite citizens of one state to another is reached in the ICC by applying corresponding provisions of the Statute, developed or agreed upon by the participating states. These provisions are based on international pacts on human rights whereas Ukraine has already agreed to be bound by it’.

Position of the Constitutional Court of Ukraine on this issue is disputable. On the one hand, the Court stated correctly that provisions of the Rome Statute are based on human rights treaties. Procedural rights of suspects and persons accused before the ICC are defined in articles 55 and 67 of the Rome Statute. Particularly, article 67 is modelled on

⁸⁶ For instance, Germany, Czech Republic, Slovenia

⁸⁷ For example, Italia, Norway, Honduras, Guatemala

⁸⁸ Robinson, *The Rome Statute and its impact on national laws*, *supra* note 76, at 1854, *see also* Schabas, *supra* note 22, at 134; Duffy, *supra* note 8, at 23

article 14 (3) of the International Covenant on Civil and Political Rights.⁸⁹ As William A. Schabas states, rights stipulated in article 55 of the Statute go even well beyond the requirements of international human rights norms, set out in such instruments as the International Covenant on Civil and Political Rights.⁹⁰

On the other hand, constitutional prohibitions on extradition are generally adopted to protect nationals from the uncertainty of being judged in a foreign court. The Constitutional Court is of the opinion that the prohibition of surrender concerns only ‘foreign court’, in other words courts of other states. And the ICC is an international court, not foreign domestic court. These provisions may also be interpreted as protecting nationals from the uncertainty of being judged in a system that is foreign to them. In this case is the ICC may be considered as a foreign system, because it is not Ukrainian. The prosecution by the ICC may be described as a foreign prosecution and the main question here is whether correspondence of the Rome Statute with human rights treaties makes this prosecution certain.

Helen Duffy mentions that in case if the International Criminal Court would violate the human rights of suspects or accused persons, such an act would violate its own Statute and would be a matter within the jurisdiction of the Assembly of States Parties.⁹¹ Is this a guarantee that rights of accused would be protected?

The protection of the right of the accused to a fair trial was the first obstacle the ICC met before the start of its first trial. In trial of Thomas Lubanga the judges of the Trial Chamber unanimously decided to “stay” the proceedings against Lubanga, because the prosecution has been unable to disclose documents containing exculpatory information gathered during investigation that had been provided confidentially by the United Nations and other organizations. The Rome Statute allows collection of confidential information, but “solely for the purpose of generating new evidence”.⁹² Judges of the Chamber concluded that “the right to a fair trial - which is without doubt a fundamental right - includes an entitlement to disclosure of exculpatory material”.⁹³

The failure of the Office of the Prosecutor to disclose potentially exculpatory documents bears on the ability to provide a complete defense and Lubanga could not have a fair trial. As judges held ‘the trial process has been ruptured to such a degree that it is

⁸⁹ Schabas, *supra* note 22, at 98

⁹⁰ *Id.*, at 131

⁹¹ Duffy, *supra* note 8, at 24

⁹² The Rome Statute art.54(3)(e)

⁹³ The ICC, Trial Chamber I, case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01-06/1401 available at http://www.icc-cpi.int/cases/RDC/c0106/c0106_docTrial1.html

now impossible to piece together the constituent elements of a fair trial'.⁹⁴ The judges managed to correct OTP's deficiencies but this situation is worrying and questions the 'certainty' of prosecution by the ICC.

Article 25 of the Constitution of Ukraine not only prohibits extradition of Ukrainian nationals to another state, but also prohibits their expulsion from Ukraine. Prohibition against expulsion can be interpreted as including prohibition against surrender of Ukrainian nationals to international tribunals. Such prohibition exists in other countries too and though it seems this could create difficulties in ratification of the Statute, Ukraine as well as Sweden, Costa Rica and Venezuela managed to interpret these provisions in favour of the ICC Statute.

Dealing with this issue, the Ukrainian Court noted that 'provisions related to prohibition on extradition (even in case of wide interpretation of the term 'extradition') should not be considered separately from international legal obligations of Ukraine'.⁹⁵ The Court did not specify any international treaty but for instance the Convention on the Prevention and Punishment of the Crime of Genocide and Convention against Apartheid Ukraine is part of provide for possibility of transfer of nationals to the international penal tribunal.⁹⁶ Ukraine has recognized the duty to prosecute or extradite for many of the crimes under the ICC Statute by ratification of the Geneva Conventions, Convention Against Torture and Genocide Convention. Following the line of argumentation of the Constitutional Court if the prohibition of expulsion did not prevent Ukraine from concluding these international treaties, then in case with the Rome Statute it should not be an obstacle.

Discussing the issues of conformity of the Rome Statute with the Constitution the Court should be guided by the principle of supremacy of the Constitution of Ukraine over international treaties. The Court used international legal obligations of Ukraine as an argument. Such obligations arise from international treaties ratified by Ukraine and that's why reference to these obligations is possible only in cases when the Constitutional Court gives its opinion on the constitutionality of these treaties.

Interesting interpretation of prohibition of expulsion was used by Costa Rica. The Supreme Court of Costa Rica held that such prohibition was not absolute and should be read in spirit of development of international human rights law. Constitution should be

⁹⁴ *Id.* at 93

⁹⁵ Decision of the Constitutional Court of Ukraine on the conformity of the Rome Statute with the Constitution of Ukraine, *supra* note 9, paragraph 2.3.3

⁹⁶ *See* Convention on the Prevention and Punishment of the Crime of Genocide, UN GA/Res/260 (III), art. 6; International Convention on the Suppression and Punishment of the Crime of Apartheid, GA/Res/3068 (XXVI), art. 5

seen as an instrument for promotion of new developments. Thus, the Supreme Court concluded that the new international order established by the Rome Statute to protect human rights was compatible with the constitution.⁹⁷

Similar argument could be used by the Ukraine's Constitutional Court. The Ukrainian Constitution was adopted in 1996, before the adoption of the Rome Statute. That is why possibility of surrender of Ukrainian citizens to the ICC is not envisaged in the Constitution. But constitutional provisions should always be interpreted in accordance with their object, and it is unlikely that the purpose of the prohibition on expulsion of Ukrainian nationals is to exempt perpetrators of international crimes from punishment.

Ukraine as it was correctly mentioned by the Constitutional Court may avoid any constitutional difficulties with surrendering of nationals to the ICC by prosecuting a national who committed a crime within the jurisdiction of the ICC in accordance with the principle of complementarity. But in order to prosecute its nationals Ukraine must ensure the implementation of the Rome Statute in its domestic law and criminalize the conduct that falls under the jurisdiction of the ICC.

⁹⁷ See Issues Raised with Regard to the Rome Statute by National Constitutional Courts, *supra* note 27, at 9

4. Enforcement of the sentences in third states

4.1 The enforcement regime under the Rome Statute

Article 103 of the Rome Statute defines the role of states in enforcing prison sentences. Since the ICC does not have capacity to enforce the sentences as there is no ICC prison it is dependant on state parties for this enforcement. Aforementioned article stipulates that sentences shall be served in a state designated by the Court from a list of States which have indicated their willingness to accept sentenced persons.

The enforcement regime of the ICC is in some respects similar to regime established for the *ad hoc* tribunals.⁹⁸ Pursuant to paragraph 3(a) of article 103, the designation of states by the Court is based on ‘principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with the principles of equitable distribution’. Another important feature of this regime is that it is based on system of double consent. First, the state of enforcement must have consented to its being placed on a list of candidate states pursuant to article 103(1) and (2), and then the state of enforcement has to accept its designation according to article 103(3).⁹⁹ If no state is designated, the sentence of imprisonment shall be served in the host state – the Netherlands.¹⁰⁰

In process of designation the ICC shall take into consideration the principle of equitable distribution, application of widely accepted international treaty standards governing the treatment of prisoners, the views and nationality of sentenced person and other factors regarding the circumstances of the crime or the person sentenced.¹⁰¹

The conditions of imprisonment will be governed by the national law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners. At the same time these conditions neither more nor less favorable than the conditions of prisoners convicted of similar offences.¹⁰²

After the ICC has designated a state, according to article 106, it will have a power to supervise the enforcement and, pursuant to article 104(1), the Court may at any time transfer a sentenced person to a prison of another state.

⁹⁸ See Claus Kress and Goran Sluiter, Imprisonment, in *The Rome Statute of the International Criminal Court: a Commentary* (Antonio Cassese, Paolo Gaeta, John R W D Jones eds., 2002), p.1758

⁹⁹ *Id* at 1787

¹⁰⁰ The Rome Statute art. 103(4)

¹⁰¹ The Rome Statute art. 103(3)

¹⁰² The Rome Statute art. 106(2)

4.2 Compatibility of article 103 of the Rome Statute with Ukraine's Constitution

According to article 103 after sentencing an offender the Court will designate a state where the punishment will take place and that means that Ukrainian nationals may serve term in any state determined by the Court.

In the request of the President of Ukraine to the Constitutional Court of Ukraine the issue whether provisions of article 103 of the Rome Statute contradict to article 63 (3) and article 64 (1) of the Constitution of Ukraine was raised.

Pursuant to article 63 (3) of the Constitution 'a convicted person enjoys all human and citizens' rights except for the restrictions determined by law and established by the court decision'. And provisions of article 64 (1) stipulate that 'human and citizens' rights and freedoms guaranteed by the Constitution shall not be restricted except in cases envisaged by the Constitution of Ukraine'. According to the position of the President provisions of article 103 of the Statute will subject Ukrainian nationals to the action of laws of other state while serving sentence, which deprives them of rights, guaranteed by the Constitution of Ukraine.

Considering this issue the Constitutional Court held that possible limitation of rights and freedoms of Ukraine's citizens in case of their serving punishment in other state could be diminished by means of declaration made by Ukraine stating willingness to accept its citizens serve their sentences in Ukraine.¹⁰³ The Court also noted that it is important to take into account that the ICC designating the state of enforcement considers, inter alia, the view and nationality of the sentenced person and application of widely accepted international treaty standards governing the treatment of prisoners.¹⁰⁴ On these grounds the Constitutional Court concluded that paragraph 1 part (a) of article 103 of the Rome Statute does not contradict articles 63 (3) and 64 (1) of Ukraine's Constitution.

The Constitutional Court asserts that in case of declaration the possible limitation of rights and freedoms of Ukrainians in case of serving punishment will be reduced. The Rome Statute indeed permits a state to provide declarations and attach certain conditions to its acceptance of enforcing prison sentences. However, the ICC Statute does not envisage that declaration of willingness to accept own nationals will be a deciding factor in the designating process. Bert Swart states that 'by making a declaration pursuant to Article 103

¹⁰³ See Decision of the Constitutional Court of Ukraine on the conformity of the Rome Statute with the Constitution of Ukraine, *supra* note 9, paragraph 2.7.1

¹⁰⁴ See *Id.*, paragraph 2.7.2

of the Statute, the State of nationality may influence the *likelihood* that its national will be able to serve a sentence on its territory'.¹⁰⁵ The ICC will only take the declaration into consideration, but it cannot secure Ukrainian citizens to serve punishment in Ukraine and from possible limitation of their rights.

Such states as Switzerland, Liechtenstein and Andorra have already provided this kinds of declarations. For instance, Switzerland declared that 'In accordance with article 103, paragraph 1, of the Statute, Switzerland declares that it is prepared to be responsible for enforcement of sentences of imprisonment handed down by the Court against Swiss nationals or persons habitually resident in Switzerland'.¹⁰⁶ Ukraine may provide similar declaration but as it was mentioned above it will only increase the likelihood that the ICC will designate Ukraine as state where Ukrainians will serve sentence of imprisonment.

As for the second argument of the Constitutional Court article 103 (3) of the Statute indeed stipulates criteria that must be taken into consideration by the ICC before the designation of the state but these criteria are of different importance. Speaking about the nationality of the convicted person it does not necessarily point to the preference for Ukrainian national to serve sentence in Ukraine. 'Whereas the goal of social rehabilitation usually makes it preferable to imprison a person in his or her national State, the peculiarities of international crimes may suggest precisely the contrary'.¹⁰⁷ The ICC shall also take into account the views of the convicted person, however, as a result of close examination of the Rules of Procedure and Evidence, some commentators came to conclusion that 'the transfer of the sentenced person to the state of enforcement does not take place in the interest of the sentenced person but to ensure the enforcement of the sentence'.¹⁰⁸

Another factor that will be taken into account by the ICC in the process of designation of state is the application of widely accepted international treaty standards governing the treatment of prisoners. This means that if there is any doubt as to the adherence of a State to such standards, this will unavoidably preclude this state from enforcement.¹⁰⁹

Standards at issue are, first of all, those envisaged in general human rights treaties like the ICCPR and ECHR¹¹⁰ as well as those found in specialized instruments of a

¹⁰⁵ Swart, Arrest and Surrender, *supra* note 76, at 1684

¹⁰⁶ Schabas, *supra* note 22, at 421 (appendix 5: declarations and reservations)

¹⁰⁷ Kress and Sluiter, Imprisonment, *supra* note 98, at 1789

¹⁰⁸ *Id.*

¹⁰⁹ *See Id.*, at 1788

¹¹⁰ International Covenant on Civil and Political Rights, GA/Res/2200A (XXI), Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS no.005

recommendatory nature.¹¹¹ It should be also taken into account that the enforcement of the sentence will be subject to supervision by the ICC.¹¹² The ICC may always react on ill-treatment of prisoner by changing the state of enforcement (such power is given to the ICC by article 104(1) of the Rome Statute). The ICC will always have means to control the enforcement.

This sounds promising on paper, however, the International Criminal Court has not sentenced any person yet and it is impossible to know how this mechanism will work in practice. The Constitutional Court of Ukraine seems to place too much trust in the ICC recognizing the process of designation of state of imprisonment as one that guarantees non-limitation of rights and freedoms of Ukrainian nationals. The Court has not yet demonstrated its credibility or shown that it is an effective institution.

¹¹¹ For more details see Kress and Sluiter, Imprisonment, *supra* note 98, at 1768

¹¹² The Rome Statute art. 106

5. Conclusion

Ukraine is among the states that are in the process of ratification of the Rome Statute and during this process it has faced different challenges common to many other countries.

The Constitutional Court of Ukraine considering the issue of the conformity of the Rome Statute with the Constitution has reached a conclusion that the Rome Statute does not correspond to the Constitution of Ukraine in the part concerning the provisions of paragraph ten of the Preamble and article 1 of the Statute where it says that ‘an International Criminal Court...shall be complementary to national criminal jurisdiction’, and that adherence of Ukraine to the Statute is possible only after introduction of relevant changes to it.

The Constitutional Court of Ukraine holds that the possibility of such a supplement of judicial system of Ukraine is not envisaged by the Constitution. Strangely enough, discussing the issue the Court did not discuss the nature of the complementarity of the ICC in its decision. Indeed the Constitution does not foresee the possibility of supplementing the national judicial system as it was adopted before the International Criminal Court was established. And speaking about the principle of complementarity the ICC can not become a part of the national judicial system. The article 17 of the Statute provides for guarantees that preserve national interests and judicial integrity at the national level and the ICC will not be able to step in unless the state in question is unable or unwilling to exercise its jurisdiction.

Article 55 of the Constitution stipulates that ‘...everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions’. The Constitutional Court observed that Ukrainian nationals have the right to appeal to the European Court of Human Rights on the basis of this article, but the nature of the ICC is significantly different from that of the ECHR. This argument of the Court is criticized by Ukrainian lawyers who state that it lacks common sense to recognize the ECHR and not the ICC. Both institutions are ‘supplementary remedies by their nature for protection of human and citizen’s rights and freedoms’. However, I agree with the position of the Constitutional Court that difference between these courts is obvious. The ECHR receives applications from the victims of human rights violations committed by states parties to the Convention for the Protection of Human Rights and Fundamental Freedoms. Whereas the ICC exercises jurisdiction over persons for the most serious crimes of international concern.

The second matter that was considered by the Constitutional Court of Ukraine was constitutional immunities granted to the head of state and People's Deputies. However, under article 27 of the Rome Statute a state cannot refuse to surrender its nationals on the basis of their having immunity. The position of the Constitutional Court is that article 27 of the Statute is in conformity with constitutional provisions. Ukraine has already taken international obligations to bar granting immunity from persecution for the most serious crimes following from the conclusion of international treaties such as Convention Against Torture or the Convention on the Prevention and Punishment of the Crime of Genocide. The Court has also held that immunity of People's Deputies and the President of Ukraine concerns only national jurisdiction and may not be an obstacle to exercise jurisdiction by the ICC. Immunity is not their personal privilege and cannot be considered as a guarantee of their impunity.

The view taken by the Constitutional Court on issue of immunities seems to be reasonable. International practice shows that this interpretation is not new. However, one argument raises doubts. The Court mentioned that 'the establishment of responsibility for committing majority of crimes stipulated by the Statute is an international legal obligation of Ukraine according to other international treaties ratified by Ukraine'. According to article 8 the Constitution of Ukraine is the supreme law in the country and takes over the international treaties. Therefore application of arguments proving the constitutionality of the Rome Statute with reference to treaties ratified by Ukraine is possible only if the Constitutional Court of Ukraine makes decision on the issue of conformity of these treaties with the Constitution.

Another issue that was raised before the Court was surrendering of Ukrainian nationals to the International Criminal Court. According to the Constitution of Ukraine citizens of Ukraine shall not be expelled from Ukraine or extradited to another state. The Constitutional Court based the interpretation of constitutional provisions on distinction between the terms of 'surrender' and 'extradition'. Another argument concerned the rationale behind the prohibition of extradition. The Court held that prohibition was adopted to protect citizens to guarantee impartial judicial review (and this includes protection from uncertainties of prosecution) in the foreign court and the ICC is not a foreign court, it was being established by agreement of states on the basis of international law. In the view of the Court the ICC Statute meets the aim that explains the prohibition of extradition. Interestingly in the Lubanga case, the first case considered by the ICC, the prosecution did not share the documents that may contain information supporting Mr. Lubanga's innocence with the defence. This fact constitutes violation of the right of the accused person to a fair

trial. Though the judges stopped the violation and stayed the proceeding this situation raises concern about how ‘certain’ the prosecution by the ICC may be.

The prohibition of expulsion of Ukrainians was interpreted by the Constitutional Court in the light of international obligations of Ukraine, what in my opinion as it was stated above is not correct from the point of view of the supremacy of the Constitution. The Court could interpret constitutional provisions stating that it was unlikely that the purpose of the prohibition on expulsion is to exempt perpetrators of international crimes from punishment.

The Court has also considered situation when the human rights and freedoms of Ukrainian citizens may be restricted when serving sentences in another country. Following its position Ukraine can safeguard constitutional guarantees for its own citizens by expressing its willingness to accept sentenced Ukrainian citizens by the ICC. The Court has also observed that according to article 103 of the Statute the ICC when determining the state where a sentenced person should serve the punishment considers, inter alia, nationality and views of this person, as well as application of widely accepted international treaty standards governing the treatment of prisoners. In the view of the Court these guarantees are sufficient enough to conclude that the rights and freedoms of Ukrainians will not be limited. In my view both arguments of the Constitutional Court are questionable. First of all the declaration will not guarantee that Ukrainian nationals will serve sentence of imprisonment in Ukraine. It will only increase such a likelihood. Therefore, this argument is irrelevant in this discussion. Secondly, procedure of the designation of a state by the ICC envisaged in article 103 sounds promising on paper. But we do not know how it will work in practice. The statement that this procedure guarantees that rights and freedoms of Ukrainian nationals will not be restricted in case of their serving punishment in other state means placing too much trust in the ICC.

There are certain provisions of the Statute that were not discussed by the Constitutional Court, but which might be in conflict with Ukraine’s Constitution. For instance, the issue of pardon and amnesty. According to the Constitution the President of Ukraine is empowered to grant pardon and the Verkhovna Rada may declare amnesty by adopting a relevant law of Ukraine. The Rome Statute restricts power of the President to grant pardon and deprives the Parliament of its ability to declare amnesty.

Now when the Constitutional Court of Ukraine ruled that the Rome Statute did not correspond to the Constitution when it comes to the complementarity of the ICC, the ratification of this document may happen only after the constitutional amendment.

In case when international treaty is in conflict with the Constitution, Ukraine usually has four solutions to this problem: 1) to amend the Constitution, 2) to change provisions of the treaty that do not comply with the Constitution, 3) to make a reservation to the treaty or 4) to refuse to ratify it.

In case with the Rome Statute the second and the third options are not possible. As for the fourth option as it was mentioned earlier in the first chapter of the thesis Ukraine signs treaties with the intention of ratifying it. Denying ratification does not correspond to Ukraine's international legal practice. The fact that Ukraine acceded to the Agreement on Privileges and Immunities of the ICC on 29 January 2007 can be understood as its intention to ratify the Rome Statute, whether sooner or later.

By changing the Constitution Ukraine has two alternatives: 1) to amend the Constitution introducing a general provision stipulating that Ukraine may recognize the jurisdiction of international judicial bodies on the basis of international treaties ratified by the Verkhovna Rada of Ukraine; 2) to add provision providing that the International Criminal Court complements courts of general jurisdiction of Ukraine and its functioning is governed by the provisions of the Rome Statute of the International Criminal Court. Both alternatives have their advantages and will solve the problem of non-conformity.

The constitutional amendment procedure is a complicated process in Ukraine and may take many years. However, there is one more option that can be used. According to the law on the Constitutional Court of Ukraine (article 68) the Court may reconsider the case provided that the new circumstances of the case that existed at the moment the Court considered the case became evident. The Court may reconsider the case and try to interpret constitutional provisions so it is in conformity with the Rome Statute. In this case the ratification of the Rome Statute becomes easier than in case of constitutional amendment.

Eight years have passed since Ukraine signed the Rome Statute. Movement of Ukraine towards ratification is very slow. At this moment the constitutional amendments that were drafted by the Ministry of Justice and Ministry of Foreign Affairs concerning the Rome Statute were submitted to the Constitutional Court of Ukraine which in its turn will make final decision whether these amendments restrict the rights and freedoms of Ukrainian nationals or not. The draft will then be submitted to the Verkhovna Rada for approval. And it is impossible to predict how much time it will take for the Parliament to approve the constitutional amendments.

BIBLIOGRAPHY

Books:

Cassese, Antonio. *International Criminal Law*. Oxford, 2003

Council of Europe. *Treaty Making – Expression of Consent by States to be Bound by a Treaty*. Martinus Nijhoff Publishers, 2001

The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations, Results. Edited by Roy S. Lee. The Hague, 1999

Kress, Claus. *Article 102: Use of Terms*, in *Commentary on the Rome Statute of the International Criminal Court*. In: *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, ed. Otto Triffterer. Baden-Baden, 1999. pp.1157

Kress, Claus and Kimberly Prost. *Article 89: Surrender of Persons to the Court*. In: *Commentary on the Rome Statute of the International Criminal Court: observer's notes, article by article*, ed. Otto Triffterer. Baden-Baden, 1999.

Kress, Claus and Goran Sluiter. *Imprisonment*. In: *The Rome Statute of the International Criminal Court: a Commentary*, ed. A. Cassese, P. Gaeta and J. Jones. Oxford, 2002. pp.1757-1822

Razesberger, Florian. *The International Criminal Court: The Principle of Complementarity*. Frankfurt am Main, 2006

Robinson, Darryl. *The Rome Statute and Its Impact on National Law*. In: *The Rome Statute of the International Criminal Court: a Commentary*, ed. A. Cassese, P. Gaeta and J. Jones. Oxford, 2002. pp. 1849 – 1869

Schabas, William A. *An Introduction to the International Criminal Court*. Second edition. Cambridge, 2004

Sluiter, Goran. *The Surrender of War Criminals to the International Criminal Court*. In: *The International Criminal Court*, ed. O. Bekou and R.Cryer. Aldershot, 2004. pp. 281-328

States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law. Edited by Roy S. Lee. New York, 2005

Swart, Bert. *Arrest and Surrender*. In: *The Rome Statute of the International Criminal Court: a Commentary*, ed. A. Cassese, P. Gaeta and J. Jones. Oxford, 2002. pp.1639-1703

Triffterer, Otto. *Article 27: Irrelevance of official capacity*. In: *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, ed. Otto Triffterer. Baden-Baden, 1999

Wirth, Steffen. *Immunities, Related Problems, and Article 98 of the Rome Statute*. In: *The International Criminal Court*, ed. O. Bekou and R. Cryer. Aldershot, 2004. pp.329-358

Articles:

Akande, Dapo. *International Law Immunities and the International Criminal Court*. In: *American Journal of International Law*. Vol.98 (3) (2004), pp. 407 - 433

Duffy, Helen. *National Constitutional Compatibility and the International Criminal Court*. In: *Duke Journal of Comparative and International Law*. Vol.11 (2001), p.5
www.law.duke.edu/shell/cite.pl?11+Duke+J.+Comp.+&+Int'l+L.+5+pdf

Duffy, Helen and Brigitte Suhr. *The Debate on Constitutional Compatibility with the ICC*. 2000 http://www.hrw.org/campaigns/icc/docs/constitutional_compatibility.pdf

Gryshenko, Kostyantyn. *Mizhnarodnyi Kryminalnyi Sud – Universalnyi Mehanizm Mizhnarodnogo Karnogo Pravosuddya*. In: *Ukrainskyi Chasopys Mizhnarodnogo Prava*. Vol.4 (2003), pp.9-13

Kuleba, Dmytro. *Scho Stalosa z Rym'skym Statutom v Ukraini*. In: *Ukrainskyi Chasopys Mizhnarodnogo Prava*. Vol.4 (2003), pp.39-56

Lavrynovych, Oleksander. *Osnovni Problemni Pytannya Implementacii Polozhen Rym'skogo Statutu Mizhnarodnogo Kryminalnogo Sudu do Zakonodavstva Ukrainy ta Shlyahy ih Vyrishennya*, In: *Ukrainskyi Chasopys Mizhnarodnogo Prava*. Vol.4 (2003), pp.14-19

Manukyan, Vyacheslav. *Ne Vse Dorogi Vedut v Gorod Gaaga*. In: *Yuridicheskaya Praktika*. Vol. 39(249) (2002) <http://www.yurpraktika.com/article.php?id=10004116>

Selivon, Mykola. *Problemy Konstytuciynosti Rym'skogo Statutu Mizhnarodnogo Kryminalnogo Sudu*. In: *Ukrainskyi Chasopys Mizhnarodnogo Prava*. Vol.4 (2003), pp.20 – 25

Skomoroha, Viktor. *Rym'skyi Statut Mizhnarodnogo Kryminalnogo Sudu: Pytannya Konstytuciynosti*. In: *Ukrainskyi Chasopys Mizhnarodnogo Prava*. Vol.4 (2003), pp.26 – 35

Cases:

Case Concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium). International Court of Justice, 14 February 2002

Case of the Prosecutor v. Thomas Lubanga Dyilo. *Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008*, The International Criminal Court, ICC-01/04-01-06/1401 http://www.icc-cpi.int/cases/RDC/c0106/c0106_docTrial1.html

Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet. House of Lords, 25 November 1998

Rishennya Konstytuciynogo Sudu Ukrainy u Spravi pro Oficiyne Tlumachennya Polozhen Chastyny Pershoi statti 105, Chastyny Pershoi Statti 111 Konstytucii Ukrainy (Sprava schodo nedotorkannosti ta impichmentu prezidenta Ukrainy), #19-pp/2003 (2003) [Decision of the Constitutional Court of Ukraine on the immunity and impeachment of the President of Ukraine] <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v019p710-03>

Rishennya Konstytuciynogo Sudu Ukrainy schodo oficiynogo Tlumachennya Polozhen' Chastyny Tret'oi Statti 80 Konstytucii Ukrainy (Sprava pro Deputatsku nedotorkannist), # 9-pp/99 (1999) [Decision of the Constitutional Court of Ukraine on Deputy's Immunity] <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v009p710-99>

Rishennya Konstytuciynogo Sudu Pro Oficiyne Tlumachennya Polozhen Chastyn Pershoi, Tret'oi Statti 80 Konstytucii Ukrainy, Chastyny Pershoi Statti 26, Chastyn Pershoi, Drugoi, Tret'oi Statti 27 Zakonu Ukrainy 'Pro Status Narodnogo Deputata Ukrainy' (Sprava pro Garantii Deputatskoi Nedotorkannosti), # 12-pp/2003 (2003) [Decision of the Constitutional Court of Ukraine on guarantees of Deputy's immunity] <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v012p710-03>

Vysnovok konstytuciynogo Sudu Ukrainy u Spravi pro Nadannya Vysnovku Schodo Vidpovidnosti Konstytucii Ukrainy Rymського Statutu Mizhnarodnogo Kryminalnogo Sudu, Case # 1-35/2001, 11 July 2001 [Decision of the Constitutional Court of Ukraine on conformity of the Rome Statute with the Constitution of Ukraine] <http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/11d83b3284a5cc4fc1256bc2004eabfa!OpenDocument>

Sources:

Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4 November 1950

Convention on the Prevention and Punishment of the Crime of Genocide (Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948)

International Convention on the Suppression and Punishment of the Crime of Apartheid (Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973)

International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966)

Konstytuciya Ukrainy. 28 June 1996 [Constitution of Ukraine]
<http://www.rada.gov.ua/const/conengl.htm>

The Rome Statute of the International Criminal Court. Rome, 17 July 1998. U.N. Doc. A/CONF.183/9

Zakon Ukrainy pro Mizhnarodni Dogovory Ukrainy, 29 June 2004 [Law on International Agreements of Ukraine] <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1906-15>

Zakon Ukrainy pro Konstytuciynyi Sud Ukrainy, 16 October 1996 [Law on the Constitutional Court of Ukraine] <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=422%2F96-%E2%F0>

Other Documents:

The ICRC, Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State, January 2003

[www.icrc.org/web/eng/siteeng0.nsf/htmlall/59RLJW/\\$FILE/Issues_Raised_with_Regard_to_the_ICC_Statute.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/59RLJW/$FILE/Issues_Raised_with_Regard_to_the_ICC_Statute.pdf)

The International Centre for Criminal Law Reform and Criminal Justice Policy
International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute, 3d ed., 2008

http://www.iccnw.org/documents/ICC_Manual_-_March_2008_-_ICLR.pdf

Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the ICC, adopted by the Venice Commission on 45th Plenary meeting (2000)
[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)001-E.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-E.asp)

Rome Statute Ratification Chart by Region (July 15, 2008)

http://www.iccnw.org/documents/RatificationsbyUNGGroup_18_July_07.pdf