

**The principles of the democratic rule of law are better protected
if Ukraine ratifies the Rome Statute of the International Criminal Court,
and political expediency counsels the same outcome**

From the attempted "genocide by hunger" (Holodomor) of Stalin's time, to the sought destruction by progressive occupation and annexation by Putin's time, today one beacon of hope lies in the attitude of Western countries towards Ukraine: no longer one of substantial indifference but of effective defense collaboration according to the Charter of the United Nations (art. 51: «Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security»).

The judicial body of the United Nations, the International Court of Justice based in The Hague, was only able to marginally intervene – due to the limitations suffered in terms of the exercise of its jurisdiction – in the face of the war of aggression implemented at the beginning of 2022 by the Russian Federation. However, on March 16 of last year, the International Court of Justice affirmed the illegitimacy of the use of force under international law (Press release 2022/11: *Provisional measure, in the case of Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide / Ukraine v. Russian Federation*).

As a result of the Russian Federation's exit from the Council of Europe, the Russian Federation has also, since 16 September, no longer been a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the application of which is overseen by the European Court of Human Rights, based in Strasbourg. On the other hand, the Human Rights Committee may receive communications, under the 1966 United Nations International Covenant on Civil and Political Rights under the Optional Protocol to which the Russian Federation continues to adhere, from individuals who consider themselves deprived of their Covenant rights in areas illegally annexed as a result of the Russian occupation of Ukrainian territories.

Beyond the aforementioned issues of international responsibility of the Russian State, it is worth focusing on the possibilities of international prosecution of individuals, for conduct that may be related to them. In particular, for war crimes and crimes against humanity, the International Criminal Court / ICC (also based in The Hague and governed by the Rome Statute of 1998, which went into effect in 2002) has jurisdiction in Ukraine, whose jurisdiction was accepted by Ukraine with the two declarations of 2014 respectively (valid for events that occurred on its territory from 21 November 2013 to 22 February 2014) and 2015 (valid for events that occurred from 20 February 2014 and for an indefinite duration). In this respect, an arrest warrant was recently issued by the International Criminal Court against the President of the Russian Federation Vladimir Putin and Maria Lvova-Belova, responsible for children's rights in the office of the President of the Russian Federation.

Also recent is a report (dated 7.3.2023) by the monitoring mission of the Office of the High Commissioner for Human Rights of the United Nations, based in Geneva, on the summary execution of prisoners, both by Russians and by Ukrainians.

One may well wonder whether, faced with the non-participation in the Statute of the ICC by – among others – the Russian Federation, the United States of America, the People's Republic of China, Israel, Iran, and Belarus, it is in Ukraine's best interest to do the opposite: ratify the Rome Statute instead of merely accepting the jurisdiction of the Court for specific facts and times. Without forgetting that Ukraine signed

the Statute of the ICC on 20 January 2000 without ratifying it afterwards, while ratifying the Agreement on the Privileges and Immunities of the Court.

From a legal point of view, article 8 of the association agreement between the European Union and Ukraine (see Official Journal of the EU, series L, no. 161 of 2014, p. 3) already establishes that «The Parties shall cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court (ICC) of 1998 and its related instruments». As the preamble to the Agreement says, this is in the context of a common commitment «to promoting the independence, sovereignty, territorial integrity and inviolability of borders».

Moreover, the Ukrainian Constitution provides as follows in its art. 124, modified together with others after an opinion of the local Constitutional Court of 2001:

Розділ VIII ПРАВОСУДДЯ*

Стаття 124. Правосуддя в Україні здійснюють виключно суди.

Делегування функцій судів, а також привласнення цих функцій іншими органами чи посадовими особами не допускаються.

Юрисдикція судів поширюється на будь-який юридичний спір та будь-яке кримінальне обвинувачення. У передбачених законом випадках суди розглядають також інші справи.

Законом може бути визначений обов'язковий досудовий порядок урегулювання спору.

Народ безпосередньо бере участь у здійсненні правосуддя через присяжних.

Україна може визнати юрисдикцію Міжнародного кримінального суду на умовах, визначених Римським статутом Міжнародного кримінального суду.

{Частина шоста статті 124 набирає чинності з 30.06.2019 - див. пункт 1 розділу II Закону № 1401-VIII від 02.06.2016}

{Стаття 124 в редакції Закону № 1401-VIII від 02.06.2016}

There is talk of Ukraine joining NATO and the European Union. This is currently unfeasible, as long as the state of war with the Russian Federation exists, first of all in the light of NATO's art. 5, according to which «The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force». In addition, art. 42.7 of the Treaty on European Union establishes that «If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States». In short, accession would result in the automatic extension of the state of war to a substantial number of other countries, including Italy, with catastrophic consequences.

If Ukraine ratifies the Statute of the ICC, with its 123 current State Parties, would go in a different direction – well beyond the proposed emergency activation of an *ad hoc* special international Tribunal on Russian aggression. In fact, with this act the country would acquire a leading role within the Court and with respect to the countries that recognize its jurisdiction – as well as fully entering the Assembly of States Parties to the

Rome Statute – expanding its contribution in intergovernmental organizations of which it is a member. Thus, for example, a case can be significantly cited (*Yakovlyev v. Ukraine* – n. 42010/18 of 8.12.2022) of submission of Ukraine to the jurisdiction of the European Court in Strasbourg where, although it establishes liability for violation of the European Convention of Human Rights in relation to a prisoner, it will result in increased international admiration for Ukraine’s willingness, unlike Russia, to submit to external control in order to be responsive – even in the very difficult current circumstances – to the principles of the democratic rule of law, in particular in terms of respect for the fundamental rights of the individual.

* Chapter VIII - JUSTICE

Article 124. Justice in Ukraine is administered exclusively by the courts.

The delegation of judicial functions is not permitted, nor is the appropriation of these functions by other bodies or officials. The jurisdiction of the courts extends to any legal dispute and any criminal proceeding. In cases stipulated by law, the courts also hear other cases.

The mandatory pre-dispute resolution procedure may be established by law.

The people participate directly in the administration of justice through juries.

Ukraine may recognize the jurisdiction of the International Criminal Court under the conditions defined by the Rome Statute of the International Criminal Court.

{The sixth part of article 124 enters into force on June 30, 2019 - see Article 1 of section II of law n. 1401-VIII of 2 June 2016}

{Article 124 as amended by Law 2 June 2016, n. 1401-VIII}