

## REASSESSING ARMENIA'S STANCE ON THE ROME STATUTE: CONSTITUTIONAL COMPLIANCE AND POSSIBLE IMPLICATIONS FOR ARMENIA

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### Abstract

The Republic of Armenia signed the Rome Statute of the International Criminal Court in 1999 but found it unconstitutional in 2004. After constitutional amendments in 2005 and 2015, the issue resurfaced. In March 2023, Armenia's Constitutional Court declared the Statute constitutional, allowing the continuation of the ratification process. This could enable the examination of issues related to Azerbaijan's aggression in the ICC. The ICC's recent issuance of an arrest warrant for Russian President Vladimir Putin has gained attention in Armenian media. In this article, I will first provide background information on the ICC. Next, I will examine the two decisions of the Constitutional Court. Finally, and most importantly, I will discuss the potential political and foreign policy implications of the ratification of the Statute.

**Keywords** - Republic of Armenia, Russia, Azerbaijan, Rome Statute of the International Criminal Court, Individual criminal responsibility, Nagorno-Karabakh War, EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA).

### Introduction

The ICC, founded in 2002 based on the Rome Statute, prosecutes individuals responsible for genocide, war crimes, and other serious offenses. The Rome Statute of the International Criminal Court (hereinafter referred to as ICC) was signed and adopted on July 17, 1998, at a United Nations Diplomatic Conference of Plenipotentiaries in Rome. It entered into force on July 1, 2002. The Republic of Armenia signed the Statute on October 1, 1999, issuing a statement pertaining to Article 124. The statement declares that the Republic of Armenia does not acknowledge the Court's jurisdiction over crimes categorized under Article 8, committed by its citizens or within its territory for seven years post-ratification. Furthermore, according to Article 103 of the Statute, Armenia agreed to accept

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individuals convicted by the Court, provided they are Armenian citizens or have permanent residence in Armenia.<sup>1</sup> However, in 2004, the Constitutional Court deemed the Statute incompatible with Armenia's constitution. Subsequently, the Constitution was amended twice, in 2005 and in 2015.

On December 29, 2022, the Armenian government announced its decision to acknowledge the jurisdiction of the ICC and begin ratifying the Rome Statute, reflecting Armenia's robust commitment to international criminal justice. This resolution, after thorough discussions within Armenia, highlighted the significance of the ICC, with informal talks about its potential legal protection against international crimes already occurring during the second Nagorno-Karabakh War.<sup>2</sup> Therefore, the Constitutional Court was again assigned to assess the constitutionality of the Statute.

In reassessing the Rome Statute's constitutionality, the Constitutional Court examined two major issues: the principle of complementarity and Article 105 of the Rome Statute. Referring to its previous stance, the Court evaluated the shared values in the Constitution and the Statute by comparing their preambles. It underscored the Armenian people's commitment to universal values and battling serious crimes and impunity, as depicted in the Rome Statute's preamble. The Court concluded that Armenia's ineffectiveness in investigating and prosecuting cases that uphold global peace and well-being was unconstitutional. It further ascertained that the ICC's exercise of complementary jurisdiction to reinforce Armenia's constitutional adherence did not unconstitutionally violate Armenia's sovereign criminal jurisdiction.

Amid ongoing tensions with Azerbaijan, Armenia's ratification could permit to examine matters related to Azerbaijan's aggression in the ICC. Noteworthy is the ICC's recent issue of an arrest warrant against Russian President Vladimir Putin, which has garnered attention in Armenian media and social networks. Among Armenia's neighbors, only Georgia has ratified the Rome Statute, while Iran, Azerbaijan, and Turkey have not. On September 28, 2023, Armenia's National Assembly committee unanimously approved the government's proposal to ratify the Rome Statute. This item is slated for inclusion in the agenda of the forthcoming parliamentary sessions.

### **Background Information: The ICC**

The ICC, established by the Rome Statute in 1998, began its operations in 2002 as an intergovernmental organization and a tribunal that sits in The Hague, Netherlands. The ICC is the first and only permanent international court with jurisdiction to prosecute individuals for the most serious offenses of concern to the global community, including genocide, war crimes, and crimes against humanity. Unlike ad hoc tribunals created for specific conflicts, the ICC serves as a permanent institution to enforce international criminal law and enhance the protection of human rights worldwide. The ICC operates

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<sup>1</sup> Constitutional Court of the Republic of Armenia, "Decision on the compliance of the obligations outlined in the Agreement on the Statute of the International Criminal Court," 2004, [https://www.concourt.am/decision/decisions/6421e55c142ad\\_SDV-1680.pdf](https://www.concourt.am/decision/decisions/6421e55c142ad_SDV-1680.pdf). (accessed September 30, 2023)

<sup>2</sup> Armenian Government Starts Process of Ratifying Rome Statute over Azeri War Crimes, Risk of New Aggression, Armenpress, December 29, 2022, <https://armenpress.am/eng/news/1100784.html> (accessed 29 September 2023)

independently, not under the United Nations' auspices, and currently, 123 countries are parties to the Rome Statute. The table below provides a concise summary of pertinent information about the ICC.

**Table 1. General information about the International Criminal Court<sup>3</sup>**

Raison d'être	Prevention of and retribution for the most serious crimes of concern to the international community (crimes under Art. 5 of the Rome Statute)
Legal base	Rome Statute, signed on 19 June 1998 in Rome, Italy and is in force from 1 July 2002.
Principles	Nullum crimen sine lege, nulla poena sine lege and ratione materiae.
Venue	The Hague, Netherlands
Individual criminal responsibility	The Rome Statute is applied impartially to all individuals, regardless of their official position. Specifically, holding a high-ranking position such as a Head of State or Government, being a member of a Government or parliament, an elected representative, or a government official does not exempt anyone from criminal accountability under this Statute. Such positions also do not serve as a basis for reducing sentences. Any immunities or special procedural rules linked to a person's official status, whether under national or international law, will not prevent the Court from exercising its jurisdiction over them (Article 27 of the Rome Statute). Nonetheless, the Court will not have authority over individuals who were under 18 years of age at the time the alleged crime was committed (Article 26 of the Rome Statute).
Official languages of the Court	Arabic, Chinese, English, French, Russian and Spanish.
Working languages of the Court	English and French
Place of trial	Unless otherwise decided, the place of the trial shall be the seat of the Court.
Crimes within the jurisdiction of the Court	1. Crime of Genocide; 2. Crimes against humanity; 3. War crimes and 4. Crime of aggression.
Subjects eligible to bring cases before the Court	1. The UN Security Council, 2. The prosecutor of the Court (motu proprio), 3. Any state party to the Statute
Applicable punishments	Imprisonment; life imprisonment; fine; A forfeiture of proceeds, property and assets derived directly or

<sup>3</sup> International Criminal Court, "Rome Statute of the International Criminal Court," <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (accessed July 11, 2023)

	indirectly from that crime, without prejudice to the rights of bona fide third parties.
Bodies of the Court	The ICC is governed by the Assembly of States Parties, which consists of the states that are party to the Rome Statute. It elects officials of the Court, approves its budget, and adopts amendments to the Rome Statute. The Court itself is composed of the following four organs: the Presidency, the Judicial Divisions (an Appeals Division, a Trial Division and a Pre-Trial Division), the Office of the Prosecutor, and the Registry.
States that voted against the Statute	General Assembly convened a conference in Rome in June 1998, with the aim of finalizing the treaty to serve as the Court's statute. On 17 July 1998, the Rome Statute of the ICJ was adopted by a vote of 120 to seven, with 21 countries abstaining. The seven countries that voted against the treaty were China, Iraq, Israel, Libya, Qatar, the United States, and Yemen.
Responsibilities of states party to Rome Statute	1. Recognize the ICC as a complementary to national criminal jurisdictions, 2. Recognize the jurisdiction of the Court over the crimes listed under Art. 5 of the Rome Statute 3. To act in accordance with the international law, especially with respect to the State or diplomatic immunity of a person or property of a third State which remains immune until and unless he Court obtains the cooperation of that third State for the waiver of the immunity.
Criticism	ICC is often criticized for having a so-called "Africa-bias". The bulk of the cases hitherto brought before the Court are related to African states.

Despite facing challenges, including non-cooperation from certain states and accusations of bias, the ICC's existence symbolizes the international community's collective endeavor to confront impunity and foster a world rooted in justice and the rule of law. Its commitment to rendering justice to victims and holding perpetrators accountable remains unwavering, reflecting the global aspiration for lasting peace and respect for human dignity. In the realm of bias, the ICC grapples with serious reproach for its perceived disproportionate scrutiny on African nations, an aspect that has evoked accusations of neocolonialism and kindled contemplation of withdrawal by some states from the Rome Statute. This discerned concentration on Africa<sup>4</sup>, paired with an apparent vulnerability to global political currents—especially visible through the United Nations Security Council's authority to refer cases—further escalates apprehensions concerning the ICC's even-handedness and the uniform enforcement of

<sup>4</sup> For further information check Murungu, Chacha, and Japhet Biegon. *Prosecuting International Crimes in Africa*. (Pretoria: Pretoria University Law Press, 2011).

international law. Its conspicuous inability to bring to book leaders from powerful non-member nations further exacerbates these concerns, casting shadows of doubt over the court's equitable application of justice. In the face of these formidable challenges, the Court's unwavering commitment to championing global backing, bolstering state cooperation frameworks, augmenting operational efficiency, and resolutely confronting and dispelling bias perceptions remains paramount. Through these concerted efforts, the ICC can robustly reinforce its indispensable role as a beacon of international justice, unwaveringly advancing global peace, stability, and the entrenched rule of law.

### **The Decision of the Constitutional Court of Armenia on the Constitutionality of Rome Statute (2004)**

In the deliberative ambiance of Armenia's Constitutional Court's 2004 decision on the constitutionality of the Rome Statute, critical issues surfaced, carrying substantial implications for Armenia's constitutional landscape. The Court's detailed examination underlines pivotal conflicts between the Statute and the Armenian Constitution, particularly focusing on the encroachment upon the President's right to pardon and the constitutional right to amnesty.

The Court's decision poignantly highlights the substantial limitations imposed on the President's power to grant pardons by the Rome Statute. The Statute's insistence on strict adherence to the ICC verdicts eliminates the possibility for presidential pardon in alignment with Armenia's domestic legal framework. The Court eloquently elaborates on the implication of this restriction, asserting a palpable conflict with Article 55, Clause 17, of the Armenian Constitution, which confers upon the President the prerogative to grant pardons. This Statute-mandated constraint diminutively shrinks the constitutional power of the Armenian President, marking a contentious issue in the quest for constitutional compatibility with international commitments.

Expanding the discussion, the decision also underscores the Statute's potential impact on the constitutional right to amnesty. The obligations within the Statute's Article 105 irrevocably bind Armenia to the enforcement of sentences as adjudged by the ICC, nullifying any domestic prospects for sentence amendments, reductions, or amnesties. This international obligation stands in stark contrast to Article 81, Clause 1 of the Armenian Constitution, which solidifies the right to amnesty. The Court's analysis accentuates this disparity, marking another domain of pronounced conflict between the Statute and the Armenian Constitution.

The Court's decision, through its profound and comprehensive analysis, thereby signals the substantial encroachments on both the right to pardon and the right to amnesty as articulated within the Armenian Constitution. By echoing these concerns, the Court affirms the significant incompatibilities between the Statute and Armenia's constitutional framework, reinforcing the urgency for a scrupulous review and possible amendment of international commitments to ensure their alignment with domestic constitutional provisions. The Court's evaluation stands as a robust argument for safeguarding Armenian constitutional authority and rights against external infringement, underscoring the imperative of internal legal sovereignty and the protection of constitutional rights and freedoms.

## Concourt Decision Divergence: Are Legal Judgments Eclipsed by Political Agendas?

In the annals of Armenian legal and political history, March 16, 2018, stands out as a significant date. On this day, the Constitutional Court of Armenia rendered a landmark judgment regarding the Comprehensive Enhanced Partnership Agreement (CEPA), signed on November 24, 2017. This agreement, a collaborative pact between the European Union and the European Atomic Energy Community along with their member states on one side, and the Republic of Armenia on the other, marked a pivotal advance in Armenia's international relations. The Court's scrutiny focused on ensuring the accord's alignment with the nation's Constitution. After extensive deliberation, the Court conclusively found that the CEPA accord is in congruence with the Constitution of Armenia.<sup>5</sup> Nevertheless, in Article 6.2 of the CEPA the following is stated: "The Parties consider that the establishment and effective functioning of the International Criminal Court constitutes an important development for international peace and justice. The Parties shall aim to enhance cooperation in promoting peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court and its related instruments, taking into account their legal and constitutional frameworks."<sup>6</sup>

It is crucial to note that the above decision of the Armenian Constitutional Court was rendered in 2004, prior to the Constitutional amendments of 2005 and 2015. Despite these changes, the core of the issue remains unaltered, as the right to pardon and amnesty persists in the Republic of Armenia. Nonetheless, under Article 6 of the Comprehensive and Enhanced Partnership Agreement, signed between the Republic of Armenia and the EU in 2017, the Republic of Armenia is committed to signing the Rome Statute of the ICC. Evidently, the two aforementioned decisions of the Constitutional Court of the Republic of Armenia starkly contradict each other.

## The Decision of the Constitutional Court of Armenia on the Constitutionality of Rome Statute (2023)

The 2023 Decision of the Constitutional Court of Armenia initially outlines the position of the Government of the Republic of Armenia.<sup>7</sup> In a comprehensive discourse on the imperative of upholding *jus cogens* norms within the jurisdictional boundaries of the ICC, the Government of Armenia, in its elucidative statement of February 3,

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<sup>5</sup> Armenian Legal Information System, "The Decision of the Constitutional Court of the RA on the correspondence of the Comprehensive Enhanced Partnership Agreement to the Constitution of the RA" (in Armenian), <https://www.arlis.am/DocumentView.aspx?docID=120651> (accessed September 1, 2023).

<sup>6</sup> Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part and the Republic of Armenia, of the other part, Ministry of Foreign Affairs of the RA, [https://www.mfa.am/filemanager/eu/CEPA\\_ENG\\_1.pdf](https://www.mfa.am/filemanager/eu/CEPA_ENG_1.pdf) (accessed September 1, 2023).

<sup>7</sup> Decision of the Constitutional Court Concerning the Determination of the Question of Constitutionality of the Obligations Set Forth in the Rome Statute of the International Criminal Court in Case of the Republic of Armenia, signed on July 17, 1998; re-examined (Yerevan, March 24, 2023), [https://www.concourt.am/decision/decsions/6421e55c142ad\\_SDV-1680.pdf?fbclid=IwAR23CQLmNeFY4lk0eyIIEp6rLSYWjGL-Ci-iLX5OmZT5TIXW4DL-ZM3cAWQ](https://www.concourt.am/decision/decsions/6421e55c142ad_SDV-1680.pdf?fbclid=IwAR23CQLmNeFY4lk0eyIIEp6rLSYWjGL-Ci-iLX5OmZT5TIXW4DL-ZM3cAWQ).

2023, astutely draws attention to the overarching principles that guide the international legal framework. It emphasizes the clear necessity for strict adherence to these norms from which no derogation is permitted, prohibiting severe crimes such as genocide, war crimes, and crimes against humanity. The *jus cogens* norms emerge as the bedrock of international legal commitments, binding all nations to an unwavering pursuit of justice against the backdrop of the gravest crimes known to humanity.

In a delineation of the principles underpinning the ICC, the Armenian Government accentuates the foundational role of complementarity in fortifying the interplay between national and international jurisdictions. This principle, as articulated by the government, underlines the ICC's ancillary role, signifying its intervention solely in instances where a state is demonstrably unable or unwilling to undertake a robust investigation and prosecution of serious international crimes. In doing so, the government reaffirms the inviolable sovereignty of states, concurrently ensuring the absence of impunity for perpetrators of these cardinal transgressions.

Amidst the intricate mosaic of international and national legal interplay, the Armenian Government's elucidation stands as a testament to its unwavering commitment to the pillars of justice, human rights, and international legal obligations. It unequivocally declares no intent of contravention upon the signing of the Statute, thereby solidifying its stance as a conscientious actor on the global stage, ardently dedicated to the unwavering enforcement of *jus cogens* norms and the eradication of impunity for the most grievous international crimes. In this resolute commitment, the government elegantly intertwines national constitutional fidelity with the robust frameworks of international law, crafting a harmonious symphony of justice, accountability, and unwavering dedication to the upholding of human rights.

The pronouncements of the Constitutional Court illuminate Armenia's robust alignment with international instruments geared towards the prevention and punishment of crimes that have long cast a shadow on human history. The Republic of Armenia, as emphasized by the Court, has ratified a cadre of seminal international agreements and conventions that underline its resolute stance against grave injustices including genocide, war crimes, and torture. These international alignments encompass the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the 1968 Geneva Convention regarding the non-applicability of the Statute of Limitations to War Crimes and Crimes Against Humanity, and the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, to enumerate a few.

In its deliberation, the Court posits a fundamental inquiry: To what extent is the principle of addition or complementarity underlying the exercise of the jurisdiction of the ICC, as defined by Article 5, Part 1 of the Statute, compatible with the principle of exclusivity entrenched in the Armenian Constitution? "Putting it short, the Court found no contradiction between the Rome Statute and the Constitution. Thus, it is notable that in a similar vein, the Constitutional Court of the Republic of Armenia has issued two divergent decisions in 2004 and 2023. This discrepancy was underscored by a judge in his special opinion. From this perspective, it is arguable that the Constitutional Court lacks the authority to reassess an international agreement, previously identified as constitutionally incongruent, in the absence of relevant constitutional amendments.

Nevertheless, not all countries did it à la Armenia, i.e., by making another political and politicized decision of the Concourt, thus opting for constitutional changes.

In the European domain, France provides a compelling example. Having ratified the Rome Statute in 2000, France took the necessary legal strides to bridge constitutional gaps with international expectations. Originally, the French Constitution held firm against the extradition of its nationals. Yet, to ensure alignment with the Rome Statute's mandates, France amended its Constitution. This legal revision allowed for the transfer of French citizens to the ICC, marking a momentous shift in French legal paradigms and international cooperation.

Similarly, across the Atlantic, Brazil's commitment to the Rome Statute in 2002 prompted constitutional evolution. The country, eager to contribute to global justice efforts, refined its constitutional language regarding the extradition of naturalized citizens for pre-naturalization crimes. This amendment bolstered Brazil's legal synchrony with the ICC, reinforcing the nation's commitment to international justice standards.

Further to the north, Ireland echoed these adjustments, underscoring the global resonance of the Rome Statute. Ratifying the Statute in 2002, Ireland reviewed its constitutional framework, ensuring seamless compliance with ICC cooperation requests. While Ireland's Constitution did not explicitly oppose extradition, necessary amendments solidified its capacity to support ICC endeavors, ensuring the surrender of individuals without constitutional conflicts.

### **Domestic Political Implications of Ratifying the Rome Statute**

One of the pivotal provisions of the Rome Statute of the ICC lies in Article 15, which grants the Prosecutor the authority to initiate investigations *proprio motu*—meaning “on their own motion.” This authority empowers the ICC to investigate and prosecute individuals responsible for the most heinous international crimes, even in the absence of a referral from a state party or the United Nations Security Council. Such a provision has profound implications for countries like Armenia, where domestic political events have tested the boundaries of accountability.

The events of March 1, 2008, in Armenia serve as a stark reminder of the complexities surrounding political transitions and electoral disputes. The aftermath of the disputed presidential election witnessed protests, violence, and a forceful state response. In the context of the Rome Statute, this period of political turmoil becomes emblematic of the potential consequences of ratifying the Statute. Once the Armenian Parliament ratifies the Rome Statute and the country becomes an ICC member, a significant shift in the domestic political landscape can be anticipated. The Statute establishes the ICC as a powerful deterrent against impunity for grave international crimes, including crimes against humanity, war crimes, and genocide. Importantly, the Prosecutor's *proprio motu* powers allow for investigations into such crimes even when domestic authorities may be unwilling or unable to act.

The existence of the ICC serves as a crucial check on political actors and institutions. The knowledge that the Court can exercise jurisdiction over individuals responsible for crimes falling within its purview should discourage political leaders and opposition groups from engaging in acts that could amount to international crimes.



This deterrent effect extends beyond the ruling party to encompass all political actors, reinforcing the need for accountability and the rule of law.

In light of the Rome Statute's provisions, Armenia's future political landscape is poised to witness greater caution and responsibility among political leaders and opposition figures. The potential for international scrutiny and accountability through the ICC acts as a powerful force discouraging the repetition of events like those of March 1, 2008. Ratifying the Rome Statute is not merely a legal step for Armenia; it is a commitment to a more accountable and just political future, where the specter of international justice looms large, promoting stability, peace, and the protection of human rights.

### **Foreign Policy Implications: Russia and Azerbaijan**

On March 17, 2023, the Pre-Trial Chamber II of the ICC issued arrest warrants for Vladimir Putin, the President of the Russian Federation, and Maria Lvova-Belova, the Commissioner for Children's Rights in the Russian President's Office. President Putin is accused of committing war crimes, specifically involving the unlawful deportation and transfer of children from occupied Ukrainian territories to the Russian Federation. These actions are in violation of articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute. These alleged crimes occurred in Ukraine starting from at least February 24, 2022. The arrest warrant is grounded in the belief that Mr. Putin is individually responsible for these crimes, whether by direct involvement, joint action with others, or through subordinates, and for failing to properly control those who carried out these acts. Ms. Lvova-Belova faces similar allegations of war crimes related to the unlawful deportation and transfer of children from Ukrainian occupied areas to the Russian Federation. Her arrest warrant is also based on the belief that she is individually responsible for these actions, either directly, jointly, or through others. These arrest warrants were issued in response to applications submitted by the Prosecution on February 22, 2023.<sup>8</sup> In an act of retaliation following the issuance of an arrest warrant by the ICC for President Putin over allegations of overseeing the abduction of Ukrainian children, the Russian government has included the British prosecutor of the ICC on a list of individuals wanted for arrest. The arrest directive specifies that Russia's interior ministry is pursuing the detention of Karim Khan, who has held the position of ICC prosecutor since 2021.<sup>9</sup>

However, Armenia's intention to join the ICC has raised concerns in Moscow, with the Kremlin warning that such a move could worsen relations between the two nations. The ICC's jurisdiction would require Armenia to arrest President Vladimir Putin if he were to visit the country, due to an ICC warrant for his arrest on war crimes charges. Armenian Prime Minister Nikol Pashinyan has advocated for joining the ICC as a matter of national security and accountability for alleged war crimes by Azerbaijan in

<sup>8</sup> Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, International Criminal Court, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (accessed September 1, 2023)

<sup>9</sup> Russia issues arrest order for British ICC prosecutor after Putin warrant, *The Guardian*, May 19, 2023, <https://www.theguardian.com/law/2023/may/19/russia-arrest-order-international-criminal-court-prosecutor-karim-khan>.

the Nagorno-Karabakh conflict. Russia, not a party to the Rome Statute, views Armenia's decision as hostile. The move reflects Armenia's efforts to reduce dependence on Moscow and strengthen its independence.<sup>10</sup>

The concerns raised by Russia regarding the potential enforcement of the ICC arrest warrant for President Vladimir Putin in Armenia can indeed be effectively addressed within the framework of the Rome Statute. Specifically, the Statute provides mechanisms for cooperation and diplomatic solutions to mitigate any apprehensions related to the enforcement of arrest warrants.

One notable provision is the possibility for a State Party to refer a situation to the ICC Prosecutor. Article 14 of the Rome Statute allows a State Party to refer to a situation where crimes within the Court's jurisdiction may have been committed. This entails a formal request to the Prosecutor to investigate the situation and determine whether specific individuals should be charged with these crimes. Importantly, the referring State can provide detailed information and supporting documentation to clarify the circumstances surrounding the situation.

In the context of Armenia's willingness to sign an agreement with Russia to address these concerns, it becomes evident that the issue is not solely legal but also political. Armenia's proactive approach in proposing a bilateral agreement under Article 98 of the Rome Statute demonstrates its commitment to finding a diplomatic resolution. A mention must be made that Armenia officially made such a proposal. In particular, Armenia's Representative on International Legal Affairs, Yeghishe Kirakosyan, clarified that in the event of Russian President Vladimir Putin visiting Armenia after the country's ratification of the Rome Statute, the issue of arrest is unlikely due to the immunity of heads of states. He mentioned that a proposed solution, based on Article 96 of the Rome Statute (I believe he should have referred to Article 98, as Article 96 pertains to the technical regulation of other forms of regulation outlined in Article 93 of the Rome Statute of the ICC), involves signing a bilateral agreement with Russia to address concerns and provide guarantees.<sup>11</sup> The US has signed "Article 98 agreements" with around 100 countries<sup>12</sup>, under which those countries agree not to surrender US nationals to the ICC without US consent. This is a common practice, and the US, for example, often takes the opportunity to sign the so-called Article 98 agreements. However, Russia's lack of response and its public criticisms of Armenia raise questions about the political motivations behind the dispute.

It can be surmised that Russia may be inclined to attribute the challenges stemming from its peacekeeping mission in Karabakh and the deterioration of Russo-Armenian relations to Armenia's actions. This suggests that the matter is more rooted in political considerations than legal ones and highlights the need for diplomatic dialogue and

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<sup>10</sup> Gavin, Gabriel, Russia President Vladimir Putin warns Armenia's Nikol Pashinyan on Nagorno-Karabakh not to join International Criminal Court, Politico, September 28, 2023, <https://www.politico.eu/article/russia-president-vladimir-putin-warns-armenia-nikol-pashinyan-nagorno-karabakh-not-join-international-criminal-court/>.

<sup>11</sup> Senior government official explains what ratification of Rome Statute would mean in terms of Putin arrest warrant, Armenpress, September 28, 2023, <https://www.armenpress.am/eng/news/1120731/>.

<sup>12</sup> Georgetown Law Library, "International Criminal Court - Article 98 Agreements Research Guide, Countries that have Signed Article 98 Agreements with the U.S.," <https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099> (accessed September 30, 2023)

cooperation to address the underlying issues effectively. Ultimately, the Rome Statute offers a framework through which such concerns can be resolved, emphasizing the importance of a legal and diplomatic approach to international disputes.

Nevertheless, the looming “elephant in the room” poses a pressing question: What if Russia refuses to sign an “Article 98 agreement,” and President Putin visits Armenia under any pretext, such as a Eurasian Economic Union summit? In such a scenario, Armenia would inevitably find itself “between the devil and the deep blue sea.” Arresting one of the world’s most influential leaders, with whom Armenia shares economic and military alliances, would be fraught with unpredictable repercussions and is likely to gravely undermine the nation’s security. Conversely, not proceeding with the arrest, in the absence of an “Article 98 agreement,” would markedly tarnish the country’s international reputation. This delicate balance leaves Armenia navigating a precarious path where both directions lead to potential turmoil and discord. The question then arises: is there any other legal ground to avoid making an arrest? Perhaps one could invoke the immunity traditionally afforded to a Head of State.

This potential loophole may provide some legal shelter, albeit a contentious one, in navigating such a fraught scenario. The decision by Belgium to prosecute the Minister of Foreign Affairs of the Democratic Republic of Congo, accusing him of violating peremptory norms of international law, holds significant theoretical importance for legal studies. Prior to the prosecution, Belgium had, in 1993, already adopted legislation enabling its national courts to adjudicate over individuals for an array of committed crimes irrespective of the crime’s location. This legislation was applicable even in instances when the committed crime had no connection to Belgium itself! Congo subsequently filed a case against Belgium before the International Court of Justice (hereinafter referred to as ICJ). The ICJ ruled that the Minister of Foreign Affairs is immune from criminal prosecution. Contrary to Belgium’s arguments, the Court noted its inability to deduce from state practice any exception to the rule granting incumbent Ministers of Foreign Affairs immunity from criminal jurisdiction, even when suspected of having committed war crimes or crimes against humanity. Despite this, the Court refrained from commenting on the legality of invoking so-called ‘universal jurisdiction’ for justifying the prosecution of alleged perpetrators for crimes lacking an effective link with the prosecuting state!<sup>13</sup> In a nutshell, the Head of State, Head of Government and the Minister of Foreign Affairs have (almost) absolute immunity under customary international law. However, the ICJ stated that the Minister of Foreign Affairs (presumably and logically Head of State and/or Head of Government as well) can be prosecuted in one of the following cases:

1. Foreign Minister can be prosecuted in her home state;
2. Foreign Minister can be prosecuted if her home state agrees to waive the immunity;
3. Foreign Minister can be prosecuted by international criminal courts;
4. Foreign Minister can be prosecuted after the expiration of her terms for the crimes committed before/after the period in office for the private acts.<sup>14</sup>

<sup>13</sup> International Court of Justice, “Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).” <https://www.icj-cij.org/en/case/121> (accessed September 30, 2023)

<sup>14</sup> Hayrapetyan, Albert, *The Legal Aspect of Nagorno-Karabakh Issue*, (Yerevan: Tntesaget Publishing House of Armenian State University of Economics, 2022).

In sum, while the ICJ underscores the immunity of foreign ministers from prosecution in foreign territories, doors remain ajar for legal actions within their home state, through international criminal courts, or post-tenure for private acts. In discussing the breadth of international law concerning accountability, one's focus inevitably shifts to Article 27 of the Rome Statute of the ICC.<sup>15</sup> This article unambiguously affirms the equal application of the Statute to all individuals, irrespective of their official capacity or position. The language of the Statute leaves no room for ambiguity; no role as a Head of State, Government member, parliamentarian, elected representative, or government official will serve as a shield from the responsibilities and liabilities outlined within the Rome Statute.

This precise stipulation places nations such as Armenia in a position with minimal legal maneuverability. Should a situation unfold where a figure like President Putin elects to visit Armenia without the safety net of an "Article 98 agreement", Armenia's legal corridors for evading the mandated arrest of a foreign sovereign are glaringly narrowed. The stringent provisions embedded within Article 27 of the Rome Statute act as a robust barricade, hindering Armenia's ability to tender any legally sustainable justification for abstaining from the execution of such an arrest.

Conversely, the ratification of the Rome Statute holds the potential to bolster Armenia's security guarantees. Distinct from the situation with Russia, Armenia's anticipated ratification of the Rome Statute carries substantial implications for its national security, especially within the context of its enduring regional conflicts with Azerbaijan. This strategic move not only underscores Armenia's commitment to the principles of international justice but also fortifies its ability to address potential security threats through a well-established legal framework. The Rome Statute, complemented by international legal documents and precedents set by the ICC, provides Armenia with robust tools to manage and mitigate emerging challenges within its jurisdiction.

Foremost among these mechanisms is the principle of territorial jurisdiction, a cornerstone embedded within Article 12(2)(a) of the Rome Statute. This particular jurisdictional delineation authorizes the ICC to scrutinize crimes falling under its mandate when transacted on the sovereign expanse of a State Party, such as Armenia. Article 12 unequivocally positions the ICC to act when crimes, delineated in Article 5, unfold within the territorial bounds of a State Party.

In a tangible scenario, consider an Azerbaijani sniper executing a war crime on Armenian soil or infiltrating Armenian borders to commit such malevolent acts. The Rome Statute's Article 12 paves the way for the ICC to assert its jurisdiction resolutely over the incident. This assertion is not merely theoretical but finds its robust affirmation in the ICC's landmark judgment of *Prosecutor v. Lubanga*, underscoring the functional potency of territorial jurisdiction.

Delving deeper into the architectural framework of the Rome Statute, Article 15 emerges as another significant conduit. This article endows the ICC Prosecutor with the exclusive authority to initiate investigations *proprio motu*, unhindered by the necessity of state referrals, grounded on credible information indicative of crimes

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<sup>15</sup> International Criminal Court, "Rome Statute of the International Criminal Court." <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (accessed July 11, 2023).

within the ICC's jurisdictional ambit. This autonomous investigative discretion enables the Prosecutor to commence inquiries independent of a formal referral from a state party, markedly enhancing the responsiveness and agility of the ICC in addressing potential crimes.

In line with international legal instruments like the Geneva Conventions and the Rome Statute, Armenia's decision to ratify the Rome Statute signifies a proactive step toward bolstering its security and accountability mechanisms, much like the ICC's approach in the *Prosecutor v. Katanga* case. It mirrors the ICC's principles of accountability, deterrence, and prevention of grave international crimes. Ultimately, the Rome Statute, fortified by the ICC's rich jurisprudence and international legal documents, offers Armenia a comprehensive and legally sound framework to address emerging security concerns while underscoring the importance of a judicious and diplomatic approach to international disputes. Last but not least, by ratifying the Rome Statute, Armenia will fulfill its commitments under the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA). This, in turn, is expected to have a positive impact on EU-Armenia relations, solidifying Armenia's reputation as a reliable partner for the EU.

## **Conclusion**

The fluctuating stance of the Armenian Constitutional Court regarding the Rome Statute's constitutionality between 2004 and 2023 underscores the global struggle in aligning domestic constitutions with international obligations. Nations worldwide, like France, Brazil, and Ireland, demonstrate the critical importance of evolving domestic legal frameworks to meet international standards. The Armenian scenario, marked by legal and constitutional discrepancies, emphasizes the essential balance between upholding national rights and fulfilling international commitments. This delicate balance remains pivotal as nations integrate into the global legal order, ensuring both national sovereignty and adherence to international justice standards.

The domestic political implications of ratifying the Rome Statute are significant for Armenia. The ICC's potential to investigate and prosecute international crimes *proprio motu* highlights the necessity for robust internal accountability mechanisms and the assurance of adherence to international legal standards by all political actors within Armenia. This commitment will aid in fortifying the country's democratic institutions and ensuring that past events, like those of March 1, 2008, are not repeated.

However, the external pressures and considerations, especially concerning Russia and Azerbaijan, cannot be ignored. The issuance of ICC arrest warrants for high-profile figures like President Vladimir Putin places Armenia in a diplomatically precarious position. The possibility of having to arrest an ally's head of state under an ICC warrant could strain Armenia's diplomatic relationships. The concerns raised by Russia regarding Armenia's intention to join the ICC emphasize the need for deft diplomatic maneuvering to navigate these intricate international relations while maintaining a steadfast commitment to international law and justice.

Armenia's proactive approach in seeking a diplomatic resolution through a possible Article 98 agreement underlines the importance of diplomatic dialogue and international cooperation in addressing these issues. It underscores the nation's

commitment to upholding international law while also being sensitive to its unique geopolitical context. The ICJ's recognition of certain immunities, while maintaining the possibility of prosecution through various avenues, highlights the delicate balance required in upholding diplomatic relations while ensuring accountability for international crimes.

Armenia's prospective ratification of the Rome Statute is a bold step towards enhancing its national security, especially in light of the ongoing conflict with Azerbaijan. The Rome Statute provides Armenia with a solid legal framework to address potential security threats and reinforces its commitment to abiding by international legal standards. The principle of territorial jurisdiction, along with the Prosecutor's proprio motu powers, bolsters Armenia's legal arsenal in addressing potential international crimes within its territory.

Moreover, ratifying the Rome Statute reaffirms Armenia's alignment with the principles of the European Union, as outlined in the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA). This alignment reinforces Armenia's status as a credible and reliable partner for the EU, contributing to the strengthening of EU-Armenia relations and enhancing Armenia's diplomatic standing on the global stage.

In the face of these complexities, the ratification of the Rome Statute by Armenia is a testament to the nation's dedication to the principles of justice, accountability, and human rights. It is an assertion of its sovereignty and commitment to international legal order, despite the potential challenges and diplomatic intricacies it may bring. As Armenia navigates this intricate landscape, the steadfast adherence to these principles will pave the way for a more just, secure, and accountable future, both domestically and internationally.

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