

Armenia's Impending Ratification of the ICC's Rome Statute

Lawfare, Global Misinformation, or Peace Derailment?

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On 17 March 2023 the International Criminal Court (ICC) dropped what was widely seen as a bombshell announcement: an arrest warrant against Russian president Vladimir Putin for war crimes Russian forces have allegedly committed in Ukraine. On 24 March 2023, a decision of the Constitutional Court of Armenia cleared the domestic obstacles for Armenia's intent to join the Rome Statute of the ICC. However, these two events are only related insofar as the arrest warrants against Putin et. al. may well politically impede the ratification of the Rome Statute by Armenia.

To better understand why Armenia decided to proceed now with the ratification of the Rome Statute, it would be helpful to clarify what the ICC is about and what are its powers, and consequently what are the possible implications of Armenia's joining the ICC in the context of the Armenia-Azerbaijan conflict and peace process, which is the right context to consider this ratification.

What is the ICC and What Are Its Powers?

The ICC is the first permanent international court established by sovereign states with the sole purpose to assign criminal liability to individuals for violations of certain international crimes. It deals with criminal liability of individuals only rather than with the responsibility of states—unlike the International Court of Justice (ICJ) or the European Court of Human Rights. It is also different from other ad-hoc international criminal tribunals, such as the International Criminal Tribunal for former Yugoslavia

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(ICTY) and the International Criminal Tribunal for Rwanda (ICTR), that were established pursuant to binding resolutions of the UN Security Council.

Unlike the ICTY and the ICTR, the ICC has its legal mandate in an international treaty called the Rome Statute, which has been ratified by 123 states (such states are called “state parties”), whereas a few states (including the United States, the Russian Federation, and China) have not ratified this treaty and are not state parties (such states are called “third states”).

The reasons why some powerful states are not entirely happy with the ICC can be found in its legal powers to start investigations, charge, and sentence individuals with crimes, in short, its jurisdiction. The ICC may start an investigation in three possible scenarios: a referral by a UN Security Council resolution, such as in the case of Sudan in 2005 and Libya in 2011 (in such cases, the consent of the state where crimes may be occurring is not required); referral by a state party; or an initiation of an investigation by the ICC’s Prosecutor. In the last two situations, the ICC may only start a case if the conduct or crime being investigated occurred on a territory of a state party or by a national of a state party (as per Articles 12 and 13 of the Rome Statute).

Therefore, the ICC may start an investigation and prosecute with regard to nationals of third states, that is, nationals of states *not* parties to the Rome Statute, if the conduct in question took place on a territory of a state party. Given that the ICC may reach out to indict even highest-ranking state officials, this causes annoyance with states not willing to expose their officials to possible investigations and prosecutions by the ICC.

When the ICC started an investigation into allegations of numerous war crimes committed in Afghanistan during the presidency of Donald Trump, this caused a major backlash in the U.S., which proceeded to revoke the visa of ICC Prosecutor Fatou Bensouda. Several weeks later, in April 2019, Trump hailed the unanimous decision of a three-judge ICC pre-trial chamber to drop the case as a “major international victory.” In fact, following the Rome Statute’s entry into force, the U.S. Congress passed in July 2003 the American Service-Members’ Protection Act, known informally as the “Hague Invasion Act,” which authorizes the U.S. government to use “all means necessary and appropriate to bring about the release of” U.S. service-members detained or imprisoned by the ICC or on its behalf.

Not only does the ICC have the legal power to prosecute nationals of non-party states, but it has recently ruled that even highest-ranking officials, such as incumbent heads of states of such non-party states, do not have immunity from its proceedings. Initially, this matter was left open in the Rome Statute, but in the case of then incumbent president of Sudan Omar Al-Bashir, in July 2017 the ICC decided that Al-Bashir did not enjoy immunity from its proceedings even though Sudan had not ratified the Rome Statute, because the situation was referred to it by the UN Security Council (see ICC-02/05-01/09-

302, paragraphs 87-97). Already in May 2019, the ICC changed its approach again, ruling that in *any* case heads of states of non-parties to the ICC do not have immunity from its proceedings, regardless of how the case was referred to it (see ICC-02/05-01/09-397-Corr, paragraphs 113-119).

Hence in March 2023, the ICC comfortably issued an arrest warrant for the current president of the Russian Federation, Vladimir Putin, for war crimes allegedly committed in Ukraine, even though Russia is not a party to the Rome Statute, on the basis of the argument that the conduct in question took place in Ukraine, which recognizes the jurisdiction of the ICC without being a state party to it (a provision of the Rome Statute allows for this).

The temporal jurisdiction of the ICC should also be clarified. The ICC can only deal with situations that occurred after the Rome Statute entered into force (1 July 2002). There is a possibility to recognize the jurisdiction of the ICC for conduct that occurred before the ratification of the Rome Statute by a given state, if that state makes a declaration to that effect; however, this retroactivity is limited: it cannot extend to the period before 1 July 2002 in any scenario. For example, Ukraine in 2014 recognized the ICC's jurisdiction for conduct that took place in Ukraine from 21 November 2013 onwards.

One last jurisdictional point. The ICC can only move forward with a case, if the crime alleged is either a suspected genocide, war crime, or crime against humanity. There is also a crime of aggression, but it operates under a very limited jurisdictional regime according to which the ICC “shall not exercise its jurisdiction over the crime of aggression when committed by [non-party state’s] nationals or on its territory” (Article 15.5 of the Rome Statute). Thus, the ICC could not investigate allegations of “aggression” by the Russian Federation against Ukraine, because the Russian Federation is not a party to the Rome Statute; thus, the Prosecutor focused on the war crimes charge against Putin instead. This jurisdictional limitation of the ICC has some critics too; for example, former ICC Prosecutor Luis Moreno Ocampo laments that this precludes the ICC from investigating what he called, controversially, in January 2023 “the current Azerbaijan aggression against Armenia.”

What Does Armenia Gain from Joining the Rome Statute?

The Republic of Armenia signed the Rome Statute back in October 1999, but did not ratify it because the Constitutional Court of Armenia ruled in August 2004 that it was contrary to the country's Constitution in effect at that time. However, on 24 March 2023, the same Constitutional Court changed its mind and decided that this is not the case anymore, and that Armenia may now join the Rome Statute. The Constitutional Court's decision notes that the Armenian government plans to recognize the jurisdiction of the ICC with regard to war crimes, crimes against humanity, and genocide committed in Armenia from “May 10, 2021 at 00:00” onwards.

Hence, Armenia does not hide that it is going to recognize the ICC's jurisdiction with the sole purpose of referring to the court the situation in the ongoing Armenia-Azerbaijan conflict since May 2021, and of requesting the initiation of an investigation of alleged war crimes committed on its territory. The mere initiation of an investigation likely will be celebrated by the Armenian authorities as a major public relations victory, even if there would be no arrest warrants issued by the ICC. It is easy to see how the story could be twisted to allege that Azerbaijan has committed an act of aggression against Armenia and that its servicemembers have allegedly committed war crimes, not to mention loud demands for the issuance of ICC arrest warrants against both high- and low-ranking Azerbaijani officials.

In its 'lawfare' against Azerbaijan, Armenia has a documented history of misrepresenting the positions of international courts. For example, in the recent decision on provisional measures by the ICJ concerning the obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, Armenia requested the ICJ to oblige Azerbaijan to stop blocking the Lachin Corridor without proving the factual basis of its allegations that Azerbaijan was in fact blocking it. The ICJ stated *inter alia* that "Azerbaijan shall [...] take all measures *at its disposal* to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor" (Order of 22 February 2023, Paragraph 62, emphasis added). This is continuously represented by Armenia either as forbidding Azerbaijan from installing a checkpoint on its border with Armenia at the start of the Lachin Corridor, or that Azerbaijan has been ordered by the ICC to forcibly disperse a peaceful protest by its citizens taking place at one point along the Lachin Corridor.

Therefore, any start of an investigation by the ICC for alleged war crimes on the territory of Armenia is likely to be represented as a judicial confirmation of an unfounded allegation that Azerbaijan has crossed into Armenian territory and committed an act of aggression. In disregard of the fact that Armenia currently occupies territories beyond the non-delimited border with Azerbaijan, or that Azerbaijan has a right to use armed force in necessary and proportional self-defense even on the territory of Armenia, Armenia is likely going to demand that Azerbaijan retreats from strategic military positions prior to and regardless of whether any peace treaty is concluded.

Armenia may also seek to inhibit Azerbaijan from pressuring to secure the opening of what Baku calls the Zangezur Corridor, as envisaged by Article 9 of the 10 November 2020 tripartite statement that ended the Second Karabakh War. According to this document, Armenia undertakes to secure "transport communication between the western regions of the Republic of Azerbaijan and the Nakhichevan Autonomous Republic in order to organize the *unhindered* movement of citizens, vehicles, and goods in both directions" (emphasis added). Needless to say, Armenia shuns away from enforcing this provision and seeks to frustrate it.

Timing

The gap between the proverbial chairs on which Armenia tries to sit is widening and deepening. Following the arrest warrant by the ICC against Vladimir Putin, Russian officials stated that the country does not recognize the ICC and considers their acts as legally null and void. In a briefing on 23 March 2023, the Russian Foreign Ministry's spokesperson indicated that states supporting the ICC's arrest warrant "are those countries that incited and promoted this structure, including with an injection of money, in order for such a pseudo-decision to be made" and that the "reaction of those who vehemently supported the decisions of the ICC was formed even before the decision was made."

The determination by Armenia to ratify the Rome Statute has already caused considerable political and diplomatic friction with the Russian Federation. On 27 March 2023, the Russian Foreign Ministry indicated that Moscow "considers absolutely unacceptable the plans of official Yerevan to join the Rome Statute of the ICC," warning Armenia "about the extremely negative" consequences of such steps for their bilateral relationship.

The Armenian diaspora organization in Russia, SAR, has also condemned the determination of Armenia to join the ICC, stating that Armenian statehood is "guaranteed and provided for by Russia, with which Armenia is connected by relations of strategic alliance in the military-political, economic and humanitarian spheres, not only on a bilateral basis (102nd base, border guards, peacekeepers, energy carriers, a number of vital products, etc.), but also within the framework of the CSTO and the EAEU."

There are further countermeasures that the Russian Federation might take against what it sees as an unfriendly act by Armenia, including, as press reports indicate, increasing gas prices, closing the land route for exports of goods to Russia, ceasing the supply of nuclear fuel to Armenia, and taking steps against Armenian migrant workers in Russia.

The damage that Armenia's ratification of the Rome Statute does to Armenian-Russian relations follows, perhaps coincidentally, Armenia's refusal on 10 March 2023 to appoint its representative to the post of CSTO Deputy Secretary General. On the other hand, the Armenian government takes care not to directly confront the Russian Federation, and at the recent Biden Administration's Summit for Democracy refused to join the declaration that condemned Russian invasion in Ukraine.

Nevertheless, it is wrong to consider the ratification of the Rome Statute by Armenia as a mere display of hostility towards the Russian Federation, or as simply surrendering to the demands of the European Union and the United States (if they at all push for Armenia's ratification of the Rome Statute, which is, at least in the case of the U.S., highly questionable). At the very least, this explanation does not account for the fact that the Armenian government re-initiated the Rome Statute's ratification process already in December 2022.

On its face, the ratification by Armenia should be seen, rather, as a public relations campaign against Azerbaijan: another episode in Yerevan's ongoing 'lawfare' campaign against Baku. Thus, a more plausible explanation is that Armenia's upcoming Rome Statute ratification is linked to the ongoing peace treaty negotiations between Azerbaijan and Armenia. If that is the case, then it could be an indication that Armenia does not intend to implement Article 9 of the 10 November 2020 tripartite statement and does not engage in a good faith effort to conclude a peace treaty with Azerbaijan.

It is too early to speculate in detail on the demands that would come onto the Armenian agenda once an ICC investigation is started (unless, of course, the Russian Federation somehow manages to derail Yerevan's ratification), but it is certainly not too difficult to sketch out its basic contours. Familiar calls for sanctions against Azerbaijan, demands for the Azerbaijani army to withdraw from strategic positions, refusal to implement its obligations regarding the Zangezur Corridor, reluctance to agree to a peace treaty, and seeking to preserve the current unresolved situation ('neither peace nor war') until a more favorable change of circumstance occurs politically or militarily. In short, your fantasy is your limit.