

DEBATE ON THE RATIFICATION OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT IN THE CZECH REPUBLIC

Zuzana Trávníčková

Abstract: This paper summarizes the process of ratification of the Statute of ICC in the Czech Republic and analyses the accompanying debate. The ratification of the Rome Statute in the Czech Republic took more than ten years (from 1999 to 2009). During all that time, the Rome Statute was intensively discussed. The intensity of the debate fluctuated and the central issue of the debate was changing. The first question under consideration was, whether the Statute was in compliance with the Constitutional order. The second question was, whether the Rome Statute should be ratified under article 10a of the Constitution. Finally, after the President had withheld the ratification, the scholars started to argue whether the President had a right or an obligation to ratify international treaties. Nor the establishment of the Court and its cases, neither the appeals by NGOs, but the amendment of the Constitution and the decision of the President not to ratify the Statute encouraged the debate. All of the three questions discussed were dealing with the relation between the Rome Statute and the Constitution of the Czech Republic.

Resumé: Příspěvek shrnuje průběh ratifikace Statutu Mezinárodního trestního soudu v České republice a analyzuje debatu, která se k této záležitosti vztahovala. Ratifikace Římského statutu v ČR trvala více než deset let (1999-2009). Během této doby byl Římský statut předmětem intenzivní diskuze. Její intenzita se v čase měnila, stejně jako se měnila otázka, která stála v centru diskuze. Nejprve byla diskutována otázka, zda je Římský statut v souladu s ústavním pořádkem České republiky. Po změně Ústavy ji nahradila otázka, zda má být Statut ratifikován podle čl. 10a Ústavy. Naposledy – poté, co Statut odmítl ratifikovat prezident republiky – se do centra pozornosti dostala otázka, jaká je role prezidenta v ratifikačním procesu a zda má právo nebo povinnost smlouvy ratifikovat. Nová témata do diskuze vnesly novelizace Ústavy a rozhodnutí prezidenta o neratifikaci. Zřízení Mezinárodního trestního soudu, ani řešené případy, stejně jako výzvy nevládních organizací, debatu výrazněji neovlivnily. Všechny tři diskutované otázky se týkaly vztahu mezi Římským statutem a Ústavou české republiky.

Key words: International Criminal Court, Rome Statute, debate, ratification.

On the author: JUDr. Zuzana Trávníčková, PhD., graduated at the University of Economics in Prague (major specialisation International Politics and Diplomacy) and at the Law Faculty of the Charles University in Prague. She lectures international law and international private law at Jan Masaryk Centre of International Studies at the University of Economics. She focuses on the role of international law in

international relations, on diplomatic and consular law, on international sanctions and international regimes.

Introduction

In June 2009, Czech media informed that the Czech Republic (CR) had ratified the Rome Statute of the International Criminal Court (ICC).¹ Most emphasized the fact that the Czech Republic was the last member of the European Union to join the ICC and that the period between signing and ratification had taken more than ten years. Given the importance of the Rome Statute in international relations, the Czech attitude to the ICC attracted attention and became the subject of debate.

The discussion surrounding the ICC had lasted many years but had never hit the headlines. Czech newspapers and magazines provided basic information about the institution and later also about the cases brought before the Court. However, the attention paid to the ICC was never very intensive. This probably reflected the fact that since World War II the Czech Republic has not experienced any of the crimes that fall under the jurisdiction of the ICC.

The debate took its course in many different forms – contributions mentioning the topic appeared in both print and online sources, in books, articles, conference proceedings, statements made in parliamentary debates, pronouncements of the President of the Czech Republic, in newspapers, blogs etc. Different kinds of participants took part in the debate – scholars and students, politicians, professionals and NGO representatives.

This paper concentrates on the academic debate regarding the ratification of the Statute of the International Criminal Court in the Czech Republic. It focuses on the development, forms, participants in the debate and the shift in the issues debated. On the other hand, it is not going to analyze or argue particular opinions presented in the articles published or the conclusions of their authors. This contribution attempts to distinguish between the wider debate on the ICC and the more clean-cut debate on the Czech ratification of the ICC Statute. The aim of this contribution is to discuss two hypotheses:

- 1) In view of the subject of the debate, the Rome Statute was analysed through the prism of international law, constitutional law and Czech criminal law. The constitutional point of view (the issues of ratification under the Czech Constitution) prevailed.
- 2) The course of the debate was irregular, its intensity varied with time. The events giving rise to the debate pertained to domestic affairs, they did not coincide with the establishment and activities of the ICC.

This paper is based on an analysis of scholarly literature dealing with the topic. Most of it was written in Czech and was published in the Czech Republic.² There

¹ U.N. Doc. A/CONF.183/9*

² These are some of the exceptions: D. Krivanek and P. Tyllova, *Implementation of the Rome Statute in the*

has been just one book published in this country, written by Pavel Šturma, that addresses the ICC and the international criminal justice system in general.³ On the other hand, dozens of articles were published in Czech journals such as *Právní rozhledy*,⁴ *Právník*,⁵ *Trestněprávní revue*⁶ or *Mezinárodní vztahy*.⁷ Many theses written at Czech universities were devoted to the ICC.⁸ Several conferences and seminars were organized to discuss the Rome Statute and the Court.⁹ Vigorous discussion (centering on the role of the President in the ratification of the Rome Statute) broke out on a blog called *Jiné právo*.¹⁰ Large numbers of people have commented on the

Czech Republic (2007). <<http://ssrn.com/abstract=996513>> accessed 21.3.2010, D. Krivánek, *Prospects for Ratification and Implementation of the Rome Statute by the Czech Republic* (2008) 1-2 International Criminal Law Review 161-184, M. Dobrovolny, *The Odd One Out* (2008) 3 The New Presence 12-14.

³ P. Šturma, *Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva*, Nakladatelství Karolinum, Prague 2002.

⁴ J. Kratochvíl, *Římský statut Mezinárodního trestního soudu není v rozporu s ústavou* (2007) 15 *Právní rozhledy* 537-543, J. Malenovský, *Znovu k navrhované ratifikaci Římského statutu Českou republikou* (2007) 22 *Právní rozhledy* 803-809, V. Bílková, *Ratifikace statutu Mezinárodního trestního soudu opět na stole* (2008) 11 *Právní rozhledy II*, J. Malenovský, *Kulečník namísto štafetového běhu v ratifikačních řízeních o integračních smlouvách v ČR* (2009) 4 *Právní rozhledy* 115-124, P. Hasenkopf, *Jak to bylo s ratifikací Římského statutu Mezinárodního trestního soudu* (2009) 20 *Právní rozhledy* 727-733.

⁵ e.g. L. Lukášek, *Mezinárodní trestní soud : historický vývoj, současný stav a stručný rozbor jeho statutu* (1999) 12 *Právník* 1140-1160, J. Pipek, *Jurisdikce mezinárodního trestního soudu a princip ne bis in idem* (2003) 12 *Právník* 1255-1266, M. Popenková, *Aktuální vývoj v otázce definice zločinu agrese ve smyslu čl. 5 Římského statutu Mezinárodního trestního soudu* (2008) 5 *Právník* 555-585.

⁶ e.g. P. Šámal, *Definice zločinů a další hmotněprávní aspekty v Římském statutu Mezinárodního trestního soudu* (2002) 1 *Trestněprávní revue* 43-50, M. Kavěna, *Ústava ČR a ratifikace Římského statutu Mezinárodního trestního soudu* (2003) 12 *Trestněprávní revue* 360-362, J. Pipek, *Mezinárodní trestní soud – k některým aspektům Římského statutu* (2004) 2 *Trestněprávní revue* 39-43, F. Neubacher, *Legitimace a význam stálého Mezinárodního trestního soudu – trestněprávní, kriminologické a kriminálně-politické úvahy* (2003) 6 *Trestněprávní revue* 171-177, P. Válek, *Přínos trestních tribunálů OSN mezinárodnímu trestnímu právu* (2007) 3 *Trestněprávní revue* 67-76.

⁷ M. Potočný, *Mezinárodní trestní soud* (1999) 3 *Mezinárodní vztahy* 19-28, T. Sunardi, *Mezinárodní trestní soud a jeho předchůdci* (2000) 1 *Mezinárodní vztahy* 36-46.

⁸ E.g. P. Ježová and A. Šimordová from Masaryk University in Brno have focused on a comparison of the views of political parties and their parliamentary representatives on the Rome Statute in their bachelor degree theses. P. Ježová, *Česká republika a Mezinárodní trestní soud z pohledu parlamentních stran České republiky* (bachelor degree thesis, Masaryk University in Brno 2009) <http://is.muni.cz/th/219902/fss_b/Bc.prace_finalni_verze.pdf?lang=en> accessed 20.9.2009; Andrea Šimordová, *Postoj České republiky vůči mezinárodnímu trestnímu soudu* (bachelor degree thesis, Masaryk University in Brno 2009) <http://is.muni.cz/th/206999/fss_b/Simordova_Andrea_Bakalarska_prace.pdf> accessed 2. 2. 2010.

⁹ At least three major conferences and seminars focusing on the ICC were organized in the CR in 2001, 2004 and in 2007 (all of them in Prague). The contributions presented at the second and the third of the foregoing events were published in conference proceedings: *Problémy implementace Statutu mezinárodního trestního soudu. Sborník z příspěvků ze semináře pořádaného Českou národní skupinou Mezinárodní společnosti pro trestní právo*, C.H.Beck, Prague 2004; *Sborník příspěvků ze Semináře o Mezinárodním trestním soudu*, Ministerstvo zahraničních věcí, Poslanecká sněmovna Parlamentu ČR, Prague 2007.

¹⁰ V. Šimíček, *Může prezident republiky odmítnout ratifikaci mezinárodní smlouvy?* <<http://jinepravo.blogspot.com/2009/01/me-prezident-republiky-odmtnout.html>> accessed

entries, most of them lawyers by education, including university teachers, lawyers working for the Ministry of Foreign Affairs and a legal adviser to the President.

The ratification of the Statute of the ICC by the Czech Republic

Table 1. summarizes the most important steps along the Czech Republic's journey to the ICC. It includes not only events relating to the conclusion and ratification of the Statute, but also relevant changes (proposed or adopted) in the Czech constitutional law and milestones in the functioning of the ICC. Naturally, it does not provide a complete list of all events relating to the subject (e.g., the initiatives of domestic as well as international NGOs and changes to Czech criminal norms made in connection with the Rome Statute).

Table 1. The Czech Republic's journey to the ICC

1998, July 17	The Statute of the ICC was adopted at a diplomatic conference that took place in Rome in June and July 1998. The representatives of the CR participated in the conference as well as at the Preparatory Committee that had formulated the draft of the Statute.
1999, March 22	The Czech government expressed its consent to the signing of the Rome Statute. ¹¹
1999, April 13	The CR's Permanent Representative to the United Nations signed the ICC Statute. According to Article 125 of the Statute, the treaty is subject to ratification. In the Czech Republic, the ratification procedure is defined in the Constitution ¹² and an international treaty must be approved by the Chamber of Deputies as well as by the Senate, and must be signed by the President.
2000, February 10	The Government of the Czech Republic submitted to the Chamber of Deputies a bill amending the Constitution. ¹³ It was intended as the first step on the journey to the ratification of the Rome Statute. At that time, the government's opinion was that several ICC Statute provisions are not compatible with the Czech constitutional order. That is why the government proposed an amendment to the Constitution and included a new Article 112a in a bill concerning the reform of justice.
2000, May 17	The Chamber of Deputies rejected the Constitutional amendment. (The reason did not relate to the provisions of Article 112a in particular but stemmed from a general disapproval of the reform of justice).

13. 3. 2009, Z. Kühn, Může prezident republiky odmítnout ratifikaci mezinárodní smlouvy II? <<http://jinepravo.blogspot.com/2009/01/me-prezident-odmtnout-ratifikaci.html>> accessed 13. 3. 2009

¹¹ Decree of the Government of the Czech Republic No. 253, March 22, 1999.

¹² Constitutional Act No. 1/2003 Coll.

¹³ Assembly Print No. 541, Chamber of Deputies 1998-2002.

2001, July 3	The Chamber of Deputies adopted another Constitutional amendment. ¹⁴ This substantial amendment, referred to as a “Euroamendment”, prepared the Czech constitutional order for accession to the European Union and for the binding force of European law. A newly introduced Article 10a provided for the transfer of certain powers of Czech authorities to an international organization by means of an international treaty. The reasoning report did not expressly state that Article 10a could be applied in the case of the Rome Statute, it only stated generally that the provision created scope for joining the European Union as well as other international institutions, e.g., institutions exercising common criminal jurisdiction. The amendment was approved by the Senate on 19 October. ¹⁵ It was published in the Collection of Laws as Constitutional Act No. 395/2001 Coll. And entered into force on 1 June 2002.
2001, October 1	The Government took another step towards the ratification of the Statute – it submitted an amendment of the Constitution and the Charter of Fundamental Rights and Basic Freedoms ¹⁶ to the Parliament. ¹⁷ This time, the main reason for the amendment was to ensure conformity with the constitutional order.
2001, October 10	The Government submitted a proposal for the ratification of the Rome Statute. ¹⁸
2001, October 30	The Chamber of Deputies referred the amendments of 1 October back to the government for further evaluation.
2002, January 29	The government withdrew the proposal of 10 October for the ratification of the ICC Statute.
2002, July 1	In accordance with Article 126, the Rome Statute entered into force.
2003, May 12	Lithuania ratified the Rome Statute. The Czech republic became the only EU member/accession country without such ratification.
2004, May 1	The Czech Republic joined the European Union.
2006, April 10	An agreement between the European Union and the International Criminal Court on cooperation and assistance was concluded. ¹⁹ The agreement entered into force on 1 May 2006.

¹⁴ Assembly Print No. 884/0, Chamber of Deputies 1998-2002.

¹⁵ Senate Print No. 88/0.

¹⁶ Constitutional Act No. 2/1993 Coll.

¹⁷ Assembly Print No. 1078, Chamber of Deputies 1998-2002.

¹⁸ Assembly Print No. 1112, Chamber of Deputies 1998-2002.

¹⁹ Agreement between the International Criminal Court and the European Union on cooperation and assistance. OJ L 115, 28.4.2006, p. 50-56.

2008, January 23	The Government of the Czech Republic issued Decree No. 63 that contained a decision to submit the Rome Statute to the Parliament for ratification as an international treaty pursuant to Article 10a of the Constitution.
2008, July 16	The Senate granted its consent to the ratification. ²⁰
2008, October 29	The Chamber of Deputies granted its consent to the ratification. ²¹
2008, November 26	The Czech Constitutional Court handed down its judgment on the Lisbon Treaty. It was the first case in which the Court decided on whether the ratification of an international treaty was compatible with the Czech Constitution.
2008, November 28	The Minister of Foreign Affairs informed the President of the Czech Republic that the conditions for ratification were fulfilled.
2008, December 20	The media informed that the President had refused to ratify the Rome Statute. ²²
2009, January 21	The President sent a letter to the Minister of Foreign Affairs explaining his reasons for refusing ratification. ²³
2009, July 8	The President of the Czech Republic ratified the Statute of the International Criminal Court. (The reasons were not made public on the website of the Office of the President and were not explained on his personal website where the abovementioned letter had been published). ²⁴
2009, July 21	The Czech Republic deposited the instrument of ratification to the Rome Statute with the Secretary-General of the United Nations and became the 110th State Party to the Statute.
2009, October 1	The Rome Statute entered into force for the Czech Republic. The text of the Statute was published in the Collection of International Treaties. ²⁵

²⁰ Senate Print 188, 2006-2008.

²¹ Assembly Print No. 423, current election term.

²² O. Kundra, *Spor o soud* (2008). 52 *Respekt* (20. 12. 2008) <<http://respekt.ihned.cz/c1-36385500-spor-o-soud>> accessed 30 March 2010.

²³ *Římský statut: mič není na straně prezidenta republiky* (2009) <<http://www.klaus.cz/klaus2/asp/clanek.asp?id=SIB9whyzFPeM>> accessed 21. 3. 2010

²⁴ In an article that was issued shortly after the ratification, Pavel Hasenkopf informed briefly in the last sentence that the President ratified the Statute after he had been assured by the Foreign Affairs Minister that the Department agreed with the President's opinion concerning the interpretation of the Rome Statute in relation to the Constitution. Hasenkopf (n.4).

²⁵ Announcement of the Ministry of Foreign Affairs No. 84/2009 Coll. of Int. treaties.

The table shows that the ratification process was formally initiated two times. Before 10 October 2001, when the Government put forward the Rome Statute for ratification for the first time, two amendments to the Constitutional Law had been submitted to the Parliament. This Government activity was based on a presumption that some of the obligations contained in the Rome Statute (e.g., the extradition of Czech nationals to the ICC, denial of jurisdictional immunity defined in the Constitution) contradicted specific rules of the Constitution and the Charter of Fundamental Rights and Basic Freedoms and that these rules must be changed prior to the ratification. After the efforts to amend the Constitution had failed, the Government withdrew the ratification process for six years.

In 2007, the Czech Republic began preparations for the Presidency of the European Council (January – June 2009). The Agenda of the Council Presidency country also includes relations with the ICC. This became a key impetus, one of several, for re-opening the ratification of the Rome Statute in the Czech Republic. This time the Government classified the Statute as an international treaty ratified in accordance with Article 10a of the Constitution. During several months in 2008, the Statute was approved by both chambers of the Czech Parliament (the Senate in July 2008 and the Chamber of Deputies in October 2008) and submitted to the President. The President refused to ratify the Statute at first and ultimately ratified it seven months later (in July 2009).

The ratification process and the attendant debate

Many participants of various backgrounds took part in the debate about the Rome Statute – journalists, politicians, NGOs, scholars and students. This paper concentrates on the opinions and findings presented by scholars. The topic attracted the attention of scholars specializing in international, criminal and constitutional law.

From the point of view of international law, the Rome Statute has been analysed as an international treaty, the history of international criminal justice has been summarized. Scholars have compared different international criminal tribunals and have dealt with specific crimes covered by the jurisdiction of the ICC.²⁶ Experts in criminal law were concerned primarily with the definition of *ratione materiae* of the ICC and the definitions of crimes in the Czech Criminal Code;²⁷ they also compared the obligations flowing from the Statute with the domestic rules contained in the Criminal Procedure act.²⁸ For constitutional lawyers, the ratification process represented the core of the discussion; especially after 2002, when the Constitution was amended and the special category of treaties transferring certain powers pursuant

²⁶ Sunardi (n.7), Potočný (n.7), Šturma (n.3), Popenková (n.5).

²⁷ Šámal (n.6).

²⁸ Válek (n.6), Pipek (n.5), Pipek (n.6), Neubacher (n.6), B. Repík, Problémy implementace Statutu Mezinárodního trestního soudu do trestního práva České republiky in *Problémy implementace Statutu Mezinárodního trestního soudu do právního řádu: sborník příspěvků ze semináře pořádaného Českou národní skupinou Mezinárodní společnosti pro trestní právo*. C. H. Beck, Praha 2004.

to Article 10a was introduced. However, we cannot separate the constitutional, criminal and international aspects of the discussion (or identify separate discussions stemming from these three branches of law). Most of the scholars have respected the overlapping character of the subject and have also reflected the view of the other branches of law in their evaluations.

Now let us set aside the general issues surrounding the ICC and focus on the ratification of the Rome Statute in the Czech Republic. During the debate, scholars discussed at least three different aspects of the ratification. After the Rome Conference, the first question under consideration was whether the Statute was in compliance with the Constitutional order.²⁹ The initial conclusion that the Constitution must be amended before the ratification process begins³⁰ became the starting point for the government's efforts to amend the Constitution in 2000 and 2001. Later, when Article 10a of the Constitution was introduced, a new issue appeared – whether the Rome Statute should be ratified under Article 10a (just as the Lisbon treaty) or as a “common” international treaty (under Article 49 of the Constitution).³¹ Finally, after the President had withheld ratification, scholars began to argue whether the President had a right or an obligation to ratify international treaties.³² This issue is of a general nature and applies to any international treaty.

Each of the issues was evoked in a specific situation – the first one (and also the one that was the most expected to be raised), was raised after the signing of the Rome Statute. Two circumstances contributed to the raising of the second issue; Firstly, the Government decided to initiate the ratification process within the framework of preparation for the Czech Presidency of the EU in 2007; Secondly, the Constitution had been amended in 2001 and new situation concerning international treaties had arisen. In November 2008, a few days before the Rome Statute was submitted to the President, the Constitutional Court handed down a judgment relating to the Lisbon Treaty. In the judgment, the Court broadly discussed the relationship between international treaties under Article 10a of the Constitution and the Constitution itself. As a result, the debate about the ICC received an important impulse.³³

²⁹ Kavěna (n.6), Kratochvíl (n.4).

³⁰ Šturma (n.3) 190-197, 202.

³¹ e.g. J. Malenovský, Důvody pro použitelnost čl. 10a Ústavy ČR při ratifikačním procesu Římského statutu v ČR. in *Sborník příspěvků ze Semináře o Mezinárodním trestním soudě*, Ministerstvo zahraničních věcí - Poslanecká sněmovna Parlamentu ČR, 2007.

M. Kavěna, Mezinárodní trestní soud - právní základ, činnost a varianty ratifikace v ČR (2007) Studie č. 5.276, Parlamentní institut Parlamentu České republiky <<http://www.psp.cz/kps/pi/PRACE/pi-5-276.pdf>> accessed 3.3.2010, Malenovský (n.4), V. Bílková, V roli unijního solitéra? Česká republika a Mezinárodní trestní soud (2007) Policy Paper, Ústav mezinárodních vztahů Praha <<http://iir.cz/upload/PolicyPapers/2007/vbilkova2007MTS.pdf>> accessed 21.2.2010, Křivánek (n.2).

³² Šimíček (n.10), Kühn (n.10), Malenovský (n.5).

³³ J. Wintr, První rozhodnutí Ústavního soudu o ústavnosti mezinárodní smlouvy (2009) 1 *Jurisprudence* 21-31.

The third issue began to be discussed at the end of 2008, being initiated by the President's decision not to ratify the Rome Statute. Other events mentioned in the above overview (e.g., events associated with the operation of the ICC or Czech accession to the Union) did not influence the debate substantially. Before the ratification of the Statute, many appeals were made to Czech politicians to proceed with the ratification, appeals from national as well as international NGOs and from other institutions abroad. However, none of them attracted a substantial amount of attention from scholars or caused a shift in the debate. Thus, the debate was inspired mainly by developments in the Czech Republic.

Looking at the timeline of the debate, we can say that the debate lasted for many years and its intensity has fluctuated. We can identify three waves of the debate, mostly overlapping with the three abovementioned specific issues. The third issue that was discussed is a general one and in addition to the Rome Statute, it may also affect other international treaties.³⁴ That is why the debate surrounding the third issue – the status of the President with regard to international treaties approved by the Parliament with a qualified majority – has merely subsided for now and may be reopened by any further Presidential decision to refuse or postpone the ratification of another treaty.

Conclusion

Although the Czech Republic supported the idea of the International Criminal Court from the very beginning, the ratification process in the Czech Republic took more than ten years. During all that time, the Rome Statute was the subject of debate.

Both of the hypotheses defined in the introduction have been confirmed. The intensity of the debate fluctuated and the issue at the centre of the debate changed. The shifts were caused by impetuses coming from the domestic milieu. It was neither the establishment of the Court and its cases nor the appeals made by NGOs that gave rise to the debate that took place. The debate was fuelled by the amendment to the Constitution and the decision of the President not to ratify the Statute. All of the three issues discussed concerned the relationship between the Rome Statute and the Constitution of the Czech Republic. Although experts in the field of international and criminal law actively participated in the debate, the merits of the debate must be associated with constitutional law.

³⁴ R. Malenovský, *Může prezident republiky odmítnout (odložit) ratifikaci mezinárodní smlouvy?* 22 *Právní rozhledy* 812-821.