

TOAEP

Torkel Opsahl  
Academic EPublisher



## Quality Control in Preliminary Examination: Volume I

Morten Bergsmo and Carsten Stahn (editors)

## E-Offprint:

Iryna Marchuk, “Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor’s Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine”, in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book)). This publication was first published on 6 September 2018. TOAEP publications may be openly accessed and downloaded through the web site [www.toaep.org](http://www.toaep.org) which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors such as [www.amazon.co.uk](http://www.amazon.co.uk).

This e-offprint is also available in the Legal Tools Database under PURL <http://www.legal-tools.org/doc/8ae9bf/>. It is noteworthy that the e-book versions of *Quality Control in Preliminary Examination: Volumes 1 and 2* contain more than 1,000 hyperlinks to legal sources in the Database. This amounts to a thematic knowledge-base that is made freely available as an added service to readers.

© Torkel Opsahl Academic EPublisher, 2018. All rights are reserved.

**Front cover:** *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers – Arte dei Maestri di Pietra e Legname – was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

**Back cover:** *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

---

## Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor's Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine

Iryna Marchuk\*

### 12.1. Introduction

The chapter critically evaluates the progress of preliminary examination into the situation of Ukraine that is currently under consideration for possible investigation in the International Criminal Court ('ICC'). Following a brief discussion on the background of the conflict and Ukraine's relationship with the ICC, the chapter turns to the analysis of Ukraine's two declarations accepting the *ad hoc* jurisdiction of the Court<sup>1</sup> and then examines the steps undertaken by the ICC Prosecutor with respect to an investigation of the alleged crimes against humanity and war crimes. Re-

---

\* **Iryna Marchuk** is Associate Professor at the Faculty of Law at the University of Copenhagen (Denmark). She obtained her Ph.D. degree from the University of Copenhagen (2011). She held appointments as a visiting scholar at the Castan Centre for Human Rights Law at Monash University (2016) and the Lauterpacht Centre for International Law at the University of Cambridge (2009-2010).

<sup>1</sup> Declaration of the Verkhovna Rada of Ukraine to the ICC on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity, committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013–22 February 2014 signed by the Chairperson of the Verkhovna Rada of Ukraine Oleksandr Turchynov, 25 February 2014, case no. 790-VII ('Declaration I'); Declaration of Verkhovna Rada of Ukraine to the ICC on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the Russian Federation and leaders of terrorist organizations "DNR" and "LNR", which led to extremely grave consequences and mass murder of Ukrainian nationals signed by the Chairperson of the Verkhovna Rada of Ukraine V. Groysman, 4 February 2015, case no. 145-VIII ('Declaration II').

garding Ukraine's declaration with respect to the Maydan crimes (Declaration I), it is argued that the ICC Prosecutor applied an overly stringent definition of crimes against humanity with respect to the Maydan crimes, thus reinforcing a perception that she will only be willing to move forward with an investigation if the attack is both widespread *and* systematic, notwithstanding the commonly agreed disjunctive test. Further, it is argued that the ICC Prosecutor – in invoking her broad discretionary powers – not only applied an unreasonably high evidentiary standard at the preliminary examination stage, but also denied the ICC judges an opportunity to clarify the application of the systematic requirement on a stand-alone basis, as well as how it interacts with the element of a State or organizational policy.

As for Ukraine's declaration regarding the situation in Crimea and eastern Ukraine (Declaration II), the chapter highlights a number of challenges that are most likely to be encountered by the ICC Prosecutor if the overall control test were to be established with respect to Russia's involvement in the conflict in eastern Ukraine. Similar, in the absence of Russia's co-operation with the Court, an investigation with respect to the situation in Crimea will most probably be deadlocked. Here, the ICC Prosecutor's main challenge is not whether the legal elements of war crimes and crimes against humanity are met, but more strategic in nature. How would potential proceedings against any suspects who are nationals of the Russian Federation affect the legitimacy of the work of the Office of the Prosecutor ('OTP') and the Court more generally?

To enhance the quality control in the ICC Prosecutor's preliminary examination of the situation in Ukraine, it is advised that the OTP carry out its inquiry into the alleged crimes without any further delay (especially given that the conflict is still ongoing) and make its final decision on the fate of Ukraine's first declaration with respect to the Maydan crimes in light of the submitted additional evidence. It is also advisable that the ICC Prosecutor be more transparent about communicating the work the OTP has done at the preliminary examination stage and actively foster a dialogue with all the relevant stakeholders. The ICC Prosecutor should dispel myths in Ukraine that the ICC will compensate for the deficient work of national authorities and prosecute all responsible ones in The Hague. Being transparent about the ICC's limitations and constraints might have a catalysing effect on the ability of the Ukrainian national authorities to

prosecute those who were involved in the commission of war crimes and crimes against humanity.

### 12.2. Background

The political tensions in Ukraine were sparked by the peaceful demonstrations against the government of the former President of Ukraine, Viktor Yanukovych, who refused to sign the deal on Ukraine's closer ties with the European Union.<sup>2</sup> The peaceful protests turned violent when Yanukovych authorized the law enforcement agencies to use violence against the protesters when dispersing the crowds in the centre of Kiev. The apogee of violence was reached on 18 February 2014 with the death of around one hundred protesters, mostly young university students, and hundreds of injuries of various gravity (known as the Maydan crimes).<sup>3</sup> Although the former government attempted to strike a deal with the opposition leaders, this was plainly rejected by the general public that was shell-shocked by the Maydan crimes and demanded the resignation of Yanukovych with immediate effect, as well as the prosecution of those responsible for the crimes. Yanukovych claimed that his life was in danger and left, along with his entourage and associates, to neighbouring Russia where he remains until today.<sup>4</sup>

The dramatic events had a catalysing effect on Russia's actions in Crimea that assumed its control over the peninsula following the sham referendum, in which the inhabitants of Crimea expressed their will to secede from Ukraine in the presence of Russian troops, while the international observers were denied access to monitor the referendum.<sup>5</sup> The Rus-

---

<sup>2</sup> Oksana Grytsenko, "Ukrainian protesters flood Kiev after president pulls out of EU deal", in *The Guardian*, 24 November 2013 (<http://www.legal-tools.org/doc/3746a7/>).

<sup>3</sup> For an official source on the number of casualties, see Prosecutor General's Office ('PGO'), Register of Proceedings of Crimes During the Revolution of Dignity (<http://www.legal-tools.org/doc/95f3d2/>).

<sup>4</sup> "Viktor Yanukovych Press Conference in Rostov", in *News of Ukraine*, 11 March 2014, available on YouTube at the time of writing. See also "Putin: Russia helped Yanukovych to flee Ukraine", in *BBC News*, 24 October 2014 (<http://www.legal-tools.org/doc/6c1504/>).

<sup>5</sup> Shaun Walker, "Ukraine crisis: Crimea MPs vote to join Russian Federation sparks outrage", in *The Guardian*, 6 March 2014 (<http://www.legal-tools.org/doc/1c8c1e/>). See also Russia, Federal Constitutional Law N 6-ФКЗ, О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов Республики Крым и города федерального значения Севастополя (Law on admitting to the Russian Federating the Republic of Crimea and establishing within the Russian Federa-

sian politicians welcomed the return of Crimea to its homeland, often referring to the restoration of historical truth and pointing towards a grave historical mistake when the peninsula was gifted by Nikita Khrushchev to the Ukrainian Socialist Republic in 1954.<sup>6</sup> While Russia considers Crimea an integral part of its territory, the international community on many occasions has condemned the annexation of Crimea and demanded its return to Ukraine.<sup>7</sup> Following the annexation, the human rights situation of the members of the Crimean Tatar and Ukrainian minority groups residing on the peninsula has considerably worsened. The allegations of the widespread abuses directed at the members of the minority groups range from torture, ill treatment, persecution to media harassment.<sup>8</sup>

The events in Crimea sparked similar secessionist sentiments in eastern Ukraine in April 2014 where fighting broke out between the pro-Russian rebels and the Ukrainian government forces. The conflict gained international notoriety when the MH17 passenger jet was shot down over the territory of eastern Ukraine and claimed 298 innocent lives.<sup>9</sup> This became a turning point when the eyes of the international community were set on the fighting in eastern Ukraine, and the ICRC for the very first time declared the conflict to be governed by the rules of international humani-

---

tion new constituent entities the Republic of Crimea and the city of federal significance Sevastopol), 21 March 2014.

<sup>6</sup> Крым. Путь на Родину. Документальный фильм Андрея Кондрашова (Crimea: Way Back Home. Documentary by Andrei Kondrashov), in *Russia-24*, available on YouTube at the time of writing.

<sup>7</sup> United Nations General Assembly, Territorial Integrity of Ukraine, 1 April 2014, UN doc. A/RES/68/262 (<http://www.legal-tools.org/doc/985059/>); Council of Europe Parliamentary Assembly ('PACE'), Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, 10 April 2014, Resolution 1990 (2014) (<http://www.legal-tools.org/doc/087ddc/>).

<sup>8</sup> Office of the United Nations Commissioner for Human Rights, Report on the human rights situation in Ukraine (16 November to 15 February 2016), 15 March 2017 (<http://www.legal-tools.org/doc/11df8f/>); Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights and High Commissioner on National Minorities, Report of the Human Rights Mission on Crime (6-8 July 2015), 17 September 2015; Human Rights Watch Report, Rights in Retreat: Abuses in Crimea, November 2014 (<http://www.legal-tools.org/doc/479a72/>) last accessed on 28 December 2017 ('HRW Crimea report').

<sup>9</sup> Dutch Safety Board, "Crash of Malaysia Airlines MH17: Hrabove, Ukraine, 17 July 2014", The Hague, October 2015.

tarian law and classified it as a non-international armed conflict.<sup>10</sup> With Russia's involvement by supplying arms, weaponry, funds and manpower to the rebel groups in eastern Ukraine, the nature of the conflict had quickly transformed, bordering on an international armed conflict.<sup>11</sup> Russia has vehemently denied any involvement in directing the conflict from behind the scenes in eastern Ukraine, considering it to be an internal matter of Ukraine.<sup>12</sup> Most recently, in the context of proceedings before the International Court of Justice, the official position of Russia is that arms and weaponry, which were alleged by Ukraine to have been supplied by Russia, came from the old Soviet stockpiles and the retreating Ukrainian army.<sup>13</sup> The involvement of the international community resulted in the two ceasefire agreements, Minsk Protocol I of 5 September 2014 and Minsk Protocol II of 11 February 2015, that were adopted with the aim of ceasing hostilities and achieving conflict resolution in eastern Ukraine. The countless violations of the Minsk agreements are reported to have taken place, as the fighting in eastern Ukraine does not show any signs of abating, with the most recent flare-up of fighting in Avdiivka.<sup>14</sup> As it is clear from a brief recap of the conflict in Ukraine, it has taken place against the complex political backdrop when Ukraine lost control over Crimea and unsuccessfully attempts to regain control from the pro-Russian separatists in eastern Ukraine.

---

<sup>10</sup> ICRC Press Release, "Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law", 23 July 2014 (<http://www.legal-tools.org/doc/24665e/>).

<sup>11</sup> Human Rights Watch News Release, "Eastern Ukraine: Questions and Answers About the Laws of War", 11 September 2014 (<http://www.legal-tools.org/doc/5a948f/>); Noelle Quenivet, "Trying to Classify the Conflict in Eastern Ukraine", in *IntLawGrrls*, 28 August 2014.

<sup>12</sup> "Песков: Россия не поставляет оружие ополченцам ДНР" (Russia does not supply weapons to the DNR rebels), in *NTV News*.

<sup>13</sup> International Court of Justice, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, *Ukraine v. Russian Federation*, Oral hearings on indication of provisional measures, verbatim record, 7 March 2017, CR 2017/2, pp. 20-21 (<http://www.legal-tools.org/doc/e537cd/>).

<sup>14</sup> European Union External Action, Statement by the Spokesperson on the ceasefire violations in eastern Ukraine, 31 January 2017 (<http://www.legal-tools.org/doc/bd5ee4/>).

### 12.3. Uneasy Relationship between Ukraine and the ICC: Constitutional Conundrum

Ukraine signed the Rome Statute on 20 January 2000 but has yet to ratify it. The major obstacle to ratification was the ruling of the Constitutional Court back in 2001 that the ICC's principle of complementarity would be contrary to the Constitution of Ukraine.<sup>15</sup> The proceedings before the Constitutional Court were initiated by the former President of Ukraine, Leonid Kuchma, who in his submission argued that the Rome Statute's provisions on immunities (Article 27), the principle of complementarity (Articles 1, 17 and 20), surrender of nationals (Article 89) and enforcement of prison sentences (Articles 103 and 124) were in conflict with the Constitution.<sup>16</sup> Further, he submitted that the Rome Statute was contrary to the constitutional provisions on the people's exercise of power, legislative competence of Parliament and the role of the prosecution.<sup>17</sup> The President's submission to the Constitutional Court on the constitutionality of the Rome Statute thus differed from the official position of the Ministry of Foreign Affairs, which did not find any impediments to ratification of the Rome Statute.<sup>18</sup>

The judges dismissed nearly all arguments advanced by the former President, except the ICC's principle of complementarity, which they found to be contrary to the constitutional exclusive competence of national courts.<sup>19</sup> As argued elsewhere, the finding of the Constitutional Court stems from its flawed interpretation of the principle of complementarity, as the ICC would only assert its jurisdiction if national courts are no longer a viable option due to their unwillingness or inability to prosecute the crimes falling within the jurisdiction of the ICC.<sup>20</sup> The preference clearly

---

<sup>15</sup> Конституційний Суд України (Constitutional Court of Ukraine), Висновок Конституційного Суду України у справі за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду (Ruling on the Submission of the President of Ukraine Regarding Conformity of the Constitution of Ukraine with the Rome Statute of the International Criminal Court), 11 July 2001, Case No 1-35/2001 ('CC Ruling').

<sup>16</sup> *Ibid.*, para. 1.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, para. 2.1.

<sup>20</sup> Iryna Marchuk, "Ukraine and the International Criminal Court: Implications of the *Ad Hoc* Jurisdiction Acceptance and Beyond", in *Vanderbilt Journal of Transnational Law*, 2016, vol. 49, no. 2, pp. 331-32.



lies with national courts, as the ICC would only step in if Ukraine does not honour its obligations to prosecute international crimes. Nevertheless, as things stood, the only way to enforce the decision of the Court would be to amend the Constitution of Ukraine's provision on the exclusive competence of national courts, as the Ukrainian legislation does not allow reopening the case in the Constitutional Court on the grounds of an alleged wrongful interpretation of an international treaty.<sup>21</sup>

Despite many legislative initiatives aimed at such amendment,<sup>22</sup> it took fifteen years for the Ukrainian parliament to adopt the necessary changes.<sup>23</sup> The turbulent situation in Ukraine sparked by the Maydan crimes that escalated with the annexation of Crimea and intense fighting in eastern Ukraine made that need even more acute. In January 2015, 155 members of the Ukrainian parliament submitted the draft law on amending Article 124 of the Constitution of Ukraine, which would provide that "Ukraine may recognize the jurisdiction of the ICC on the conditions stipulated by the Rome Statute of the ICC". The accompanying explanatory note emphasized upon the importance of the immediate ratification of the Rome Statute "given a large number of victims as a result of criminal acts committed by the highest governmental officials, as well as given the investigation of crimes that are of concern to the international community".<sup>24</sup> Notwithstanding the parliamentary committee's finding on the com-

---

<sup>21</sup> Закон України 'Про Конституційний Суд України' (Law of Ukraine on the Constitutional Court of Ukraine), 16 October 1996, Article 68 (<http://www.legal-tools.org/doc/d3ef06/>). The reopening procedure can only be triggered by the discovery of new facts that, although had existed at the time of the case was heard by the court, were not subject by the proceedings.

<sup>22</sup> See *Проект Закону про ратифікацію Римського статуту міжнародного кримінального суду* (Draft Law of Ukraine on Ratification of the Rome Statute of the ICC), 22 February 2014, no. 0072 (<http://www.legal-tools.org/doc/17cd5b/>) (it was recalled on 24 February 2014); *Проект Закону про внесення змін до статті 124 Конституції України (щодо визнання положень Римського статуту)* (Draft Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with Regard to the Recognition of the Rome Statute)), 16 January 2015, no. 1788 (<http://www.legal-tools.org/doc/72b221/>).

<sup>23</sup> *Проект Закону про внесення змін до Конституції України (щодо правосуддя)* (Draft Law of Ukraine on Amending the Constitution of Ukraine (with Regard to the Judiciary)), 25 November 2015, no. 3524 ('2015 Draft Law Regarding Judiciary') (<http://www.legal-tools.org/doc/747e68/>).

<sup>24</sup> Пояснювальна записка до проекту закону про внесення змін до статті 124 Конституції України (щодо визнання положень Римського статуту) (Explanatory Note

patibility of the law draft with the Constitution, it nevertheless did not recommend including the law draft on the parliamentary agenda, referring to the preliminary conclusions of the Prosecutor General's Office ('PGO'), the parliamentary committee on budgetary matters and the parliamentary committee on European integration.<sup>25</sup>

The same year, President Petro Poroshenko submitted a law draft to Parliament on amending Chapter VIII of the Constitution with respect to the administration of justice, which was reviewed and endorsed by the Venice Commission.<sup>26</sup> The draft includes an identical provision to the one submitted by the parliamentarians on Ukraine's recognition of the jurisdiction of the ICC. Interestingly, the law draft provides that the provision on the ICC's exercise of jurisdiction will only "come into force three years after the date of the official publication of the law act".<sup>27</sup> The provision on the ICC remained unchanged in the final version of the law adopted by Parliament and will come into force on 30 June 2019.<sup>28</sup> Although the obstacle to ratification has thus been removed, the Ukrainian parliament has yet to ratify the Rome Statute by adopting a specific law on ratification with the full text of the Statute.<sup>29</sup> Further, given that the necessary changes to existing laws, in particular the Criminal Code of Ukraine, the draft law accounting for such changes need to be submitted to Parliament along with the law on ratification of the Rome Statute.<sup>30</sup>

---

to the Draft Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with regard to the recognition of the ICC Statute), 16 January 2015.

<sup>25</sup> Висновок комітету щодо включення до порядку денного, The Committee's Conclusion Regarding Including (the Law Draft) on the Parliamentary Agenda, 09 December 2015. The PGO noted the necessity of further work on the draft. The parliamentary committee on budgetary matters voiced its concerns regarding the anticipated increase of budgetary expenses with the adoption of the law draft, whereas the parliamentary committee on European integration found that the law draft was not part of the prioritized Ukrainian legislation that should conform to the EU law.

<sup>26</sup> 2015 Draft Law Regarding Judiciary, see *supra* note 23.

<sup>27</sup> *Ibid.*

<sup>28</sup> Закон України 'Про внесення змін до Конституції України (щодо правосуддя)' (Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with regard to the recognition of the ICC Statute), 2 June 2016 (<http://www.legal-tools.org/doc/31cd61/>). See also *Конституція України* (Constitution of Ukraine), 28 June 1996 with subsequent amendments, Article 124 (<http://www.legal-tools.org/doc/d1a72d/>).

<sup>29</sup> Закон України 'Про міжнародні договори України' (Law of Ukraine on International Treaties of Ukraine), 29 June 2004, Article 9(1) (<http://www.legal-tools.org/doc/337dd8/>).

<sup>30</sup> *Ibid.*, Article 9(7).

The rationale behind the introduction of a three-year period before the constitutional provision on the ICC comes into force is not entirely clear, with no explanation provided in an accompanying note to the law draft. One may speculate that Ukraine is reluctant for the provision to come into force with immediate effect, given that the ongoing fighting in eastern Ukraine has been marred by serious violations of international humanitarian law by all parties to the conflict, including the members of the Ukrainian military forces.<sup>31</sup> Another plausible explanation is that ratification was postponed until after new parliamentary elections in 2019. However, despite this strategic manoeuvre, the ICC Prosecutor is currently examining the situation in Ukraine, since the Ukrainian government has already accepted the *ad hoc* jurisdiction of the ICC two years ago by lodging two declarations to the Court under Article 12(3) of the Rome Statute.

By accepting the *ad hoc* jurisdiction of the ICC with respect to the Maydan crimes (Declaration I) and the situation in eastern Ukraine and Crimea (Declaration II), Ukraine authorized the Court to exercise its jurisdiction retroactively with respect to the crimes committed within the specific temporal framework as outlined by the two declarations. The second declaration lodged by Ukraine includes an open-ended temporal jurisdictional clause from 2014 onwards, which means that the ICC Prosecutor is fully entitled to investigate the crimes falling within this broad jurisdictional framework committed by all sides to the conflict.

#### **12.4. The ICC Prosecutor's Preliminary Examination into the Maydan Crimes (Declaration I)**

The first declaration accepting the jurisdiction of the ICC was signed on 25 February 2014 in rather peculiar constitutional circumstances.<sup>32</sup> The former President Yanukovich – vested with the constitutional authority to sign international treaties on behalf of Ukraine – fled the country following the Maydan crimes without tending his resignation proper and thus leaving the country without a president.<sup>33</sup> In these rather unusual circum-

---

<sup>31</sup> FIDH Report, Ending Impunity in Eastern Ukraine: new report reveals the urgency to open an ICC investigation, 23 November 2015, part: 2(b) (Pro-Ukrainian forces abuses: no longer a taboo issue?) ('FIDH Report') (<http://www.legal-tools.org/doc/de6f22/>).

<sup>32</sup> Declaration I, see *supra* note 1.

<sup>33</sup> Про самоусунення Президента України від виконання конституційних повноважень та призначення позачергових виборів Президента України (Resolution of Verkhovna Rada of Ukraine 'On Self-Withdrawal of the President of Ukraine from Performing His

stances, Parliament bestowed presidential duties upon the Chairperson of Parliament, Oleksandr Turchynov, who signed the parliamentary declaration accepting the jurisdiction of the Court with respect to the Maydan crimes in his capacity as *ex officio* Head of State.<sup>34</sup> Three months later, Ukraine lodged its declaration with the Registrar of the ICC. In its press release, the ICC confirmed that Ukraine's declaration was relayed to the OTP for further consideration.<sup>35</sup> As clarified in the press release, Ukraine's acceptance of the ICC's jurisdiction did not automatically trigger an investigation, as it was within the discretion of the ICC Prosecutor to decide whether or not to request the Pre-Trial Chamber's authorization of an investigation.<sup>36</sup>

Despite Ukraine's high hopes, the ICC Prosecutor, in her annual preliminary investigation report nearly one and a half year later, made known her decision not to act on Ukraine's declaration with respect to the alleged crimes against humanity during the 2014 Maydan protests.<sup>37</sup> In deciding whether a reasonable basis for initiating an investigation exists, the ICC Prosecutor is guided by a three-prong test laid down in Article 53(1)(a)-(c) of the Rome Statute by considering "whether (a) [...] a crime within the jurisdiction of the Court has been committed or is been committed; (b) the case is or would be inadmissible under Article 17 of the Statute; and (c) taking into account the gravity of the crime and the interests of justice". When examining the first limb of the test (whether the alleged crimes during the Maydan protests may amount crimes against humanity within Article 7 of the Rome Statute), the ICC Prosecutor found the alleged crimes did not constitute crimes against humanity, as they had not been committed in the context of a widespread or systematic attack against the civilian population.<sup>38</sup>

---

Constitutional Duties and Scheduling Early Elections of the President of Ukraine'), 22 February 2014 (<http://www.legal-tools.org/doc/54dc2c/>).

<sup>34</sup> Конституція України (Constitution of Ukraine), Article 112 (stating that in the event of early termination of the presidential duties, the chairperson of the Verkhovna Rada of Ukraine acts as *ex officio* Head of State until the elections of a new president).

<sup>35</sup> ICC Press Release, Ukraine Accepts the ICC Jurisdiction over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014, ICC-CPI-20140417-PR997, 17 April 2014 (<http://www.legal-tools.org/doc/289ef1/>).

<sup>36</sup> *Ibid.*

<sup>37</sup> ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2015*, 12 November 2015 (<http://www.legal-tools.org/doc/ac0ed2/>) ('2015 OTP Report').

<sup>38</sup> *Ibid.*, para. 101.

That further broke down to the questions (1) whether the alleged crimes constituted an attack against the civilian population, (2) whether there existed a State of organizational policy to carry out such attack, and (3) whether the alleged attack was widespread or systematic.<sup>39</sup> Firstly, the ICC Prosecutor was satisfied that there was “an attack direct against a civilian population” due to the use of “excessive and indiscriminate force” by the Ukrainian security forces and *titushky* (pro-government group of civilians who provided support to law enforcement during demonstrations) against protesters who took to the streets to voice their dissent against the former government.<sup>40</sup>

Secondly, the ICC Prosecutor inferred the existence of a State policy to attack the civilian population from a number of factual circumstances, such as (1) “coordination of [state authorities], and cooperation with, anti-Maydan citizen volunteers”; (2) “the consistent failure of state authorities to take any meaningful or effective action to prevent the repetition of incidents of violence”; and (3) “the apparent efforts to conceal or cover the alleged crimes”.<sup>41</sup> On the basis of the available information and at the backdrop of the turbulent political situation in Ukraine, the Prosecutor therefore found that the acts of the Ukrainian security forces and *titushky* were carried out pursuant to or in furtherance of a State policy aimed at suppressing the Maydan protest movement.<sup>42</sup>

Thirdly, however, the ICC Prosecutor found that the attack directed against the civilian population in the Maydan protests was neither widespread nor systematic. At the outset, she dismissed the widespread characteristic of the attack, reasoning that it was “limited in its intensity and geographic scope”.<sup>43</sup> In support of this finding, she noted that the alleged crimes were committed in the context of “a limited number of clashes and confrontations between security forces and protesters” during the three-month period, as well as that the majority of the alleged crimes were primarily committed in a limited geographic area within the city of Kyiv.<sup>44</sup> Further to this, she concluded that the cumulative effect of the killing of at

---

<sup>39</sup> *Ibid.*, paras. 89-100.

<sup>40</sup> *Ibid.*, para. 90.

<sup>41</sup> *Ibid.*, para. 93.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, para. 96.

<sup>44</sup> *Ibid.*

least 75 persons and the injury of over 700 protesters rendered the widespread nature of the attack questionable.<sup>45</sup> As argued elsewhere, the ICC Prosecutor's finding on the absence of the widespread nature of the attack is not entirely surprising, as it appears to be consistent with her earlier evaluation of the crimes against humanity allegations in the context of the situations of Kenya and Ivory Coast.<sup>46</sup> In those two situations, which were considered by the ICC Prosecutor, a number of casualties was substantially higher, as well as the crimes were more geographically scattered.<sup>47</sup>

A more controversial finding of the ICC Prosecutor was the absence of the systematic dimension of the attack. According to the report, the alleged crimes did "not necessarily appear to have been carried out in a consistent, organized manner or on a regular or continual basis".<sup>48</sup> Notwithstanding the report findings on the unjustified and disproportionate nature of the attack against protesters, it nevertheless concludes that the alleged crimes were "aimed to limit the protests rather than being part of a deliberate, coordinated plan of violence methodically carried out against the protest movement", appearing to have "occurred only sporadically, in limited instances".<sup>49</sup> As argued elsewhere, this finding appears to stem "from the lack of clarity in international criminal law as to how the systematic requirement is applied on a stand-alone basis as well as how it interacts with the policy element".<sup>50</sup>

As it is clear from the developed jurisprudence of international criminal courts, one does not have to prove both dimensions of the attack

---

<sup>45</sup> *Ibid.*, para. 97.

<sup>46</sup> Iryna Marchuk, "No Crimes Against Humanity During the Maydan Protests in Ukraine? Or the ICC Prosecutor's Flawed Interpretation of Crimes Against Humanity?", in *Boston University International Law Journal*, 2017, vol. 35, no. 1, p. 62.

<sup>47</sup> During the post-election violence in Kenya, between 1,133 and 1,220 persons died and 3,561 persons were injured. More than 1,000 persons were killed during the post-election violence in Ivory Coast. See ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 131 ('Kenya Article 15 Decision') (<http://www.legal-tools.org/doc/338a6f/>); ICC, Situation in the Republic of Côte D'Ivoire, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14, paras. 103, 105 (<http://www.legal-tools.org/doc/7a6c19/>).

<sup>48</sup> 2015 OTP Report, para. 98, see *supra* note 37.

<sup>49</sup> *Ibid.*, paras. 99-100.

<sup>50</sup> Marchuk, 2017, p. 67, see *supra* note 46.

in the context of crimes against humanity, as the proof of either *widespread* or *systematic* dimension will suffice.<sup>51</sup> However, notwithstanding this disjunctive test, it appears that the ICC Prosecutor will only be willing to move forward and seek the Pre-Trial Chamber's authorization of an investigation if both requirements of the attack are in fact present.<sup>52</sup> In the absence of any precedent in which the systematic requirement was deemed sufficient on a stand-alone basis for the purposes of crimes against humanity, there is a certain degree of uncertainty as to what kind of conduct may satisfy this requirement alone. This is also complicated by the lack of clarity as to how the systematic requirement interacts with the element of a State or organizational policy. In the jurisprudence of the *ad hoc* tribunals, the existence of a policy element was treated as an evidentiary matter attesting to the systematic nature of the attack.<sup>53</sup> However, in the context of the ICC, the drafters of the Rome Statute introduced a State or organizational policy as a separate contextual element of crimes against humanity in addition to the widespread or systematic requirement.<sup>54</sup> However, as rightly noted in the academic literature, the inclusion of the policy element in the Rome Statute's definition of crimes against humanity has not elevated it into the "more prominent role [...] in the crimes against humanity concept" in the ICC.<sup>55</sup>

Whereas the existence of the policy element is an important indicator of the 'systematicity' of the attack (albeit not the only one from which

---

<sup>51</sup> ICTY, *Prosecutor v. Tadić*, Trial Chamber, Opinion and Judgment, 7 May 1997, IT-94-1-T, para. 647 (<http://www.legal-tools.org/doc/0a90ae/>); ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Trial Judgment, 2 September 1998, ICTR-96-4-T, para. 579 (<http://www.legal-tools.org/doc/b8d7bd/>).

<sup>52</sup> Marchuk, 2017, p. 53, see *supra* note 46. This position is also reinforced by the ICC Prosecutor's policy paper, in which it states that "the Office will pay particular consideration to crimes committed on a large scale, as part of a plan or pursuant to a policy". Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, 1 November 2013, para. 81 (<http://www.legal-tools.org/doc/acb906>) ("OTP 2013 Policy Paper").

<sup>53</sup> ICTY, *Prosecutor v. Kunarac*, Appeals Chamber, Judgment, 12 June 2002, IT-96-23/1-A, para. 98 (<http://www.legal-tools.org/doc/029a09/>); ICTY, *Prosecutor v. Vasiljević*, Trial Chamber, Judgment, 29 November 2002, IT-98-32-T, para. 36 (<http://www.legal-tools.org/doc/8035f9/>); ICTY, *Prosecutor v. Naletilić*, Trial Chamber, Judgment, 31 March 2003, IT-98-34-T, para. 234 (<http://www.legal-tools.org/doc/f2cfeb/>).

<sup>54</sup> Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference", in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 48.

<sup>55</sup> Marjolein Cupido, "The Policy Underlying Crimes Against Humanity: Practical Reflections on a Theoretical Debate", in *Criminal Law Forum*, 2011, vol. 22, no. 3, p. 296.

the systematic nature of the attack may be inferred), here the ICC Prosecutor did not establish the systematic requirement of the attack, notwithstanding her earlier finding on the existence of a State policy aimed at suppressing the Maydan protest movement.<sup>56</sup> As discussed elsewhere, the Prosecutor overlooked the existence of a State policy as an important indicator of the systematic nature of the attack, as well as failed to consider additional indicators attesting to the systematicity of the attack directed against the Maydan protesters.<sup>57</sup> In the analysis section on the policy element, the ICC Prosecutor recognized that the acts of violence were not “mere aggregate of random acts”.<sup>58</sup> However, while discussing the systematic requirement, the ICC Prosecutor considers that the crimes “do not necessarily appear to have been carried out in a consistent, organized manner or on regular or continual basis”.<sup>59</sup> It is somehow paradoxical that the acts of violence, which encompassed killing by security forces of over 75 persons and injuring over 700 at the peak of violence, were considered by the ICC Prosecutor to have been carried out in a completely unorganized, inconsistent or irregular manner.<sup>60</sup> A high number of casualties resulting from the acts of the security forces and *titushky* acting on orders from the Ukrainian senior officials is indicative of a systematic dimension of the attack. Not only the Ukrainian senior political leadership turned a blind eye to the crimes committed against protesters, but it also condoned such crimes by failing to effectively prosecute perpetrators.

As argued in greater detail elsewhere, other indicators of the systematic nature of the attack include: (1) thorough organization of the attacks evidenced by a high degree of organization of the Ukrainian security forces and *titushky* who coordinated in quelling the protests; (2) the existence of a regular pattern of behaviour demonstrated by the Ukrainian security forces and *titushky* in terms of characteristics, the targeted population, the alleged perpetrators and location; (3) repeated and continuous commission of crimes directed against the protesters who opposed the former government; (4) condoning of crimes by the Ukrainian political leadership and failure to sanction the commission of crimes; (5) implication of high-level political leaders in the commission of crimes, including,

---

<sup>56</sup> 2015 OTP Report, para. 93, see *supra* note 37.

<sup>57</sup> Marchuk, 2017, pp. 62-63, see *supra* note 46.

<sup>58</sup> 2015 OTP Report, para. 92, see *supra* note 37.

<sup>59</sup> *Ibid.*, para. 98.

<sup>60</sup> Marchuk, 2017, pp. 63-64, see *supra* note 46.



among others, the former President of Ukraine, Viktor Yanukovych, the former Minister of Interior Affairs, Vitaliy Zakharchenko, the former General Prosecutor of Ukraine, Viktor Pshonka; and (6) involvement of substantial public and private resources to quell the Maydan protests (around 11,000 law enforcement officers and hundreds of *titushky* were deployed in Kyiv on public order duties during the Maydan protests).<sup>61</sup>

What are the conclusions to be drawn from the ICC Prosecutor's findings with respect to the Maydan crimes at the preliminary examination stage? First, by narrowly construing the widespread or systematic requirement of crimes against humanity, the ICC Prosecutor overlooked the interests of justice and denied the judges an opportunity to decide on whether the crimes satisfied the threshold of crimes against humanity.<sup>62</sup> There is a clear gap in the jurisprudence of the ICC, which has not been addressed yet, as to how the systematic element interacts with the element of a State or organizational policy. Shedding light on the theoretical understanding of crimes against humanity is not only significant in the context of the ICC Prosecutor's inquiry into the Maydan crimes, but is of utmost importance for the future development of the law on crimes against humanity.

Second, from a purely strategic perspective, the ICC Prosecutor's might have missed an opportunity to enhance the fragile legitimacy of the Court plagued by the African bias claims and boost the credibility of international justice in Ukraine. In the absence of any credible prosecutions of the Maydan crimes at the national level and the deficit of trust in the work of the PGO and national courts, the general public's only hope is that the ICC could deliver justice.<sup>63</sup> Failing to address the Maydan crimes

---

<sup>61</sup> *Ibid.*, pp. 64-66.

<sup>62</sup> *Ibid.*, p. 67. The Pre-Trial Chamber cannot review the ICC Prosecutor's decision not to proceed with an investigation into the Maydan crimes. This could have been only possible if the decision was solely based on the interests of justice criterion. See also ICC Statute, Article 53(3).

<sup>63</sup> Valentyna Polunina, "Unfinished Business: Acceptance of International Criminal Justice in Ukraine", in Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa (eds.), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, International Nuremberg Principles Academy, Nuremberg, 2017; Svitlana Dorosh, "Кров Майдану: кінця розслідуванню не видно" (Maydan Blood: No Prospects of Investigation Soon), in *BBC News*, 15 February 2017 (<http://www.legal-tools.org/doc/ea47a0/>). For the latest updates on the progress of national proceedings concerning the Maydan crimes, consult PGO Register, see *supra* note 3.

at the national and international levels only reinforces the perception of impunity of top political leadership who commit crimes against their own nationals.

Third, it appears that the ICC Prosecutor applied an unreasonably high evidentiary standard at this stage of proceedings, as the reasonable basis standard suffices at the stage of seeking Pre-Trial Chamber's authorization to initiate an investigation. The information available to the Prosecutor during the preliminary examination does not have to be "comprehensive" or "conclusive" of the alleged crimes, since it is only necessary for the Pre-Trial Chamber to arrive at the conclusion that "a sensible or reasonable justification for a belief" that the crimes within the jurisdiction of the Court have been committed exists.<sup>64</sup>

As soon as the ICC Prosecutor's decision with respect to the Maydan crimes became public, various NGOs and human rights activists in Ukraine claimed that the Ukrainian PGO was largely to blame for not furnishing the ICC Prosecutor with the sufficient information regarding the crimes committed during the Maydan protests.<sup>65</sup> There were calls of encouragement addressed to the civil society and other relevant stakeholders to provide more information that could persuade the ICC Prosecutor to change her mind with respect to Ukraine's first declaration accepting the jurisdiction of the Court. There were suggestions to focus on providing evidence on the widespread nature of the acts of violence directed against a larger group of victims and covering a broader geographical area, as well as providing evidence of a carefully planned decision by top political leadership to unleash violence against protesters, thus demonstrating that the acts of violence were not the result of indiscriminate and spontaneous response to the Maydan protest movement.<sup>66</sup> In 2016, legal representatives of families of victims of the Maydan crimes (known as 'Heaven's Hundred') submitted additional evidence to the ICC, arguing that the crimes were carefully orchestrated by the top political leadership and satisfied the systematic requirement of crimes against hu-

---

<sup>64</sup> Kenya Article 15 Decision, paras. 27-35, see *supra* note 47.

<sup>65</sup> "'No crimes against humanity on Euromaidan' finding of the ICC may be result of poor prosecutor's work", in *Euromaidan Press*, 18 November 2015 (<http://www.legal-tools.org/doc/e8a03a-1/>).

<sup>66</sup> Ukraine Crisis Media Center, 25 November 2015 (<http://www.legal-tools.org/doc/fdfe61/>).

manity.<sup>67</sup> At the same time, the General Prosecutor of Ukraine, Yuriy Lutsenko, announced that more evidence regarding the Maydan crimes would be submitted to the ICC.<sup>68</sup> Later that year, the PGO representative revealed that the analysis of evidence with respect to the Maydan crimes took more time, given that only one prosecutor was in charge of systematizing the evidence on the Maydan crimes.<sup>69</sup> From the public reports, it is not entirely clear whether the PGO submitted additional evidence to the ICC. It is also difficult to understand why the PGO is not willing to allocate more resources to deal with the analysis of evidence on the Maydan crimes, as the ICC is heavily dependent upon the quality of evidence furnished by national authorities at the stage of preliminary examination.

### **12.5. The ICC Prosecutor's Preliminary Examination into the Conflict in Eastern Ukraine (Declaration II)**

Given a limited scope of the first declaration that only focused on the Maydan crimes, the Ukrainian government lodged yet another declaration accepting the jurisdiction of the ICC that covered the crimes committed in the context of the ongoing fighting in eastern Ukraine and at the territory of the occupied Crimea.<sup>70</sup> As outlined in the declaration of 8 September 2015, it was submitted “for the purpose of bringing senior officials of the Russian Federation and leaders of terrorist organizations ‘DNR’ and ‘LNR’ [...] in respect of crimes against humanity and war crimes [...] committed on the territory of Ukraine from 20 February 2014 and to the present time”. Unlike the first declaration, which is limited in its temporal scope, the second declaration includes an open-ended temporal jurisdictional clause.

---

<sup>67</sup> “Адвокати родин “Небесної Сотні” передали справу до Міжнародного суду в Гаазі” (Lawyers Representing Families of “Heaven’s Hundred” Submitted Evidence to the ICC in The Hague), in Високий Замок, 6 October 2016 (<http://www.legal-tools.org/doc/3b06e4/>).

<sup>68</sup> “Документи у справі Майдану передадуть в Міжнародний кримінальний суд за 2-3 місяці” (Evidence in the case of Maydan will be submitted to the ICC in 2-3 months), in Zaxid.net, 23 November 2016 (<http://www.legal-tools.org/doc/013762/>).

<sup>69</sup> Human Rights Information Centre, “У Генпрокуратурі лише один прокурор систематизує злочини під час Майдану для Гаазького суду – Горбатюк” (In the General Prosecutor’s Office there is only one prosecutor to systematize evidence on the Maydan crimes for the ICC in The Hague – Gorbatyuk), 19 December 2016 (<http://www.legal-tools.org/doc/2b5351/>).

<sup>70</sup> Declaration II, see *supra* note 1.

The declaration explicitly alleges the responsibility of “senior officials of the Russian Federation” and “leaders of terrorist organizations DNR and LNR”. It is important to keep in mind that the ICC Prosecutor is not obligated to limit the scope of her preliminary examination to the parties as identified in Ukraine’s declaration.<sup>71</sup> By nature of her mandate, the Prosecutor will have to examine the responsibility of *all* parties to the conflict, including the responsibility of Ukrainian armed forces. Non-governmental organizations reporting on the conflict in Ukraine have on many occasions condemned both Ukrainian governmental forces and separatist forces for indiscriminate attacks against the civilian population that involved the use of weapons incapable of distinguishing between civilian and military objects with sufficient accuracy.<sup>72</sup>

With the escalation of the hostilities in eastern Ukraine in April 2014, the Ukrainian government declared that it was waging an anti-terrorist offensive against the pro-Russian separatists in eastern Ukraine. Despite Ukraine’s treatment of the DNR and LNR organizations as terrorist groups, they have been recognized by international organizations and civil society as parties to an armed conflict, which is governed by the rules of international humanitarian law.<sup>73</sup> Hence, Ukraine’s qualification of the members of the DNR and LNR as “militant-terrorists” is of no legal significance to the ICC. In any case, the Court can neither exercise its jurisdiction over the crime of terrorism nor over a war crime of spreading terror among the civilian population.

As for the responsibility of senior Russian leaders alleged in Ukraine’s declaration, the ICC Prosecutor is tasked with identifying suspects at a later stage of proceedings, provided that the Pre-Trial Chamber will authorize a full-scale investigation into the situation of Ukraine. If

---

<sup>71</sup> OTP 2013 Policy Paper, para. 27, see *supra* note 52.

<sup>72</sup> “Eastern Ukraine: Both Sides Responsible for Indiscriminate Attacks”, in Amnesty International, 6 November 2014 (<http://www.legal-tools.org/doc/5f268e/>); “Ukraine: Rising Civilian Death Toll. Unlawful Unguided Rocket Attacks on Populated Areas”, in Human Rights Watch, 3 February 2015 (<http://www.legal-tools.org/doc/378f7b/>). More generally, see also FIDH Report, see *supra* note 31.

<sup>73</sup> ICRC, Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law, 23 July 2014 (<http://www.legal-tools.org/doc/24665e/>); “Ukraine: Escalation Triggers Laws of War”, in Human Rights Watch, 30 June 2014 (<http://www.legal-tools.org/doc/3764b5/>); ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, 14 November 2016, paras. 168-169 (<http://www.legal-tools.org/doc/f30a53/>) (‘2016 OTP Report’).

the case moves forward, the ICC Prosecutor will have some difficult choices to make given the highly politicized context in which the annexation of Crimea and the escalation of hostilities in eastern Ukraine have taken place. Senior Russian leaders have denied any wrongdoing in annexing Crimea, claiming that the peninsula historically belongs to Russia and was incorporated into the territory of Russia based on free will of the inhabitants of Crimea during the referendum.<sup>74</sup> Likewise, Russia denies any widespread or systematic instances of crimes committed against the members of the Crimean Tatar and ethnic Ukrainian communities.<sup>75</sup>

As for the situation in eastern Ukraine, Russian leaders deny that they have been orchestrating the conflict from behind the scenes by providing continuous support to the pro-Russian separatist groups in the form of funds, arms, weaponry and manpower.<sup>76</sup> Although Russia has not ratified the Rome Statute and recently withdrew its signature from the Statute,<sup>77</sup> the Court will be able to exercise its jurisdiction over Russian nationals, provided that the crimes have been committed at the territory of Ukraine. By withdrawing its signature from the Rome Statute, Russia clearly signalled that the ICC Prosecutor should not count on any form of cooperation with respect to the situation of Ukraine, unlike the cooperation it enjoyed with respect to the situation of Georgia.

### **12.5.1. International, Non-International or Hybrid Armed Conflict in Ukraine?**

In the report on the preliminary examination activities, the ICC Prosecutor finds that the situation in Crimea amounts to an international armed conflict between Ukraine and the Russian Federation.<sup>78</sup> As a starting point of the conflict, the Prosecutor took 26 February 2014, when Russia deployed its armed forces in the territory of Crimea without the consent of the

---

<sup>74</sup> Crimea documentary, see *supra* note 6.

<sup>75</sup> International Court of Justice, *Ukraine v. Russian Federation*, Oral hearings on indication of provisional measures, verbatim record, 7 March 2017, pp. 53-62, see *supra* note 13.

<sup>76</sup> *Ibid.*, pp. 16-22 (per Ilya Rogachev representing the government of the Russian Federation before the ICJ). See also “Рогозин объяснил, почему Россия не поставляет оружие Киеву (Rogozin explained why Russia does not supply weapons to Kiev)”, in *NTV*, 1 July 2015 (<http://www.legal-tools.org/doc/fe5456/>).

<sup>77</sup> Sergey Sayapin, “Russia’s Withdrawal of Signature from the Rome Statute Would Not Shield its Nationals from Potential Prosecution at the ICC”, in *EJIL: Talk!*, 21 November 2016.

<sup>78</sup> 2016 OTP Report, para. 155, see *supra* note 73.

Ukrainian government. Further to this, the Prosecutor finds that the law of international armed conflict would continue to apply after 18 March 2014 “to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation”.<sup>79</sup> The ICC Prosecutor was not required to consider whether the intervention which led to the occupation was lawful or not, since for the purposes of the Rome Statute, an international armed conflict may exist “if one or more States partially or totally occupies the territory of another State, whether or not the occupation meets with armed resistance”.<sup>80</sup> The findings of the ICC Prosecutor with respect to the existence of an international armed conflict at the territory of Crimea is hardly surprising, as it is commonly known that Russia exercises its effective control over Crimea, as well as that the rules governing the law of occupation would apply even in the absence of any armed resistance.<sup>81</sup>

The classification of the conflict in eastern Ukraine was far more problematic, as it shares characteristics of both an international and a non-international armed conflict. The ICC Prosecutor found that by 30 April 2014, the level of intensity of hostilities between Ukrainian government forces and pro-Russian separatist armed groups, as well as the level of organization of parties to a conflict were sufficient to qualify the situation as a non-international armed conflict and trigger the application of the law of armed conflict.<sup>82</sup> In parallel to a non-international armed conflict, the Prosecutor found that evidence on mutual shelling by Russia and Ukraine, as well as their detention of each other’s military personnel, point to direct military engagement between Russian and Ukrainian armed forces, and therefore, suggest the existence of an international armed conflict in eastern Ukraine from 14 July 2014 onwards.<sup>83</sup>

Given the allegations of Russia’s continuous support of the armed groups in eastern Ukraine, the nature of such support may transform the otherwise non-international armed conflict to an international armed con-

---

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Human Rights Watch, “Questions and Answers: Russia, Ukraine, and International Humanitarian and Human Rights Law”, 21 March 2014 (<http://www.legal-tools.org/doc/d3f028/>); ICRC, “Occupation and International Humanitarian Law: Questions and Answers”, 4 August 2004 (<http://www.legal-tools.org/doc/aac441/>).

<sup>82</sup> 2016 OTP Report, para. 168, see *supra* note 73.

<sup>83</sup> *Ibid.*, para. 169.

flict. Therefore, the ICC Prosecutor is examining allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine.<sup>84</sup> If the ICC Prosecutor were to establish the existence of a single international armed conflict in eastern Ukraine, this would entail the application of the Rome Statute's provisions relevant to an armed conflict of international character.

The overall control test, as defined by the ICTY Appeals Chamber in *Tadić*, implies a situation when a State goes beyond mere financing and equipping of opposition groups and participates in the planning and supervision of military operations, thus qualifying an armed conflict for the status of an international armed conflict.<sup>85</sup> In the context of Ukraine's case, the ICC Prosecutor will have to assess whether the available information shows that "Russian authorities have provided support to the armed groups in the form of equipment, financing and personnel, and also whether they have generally directed or helped in planning actions of the armed groups in a manner that indicates they exercised genuine control over them".<sup>86</sup> At the moment, the OTP is undertaking a detailed analysis of the relevant evidence in order to establish whether there exists a single international armed conflict, or an international armed conflict that runs in parallel to a non-international armed conflict.<sup>87</sup>

### **12.5.2. No Prospects of Justice in Eastern Ukraine without the ICC Prosecutor's Involvement?**

The publicly available information indicates that Ukraine has done little to prosecute the crimes committed in eastern Ukraine. Despite compelling evidence of the commission of both war crimes and crimes against humanity, it is noted by human rights experts that "there is a little sign of justice done at the local level".<sup>88</sup> Numerous reports, public statements and expert opinions shed light on the difficulties encountered by the Ukrainian

---

<sup>84</sup> *Ibid.*, para. 170.

<sup>85</sup> ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1-A, paras. 131, 137, 145 (<http://www.legal-tools.org/doc/8efc3a/>).

<sup>86</sup> 2016 OTP report, para. 170, see *supra* note 73.

<sup>87</sup> ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2017*, 4 December 2017, para. 95 ('2017 OTP Report') (<http://www.legal-tools.org/doc/e50459/>).

<sup>88</sup> International Partnership for Human Rights ('IPHR'), Submission to the International Criminal Court on war crimes and crimes against humanity in Ukraine, 20 October 2015 (per Brigitte Dufour, Director of IPHR) (<http://www.legal-tools.org/doc/d44c7d/>).

authorities in dealing with the effective investigation and prosecution of war crimes and crimes against humanity.

One of the most serious impediments to the effective investigation of the crimes committed in the context of the conflict is the lack of technical and financial capabilities, including the lack of human resources in conducting pre-trial investigation of international crimes. This is complicated by the lack of professional qualifications of investigators to deal with the crimes against the backdrop of hybrid warfare in eastern Ukraine and uncertainty of the situation on the ground.<sup>89</sup> The local law enforcement units are understaffed, as many left their work or changed their allegiance to the DNR or LNR groups following the escalation of violence in 2014.<sup>90</sup> Those who remain employed in the law enforcement units lack motivation to effectively investigate the crimes, given the uncertainty surrounding the conflict in eastern Ukraine, rampant institutional corruption, unclear aspects on the potential application of amnesties to certain categories of individuals, as well as personal non-work related connections (such as family and friends) to suspects.<sup>91</sup> Other reasons hindering the effective prosecution of crimes in eastern Ukraine include “the lack of transparency of the actions of Ukrainian authorities on separatist-controlled territories, the highly politicized context of investigations and entrenched problems in the functioning of the Ukrainian justice system”.<sup>92</sup>

Given Ukraine’s failed attempts at ratifying the Rome Statute, the Criminal Code of Ukraine, in its part on the crimes against peace, security and international order (Chapter XX), does not contain an elaborate list of crimes corresponding to the catalogue of crimes in the Rome Statute, hindering the correct qualification of crimes as war crimes or crimes against

---

<sup>89</sup> Center for Civil Liberties, “У ПОШУКАХ СПРАВЕДЛИВОСТІ. Розслідування злочинів, пов’язаних із порушенням права на життя, особисту недоторканість і свободу від тортур, вчинених у зоні АТО: недоліки роботи слідчих органів та рекомендації від правозахисників” (Quest for Justice. Investigation of Crimes Dealing With the Violation of the Right to Life, Security of Person and the Freedom from Torture in the Zone of “ATO”: Shortcoming of the Work of Investigative Units and Recommendations from Human Rights Defenders), 2016, p. 8.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> IPHR, “Ukraine: IPHR delegation submits communication on war crimes and crimes against humanity to the ICC”, 26 October 2015 (per Roman Romanov, Human Rights and Justice Program Initiative Director at the International Renaissance Foundation in Ukraine) (<http://www.legal-tools.org/doc/e0cf21/>).



humanity.<sup>93</sup> To demonstrate its commitment to international law, Ukraine should prioritize the ratification of the Rome Statute, as it would catalyse the development of the national criminal justice system and enable the prosecution of international crimes. In its resolution 2112 (2016), PACE (the Parliamentary Assembly of the Council of Europe) strongly urged Ukraine to bring its national legislation, including the Criminal Code and the Criminal Procedural Code, in conformity with the international criminal law standards, in particular with respect to the status of captured persons and the crime of torture.<sup>94</sup>

### **12.5.3. The ICC Prosecutor's Access to Evidence and Co-operation with National Authorities in Ukraine**

Unlike other situations where access to evidence may prove to be difficult for the ICC Prosecutor given the volatility of the situation on the ground, it is possible to gain access to abundant materials on the crimes committed in eastern Ukraine. However, such access is far more challenging on the territory of Crimea due to Russia's refusal to allow international organizations to visit the peninsula. Even if the ICC Prosecutor were to send requests to obtain information from *de facto* Russian authorities in Crimea, this would most likely be denied (it is not clear whether this has been attempted at all). Russia clearly signalled that the ICC should not be counting on its co-operation with the Russian authorities when it withdrew its signature from the Rome Statute. Nevertheless, there are many credible reports produced by international organizations on the situation in Crimea.<sup>95</sup> Also, it is possible to collect witness testimonies on the crimes potentially falling within the jurisdiction of the ICC from IDPs (internally displaced persons) who left Crimea for mainland Ukraine. National au-

---

<sup>93</sup> The law draft on amending the Criminal Code of Ukraine in part on international crimes has been recently subject to public consultations initiated by the Ministry of Justice. See проект Закону України «Про внесення змін до деяких законодавчих актів щодо забезпечення гармонізації кримінального законодавства з положеннями міжнародного права» (Law Draft of Ukraine "On amending some legislative acts in order to ensure harmonisation of criminal legislation with the norms of international law" (<http://www.legal-tools.org/doc/e9cd62/>).

<sup>94</sup> PACE, The humanitarian concerns with regard to people captured during the war in Ukraine, 21 April 2016, Resolution 2112 (2016), para. 12.1.3 (<http://www.legal-tools.org/doc/853ef5/>).

<sup>95</sup> HRW Crimea report, see *supra* note 8; Andrii Klymenko, *Human Rights Abuses in Russian-Occupied Crimea*, Atlantic Council and Freedom House, March 2015 (<http://www.legal-tools.org/doc/c8f6e6/>).

thorities, in particular the Office of the Prosecutor in the Autonomous Republic of Crimea (in exile), together with the NGOs working in Ukraine have been instrumental in collection of evidence by conducting interviews with witnesses and victims and documenting instances of crimes. The active engagement of national authorities and other relevant stakeholders is extremely important at the preliminary examination stage, since the OTP “does not enjoy investigative powers, other than that for the purpose of receiving testimony at the seat of the Court”.<sup>96</sup> In addition to collection of information through Article 15 communications, the OTP held a number of meetings with the Government of Ukraine, national and international organizations at the seat of the Court, as well as during its missions to Ukraine in 2016 and 2017.<sup>97</sup>

Given the lack of public trust placed by Ukrainians in its public institutions and law enforcement agencies, the ICC is viewed as a credible institution that could deliver justice in Ukraine. Civil society in Ukraine plays an incredibly important role in reporting on the conflict, collecting and systematizing evidence that could be used by the ICC Prosecutor. In October 2015, the International Partnership for Human Rights submitted a communication to the ICC detailing instances of war crimes and crimes against humanity in Ukraine. The communication was accompanied by a compilation of over 300 testimonies of victims and witnesses. Although the communication notes the commission of crimes by both sides to the conflict, the collected evidence primarily concerns crimes committed by the pro-Russian separatist forces noting security issues related to the access to the separatists controlled territories in eastern Ukraine.<sup>98</sup> As noted above, legal representatives of the families of the victims of the Maydan crimes, having lost trust in national authorities, submitted additional evidence, hoping that it will make the ICC Prosecutor re-assess her findings on the absence of crimes against humanity.

---

<sup>96</sup> OTP 2013 Policy Paper, para. 85, see *supra* note 52.

<sup>97</sup> 2016 OTP Report, para. 188, see *supra* note 73; 2017 OTP Report, para. 116, see *supra* note 87.

<sup>98</sup> IPHR, “Ukraine: IPHR delegation submits communication on war crimes and crimes against humanity to the ICC”, 26 October 2015 (<http://www.legal-tools.org/doc/e0cf21/>). The evidence submitted to the ICC encompassed five major categories of the alleged crimes, such as torture, killings, shelling, looting and treatment of prisoners of war.

### 12.6. What's Next? Will the ICC Prosecutor Move Forward with an Investigation?

There are high hopes in Ukraine that the ICC Prosecutor will move forward with the two declarations accepting the jurisdiction of the ICC. Whereas the ICC Prosecutor's initial assessment of the Maydan crimes fell short of those expectations, it is nevertheless hoped that the Prosecutor will re-assess the Maydan crimes based on the submitted additional evidence.<sup>99</sup> Given that the ICC judges cannot exercise quality control in the form of judicial oversight over the ICC Prosecutor's decision not to proceed with an investigation of the Maydan crimes, it is important that the ICC Prosecutor review in an expeditious manner additional evidence submitted to the Court in relation to those crimes and shed more light on the interpretation of a widespread of systematic attack in the context of crimes against humanity. In addition to bringing more clarity to the law of crimes of humanity, the involvement of the ICC Prosecutor will be deemed extremely valuable by Ukrainians who are deeply dissatisfied with a slow pace of national proceedings against those who were involved in the Maydan crimes. However, it should be communicated more clearly at the national level that even if the ICC Prosecutor were to move forward with the allegations of crimes against humanity committed during the Maydan protests, this would not cover the prosecution of low-ranking officials, but will only be limited to senior officials who authorized and tolerated the use of violence by the law enforcement agencies against the demonstrators.<sup>100</sup> This is in accordance with the principle of transparency that prominently features in the OTP policy paper with the aim "to promote a better understanding of the process and to increase predictability" in order to dissuade "undue expectations that an investigation will necessarily be opened".<sup>101</sup>

Obtaining those senior officials would be another obstacle encountered by the ICC Prosecutor, since the former President Yanukovych and his entourage left Ukraine for neighbouring Russia, which will most likely be unwilling to surrender the suspects residing on its territory to the ICC. However, the symbolic value of outstanding arrest warrants against senior

---

<sup>99</sup> 2017 OTP Report, para. 117, see *supra* note 87. The latest report states that the new information related to the Maydan crimes is being examined.

<sup>100</sup> OTP 2013 Policy Paper, para. 66, see *supra* note 52.

<sup>101</sup> *Ibid.*, para. 94.

Ukrainian officials cannot be underestimated. First of all, this will provide a certain sense of relief to Ukrainians that something is being done to address crimes committed by the former government against its own nationals. This could also have a catalysing impact on the prosecution of crimes committed by low-ranking perpetrators at the national level.<sup>102</sup> Coupled with other initiatives to achieve post-conflict justice in Ukraine, the intervention by the ICC Prosecutor would promote reconciliation at the national level and reinforce the idea that the international community has not abandoned Ukraine to deal with its problems. However, the ICC cannot do the work of Ukrainian national authorities in investigating the crimes, as the prospects of the ICC Prosecutor looking into the Maydan crimes largely depend upon the quality of evidence provided by national authorities, in particular at the initial stage of the preliminary examination. While the OTP does not enjoy investigative powers at this preliminary stage, it is important that the ICC Prosecutor utilize more amply its opportunities to consult with the competent authorities, the affected communities and civil society regarding the information received on the alleged crimes and the ongoing upsurges of violence. This communication strategy will undoubtedly enhance the quality control in the preliminary examination, as it will demonstrate to the relevant stakeholders the seriousness of the OTP's approach towards achieving its goals of ending impunity and prevention.<sup>103</sup>

Whereas the ICC Prosecutor had her doubts whether the violence during the Maydan protests satisfied the requirements of crimes against humanity, any similar doubts should be dispelled with respect to the crimes committed in eastern Ukraine. There are numerous accounts of war crimes and crimes against humanity having taken place on the rebel-controlled territories in eastern Ukraine. The most challenging part of the ICC's Prosecutor's job is to establish whether the crimes have taken place in the context of a single international armed conflict. If the Prosecutor were to establish Russia's overall control, it would be undoubtedly met by strong resistance on the part of Russia that would most likely accuse the Court of politically motivated decisions. Although Russia's occupation of Crimea entails applicability of the rules of international humanitarian law

---

<sup>102</sup> *Ibid.*, para. 100 where it is stated that "States bear the primary responsibility for preventing and punishing crimes, while proceedings before the ICC should remain an exception to the norm".

<sup>103</sup> *Ibid.*, paras. 100-106.

and qualifies as an international armed conflict, the ICC Prosecutor would need to weigh her options carefully whether to proceed with an investigation into the situation in Crimea, as she will struggle to obtain any suspects into the custody to the Court and might be left with cases that will be impossible to move from a dead point.

On the one hand, acting on Ukraine's declarations would enhance legitimacy of the Court and demonstrate that the ICC Prosecutor is willing to focus on the situations geographically removed from the African continent. On the other hand, adding another situation to the workload of the Court – one in which the prospects of obtaining suspects into the custody of the Court are bleak and entail confrontation with a permanent member of the UN Security Council – could potentially lead to yet another legitimacy crisis. The only way to enhance the quality control at this stage would be for the ICC Prosecutor to be actively engaged in a meaningful dialogue with all the relevant stakeholders and to be transparent about the OTP preliminary examination activities in order to fend off any potential bias or politicization claims at a later stage of proceedings. It may be also beneficial if the ICC Prosecutor prioritizes the preliminary examinations in situations where the conflict or violence are still ongoing, or at least adopts a more proactive strategy in calling upon the parties to refrain from engaging in conduct that could potentially be prosecuted by the ICC. The situation in Ukraine tests the ability of the Court to deal with the ongoing conflict at the heart of Europe that shows no signs of abating. Hence, sitting idle and waiting for the conflict to be resolved by itself is not an option. While action is expected from the ICC Prosecutor, Ukraine has finally to stop playing political games and re-affirm its commitment to the ICC by ratifying the Rome Statute without any further ado.

Publication Series No. 32 (2018):

## **Quality Control in Preliminary Examination: Volume I**

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book).

TOAEP

Torkel Opsahl  
Academic EPublisher

**Torkel Opsahl Academic EPublisher**

E-mail: [info@toaep.org](mailto:info@toaep.org)

URL: [www.toaep.org](http://www.toaep.org)

**CILRAP:**

Centre for International  
Law Research and Policy

ISBN 978-82-8348-123-5



PURL: <http://www.legal-tools.org/doc/8ae9bf/>