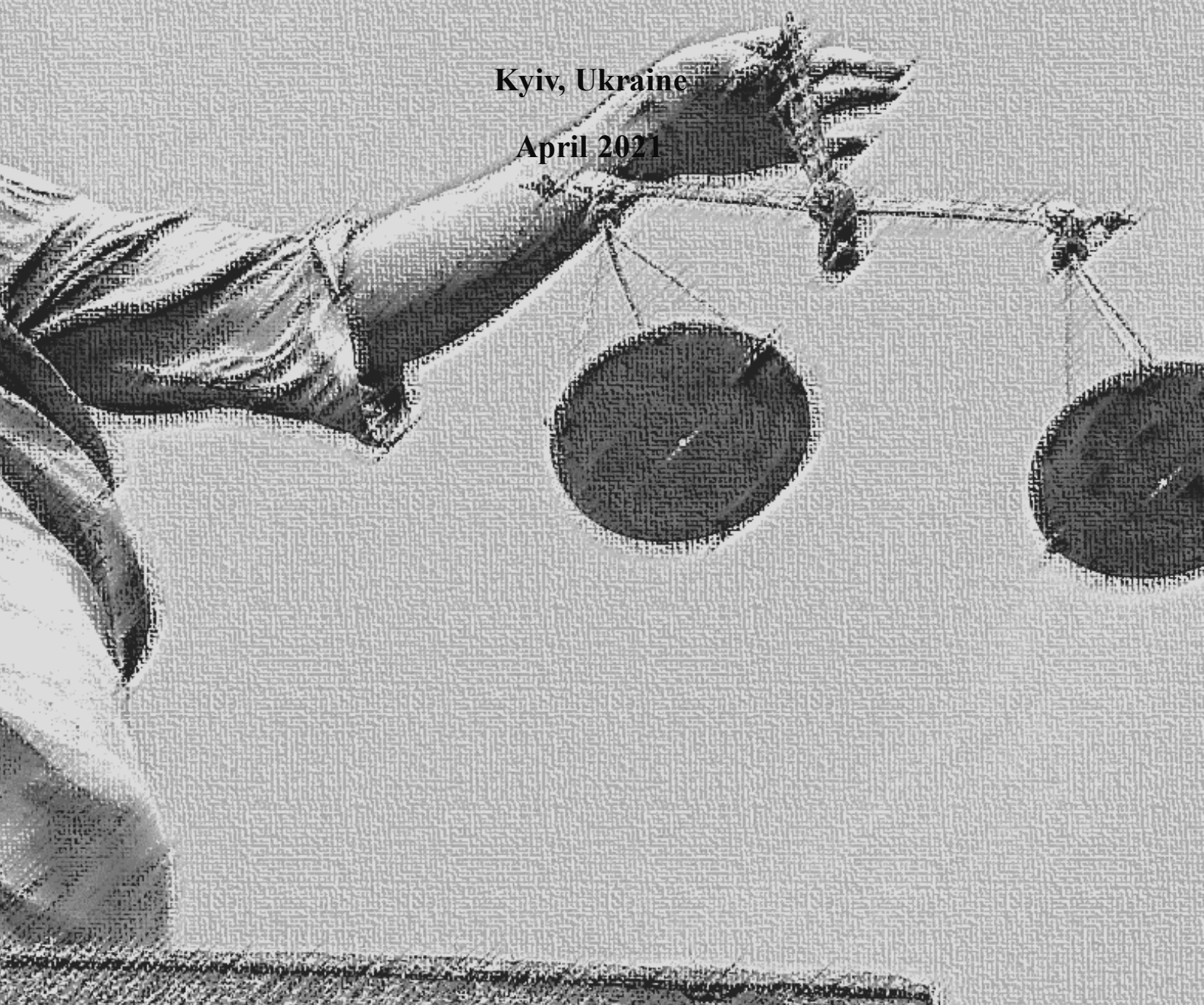


Ukraine and the International Criminal Court

(updated)

Kyiv, Ukraine

April 2021





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April 2021

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List of Abbreviations

ASP – Assembly of States Parties

CAR – Central African Republic

DPR – Donetsk People’s Republic

DRC – Democratic Republic of the Congo

ECHR – European Court of Human Rights

EU – European Union

GoU – Government of Ukraine

GRC – Global Rights Compliance

HRMMU – United Nations Human Rights Monitoring Mission in Ukraine

IBA – International Bar Association

ICC – International Criminal Court

ICJ – International Court of Justice

ICRC – International Committee of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

IDP – Internally Displaced Persons

IHL – International Humanitarian Law

ISIS – Islamic State of Iraq and Syria

LPR – Luhansk People’s Republic

LRA – Lord’s Resistance Army

MP – Member of Parliament

NGO – Non-Governmental Organisation

OHCHR – Office of the United Nations High Commissioner for Human Rights

Omnibus Resolution – Resolution on Strengthening of the International Criminal Court and the Assembly of States Parties

OPCD – Office of Public Counsel for the Defence

OPCV – Office of the Public Counsel for Victims

OSCE – Organization for Security and Co-operation in Europe

PGA – Parliamentarians for Global Actions

PNU – Party of National Unity

POW – Prisoner of war

SBU – Security Service of Ukraine

SCSL – Special Court for Sierra Leon

Trust Fund – ICC Trust Fund for Victims

UNSC – United Nations Security Council

UN – United Nations

UNCHR – UN Commission on Human Rights

UK – United Kingdom

UPC/FPLC – Congolese Patriotic Union/Patriotic Forces for the Liberation of Congo

UPC/PR – Congolese Patriotic Union/Popular Rally

Venice Commission – European Commission for Democracy through Law

Verkhovna Rada – Parliament of Ukraine

VPRS – Victims Participation and Reparations Section

VWU – Victims and Witnesses Unit

Executive Summary

This Report is an updated version of the report that Global Rights Compliance (“GRC”) published in 2016 (“Report”). Between July 2020 and April 2021, GRC examined the developments that occurred between March 2016 and April 2021 regarding Ukraine’s relationship with the International Criminal Court (“ICC”) and its governing law—the Rome Statute. The Report presents GRC’s findings in two chapters. The first chapter of the Report offers a reference guide to key issues relating to Ukraine’s relationship with the ICC and the Rome Statute, including how the ICC processes a criminal case.

For those who wish to explore the legal technicalities of those topics, the second chapter provides a more theoretical and technical overview of the issues. Chapter Two follows the same structure as Chapter One. It explains the more difficult aspects of Ukraine’s engagement with the ICC, including discussing the Government of Ukraine’s (“GoU”) domestic and international legal obligations now that it has formally accepted the powers of the ICC by submitting two declarations accepting the jurisdiction of the ICC over events in the disputed territories of Crimea and Eastern Ukraine.

Both chapters centre on the life of an ICC case and are broken into five parts. Part One provides a chronology of Ukraine’s engagement with, and an overview of, the ICC. The chronology begins in 1998 and continues to the present day. The overview identifies the ICC’s basic functions: what the ICC does, and when and how it does it.

Part Two addresses the remit of the ICC’s powers, more formally known as its “jurisdiction”. It defines and addresses some fundamental issues relevant to the ICC’s jurisdiction. These issues include: (i) whether the Government of Ukraine may refer the alleged criminals to the ICC; (ii) whether the ICC will have jurisdiction over crimes relating to Crimea; (iii) whether the ICC can prosecute foreign fighters (e.g. Russians) who have committed crimes in Ukraine; and (iv) how the ICC may handle people who have received a promise (“amnesty”) that they will not be prosecuted for crimes committed during the conflict.

Further, Part Two of Chapters One and Two identifies the crimes that the ICC Prosecutor can investigate and prosecute. This analysis includes discussion of the crime of aggression, including what it is and how and when the ICC will address this crime. Finally, Part Two will consider the implications of Ukraine (potentially) agreeing to be fully bound to (in other words, “ratify”) the Rome Statute of the ICC, as well as how its provisions may be incorporated into domestic law.

Part Three of each chapter addresses the first steps of any case at the ICC—the preliminary examination and investigation. These steps involve the ICC Prosecutor being alerted to a situation where possible crimes within the jurisdiction of the ICC have been committed. The ICC Prosecutor will then consider the available information and determine whether there is a basis to apply to the ICC’s Pre-Trial Chamber to be allowed to proceed with the prosecution of alleged perpetrators. This preliminary examination phase in relation to Ukraine lasted since 25 April 2014 and has recently been completed.

In keeping with the theme of the life of a case, Part Four addresses the sort of information and evidence that will form the basis of any case at the ICC, and will be relevant to Ukraine should the Pre-Trial Chamber grant the Prosecutor’s request to authorise a full investigation. It identifies how individuals, states, and governmental and non-governmental organisations (“NGOs”) may provide information concerning crimes to the ICC Prosecutor and the different types of evidence that may emerge from this information and form the basis of the Prosecutor’s cases. As such, Part Four discusses the question of whether members of NGOs and other types of “first responders”—i.e. those involved in the investigation of international crimes — could be called to give evidence at the ICC, and if so, what sort of information they may expect to have to give to the Court. Finally, Part Four outlines what happens during an ICC trial and sentencing process.

Lastly, Part Five addresses the role that victims of international crimes and witnesses to international crimes have in the ICC’s proceedings. It outlines in particular how a victim may join ICC proceedings and their role in them. It also identifies how the Court protects witnesses and victims. Finally, it considers the question of “reparations”, which is the formal term for compensation for individuals who have suffered as a result of the criminal conduct of an individual found guilty by the ICC.

GRC considers the information outlined in this Report to be most essential to understanding Ukraine’s developing relationship with the ICC and international justice as a whole. Although Ukraine appears committed to engaging with the ICC, it has yet to ratify the Rome Statute. Accordingly, this Report addresses popular misconceptions and beliefs about the country and the Court, and outlines the situation now and the road ahead for Ukraine. This Report accurately describes the nature of the ICC and its remit to foster and inform debate about the process of Ukraine’s involvement with the ICC.

GRC has drafted two further Reports on international humanitarian law (“IHL”). First, GRC conducted an analysis of legal measures aimed at identifying gaps and inconsistencies in the domestic implementation of IHL in the Ukrainian legal system. The Report presents GRC’s findings and offers a detailed assessment of the degree of domestic implementation.

Second, GRC has reviewed the practice of State bodies that are responsible for implementing IHL and the current approach to prosecutions of violations of IHL in conformity with relevant international standards.

This Report is designed to complement the aforementioned two Reports and provide a comprehensive outline of Ukraine’s overall compliance with IHL standards, as well as provide knowledge that will give the full array of IHL stakeholders—including government and non-government actors—the legal “know-how” to achieve vital reform or otherwise enhance accountability efforts in Ukraine.

Background

Since Ukraine gained its independence in 1991, pro-Western and pro-Russian factions have been engaged in a continuous struggle to define the country's identity. Never was this struggle more divisive than during the 2014 Revolution of Dignity—colloquially termed the “Euromaidan Revolution”—and the subsequent conflict in Eastern Ukraine.

Demonstrators first took to Kyiv's Maidan Nezalezhnosti (Independence Square) in November 2013 to protest President Viktor Yanukovich's decision to suspend Ukraine's integration into the EU: rather than signing an Association Agreement with the European Union (“EU”),¹ Yanukovich took a \$15 billion loan from the Russian Federation, understood by some to be a bribe not to sign the EU agreement.² After more than twenty years of state corruption and mismanagement—the promises of the 2004 Orange Revolution still unfulfilled—Ukrainians had had enough.

The protests swelled over the course of the winter, crescendoing in late February. On 18 February, protesters on the Maidan were attacked by pro-government forces, leading to numerous injuries and deaths. According to the United Nations Human Rights Monitoring Mission in Ukraine (“HRMMU”),³ 90 people were killed from 18-20 February alone, with reports alleging that most of the deaths resulted from sniper fire.⁴ Between December 2013 and February 2014, 121 people were killed.⁵ Lacking a defence for this attack on protesters and losing his mandate to govern, President Yanukovich fled the country on 21 February.

At the end of the month, unidentified armed men (since acknowledged to have been members of the Russian military)⁶ began showing up in the Autonomous Republic of Crimea. In addition to occupying government buildings and acquiring *de facto* control over the region, they arranged for a “referendum” on the question of Crimean annexation

¹ Ian Traynor, Oksana Grytsenko, ‘[Ukraine suspends talks on EU trade pact as Putin wins tug of war](#)’ *The Guardian* (UK, 21 November 2013).

² Damien McElroy, ‘[Ukraine receives half price gas and \\$15 billion to stick with Russia](#)’ *The Telegraph* (London, 17 December 2013); ‘[Yanukovich denies taking any bribes from Russia](#)’ *Ukrainska Pravda* (Kyiv, 9 December 2013); ‘[A 3 bln part of a Ukrainian debt owed to Russia will be restructured - Moody's](#)’ *Rianovostiukraina* (Kyiv, 14 December 2015).

³ In March 2014, the Office of the United Nations High Commissioner for Human Rights deployed to Ukraine a Human Rights Monitoring Mission to evaluate and report on the human rights situation and to provide support to the Government of Ukraine in the promotion and protection of human rights. As part of its work, the Mission prepares monthly reports describing the human rights situation and makes recommendations. See ‘[UN Human Rights Monitoring Mission in Ukraine \(UN Ukraine\)](#)’.

⁴ Office of the United Nations High Commissioner for Human Rights (“OHCHR”), ‘[Report on the Human Rights Situation in Ukraine](#)’ (15 April 2014) para. 57. Those who died included 101 Maidan protesters, 17 police officers, 2 members of the non-governmental organisation named “Oplot” and a Crimean Tatar. *Ibid.*

⁵ *Ibid.*

⁶ See e.g. ‘[In Crimea there is an armed invasion of Russia — Kunitsyn](#)’ *The Ukrainska Pravda* (28 February 2014). See also ‘[Putin acknowledges Russian military servicemen were in Crimea](#)’ *Russia Times* (17 April 2014).

to the Russian Federation to be held on 16 March 2014. This referendum violated the Ukrainian Constitution⁷ and its execution is alleged to have been riddled with electoral irregularities.⁸ The referendum results indicated that more than 95% of voters supported joining the Russian Federation.⁹ Accordingly, the “Treaty on Accession of the Republic of Crimea to the Russian Federation” was signed between the representatives of the Russia and the Crimean Republic on 18 March 2014 and promptly ratified by the Russian Federal Assembly.¹⁰ International condemnation soon followed.¹¹

Since Russian involvement on the peninsula began, recurrent human rights violations have been reported, including forced disappearances, torture and restrictions on the freedoms of expression and association.¹²

Just after the annexation of Crimea, large parts of Eastern Ukraine began to destabilise. In Donetsk and Luhansk oblasts, people began to protest against the “coup” in Kyiv and what they perceived to be discrimination against the

⁷ See Constitution of Ukraine, Article 73, which provides that “[i]ssues on altering Ukraine's territory shall be resolved exclusively through an *all-Ukrainian referendum*” (emphasis added); see also Decision of the Constitutional Court of Ukraine in the case referred to pursuant to the constitutional procedure by the Acting President of Ukraine, Head of the Verkhovna Rada of Ukraine and Ukrainian Parliament Commissioner for Human Rights regarding the conformity of the Decree of the Verkhovna Rada of the Autonomous Republic of Crimea on the All-Crimean Referendum with the Constitution of Ukraine (the case on a local referendum in the Autonomous Republic of Crimea) No.2-rp/2014 of 14 March 2014.

⁸ The identified violations include: (i) additional voters lists; (ii) harassment and arbitrary detentions of those protesting the referendum; (iii) harassment and persecution of journalists trying to report violations; (iv) voting at home organised in an impromptu manner; (v) presence of military groups widely believed to be fully or in part composed of Russians. The referendum was initiated and conducted in gross violation of Ukrainian laws as Article 73 of the Constitutions of Ukraine expressly provides that “Issues on altering Ukraine's territory shall be resolved exclusively through an all-Ukrainian referendum.” Given the above, the UN General Assembly in its Resolution 68/262 declared that the referendum “had no validity”. For more details, see OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (15 April 2014) para. 6.

⁹ [‘97% of Crimean population voted for joining Russia’](#) Tyzhden.ua (Kyiv, 17 March 2014).

¹⁰ The Treaty was ratified by the federal law of the Russian Federation of 21.03.2014 N 36-ФЗ entitled “On Ratification of the Treaty Between the Russian Federation and the Republic of Crimea on Accession of the Republic of Crimea to the Russian Federation and the Formation of New Subjects in the Russian Federation” (“О ратификации Договора между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов”), adopted on the 349th (extraordinary) session of the Council of the Federation.

¹¹ For example, on 27 March 2014, the United Nations General Assembly adopted a resolution entitled [“Territorial Integrity of Ukraine”](#). With 100 votes in support, 11 votes against and 58 abstentions, the resolution supported the territorial integrity of Ukraine and called on the state parties and international organisations neither to recognise any alterations in the territorial structure of Ukraine, nor to take any actions that could be interpreted as such recognition. See UNGA Res 68/262 (1 April 2014).

¹² OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (15 April 2014) paras 6, 72, 83, 85; OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (15 May 2014) paras 5, 118, 127, 129, 137, 138, 142-144, 146, 148-154; OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (15 June 2014) paras. 9, 10, 15, 140, 236-238, 241, 284-286, 289-292, 295, 298-303, 305, 307-320, 323, 324; OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (16 September 2014) paras 18, 152-157, 160-162, 165, 172; OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (1 December 2014 to 15 February 2015) paras 19, 20, 92-95, 98, 101, 103; OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (16 August to 15 November 2015) paras. 15, 141, 149-155, 158; OHCHR, [‘Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol, Ukraine 13 September 2017 to 30 June 2018’](#) (10 September 2018) paras 22-25, 31-35, 44-47, 53-56; OHCHR, [‘Report on the human rights situation in Ukraine’](#) (16 May to 15 August 2019) paras 109-110.

Russian-speaking population in Ukraine.¹³ Protesters in the east quickly declared their desire to ally with Russia. In April 2014, conflict broke out between armed separatists in Donetsk and Luhansk oblasts (allegedly supported by Russia) and the Ukrainian law enforcement agencies located there.

On 11 May, pro-Russian separatists organised a referendum on the sovereignty of the Donetsk and Lugansk oblasts, the results of which were allegedly falsified (89.07 percent of Donetsk residents and 96.20 percent of Luhansk residents were said to have voted in favour of independence).¹⁴ Shortly thereafter, locals declared Donetsk the “Donetsk People’s Republic”(“DPR”) and Luhansk the “Luhansk People’s Republic” (“LPR”).

Between April 2014 and April 2018, the Ukrainian Government conducted an “Anti-Terror Operation” in Eastern Ukraine. In 2018, the title changed from the “Anti-Terror Operation” to the “Joint Forces Operation”. Specifically, on 24 February 2018, a law providing a new framework for the GoU to re-establish control over certain areas of Donetsk and Luhansk entered into force,¹⁵ pursuant to which the Joint Operative Headquarters of the Armed Forces of Ukraine are entrusted to counter Russia’s armed aggression against Ukraine.¹⁶ Accordingly, the “Anti-Terror Operation” ended and the “Joint Forces Operation” of the Armed Forces of Ukraine started in April 2018.¹⁷

The conflict in Ukraine has had devastating consequences for the residents of Crimea and Donbas: according to Ukraine’s Ministry of Social Policy, the number of internally displaced persons (“IDPs”) in Ukraine was nearly 1,464,628, as of 13 April 2021.¹⁸ Furthermore, the Office of the Prosecutor of the International Criminal Court has, in the course of its Preliminary Examination, concluded that there is a reasonable basis to believe that a range of war crimes and crimes against humanity have been perpetrated on each of these contested territories. It has found a reasonable basis to believe that the following war crimes were committed from 26 February 2014 onwards, in the period leading up to, and/or in the context of the occupation of the territory of Crimea:

- wilful killing, pursuant to article 8(2)(a)(i);
- torture, pursuant to article 8(2)(a)(ii);
- outrages upon personal dignity, pursuant to article 8(2)(b)(xxi);
- unlawful confinement, pursuant to article 8(2)(a)(vii);
- compelling protected persons to serve in the forces of a hostile Power, pursuant to article 8(2)(a)(v);

¹³ See e.g. ‘[Ukraine crisis: Timeline](#)’ BBC (13 November 2014).

¹⁴ ‘[The Farce of the ‘Referendum’ in Donbas](#)’ OSW (14 May 2014). As previously noted in relation to Crimea, Article 73 of the Constitution of Ukraine provides that “[i]ssues on altering Ukraine’s territory shall be resolved exclusively through an *all-Ukrainian referendum*” (emphasis added). See *supra*, fn. 8.

¹⁵ Law of Ukraine “[On particular aspects of public policy aimed at safeguarding the sovereignty of Ukraine over the temporarily occupied territory of the Donetsk and Luhansk regions of Ukraine](#)” No. 2268 [Online resource] 18 January 2018.

¹⁶ *Ibid.*, art. 9.

¹⁷ Order of the President of Ukraine “[On approval of the decision of the National Security and Defence Council ‘On a large-scale anti-terror operation in the Donetsk and Luhansk regions’ of 30 April 2018](#)” No. 116/2018 [Online resource].

¹⁸ Ministry of Social Policy of Ukraine, [1,464,628 internally displaced persons were registered](#) (13 April 2021).

- wilfully depriving protected persons of the rights of fair and regular trial, pursuant to article 8(2)(a)(vi);
- the transfer of parts of the population of the occupied territory outside this territory (with regard to the transfer of detainees in criminal proceedings and prisoners), pursuant to article 8(2)(b)(viii); and
- seizing the enemy's property that is not imperatively demanded by the necessities of war, with regard to private and cultural property, pursuant to article 8(2)(b)(xiii) of the Rome Statute.¹⁹

The Office of the Prosecutor also concluded that there is a reasonable basis to believe that the following crimes against humanity have been perpetrated in the context of the ongoing occupation of Crimea:

- murder, pursuant to article 7(1)(a);
- deportation or forcible transfer of population (with regard to the transfer of detainees in criminal proceedings and prisoners), pursuant to article 7(1)(d);
- imprisonment or other severe deprivation of physical liberty, pursuant to article 7(1)(e);
- torture, pursuant to article 7(1)(f);
- persecution against any identifiable group or collectivity on political grounds, pursuant to article 7(1)(h); and
- enforced disappearance of persons, pursuant to article 7(1)(j) of the Rome Statute.²⁰

The Office of the Prosecutor concluded that the information available provides a reasonable basis to believe that, in the period from 30 April 2014 onwards, at least the following war crimes were committed in the context of the armed conflict in Eastern Ukraine:²¹

- intentionally directing attacks against civilians and civilian objects, pursuant to article 8(2)(b)(i)-(ii) or 8(2)(e)(i);
- intentionally directing attacks against protected buildings, pursuant to article 8(2)(b)(ix) or 8(2)(iv);
- wilful killing/murder, pursuant to article 8(2)(a)(i) or article 8(2)(c)(i);
- torture and inhuman/cruel treatment, pursuant to article 8(2)(a)(ii) or article 8(2)(c)(i);
- outrages upon personal dignity, pursuant to article 8(2)(b)(xxi) or article 8(2)(c)(ii); and
- rape and other forms of sexual violence, pursuant to article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Rome Statute,²² and

In addition, if the conflict was also international in character, the Office of the Prosecutor is of the view there is a reasonable basis to believe that the following war crimes were committed:

¹⁹ Office of the Prosecutor of the International Criminal Court, ‘[Report on Preliminary Examination Activities 2020](#)’ (14 December 2020), para. 278.

²⁰ *Ibid.*, para. 279.

²¹ Office of the Prosecutor of the International Criminal Court, ‘Report on Preliminary Examination Activities 2016’, para. 189; Office of the Prosecutor of the International Criminal Court, ‘[Report on Preliminary Examination Activities 2020](#)’ (14 December 2020), para. 280.

²² Office of the Prosecutor of the International Criminal Court, ‘[Report on Preliminary Examination Activities 2020](#)’ (14 December 2020), para. 280.

- intentionally launching attacks that resulted in harm to civilians and civilian objects that was clearly excessive in relation to the military advantage anticipated (disproportionate attacks), pursuant to article 8(2)(b)(iv); and
- unlawful confinement, pursuant to article 8(2)(a)(vii) of the Rome Statute.²³

Further, human rights organisations and activists have reported numerous other violations of IHL and international human rights law, including:

- preventing access for humanitarian relief to civilians in need;
- using cultural property for military purposes and as venues where human rights abuses have taken place and/or as *ad hoc* detention centres;
- perfidy (deceiving the enemy by gaining their confidence and leading them to believe the person is entitled to protection under IHL with the intention of betraying that confidence, *i.e.* by flying a white flag of truce and the attacking the enemy;
- use of booby-traps;
- pillage; and
- violations of human rights to equality and non-discrimination, education, peaceful assembly, freedom of association, freedom of expression, freedom of thought, conscience and religion, enjoyment of just and favourable conditions of work, adequate standard of living, respect for private and family life, social security, and the right of minorities to use their own language.²⁴

Additionally, women have frequently become subjects of abuse in the conflict zone.²⁵

From mid-April 2014 to mid-February 2020, the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) recorded approximately 41,000-44,000 casualties (13,000-13,200 fatalities and 29,000-31,000 injuries) amongst the Armed Forces of Ukraine, civilians and members of armed groups in the conflict area in Eastern Ukraine.²⁶ By 31 January 2021, OHCHR recorded a total of 3,375 conflict-related civilian deaths and more than 7,000 injuries among civilians.²⁷ As is well known, an additional 298 people died when Malaysia Airlines flight

²³ *Ibid.*, para. 281.

²⁴ Office of the United Nations High Commissioner for Human Rights (“OHCHR”), [‘Report on the human rights situation in Ukraine’](#) (15 February 2017); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 May 2017); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 August 2017); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 November 2017); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 February 2018); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 May 2018); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 August 2018); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 November 2018); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 February 2019); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 May 2019); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 August 2019); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 November 2019); OHCHR, [‘Report on the human rights situation in Ukraine’](#) (15 February 2020).

²⁵ OHCHR [‘Report on the Human Rights Situation in Ukraine’](#) (16 September 2014) paras 147-149; OHCHR [‘Report on the Human Rights Situation in Ukraine’](#) (1 December 2014 to 15 February 2015) para. 62.

²⁶ OHCHR [‘Report on the human rights situation in Ukraine’](#) (12 March 2020) para. 31.

²⁷ OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (11 March 2021) para. 2.

MH17 was shot down in July 2014.²⁸

Since the conflict erupted, a number of attempts have been made to negotiate an end to the hostilities, with the so-called “Minsk Agreements” being the most prominent.²⁹ The first Minsk Protocol was signed on 5 September 2014 by representatives from Ukraine, the Russian Federation, the DPR and the LPR. Shortly thereafter, the ceasefire was reportedly broken, most notably during heavy shelling of the city of Mariupol in January 2015.³⁰

Eventually, an additional package of measures was adopted in Minsk in February 2015. Though the provisions of “Minsk II” were supposed to be fulfilled by the end of 2015,³¹ both sides began to violate the agreement almost immediately.³² Although on several occasions since 2016 the parties to the Trilateral Contact Group in Minsk (Ukraine, the Russian Federation, and the Organization for Security and Co-operation in Europe) reconfirmed their commitment to an “unlimited” ceasefire, progress towards the implementation of the Minsk Agreements has been mixed, with multiple violations recorded.³³ Reportedly, for the quarter between 16 November 2019 and 15 February 2020, the number of ceasefire violations reached 56,521, and whilst high, this number is lower than the number of 73,756 violations reported for the previous quarter from 16 August to 15 November 2019.³⁴ In 2019, Ukraine withdrew its forces and military hardware in three areas of Stanytsya Luhanska, Zolote and Petrivske, as foreseen in the framework agreement of the Trilateral Contact Group. However, reports suggest that as of January 2021, neither the GoU nor the separatists are in full compliance with the terms of the Minsk Agreements.³⁵

The Minsk Agreements also envisage prisoner exchanges. On 27 December 2017, the simultaneous release of detainees took place under the “all for all” framework foreseen in the Minsk agreements.³⁶ The GoU released 233 individuals, whereas the armed groups released 74 persons.³⁷ Further, on 7 September 2019, a simultaneous release

²⁸ *Ibid.*, para. 29.

²⁹ [Protocol on the Results of Consultations of the Trilateral Contact Group](#) (Minsk 5 September 2014).

³⁰ As a result, at least 29 civilians were killed and about 97 were injured. This led to the United Nations declaring that the ceasefire had been violated. UNGA [‘Statement attributable to the Spokesman for the Secretary-General on Ukraine’](#) (New York, 24 January 2015).

³¹ *Ibid.*

³² [‘The militants fired 112 strokes, hit Debaltseve 88 times in the course of one day of “silence”’](#) *The Ukrayinska Pravda* (Kyiv, 16 February 2015).

³³ OHCHR [‘Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020’](#) (12 March 2020) para. 20.

³⁴ *Ibid.*

³⁵ [Framework Decision of the Trilateral Contact Group relating to disengagement of forces and hardware](#), 21 September 2016; OSCE Special Monitoring Mission, [‘Spot Report by OSCE Special Monitoring Mission to Ukraine \(SMM\): Receipt of notifications on completion of disengagement in Stanytsia Luhanska disengagement area’](#), 30 June 2019; OSCE Special Monitoring Mission, [‘Receipt of Notifications on Completion of Withdrawal of Forces and Hardware in Zolote Disengagement Area’](#), 2 November 2019; OSCE Special Monitoring Mission, [‘Spot Report by OSCE SMM: Receipt of Notification on Completion of Withdrawal of Forces and Hardware in Petrivske Disengagement Area’](#), 13 November 2019; OHCHR, [‘Report on the Human Rights Situation in Ukraine’](#) (11 March 2021) para. 22.

³⁶ [Package of measures for the Implementation of the Minsk agreements](#), 12 February 2015, para. 6.

³⁷ OHCHR [‘Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018’](#) (19 March 2018) para. 56.

of 35 individuals by the GoU and 35 individuals by the Government of the Russian Federation, including the 24 Ukrainian crew members seized during the 25 November 2018 incident near the Kerch Strait.³⁸ The next major simultaneous release of detainees occurred on 29 December 2019, following the Normandy Four summit of 9 December 2019.³⁹ During the exchange, the GoU released 141 detainees and the armed groups released 81 detainees.⁴⁰ As of April 2021, no more exchanges or releases took place.

CHAPTER ONE: GUIDEBOOK

Part One: Overview of Ukraine and the International Criminal Court

This Part provides an overview of what the ICC is and the GoU's budding relationship with the Court. It outlines:

- The nature of the ICC: what crimes it tries, who it can try, when it can try them, as well as the structures within the ICC; and
- Ukraine's relationship with the ICC chronologically. This begins from the outset of the life of the ICC in 1998 through to recent developments in the GoU's relationship with the ICC.

I. The ICC: A Global Criminal Court

The ICC is the first permanent, autonomous international criminal court. It is fully independent.⁴¹ It is based in The Hague, Netherlands. It was created by formal agreement between States from around the world, culminating in a treaty called the Rome Statute that outlines the functions of the Court and grants it the relevant powers.⁴² The Rome Statute entered into force on 1 July 2002.⁴³ It makes it clear that the ICC was established to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community and, ultimately, to contribute to the prevention of such crimes.⁴⁴

³⁸ OHCHR '[Report on the human rights situation in Ukraine 16 August to 15 November 2019](#)' (12 December 2019) para. 9.

³⁹ OHCHR '[Report on the human rights situation in Ukraine 16 November 2019 to 15 February 2020](#)' (12 March 2020) para. 55.

⁴⁰ *Ibid.*

⁴¹ The ICC is not part of the UN, even though an agreement governing the relationship between the UN and the ICC exists. The Relationship Agreement defines the terms on which the UN and the ICC interact. The Agreement aims to balance the fact that the ICC is an independent Court, but the UN has responsibilities under the UN Charter and that they must respect and facilitate each other's mandate. See [Negotiated Relationship Agreement between the International Criminal Court and the United Nations](#) (entered into force 4 October 2004) ("Relationship Agreement").

⁴² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, signed by Ukraine on 20 January 2000) 2187 UNTS 90 ("Rome Statute").

⁴³ '[About the Court](#)' (ICC).

⁴⁴ Rome Statute, Preamble, para. 5.

As of January 2021, there are 123 State Parties to the Rome Statute.⁴⁵ States become a formal party to the Rome Statute through “ratification”, “accession”, “approval” or “acceptance” of the Statute.⁴⁶ Ratification is the formal act of a State consenting to be bound by a treaty.⁴⁷ To ratify, a State will deposit a document containing this consent with the Secretary-General of the United Nations (“UN”).⁴⁸ Accession, approval or acceptance have the same effect as ratification.⁴⁹ The Rome Statute continues to be the basis for the Court’s existence and its authority.

II. The Jurisdiction of the ICC

The term “jurisdiction” is the technical term for the ICC’s authority. The ICC obtains jurisdiction in certain circumstances. In these specific circumstances, the Prosecutor can investigate and prosecute certain cases and the Court can hear the trial of those cases. In sum, jurisdiction encompasses what crimes the ICC can try, who can be tried and when the ICC may try a case.

A. What Crimes?

The ICC has jurisdiction over the most serious crimes of concern to the international community. These crimes are genocide, crimes against humanity, and war crimes committed after 1 July 2002, and the crime of aggression committed after 17 July 2018.⁵⁰ The crime of aggression provision provoked disagreement among the States Parties but following the ratification of the Kampala Resolution by 30 States Parties in June 2016⁵¹ and the adoption of a resolution on the activation of the jurisdiction of the Court over the crime of aggression by the ASP of the ICC in December 2017, the relevant provisions finally came into force on 17 July 2018.⁵² The crime of aggression is addressed in more detail in Chapter Two, Part Two.

B. Who Can Be Tried?

The Court can only try “natural persons”.⁵³ In other words, it can only try individual persons and not a State or a group (including business enterprises). The ICC Prosecutor’s policy is normally to focus on individuals who, having

⁴⁵ ICC, [The States Parties to the Rome Statute](#).

⁴⁶ Rome Statute, art. 125.

⁴⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 I.L.M. 679 (“Vienna Convention”), arts. 2 (1) (b), 14 (1) and 16.

⁴⁸ Rome Statute, art. 125(2).

⁴⁹ Vienna Convention, arts. 2(1)(b), 14(2) and 15.

⁵⁰ Rome Statute, art. 5.

⁵¹ ICC Press Release, ICC-ASP-20160629-PR1225, [State of Palestine becomes the thirtieth State to ratify the Kampala amendments on the crime of aggression](#), 29 June 2016.

⁵² International Criminal Court Assembly of States Parties, Res. ICC-ASP/ASP/16/Res.5 on the Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017 (‘ASP Res. ICC-ASP/ASP/16/Res.5’). As of 17 April 2021, 39 states ratified Kampala amendments: Andorra, Argentina, Austria, Belgium, Botswana, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Ecuador, El Salvador, Estonia, Finland, Georgia, Germany, Guyana, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, North Macedonia, Panama, Paraguay, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, State of Palestine, Switzerland, Trinidad and Tobago, and Uruguay.

⁵³ Rome Statute, art. 25(1). The ICC cannot try those who were under 18 at the time a crime was allegedly committed: Rome Statute, art. 26.

regard to the evidence gathered, bear the greatest responsibility for the crimes committed.⁵⁴ More recently, the ICC Prosecutor has begun to consider prosecuting lower-level perpetrators if their conduct has been particularly grave or received extensive notoriety.⁵⁵

The ICC Prosecutor will not be deterred by alleged protections (i.e., immunities) offered by official positions. No one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed.⁵⁶ Therefore, there is no immunity from prosecution or criminal responsibility for those acting in an official capacity as a head of State, member of government or parliament or as an elected representative or public official.⁵⁷ These issues will be further addressed in Chapter Two, Part Two.

C. When Can a Case Be Tried?

A case can be tried where the ICC has jurisdiction over it, and decides that the case is admissible and of sufficient gravity for the Court. The ICC's jurisdiction is activated where: (i) the State in question has ratified the Rome Statute;⁵⁸ (ii) the State in question has "declared" that it accepts the jurisdiction of the ICC without ratifying the Statute;⁵⁹ or (iii) the United Nations Security Council ("UNSC") refers a situation to the Court.⁶⁰

If one of the above circumstances exists, the ICC may exercise its jurisdiction if: (i) a situation has been referred to the Prosecutor by a State Party; (ii) the UNSC refers a situation to the Prosecutor to launch an investigation; or (iii) the Prosecutor initiates an investigation *proprio motu* (on her own initiative) on the basis of information received from reliable sources, including from a State's Declaration.⁶¹

If the Prosecutor receives one of the above, he or she will open a "preliminary examination" into the situation at hand as a matter of policy.⁶² It must be noted, however, that a preliminary examination is not an investigation. It is a process by which the Prosecutor considers all the information available in order to reach a fully informed

⁵⁴ Office of the Prosecutor, ['Paper on some policy issues before the Office of the Prosecutor'](#) (September 2003) pp. 3 and 7; Office of the Prosecutor, ['Report on Prosecutorial Strategy'](#) (14 September 2006), pp. 3 and 5; Office of the Prosecutor, ['Prosecutorial Strategy 2009-2012'](#) (1 February 2012), paras. 19-20; [Understanding the International Criminal Court \(ICC\)](#), p. 5.

⁵⁵ Office of the Prosecutor, ['Strategic Plan June 2012-2015'](#) (11 October 2013), para. 22.

⁵⁶ Rome Statute, art. 27.

⁵⁷ *Ibid.*, art. 27.

⁵⁸ *Ibid.*, arts. 13(a) and 14.

⁵⁹ *Ibid.*, art. 12(3).

⁶⁰ *Ibid.*, art. 13(b).

⁶¹ *Ibid.*, art. 13.

⁶² Upon receipt of a referral or a valid declaration made pursuant to art. 12(3) of the Statute, the Prosecutor may open a preliminary examination of the situation: ICC, Regulations of the Prosecutor, ICC-BD/05-01-09 (adopted 23 April 2009) ("Regulations of the Prosecutor") reg 25(1)(c). Although the Prosecutor is under no obligation to start a preliminary examination upon the receipt of a declaration, recent practice suggests that the Prosecutor will automatically open a preliminary examination: Office of the Prosecutor, ['Policy Paper on Preliminary Examinations'](#), November 2013, ("Preliminary Examinations Policy Paper"), p. 18, para. 76.

determination on whether there is a reasonable basis to proceed with a full investigation. In reaching this decision, the preliminary examination must consider the following:

- **Jurisdiction:** As noted, the Court can prosecute genocide, war crimes or crimes against humanity committed after 1 July 2002 or after the date a State accepts the jurisdiction of the Court.⁶³ The Court can only prosecute persons who commit a crime on the territory of or who are nationals of a State Party or a declaring State.⁶⁴ In line with its recent jurisprudence, the ICC can exercise territorial jurisdiction where “at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.”⁶⁵ The Prosecutor has jurisdiction over matters the UNSC has referred;⁶⁶
- **Admissibility:** The ICC is a Court of last resort. Under the Rome Statute, States have a duty to exercise their criminal jurisdiction over those responsible for international crimes and priority is accorded to national systems.⁶⁷ The ICC is therefore a last resort jurisdiction intended to complement national justice systems only when they do not or are unwilling or unable to carry out genuinely any investigations and prosecutions of alleged perpetrators;⁶⁸ and
- **Interests of justice:** In light of the gravity of the crimes and interests of victims, the Prosecutor will consider whether there are substantial reasons to believe that an investigation would not serve the interests of justice.⁶⁹

The Prosecutor will report on these issues once the preliminary examination has concluded. If she is satisfied that there is a reasonable belief that crimes within the jurisdiction of the ICC have been committed and that the cases are admissible, sufficiently serious and there is no substantial interest of justice reason to not proceed, she will proceed to a formal investigation. If the Prosecutor decides to open an investigation on her or his own volition, she must ask the ICC Pre-Trial Chamber for authorisation to proceed.⁷⁰ The ICC Prosecutor does not need the Court’s permission to launch an investigation if she has a State referral⁷¹ or a referral from the UN Security Council.⁷² She does need authorisation after a Declaration.

If the Pre-Trial Chamber at the ICC agrees that there is a reasonable belief that crimes within the jurisdiction of the ICC have been committed and that the cases are admissible, sufficiently serious and there is no substantial interest

⁶³ Rome Statute, art. 11.

⁶⁴ *Ibid.*, art. 12(2).

⁶⁵ ICC, Case No. ICC-RoC46(3)-01/18, [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), 6 September 2018, para. 64.

⁶⁶ *Ibid.*, art. 12(2).

⁶⁷ *Ibid.*, Preamble: ‘Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [...] Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’.

⁶⁸ Rome Statute, arts. 1 and 17.

⁶⁹ As discerned from the Rome Statute, art. 53(1)(a) - (c); Preliminary Examinations Policy Paper.

⁷⁰ Rome Statute, art. 15(3).

⁷¹ *Ibid.*, arts. 14(1) and 15(1).

⁷² *Ibid.*, art. 12(2).

of justice reason to not proceed, they will authorise a full investigation to be opened.⁷³ The Prosecutor may request that the Pre-Trial Chamber issue an arrest warrant or a summons to appear to a person who the Prosecutor reasonably believes, as a result of her investigation, has committed a crime within the jurisdiction of the Court.⁷⁴ Once the named individuals appear in front of the Court and if the charges are confirmed by the Court,⁷⁵ the trial can begin. This process is explained in detail in Chapter Two, Part Four.

D. ICC Structures

The Court is made up of different organs. The Assembly of States Parties (“ASP”) oversees the Court. The Court itself is made up of the Presidency, Chambers, Prosecutor and the Registry.⁷⁶ The Office of the Public Counsel for Victims (“OPCV”), administered by the Registry but otherwise independent, and Defence teams who represent the accused are not official organs of the Court.

a) The ASP

The ASP is the governing body of the ICC.⁷⁷ It is responsible for managerial oversight and legislative decision-making.⁷⁸ The ASP is composed of a representative from each State Party that has ratified or acceded to the Rome Statute.⁷⁹ It convenes annually to discuss issues essential to the functioning of the Court and its future.⁸⁰ This includes the responsibility to, among other duties, approve the budget of the Court, elect ICC Judges and Prosecutors, provide management oversight on the administration of the Court and establish subsidiary bodies.⁸¹ As the ICC’s legislative body, the ASP can also amend the Rome Statute or the Rules of Procedure and Evidence, which governs how the ICC conducts its proceedings.⁸²

The 19th session of the ASP was held from 7 to 17 December 2020 in New York.⁸³ One of the matters to be decided during the 19th session of the ASP was the election of the next ICC Prosecutor.⁸⁴ On 18 December 2020, the ASP decided to defer the election of the Prosecutor to a second resumed session in early 2021. On 12 February

⁷³ *Ibid.*, art. 15(4). The “reasonable basis” to believe standard is the lowest at the ICC. Put differently, the PTC should be satisfied that there is a sensible or reasonable justification for the belief that a crime falling within the jurisdiction of the ICC has been or is being committed: *Situation in the Republic of Kenya* (Decision) ICC-01/09-19-Corr (31 March 2010) (“Kenya Authorisation Decision”), paras 27-35.

⁷⁴ Rome Statute, art. 58(1)(b)(i).

⁷⁵ *Ibid.*, art. 61.

⁷⁶ *Ibid.*, art. 34.

⁷⁷ Established pursuant to art. 112 of the Rome Statute.

⁷⁸ ‘[Assembly of States Parties](#)’ (ICC).

⁷⁹ *Ibid.*

⁸⁰ The outcomes of the most recent session of the ASP can be found here: ICC, ‘[Fourteenth Session of the Assembly of States Parties](#)’ (18 to 26 November 2015).

⁸¹ Rome Statute, art. 112(2).

⁸² *Ibid.*, art. 121.

⁸³ ICC, ‘[Assembly of States Parties concludes its eighteenth session](#)’ (6 December 2019).

⁸⁴ [ICC Bureau of Assembly of States Parties](#), Res ICC-ASP/18/INF.2, 18th Session, 11 April 2019, para. 29. See also ICC Secretariat of the Assembly of States Parties, [Election of the Prosecutor: Background Note](#), 6 July 2020.

2021, British human rights lawyer Karim Khan was elected to be the next ICC Prosecutor.⁸⁵ He will take office on 16 June 2021.

b) The Chambers

The judiciary of the ICC is made up of the Presidency and the Chambers. The Presidency has three main areas of responsibility: judicial/legal functions, administration and external relations.⁸⁶ These functions focus on the proper functioning of the Court. The Chambers of the Court is divided into three Divisions that hear cases at the ICC:⁸⁷

- The Pre-Trial Division, each composed of not less than six judges. The Pre-Trial Chamber's primary responsibility is to supervise how the ICC Prosecutor carries out his or her investigatory and prosecutorial activities, to guarantee the rights of suspects, victims and witnesses during the investigatory phase and to ensure the integrity of the proceedings it is presiding over;⁸⁸
- The Trial Division, constituted to hear a trial and determine whether an accused has been proven by the Prosecutor to be guilty beyond all reasonable doubt.⁸⁹ If the accused's guilty has been proven, a sentence will be imposed to punish the accused. It can impose a sentence not exceeding thirty years or life imprisonment and only in extreme circumstances life sentence.⁹⁰ It may also impose financial penalties for the harm suffered by the victims, including compensation, restitution or rehabilitation;⁹¹ and
- The Appeals Division, composed of the President and four other judges. The Appeals Chamber hears any challenges to decisions of the Pre-Trial Chamber or Trial Chamber, or to sentences imposed by the Trial Chamber.⁹² If the Appeals Chamber finds that the decision of sentence appealed from was materially affected by an error of fact or law, it can: (i) reverse or amend the decision or sentence; or (ii) order for a new trial to take place.⁹³ The Appeals Chamber can do the same if it finds that the proceedings were unfair in a way that affected the reliability of the decision or sentence.⁹⁴ In addition, the Appeals Chamber can remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or can also

⁸⁵ British human rights lawyer elected chief prosecutor of the International Criminal Court, [UN News](#), 12 February 2021.

⁸⁶ Rome Statute, art. 38; [‘The Presidency’ \(ICC\)](#).

⁸⁷ Rome Statute, art. 39.

⁸⁸ Rome Statute, arts. 56 and 57. In April 2021, the judges assigned to the Pre-Trial Division are Judge Reine Alapini-Gansou (Benin), President of the Pre-Trial Division, Judge Marc Perrin De Brichambaut (France), Judge Antoine Kesia-Mbe Mindua (Democratic Republic of the Congo), Judge Péter Kovács (Hungary), Judge Tomoko Akane (Japan), and Judge Rosario Salvatore Aitala (Italy).

⁸⁹ Rome Statute, art. 66.

⁹⁰ *Ibid.*, art. 77(1)(b).

⁹¹ *Ibid.*, art. 77. In April 2021, the Judges assigned to the Trial Division are Judge Raul Cano Pangalangan (Philippines), President of the Trial Division, Judge Olga Venecia Del C. Herrera Carbuccia (Dominican Republic), Judge Robert Fremr (Czech Republic), Judge Geoffrey Henderson (Trinidad and Tobago), Judge Chang-ho Chung (Republic of Korea), Judge Kimberly Prost (Canada), and Judge Bertram Schmitt (Germany).

⁹² *Ibid.*, arts. 81-85.

⁹³ *Ibid.*, art. 83(2).

⁹⁴ *Ibid.*, art. 83(2). In April 2021, the five judges in place are Judge Chile Eboe-Osuji (Nigeria), President of the Appeals Division, Judge Howard Morrison (UK), Judge Piotr Hofmański (Poland), Judge Luz del Carmen Ibáñez Carranza (Peru), and Judge Solomy Balungi Bossa (Uganda).

call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.⁹⁵

When a panel of judges hears a case—whether at the appeal, trial or pre-trial phase—that panel of judges is referred to as a “Chamber”.

c) The ICC Prosecutor

The ICC Prosecutor, head of the Office of the Prosecutor, is a separate and independent organ of the ICC.⁹⁶ Since 15 June 2012, it has been led by Ms. Fatou Bensouda, who has full authority over the management and administration of the Office. Ms. Bensouda’s term of office expires on 15 June 2021, and the election of the next ICC Prosecutor took place at the 19th session of the ASP (resumed) in February 2021 when Karim Khan was elected to replace Fatou Bensouda.⁹⁷ As a non-state party, Ukraine has no right to nominate and participate in the election of the next Prosecutor. The Prosecutor’s Office comprises three sections:

- The Investigations Division, which is responsible for gathering and examining evidence, questioning suspected persons, and speaking to victims and prospective witnesses. The Rome Statute requires the Investigations Division to investigate inculpatory and exculpatory circumstances equally;⁹⁸
- The Jurisdiction, Complementarity and Cooperation Division, with the support of the Investigations Division, assesses information received by the ICC and situations referred to the Court and analyses these situations and cases to determine their potential admissibility before the ICC; and
- The Prosecutions Division, which litigates cases before the Chambers.

The Prosecutor’s Office is responsible for: (i) conducting a preliminary examination;⁹⁹ (ii) seeking authorisation of a full investigation;¹⁰⁰ (iii) the investigation of a situation;¹⁰¹ (iv) seeking necessary orders from the Court such as arrest warrants, summons or measures to protect witnesses or victims; (v) formulating charges against an accused; (vi) seeking confirmation of those charges with sufficient evidence to establish substantial grounds to believe a person committed the crime;¹⁰² and (vii) conducting a trial or appeal before the ICC. At trial, it is for the Prosecutor to prove that the accused committed the crimes charged beyond all reasonable doubt.¹⁰³ To do so, she must present witnesses and documentary and physical evidence to the Court. These steps are explored fully in Parts Three, Four and Five.

⁹⁵ *Ibid.*, art. 83(2).

⁹⁶ *Ibid.*, art. 42(1).

⁹⁷ ICC Bureau of Assembly of States Parties, [Res ICC-ASP/18/INF.2](#), 18th Session, 11 April 2019, para. 29. See also ICC Secretariat of the Assembly of States Parties, [Election of the Prosecutor: Background Note](#), 6 July 2020. [British human rights lawyer elected chief prosecutor of the International Criminal Court](#), *UN News*, 12 February 2021.

⁹⁸ *Ibid.*, art. 54(1)(a).

⁹⁹ Regulations of the Prosecutor, reg 25.

¹⁰⁰ Rome Statute, arts. 12(2) and 15(3).

¹⁰¹ *Ibid.*, art. 54.

¹⁰² *Ibid.*, art. 61(5).

¹⁰³ *Ibid.*, art. 66.

d) The Registry

The Registry is in charge of the non-judicial aspects of the administration and servicing of the Court.¹⁰⁴ It is headed by the Registrar,¹⁰⁵ who is assisted by a Deputy Registrar. The Registry handles issues related to the defence (such as being admitted to practise before the Court), victims and witnesses, outreach and detention, judicial proceedings and other administrative or judicial support necessary for the proper functioning of the Court.

The Registry is also responsible for ensuring that certain divisions of the Court run properly. The Victims and Counsel Division, which enables suspects and accused to be represented and supports Defence Counsel in the discharge of their mandate. It also assists victims with participation in proceedings before the Court. Specifically, it assists the defence teams and manages the Victims Participation and Reparations Section (“VPRS”), the Victims and Witnesses Unit (“VWU”), the OPCV, and the Office of Public Counsel for the Defence (“OPCD”).¹⁰⁶

The VPRS is a specialised section responsible for helping victims fully exercise their rights under the Rome Statute and to obtain legal assistance and representation, including, where appropriate, from the OPCV.¹⁰⁷ The VPRS is in charge of disseminating the application forms for participation and reparations and assisting victims in filling them in, as well as providing them with the information necessary for them to exercise their rights under the Rome Statute.¹⁰⁸

The VWU makes it possible for victims and witnesses to testify and/or to participate in proceedings before the ICC and mitigates possible adverse effects incurred by their status by providing protective measures, security arrangements, counselling and other appropriate assistance for victims and witnesses appearing before the Court and others who are at risk on account of giving evidence to the Court. The VWU also provides appropriate measures to protect the safety, dignity, privacy, and physical and psychological well-being of victims, witnesses and other persons at risk. Finally, it advises participants in the proceedings, as well as organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance.¹⁰⁹

The OPCV seeks to ensure effective participation of victims in proceedings before the Court.¹¹⁰ The OPCV is responsible for assisting victims to exercise their rights effectively, as well as offering its expertise to the victims and their legal representatives or representing victims itself before the Chambers of the Court. Members of the OPCV may be appointed as legal representatives of victims, providing their services free of charge.¹¹¹

¹⁰⁴ *Ibid.*, art. 43.

¹⁰⁵ Mr. Herman von Hebel is the current Registrar, elected on 8 March 2013.

¹⁰⁶ ICC, ‘The Registry’, [ICC-PIDS-FS-10-002/08 En](#).

¹⁰⁷ ‘Frequently Asked Questions’ (ICC).

¹⁰⁸ *Ibid.*

¹⁰⁹ Rome Statute, art. 43(6).

¹¹⁰ ICC, [Regulations of the Court, ICC-BD/01-01-04](#), (adopted 26 May 2004) (“Regulations of the Court”). For more information, ‘Office of Public Counsel for Victims (ICC)’.

¹¹¹ Regulations of the Court, reg 80.

The OPCD is managed by the Registry, but is independent.¹¹² It exists to represent and protect the rights of accused before the Court. Specifically, its tasks include representing the rights of the Defence during the initial stages of an investigation, supporting Defence Counsel with legal advice or appearing before the court on specific issues, and acting as duty counsel if the accused is yet to secure permanent counsel.¹¹³

e) The Defence

An accused is entitled to defend him or herself through a lawyer or without a lawyer.¹¹⁴ An effective defence is fundamental to ensuring that the ICC's proceedings are in conformity with the highest legal standards and due process rights of suspects and accused implicated in the proceedings before the Court. An accused is presumed innocent until proven guilty by the Prosecutor.¹¹⁵ The Rome Statute identifies minimum guarantees to ensure that an accused has a public, impartial and fair hearing.¹¹⁶

III. Ukraine, the ICC and the Rome Statute

This section outlines Ukraine's recent mixed engagement with the ICC. The GoU initially signed the Rome Statute on 20 January 2000,¹¹⁷ but in 2001 the Constitutional Court of Ukraine ruled that full ratification would be unconstitutional.¹¹⁸ Later, after the events in late 2013 at Maidan and in Eastern Ukraine, Ukraine submitted an official Declaration which "declared" that it accepted the Court's jurisdiction. However, it has not ratified the Rome Statute and, according to public information, has investigated and prosecuted only a small amount of those allegedly responsible for international crimes. More recently, promising signs have emerged of a commitment to ratifying the Rome Statute. In late November 2015, the President of Ukraine submitted a draft law to the country's Parliament ("Verkhovna Rada" or "Rada") on amending the Constitution to permit the ratification of the Rome Statute. However, the GoU has delayed ratification for three years. These events are outlined below.

After signing the Rome Statute in January 2000, President Leonid Kuchma applied to the Constitutional Court under Article 151 of the Constitution of Ukraine¹¹⁹ for a decision on the conformity of the Rome Statute with the

¹¹² *Ibid.*, reg 77.

¹¹³ [‘The Office of Public Counsel for the Defence’ \(ICC\)](#).

¹¹⁴ Rome Statute, art. 67.

¹¹⁵ *Ibid.*, art. 66.

¹¹⁶ *Ibid.*, art. 67.

¹¹⁷ [On Authorisation of V. Yelchenko to Sign the Rome Statute of the International Criminal Court on Behalf of Ukraine: Presidential Order No. 313](#) [Online resource]. - 11 December 1999.

¹¹⁸ Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, N 3-v/2001 of 11 July 2001 ("Constitutional Court Opinion").

¹¹⁹ Art. 151 of the Constitution of Ukraine provides that the Constitutional Court of Ukraine, on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature.

Constitution of Ukraine.¹²⁰ The President, who was opposed to the ratification of the Rome Statute, argued that several provisions contradicted Ukraine's Constitution. For example, he argued that the principle of complementarity, which permits the ICC to exercise jurisdiction over Ukraine's sovereign territory under certain circumstances, would conflict with the Constitution.¹²¹ Conversely, as the President pointed out, Article 124 of the Constitution provides that the administration of justice is the 'exclusive competence of the courts' in Ukraine and judicial functions cannot be delegated to other bodies.¹²² This, it was argued, conflicted with the Rome Statute.

The Court decided, after analysing other issues, that the ratification of the Rome Statute would be unconstitutional due to the principle of complementarity. Specifically, the Court decided that the principle of complementarity¹²³ contravened the Constitution because acceptance of another court system's jurisdiction is not permitted under Article 124 of the Constitution, which provides that the administration of justice is the exclusive competence of the domestic Courts and cannot be delegated to another body.¹²⁴ The Court recognised the idea that the ICC is secondary to national jurisdictions and will only step in when they fail, but said that the ICC could exercise its powers and functions on *any* State Party, and has the power to find *any* case admissible if a state is unwilling or unable to genuinely conduct an investigation or prosecution.¹²⁵ The Court concluded that any jurisdiction supplementary to the national Ukrainian system was not allowed by the Constitution.¹²⁶ Therefore, under Part 9 of the Constitution, the Constitution itself must be amended before the Rome Statute could be ratified.¹²⁷

In 2005, Ukraine's aspirations regarding the ICC were declared in the Plan of Measures on the implementation of the Ukraine-EU Action Plan, approved by the Cabinet of Ministers of Ukraine.¹²⁸ Among other things, the Decree sought to enhance cooperation, promote international justice and fight impunity with the support of the ICC. The measures to be taken on the fulfilment of this provision included, in particular, joining the "Agreement on the Privileges and Immunities of the International Criminal Court"¹²⁹ and preparing proposals on ratifying the Rome Statute, including amendments to the Constitution of Ukraine.

¹²⁰ ICRC has provided a concise analysis of the Constitutional Court's Opinion: International Committee of the Red Cross, ['Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Court and Councils of State'](#), 01/2010 ("ICRC Rome Statute Issues").

¹²¹ Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, N 3-v/2001 of 11 July 2001, para. 5. The Ministry of Foreign Affairs of Ukraine argued that the Statute did not offend the Constitution (*Ibid.*, para. 11).

¹²² Constitution of Ukraine, art. 124.

¹²³ Rome Statute, Preamble, para. 10 and arts. 1, 17 and 20.

¹²⁴ ICRC Rome Statute Issues, p. 11.

¹²⁵ Constitutional Court Opinion, part 2.1, para. 3.

¹²⁶ ICRC Rome Statute Issues, p. 11.

¹²⁷ *Ibid.*

¹²⁸ [On Approval of the 2005 Action Plan Ukraine - EU: Order of the Cabinet of Ministers of Ukraine No. 117](#) [Online resource]. - 22 April 2005.

¹²⁹ ICC, [Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3](#) (adopted at the first session on 3-10 September 2002) ("ICC Agreement on Privileges and Immunities").

In 2006, the Ukraine-EU Action Plan was implemented.¹³⁰ As noted, one of the five objectives of the Action Plan concerned the signing and ratification of the Agreement on the Privileges and Immunities of the ICC.¹³¹ Accordingly, the Ministry of Justice prepared a draft law.¹³² The Verkhovna Rada adopted this law on 16 October 2008.¹³³

On 29 January 2007, Ukraine acceded to the Agreement on the Privileges and Immunities of the International Criminal Court.¹³⁴ This Agreement is designed to imbue officials from the ICC in the territory of each State Party with certain privileges and immunities to enable them to work and fulfil the ICC's purposes.¹³⁵ In short, the immunities concern immunity from prosecution for any activities carried out by the ICC, whether employed at the time or after employment ends.

In 2010, Ukraine attended the review conference of the Rome Statute in 2010, held in Kampala, Uganda,¹³⁶ attending the conference as official observers.¹³⁷ The conference was notable for the way in which it addressed the crime of aggression. The States Parties decided that the crime of aggression would not be adopted until a decision is taken after 1 January 2017 by a two-thirds majority of States Parties (as is required for the adoption of an amendment to the Statute) and one year after the ratification or acceptance of the amendment by 30 States Parties, whichever is later.¹³⁸

More recently, the GoU has declared twice that it accepts the jurisdiction of the ICC.¹³⁹ Both Declarations have been, or have attempted to be, "limited" by the Government in terms of time, geography and the persons or groups of persons that the ICC jurisdiction may extend to. The first Declaration, made by the Government in April 2014, declared that the Government accepts the jurisdiction of the ICC "for the purpose of identifying, prosecuting and

¹³⁰ [On Approving Measures for the Implementation of Action Plan Ukraine-EU in 2006: Order of the Cabinet of Ministers of Ukraine N 243-p](#) [Online resource]. -27 April 2006.

¹³¹ *Ibid.*, para. 17.

¹³² [On Accession of Ukraine to the Agreement on the Privileges and Immunities of the International Criminal Court: Draft Law N 0015](#) [Online resource]. - 21 June 2006.

¹³³ *Ibid.*

¹³⁴ ICC Agreement on the Privileges and Immunities, p. 3. As outlined above, acceding to the Rome Statute has (approximately) the same legal effect as ratification. See Vienna Convention, arts. 2(1)(b) and 15.

¹³⁵ ICC Agreement on the Privileges and Immunities, art. 3.

¹³⁶ ICC, [Review Conference of the Rome Statute, Delegations to the Review Conference of the Rome Statute of the International Criminal Court](#), Kampala, 31 May-11 June 2010 RC/INF.1 (26 August 2010).

¹³⁷ *Ibid.*, p. 51.

¹³⁸ Aggression Resolution; Mauro Politi, 'The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead' (2012) 10(1) Journal of International Criminal Justice 267-288.

¹³⁹ [On Recognition of the Jurisdiction of the International Criminal Court 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 of 21 November 2013-22 February 2014: Declaration of the Verkhovna Rada of Ukraine No. 790-VII](#) [Online resource]. - 25 February 2014. - ("The First Declaration"); [Declaration of the Verkhovna Rada of Ukraine, On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organisations "DPR" and "LPR", which led to extremely grave consequences and mass murder of Ukrainian nationals": Resolution of the Verkhovna Rada of Ukraine No. 145-VIII](#) [Online resource]. - 8 September 2015. - ("The Second Declaration").

judging the authors and accomplices of acts committed on the territory of Ukraine within the period between 21 November 2013 and 22 February 2014”.¹⁴⁰

This Declaration was targeted to the events of Euromaidan between 21 November 2013 and 22 February 2014 and the alleged actions of former President of Ukraine Viktor Fedorovych Yanukovych and his officials.¹⁴¹ The Declaration outlines the events that occurred during the specified dates. In particular, it identifies that “law enforcement agencies unlawfully used physical force, special means and weapons toward the participants of peaceful actions in Kyiv and other Ukrainian cities on the orders of senior officials of the state”. The Declaration claims that the “[e]xcess of power and office duties by officials as well as the commitment of other serious and grave crimes were systematic”. The Declaration also outlines the acts that were allegedly committed as a result, including:

- Killing of 100 nationals of Ukraine and other States;
- The injuring and mutilating of more than 2000 persons, 500 of whom were left in a serious condition;
- Torture of the civilian population;
- Abduction and enforced disappearance of persons;
- Forcefully and unlawfully depriving an individual of liberty;
- Forcefully transferring persons to deserted places for the purpose of torture and murder;
- Arbitrary imprisonment of many persons in different cities in Ukraine;
- The brutal beating of persons; and
- Unlawful damaging of peaceful protestors’ property.

The Declaration alleges that these activities amounted to persecution carried out on political grounds to oppose the peaceful protests and the Euromaidan activities. With regard to the perpetrators of the acts outlined above, the Declaration identifies the use of organised criminal groups to commit such acts. The persons identified as responsible specifically for crimes against humanity are:

- Viktor Yanukovych, former President;
- Pshonka Viktor Pavlovych, former Prosecutor General of Ukraine;
- Zakharchenko Vitalii Yuriiovych, former Minister of Internal Affairs of Ukraine; and
- Other officials who “issued and executed the manifestly criminal orders”.

A second Declaration by the GoU in September 2015 extended the time frame of ICC jurisdiction beyond 22 February 2014.¹⁴² It declared that Ukraine accepts the ICC’s jurisdiction over “crimes against humanity and war crimes [...] which led to extremely grave consequences and mass murder [...]”.¹⁴³ It also annexed a Declaration outlining several paragraphs appearing to explain the decision. This document states that it accepts jurisdiction “in respect of crimes

¹⁴⁰ The First Declaration.

¹⁴¹ *Ibid.*

¹⁴² The Second Declaration.

¹⁴³ *Ibid.*

against humanity and war crimes, stipulated in Article 7 and Article 8 of the Rome Statute [...] committed on the territory of Ukraine starting from 20 February 2014 and to the present time”. The Declaration is expressly aimed at senior officials of the Russian Federation and leaders of the groups the Ukrainian government has designated as “terrorist organisations”—the DPR and the LPR. The Declaration is of indeterminate duration going forward and therefore encompasses the present and the future.

The Declaration outlined ongoing armed aggression by the Russian Federation and the “militant-terrorists” supported by the Russian Federation, during which parts of the State of Ukraine—Crimea and Sevastopol—were annexed and parts of the oblasts of Donetsk and Luhansk were occupied. The Declaration outlines recent “blatant” acts of violence by Russian and Russian-backed “militant terrorists”, including the shelling of civilians in the city of Mariupol on 24 January 2015 that killed 30 civilians and injured over 100 people. The Declaration also states that during this “undeclared war”, a number of Ukrainian nationals were illegally detained in the territory of the Russian Federation.

As a result of the first Declaration submitted by Ukraine on 17 April 2014,¹⁴⁴ the ICC Prosecutor opened a preliminary examination that same month into the situation in Ukraine in order to establish whether the three criteria for opening an investigation were met (jurisdiction, admissibility and the interests of justice).¹⁴⁵ As a consequence of the second Declaration submitted by Ukraine on 8 September 2015, the scope of the preliminary examination was extended from 22 February 2014 to the present day and is ongoing.¹⁴⁶

While Ukraine has submitted two Declarations to the ICC, it is yet to ratify the Rome Statute. Recently, Ukraine has been encouraged to make additional efforts to ratify the Rome Statute. The EU-Ukraine Association Agreement signed on 27 June 2014 encourages Ukraine to work toward ratification and implementation of the Rome Statute.¹⁴⁷ The Agreement mandates that the parties to the Agreement must cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute and its related instruments.¹⁴⁸

According to an official statement from the Ministry of Foreign Affairs of Ukraine on 11 December 2014, the Ministry submitted a legislative package to the President of Ukraine which included necessary amendments to the Constitution of Ukraine, a draft law on the ratification of the Rome Statute together with ratification of the two 2010 Kampala amendments.¹⁴⁹ According to the Ministry, the draft law includes recognition of ICC jurisdiction with

¹⁴⁴ *Ibid.*

¹⁴⁵ ‘Ukraine’ (ICC).

¹⁴⁶ ‘ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) Declaration’ (ICC) 29 September 2015.

¹⁴⁷ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, O.J.L 161/3 (29 May 2014), arts. 8 and 24(3).

¹⁴⁸ *Ibid.*

¹⁴⁹ [Opening remarks by the Permanent Representative Yuriy Sergeyev at the round table discussion on ‘Ukraine, accountability and International Criminal Court’ \(MFA, 11 December 2014\).](#)

respect to any crime over which the ICC has jurisdiction (genocide, war crimes and crimes against humanity) that was committed before the entry into force of the Rome Statute in Ukraine.¹⁵⁰

On 16 January 2015, 155 Members of Parliament (“MPs”)¹⁵¹ submitted a draft law to the Verkhovna Rada entitled “On Amending Article 124 of the Constitution of Ukraine”, which would provide for the recognition of the provisions of the Rome Statute.¹⁵² According to the explanatory memorandum, the bill is designed to create the constitutional preconditions for Ukraine’s recognition of the jurisdiction of the ICC under the terms stipulated by the Rome Statute. The bill proposes to amend Article 124 of the Constitution of Ukraine with the sixth part reading that “Ukraine may recognise the jurisdiction of the International Criminal Court under the terms of the Rome Statute of the International Criminal Court”.

On 3 September 2015, the Constitutional Commission of Ukraine developed the draft law proposing amendments to the Constitution of Ukraine concerning the judiciary.¹⁵³ As noted above, Article 124 provides that Ukraine may recognise the jurisdiction of the ICC. This article paves the way for ratification. Although it is not actual ratification, it is an important stepping stone. It imbues the Verkhovna Rada with the power to recognise the Court’s jurisdiction.

On 30 October 2015, the proposal was submitted to the President of Ukraine for consideration.¹⁵⁴ In turn, on 25 November 2015, the President submitted draft law No. 3524 on amending the Constitution for the consideration of the Verkhovna Rada.¹⁵⁵

The draft law that appeared on the Rada’s official website immediately resulted in heated debate.¹⁵⁶ One provision in the “Concluding and Transitional Provisions” chapter of the Constitution reads that the part of Article 124 of the Constitution concerning the right to ratify the Rome Statute becomes effective only three years after the day the law is published.¹⁵⁷ It is said that the President introduced the three-year deferral, although no official commentaries have been provided. The deferral became the subject of lengthy discussions during the Seminar on the ICC in Ukraine organised by the Parliamentarians for Global Action (“PGA”) a non-profit international network of legislators from around the world.¹⁵⁸ MP Oksana Syroid, then Deputy Speaker of the Verkhovna Rada, tried to defend the transitional three-year period, arguing it would allow for the adoption of necessary amendments to Ukrainian criminal and

¹⁵⁰ *Ibid.*

¹⁵¹ [List of initiators of the Draft Law on Amending Article 124 of the Constitution of Ukraine, No. 1788](#) (16 January 2015).

¹⁵² [On Amending Article 124 of the Constitution of Ukraine: Draft Law No. 1788](#) [Online resource]. - 16 January 2015.

¹⁵³ [Draft amendments to the Constitution of Ukraine in the field of judiciary as approved by the Constitutional Commission and forwarded to the Venice Commission](#), 3 September 2015.

¹⁵⁴ [‘Constitutional Commission submitted the approved draft amendments to the Constitution of Ukraine to the President’](#) (5, 30 October 2015).

¹⁵⁵ [On the Amendments to the Constitution of Ukraine: Draft Law No.3524](#) [Online resource]. - 25 November 2015.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, Concluding and Transitional Provisions, para. 1.

¹⁵⁸ [‘Parliamentary Seminar on the ICC in Ukraine, under high patronage of the Chairman of the Verkhovna Rada of Ukraine, received multi-party support for RS ratification’](#) (*Parliamentarians for Global Action*, 15 December 2015).

criminal procedure laws. GRC, certain politicians, academics and representatives of PGA argued that the deferral was not reasonable.¹⁵⁹

On 12 January 2016, the Constitutional Court of Ukraine started its hearing on the draft law.¹⁶⁰ Oleksii Filatov, then the presidential representative in the Constitutional Court, addressed, among other matters, the issue of ratification of the Rome Statute. According to Mr. Filatov, Ukraine is interested in accepting the jurisdiction of the Court.¹⁶¹ However, the Presidential representative believes that given the experience of Georgia and other states, Ukraine should be more cautious when deciding upon the ratification of the Statute as it is a party to an ongoing-armed conflict.¹⁶² It was argued that the transitional three-year period will allow Ukraine to adopt necessary national legislation and avoid certain risks from the ongoing conflict in Eastern Ukraine.¹⁶³ The alleged risks were not identified, but Mr. Filatov noted that there were particular risks for the Ukrainian military, which had no choice but to participate in the conflict.¹⁶⁴

The position of the presidential representative is difficult to understand. The argument that there can be no ratification for some time because Ukraine is in an armed conflict has not been fully explained and is at odds with other actions taken by the GoU that grant the ICC jurisdiction in Ukraine. In particular, as discussed, Ukraine submitted Declarations to the ICC accepting its jurisdiction from 21 November 2013 and onwards without limitation. Therefore, the ICC will have jurisdiction over crimes committed during the conflict and Ukraine is obliged to cooperate with the ICC with few caveats. The main differences between ratification and declarations accepting jurisdiction of the ICC will be addressed in Part Two.

¹⁵⁹ *Ibid.*

¹⁶⁰ [‘Constitutional Court of Ukraine started hearing on the Draft Law on Amending the Constitution of Ukraine’](#) (CCU, 12 January 2016).

¹⁶¹ [‘Ukraine defers the recognition of the jurisdiction of The Hague court because of the armed conflict’](#) (Liga, 12 January 2016).

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

On 30 January 2016, the Constitutional Court of Ukraine issued its Opinion.¹⁶⁵ The Court opined that the draft law is in compliance with the procedural provisions of Articles 157¹⁶⁶ and 158¹⁶⁷ of the Constitution.¹⁶⁸ The Constitutional Court did not express any reservations about the draft law.

On 2 February 2016, the Opinion of the Constitutional Court was submitted to the Verkhovna Rada's Committee on Legal Policy and Justice.¹⁶⁹ According to the Rules of the Verkhovna Rada of Ukraine,¹⁷⁰ Parliament may consider and decide whether to approve the draft law preliminarily under Article 155 of the Constitution, provided that such a bill is approved by the Constitutional Court and there are no reservations attached to its provisions.¹⁷¹ A preliminary approval will permit the Rada to adopt the bill at its next session.

On the same day, the Committee on Legal Policy and Justice delivered its Conclusion, recommending that the Verkhovna Rada preliminarily approves the draft law.¹⁷² Accordingly, the Rada preliminarily approved the draft law of amending the Constitution during its plenary meeting on 2 February 2016. On 2 June 2016, the Verkhovna Rada of Ukraine adopted the draft law.¹⁷³ Pursuant to the "Concluding and Transitional Provisions" of the draft law, the amendment to Article 124 of the Constitution of Ukraine became effective three years after the law had been published, namely on 30 June 2019.¹⁷⁴

¹⁶⁵ [Opinion No.2-B/2016 of the Constitutional Court of Ukraine in case of application of the Verkhovna Rada of Ukraine on issuing the opinion on the conformity of the draft law on amending the Constitution of Ukraine \(in terms of justice\) with requirements of arts. 157 and 158 of the Constitution of Ukraine](#) [Online resource]. - 30 January 2016. - ("Constitutional Court Opinion on the Draft Law").

¹⁶⁶ Art. 157 provides that the Constitution of Ukraine shall not be amended if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

¹⁶⁷ Art. 158 states that The draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law. Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution.

¹⁶⁸ Constitutional Court Opinion on the Draft Law, para. 1 of the Reasoning Part.

¹⁶⁹ ["Chronology of consideration of the draft law"](#) (Verkhovna Rada) No.3524.

¹⁷⁰ [On the Rules of the Verkhovna Rada of Ukraine: Law of Ukraine No. 1861-VI](#) [Online resource]. 10 February 2010. art. 149 (5).

¹⁷¹ *Ibid.*

¹⁷² Art. 155 of the Constitution of Ukraine provides that the law on amendments to the Constitution previously approved by the majority of the constitutional composition of the Verkhovna Rada of Ukraine shall be considered adopted if at the next regular session of the Verkhovna Rada at least two-thirds of MPs will vote in its favour.

¹⁷³ [Law of Ukraine "On amendments to the Constitution of Ukraine \(in the field of judiciary\)" No. 1401-VIII](#) [Online resource] 2 June 2016.

¹⁷⁴ [Constitution of Ukraine](#) [Online resource], art. 124.

Part Two: Jurisdiction of the International Criminal Court

This Part considers the jurisdiction of the ICC and how it relates to Ukraine. First, this section will describe the consequences of Ukraine's two Declarations accepting the ICC's jurisdiction (geographically, temporally and who now falls within the ICC's reach). The second section will address whether and how the jurisdiction will change if Ukraine ratifies the Rome Statute. Then, the subject-matter jurisdiction of the Court will be considered; namely, what crimes it can hear and try. Lastly, the section will consider how Ukraine may ratify the Rome Statute.

I. Declarations: Where and When the ICC has Jurisdiction

As noted in Part One, while Ukraine has not ratified the Rome Statute, it has “declared” that it accepts the jurisdiction of the ICC. It has made two “Declarations”, both of which have been, or have attempted to be, “limited” by the Government in terms of time, geography and the persons or groups of persons to which the ICC jurisdiction should extend. The first Declaration was filed with the ICC in April 2014.¹⁷⁵ It is aimed at crimes alleged to have been committed during the Euromaidan Revolution between 21 November 2013 and 22 February 2014. In September 2015, the GoU filed a second Declaration.¹⁷⁶ It states that the Government accepts the ICC's jurisdiction from 20 February 2014 onwards. In other words, the ICC has indefinite jurisdiction. It is aimed at the conflict in Eastern Ukraine and alleged Russian aggression.

A. Jurisdiction from a Declaration

As noted above, the *acceptance* of the Court's jurisdiction, by ratification of the Rome Statute or by a “Declaration” accepting the jurisdiction of the Court, is the precondition to the *exercise* of jurisdiction by the ICC. As Ukraine is not a State Party to the Rome Statute, it is therefore required to “invite” the Court to look at a situation on its territory or concerning its nationals; it must make a Declaration in order to accept the jurisdiction of the Court with respect to the crimes of genocide, crimes against humanity and war crimes.

The relevant provision permitting a “Declaration” is Article 12(3) of the Rome Statute—preconditions to the exercise of jurisdiction—that reads: “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”¹⁷⁷

It will be noted that this provision is entitled “Preconditions to the Exercise of Jurisdiction”. Indeed, Article 12(3) provides what conditions must be met before the Court will consider looking at a situation. This provision is a “consent” provision that permits the ICC to accept jurisdiction where it is invited into a State not party to the Rome

¹⁷⁵ The First Declaration.

¹⁷⁶ The Second Declaration.

¹⁷⁷ Rome Statute, art. 12(3).

Statute. A Declaration does not automatically seize the Court of a situation, or “trigger” jurisdiction. As such, it is important not to equate Declarations with referrals made under Article 13 that *prompt the exercise* of jurisdiction. Instead, Declarations made accepting the Court’s jurisdiction require an additional and separate trigger to allow the exercise of jurisdiction, either by the Prosecutor initiating an investigation *proprio motu*, by referral from a State Party, or by referral from the UNSC.¹⁷⁸

Although the ICC Prosecutor is under no statutory obligation to take any action as a result of the Declaration, the current Prosecutor has developed a policy to automatically initiate a “preliminary examination” into the situation.¹⁷⁹ A preliminary examination is not an investigation. It is a process by which the Prosecutor considers all the information available to her in order to reach a fully informed determination on whether there is a reasonable basis to proceed with a full investigation.¹⁸⁰

The Ukrainian Declarations give jurisdiction to the Court over criminal conduct covered by the Rome Statute that occurs on the territory of Ukraine or committed by a Ukrainian citizen.¹⁸¹ This means, in short, that the ICC could potentially have jurisdiction over any crime committed on Ukraine’s territory or by a Ukrainian citizen. This raises several questions, including whether Crimea still falls within this remit, and whether a foreign fighter—for example, a Russian citizen—fighting on Ukrainian soil and allegedly committing a crime there could be held responsible by the ICC. Specific issues regarding jurisdiction as they relate to the situation in Ukraine are addressed below.

B. Jurisdiction in the Context of the Ukrainian Situation

If one of the above circumstances has triggered the need to consider a situation, it must next be assessed whether the Court’s jurisdiction is enabled. The Court’s jurisdiction becomes active if the following questions are answered in the affirmative: (i) are the crimes alleged referred to in the Rome Statute?; (ii) did the crimes occur after the Rome Statute’s provisions entered into force for the State in question?;¹⁸² and (iii) did they occur in the specified territory or by a person of the specified nationality? The technical phrasing for these three factors is as follows:

- Crimes as referred to in Article 5 of the Rome Statute (jurisdiction *ratione materiae*). This is translated as “material jurisdiction” but is more commonly known as “subject-matter jurisdiction”;
- Crimes that fulfil the temporal requirements under Article 11 of the Rome Statute [jurisdiction *ratione temporis* (“temporal jurisdiction”)]; and

¹⁷⁸ *Ibid.*, art. 13.

¹⁷⁹ Upon receipt of a referral or a valid declaration made pursuant to art. 12(3) of the Statute, the Prosecutor may open a preliminary examination of the situation: Regulations of the Prosecutor, reg 25(1)(c). Although the Prosecutor is under no obligation to start a preliminary examination upon the receipt of a declaration, recent practice suggests that she will automatically open a preliminary examination. *See* Preliminary Examinations Policy Paper, p. 18, para. 76.

¹⁸⁰ Rome Statute, arts. 15(2) and (3).

¹⁸¹ Rome Statute, art. 12(2).

¹⁸² *Ibid.*, art. 11(2).

- Crimes that are covered by one of the alternate jurisdictional parameters in Article 12(2) [jurisdiction *ratione loci* (“territorial jurisdiction”) or *ratione personae* (“nationality jurisdiction”)].¹⁸³

This section assesses whether the ICC’s jurisdiction has been limited by the “targeted” Declarations submitted by Ukraine. It will then go on to assess the jurisdiction of the ICC over specific areas of concern, namely Crimea and Eastern Ukraine; and foreign fighters on the territory of Ukraine. Finally, it will consider what impact possible amnesties in the Ukrainian conflict may have on the ICC’s ability to prosecute individuals.

The Report does not assess the jurisdiction of the ICC over the downing of Malaysia Airlines flight MH17 since the criminal proceedings in this case are currently taking place before a Dutch court.¹⁸⁴

a) Attempts to Limit or Target the ICC’s Jurisdiction by the Declarations

This section relates to whether Declarations accepting the jurisdiction of the ICC can legitimately be targeted or limited in any way by the declaring State.

As discussed above, the Ukrainian declarations are drafted in a way that seeks to accepted the jurisdiction of the ICC that would be limited with regard to the crimes committed, the perpetrators, geographical scope and the time-frame of jurisdiction. The ICC does not have to and will not accept these constraints and may investigate all sides to the conflict and the crimes wherever they arise within Ukrainian territory within the relevant time period. The Court may, however, accept the timeframe the Declarations have given—granting jurisdiction only beginning in November 2013.

The Declarations profess to accept jurisdiction over crimes against humanity and war crimes in Ukraine.¹⁸⁵ The first is largely targeted at crimes allegedly occurring during the Euromaidan Revolution and the actions of former President Yanukovich and officials in his administration. It accepts jurisdiction for crimes committed from 21 November 2013 to 22 February 2014. The second Declaration is aimed at the Russian Federation and the leaders of the “terrorist organisations”, namely the DPR and LPR. The timeframe of this Declaration overlaps with the first and accepts the ICC’s jurisdiction from 20 February 2014 onwards. Accordingly, it is clear that the GoU attempted to limit the crimes to those committed by the previous regime, as well as and the separatists and those who have supported them.

As will be discussed, although the law is evolving, ICC practice to date has recognised these concerns and has generally opposed attempts by States to define or limit jurisdiction. This general prohibition on Declarations limiting the jurisdiction of the ICC, however, may not apply with equal force to Declarations limiting the Court’s jurisdiction in terms of time.

¹⁸³ Kenya Authorisation Decision, para. 39; *Situation in the Republic of Côte d’Ivoire* (Decision) ICC-02/11 (3 October 2011) (“Côte d’Ivoire Authorisation Decision”), para. 22.

¹⁸⁴ Netherlands Public Prosecution Service, [MH17 plane crash](#).

¹⁸⁵ The Second Declaration, para. 1.

There are two parts to the general prohibition on Declarations limiting the jurisdiction of the Court: a general prohibition on “framing” the Court’s jurisdiction with a Declaration, and a caveat for framing the time period in which the ICC has jurisdiction. First, pursuant to the ICC’s Rules of Procedure and Evidence, after a Declaration has been made, the Registrar must inform the State in question of the fact that by a declaration the State accepts the jurisdiction of the Court “with respect to the crimes referred to in Article 5 of relevance to the situation”.¹⁸⁶ The significance of this rule is two-fold: first, it explicitly demands that the country accept jurisdiction for *all* crimes of relevance, not just the ones identified in a declaration; and secondly, it has been interpreted by the ICC to restrict a State’s ability to frame a situation the way it wants and in turn limit the ICC’s jurisdiction.¹⁸⁷

The ICC made this clear in the recent *Gbagbo* case. It found that while States may seek to define the scope of its acceptance, they cannot establish arbitrary parameters on a given situation; it will be for the Court to determine the parameters of the jurisdiction.¹⁸⁸ As summarised by one commentator, a state may not “have its cake and eat it” by issuing a Declaration but attempting to have a say in the choice of accused.¹⁸⁹ In other words, the ICC will not permit States to opportunistically pursue its enemies.¹⁹⁰

The possible exception to these hard rules concerns the potential for a State to define a specific time period for ICC action. This is relevant to Ukraine because the Declarations specify that the Court’s jurisdiction is accepted from November 2013 onwards. In the *Gbagbo* case at the ICC, the Court appeared to address this issue. The Declaration made by Côte d’Ivoire under Article 12(3) on 18 April 2003 declared it accepted the jurisdiction of the Court for an indeterminate duration (“*pour une durée indéterminée*”).¹⁹¹ The Appeals Chamber took a broad view on the parameters of a declaration.¹⁹² It found that a State could accept the jurisdiction of the ICC in general terms, but that this did not suggest that a State might not further limit the acceptance of jurisdiction within the parameters of the Court’s legal framework.¹⁹³ It appears that the ICC might permit a Declaration to restrict the time period of jurisdiction, but not other substantive matters (as discussed above).

Legal commentators appear to agree. Professor Andreas Zimmermann has argued that a State’s Declaration (such as Ukraine’s) can limit the timeframe of the ICC’s jurisdiction.¹⁹⁴ Another commentator suggested — prior the *Gbagbo*

¹⁸⁶ International Criminal Court, [Rules of Procedure and Evidence](#), ICC-ASP/1/3 (Part. II-A) (2002) (“Rules of Procedure and Evidence”), r. 44.

¹⁸⁷ *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision](#)) ICC-02/11-01/11-212 (15 August 2012), para. 59.

¹⁸⁸ *Ibid.*, para. 60.

¹⁸⁹ Harmen van der Wilt, ‘Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015), pp. 214- 215.

¹⁹⁰ Ruth Wedgwood, ‘Speech Three: Improve the International Criminal Court’ in Alton Frye (ed) *Toward an International Criminal Court?: Three Options Presented as Presidential Speeches* (New York: Council for Foreign Relations, 1999), p. 69.

¹⁹¹ [‘Republic of Côte d’Ivoire Declaration’](#) (ICC) 18 April 2003, ICC-02/11-01/11-129-Anx16.

¹⁹² *The Prosecutor v. Laurent Koudou Gbagbo* ([Judgment](#)) ICC-02/11-01/11-212 (12 December 2012).

¹⁹³ *Ibid.*, para. 84.

¹⁹⁴ Andreas Zimmermann, ‘Palestine and the International Criminal Court Quo Vadis: Reach and Limits of Declarations under art. 12(3)’ (2013) 11(2) *Journal of International Criminal Justice* 303, pp. 312-313.

judgment — that there appears to be no reason why a State should not be able to limit the temporal scope of the ICC’s jurisdiction.¹⁹⁵

In conclusion, attempts to limit or target the jurisdiction of the ICC by virtue of the Declarations made are unlikely to be accepted by the Court. Restrictions on the timeframe of the Declarations are more likely to be accepted. As a result, Ukraine’s attempt to pre-ordain the crimes or perpetrators that face scrutiny from the ICC can be expected to fail. The ICC Prosecutor’s preliminary examination was not limited by the terms of the declarations, but by the evidence discovered after a review of all relevant crimes and perpetrators. The same will apply to any subsequent investigation and prosecution.

b) ICC Jurisdiction over Disputed Territories: Crimea and Eastern Ukraine

This section considers the ICC’s jurisdiction over the disputed territories of Crimea and Eastern Ukraine. Ukraine’s Declarations provide for ICC jurisdiction over “Ukraine’s” territory and nationals. With the regions of Crimea and Eastern Ukraine declaring themselves as separate from Ukraine, this section considers whether the ICC would nevertheless have jurisdiction over crimes related to these regions.

i. ICC Jurisdiction over Crimea

There have been questions raised as to whether the ICC has jurisdiction over events in Crimea given the current authorities’ claim that it is now a part of the Russian Federation. This has now been accepted by the ICC in its November 2016 preliminary examinations report, describing Crimea as “incorporat[ed] [...] into the Russian Federation”¹⁹⁶ and the Russian Federation as “assum[ing] control over Crimea”.¹⁹⁷ As mentioned, when considering whether the Court has jurisdiction over particular events, a three-stage test must be satisfied: it must be satisfied that the Court has subject-matter jurisdiction, temporal jurisdiction and either territorial jurisdiction or nationality jurisdiction.

As the ICC confirmed in its November 2016 report that it does in fact have subject-matter jurisdiction over the events that occurred in Crimea (as the Prosecutor found that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation)¹⁹⁸, the question of whether the situation in Crimea falls within the jurisdiction of the Court will be considered in relation to the latter two parts of the three-part test (temporal jurisdiction and either territorial or nationality jurisdiction). These requirements will be discussed below.

¹⁹⁵ Steven Freeland, ‘How open Should the Door Be - Declarations by Non-States Parties under art. 12(3) of the Rome Statute of the International Criminal Court(2011) Nordic J Int’l L 211, p. 234.

¹⁹⁶ 2016 Report on preliminary examination, para. 156.

¹⁹⁷ *Ibid.*, para. 157.

¹⁹⁸ *Ibid.*, para. 158.

As discussed in the Introduction, the events surrounding the annexation of Crimea began around 23 February 2014, when pro-Russian protestors demonstrated in Crimea against the new Kyiv administration.¹⁹⁹ On or around 27 February 2014, pro-Russian gunmen began to seize key buildings in the Crimean capital, Simferopol. This included the Crimean Parliament, where a Russian flag was raised. Unidentified gunmen in combat fatigues appeared at two airports in Crimea. On 1 March 2014, the Russian Parliament approved the use of force in Crimea to protect Russian interests. On 5 March 2014, Russian President Vladimir Putin rejected calls to withdraw troops from Crimea on the basis that the “self-defence” troops were not under Russian command. On 6 March 2014, the pro-Russian leadership in Crimea voted to join Russia and instituted a referendum. On 16 March 2014, Crimea’s secession referendum on joining Russia was reportedly backed by 97% of voters. On 18 March 2014, President Vladimir Putin signed a bill to incorporate Crimea into the Russian Federation.

As noted above, the GoU then submitted two Declarations to the ICC. The second Declaration is clearly intended to address events in Crimea and Eastern Ukraine, covering from 20 February 2014 onwards.²⁰⁰ From the outset, it should be noted that the ICC Prosecutor has confirmed that she was looking at “any relevant crimes arising out of events in Crimea”.²⁰¹

1) Temporal Jurisdiction

An analysis of the Ukrainian Declarations shows that the ICC does have temporal jurisdiction over Crimea, as the second Declaration submitted to the ICC applies to “acts committed in the territory of Ukraine since 20 February 2014”. As a result, the situation in Crimea falls within the temporal scope of the Declaration.

2) Territorial or Nationality Jurisdiction

Once temporal jurisdiction is established, the Court will need to consider whether it has either territorial jurisdiction or nationality jurisdiction over the crime(s) in question. As noted above, the Rome Statute provides that the Court may exercise its jurisdiction over a crime committed on the territory of a declaring State (“territorial jurisdiction”), or committed by a person who is a national of the declaring State (“nationality jurisdiction”). The separate issues of territorial and nationality jurisdictions will be considered separately below.

i) Territorial Jurisdiction

First, the ICC may exercise territorial jurisdiction if the alleged crime was committed on the territory of the State that is a State Party or has declared it accepts the jurisdiction of the Court.²⁰² Therefore, to assess whether the ICC has

¹⁹⁹ ‘Ukraine crisis: Timeline’ (BBC, 13 November 2014); ‘Timeline: Political crisis in Ukraine and Russia’s Occupation of Crimea’ (Reuters, 8 March 2014); ‘Timeline: Key events in Ukraine’s ongoing crisis’ (Washington Post, 12 May 2014); ‘Ukraine crisis: timeline of major events’ (The Telegraph, 5 March 2015); ‘Timeline: Ukraine’s political crisis’ (Al Jazeera, 20 September 2014).

²⁰⁰ The Second Declaration.

²⁰¹ Office of the Prosecutor, ‘Report on Preliminary Examination Activities’ (2015) (“2015 Preliminary Examination Report”), paras 106 and 110.

²⁰² Rome Statute, art. 12(2)(a).

territorial jurisdiction over alleged crimes in Crimea, the ICC Prosecutor needs to consider whether any alleged crimes that fall within the jurisdiction of the ICC after the territory of Crimea was, and still is, occupied by Russia (around 27 February 2015) still fall within the territory of Ukraine. The below explains why the ICC Prosecutor has come to the view that the Court has territorial jurisdiction over alleged crimes in Crimea.

International law is unequivocal that territory cannot be forcibly annexed.²⁰³ As Crimean “independence” came about as a result of Russia’s seemingly unlawful use of force, the International Court of Justice (“ICJ”) would likely find that this rendered the declaration of independence from Ukraine invalid.²⁰⁴ An example of this can be seen in the ICC Prosecutor’s preliminary examination of the situation in Georgia. Despite South Ossetia’s declaration of independence of 29 May 1992 and its subsequent recognition by four UN Member States beginning in 2008 onwards, the ICC Prosecutor has said that she considers the area of South Ossetia to be part of Georgia for the purposes of the investigation. She was of the view that it is generally not considered an independent state and accordingly should be considered as part of Georgia for the purposes of ICC jurisdiction.²⁰⁵ It is likely that the ICC Prosecutor would apply the same reasoning to Crimea in relation to the remit of the Court’s territorial jurisdiction in Ukraine.

Further, it appears that there is no requirement that the territorial jurisdiction conferred upon the Court be limited to territory over which a state actually exercises effective control.²⁰⁶ An example of this “control” principle is Cyprus, which ratified the Rome Statute in March 2002.²⁰⁷ This ratification gives the Court jurisdiction over northern Cyprus, even though Turkey has occupied it since 1974.²⁰⁸ This situation is likely to apply only to territory that at one point was clearly within the sovereignty of the State in question.²⁰⁹ This view appears to be the prevailing view among international commentators.²¹⁰ There does not seem to be any reason why these arguments do not apply equally to non-State parties who only issue a Declaration (such as Ukraine) as it does to State Parties (such as Cyprus) when determining the remit of territorial jurisdiction.

²⁰³ [UN, UN Charter, 24 October 1945, 1 UNTS XVI, art. 2; Aurel Sari, ‘Ukraine Insta-Symposium: When does the Breach of a Statute of Forces Agreement amount to an Act of Aggression? The Case of Ukraine and the Black Sea Fleet SOFA’ \(Opinio Juris, 6 March 2014\).](#)

²⁰⁴ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports (2010), p. 403, para. 81.

²⁰⁵ *Situation in Georgia (Corrected Version of ‘Request for authorisation of an investigation pursuant to article 15’, 16 October 2015)* ICC-01/15-4-Corr2 (17 November 2015), para. 54.

²⁰⁶ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010), p. 285.

²⁰⁷ [‘Cyprus’ \(ICC\)](#)

²⁰⁸ Kypros Chrysostomides, *The Republic of Cyprus—A study in International Law* (Martinus Nijhoff, 2000), pp. 148-153; *Cyprus v. Turkey (Merits Judgment)* App. No. 25781/94 (10 May 2001), paras. 13-14; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1987).

²⁰⁹ Eugene Kontorovich, ‘Israel/Palestine—The ICC’s Uncharted Territory’ (2013) 11(5) *Journal of International Criminal Justice* 979-999, pp. 990-991.

²¹⁰ Michael Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, 2014), p. 222 *et seq.* citing Kypros Chrysostomides, *The Republic of Cyprus—A study in International Law* (Martinus Nijhoff, 2000), pp. 148-153, 155-157; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1987), p. 110; *Cyprus v. Turkey (Merits Judgment)* App. No. 25781/94 (10 May 2001), paras. 13-14; *Demopoulos et al. v. Turkey (Admissibility Decision)* App. No. 46113-99 (1 March 2010), para. 96.

Lastly, as the ICC was set up to end impunity,²¹¹ the ICC Prosecutor is concerned with avoiding accountability gaps. If Crimea is deemed to be outside the territorial jurisdiction of Ukraine, there would be little or no basis for prosecuting crimes within the jurisdiction of the court within that territory. This would foreshadow a situation in which a State would be able to avoid accountability by illegally occupying a region of another state.²¹²

To conclude, international law and ICC practice suggest that it is likely the ICC Pre-Trial Chamber would agree with the Prosecutor and find that the Court has territorial jurisdiction over relevant crimes in Crimea.

ii) *Nationality Jurisdiction*

Second, as it is likely that the ICC has territorial jurisdiction over Crimea, an analysis of nationality jurisdiction is not vital as there are alternative bases for jurisdiction. Irrespective, if the ICC did not have territorial jurisdiction, it may still have nationality jurisdiction, meaning that the ICC has jurisdiction over Ukrainian citizens who have committed crimes in Crimea or elsewhere.

The Rome Statute provides that the Court may exercise its jurisdiction where a State accepts jurisdiction and the person accused of a crime ‘is a national’ of that State, irrespective of where the national committed the crime.²¹³ A contemporary example of this concerns so-called Islamic State of Iraq and Syria (ISIS) in the Middle East. The crimes are plainly committed on the territories of Syria and Iraq. Many of the perpetrators consider themselves to now be part of ISIS. Syria and Iraq are not parties to the Rome Statute and have not accepted ICC jurisdiction. However, as noted by the ICC Prosecutor, the ICC could exercise nationality jurisdiction over such persons. This would permit the ICC to exercise jurisdiction over nationals from, among other States, Tunisia, Jordan, France, the United Kingdom (“UK”), Germany, Belgium, the Netherlands and Australia that have travelled to Syria.

However, the existence of this type of national jurisdiction does not mean the ICC Prosecutor will open a preliminary examination. It will depend upon the circumstances. In relation to ISIS particularly, the Prosecutor is of the view that the jurisdictional basis for opening a preliminary examination is too narrow at this point.²¹⁴ This is primarily because

²¹¹ Rome Statute, Preamble, para. 5.

²¹² [‘Ukraine: clear breaches of international law in Crimea’](#) (*International Bar Association*, 20 February 2015); Daniel Wisheart, [‘The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?’](#) (*EJIL: Talk!*, 4 March 2014). It is likely that Russia’s intervention and acquisition of Crimea was unlawful. For support of this proposition: [‘The 1997 Black Sea Fleet Agreement between Russia and Ukraine’](#) (*Eric Posner Blog*, 5 March 2014) citing John L. Black (ed), *Russia & Eurasia Documents Annual 1997: The Russian Federation* (vol 1, Academic International Press, 1998), p. 129; [‘On Violations of Ukraine’s Laws in Force and of Ukrainian Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine’](#) (*MFA*, 3 March 2014). Similar calls for independence from Abkhazia and South Ossetia have gone unsupported internationally: Malcolm N Shaw, ‘The Heritage of States: The Principles of Uti Possidetis Juris Today’ (1996) 67 *British Yearbook of International Law*, fn. 218; Romain Yakemtchouk, ‘Les conflits de territoires et de frontieres dans les Etats de l’ex-URSS’ (1993) 39 *Annuaire francais de droit international*, p. 409; A V Lowe and Colin Warbrick (eds), ‘Current Developments: Public International Law - Recognition of States’ (1991) 41 *International and Comparative Law Quarterly*, pp. 473, 478; UNSC Res 822 (30 April 1993) UN Doc S/RES/822; UNSC Res 853 (29 July 1993) UN Doc S/RES/853; UNSC Res 876 (19 October 1993) UN Doc S/RES/876; UNSC Res 884 (12 November 1993) UN Doc S/RES/884; UNSC Res 896 (31 January 1994) UN Doc S/RES/896.

²¹³ Rome Statute, art. 12(2)(b).

²¹⁴ [‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS’](#) (ICC, 8 April 2015).

ISIS appears to be an organisation led mainly by nationals of Iraq and Syria and these States are not parties to the Rome Statute and have not accepted ICC jurisdiction. Therefore, the ICC would not have jurisdiction over their nationals for offences in those countries. Accordingly, in the absence of nationals from ratifying or declaring states being in leadership positions, there are few opportunities or prospects of the ICC Prosecutor investigating and prosecuting those most responsible—which is the ICC Prosecutor’s expressed focus.

However, returning to Crimea and applying this logic, it may be that information exists that demonstrates that Ukrainians [such as high-ranking military or Security of Ukraine (“SBU”) officials] are suspected of assisting alleged Russian crimes in Crimea (or within conflict areas in Eastern Ukraine). If this is so, such persons can be considered as Ukrainian citizens, over whom Ukraine has jurisdiction. As a result of the Declarations, because of the nationality jurisdiction, the ICC also has jurisdiction over such persons.

It may be argued that people in Eastern Ukraine and Crimea are not Ukrainian citizens. This argument is flawed for the purposes of the ICC’s criminal investigation. The people in Crimea are still considered to be part of Ukraine for the purposes of jurisdiction. Therefore, the Court will consider the people who were “formerly” Ukrainian citizens to still be Ukrainian for the purposes of an investigation.

3) *Conclusion*

To conclude, the ICC will likely have both temporal and territorial jurisdiction over crimes allegedly committed in Crimea by a person of any nationality. In the alternative, it is likely that Ukrainian nationals could be prosecuted for crimes in Crimea pursuant to the ICC’s jurisdiction over Ukrainian nationals.

ii. *ICC Jurisdiction over Eastern Ukraine*

The same questions and answers to the question of ICC jurisdiction over Crimea apply to the regions of Luhansk and Donetsk in Eastern Ukraine. These regions have not, however, attempted to join another recognised State, but instead tried to form their own republics. This, as discussed below, is of no consequence for the purposes of determining the ICC’s territorial and nationality jurisdiction.

From the outset, like Crimea, the ICC Prosecutor considered all information from reliable sources to evaluate the situation in Ukraine including the regions of Luhansk and Donetsk, which together make up the “Donbas” region.²¹⁵ The Prosecutor will still be required to consider whether the Court has jurisdiction temporally, as well as either territorially or in terms of nationality in the region. These are considered in turn below.

First, the temporal jurisdiction of the ICC in terms of the conflict in the east is clearly satisfied.²¹⁶ The conflict in Eastern Ukraine appeared to begin around 7 April 2014 when protesters began to seize government buildings in

²¹⁵ 2015 Preliminary Examination Report, para. 110.

²¹⁶ Rome Statute, art. 11.

Kharkiv, Donetsk and Luhansk.²¹⁷ The Declarations give the ICC jurisdiction from 21 November 2013 until the present day. In particular, the second Declaration submitted to the ICC applies to ‘acts committed in the territory of Ukraine since 20 February 2014’. Accordingly, the situation in Eastern Ukraine falls within the temporal scope of the Declaration.

Second, in terms of territorial jurisdiction, Eastern Ukraine will likely be considered part of Ukraine for the purposes of the ICC Prosecutor’s preliminary examination. On 11 May, pro-Russian separatists organised a “referendum” on the sovereignty of the Donetsk and Luhansk regions, the results of which were allegedly falsified, did not satisfy basic democratic standards and violated the Constitution of Ukraine.²¹⁸ Shortly thereafter, the locals declared the areas of Donetsk and Luhansk to be the “Donetsk People’s Republic” and “Luhansk People’s Republic”, respectively. The referendum is problematic. Article 73 of the Constitution of Ukraine provides that “[i]ssues on altering Ukraine’s territory shall be resolved exclusively through an all-Ukrainian referendum”. The referendum was not an all-Ukraine referendum, and accordingly appears not to have been valid under the Constitution of Ukraine. To add credence to this, no legitimate States—not even Russia—have recognised Eastern Ukraine as acquiring statehood. Therefore, while Eastern Ukraine may claim to be independent, it cannot reasonably be said to have acquired statehood legitimately.

Third, for nationality jurisdiction, it may be argued that people in Eastern Ukraine are not Ukrainian citizens for the purposes of nationality jurisdiction. This argument is flawed for the purposes of the ICC’s criminal investigation. First and foremost, the people in the eastern conflict region have not changed their nationality legally. The Parliament of the LPR adopted a “declaration” on 27 May 2015, claiming LPR citizenship for those in the territory or born in it.²¹⁹ This declaration is not a law, but paves the way for a future act of parliament to be enacted. While the above and heritage to Russia is claimed, they remain Ukrainian for the purposes of international law and the purportedly new State has not formally acquired statehood.²²⁰ Therefore, the ICC will consider the people who were “formerly” Ukrainian citizens to still be Ukrainian for the purposes of an ICC investigation.

Overall, it appears highly likely that the ICC would have temporal and either territorial or nationality jurisdiction over the conflict in Eastern Ukraine.

iii. ICC Jurisdiction over Foreign Fighters on Ukrainian Territory

This section considers whether the ICC would have jurisdiction to try foreign fighters who are alleged to have committed crimes on the territory of Ukraine. This concerns basic questions of temporal and territorial jurisdiction. In sum, as described below, these jurisdictional requirements will be satisfied.

²¹⁷ [‘Ukraine crisis: timeline of major events’](#) (*The Telegraph*, 5 March 2015); [‘Timeline: Key events in Ukraine’s ongoing crisis’](#) (*Washington Post*, 12 May 2014); [‘Ukraine crisis: Timeline’](#) (*BBC*, 13 November 2014).

²¹⁸ [‘The Farce of the ‘Referendum’ in Donbas’](#) (*Centre for Eastern Studies*, 14 May 2014).

²¹⁹ [‘Supreme Council “Luhansk People’s Republic” adopted a declaration on citizenship’](#) (*Forbes*, 27 May 2014).

²²⁰ [The Constitution of Ukraine requires a referendum across the country for the purposes of secession. Constitution of Ukraine: Law of Ukraine No. 254к/96-BP](#) [Online resource]. 28 June 1996, art. 73.

Concerning temporal jurisdiction, the ICC has jurisdiction over crimes committed since 21 November 2013 onwards because of the Declarations. In relation to territorial jurisdiction, the recent preliminary examination into the conflict in Georgia provides clear indicators regarding the ICC's territorial jurisdiction over foreign fighters. The application by the ICC Prosecutor to the Court seeking authorisation to open a formal investigation (on this, see Part Three) into the situation in Georgia indicates that she believes that crimes committed by the Russian armed forces, particularly alleged indiscriminate and disproportionate attacks, were committed in Georgia.²²¹ While this is a preliminary view and requires further investigation, the Prosecutor clearly acted on the basis that she considered that the Court would have territorial jurisdiction over the crimes, even though they were committed by non-Georgians.²²²

In conclusion, based upon the position of the ICC Prosecutor, it seems apparent that if a Russian citizen committed a crime on Ukrainian soil, the ICC will have territorial jurisdiction over him or her by virtue of territorial jurisdiction.

1) Objections to Jurisdiction: Amnesties

There have been various discussions within Ukraine regarding the provision of amnesty to fighters in Eastern Ukraine to assist in bringing about the end of the conflict, the reintegration of the contested regions, and the eventual reconciliation of Ukrainian society. This section considers the jurisdiction to prosecute international crimes despite the existence of amnesties.

The Minsk Agreements of September 2014 and February 2015 called on the signatories to take steps to provide amnesties. The second Agreement mandates that the parties ensure a pardon and amnesty by “enacting the law” prohibiting the prosecution of persons in connection with events in Donetsk and Luhansk regions.²²³ However, there is no outright amnesty provision in the Minsk Agreements — only a requirement to take steps to provide for them.

The concept of amnesty in exchange for peace is not new. In fact, the International Committee of the Red Cross (“ICRC”) even takes the position that IHL obliges States such as Ukraine to endeavour to grant the “broadest possible” amnesties for those who have participated in a non-international armed conflict.²²⁴ In other words, to ensure

²²¹ *The Situation in Georgia* ([Request for authorisation of an investigation](#)) ICC-01/15-4-Corr (17 November 2015), paras. 198-201.

²²² *Ibid.*, para. 138: ‘Alleged involvement of Russian armed forces in the commission of crimes attributed to South Ossetian forces’; *Ibid.*, para. 198: ‘Alleged Indiscriminate and Disproportionate Attacks by Russian armed forces’; *Ibid.*, para. 65: ‘[...] the information available indicates that at least some members of the Russian armed forces participated in the commission of such crimes, while other members of the Russian armed forces acted passively in the face of such crimes, and still others acted to prevent and punish such crimes’.

²²³ ‘5. Ensure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine’: [‘Full text of the Minsk Agreement’](#) (*Financial Times*, 12 February 2015); [‘Provide pardon and amnesty by way of enacting a law that forbids persecution and punishment of persons in relation to events that took place in particular departments of Donetsk and Luhansk Oblasts of Ukraine’](#); [‘Minsk agreement on Ukraine Crisis: text in full’](#) (*The Telegraph*, 12 February 2015); [‘Minsk Agreement: Full text in English’](#) (*UNIAN*, 12 February 2015).

²²⁴ It is presumed, for the purpose of this report, that the conflict is a non-international armed conflict. If the conflict was classified as an international armed conflict, Additional Protocol I, art. 43(2) would apply. This provides that members of the armed forces of a Party to a conflict are combatants, that is to say, they have the right to participate directly in hostilities. This has been interpreted as granting “immunities” for IHL-compliant actions in international armed conflicts.

that participation in the conflict and crimes committed as a consequence cannot be prosecuted. However, IHL does not permit all amnesties and they must be carefully considered and focused. Those who are suspected of or accused of war crimes or certain other international crimes should not be granted amnesty and should still be investigated and prosecuted.²²⁵ There is little disagreement with this position.²²⁶ The ICRC agrees with this stance,²²⁷ as does the UN,²²⁸ the UN Commission on Human Rights (“UNCHR”)²²⁹ and the UN Secretary-General.²³⁰ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) has said explicitly that war crimes may not be the object of

²²⁵ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol I, Cambridge University Press, 2009), p. 612 *et seq.*

²²⁶ As pointed out by the ICRC: *Ibid.*, pp. 4017-4044.

²²⁷ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol I, Cambridge University Press, 2009), p. 612.

²²⁸ Resolutions on Croatia and Sierra Leone, the UN Security Council confirmed that amnesties may not apply to war crimes: UN Security Council, Res 1120, 14 July 1997, UN Doc S/RES/1120, para. 7; UN Security Council, Res 1315, (14 August 2000) UN Doc S/RES/1315, preamble.

²²⁹ UN Commission on Human Rights, Res 2002/79 (25 April 2002) E/2002/23, para. 2.

²³⁰ *See, e.g.*, UN Secretary-General, ‘Report on the establishment of a Special Court for Sierra Leone’, UN Doc S/2000/915 (4 October 2000), paras. 22-24; UN Secretary-General, ‘Report of the on the protection of civilians in armed conflict’, UN Doc S/2001/331 (30 March 2001), para. 10.

an amnesty.²³¹ Further, while the law is in somewhat of a state of flux,²³² depending on the nature of the offence, States may be obliged²³³ to prosecute international offences such as war crimes or crimes against humanity.²³⁴

An example of this in action is Sierra Leone. After the civil war in Sierra Leone, the Lomé Peace Accord was reached.²³⁵ The peace agreement provided for amnesties. Subsequently, the Statute of the Sierra Leone Court provided explicitly that an amnesty granted to any person falling within the jurisdiction for crimes contained within the statute or other serious violations of IHL would not preclude prosecution.²³⁶

²³¹ The Tribunal said that national amnesties could not stop fundamental obligations under international law from taking effect, *The Prosecutor v. Furundžija* (Judgment) IT-95-17/1-T (10 December 1998), paras 153-157.

²³² Yasmin Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 *International Review of the Red Cross* 851.

²³³ Genocide (The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, arts. I & IV); crimes against humanity (Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, para. 18; Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile* (Judgment) 26 September 2006, para. 114).

War crimes in an international armed conflict (customary international law (Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, (vol 1, Cambridge University Press, 2009), pp. 607-611); the four Geneva Conventions' obligation to search for persons allegedly responsible for grave violations of the Conventions). War crimes in a non-international armed conflict (customary international law (Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol I, Cambridge University Press, 2009), pp. 607-611); Common Article 3 of the four Geneva Conventions of 1949 and the Protocols Additional to the Geneva Conventions of 12 August 1949 (1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, adopted 12 August 1949; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, adopted 12 August 1949; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 UNTS 135, adopted 12 August 1949; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, adopted 12 August 1949; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3, adopted 8 June 1977; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, adopted 8 June 1977; 2005 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem [Protocol III], 2006 ATNIF 6, adopted 8 December 2005)).

Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), arts. 4.1, 4.2 and 7.1; *Prosecutor v. Anto Furundžija* (Judgment) Case No. IT-95-17/1-T (10 December 1998), para. 155); enforced disappearance (UNGA, 2006 International Convention for the Protection of All Persons from Enforced Disappearance, Res A/RES/61/177, adopted 20 December 2006, arts. 6.1, 7.1, 11.1, 24.4);

Victim's right to obtain reparation and prompt, fair and adequate compensation; *Quinteros v. Uruguay*, Communication No. 107/1981, in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol II (UN publication, Sales No. E.89.XIV.1); European Court of Human Rights, *Kurt v. Turkey* (Judgment) No. 24276/94 (25 May 1998); Inter-American Court of Human Rights, *Velásquez-Rodríguez* Case (Judgment) Series C, No. 4 (29 July 1988), para. 172).

²³⁴ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol I, Cambridge University Press, 2009), pp. 607-611: 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'

²³⁵ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, Togo, 7 July 1999, art. IX, annexed to Letter dated 12 July 1999 from the Chargé d'Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, S/1999/77, 12 July 1999.

²³⁶ *Statute of the Special Court for Sierra Leone*, 2178 UNTS 138, 145, UN Doc S/2002/246, Annex II, adopted 16 January 2002, art. 10: 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.'

These principles can be applied to Ukraine. Ukraine is entitled and encouraged to provide amnesty to those participating in the conflict. However, if Ukraine presses ahead with an amnesty law, it should include the full array of international crimes still capable of being prosecuted despite the amnesty. Accordingly, the following should be excluded from the amnesty law: genocide under Article 442 of the Criminal Code of Ukraine, murder, hostage taking and rape under Article 152 of the Criminal Code of Ukraine and other offences. However, to comply properly with its international obligations, the list of crimes excluded from the amnesty should also include war crimes (under Article 438 of the Ukrainian Criminal Code) and all other potential international crimes such as torture (Article 127 of the Ukrainian Criminal Code).²³⁷

C. The Cooperation Consequences of Ukraine's Declaration

The following section discusses the obligations that arise as a consequence of Ukraine's decision to file Declarations with the ICC.

a) The Obligation To Cooperate with the ICC

Ukraine must now fully cooperate with the ICC in its investigations and prosecutions relating to the conflict in Ukraine. Article 12(3) (the provision which permits Declarations) clearly provides that the State which has submitted the Declaration must cooperate with the Court without delay or exception under Part 9 of the Rome Statute (Articles 86-102). Part 9, which applies equally to State and non-State parties,²³⁸ outlines general and specific cooperation obligations, providing that States shall comply with, among other provisions: (i) the production of requested documents and records; (ii) the identification of people; (iii) the taking of evidence; (iv) the questioning of people; (v) executing searches or seizures;²³⁹ (vi) the surrender of persons to the court;²⁴⁰ and (vii) provisional arrest.²⁴¹ These will be discussed in detail below in Part Two, "Ratification".

b) Refusal to Cooperate

Refusal to cooperate with the ICC in accordance with the provisions of Article 9 may have consequences for Ukraine. If a declaring party fails to cooperate, the Court can inform the ASP or, if the situation was originally referred by the UNSC to the ICC, refusal to cooperate is reported to the UNSC. Therefore, Ukraine could be referred to the ASP if it fails to cooperate with the ICC.²⁴²

No specific provision exists in the Rome Statute regarding the kind of measures that may be taken by the ASP upon receipt of the referral.³⁷⁶ The ASP does not have the authority to sanction a State, and it therefore appears that the

²³⁷ International Partnership for Human Rights, '[Making Amnesty Work: Prospects of granting amnesty to the parties of the conflict in Eastern Ukraine](#)' (January 2016), pp. 6-7.

²³⁸ Rome Statute, art. 86.

²³⁹ *Ibid.*, art. 93(1).

²⁴⁰ *Ibid.*, art. 89.

²⁴¹ *Ibid.*, art. 98.

²⁴² *Ibid.*, art. 87(5)(b).

Assembly's response to non-compliance is limited to diplomatic or other political action.³⁷⁷ A formal response would ordinarily follow from a referral to the ASP and the ASP may adopt resolutions to "scold" the State responsible for non-compliance. Back channels of diplomacy will also be pursued to try and promote (or compel) cooperation.³⁷⁸

II. Ratification: Jurisdiction of the ICC

As outlined in Part One, when States agree to be bound by the provisions of the Rome Statute, they are said to "ratify" it. Ratification is the formal act of a State consenting to be bound by a treaty.²⁴³ To ratify the Rome Statute, a State will deposit a document containing this consent with the Secretary-General of the UN.²⁴⁴

Ukraine signed the Rome Statute on 20 January 2000 and acceded to the Agreement on the Privileges and Immunities of the International Criminal Court on 29 January 2007.²⁴⁵ Nevertheless, as of April 2021, Ukraine has not joined the 123 States Parties²⁴⁶ by acceding to the Rome Statute, as required by Article 125(2) for signatory States (States that have signed, but not ratified, a treaty) to become States Parties. Accordingly, Ukraine has not agreed to be fully bound by the instrument that gives jurisdiction to the ICC with respect to the crimes referred to in Article 5²⁴⁷ of the Statute when committed on its territory or by its nationals.²⁴⁸

A. Ratification versus Declaration and Its Effect on ICC Jurisdiction: Differences

This section compares ratification of the Rome Statute, which leads to a country becoming a State Party to the ICC, to Declarations, whereby a State accepts ICC jurisdiction but remains a non-State Party. On initial reflection, the difference between a Declaration and ratification is not immediately apparent. However, there are some differences that will be considered below in terms of politics, procedure, jurisdiction and obligations on the State.

a) Politically

The ratification of the Rome Statute means that the State, in the process of becoming a State Party to the Rome Statute, joins the ASP. As a non-State Party, Ukraine has no right to intervene on issues concerning issues such as amendments to the Rome Statute,²⁴⁹ or otherwise directly influence the administration of the Court (such as who is nominated or elected as the Prosecutor of the Court or who is nominated and elected as a Judge of the Court).²⁵⁰

²⁴³ Vienna Convention, arts. 2 (1) (b), 14 (1) and 16.

²⁴⁴ Rome Statute, art. 125(2).

²⁴⁵ Ukraine is the first non-State Party to the Rome Statute to accede to the latter Agreement.

²⁴⁶ ICC, [The States Parties to the Rome Statute](#).

²⁴⁷ Namely the crime of genocide, crimes against humanity and war crimes, and, subject to the completion of the conditions of art. 5(2), the crime of aggression.

²⁴⁸ Rome Statute, art. 12(1).

²⁴⁹ *Ibid.*, arts. 9(2), 51(2), 112(7), 121.

²⁵⁰ *Ibid.*, arts. 36(4), 42(4).

b) Procedurally

When a State Party brings a situation to the attention of the ICC, it is known as a “referral”. A formal investigation can only be opened following a referral of a situation by a State Party, a referral by the Security Council or authorisation by the ICC Pre-Trial Chamber to open an investigation.²⁵¹ Therefore, while a Declaration will lead to the Prosecutor automatically opening a preliminary examination,²⁵² the Prosecutor needs approval from the Court to launch a formal investigation. This is not the case with referrals from a State party to the ICC.

c) Jurisdictionally

The ratification of the Rome Statute will only give the ICC jurisdiction over conduct that occurs after it is ratified. To remedy this, a Declaration accepting the ICC’s jurisdiction must be made to cover conduct that has already taken place. However, ratification does not seem to be strictly necessary in light of the two Declarations submitted by Ukraine, which may still provide the ICC with ongoing jurisdiction over conduct since November 2013. The second Declaration submitted by Ukraine on 8 September 2015 is open-ended and it gives jurisdiction to the Court over the crimes committed from 20 February 2014 onwards for an indefinite duration.²⁵³ There is no reason to suggest that this will not cover new developments in the coming years.

d) Obligations

It is important to note that Part 9 of the Rome Statute identifies the main body of States’ obligations. States Parties and non-States Parties are treated largely as equals with regards to obligations under Part 9. According to Article 12(3), a State that has made a Declaration accepting the jurisdiction of the Court must cooperate with the Court without any delay or exception in accordance with Part 9 of the Statute. It does not name other provisions. Consequently, such a State must cooperate, as any State Party must, on issues relating to, among other matters, the provision of documents and records, identification of people, taking of evidence, questioning of people, execution of searches or seizures and the protection of victims and witnesses. There are, however, differences despite this Part of the Statute.

First, non-States Parties may only be “invited” as opposed to “requested” by the Court to provide assistance on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.²⁵⁴ This suggests a difference in the formality of the request.²⁵⁵

²⁵¹ *Ibid.*, arts. 13 and 18.

²⁵² Preliminary Examinations Policy Paper, p. 2, para. 4; Pursuant to Regulation 25(1)(c) of the Regulations of the Prosecutor, upon receipt of a referral or a valid declaration made pursuant to art. 12(3) of the Statute, the Prosecutor opens a preliminary examination of the situation at hand.

²⁵³ The Second Declaration.

²⁵⁴ Rome Statute, art. 87(5)(a).

²⁵⁵ However, in the same manner as for State Parties, according to Article 87(5)(b) (in Part 9), if a non-State Party fails to cooperate with requests pursuant to any arrangement or agreement with the Court, the Court can refer the matter to the ASP or, if the situation was referred by the Security Council, to the Security Council.

Second, Article 70(4) encourages State Parties to extend its criminal laws to cover offences against the administration of justice of the Court. This does not apply to non-States Parties even if they have lodged a Declaration under Article 12(3).

Third, pursuant to Article 73, if a State Party is requested to disclose information in its control that was disclosed in confidence by another entity, then it must seek the consent of the originator to disclose that information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of Article 72. However, if the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.²⁵⁶

Fourth, only a State Party is bound by the privileges and immunities afforded to the Court and some of its staff under the Rome Statute.²⁵⁷ According to the Rome Statute, the Court shall enjoy in the territory of each State Party, such privileges and immunities as are necessary to fulfil its purpose.²⁵⁸ This is afforded particularly but not exclusively to Judges, the Prosecutor, the Deputy Prosecutor and the Registrar when conducting business of the Court. They are afforded the same privileges and immunities as are accorded to heads of diplomatic missions and continue to be afforded them after their terms in office expire.²⁵⁹ This particular difference is, however, not applicable to Ukraine because Ukraine has acceded²⁶⁰ to the 2002 Agreement on the Privileges and Immunities of the International Criminal Court on 29 January 2007.²⁶¹ As the title suggests, this Agreement is designed to give certain privileges and immunities to the Court in the territory of each State Party as is necessary to fulfil its purposes.²⁶² Therefore, there would be no difference in Ukraine's obligations now, under the Declaration, or as a ratifying State Party.

Fifth, the ICC may only authorise the ICC Prosecutor to take specific investigative steps without having secured a State's cooperation if it is a State Party.²⁶³ Article 57(3)(d) provides that the ICC Pre-Trial Chamber may "authorise the Prosecutor to take specific investigative steps" in the territory of a State Party without having secured the cooperation of that State. The Pre-Trial Chamber will allow this request if it finds that the State Party "is clearly unable to execute a request for cooperation".²⁶⁴ The specific use of "State Party" in this provision prohibits the Prosecutor from intervening in a sovereign State that has not ratified but simply declared it accepts the jurisdiction of the ICC. Therefore, it seems the Prosecutor could not use this provision to coercively secure the cooperation of Ukraine after requests under Part 9 and the remedies within that Part are exhausted. This affords some "protection"

²⁵⁶ *Ibid.*, art. 73.

²⁵⁷ *Ibid.*, art. 48.

²⁵⁸ *Ibid.*, art. 48.

²⁵⁹ *Ibid.*, art. 48.

²⁶⁰ The difference between accession and ratification is limited; ratification is a State's outright consent to be bound by a treaty. Accession is the act of accepting an offer to be bound by a treaty already negotiated and signed by other states. It has the *same* legal effect as ratification: Vienna Convention, arts. 2(1)(b), 14(1), 15 and 16.

²⁶¹ ICC Agreement on Privileges and Immunities.

²⁶² *Ibid.*, art. 3.

²⁶³ Rome Statute, art. 57(3)(d).

²⁶⁴ *Ibid.*, art. 57(3)(d).

to non-States Parties to prevent the ICC Prosecutor from executing requests without the State having ratified the Rome Statute.

Accordingly, there are important differences in the obligations between a State that has ratified the Rome Statute and a non-State Party that has accepted the jurisdiction of the Court.

B. Similarities

There are a number of similarities in the obligations imposed on States Parties and on declaring non-States Parties. These include, among other provisions:

- Assisting with arrest;²⁶⁵
- Surrendering people to the Court;²⁶⁶
- Identifying the whereabouts of persons;²⁶⁷
- Taking evidence including testimony;²⁶⁸ and
- Executing search and seizures.²⁶⁹

Aside from these examples from Part 9, there are some Rome Statute provisions that also bind non-State Parties who accept the Court's jurisdiction to other provisions in the Rome Statute (i.e., some that might normally be reserved for States Parties to the Rome Statute). For example, Ukraine, as a declaring non-State Party, could be asked to assist with securing compensation for victims of crimes tried by the ICC. Article 75 of the Statute concerns reparations—compensation for victims of crimes tried by the ICC. Where the Court makes a reparations order, the Rome Statute provides that a “State Party” shall give effect to a reparations decision.²⁷⁰ When the Court exercises its power under Article 75, the Court can use certain measures under Part 9, which now binds Ukraine and declaring non-States Parties.²⁷¹ The measures could include the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture,²⁷² and “[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”.²⁷³ In other words, due to the involvement of Part 9 into the exercise of power under Article 75 and the fact that Article 9 also binds the non-States Parties, the measures used to give effect to an order under this provision would bind Ukraine and other declaring non-States Parties.

²⁶⁵ *Ibid.*, art. 92.

²⁶⁶ *Ibid.*, art. 89.

²⁶⁷ *Ibid.*, art. 93(1).

²⁶⁸ *Ibid.*, art. 93(1).

²⁶⁹ *Ibid.*, art. 93(1).

²⁷⁰ *Ibid.*, art. 75(5)

²⁷¹ *Ibid.*, art. 75(4).

²⁷² *Ibid.*, art. 93(1)(k).

²⁷³ *Ibid.*, art. 93(1)(l).

To conclude, although Ukraine, by virtue of its Declarations is bound by Part 9 to cooperate with the Court, there are some differences between the obligations placed on States Parties and those placed on declaring non-States Parties. Overall, however, the differences between ratification and Declaration are not overwhelming.

III. Procedure for Ratification of the Rome Statute

This section addresses a fundamental aspect of this report: ratification of the Rome Statute. It will first identify the steps States needed to be taken to ratify the Rome Statute and consider what steps Ukraine specifically must take. This will be analysed by reference to other domestic jurisdictions.

A. Defined

As outlined in Part One, when States agree to be bound by the provisions of the Rome Statute, they are said to “ratify” it. Ratification is the formal act of a State consenting to be bound by a treaty.²⁷⁴ To ratify the Rome Statute, a State will give a document containing this consent to the Secretary-General of the UN.²⁷⁵

B. The Steps Needed to Accept the Rome Statute

This section identifies the steps Ukraine may need to take in order to ratify the Rome Statute and fully “accept” its provisions. The first step towards ratification has already been made, namely Ukraine amended its constitution to permit recognition of the Rome Statute. Now the State may proceed to “implement” the provisions of the Rome Statute into its domestic legal system.

a) Ratification

As a result of a Constitutional Court decision outlined in Part One, Ukraine amended its Constitution to be able to ratify the Rome Statute. As previously noted, Ukraine’s Constitutional Court found that the ICC could exercise its powers and functions on any State Party, and that it has the power to find any case admissible if a state is unwilling or unable to genuinely conduct an investigation or prosecution.²⁷⁶ The Court concluded that jurisdiction supplementary to the national Ukrainian system was not contemplated by the Constitution.²⁷⁷ Therefore, under Part 9 of the Constitution, the Constitution itself must have been amended before the Rome Statute can be ratified.²⁷⁸

In late November 2015, the President of Ukraine submitted a draft law to the Verkhovna Rada on amending the Constitution as it relates to the judiciary. One provision of the draft law concerned the ICC: Article 124, as the draft law purported to amend it, provides that: “Ukraine may recognise the jurisdiction of the International Criminal Court based on the provisions of the Rome Statute”. On 2 June 2016, the Verkhovna Rada of Ukraine adopted the draft

²⁷⁴ Vienna Convention, arts. 2 (1) (b), 14 (1) and 16.

²⁷⁵ Rome Statute, art. 125(2).

²⁷⁶ Constitutional Court Opinion, part 2.1, para. 3.

²⁷⁷ ICRC Rome Statute Issues, p. 11.

²⁷⁸ *Ibid.*

law.²⁷⁹ The amendment to Article 124 of the Constitution of Ukraine entered into force on 30 June 2019.²⁸⁰ This “catch-all” provision did not amend the provisions identified by the Constitutional Court (see Part One), but rather gave a power to Ukraine to recognise the Rome Statute. This is a measure which has been used by other States whose constitutions were seemingly at odds with the complementarity provisions of the Rome Statute, including Belgium,²⁸¹ Chile²⁸² and Côte d’Ivoire.

Côte d’Ivoire underwent a similar experience to Ukraine. It signed the Rome Statute in 1998, but did not ratify it at that time. In 2003, the Côte d’Ivoire Constitutional Council found issues with the complementary jurisdiction of the ICC in relation to its own Constitution. It opined that the ICC’s ability to declare admissible and try a case already before a national court was a violation of State sovereignty.²⁸³ Côte d’Ivoire, however, did lodge two Declarations (as Ukraine has) on 18 April 2003.²⁸⁴ Subsequently, in 2012, the National Assembly adopted two bills that revised the Constitution to allow ratification of the Rome Statute and authorised the Head of State to ratify the Rome Statute, respectively. The former included an amendment to the Constitution, providing that “[t]he Republic may recognise the jurisdiction of the International Criminal Court under the Treaty signed on 17 July 1998”.²⁸⁵ The State subsequently deposited its instrument of ratification on 15 February 2012 with the UN.²⁸⁶

Similarly, France adopted a comparable provision. The French Constitutional Council found certain provisions of the Rome Statute to be incompatible with the Constitution, such as the ability of the ICC Prosecutor to take certain investigatory measures outside the presence of the authorities of the requested State on the latter’s territory which the Council opined violated French sovereignty.²⁸⁷ It therefore found that this provision violated the Constitution and

²⁷⁹ Law of Ukraine [“On amendments to the Constitution of Ukraine \(in the field of judiciary\)”](#) No. 1401-VIII [Online resource] 2 June 2016.

²⁸⁰ [Constitution of Ukraine](#) [Online resource], art.124.

²⁸¹ Opinion of the Council of State of 21 April 1999 on a legislative proposal approving the Rome Statute on the International Criminal Court, Avis du Conseil d’état du 21 Avril 1999 sur un projet de loi “portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 Juillet 1998”, Parliamentary Document 2-239 (1999/2000), p. 94, cited in International Committee of the Red Cross, [‘Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Court and Councils of State’](#), 01/2010 (“ICRC Rome Statute Issues”) (“ICRC Rome Statute Issues”).

²⁸² Rome Statute of the International Criminal Court (ICC) of 7 April 2002, Decisión del Tribunal Constitucional respecto de la constitucionalidad del Estatuto de Roma de la Corte Penal Internacional, 7 de abril de 2002, cited in ICRC Rome Statute Issues, p. 18.

²⁸³ Constitutional Council Decision No. 002/CC/SG of 17 December 2003 on the compatibility of the Rome Statute of the International Criminal Court with the Ivorian Constitution [Décision Conseil Constitutionnel N°002/CC/SG du 17 décembre 2003 relative à la conformité à la Constitution du Statut de Rome de la Cour pénale internationale] cited in ICRC Rome Statute Issues, p. 23.

²⁸⁴ [‘Côte d’Ivoire ratifies the Rome Statute’](#), ICC-ASP-20130218-PR873 (ICC, 18 February 2013).

²⁸⁵ UNGA, [‘Report of the Independent Expert on the Situation of Human Rights in Côte d’Ivoire, Mr. Doudou Diène’](#) (7 January 2013) 22nd Session, A/HRC/22/66.

²⁸⁶ Coalition for the ICC, [‘2013 Status of the Rome Statute Around the World’](#) (2013) p. 16; [‘Côte d’Ivoire’](#) (*Parliamentarians for Global Action*).

²⁸⁷ Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) Décision 98-408 DC du 22 janvier 1999 (Traité portant statut de la Cour pénale internationale), Journal officiel, 24 January 1999, p. 131 7, cited in European Commission For Democracy Through Law (Venice Commission), [‘Report On Constitutional Issues](#)

ratification required a constitutional amendment.²⁸⁸ As a consequence, France adopted a constitutional provision that solved all the constitutional problems raised above.²⁸⁹ The solution adopted by the French government was to insert a provision into the Constitution which provided that “[t]he Republic may recognise the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998”.²⁹⁰ The government was of the view that this Article addressed the constitutional concerns.²⁹¹

As may be seen, the French solution—inserting an overarching provision into the Constitution—appears to be similar to the approach suggested by the Ukrainian amendments of 2016.²⁹² As noted above, amended Article 124 of the Constitution provides that “Ukraine may recognise the jurisdiction of the International Criminal Court based on the provisions of the Rome Statute”. This approach has the advantage of implicitly amending the constitutional provisions in question without opening an extensive debate on individual amendments and provisions.²⁹³ Unlike provisions addressing specific concerns, such as whether the Constitution of Ukraine is compatible with the complementarity provisions identified as unlawful, it will act as a panacea for potential challenges and concerns that may arise.

b) Implementation

In line with ratification, Ukraine must consider how to implement the provisions of the Rome Statute, particularly the crimes, the cooperation provisions and the complementarity provisions. This is a complex subject that is addressed in detail in Chapter Two. This section provides a brief summary of the advice discussed more comprehensively in that Chapter.

The implementation of the Rome Statute’s provisions concerns how to ensure Ukraine performs its obligations under the Statute. Implementation of the Rome Statute ensures that the domestic law of the State complies with the provisions of the Rome Statute. Domestication of the Rome Statute is important because, as a consequence of the Declarations and after ratification of the Rome Statute, Ukraine is and will be required to provide the ICC with its full cooperation and be able to investigate and prosecute the crimes therein.²⁹⁴ Ensuring that a State’s domestic law complies fully with the provisions of the Rome Statute is critical in regard to two issues: complementarity and cooperation.

[Raised By The Ratification Of The Rome Statute Of The International Criminal Court](#), CDL (2000) 104 rev., 15 December 2000, p. 10 (“Venice Commission Report on Constitutional Issues”).

²⁸⁸ Venice Commission Report on Constitutional Issues, p. 10.

²⁸⁹ *Ibid.*

²⁹⁰ Constitutional Law No. 99-568, July 8, 1999, inserting in Title VI of the Constitution, Article 53-2 with regard to the International Criminal Court, J.O. No. 157, July 9, 1999, 10 175, cited in ICRC Rome Statute Issues, p. 3.

²⁹¹ ‘[Cour pénale internationale, adoption du projet de loi constitutionnelle](#)’ (Ministry of Justice of France, 1999).

²⁹² [On Amending the Constitution of Ukraine \(in terms of justice\): Draft Law No.3524](#), - 25 November 2015.

²⁹³ Rights & Democracy and The International Centre for Criminal Law Reform and Criminal Justice Policy, ‘[International Criminal Court: Manual for Ratification and Implementation of the Rome Statute](#)’ (May 2000) appendix I.

²⁹⁴ The International Centre for Criminal Law Reform and Criminal Justice Policy, ‘[International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute](#)’ (3rd ed, March 2008), p. 16.

The procedure for implementation seems to be governed by a domestic Ukrainian law. The Law of International Agreements of Ukraine governs the procedure for the conclusion, performance and termination of international treaties.²⁹⁵ As with the likely majority of States globally,²⁹⁶ Ukraine has no legal requirement to modify its domestic legislation before ratifying the Rome Statute. However, State practice has shown that the full domestication of the Rome Statute is likely to require at least some domestic implementing legislation due to the uniqueness and complexity of its provisions.²⁹⁷ This section considers this issue.

First, the issue of complementarity requires States to ensure that their criminal courts are able to exercise jurisdiction over ICC crimes. At a minimum, this involves ensuring that the domestic system is able to effectively investigate and prosecute a similar range of criminal conduct. This will primarily involve implementing or amending legislation to ensure that the crimes and modes of liability provided for in the Rome Statute may be prosecuted under domestic Ukrainian legislation. The general principles and concepts of international criminal law, such as the available defences, need to also be incorporated and any bars to prosecution, such as statutes of limitations, immunities and limitations of jurisdictions must be addressed.

Second, a key issue facing Ukraine at the moment in terms of implementation is the cooperation obligations under Part 9 of the Rome Statute. As a consequence of the two Declarations submitted by Ukraine, Ukraine is now bound by a specific cooperation regime with the ICC (see above). The ICC may demand Ukraine comply with its obligations under Part 9 of the Rome Statute by cooperating with the Court at any time.

As noted above, experience has shown that the fulfilment of a State's obligation to cooperate with the ICC generally requires domestic implementation of the Rome Statute's cooperation provisions, primarily contained within Part 9. Particularly, the obligation requires ensuring that ICC investigations may take place within the domestic jurisdiction, including ensuring that there are no impediments to domestic courts and other State authorities providing full cooperation to the ICC in such matters as obtaining records and documents (including official records and documents), the locating and seizure of the assets of accused, enabling searches and seizures of potential evidence, locating and protecting witnesses and arresting and surrendering persons accused of crimes by the Court.²⁹⁸

For the crimes in the Rome Statute, there are a variety of options available to Ukraine concerning how to comprehensively implement the crimes of the Rome Statute into domestic legislation. These complex alternatives are outlined in Chapter Two. In short, Ukraine should criminalise the crimes and modes of liability contained in the Rome Statute by adopting an express and specific act of law. This can be achieved by either repeating the provisions of the Rome Statute in Ukraine's domestic criminal code or in a supplementary criminal code specifically for international crimes, or criminalising the conduct by reference. In other words, it could incorporate the provisions of

²⁹⁵ [On International Treaties: Law of Ukraine No.1906-IV](#) [Online resource]. 29 June 2004.

²⁹⁶ The International Centre for Criminal Law Reform and Criminal Justice Policy, '[International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute](#)' (3rd ed, March 2008), pp. 13-14.

²⁹⁷ *Ibid.*, pp. 13-14.

²⁹⁸ Amnesty International, '[The International Criminal Court: Checklist for Effective Implementation](#)' (2000), p. 2.

the Rome Statute by stating that the provisions of the Rome Statute are incorporated into Ukrainian law. The act should also identify the modes of liability by which the crimes can be committed (see above).²⁹⁹ The benefit of express criminalisation is that it leaves little room for doubt about the remit of the offences. A vague provision that criminalises, for example, “international crimes”, allows legal arguments about what international crimes are and what the ingredients of those crimes are (see above), of which there are different interpretations. The two options are equally appropriate with different countries adopting one or the other.

In New Zealand, the implementing law provides specifically that genocide, war crimes and crimes against humanity as provided for by the Rome Statute, i.e., by reference to the Rome Statute, are offences under the domestic law of New Zealand.³⁰⁰ The United Kingdom Act takes a similar approach by incorporating Rome Statute crimes by reference.³⁰¹ Canadian legislation provides that the ICC crimes are indictable offences under Canadian law, and goes on to define each crime in detail for the purposes of national prosecutions of the ICC crimes.³⁰² Canada establishes the crimes through custom, but defines custom as including Article 6, 7 and 8 of the Rome Statute³⁰³ so as to ensure compliance.

The German government ratified the Rome Statute on 11 December 2000 and passed the Code of Crimes Under International Law (Völkerstrafgesetzbuch) around two years later on 21 June 2002.³⁰⁴ The Law provides for universal jurisdiction over genocide, crimes against humanity and war crimes.³⁰⁵ It has been noted that this acts as a standalone Criminal Code and is not incorporated into the existing criminal code of Germany.³⁰⁶ It was further reported that this decision was made as a matter of expediency: the difficulties in incorporating principles such as command responsibility into one chapter of the Criminal Code were not insignificant and Germany had a desire to send out an important and “reassuring” message about its prosecution of such serious crimes.³⁰⁷ Unlike the States considered above, Germany defined the crimes of genocide, crimes against humanity and war crimes using terminology familiar to Germany, without restricting the scope of the crimes under the Rome Statute.

Overall, for Ukraine, it seems that an express act of the Verkhovna Rada that details the above provisions on cooperation, complementarity, crimes and modes of liability, is the safest means of moving forward with this issue.

²⁹⁹ Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), [Importing Core International Crimes into National Law](#) (2nd edn, Torkel Opsahl, Oslo, 2010), p. 7 (“Bergsmo Importing Core Crimes”).

³⁰⁰ [New Zealand ICC Act](#), ss 9, 10 and 11 cited in Human Rights Watch, ‘[International Criminal Court Making The International Criminal Court Work A Handbook for Implementing the Rome Statute](#)’, Vol. 13, No. 4(G), September 2001, Annex 1 (“HRW Implementation Handbook”).

³⁰¹ [International Criminal Court Act 2001](#) cited in HRW Implementation Handbook, Annex 1.

³⁰² [Canadian ICC Act](#), s. 4(3), cited in HRW Implementation Handbook, Annex 1.

³⁰³ Christopher Waters, *British and Canadian Perspective on International Law* (2006: Martinus Nijhoff Publishers), p. 38.

³⁰⁴ [The German Draft Code on International Crimes](#) (“Völkerstrafgesetzbuch”).

³⁰⁵ Act Introducing the Code of Crimes Under International Law (Gesetz zur Einführung des Völkerstrafgesetzbuchs) BGBl.2002 I, p. 2254 (Federal Law Gazette of the Federal Republic of Germany), 26 June 2002, as cited in Bergsmo Importing Core Crimes, p. 19.

³⁰⁶ Bergsmo Importing Core Crimes, p. 19.

³⁰⁷ *Ibid.*

This could be through an individual act that amends the Criminal Code of Ukraine and implements certain provisions on cooperation and complementarity in one enactment. For the cooperation provisions, an express enactment will enable Ukraine to comply with its obligations under the Declarations easily and will provide for a swift transition when Ukraine ratifies the Rome Statute. For Rome Statute crimes and modes of liability, implementation can be achieved by either by inserting a provision into the existing criminal code incorporating the crimes and modes of liability in the Rome Statute by reference, or by defining the provisions exhaustively in the existing criminal code or a new criminal code but with regard to Ukrainian terminology. Whichever path Ukraine chooses to take, the immediate wholesale implementation of the Rome Statute's provisions will be necessary after the ratification of the Rome Statute to ensure proper compliance with the provisions demanding cooperation from State Parties, and to comply with the duty to prosecute those responsible for international crimes.³⁰⁸

IV. Crimes: What the ICC Has Jurisdiction Over

A. Introduction

This section identifies the crimes the ICC can investigate, prosecute and adjudicate, namely genocide, crimes against humanity and war crimes. It will initially focus on a general description of these three crimes. Second, this section will identify the ways in which a person can be held responsible for one of the three crimes under the jurisdiction of the Court. Third, the section will turn to the crime of aggression. Lastly, the ICC Prosecutor's 2015 preliminary examination report outlining initial findings in relation to the events during Euromaidan will be discussed.

B. Offences under the Rome Statute

There are four crimes that may be tried by the ICC: genocide, war crimes, crimes against humanity and crime of aggression. For a crime to be established, two principal components must be shown: (i) the contextual, or "chapeau", elements of the offence; and (ii) the individual act(s) committed in that context. The contextual elements are crucial and distinguish ordinary crimes from international crimes (i.e. murder compared to murder as a crime against humanity). For a successful prosecution, these contextual elements must be proven in addition to the specific acts that make up the conduct of the crime. Depending upon the specific crimes and modes (or types) of individual criminal responsibility, these contextual requirements encompass various legal elements that must also be proven beyond reasonable doubt. Each will be discussed below.

a) Genocide

To establish genocide, the following contextual elements are required:

- An act listed in Article 6 of the Rome Statute is committed; and

³⁰⁸ Rome Statute, Preamble.

- It is committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.³⁰⁹

While unlikely to be relevant to the Ukrainian situation, the acts in Article 6 that could constitute genocide are: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; or (v) forcibly transferring children to another group.

b) Crimes Against Humanity

Crimes against humanity have the following contextual elements:

- The occurrence of an “attack”;
- The attack was either widespread or systematic;
- The attack was directed against a civilian population;
- The attack was committed pursuant to, or in furtherance of, a State or organisational policy to commit such an attack;
- A “nexus” exists between the alleged crime and the attack; and
- The accused had knowledge of the attack and the way in which his actions formed part of that attack.³¹⁰

The question of what is “widespread or systematic” is important for discerning the perpetration of a crime against humanity. This element is commonly termed as “disjunctive”—the attack should be either widespread *or* systematic.³¹¹ The terms “widespread” or “systematic” do not apply to the individual acts—such as murder or persecution—but to the attack as a whole.³¹² “Widespread” refers to the number of victims or geographical scope. It has been found to be the large-scale nature of the attack and the number of targeted persons;³¹³ it “should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.³¹⁴ It

³⁰⁹ Rome Statute, art. 6.

³¹⁰ Rome Statute, art. 7. *See also* ICC, [Elements of Crimes](#), Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (UN publication, Sales No. E.03.V.2 and corrigendum), part II.B (“ICC Elements of Crimes”), p. 5.

³¹¹ *Situation in the Republic of Kenya* ([Authorisation Decision](#)) ICC-01/09 (31 March 2010) (“Kenya Authorisation Decision”), para. 94.

³¹² *Ibid.*

³¹³ *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* ([Decision on the Prosecution Application under Article 58\(7\) of the Statute](#)) ICC-02/05-01/07-1-Corr (27 April 2007), para. 62; *Ibid.*, (Confirmation Decision) ICC-01/04-01/07-717 (26 September 2008), para. 394; *Ibid.*, ([Decision on Warrant of Arrest](#)) ICC-02/05-01/09-3 (4 March 2009), para. 81; *The Prosecutor v. Jean Pierre Bemba Gombo* ([Decision](#)) ICC-01/05-01/08-424 (15 June 2009) para. 83; *The Prosecutor v. Callixte Mbarushimana* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/10-1 (28 September 2010), para. 24; *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (30 November 2011), para. 49; *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1123.

³¹⁴ *The Prosecutor v. Jean Pierre Bemba Gombo* ([Decision](#)) ICC-01/05-01/08-424 (15 June 2009), para. 83; *Ibid.*, ([Corrigendum to the Authorisation Decision](#)) ICC-01/09-19-Corr (31 March 2010), para. 95 referring to ICTR, *The Prosecutor v. Akayesu* ([Judgment](#)) ICTR-96-4-T 2 (2 September 1998), para. 580; *Prosecutor v. Musema* ([Judgment](#)) ICTR-96-13-A (27 January 2000), para. 204; *Situation in the Republic of Côte d’Ivoire* ([Corrigendum to Authorisation](#)

can also mean an attack carried out over a small or large geographical area, but either way directed against a large number of civilians.³¹⁵ Alternatively, “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence.³¹⁶ The systematic nature of an attack can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis”.³¹⁷ Other factors that may be of relevance to the assessment of whether an attack was systematic are the involvement of substantial public or private resources³¹⁸ and the implication of high-level political and/or military authorities.³¹⁹

Further, a policy refers, in essence, to the fact that a State or an organisation intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action. The ICC does not require that a formal design exist. Explicitly advanced motivations are of little importance.³²⁰ An attack that is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.³²¹ In most cases, the existence of a State or organisational policy will be inferred from, among other things, repeated actions according to the same sequence, or preparations or mobilisation orchestrated or coordinated by a state or organisation.³²² It must involve the multiple commission of acts. It must then be directed against a civilian population.³²³ That population must be the primary target and not incidental to an attack.³²⁴

[Decision](#)) ICC-02/11-14-Corr (3 October 2011), para. 53; *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (3 November 2011), para. 49.

³¹⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the confirmation of charges](#)) ICC-01/04-01/07 (30 September 2008), para. 394; *The Prosecutor v. Blaskić* ([Judgment](#)) IT-95-14-T (3 March 2000), para. 206; *The Prosecutor v. Kordić and Čerkez* ([Judgment](#)) IT-95-14/2-A (17 December 2004), para. 94. See also Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, 2005), p. 225, para. 656.

³¹⁶ *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* ([Decision](#)) ICC-02/05-01/07-1-Corr (27 April 2007), para. 62; *Ibid.*, (Decision on the confirmation of charges) ICC-01/04-01/07-717 (26 September 2008), para. 394; ([Decision on Warrant of Arrest](#)) ICC-02/05-01/09-3 (4 March 2009), para. 81; *Situation in the Republic of Kenya* ([Corrigendum to the Authorisation Decision](#)) ICC-01/09-19-Corr (31 March 2010), para. 96; *The Prosecutor v. Callixte Mbarushimana* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/10-1 (28 September 2010), para. 24; *Situation in the Republic of Côte d’Ivoire* ([Corrigendum to Authorisation Decision](#)) ICC-02/11-14-Corr (3 October 2011), para. 54; *Ibid.*, ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (30 November 2011), para. 49; *The Prosecutor v. Germain Katanga*, ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1123.

³¹⁷ *Situation in the Republic of Kenya* ([Corrigendum to the Authorisation Decision](#)) ICC-01/09-19-Corr (31 March 2010) para. 96; *Situation in the Republic of Côte d’Ivoire* ([Corrigendum to Authorisation Decision](#)) ICC-02/11-14-Corr (3 October 2011), para. 54; *Ibid.*, ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (30 November 2011), para. 49. See also *The Prosecutor v. Germain Katanga*, ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1123.

³¹⁸ *The Prosecutor v. Callixte Mbarushimana* ([Decision on the confirmation of charges](#)) ICC-01/04-01/10 (16 December 2011), Dissenting Judgment of Judge Monageng, paras 23-25; Kenya Authorisation Decision, para. 96 citing ICTR, Trial Chamber, *Prosecutor v. Jean-Paul Akayesu* ([Judgment](#)) ICTR-96-4-T (2 September 1998), para. 580.

³¹⁹ *The Prosecutor v. Callixte Mbarushimana* ([Decision on the confirmation of charges](#)) ICC-01/04-01/10 (16 December 2011), paras 23-25; ICTY, *The Prosecutor v. Tihomir Blaskić* ([Judgment](#)) IT-95-14-T (3 March 2000), para. 203.

³²⁰ *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1107.

³²¹ *Prosecutor v. Jean-Pierre Bemba Gombo* ([Decision on the confirmation of charges](#)) ICC-01/05-01/08-424 (15 June 2009), para. 81.

³²² *The Prosecutor v. Germain Katanga* ([Judgment pursuant to art. 74 of the Statute](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1109.

³²³ *Ibid.*, para. 1102.

³²⁴ *Ibid.*, para. 1104.

In addition to the contextual elements, there are individual acts that must be established. The individual acts constituting crimes against humanity include:

- Crime against humanity of murder;³²⁵
- Crime against humanity of extermination, which entails killing as part of a mass killing including by inflicting conditions of life calculated to bring about the destruction of part of a population;³²⁶
- Crime against humanity of enslavement;³²⁷
- Crime against humanity of deportation or forcible transfer of population;³²⁸
- Crime against humanity of imprisonment or other severe deprivation of physical liberty;³²⁹
- Crime against humanity of torture;³³⁰
- Crime against humanity of rape;³³¹
- Crime against humanity of sexual slavery;³³²
- Crime against humanity of enforced prostitution;³³³
- Crime against humanity of forced pregnancy;³³⁴
- Crime against humanity of enforced sterilization;³³⁵
- Crime against humanity of sexual violence;³³⁶
- Crime against humanity of persecution, which entails the severe deprivation of a victim of their fundamental rights because of their identity;³³⁷
- Crime against humanity of enforced disappearance of persons;³³⁸
- Crime against humanity of apartheid, which entails the institutionalised regime of systematic oppression or domination by one racial group over any other racial go up;³³⁹ and
- Crime against humanity of other inhumane acts, which entails the infliction of great suffering, or serious injury to the body or the mental or physical health by means of an inhumane similar to the other crimes against humanity acts above.³⁴⁰

³²⁵ Rome Statute, art. 7(1)(a); ICC Elements of Crimes, p. 5.

³²⁶ Rome Statute, art. 7(1)(b); ICC Elements of Crimes, p. 6.

³²⁷ Rome Statute, art. 7(1)(c); ICC Elements of Crimes, p. 6.

³²⁸ Rome Statute, art. 7(1)(d); ICC Elements of Crimes, pp. 6-7.

³²⁹ Rome Statute, art. 7(1)(e); ICC Elements of Crimes, pp. 6-7.

³³⁰ Rome Statute, art. 7(1)(f); ICC Elements of Crimes, p. 7.

³³¹ Rome Statute, art. 7(1)(g)(1); ICC Elements of Crimes, p. 8.

³³² Rome Statute, art. 7(1)(g)(2); ICC Elements of Crimes, p. 8.

³³³ Rome Statute, art. 7(1)(g)(3); ICC Elements of Crimes, p. 9.

³³⁴ Rome Statute, art. 7(1)(g)(4); ICC Elements of Crimes, p. 9.

³³⁵ Rome Statute, art. 7(1)(g)(5); ICC Elements of Crimes, p. 9.

³³⁶ Rome Statute, art. 7(1)(g)(6); ICC Elements of Crimes, p. 10.

³³⁷ Rome Statute, art. 7(1)(h); ICC Elements of Crimes, p. 10.

³³⁸ Rome Statute, art. 7(1)(i); ICC Elements of Crimes, p. 11.

³³⁹ Rome Statute, art. 7(1)(j); ICC Elements of Crimes, p. 12.

³⁴⁰ Rome Statute, art. 7(1)(k); ICC Elements of Crimes, p. 12.

c) War Crimes

The following “contextual”, or chapeau, elements are required to establish the existence of a war crime at the ICC:

- There should be an armed conflict of an international or non-international nature. War crimes do not apply to internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other similar acts;³⁴¹
- The crime should be committed during, and have a sufficient nexus to, the armed conflict;³⁴² and
- The perpetrator should be aware of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with”.³⁴³

These contextual elements are addressed in detail in Chapter Two. This will include determining whether an armed conflict exists, and if so, what the nature of the conflict is. In addition to the contextual elements, individual criminal acts are required to prove “war crimes”. A war crime is defined as behaviour that is in serious violation of the laws and customs applicable during war—whether that war is an international conflict or a non-international armed conflict. This includes a range of behaviours, from torture and taking hostages to pillaging and directing attacks intentionally against civilians. Article 8 of the Rome Statute offers a comprehensive list of applicable acts. As an overview, the list of war crimes in an international armed conflict include:

- Grave breaches of the Geneva Conventions:
 - Wilful killing;
 - Torture or inhuman treatment, including biological experiments;
 - Wilfully causing great suffering, or serious injury to body or health;
 - Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - Wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial;
 - Unlawful deportation or transfer or unlawful confinement; and
 - Taking of hostages.³⁴⁴
- Other serious violations of the laws and customs of war:
 - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - Intentionally directing attacks against civilian objects, that is, objects that are not military objectives;

³⁴¹ Rome Statute, arts. 8(2)(d) and (f).

³⁴² Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, 2005) at 773-823, 833-847, 854-856.

³⁴³ Elements of Crimes, p. 13; Knut Dormann, *War Crimes under the Rome Statute of the ICC* (Cambridge University Press, 2003), p. 359.

³⁴⁴ Rome Statute, art. 8(2)(a)(i)-(viii).

- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- Intentionally launching an attack while knowing that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended and are not military objectives;
- Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- Killing or wounding treacherously individuals belonging to the hostile nation or army;
- Declaring that no quarter will be given;
- Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- Pillaging a town or place, even when taken by assault;
- Employing poison or poisonous weapons;

- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.³⁴⁵
- Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;³⁴⁶
- Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;³⁴⁷
- Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.³⁴⁸

The list of war crimes in a non-international armed conflict include:

³⁴⁵ Rome Statute, art. 8(2)(b)(i)-(xxvi).

³⁴⁶ [ICC Assembly of States Parties, Resolution ICC-ASP/16/Res.4](#), 12th Plenary Meeting, 14 December 2017 (adopted by consensus).

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

- Violations of Article 3 common to the four Geneva Conventions:
 - Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - Taking of hostages;
 - The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.³⁴⁹
- Other serious violations of the laws and customs of war:
 - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - Pillaging a town or place, even when taken by assault;
 - Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - Killing or wounding treacherously a combatant adversary;
 - Declaring that no quarter will be given;
 - Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

³⁴⁹ Rome Statute, art. 8(2)(c)(i)-(iv).

- Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- Employing poison or poisoned weapons;
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;³⁵⁰
- Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;³⁵¹
- Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;³⁵²
- Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.³⁵³
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.³⁵⁴

d) The Crime of Aggression

The crime of aggression is identified as one of the four crimes that the ICC can prosecute in the Rome Statute (alongside genocide, crimes against humanity, and war crimes).³⁵⁵ As mentioned in Chapter One, Part One, the Rome Statute provision on the crime of aggression became fully operational on 17 July 2018.

The provision that defines the crime is Article 8*bis* of the Rome Statute. This Article defines the overall crime of aggression as the planning, preparation, initiation or execution of an act of aggression by an individual in a leadership position who is able to “effectively” “exercise control” or to “direct the political or military action of a State”. Therefore, while the “crime of aggression” is an offence committed by an individual as opposed to an “act of aggression” committed by a State, an individual may only be shown to be guilty of the offence if it is proved that there has been an “act of aggression” committed by a State.

³⁵⁰ Rome Statute, arts 8(2)(e)(i)-(xv).

³⁵¹ [ICC Assembly of States Parties, Resolution ICC-ASP/16/Res.4](#), 12th Plenary Meeting, 14 December 2017 (adopted by consensus).

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ International Criminal Court Assembly of States Parties, [Res ICC-ASP/18/ Res.5](#), 9th Plenary Meeting, 6 December 2019 (adopted by consensus).

³⁵⁵ Rome Statute., art. 5.

An “act” of aggression is defined as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter.³⁵⁶ It must be noted that the offence must have been committed and that threats are not sufficient pursuant to Article 8*bis* of the Statute.

In technical terms, the elements that must be shown to attribute responsibility to an individual for the crime of aggression are:

- The perpetrator planned, prepared, initiated or executed an act of aggression;
- The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State that committed the act of aggression;
- The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed;
- The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations;
- The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations; and
- The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.³⁵⁷

As per the decision of the ASP of December 2017 on the activation of the crime of aggression, the Court may only exercise its jurisdiction over crimes of aggression committed after 17 July 2018. Consistent with the general prohibition provided by the Statute on the exercise of retroactive jurisdiction, the Court may not exercise jurisdiction over acts of aggression committed before this date.

The Statute provides distinct jurisdictional requirements for the investigation and prosecution of the crime of aggression depending on whether the crime was referred to the ICC by a State, or the UN Security Council or the examination was launched by the Prosecutor on her own initiative.

Article 15*bis* of the Statute defines the jurisdictional regime applicable to the situations when the ICC Prosecutor investigates and prosecutes acts of aggression either (i) through a referral by a State Party to the ICC Prosecutor; or (ii) on her own initiative. In these situations, the ICC may exercise its jurisdiction over the crime of aggression if it was committed by the nationals or on the territory of a State Party to the Statute that has ratified the Kampala Resolution as long as the relevant act occurs one year after the date of ratification.

The Court is unable to exercise jurisdiction over the crime of aggression if the crime was committed by the nationals or on the territory of a State that did not ratify the Statute. However, for State Parties, the State would have to opt

³⁵⁶ *Ibid.*, art. 8*bis*(2). The use of lawful self-defence cannot be regarded as an act of aggression according to art. 51 of the [UN Charter](#).

³⁵⁷ Aggression Resolution, Annex II ‘Elements’.

out through lodging a declaration with the ICC Registrar stating that it does not accept jurisdiction over the crime of aggression.

Article 15^{ter} of the Statute allows the ICC to exercise its jurisdiction over the crime of aggression committed in the territory and by the nationals of any State when it is referred to the ICC Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter. There is no requirement for the involved States to consent to the investigation or prosecution, meaning the ICC may exercise its jurisdiction irrespective of whether the State in question is a party to the Statute and has ratified the Kampala Resolution.

C. Modes of Liability

To establish criminal responsibility for the crimes of genocide, crimes against humanity or war crimes, the alleged perpetrator must have been involved in the crime in a specific manner. This is known as the “mode” or “form” of liability. Article 25(3)(a) of the Rome Statute provides for the modes of liability applicable before the ICC.

These “modes” can be broken down into direct and indirect modes of liability. The ICC Prosecutor must identify *how* a person committed the crime in question. The ways in which a person can be responsible for a crime are lengthy. The Rome Statute divides the modes of liability into five main parts: (i) those which involve commission of the crime individually, jointly with or through another person; (ii) ordering, soliciting or inducing commission; (iii) otherwise assisting or aiding and abetting the commission of the crime; (iv) contributing to the commission or attempted commission by a group of persons acting with a common purpose; and (v) responsibility as a commander or superior.

a) Individual Commission

This is the ordinary manner in which one might expect someone to commit a crime. It involves the direct physical commission of a criminal act. It covers conduct where an individual physically carries out a crime enumerated in the Rome Statute with a particular mental state.³⁵⁸

b) Joint Commission

Article 25(3)(a) envisions a crime committed not only by an individual acting alone or through another person, but also by an individual acting jointly with another.³⁵⁹ Joint commission, known as co-perpetration, describes a scenario in which two or more persons each contribute to the commission of a crime.

c) Commission through Another

Article 25(3)(a) also recognises commission “through another”. To hold an individual liable based on this mode of liability known as indirect perpetration, it must be established that: (i) he exercised control over the crime carried out

³⁵⁸ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01- 06-803 (29 January 2007), para. 332; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01-07717 (30 September 2008), para. 488.

³⁵⁹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 (14 March 2012), para. 980.

by one or several persons; (ii) he had intent and knowledge pursuant to Article 30 of the Statute, and a specific subjective element when required by a particular crime; and (iii) he was aware of the factual circumstances enabling him to exercise control over the crime.³⁶⁰

d) Indirect Co-Perpetration

Indirect co-perpetration combines indirect perpetration (“through another person”) and co-perpetration (“jointly with another”).³⁶¹ The elements of indirect co-perpetration require a common plan, an essential contribution from the accused and control over an organised and hierarchal apparatus of power and execution of the crimes by almost automatic compliance with orders.³⁶² Suspects must also be mutually aware and mutually accept that implementing their common plan will result in the realisation of the objective element of the crimes;³⁶³ and the suspects must be aware of the factual circumstances enabling them to control the crimes jointly.³⁶⁴

e) Ordering, Soliciting or Inducing Commission

i. Instigation

To prove that an accused instigated a crime, the following elements must be fulfilled: (i) the person exerts influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out; (ii) the inducement has a direct effect on the commission or attempted commission of the crime; and (iii) the person is at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realisation of the act or omission.³⁶⁵

³⁶⁰ *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07 (7 March 2014), para. 1399.

³⁶¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01-07717 (30 September 2008), para. 493.

³⁶² *The Prosecutor v. Bosco Ntaganda* ([Decision on the Confirmation of Charges](#)) ICC-01/04-02/06 (9 June 2014), para. 104-135. See also *The Prosecutor v. Jean-Pierre Bemba Gombo* ([Decision of the Confirmation of Charges](#)) ICC-01/05-01/08 (15 June 2009), paras 350-351; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01-07717 (20 September 2008), paras. 500-514, 527-539.

³⁶³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01-07717 (20 September 2008), para. 533; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (23 January 2012), para. 333.

³⁶⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01-07717 (20 September 2008), para. 538. *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (23 January 2012), para. 333; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Decision on the Confirmation of the Charges](#)) ICC-01/09-02/11-382-Red (23 January 2012) (“Muthaura, Kenyatta and Ali Decision on the Confirmation of Charges”), para. 297; *Prosecutor v. Bosco Ntaganda* ([Decision on the Prosecutor’s Application under 58](#)) ICC-01/04-02/06-36-Red (13 July 2012), para. 67.

³⁶⁵ Rome Statute, art. 25(3)(b); *The Prosecutor v. Bosco Ntaganda* ([Decision on the Confirmation of Charges](#)) ICC-01/04-02/06 (9 June 2014), para. 153.

ii. Ordering

Ordering means directing a person to commit an offence.³⁶⁶ Article 25(3)(b) of the Rome Statute refers to “ordering” the commission of a crime.

f) Otherwise Assisting or Aiding and Abetting the Commission of the Crime

Aiding and abetting involves the facilitation of an offence.³⁶⁷ The ICC has not yet charged this mode of liability. Accordingly, without jurisprudence, it is difficult to know how the ICC may interpret its elements. If the case law of the ICTY is used as persuasive guidance to an ICC Chamber, aiding and abetting requires a three-step test: (i) the participant commits a crime punishable under the statute; (ii) the accused aids and abets the participant in the commission of the crime; and (iii) the accused acts with the awareness that his acts will assist the participant in the commission of the crime.³⁶⁸ The assistance may consist of an act or omission or occur before, during, or after the act of the principal offender.³⁶⁹ Criminal participation must have a direct and substantial effect on the commission of the offence.³⁷⁰

For the accused’s state of mind, an aider and abettor should have known that his acts would assist in the commission of the crime by the principal perpetrator and must be aware of the “essential elements” of the crime. At the ICTY, it was considered that the state of mind for aiding and abetting does not require that the accused shared the intention of the principal perpetrator of such crime.³⁷¹ However, Article 25(3)(c) of the ICC Statute specifically requires that the assistance be afforded “for the purpose of facilitating the commission” of the crime. It requires not only the knowledge that the accomplice aids and abets the principle perpetrator, but he must also “wish that his assistance shall facilitate the commission of a crime”.³⁷²

³⁶⁶ *The Prosecutor v. Sylvestre Mudacumura* ([Decision on the Prosecutor’s Application under Article 58](#)) ICC-01/04-01/12-1-Red (13 July 2012), para. 63; *The Prosecutor v. Bosco Ntaganda* ([Decision on the Confirmation of Charges](#)) ICC-01/04-02/06 (9 June 2014), para. 145.

³⁶⁷ Rome Statute, art. 25(3)(c).

³⁶⁸ *The Prosecutor v. Naser Orić* ([Judgement](#)) IT-03-68-T (30 June 2006), para. 269.

³⁶⁹ *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* ([Appeals Judgement](#)) IT-02-60-T (9 May 2007), para. 127; *The Prosecutor v. Tihomir Blaškić* ([Appeals Judgement](#)) IT-95-14-A (29 July 2004), para. 48; *The Prosecutor v. Mladen Naletilić and Vinko Martinović* ([Judgment](#)) IT-98-34-T (31 March 2003), para. 63; *The Prosecutor v. Moinina Fofana and Allieu Kondewa* ([Judgement](#)) SCSL-04-14-A (28 May 2008), para. 7.

³⁷⁰ *The Prosecutor v. Jean-Paul Akayesu* ([Judgment](#)) ICTR-96-4-T (2 September 1998), paras 691, 692. *See also The Prosecutor v. Delalić et al.* ([Judgement](#)) ICC-01/04-01/12-1-Red (16 November 1998), para. 326; *The Prosecutor v. Furundžija* ([Judgement](#)) Case No. IT-95-17/1-T (10 December 1998), paras 223, 234; *The Prosecutor v. Aleksovski* ([Judgement](#)) IT-95-14/1-T (25 June 1999), para. 6.

³⁷¹ *The Prosecutor v. Milan Lukić and Sredoje Lukić* ([Appeals Judgement](#)) IT-98-32/1-A (4 December 2012), para. 428; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* ([Judgement](#)) IT-02-60-T (17 January 2005), para. 727; *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu* ([Judgment](#)) IT-03-66-T (30 November 2005), para. 518; *The Prosecutor v. Milorad Krnojelac* ([Appeals Judgement](#)) IT-97-25 (17 September 2003), para. 51.

³⁷² Albin Eser, ‘Individual Criminal Responsibility’ in Antonio Cassese (eds), *The Rome Statute of the International Criminal Court: a Commentary* (OUP, 2002), p. 801.

g) Contribution to Commission [Article 25(3)(D)]

A person shall be criminally responsible if that person “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”.³⁷³ To establish a crime has been committed through this mode of liability, it must be proven that: (i) a crime within the jurisdiction of the Court has been attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; and (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.³⁷⁴ The following must be shown about the accused’s state of mind: (i) the contribution shall be intentional; and (ii) shall either be made: (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.³⁷⁵

h) Responsibility as a Commander or Superior

The modes of “command responsibility” or “superior responsibility” concern a superior’s failure to act when he or she should have.³⁷⁶ In essence, to hold a superior or a commander responsible for the crimes of his subordinates, it must be established beyond reasonable doubt that: (i) there existed a superior-subordinate relationship between the superior and the perpetrator of the crime; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.

³⁷³ Rome Statute, art. 25(3)(d).

³⁷⁴ *Prosecutor v. Callixte Mbarushimana* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/10-1 (28 September 2010) (“Mbarushimana Arrest Warrant Decision”), para. 39. *See also The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (23 January 2012), para. 421; *Prosecutor v. Germain Katanga* ([Decision](#)) ICC-01/04-01/07-3371-tENG (15 May 2013), para. 16.

³⁷⁵ Mbarushimana Arrest Warrant Decision, para. 39, fn 66 and para. 44: recognises the various interpretations of the word “intentional” as applied to art. 25(3)(d), but not finding it necessary to address the issue. Applying these elements to the facts of the case, the Pre-Trial Chamber found that there were reasonable grounds to believe that Callixte Mbarushimana was criminally responsible under art. 25(3)(d) for the purposes of issuing the Arrest Warrant. *See also The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (23 January 2012), para. 351; Muthaura, Kenyatta and Ali Decision on the Confirmation of Charges, para. 421.

³⁷⁶ Rome Statute, art. 28.

Part Three: Preliminary Examinations and Investigations

This section considers the preliminary examination phase of the ICC’s involvement in a situation. This is particularly relevant as the ICC investigation into the situation in Ukraine is currently in the “preliminary examination” phase. As noted in Part One, a preliminary examination is the initial process by which the Prosecutor considers all the information available to her in order to decide whether there is a reasonable basis to proceed with a formal investigation. This section will consider the stages in a preliminary examination, what they involve and what a formal investigation by the ICC Prosecutor entails.

As a result of the first Declaration submitted by Ukraine on 17 April 2014, the ICC Prosecutor opened a preliminary examination that same month into the situation in Ukraine in order to establish whether the three criteria for opening an full investigation were met (jurisdiction, admissibility and the interests of justice).³⁷⁷ As a consequence of the second Declaration submitted by Ukraine on 8 September 2015, the scope of the preliminary examination was extended from 22 February 2014 to the present day and ongoing.³⁷⁸ On 11 December 2020, the ICC Prosecutor announced the conclusion of the preliminary examination in the situation in Ukraine.³⁷⁹ This section outlines what the ICC Prosecutor considered during the preliminary examination into the situation in Ukraine. It will then contemplate how a formal investigation may come about and what it involves.

I. Preliminary Examinations

A. Overview of Preliminary Examinations

As identified in Part One, the ICC will have jurisdiction over a situation if one of the following three preconditions exists: (i) the State in question has ratified the Rome Statute;³⁸⁰ (ii) the State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute;³⁸¹ or (iii) the UNSC refers a situation to the Court.³⁸² If one of these preconditions exists, the ICC may exercise its jurisdiction if: (i) a situation has been referred to the Prosecutor by a State Party; (ii) the UNSC refers a situation to the Prosecutor to launch an investigation; or (iii) the Prosecutor initiates an investigation *proprio motu* (on her own initiative) on the basis of information received from reliable sources, including from a State’s Declaration.³⁸³

³⁷⁷ ‘Ukraine’ (ICC).

³⁷⁸ ‘ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) Declaration’, ICC-OTP-20150929-PR1156 (ICC, 29 September 2015).

³⁷⁹ ‘Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine’ (ICC, 11 December 2020).

³⁸⁰ Rome Statute, arts. 13(a) and 14.

³⁸¹ *Ibid.*, art. 12(3).

³⁸² *Ibid.*, art. 13(b).

³⁸³ *Ibid.*, art. 13.

If the Prosecutor receives one of the above, she will open a “preliminary examination” into the situation at hand as a matter of policy.³⁸⁴ It must be noted, however, that a preliminary examination is not an investigation. It is a process by which the Prosecutor considers all the information available to her in order to reach a fully informed determination on whether there is a “reasonable basis” on which to proceed with a full investigation.³⁸⁵ In reaching this decision, the preliminary examination must consider the following three essential threshold criteria (as outlined in Part One):

- **Jurisdiction:** The Court can prosecute genocide, war crimes or crimes against humanity committed after 1 July 2002 or after the date a State accepts the jurisdiction of the Court (for Ukraine it is 21 November 2013, when the first Declaration was submitted); special rules apply for jurisdiction over the crime of aggression.³⁸⁶ The Court can only prosecute persons who commit a crime on the territory of or who are nationals of a State Party or a declaring State.³⁸⁷ The Prosecutor has jurisdiction over matters the UNSC has referred;³⁸⁸
- **Admissibility:** The ICC is a court of last resort, intended to complement national justice systems only when they are unwilling or unable to carry out genuinely any investigations and prosecutions of alleged perpetrators;³⁸⁹ and
- **Interests of justice:** In light of the gravity of the crimes and interests of victims, the Prosecutor will consider whether there are substantial reasons to believe that an investigation would not serve the interests of justice.³⁹⁰

A “reasonable basis” on which to proceed with an investigation means that there exists a sensible or reasonable justification for the belief that a crime falling within the jurisdiction of the Court has been, or is being, committed.³⁹¹ It does not necessarily mean that all the information “points toward only one conclusion”.³⁹² The information at this early stage is neither expected to be “comprehensive” or “conclusive”.³⁹³

The preliminary examination into Ukraine, and all preliminary examinations follow a phased approach. As will be discussed below in more detail, the preliminary examination by the ICC Prosecutor encompassed four “phases” in order to fully determine the situation or case before her:

- *Phase one:* an initial assessment of all the information received as communicated to the ICC Prosecutor;

³⁸⁴ Upon receipt of a referral or a valid declaration made pursuant to article 12(3) of the Statute, the Prosecutor may open a preliminary examination of the situation [ICC, Regulations of the Prosecutor, reg 25(1)(c)]. Although the Prosecutor is under no obligation to start a preliminary examination upon the receipt of a declaration, recent practice suggests that she will automatically open a preliminary examination. See Preliminary Examinations Policy Paper, p. 18, para. 76.

³⁸⁵ Rome Statute, arts. 15(2) and (3).

³⁸⁶ *Ibid.*, art. 11; 15*bis* and 15*ter*.

³⁸⁷ *Ibid.*, art. 12(2).

³⁸⁸ *Ibid.*, art. 12(2).

³⁸⁹ *Ibid.*, arts. 1 and 17.

³⁹⁰ As discerned from the Rome Statute, art. 53(1)(a) to (c); Preliminary Examinations Policy Paper.

³⁹¹ Preliminary Examinations Policy Paper, p. 21, para. 90; Kenya Authorisation Decision, para. 35.

³⁹² *Ibid.*, para. 34.

³⁹³ *Ibid.*, para. 27.

- *Phase two*: the formal commencement of a preliminary examination focusing on whether the alleged crimes fall within the jurisdiction of the Court;
- *Phase three*: the consideration of issues relating to the admissibility of the crimes alleged;
- *Phase four*: the consideration of issues relating to the interests of justice; and
- *Report*: the conclusion of the preliminary examination by way of an “Article 53(1) Report”.³⁹⁴

The length of time needed to complete these phases and conduct a preliminary examination varies from situation to situation. Honduras’ preliminary examination lasted for five years until 2015 when the ICC Prosecutor concluded that there was no reasonable basis to proceed with an investigation, and closed the preliminary examination.³⁹⁵ As at the time of publication, Colombia is in phase three and is sixteen years into a preliminary examination.³⁹⁶ Iraq’s preliminary examination concluded in 2006 and was reopened eight years later, in 2014, with new information and is now in phase three.³⁹⁷ The preliminary examination into the situation in Ukraine lasted more than six years.³⁹⁸ Accordingly, the four phases have no set timetable. The four phases are outlined and explained below in turn.

B. Phase One: Screening

Phase one of the preliminary examination can best be understood as the “screening phase”. This phase encompasses the initial assessment of all the information and official information received by the ICC Prosecutor, during which the Prosecutor will analyse and verify the information, filter out information on crimes falling outside the ICC’s jurisdiction and identify crimes that appear to fall within the jurisdiction of the Court. The Statute allows for the Prosecutor, in making her decision, to seek additional information from States, organs of the UN, members of civil society, or other reliable sources that she feels is appropriate given the circumstances.³⁹⁹

During this phase and the remainder of the preliminary examination, the ICC Prosecutor must act independently, impartially and objectively,⁴⁰⁰ which includes the need to act independently of instructions from any external source. The Prosecutor recognises that it will not be constrained or bound by States naming potential perpetrators,⁴⁰¹ and will cast its net widely to seek information from States, members of civil society and UN organs and other credible sources.⁴⁰² The Prosecutor may also receive written and oral testimony at the seat of the Court.⁴⁰³ The Prosecutor

³⁹⁴ Preliminary Examinations Policy Paper, paras 77-84.

³⁹⁵ Office of the Prosecutor, Preliminary Examinations, [Honduras](#).

³⁹⁶ *Ibid.*, p. 25, para. 103.

³⁹⁷ *Ibid.*, p. 11, paras 42-43.

³⁹⁸ ‘[Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine](#)’ (ICC, 11 December 2020).

³⁹⁹ Rome Statute, art. 15(3); Rules of Procedure and Evidence, Rule 104(2).

⁴⁰⁰ Rome Statute, art. 42; Preliminary Examinations Policy Paper, p. 7, paras 26-33.

⁴⁰¹ Preliminary Examinations Policy Paper, p. 7, para. 27.

⁴⁰² Rome Statute, arts. 14(2) and 15(2); Rules of Procedure and Evidence, Rule 104.

⁴⁰³ *Ibid.*

also has the option to conduct field missions for the purpose of consulting with competent national authorities, affected communities, and relevant stakeholders, like civil society organisations.⁴⁰⁴

C. Phase Two: Jurisdiction

This phase represents the formal commencement of a preliminary examination. During this phase, the preliminary examination will focus on whether the Court has the jurisdiction to try the issues highlighted by the preliminary examination by this stage. Specifically, it will focus on whether the alleged crimes fall within the subject-matter jurisdiction of the ICC. This analysis is conducted with regards to all communications and pieces of information that were not rejected in phase one, and also information from referrals from States Parties or the UNSC, Declarations lodged by States, open source information and testimony received at the seat of the Court.

During phase two, the ICC Prosecutor will hold consultations with government authorities, members of civil society, representatives of affected groups,⁴⁰⁵ and various UN and international organisations.⁴⁰⁶ Phase two will also see officials of the ICC Prosecutor go on missions to affected areas.

As noted above, this phase addresses issues relating to the jurisdiction of the Court. Jurisdiction requires an analysis of whether a crime falling under the Rome Statute may have been committed (subject-matter jurisdiction), whether it was committed on the territory of the relevant country or by one of its citizens (territorial or personal jurisdiction) and whether it was committed within the time frame of the relevant instrument permitting jurisdiction (temporal jurisdiction), such as a declaration or ratification of the Rome Statute.

The “subject-matter” jurisdiction of the Court concerns whether the criminal behaviour falls within a crime the Court can prosecute, namely genocide, crimes against humanity, war crimes and the crime of aggression (the latter only falling within the material jurisdiction of the Court after 17 July 2018).⁴⁰⁷ Lastly, “territorial” jurisdiction will apply if the crimes were allegedly committed in the territory of Ukraine (i.e., within the scope of the declaration), or “personal” jurisdiction will apply if a citizen of the relevant country is alleged to have committed a relevant crime.

D. Phase Three: Admissibility

Phase three of the preliminary examination process considers admissibility of the alleged crimes at the ICC, looking specifically at the principle of complementarity and the gravity of the crimes alleged. During this phase, the ICC Prosecutor continues to verify and gather information and also works to refine her legal assessment of admissibility. As such, attempts are made to fill in gaps in the information on issues that inform the central questions of whether national investigations or prosecutions have commenced, to what extent and whether the apparent crimes appear sufficiently grave.

⁴⁰⁴ Preliminary Examinations Policy Paper, p. 20, para. 85.

⁴⁰⁵ Office of the Prosecutor, Preliminary Examinations, [Honduras](#).

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Rome Statute, art. 5.

As noted above, the principle of admissibility encompasses the concepts of complementarity and gravity.⁴⁰⁸ Complementarity involves the examination of the existence of relevant national proceedings in relation to the alleged situation or case that is being considered and the nature of those proceedings. In other words, complementarity can be described as concerning whether genuine investigations and prosecutions are being conducted at a national level. It will see the ICC Prosecutor analyse the steps taken by national courts to investigate and prosecute the alleged crimes covered by the preliminary examination.⁴⁰⁹ The steps the ICC Prosecutor must consider when analysing this are:

- Whether there are, or have been, national investigations or prosecutions relevant to the preliminary examination.⁴¹⁰ If not, then this factor alone is sufficient to make the case admissible at the ICC.⁴¹¹
- If there have been national investigations or prosecutions, the ICC Prosecutor will assess whether these relate to the potential cases being examined by the ICC Prosecutor. Principal among the questions raised are: Is it the same person and the same conduct being investigated by the ICC Prosecutor? Is the focus on those most responsible for the most serious crimes?
- If the answer is yes, the ICC Prosecutor will examine whether the national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings.⁴¹² In sum, unwillingness will be examined through an assessment of: (i) the existence of proceedings designed to shield an individual from ICC jurisdiction; (ii) unjustifiable delay in the proceedings; and (iii) proceedings not conducted impartially or independently.⁴¹³ In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain of the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. In the event that the ICC concludes that the national proceedings are vitiated by unwillingness or inability, the ICC will (subject to the other ICC requirements) have jurisdiction over the crimes.

Next, the ICC Prosecutor must consider whether a case is of sufficient gravity to justify further action by the Court.⁴¹⁴ In line with the above, the ICC Prosecutor must consider each potential case that would likely arise from the

⁴⁰⁸ *Ibid.*, arts. 17(1)(a)-(c) (complementarity), 17(1)(d) (gravity).

⁴⁰⁹ *Ibid.*, arts. 18(1) and 19(2)(b).

⁴¹⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Admissibility Judgment](#)) ICC-01/04-01/07-1497 (25 September 2009), para. 78.

⁴¹¹ *Ibid.*

⁴¹² Preliminary Examinations Policy Paper, p. 12, para. 49; The ICC has said that the evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation ... which are significant to the question of whether there is no situation of 'inactivity' at the national level, are also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings": *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ([Al-Senussi Admissibility Decision](#)) ICC-01/11-01/11-466-Red (11 October 2013), para. 210.

⁴¹³ Rome Statute, art. 17(2); Preliminary Examinations Policy Paper, pp. 13-15, paras. 51-58; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ([Gaddafi Admissibility Decision](#)) ICC-01/11-01/11-344-Red (31 May 2013), paras 199-215; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ([Al-Senussi Admissibility Decision](#)) ICC-01/11-01/11-466-Red (11 October 2013), para. 235.

⁴¹⁴ Rome Statute, art. 17(1)(d).

investigation of a situation.⁴¹⁵ The factors that the ICC Prosecutor must consider include the scale, nature and manner of commission of the crimes, as well as their impact on victims.⁴¹⁶

E. Phase Four: Interests of Justice

Finally, the ICC Prosecutor will consider the interests of justice in deciding whether to proceed to a formal investigation. In order to demonstrate that launching a full investigation is in the interests of justice, the ICC Prosecutor must question whether, in light of the gravity of the crime and interests of victims, there are substantial reasons to believe that an investigation would *not* serve the interests of justice.⁴¹⁷

What is in the interests of justice is difficult to define. It is a broad discretionary power that the Prosecutor appears never to have exercised. As noted, the Prosecutor must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice.⁴¹⁸ The Prosecutor will consider this exceptional power in light of the object and purpose of the Statute — namely the prevention of serious crimes of concern to the international community through ending impunity.⁴¹⁹ The Prosecutor has explicitly said that there is a difference between the concepts of the interests of justice and the interests of peace. The latter is not part of the role of the ICC Prosecutor, who refuses to view the provision as a conflict management tool where the Prosecutor becomes part of a political peace negotiation.⁴²⁰

F. Report: The Outcome

After the four phases of the preliminary examination, taking into account the principles of jurisdiction, admissibility and the interests of justice, the ICC Prosecutor must be satisfied that there is a “reasonable basis” to believe a crime has been perpetrated and to proceed with an investigation. Once the above considerations have been made, one of the following decisions relating to a full investigation will be made:

- A refusal to initiate an investigation because the information falls short of the factors outlined above;⁴²¹
- A need to continue to collect information on crimes and/or relevant national proceedings to establish a sufficient factual and legal basis to give a conclusive determination; or
- Decide the factors outlined above are satisfied and proceed to initiate an official ICC criminal investigation. This requires judicial authorisation from the ICC.⁴²²

⁴¹⁵ Kenya Authorisation Decision, paras 50 and 188; *Situation in the Republic of Côte d’Ivoire* ([Authorisation Decision](#)) ICC-02/11-14 (3 October 2011), paras 202-204.

⁴¹⁶ Regulations of the Prosecutor, reg. 29(2); *The Prosecutor v. Abu Garda* ([Decision on the Confirmation of Charges](#)) ICC-02/05-02/09-243-Red (8 February 2010), para. 31; *Situation in the Republic of Côte d’Ivoire* ([Authorisation Decision](#)) ICC-02/11-14 (3 October 2011), paras 203-204; Preliminary Examinations Policy Paper, p. 15, para. 61.

⁴¹⁷ Rome Statute, art. 53(1)(c).

⁴¹⁸ Preliminary Examinations Policy Paper, para. 10; 2015 Report on Preliminary Examination Activities, p. 3, para. 8.

⁴¹⁹ Office of the Prosecutor of the ICC, [Policy Paper on the Interests of Justice](#), September 2007, p. 1.

⁴²⁰ *Ibid.*

⁴²¹ Rome Statute, art. 53(1)(a)-(c) and (d).

⁴²² Preliminary Examinations Policy Paper, p. 4, para. 14.

It is important to note at this point that the decision-making process is an on-going one and the Prosecutor may, at any time, reconsider her decision based on receiving new facts and information.⁴²³

II. Investigation

This part considers how a formal investigation begins. It will then outline a general overview of the obligations on a State during an investigation, and how the activities of the Prosecutor (preliminary examination and formal investigation) then translate into a criminal trial at the ICC.

If, as a result of conducting her preliminary examination, the ICC Prosecutor deems it is necessary to conduct a full investigation into the situation at hand (as is the case with Ukraine), she may need to apply to the Pre-Trial Chamber at the ICC to seek authorisation to launch an investigation. This will be necessary where the Prosecutor has initiated a preliminary examination on her own volition (such as from a Declaration by a non-State Party, or on reliable information received).⁴²⁴ It will not be necessary if she has a referral from a State Party or the UNSC. If the Pre-Trial Chamber concludes that there is a “reasonable basis” to proceed with an investigation, and the case “appears” to fall within the jurisdiction of the Court, then it must authorise the commencement of an investigation.

A. *How a Full Investigation Begins*

The Rome Statute compels the Prosecutor to seek to commence a full investigation unless, based on the information she has scrutinised as the result of her preliminary examination, she makes the determination that there is no “reasonable” basis to proceed under the jurisdiction and reach of the Statute.⁴²⁵

a) *The Decision to Proceed*

If, after the Prosecutor initiated a preliminary examination on her own volition (such as with a Declaration), the Prosecutor comes to the conclusion that there is a reasonable basis to initiate a full investigation, she must send a written request to the Pre-Trial Chamber to authorise such an investigation.⁴²⁶ Before this can take place, the Statute places a duty on the Prosecutor to inform all victims known to her, or the VWU, or their legal representatives, of the decision, unless she determines that doing so could pose a danger to well-being or the integrity of the investigation.⁴²⁷ She must also send notice of this decision, along with her reasoning, in a manner that prevents any danger to the safety, well-being or privacy of those who provided information to her.⁴²⁸

⁴²³ Rome Statute, art. 53(4); Rules of Procedure and Evidence, Rule 49(2).

⁴²⁴ Rome Statute, arts 15(1)-(3); Rules of Procedure and Evidence, Rule 50.

⁴²⁵ *Ibid.*, art. 53(1).

⁴²⁶ *Ibid.*, art. 15(3); Rules of Procedure and Evidence, Rule 50(2).

⁴²⁷ Rules of Procedure and Evidence, Rule 50(1).

⁴²⁸ Rules of Procedure and Evidence, Rule 49(1).

If the Pre-Trial Chamber, upon examination of the request for authorisation from the Prosecutor, concludes that there is a “reasonable basis”⁴²⁹ to proceed with the investigation, and that the case appears to fall within the jurisdiction of the Court, the Pre-Trial Chamber will send this decision, including its reasons for coming to the decision, to the Prosecutor as well as to any victims who made representations to the Chamber.⁴³⁰ On the other hand, if the Pre-Trial Chamber decides that the Prosecutor has not made the case for a full investigation, the Prosecutor can make further submissions to the Chamber based on any new evidence or information that she later finds.

b) The Decision Not to Proceed

Conversely, if, in the course of her deliberations, the Prosecutor determines that there is: (i) an insufficient legal or factual basis to seek an arrest warrant or summons under Article 58;⁴³¹ (ii) that the case is inadmissible under Article 17;⁴³² or (iii) that an investigation would not serve the interests of justice, then she is compelled to inform the Pre-Trial Chamber and the entity which initiated the action - whether it be by way of State referral under Article 14, or the UNSC under Article 13(b)—and the reasons for it.⁴³³

At this point, the State that made the original referral under Article 14, or the UNSC that initiated the action under Article 13(b), could request the Pre-Trial Chamber review the Prosecutor’s decision not to initiate a full investigation. Once the Pre-Trial Chamber has evaluated the reasons provided by the Prosecutor, it has the power ask the Prosecutor to reconsider her decision.⁴³⁴

Additionally, the Pre-Trial Chamber could decide to review the Prosecutor’s decision without a request from an initiating entity if the decision has been solely made on the basis that the Prosecutor did not think an investigation would be in the interests of justice. In this case, such a decision would have to be confirmed by the Pre-Trial Chamber in order to become effective.⁴³⁵

B. The Investigation

It is the job of the investigation division at the ICC Prosecutor’s office to investigate. If a full investigation is opened, investigators will interview alleged victims and witnesses in the State concerned. The investigators can receive and request evidence as necessary from Ukraine and other States or entities. If the ICC Prosecutor wishes to conduct investigations on the territory of a State such as Ukraine, she must contact the GoU and request permission.

⁴²⁹ The “reasonable basis” to believe standard is the lowest at the ICC. Put differently, the PTC should be satisfied that there is a sensible or reasonable justification for the belief that a crime falling within the jurisdiction of the ICC has been or is being committed. *See* Kenya Authorisation Decision, paras. 27-35.

⁴³⁰ Rules of Procedure and Evidence, Rule 50(6).

⁴³¹ Rome Statute, art. 53(2)(a).

⁴³² *Ibid.*, art. 53(2)(b).

⁴³³ *Ibid.*, art. 53 (2)(c); Rules of Procedure and Evidence, Rule 105(1).

⁴³⁴ *Ibid.*, art. 53(3)(a).

⁴³⁵ *Ibid.*, art. 53(3)(b).

Ukraine is generally under an obligation to allow such requests. Even though the Prosecutor must request permission, this is largely *pro forma*, as Ukraine is under an obligation to “cooperate with the Court without any delay or exception in accordance with Part 9 [of the Rome Statute]”.⁴³⁶ If the ICC Prosecutor seeks to take certain investigative steps within Ukraine without its cooperation, the Prosecutor must apply to the Pre-Trial Chamber for permission. In turn, the Pre-Trial Chamber will ask Ukraine whether it has any views on the application. However, considering Ukraine’s requirement to cooperate, this should be necessary in only limited situations.

The Statute places a duty on the Prosecutor to investigate each and every aspect of the crime, including all facts and pieces of evidence pertaining to it, in order to assess whether there is any criminal responsibility that falls under the jurisdiction of the Statute.⁴³⁷ Further, the Statute makes it clear that the purpose of the Prosecutor’s investigation is to establish truth rather than to prove guilt.⁴³⁸ As such, the provisions of the Statute make clear that the Prosecutor must investigate not only incriminating evidence and information, but also pieces of evidence and information that would potentially exonerate the accused, in order to paint a full picture of the events in question. Throughout the whole investigation, the Prosecutor is also obliged to take all appropriate measures and precautions to respect the interests and personal circumstances of all victims and witnesses the Prosecutor encounters during the investigatory process, bearing in mind at all times the nature of the alleged crimes and the physiological and psychological effects they could have had on those involved.⁴³⁹

With those obligations in mind, the investigatory powers afforded to the Prosecutor are wide. In the course of the investigatory process, the Prosecutor can collect and examine any evidence she feels is necessary and relevant to the case,⁴⁴⁰ as well as questioning potential suspects, including victims and witnesses.⁴⁴¹ The Prosecutor is also given the power to enter into her own arrangements with States, intergovernmental organisations or individuals in order to elicit information which otherwise may not have been obtainable, providing the agreements are not deemed to be inconsistent with the law of the Statute.⁴⁴²

Part 9 of the Rome Statute provides a detailed list of the types of cooperation States Parties have agreed to provide to the Court (and by extension to the Prosecutor) which covers virtually any investigative activity that the Prosecutor may need to undertake as part of her investigation. States Parties and declaring non-State Parties agree to assist the Prosecutor’s investigation in a number of ways⁴⁴³ including (i) surrendering a person to the Court;⁴⁴⁴ (ii) identifying and providing the whereabouts of persons or the location of items,⁴⁴⁵ (iii) assisting in the taking of evidence, including

⁴³⁶ *Ibid.*, art. 12(3).

⁴³⁷ *Ibid.*, art. 54(1)(a).

⁴³⁸ *Ibid.*, art. 54(1)(a).

⁴³⁹ *Ibid.*, art. 54(1)(b).

⁴⁴⁰ *Ibid.*, art. 54(3)(a).

⁴⁴¹ *Ibid.*, art. 54(3)(b).

⁴⁴² *Ibid.*, art. 54(3)(d).

⁴⁴³ *Ibid.*, art. 93.

⁴⁴⁴ *Ibid.*, art. 89.

⁴⁴⁵ *Ibid.*, art. 93(1)(a).

testimony under oath, and the production of evidence, including expert opinions and reports deemed necessary by the ICC;⁴⁴⁶ (iv) providing the questioning of any person being investigated or prosecuted;⁴⁴⁷ (v) facilitating the voluntary appearance of persons as witnesses or experts before the Court;⁴⁴⁸ (vi) providing the examination of places or sites, including the exhumation and examination of grave sites;⁴⁴⁹ (vii) executing searches and seizures;⁴⁵⁰ (viii) providing the protection of victims and witnesses and the preservation of evidence;⁴⁵¹ (ix) identifying, tracing and freezing or seizing the proceeds, property and assets and instrumentalities of crimes;⁴⁵² as well as (x) any other type of assistance requested by the Prosecutor which is not prohibited by the law of the requested State.⁴⁵³

In the event that the Prosecutor wishes to pursue her investigation in the territory of a State not party to the Statute or in one that has not accepted the jurisdiction of the ICC through a Declaration (such as the USA), the Statute gives the Prosecutor the power to enter into an agreement via the Court to invite the State to provide assistance on the basis of an *ad hoc*, one-off arrangement.⁴⁵⁴ In the event the State enters into this agreement but then fails to co-operate with the Prosecutor in the course of her investigation, the State could then be referred to the ASP or the UNSC.⁴⁵⁵

Another power given to the Prosecutor is the ability to request that the Pre-Trial Chamber issue an arrest warrant or a summons to appear for a person who the Prosecutor reasonably believes, as a result of her investigation, has committed a crime within the jurisdiction of the court.⁴⁵⁶ Whereas the summons to appear is a voluntary measure used where the Court believes the summons will be enough to ensure the person's appearance, the arrest warrant involves a coercive power that allows the detention of the named person for the purposes of bringing them before the Court.

Practically speaking, the ICC may face limitations on its capabilities to secure the attendance of some alleged perpetrators forcibly. In short, the ICC does not have its own police or arresting force. It must rely upon State cooperation and local capabilities. For example, in the case of Uganda, persons fighting against the government have proven difficult to arrest. In 2005, the ICC issued warrants for the arrest of Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen as part of the Uganda investigation. In January 2015, Dominic Ongwen voluntarily surrendered himself to American forces in the Central African Republic ("CAR"). The others are still at large or identified as dead. In the case of Sudan, in 2009, the ICC issued a warrant for the arrest of Omar

⁴⁴⁶ *Ibid.*, art. 93(1)(b).

⁴⁴⁷ *Ibid.*, art. 93(1)(c).

⁴⁴⁸ *Ibid.*, art. 93(1)(e).

⁴⁴⁹ *Ibid.*, art. 93(1)(g).

⁴⁵⁰ *Ibid.*, art. 93(1)(h).

⁴⁵¹ *Ibid.*, art. 93(1)(j).

⁴⁵² *Ibid.*, art. 93(1)(k).

⁴⁵³ *Ibid.*, art. 93(1)(l).

⁴⁵⁴ *Ibid.*, art. 87(5)(a).

⁴⁵⁵ *Ibid.*, art. 87(5)(b).

⁴⁵⁶ *Ibid.*, art. 58(1)(b)(i).

Al-Bashir, former President of Sudan. He has remained at large since 2009. In June 2015, South Africa was heavily criticised for refusing to arrest him in their country despite being a State Party to the Rome Statute.⁴⁵⁷

C. The Start of an ICC Case

Once an arrest warrant or a summons to appear has been issued under Article 58, the person subject to the warrant or summons will appear before the Pre-Trial Chamber in the presence of the Prosecutor.⁴⁵⁸ During this time, the Chamber will ensure the accused is aware of the crimes he or she is alleged to have committed, as well as of his or her rights under the Statute, including, in the event the accused is detained on an arrest warrant, the right to apply to the Chamber to be released before the trial commences.⁴⁵⁹

As well as making the accused aware of their rights under the Statute, the Pre-Trial Chamber also uses this short hearing to deal with a number of administrative issues, such as setting the date to hold a hearing to confirm the charges against the accused (the “confirmation hearing”).⁴⁶⁰ The Chamber will also make decisions regarding the disclosure of evidence between the Office of the Prosecutor and the defence team(s).⁴⁶¹

D. The Confirmation Hearing

The confirmation of charges hearing must take place within a reasonable time after the accused’s surrender or voluntary appearance before the Court. During the confirmation hearing, the Prosecutor, in the presence of the Chamber, the accused and the counsel of the accused, will confirm which charges she wishes to bring against the accused based on the conclusions of her investigation.⁴⁶²

Although it is preferable, in the interests of justice, for the accused to be present during the confirmation of charges hearing, the Pre-Trial Chamber, may, on the request of the Prosecutor, or on its own motion, decide to hold the hearing in the absence of the accused in the event that the accused has waived their right to be present,⁴⁶³ or is unable to attend for any other reason.⁴⁶⁴ In this case, the hearing would usually continue with the accused being represented by their counsel.

During the hearing, the Presiding Judge of the Pre-Trial Chamber will ask for the list of charges—in other words, the specific accusations of criminal conduct—the Prosecutor has decided to file against the accused to be read out before the Chamber.⁴⁶⁵ Once the charges have been read and the Presiding Judge has ruled on how the hearing shall take

⁴⁵⁷ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* ([Decision](#)) ICC-02/05-01/09 (6 July 2017). See also the Supreme Court of Appeal of South Africa ([Judgement](#)) Case No. 867/15 (15 March 2016).

⁴⁵⁸ Rules of Procedure and Evidence, Rule 121.

⁴⁵⁹ Rome Statute, art. 60(1).

⁴⁶⁰ A confirmation hearing must be carried out within a “reasonable time” pursuant to Rome Statute, art. 61(1); Rules of Procedure and Evidence, Rule 121(1).

⁴⁶¹ Rules of Procedure and Evidence, Rule 121(2).

⁴⁶² Rome Statute, art. 61(1).

⁴⁶³ Rules of Procedure and Evidence, Rule 124.

⁴⁶⁴ Rome Statute, art. 61(2).

⁴⁶⁵ Rules of Procedure and Evidence, Rule 122(1).

place, the Prosecutor must then support each charge with sufficient evidence to establish “substantial grounds” to believe that the accused has committed the crime alleged.⁴⁶⁶

The accused may then: (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; or (iii) present their own contradictory evidence.⁴⁶⁷ Once the Chamber has listened to the arguments presented by the Prosecutor and the accused, the Chamber will ask for final statements to be made⁴⁶⁸ before coming to a judgment as to whether there is sufficient evidence to establish substantial grounds to believe the accused committed the crimes as charged.

The Pre-Trial Chamber is tasked with determining whether there is sufficient evidence to establish “substantial grounds to believe that the person committed each of the crimes charges”⁴⁶⁹ and the Prosecution must offer “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations,”⁴⁷⁰ which must go beyond a mere theory or suspicion.⁴⁷¹ It is the duty of the Prosecutor to furnish all facts underpinning the charges and to present evidence in relation to each legal requirement of the crime.⁴⁷²

Based on the evidence and arguments provided by the Prosecutor and the accused, the judges of the Pre-Trial Chamber have the power to decide either to: (i) confirm the charges and commit the person to the Trial Chamber for a full trial;⁴⁷³ (ii) decline to confirm the charges as a result of determining there is a lack of evidence to support them;⁴⁷⁴ or (iii) adjourn the hearing⁴⁷⁵ and request the Prosecutor to consider either providing further evidence or conducting further investigations or amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.⁴⁷⁶

⁴⁶⁶ Rome Statute, art. 61(5).

⁴⁶⁷ *Ibid.*, art. 61(6).

⁴⁶⁸ Rules of Procedure and Evidence, Rule 122(8).

⁴⁶⁹ Rome Statute, art. 61(7).

⁴⁷⁰ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on the Confirmation of Charges](#)) ICC-01/04-01/06-803-tEN (29 January 2007), para. 39.

⁴⁷¹ *Ibid.*, para. 37.

⁴⁷² *The Prosecutor v. Jean-Pierre Bemba Gombo* ([Decision on the Confirmation of Charges](#)) ICC-01/05-01/08-424 (25 June 2009), paras 206-209, 299-300, 311-312.

⁴⁷³ Rome Statute, art. 61(7)(a).

⁴⁷⁴ *Ibid.*, art. 61(7)(b).

⁴⁷⁵ *Ibid.*, art. 61(7)(c).

⁴⁷⁶ *Ibid.*, art. 61(7)(c).

Part Four: Information, Evidence and Trials

This section summarises three main issues. First, it addresses how information pertaining to crimes falling within the jurisdiction of the ICC can be conveyed to the Court. Having addressed how information can be sent to the court, the section moves on to look at the role of evidence at the ICC. Finally, the section outlines the ICC process after confirmation of charges (above), namely the trial process and sentencing procedure.

I. Sending Information to the ICC Prosecutor

The Prosecutor will receive information during the preliminary examination from any reliable source about a situation. Individuals or organisations may submit to the Prosecutor information on crimes within the jurisdiction of the Court. These are known as “communications”. Article 15 of the Rome Statute permits the Prosecutor to receive information from a variety of entities, namely States, organs of the UN, inter-governmental or non-governmental organisations, or other reliable sources that she deems appropriate. She may also receive written or oral testimony at the seat of the Court. When such information is received, the Prosecutor must protect the confidentiality of the information and testimony and take measures accordingly.⁴⁷⁷ The receipt of communications is an ongoing process and may be considered at any time.⁴⁷⁸

The ICC provides practical guidance on how to submit information to the Court. The ICC website directs you from “if you would like to submit information on alleged crimes to the Prosecutor”, to a section entitled “What should be included in a communication sent to the Office”.⁴⁷⁹ This section provides useful guidance for anyone thinking about sending information to the Prosecutor. It notes that the Rome Statute does not expressly specify what information sent to the Prosecutor should contain. Further, it states that if the information for a situation “does not provide sufficient guidance for an analysis that could lead to a determination that there is a reasonable basis to proceed, the analysis is concluded and the sender informed”.⁴⁸⁰ Those who send information are encouraged to send it in English or French, but informal translations will be sought for other languages.⁴⁸¹

II. Evidence at the International Criminal Court

The ICC Prosecutor’s investigation is focused on evidence. It is evidence that can prove the guilt of an accused beyond all reasonable doubt. A variety of evidence may be admitted as evidence in a trial at the ICC:

- Live testimony, which is a witness giving oral evidence in Court;
- Written testimony, which involves a witness handing in a written statement to the Court;

⁴⁷⁷ Rules of Procedure and Evidence, Rule 46.

⁴⁷⁸ 2014 Report on Preliminary Examination Activities, para. 194.

⁴⁷⁹ [‘What should be included in a Communication sent to the Office?’ \(ICC\)](#).

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

- Documentary evidence, used to refer to items which document something. It can include UN reports, posts on social media or radio broadcast recordings;
- Physical evidence which is the traditional form of evidence. It includes actual objects such as knives or guns; and
- Expert evidence, which is the written or oral testimony of an expert who is able to give the Court the benefit of their opinion on an issue not ordinarily within the Court’s expertise, such as forensic medicine or military tactics.

The ICC has a significant degree of discretion in considering all types of evidence—particularly necessary given the nature of the cases that will come before the ICC.⁴⁸² This section will look at the types of evidence that can be used during proceedings at the ICC as well as addressing issues relating to admissibility and reliability. Finally, the section will look at civil society groups and consider when members of these groups may be compelled to give evidence before the Court.

In the request for authorisation in the situations in Georgia, Kenya and the Côte d’Ivoire, the supporting evidence relied upon has been largely documentary. Such evidence includes items such as maps, NGO and UN reports, official documents and other items like photographs. Many of the reports include references to testimonial, documentary and physical evidence. The reports can come from NGOs such as Human Rights Watch or International Crisis Group, or from official entities such as the Council of Europe or UN. Even though some of the evidence relied on consisted of interviews with witnesses, the bulk was made up of documentary evidence. It seems the Prosecutor was satisfied largely by reports of second hand information.

III. Basic Investigative Standards

GRC has produced a guide on the Basic Investigative Standards for first responders to international crimes and a mobile application “GRC BIS” that ensures that its users have access to up-to-date IHL and ICL knowledge and guidance on how to find and preserve evidence and build viable cases for eventual prosecution.⁴⁸³ The guide and app are designed to identify and explain the basic standards that anyone collecting evidence of international crimes in Ukraine should adhere to.

IV. Trial

So far, this Part has addressed how information about suspected crimes can be sent to the Prosecutor, and the different types of evidence used by the Court. The following section will focus on what happens during the trial phase at the ICC; in particular, the process the trial follows and the rights of the accused during that trial.

⁴⁸² *The Prosecutor v. Thomas Lubanga Dyilo (Corrigendum to Decision on the Admissibility of Four Documents)* ICC-01/04-01/06 (20 January 2011), para. 24; Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan and Christopher Gosnell, *Cassese’s International Criminal Law* (OUP, 2013), p. 380.

⁴⁸³ GRC BIS App is available on [IOS](#) and [Android](#) free of charge in English and Russian languages.

From the very first moment the Trial Chamber is constituted, the Chamber will usually designate⁴⁸⁴ one member to be responsible for the preparation of the trial and to facilitate the fair and expeditious conduct of the proceedings, for example, by ensuring that evidence is disclosed by both sides in a timely fashion.⁴⁸⁵ Once this is done, the Chamber will preside over a “status conference” with the Prosecutor and Defence in order to set the date for when the trial will commence.

At this stage prior to the commencement of the trial, the Prosecutor or Defence can raise with the Chamber any issues they have regarding the forthcoming trial. This can be anything from challenging the jurisdiction of the court or the admissibility of the case,⁴⁸⁶ to bringing motions to somehow change the conduct of the trial.⁴⁸⁷

One of the first acts the Trial Chamber carries out is to read the charges the Prosecutor has brought against the accused, as confirmed by the Pre-Trial Chamber. The Statute sets out that the Trial Chamber, once satisfied that the accused understands the nature of the charges (if needed, with the help of simultaneous translation) he or she is then given the option to plead “guilty” or “not guilty” to the charges.⁴⁸⁸

Should the accused plead not guilty, from that point on the onus is on the Prosecutor to show the accused is guilty beyond reasonable doubt. As per the Statute, everyone who appears before the Court has the fundamental right to be presumed innocent until proven guilty in accordance with the laws and procedures of the Court.⁴⁸⁹ If the accused pleads guilty, the Chamber will satisfy itself of the validity of the plea and move to the sentencing phase of the proceedings, as described below.

Throughout the whole case, from the first opening statements to the moment the judgment is delivered, the accused should be afforded basic rights and privileges to ensure the trial is fair, impartial and the powers of the Prosecution and Defence are balanced.⁴⁹⁰ The accused is entitled to, *inter alia*, the following rights: (i) to be promptly informed of the charges in the language he/she fully understands;⁴⁹¹ (ii) to be given adequate time and facilities to prepare his defence and communicate with his counsel in confidence (in other words, in private channels of communication);⁴⁹² (iii) to be tried without undue delay;⁴⁹³ (iv) to be provided with legal aid should he/she be unable to afford their own defence;⁴⁹⁴ (v) to question witnesses in Court or have witnesses questioned by their counsel;⁴⁹⁵ (vi) to have access to

⁴⁸⁴ Rules of Procedure and Evidence, Rule 132*bis*(1).

⁴⁸⁵ *Ibid.*, Rule 132*bis*(2).

⁴⁸⁶ *Ibid.*, Rule 133.

⁴⁸⁷ *Ibid.*, Rule 134.

⁴⁸⁸ Rome Statute, art. 64(8)(a).

⁴⁸⁹ *Ibid.*, art. 66.

⁴⁹⁰ *Ibid.*, art. 67.

⁴⁹¹ *Ibid.*, art. 67(1)(a).

⁴⁹² *Ibid.*, art. 67(1)(b).

⁴⁹³ *Ibid.*, art. 67(1)(c).

⁴⁹⁴ *Ibid.*, art. 67(1)(d).

⁴⁹⁵ *Ibid.*, art. 67(1)(e).

an interpreter, when and if necessary, in order to fully understand the proceeding;⁴⁹⁶ and (vii) not to be forced to testify, confess guilt and remain silent without determination of guilt or innocence.⁴⁹⁷

No matter what directions are given, all witnesses who appear before the Trial Chamber will be examined in the same manner. First, the party that relies on the witness will question the witness to elicit what the witness saw and heard about the crimes in question. Then, the other parties can question the witness about their evidence. They can challenge matters such as whether their evidence is reliable and accurate, or whether the witness is credible and other matters.⁴⁹⁸ The Judges can ask questions themselves.⁴⁹⁹

Throughout all the proceedings of the Trial, due to the often sensitive and distressing nature of the crimes alleged, Trial Chamber is under an ongoing obligation to the Statute to take all appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.⁵⁰⁰ In certain circumstances, this could mean the Chamber could decide, for example, to make an exception to the rule that all proceedings should be held in public, and order that some of the trial take place in closed proceedings.⁵⁰¹ This exception would be particularly apt in the case of a victim of sexual violence or with a child witness. In deciding such exceptions, the Statute compels the Chamber to take heed of all the circumstances, particularly with regards to how such an exception could hinder the fairness of the trial.⁵⁰²

Once all witnesses have been heard and all evidence has been presented before the Chamber, the presiding judge will then declare that the submission of evidence has ended. The Chamber will then invite the Prosecutor and the Defence to make their closing statements.⁵⁰³ The closing statements give the Prosecutor and the Defence the chance to remind the Chamber of the evidence and facts they have presented before them, as well as to reiterate the arguments that support their respective cases.

Once the Prosecutor and the Defence have both made their closing statements, the Judges of the Trial Chamber decide the case.⁵⁰⁴ A verdict will then be reached. The verdict must be a decision based on an “evaluation of the evidence and the entire proceedings”,⁵⁰⁵ and must not exceed the facts and circumstances described in the charges which were transferred to the Chamber from the Pre-Trial Chamber (see above). From the moment the Chamber retires to begin its deliberations, all aspects of the deliberations of the judges must remain secret. Only when the decision, along with a full and reasoned statement supporting it, has been distributed should the Chamber’s verdict be known.⁵⁰⁶

⁴⁹⁶ *Ibid.*, art. 67(1)(f).

⁴⁹⁷ *Ibid.*, art. 67(1)(g).

⁴⁹⁸ Rules of Procedure and Evidence, Rule 140(2)(b).

⁴⁹⁹ *Ibid.*, Rule 140(2)(c).

⁵⁰⁰ Rome Statute, art. 68(1).

⁵⁰¹ *Ibid.*, art. 68(2).

⁵⁰² *Ibid.*, art. 68(2).

⁵⁰³ Rules of Procedure and Evidence, Rule 141.

⁵⁰⁴ *Ibid.*, Rule 142.

⁵⁰⁵ Rome Statute, art. 74(2).

⁵⁰⁶ *Ibid.*, art. 74(4).

If the verdict is “guilty”, the Chamber will proceed to sentence the accused. If the verdict is not guilty, the accused should be immediately released and the trial proceedings will come to an end.

V. Sentencing

The aim of sentencing perpetrators found guilty beyond reasonable doubt is multi-fold: to punish and to deter being the main goals.⁵⁰⁷ First, sentencing aims to ensure that perpetrators of the most serious crimes do not go unpunished.⁵⁰⁸ Through the punishment of a convicted person, sentencing is seen to contribute to the fostering of reconciliation and the restoration of peace in the concerned communities. The sentence responds to a “need for truth and justice voiced by the victims and their family members”, is an “expression of society’s condemnation of the criminal act and of the person who committed it” and is “also a way of acknowledging the harm and suffering caused to the victims”.⁵⁰⁹ Second, it is believed that sentencing will act as a deterrent to those planning to commit the most serious crimes in the future and will therefore contribute to the prevention of such crimes.⁵¹⁰

When determining the length of a sentence, the Trial Chamber has substantial discretionary power,⁵¹¹ since it has to: (i) examine the relevance and weight of all factors, including mitigating and aggravating circumstances; (ii) balance all factors it considers relevant; (iii) consider the proportionality of the sentence; and (iv) decide upon what facts and circumstances should be taken into account in the determination of the sentence. The Court may impose two types of sentence: a prison sentence and a financial sentence. The financial sentence is ancillary to the final sentence.

A. Prison

Any person convicted of a crime referred to in the Rome Statute—namely, genocide, crimes against humanity, war crimes and the crime of aggression⁵¹²—may be sentenced to prison for a term up to 30 years,⁵¹³ or exceptionally a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.⁵¹⁴

The Chamber, when considering the appropriate sentence, takes into account the evidence presented and submissions made during the trial that are relevant to the sentence.⁵¹⁵ The circumstances that the Court will take into account when making a determination of sentence are listed in Article 78 and Rule 145. The Court will take into account: (i)

⁵⁰⁷ Other goals include rehabilitation, expressive and communicative goals. See also Barrie Sander, ‘[Justifying International Criminal Punishment: A Critical Perspective](#)’, in Bergsmo and Buis (ed.), *Philosophical Foundations of International Criminal Law: Foundational Concepts (TOAEP)*, 2019).

⁵⁰⁸ *The Prosecutor v. Germain Katanga* ([Sentence](#)) ICC-01/04-01/07 (23 May 2014), para. 38.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*, para. 37.

⁵¹¹ As the Appeal Chamber reminds it in the appeal confirmation sentence in Lubanga case, the Chamber ‘enjoys broad discretion in determining a sentence’. See *Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 (1 December 2014), para. 1.

⁵¹² Rome Statute, art. 5.

⁵¹³ *Ibid.*, art. 77(1)(a).

⁵¹⁴ *Ibid.*, art. 77(1)(b).

⁵¹⁵ *Ibid.*, art. 76(1).

the gravity of the crime; (ii) the individual circumstances of the convicted person and other factors such as those listed in Rule 145; (iii) the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; (iv) the degree of participation of the convicted person; (v) the degree of intent; (vi) the circumstances of the manner, time and location; and (vii) the age, education, social and economic condition of the convicted person.⁵¹⁶ In addition, the Chamber must take into account any mitigating and aggravating circumstances.⁵¹⁷ It should be noted that this list is not exhaustive.

The gravity of the crime is one of the keys determining factors of the sentence.⁵¹⁸ Neither the Statute nor the Rules provide guidance as to how to characterise and weigh the gravity of the offences committed. The individual circumstances of the accused are not defined, but do seem to overlap with the age, education, social and economic condition of the convicted person, which has to be taken into account by the Chamber.

The aggravating circumstances the Court must take into account are:⁵¹⁹

- Prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
- Abuse of power or official capacity, in other words by virtue of a position of power of the convicted person committing the crimes in question;
- Commission of the crime where the victim is particularly defenceless;
- Commission of the crime with particular cruelty or where there were multiple victims;
- Commission of the crime for any motive involving discrimination;⁵²⁰ and
- Other circumstances that, although not enumerated above, by virtue of their nature, are similar to those mentioned.⁵²¹

Mitigating circumstances include:⁵²²

- Circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; and
- The convicted person's conduct after the act, including any efforts by the person to compensate the victims or cooperate with the Court.⁵²³

⁵¹⁶ *Ibid.*, art. 78.

⁵¹⁷ Rules of Procedure and Evidence, Rule 145(2).

⁵¹⁸ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 (1 December 2014), para. 36.

⁵¹⁹ Rules of Procedure and Evidence, Rule 145(2)(b).

⁵²⁰ Namely gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

⁵²¹ Rules of Procedure and Evidence, Rule 145(2)(b).

⁵²² *Ibid.*, Rule 145(2)(b).

⁵²³ *Ibid.*, Rule 145(2)(a). Therefore, in the determination of the sentence, the Chamber can take into account facts that have not been possibly examined during the Trial such as cooperation with the Court, which may conflict with art. 76(1) of the Rome Statute.

Finally, the sentence must reflect the culpability of the convicted person,⁵²⁴ balance all the relevant factors described above, including mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.⁵²⁵ It is important that the sentence is proportionate to the crime(s) committed, and accordingly, a sentence may be appealed if it is considered disproportionate.⁵²⁶

B. Financial Penalties

In addition to imprisonment, a convicted person may be ordered to pay a fine under certain criteria,⁵²⁷ as well as forfeit proceeds, property and assets derived directly or indirectly from the crime committed, without prejudice to the rights of bona fide third parties.⁵²⁸

When deciding whether to impose a fine, the Court should take into account: (i) whether imprisonment is a sufficient penalty; (ii) the financial situation of the convicted person; (iii) factors as described in Rule 145 concerning the determination of sentence; and (vi) whether and to what degree the crime was motivated by personal financial gain.⁵²⁹ The amount of the fine is also set in accordance to: (i) the damages and injuries caused; (ii) the proportionate gains derived from the crime by the perpetrator; and (iii) the wealth of the convicted person as the fine cannot exceed 75 percent of the value of his identifiable assets, liquid or realisable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependents.⁵³⁰ Failure to pay the fine may result in an extension of the period of imprisonment.⁵³¹

When deciding whether to order forfeiture in relation to specific proceeds, property or assets can be ordered by the Court on two conditions: (i) it must be evidenced that they derive directly or indirectly from the crime; and (ii) it will not cause prejudice to the rights of bona fide third parties.⁵³² The Chamber must hold an additional hearing to hear and consider evidence as to the identification and location of specific proceeds, property or assets derived directly or indirectly from the crime before issuing an order of forfeiture when the conditions mentioned above are satisfied.⁵³³ A bona fide third party must be given notice by the Chamber and will then be able to submit relevant to the issue.⁵³⁴

⁵²⁴ Rules of Procedure and Evidence, Rule 145(1)(a).

⁵²⁵ *Ibid.*, Rule 145(1)(b).

⁵²⁶ Rome Statute, art. 81(2)(a).

⁵²⁷ *Ibid.*, art. 77(2)(a).

⁵²⁸ *Ibid.*, art. 77(2)(b).

⁵²⁹ Rules of Procedure and Evidence, Rule 146(1).

⁵³⁰ *Ibid.*, Rules 146(1)-(2).

⁵³¹ *Ibid.*, Rule 146(5).

⁵³² Rome Statute, art. 77(2)(b).

⁵³³ Rules of Procedure and Evidence, Rules 147(1) and (4).

⁵³⁴ *Ibid.*, Rules 147(2) and (3).

C. Appeal against Sentence

The Prosecutor or the convicted person can appeal the sentencing decision on the ground of disproportion between the crime and the sentence.⁵³⁵ The Appeals Chamber's primary task in this situation is to "review whether the Trial Chamber's role made any errors in sentencing the convicted person" that may affect the propriety of the decision.⁵³⁶

D. Enforcement of Sentences

States have an important role to play in making sure the sentences delivered by the ICC are carried out. A list of States that have declared a willingness to accept sentenced persons is established and maintained by the Registrar.⁵³⁷

A person sentenced to imprisonment shall be designated a State from the list of States that have indicated acceptance of such persons.⁵³⁸ The State will then either accept or reject the person.⁵³⁹ When designating a State, or any conditions to be attached, the Court must take into account five factors, namely: (i) the principle that States Parties should share responsibility for enforcing sentences; (ii) the application of international treaty standards on treatment of prisoners; (iii) the views of the sentenced person; (iv) the nationality of the sentenced person; and (v) other factors concerning the circumstances of the crime or person, or effective enforcement of the sentence.⁵⁴⁰

If the sentenced person is subject to fines and forfeiture, States Parties must give effect to orders from the Court in accordance with their domestic law.⁵⁴¹ If a State Party cannot give effect to a forfeiture order, it must take steps to recover the property, proceeds or assets ordered by the Court.⁵⁴² The property or proceeds from sale of assets must be transferred to the Court.⁵⁴³

Despite these provisions referring to States Parties, Ukraine may still be bound to follow them. It seems Ukraine would not be bound to execute the order, and particularly not to transfer the funds to the Court. However, Ukraine is obliged to provide assistance to the Court in the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties, as well as any other assistance as necessary.⁵⁴⁴ There would be no obligation on Ukraine, it seems, to enforce an order for a fine or accept a prisoner of the Court. Ukraine may, however, enter into ad hoc agreements with the Court concerning these matters.⁵⁴⁵

⁵³⁵ Rome Statute, art. 81(2).

⁵³⁶ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 A 4 A 6 (1 December 2014), para. 2.

⁵³⁷ Rules of Procedure and Evidence, Rule 200. This Rule permits the Court to enter into agreements with states concerning persons sentenced by the Court.

⁵³⁸ Rome Statute, art. 103(1)(a).

⁵³⁹ *Ibid.*, art. 103(1)(c).

⁵⁴⁰ *Ibid.*, art. 103(3).

⁵⁴¹ *Ibid.*, art. 109(1).

⁵⁴² *Ibid.*, art. 109(2).

⁵⁴³ Rome Statute, art. 109(3).

⁵⁴⁴ *Ibid.*, arts 93(1)(k) and (l).

⁵⁴⁵ *Ibid.*, art. 87(5); Rules of Procedure and Evidence, Rule 200.

Part Five: Victims and Witnesses

This section looks at the different ways victims and witnesses of international crimes can engage with the ICC. It begins by looking at the different types of victims recognised by the ICC, before addressing how potential victims can achieve the official status of a victim. The section then moves on to analyse the process that allows victims to participate in ICC proceedings, before focusing on the measures available to assist and protect victims and witnesses who do participate in proceedings. Finally, the section explores the concept of reparations at the ICC, focusing specifically on the types of reparations available and who can benefit from them.

I. Victims at the ICC

The ICC permits victims of crimes the ICC is investigating and prosecuting to engage with the proceedings and to obtain compensation—formally known as reparations—after the conviction of an accused.

A. *Qualifying and Participating as a Recognised Victim*

The ICC recognises two types of victims for the purposes of participation in ICC proceedings: Individuals who have suffered harm as a result of one of the ICC crimes (genocide, crimes against humanity, war crimes, and the crime of aggression); and

Organisations or institutions, when property dedicated to certain purposes (religion, education, art, science or charitable and humanitarian purposes) or historic monuments or hospitals is harmed as a result of one of the ICC crimes.⁵⁴⁶

If a victim believes they are able to prove they qualify for the status of a victim, the next step is for that individual, organisation or institution to submit a request to the Registrar in writing, preferably before the beginning of the phase of the proceedings in which they wish to participate. Once an application for participation is received at the Court, it will then be passed to a Chamber of judges that is dealing with the situation or case that the application relates to for consideration.

The Chamber will decide on a case-by-case basis whether the applicant meets the criteria to be considered a victim. Once the applicant is considered to be a victim within the meaning of the Rome Statute, the Chamber will then move to consider whether the victim meets the criteria to be entitled to participate in proceedings.

When deciding whether to allow the victim to participate in proceedings before the Court, the Chamber must make an assessment based on the individual circumstances of the application. There are three requirements for participation listed in Article 68(3) of the Statute:

⁵⁴⁶ Rules of Procedure and Evidence, Rule 85; [‘A Guide for the Participation of Victims in the Proceedings of the Court’ \(ICC\)](#).

Whether there is sufficient personal interest for participation;⁵⁴⁷

Whether such participation is appropriate at the procedural stage in question;⁵⁴⁸ and

Whether it would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁵⁴⁹

If the Chamber is satisfied that, based on the criteria above, the individual is entitled to participate in Court proceedings, the next step is for the Chamber to decide the manner of participation. In every instance, participation is solely at the discretion of the Chamber.⁵⁵⁰

The legal representatives of victims may attend and participate in proceedings only in accordance with an express order handed down by the Chamber.⁵⁵¹ Specifically, legal representatives can participate,⁵⁵² question witnesses, experts or the accused⁵⁵³ only if, in the view of the Chamber, it would assist in the determination of the truth, and if in this sense the Court has “requested” the evidence.⁵⁵⁴ The Court can also allow appropriate questions to be put forward by victims whenever the evidence under consideration engages their personal interests.⁵⁵⁵

B. Facilitating Participation as a Victim

As outlined in Part One, there are a number of bodies established to assist victim participation including the OPCV, the VPRS, and the VWU.

Members of civil society can play a number of important roles in relation to the proceedings before the ICC. NGOs can provide information about the Court to interested parties; provide information to the Office of the Prosecutor since they often have knowledge of the situation and direct contact with the victims; and submit *amicus curiae* briefs, in addition to serving as a link between the Court, victims and witnesses. Local NGOs are in certain cases especially

⁵⁴⁷ The personal interest must relate specifically to the concrete proceedings against a particular person. The key question is whether the contents of the victim’s application either establish that there is a real “evidential link” between the victim and the evidence which the Court will be considering, leading to the conclusion that the victim’s personal interests are affected, or, determine whether the victim was affected by an issue arising during the trial because his or her personal interests are in a real sense engaged by it. *See The Prosecutor v. Thomas Lubanga Dyilo (Decision on Victims’ Participation)* ICC-01/04-01/06-1119 (18 January 2008), para. 95.

⁵⁴⁸ There is a tendency to focus not on the appropriateness of the participation and its consistency with fair trial standards and rights of the accused, but rather define the modalities of participation to permit the accused’s interests to be safeguarded. *See Situation in the Democratic Republic of the Congo (Decision on the Applications for Participation)* ICC-01/04-101-Corr (17 January 2006), para. 58 (“[...] the core consideration, when it comes to determining the adverse impact on the investigation alleged by the Office of the Prosecutor, is the extent of the victim’s participation and not his or her participation as such.”).

⁵⁴⁹ Rome Statute, art. 68(3).

⁵⁵⁰ Rules of Procedure and Evidence, Rule 89(1); Katanga Modalities, para. 45.

⁵⁵¹ *Ibid.*, Rule 91(2); Katanga Modalities, para. 45.

⁵⁵² *Ibid.*, Rule 91(1); Katanga Modalities, para. 45.

⁵⁵³ *Ibid.*, Rule 91(3)(a); Katanga Modalities, para. 45.

⁵⁵⁴ Rome Statute, art. 69(3); Rules of Procedure and Evidence, Rule 91(3); Katanga Modalities, para. 46.

⁵⁵⁵ Katanga Modalities, para. 46.

important considering the distance between the ICC and affected communities and in others due to the lack of cooperation between the Court and the State concerned.

NGOs can send the information gathered from victims and witnesses to the Court, inform victims and witnesses about different possibilities of participation in the Court proceedings, and help victims and witnesses get legal representation to represent them at any stage of the trial. Considering the broad role NGOs can play, it is essential that they are able to provide accurate information to victims and witnesses, which is possible only if they have knowledge about the Court and proceedings taking place before it.

II. The Protection of Victims and Witnesses at the ICC

The ICC must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, particularly during its investigation and prosecution of crimes. Appropriate measures are numerous and fall into three categories: (i) protective measures;⁵⁵⁶ (ii) special measures;⁵⁵⁷ and (iii) other measures for the protection of victims and witnesses.⁵⁵⁸ Protective measures are those that shield and protect witnesses or victims from possible harm and special measures are those that assist and facilitate vulnerable witnesses when giving evidence at the ICC.

A. Protective Measures

Protective measures may be ordered by the ICC to protect a victim, a witness or any other person at risk as a result of giving testimony in proceedings at the ICC. An ICC Chamber can order protective measures either upon:

- The motion of the Prosecutor;
- The motion of the Defence;
- The request of a witness or a victim or his or her legal representative; or
- Its own motion, and after having consulted with the VWU.

The ICC Prosecutor requests protective measures in relation to her witnesses during the investigation and prosecution phases of proceedings. The Prosecutor should ordinarily request protective measures from the Court, unless she wishes to take ordinary “day-to-day” protective measures such as ensuring confidentiality.

There is no fixed test to determine who is “at risk”. The ICC has said that, irrespective of the precise description of the test, protection shall be afforded to “any witness, following careful investigation, if he or she is exposed [...] to an evidence-based (“established”) danger of harm or death”.⁵⁵⁹ This should be interpreted in a sufficiently flexible and purposive manner to ensure proper protection.

⁵⁵⁶ Rules of Procedure and Evidence, Rule 87.

⁵⁵⁷ *Ibid.*, Rule 88.

⁵⁵⁸ *Ibid.*, Rule 112(4); Regulations of the Court, regs 21, 41, 42, 101; ICC, Regulations of the Registry, ICC-BD/03-02-06 (entered into force 6 March 2006) (“Regulations of the Registry”), regs 79 and 100.

⁵⁵⁹ *Prosecutor v. Thomas Lubanga Dyilo*, [Decision](#), ICC-01/04-01/06-1557 (16 December 2008), para. 27.

The Court has said in-court measures should only be granted exceptionally after a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused. It can be discerned from this that there is a need for objective evidence, as opposed to a subjective fear or suspicion, to show a witness is genuinely at risk of being hurt.

The Prosecutor uses risk assessments to determine the need for protective measures by reference to the individual circumstances of a witness, such as the nature of the testimony and the environment in which the individual operates—for example, whether prior security incidents or threats have occurred.

The role of the VWU is separate: while the Prosecutor decides to take or apply to the Court for protective measures, the VWU provides the measures, such as security arrangements, and recommends or advises other organs of the Court on measures to be taken. The VWU is a neutral service provider, serving the Prosecution, the Defence and legal representatives of victims equally. The services of the VWU are activated by a referral from the Prosecutor or a request from the Prosecutor, Defence or other parties. There remains the ability to go to Court for all parties, which is the ultimate arbiter of protective measures.

B. Special Measures

In much the same way as with protective measures, the Prosecution, Defence, a witness or a victim may apply to the Court for special measures to be implemented. Similarly, the Court may order special measures to be put in place on its own motion, having consulted with the VWU. In all instances, special measures will be implemented with the aim to facilitate the testimony of a traumatised victim or witness, such as a child, an elderly person or a victim of sexual violence.⁵⁶⁰

In order to protect victims and witnesses, including those entitled to special measures, NGOs working with them have the possibility of insisting on confidentiality, in case the ICC requests that they hand over certain information, including statements taken from victims, victims' names and other research data. The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purposes of generating new evidence, unless the provider of the information consents.⁵⁶¹ In addition, if the Prosecutor does introduce such protected material into evidence, the Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.⁵⁶²

At the location of testimony, a psychologist will assess the vulnerable witness,⁵⁶³ in order to review the decision on whether the witness should testify. This assessment will also identify any appropriate special measures that could be

⁵⁶⁰ Rules of Procedure and Evidence, Rule 88(1).

⁵⁶¹ Rome Statute, art. 54(3)(e).

⁵⁶² Rules of Procedure and Evidence, Rule 82(2).

⁵⁶³ *Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 OA 13 (21 October 2008), para. 10.

taken.⁵⁶⁴ The witness will be given a chance to consent to the special measures.⁵⁶⁵ An assessment report will then be made to the Trial Chamber.⁵⁶⁶ Immediately post-trial, after the vulnerable witness has finished giving testimony, there will be a debriefing and a check on the mental state of the witness. Once a witness is an official witness, the VWU at the ICC or the Prosecutor will take over.

A good example of a special measure intended to facilitate the testimony of a victim or witness would be the “familiarisation process” often used by the ICC. The purpose of the familiarisation process is to assist witnesses to better understand the Court’s proceedings and the precise role played by each of the participants in the proceedings. The familiarisation process also provides witnesses with an opportunity to acquaint themselves with the individuals who may examine them in Court.⁵⁶⁷ Legal representatives may be present during the familiarisation process.⁵⁶⁸ Aside from this example, the Court has broad discretion to determine what special measures would adequately facilitate the testimony of a vulnerable witness adequately. Other examples are outlined in Chapter Two, Part Five.

III. Reparations

Reparations are forms of compensation intended to address the harm suffered by victims of crimes and may include restitution, rehabilitation, and also other measures. In essence, reparations seek to recognise and address harms suffered by victims and publicly affirm that victims are rights-holders entitled to a remedy.⁵⁶⁹ Compensation and restitution includes fines or forfeitures against the convicted person, and the Court can order reparations be paid through the Trust Fund for Victims (“Trust Fund”).⁵⁷⁰ Rehabilitation and other measures includes medical services and healthcare, psychological, psychiatric and social assistance to support victims suffering from grief and trauma and also relevant legal or social services.⁵⁷¹ It may include measures to facilitate reintegration into society or address shame.⁵⁷² The ICC is the first international criminal court to be able to make a convicted perpetrator pay reparations to victims of his crimes.

Reparations may be granted to direct victims and also to indirect victims, such as family members of direct victims, those who attempted to prevent the crimes, and those who suffered harm while helping or intervening on behalf of

⁵⁶⁴ *Ibid.*, para. 10; Rules of Procedure and Evidence, Rule 88.

⁵⁶⁵ *Ibid.*, para. 12.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06-1049 (30 November 2007), para. 39; Katanga Modalities, para. 79.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ ‘[Reparations](#)’ (*International Center for Transitional Justice*).

⁵⁷⁰ Rome Statute, art. 75(2).

⁵⁷¹ *The Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations) IC-01/04-01/06-3129-AnxA (3 April 2015), para. 42 referring to UN Basic Principles, principle 21.

⁵⁷² *The Prosecutor v. Thomas Lubanga Dyilo* ([Amended order for reparations](#)) ICC-01/04-01/06 AA 2 A 3 (3 March 2015), para. 258.

victims.⁵⁷³ Reparations can also be granted to legal entities, including NGOs, non-profits, government departments, schools, hospitals, etc.⁵⁷⁴

Special procedural rules exist for the reparations process. It is important to note that the victim does not need to have participated in the court proceedings (as a victim) previously to engage in the reparations process.⁵⁷⁵ These rules are identified in Chapter Two, Part Five. Importantly, however, compensation should be considered when three conditions are satisfied: (i) the economic harm is significantly quantifiable; (ii) an award would be appropriate and proportionate (bearing in mind the gravity of the crime and circumstances of the case); and (iii) with the available funds, the result is feasible.⁵⁷⁶

The Court has a Trust Fund to implement reparations orders and to provide physical, psychological, and material support to victims and their families.⁵⁷⁷ Voluntary contributions and private donors fund the reparations fund. There is also a reparations reserve in the case of a court-ordered reparation against an indigent convicted perpetrator.⁵⁷⁸ In other words, if the ICC is unable to seize sufficient assets from the convicted individual, the reparations reserve will be relied upon.

The Court is empowered to make reparations orders. In other words, it may provide for compensation to victims of crimes of perpetrators convicted at the Court. Where the Court makes an order, the Rome Statute provides that a “State Party” shall give effect to that judgement. This expressly applies to States Parties; however, Article 75 also provides that the Court may seek to make use of measures in Part 9 to give effect to a reparations order.

In effect, this would largely bind Ukraine to comply with the Court’s requests—if Ukraine refused to comply it would be seen as being in breach of its duty to cooperate with the Court in line with Part 9. This would make Ukraine responsible for the identification, tracing and freezing or seizure of proceeds, property and assets of crimes for the purpose of eventual forfeiture. Therefore, it seems that the ICC could reasonably request that Ukraine execute steps to secure a reparations order, and in doing so, effectively execute an order for reparations.

Victims may apply for reparations at any time. The Trial Chamber can initiate the process of its own volition, but this is much less likely.⁵⁷⁹ To do so, victims apply through the VPRS by providing the information required in Rule 94 of the Rules. This information includes the: (i) identity and address of the applicant victim; (ii) description of injury, loss or harm; (iii) location and date of the incident and if possible the identity of the person or persons believed to be responsible for the injury, loss or harm; (iv) where restitution of assets, property or tangible items is sought, a description of the item(s); (v) claims for compensation; (vi) claims for rehabilitation and other remedies; and (vii) all

⁵⁷³ Rules of Procedure and Evidence, Rule 85.

⁵⁷⁴ *Ibid.*, Rule 85(b).

⁵⁷⁵ *Ibid.*, Rule 96.

⁵⁷⁶ *The Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations) IC-01/04-01/06-3129-AnxA (3 April 2015), para. 37 referring to UN Basic Principles, principle 20.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ [‘Financial Information’](#) (*Trust Fund for Victims*).

⁵⁷⁹ Antonio Cassese, *International Criminal Law* (2nd edn, OUP, 2008), p. 423.

relevant documentation possible, including any witnesses. The ICC has created a standard form with this information, which can be used to apply for either participation or reparations or both, to simplify the application process.⁵⁸⁰

⁵⁸⁰ [‘Forms’](#) (ICC).

CHAPTER TWO: REPORT

This Chapter is an in-depth guide to the issues identified in Chapter One. The five parts to this Chapter act as a “pull out” guide. Each part is intended to provide a standalone analysis of the subject it addresses. Accordingly, each part addresses Ukraine’s engagement with the ICC in detail and incorporates the technical aspects of these issues. It is intended to explain the more difficult aspects of Ukraine’s engagement with the ICC, including discussing Ukraine’s domestic and international legal obligations now that the GoU has formally accepted the powers of the ICC through the filing of two Declarations.

Part One: Overview of the International Criminal Court in Ukraine

I. Introduction

This part provides an overview of what the ICC is, and Ukraine’s relationship with the Court. Accordingly, it outlines:

- The nature and structure of the ICC: what crimes it tries, who it can try, when it can try them; and
- A chronological description of Ukraine’s relationship with the ICC from 1998 to recent developments concerning ratification and self-declarations.

II. The ICC

A. *What is the ICC?*

The ICC is the first permanent, autonomous international criminal court. It is based in The Hague, Netherlands. It was created by formal agreement between States from around the world, culminating in a treaty that outlines the functions of the Court and grants the Court its powers—the Rome Statute.⁵⁸¹ The Rome Statute makes it clear that the ICC was established to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community and ultimately to contribute to the prevention of such crimes.⁵⁸²

The Rome Statute was signed and agreed upon by 120 States on 17 July 1998 at a conference in Rome. It came into force on 1 July 2002 after the minimum number of States needed to give it effect (60 States) ratified the Statute.⁵⁸³

⁵⁸¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, signed by Ukraine on 20 January 2000) 2187 UNTS 90 (“Rome Statute”).

⁵⁸² Rome Statute, Preamble, para. 5.

⁵⁸³ [‘About the Court’ \(ICC\)](#).

As of April 2021, there are 123 States Parties to the Rome Statute.⁵⁸⁴ States become a formal party to the Rome Statute through “ratification”, “accession”, “approval” or “acceptance”.⁵⁸⁵ Ratification is the formal act of a State consenting to be bound by a treaty.⁵⁸⁶ To ratify, a State will deposit a document containing this consent with the Secretary-General of the UN.⁵⁸⁷ Accession, approval or acceptance have the same effect as ratification.⁵⁸⁸ Accession is used when a State accepts an offer or chance to become a party to a treaty that has already been negotiated and signed by other States.⁵⁸⁹ Approval or acceptance tends to be used in practice when a Head of State—namely, a President or a person in a similar position of executive authority—is not needed by domestic constitutional law to formally agree to the treaty on behalf of his or her State.⁵⁹⁰ If a State takes one of the above-mentioned steps in relation to the Rome Statute, then that State becomes a State Party to the Rome Statute.⁵⁹¹ The Rome Statute continues to be the basis for the Court’s existence and its authority.

The ICC is a fully independent institution.⁵⁹² For example, it is not part of the UN, even though an agreement governing the relationship between the UN and the ICC exists.⁵⁹³ The Relationship Agreement defines the terms on which the UN and the ICC interact.⁵⁹⁴ The Agreement aims to balance the fact that the ICC is an independent court, but the UN has responsibilities under the UN Charter and that they must respect and facilitate each other’s mandate.⁵⁹⁵

The ICC’s funding comes from States Parties and the UN,⁵⁹⁶ as well as by voluntary contributions from governments, international organisations, individuals, corporations and other entities.⁵⁹⁷

B. The Jurisdiction of the ICC

This section serves as a preliminary introduction to the remit of the ICC’s powers and responsibilities. The remit or scope of the ICC’s power—namely, its “jurisdiction”—is considered in detail in Part Two.

⁵⁸⁴ United Nations Treaty Collection, Depository, [Rome Statute of the International Criminal Court](#).

⁵⁸⁵ Rome Statute, art. 125.

⁵⁸⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 I.L.M. 679 (“Vienna Convention”), arts 2 (1) (b), 14 (1) and 16.

⁵⁸⁷ Rome Statute, art. 125(2).

⁵⁸⁸ Vienna Convention, arts 2(1)(b), 14(2) and 15.

⁵⁸⁹ *Ibid.*, arts 2(1)(b) and 15. [‘Glossary’](#) (*UN Treaty Collection*).

⁵⁹⁰ [‘Glossary’](#) (*UN Treaty Collection*).

⁵⁹¹ Rome Statute, art. 125.

⁵⁹² *Ibid.*, Preamble, para. 9.

⁵⁹³ [Negotiated Relationship Agreement between the International Criminal Court and the United Nations](#) (entered into force 4 October 2004), (“Relationship Agreement”). This agreement governing the relationship between the ICC and the UN is required by the Rome Statute (Rome Statute, art. 2).

⁵⁹⁴ *Ibid.*, art. 1.

⁵⁹⁵ *Ibid.*, art. 2.

⁵⁹⁶ Rome Statute, art. 115.

⁵⁹⁷ *Ibid.*, art. 116.

a) What crimes?

The ICC has jurisdiction over the most serious crimes of concern to the international community as a whole. These crimes are genocide, crimes against humanity and war crimes committed after 1 July 2002.⁵⁹⁸ As discussed in Chapter One, Part One, the Rome Statute provisions on the crime of aggression became fully operational on 17 July 2018. The crime of aggression is addressed in more detail in Part Two.

b) Who can be tried?

The Court can only try “natural persons”.⁵⁹⁹ In other words, it can only try individual persons and not a State or a group (including corporations). The ICC Prosecutor’s policy is normally to focus on individuals who bear the greatest responsibility for the crimes committed.⁶⁰⁰ More recently, the ICC Prosecutor began to consider prosecuting lower-level perpetrators if their conduct has been particularly grave or received extensive notoriety.⁶⁰¹ This is part of a strategy of building upwards toward those most responsible for the crimes in question and linking the crimes on the ground (often carried out by low-level persons) to persons higher up the chain of political or military command.⁶⁰²

The ICC Prosecutor will not be deterred by purported protections such as immunities offered by official positions. No one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed.⁶⁰³ Therefore, there is no immunity from prosecution or criminal responsibility for those acting in an official capacity as a head of State, member of government or parliament or as an elected representative or public official.⁶⁰⁴ These issues will be further addressed in Part Two.

c) When can a case be tried?

A case can be tried when the ICC has jurisdiction over it, decides that the case is admissible and it is of sufficient gravity for the Court. The preconditions to the ICC’s jurisdiction are: (i) the State in question has “ratified”—in other words, agreed to—the Rome Statute, the governing law of the ICC;⁶⁰⁵ (ii) the State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute;⁶⁰⁶ or (iii) the UNSC refers a situation to the Court.⁶⁰⁷

⁵⁹⁸ *Ibid.*, art. 5.

⁵⁹⁹ Rome Statute, art. 25(1). The ICC cannot try those who were under 18 at the time a crime was allegedly committed. *See* Rome Statute, art. 26.

⁶⁰⁰ Office of the Prosecutor (“OTP”), [‘Paper on some policy issues before the Office of the Prosecutor’](#) (September 2003), pp. 3; OTP, [‘Report on Prosecutorial Strategy’](#) (14 September 2006), pp. 3 and 5; OTP, [‘Prosecutorial Strategy 2009-2012’](#) (1 February 2012), paras 19-20; ICC, [‘Understanding the International Criminal Court’](#), p. 5.

⁶⁰¹ OTP, [‘Strategic Plan June 2012-2015’](#) (11 October 2013), para. 22.

⁶⁰² *Ibid.*

⁶⁰³ Rome Statute, art. 27.

⁶⁰⁴ *Ibid.*, art. 27.

⁶⁰⁵ *Ibid.*, arts 13 (a) and 14.

⁶⁰⁶ *Ibid.*, art. 12(3).

⁶⁰⁷ *Ibid.*, art. 13(b).

If one of the above circumstances exists, the ICC may exercise its jurisdiction if: (i) a situation within the jurisdiction of the Court has been referred to the Prosecutor by a State Party; (ii) the UNSC refers a situation to the Prosecutor to launch an investigation; or (iii) the Prosecutor initiates an investigation *proprio motu* (on her own initiative) on the basis of information received from reliable sources.⁶⁰⁸

If the Prosecutor receives one of the above, she will open a “preliminary examination” into the situation at hand as a matter of policy.⁶⁰⁹ It must be noted, however, that a preliminary examination is not an investigation. It is a process by which the Prosecutor considers all the information available to her in order to reach a fully informed determination on whether there is a reasonable basis to proceed with a full investigation. In reaching this decision, the preliminary examination must consider the following:

- **Jurisdiction:** The Court can prosecute genocide, crimes against humanity or war crimes committed after 1 July 2002 or after the date a State accepts the jurisdiction of the Court;⁶¹⁰ special rules apply for jurisdiction over the crime of aggression.⁶¹¹ The Court can only prosecute persons who commit a crime on the territory of or who are nationals of a State Party or a declaring State.⁶¹² In line with its recent jurisprudence, the ICC can exercise territorial jurisdiction where “at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.”⁶¹³ The Prosecutor has jurisdiction over matters the UNSC has referred;⁶¹⁴
- **Admissibility:** Under the Rome Statute, States have a duty to exercise their criminal jurisdiction over those responsible for international crimes and priority is accorded to national justice systems.⁶¹⁵ The ICC is therefore intended to complement national systems only when they are unwilling or unable to genuinely carry out any investigations and prosecutions of alleged perpetrators;⁶¹⁶ and

⁶⁰⁸ *Ibid.*, art. 13.

⁶⁰⁹ Upon receipt of a referral or a valid declaration made pursuant to article 12(3) of the Statute, the Prosecutor may open a preliminary examination of the situation (ICC, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09 (“Regulations of the Prosecutor”) reg. 25(1)(c). Although the Prosecutor is under no obligation to start a preliminary examination upon the receipt of a declaration, recent practice suggests that she will automatically open a preliminary examination. See Preliminary Examinations Policy Paper, p. 18, para. 76.

⁶¹⁰ Rome Statute, art. 11.

⁶¹¹ *Ibid.*, 15*bis* and 15*ter*.

⁶¹² *Ibid.*, art. 12(2).

⁶¹³ ICC, Case No. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, para. 64.

⁶¹⁴ *Ibid.*, art. 12(2).

⁶¹⁵ *Ibid.*, Preamble (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [...] Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”).

⁶¹⁶ *Ibid.*, arts 1 and 17.

- Interests of justice: In light of the gravity of the crimes and interests of victims, the Prosecutor will consider whether there are substantial reasons to believe that an investigation would not serve the interests of justice.⁶¹⁷

Once the preliminary examination has concluded, the Prosecutor will report on these issues. If she is satisfied that there is a reasonable belief that crimes within the jurisdiction of the ICC have been committed and that the situation is admissible, sufficiently serious and there is no substantial interest of justice reasons not to proceed, she will seek to open a formal investigation. Depending on how the case has arisen (State referral, on her own volition or UNSC referral), the Prosecutor may need to seek authorisation from the Pre-Trial Chamber to open a full investigation.⁶¹⁸ This topic is considered in greater detail in Part Three.

If authorisation is sought and the Pre-Trial Chamber agrees that there is a reasonable basis to believe the above, a full investigation will be opened.⁶¹⁹ The Prosecutor may request that the Pre-Trial Chamber issue an arrest warrant, or a summons to appear, for a person who the Prosecutor reasonably believes, as a result of her investigation, has committed a crime within the jurisdiction of the Court.⁶²⁰ Once the named individuals appear in front of the Court and if the Court confirms the charges,⁶²¹ the trial can begin. This is explained fully in Part Four.

C. Structures in the ICC

The Court is made up of different organs. The ASP oversees the Court. The Court itself is made up of the Presidency, Chambers, the Prosecutor and the Registry.⁶²² The OPCV and Defence teams are not official organs of the Court.

a) The ASP

The ASP is the governing body of the ICC.⁶²³ It is responsible for managerial oversight and legislative decision-making.⁶²⁴ The ASP is composed of a representative from each State Party that has ratified or acceded to the Rome Statute.⁶²⁵ It convenes annually to discuss issues essential to the functioning of the Court and its future.⁶²⁶

⁶¹⁷ *Ibid.*, *Ibid.*, arts 53(1)(a)-(c); ICC Prosecutor, [Policy Paper on Preliminary Examinations](#), November 2013.

⁶¹⁸ *Ibid.*, arts 12(2) and 15(3).

⁶¹⁹ *Ibid.*, art. 15(4). The “reasonable basis” to believe standard is the lowest at the ICC. Put differently, the PTC should be satisfied that there is a sensible or reasonable justification for the belief that a crime falling within the jurisdiction of the ICC has been or is being committed. See *Situation in the Republic of Kenya* ([Authorisation Decision](#)) ICC-01/09-19-Corr (31 March 2010) (“Kenya Authorisation Decision”), paras 27-35.

⁶²⁰ Rome Statute, art. 58(1)(b)(i).

⁶²¹ *Ibid.*, art. 61.

⁶²² *Ibid.*, art. 34.

⁶²³ Established pursuant to art. 112 of the Rome Statute.

⁶²⁴ [Assembly of States Parties](#) (ICC).

⁶²⁵ *Ibid.*

⁶²⁶ The outcomes of the most recent session of the ASP can be found here: [‘Fourteenth Session of the Assembly of States Parties’](#) (ICC, 18 to 26 November 2015).

As the governing body of the ICC, the ASP's primary responsibility is to make decisions on issues related to the laws, rules and management of the Court.⁶²⁷ The ASP has the responsibility to, among other duties, approve the budget of the Court, elect ICC judges and prosecutors, provide management oversight on the administration of the Court and establish subsidiary bodies.⁶²⁸

In addition, there is a Bureau whose main function is to assist the ASP. Meeting at least once per year,⁶²⁹ it is representative of the members of the ASP and assists in the discharge of the ASP's responsibilities.⁶³⁰ The ASP regularly considers the Bureau's reports and activities.⁶³¹ The President of the Bureau (provided for by the Rome Statute⁶³²) calls for and heads Bureau meetings and chairs ASP sessions.⁶³³ As the ICC's legislative body, the ASP can also amend the Rome Statute or the Rules of Procedure of Evidence that govern how the ICC conducts its proceedings.⁶³⁴

The ASP convenes annually to decide on matters affecting the Court. During these meetings, each State Party has one vote and the ASP must strive to reach a consensus on decisions.⁶³⁵ If it cannot, a two-thirds majority must agree on matters of substance,⁶³⁶ and a simple majority must agree matters of procedure.⁶³⁷ The ASP may also pass resolutions at the annual session on issues of importance to the Court, such as the issue of complementarity (see Part Three) or about the enhancement of the efficiency of the Court. The ASP's duties also include addressing the issue of cooperation with States. In the event that a State fails to cooperate with the Court, the issue may be referred to the ASP who can consider any question related to non-cooperation⁶³⁸ and formally request the uncooperative State to respect its obligations under the Rome Statute (on sanctioning uncooperative States, see Part Two—"Declarations").

b) The Chambers

i. The Presidency⁶³⁹

The Presidency is made up of Judges, namely the President, and the First and Second Vice-Presidents. The Presidency has three main areas of responsibility: judicial/legal functions, administration and external relations.⁶⁴⁰ Concerning judicial functions, the Presidency conducts judicial reviews of certain decisions of the Registrar. Concerning administration, the Presidency is responsible for the proper administration of the Court, other than the Office of the

⁶²⁷ Rome Statute, art. 112.

⁶²⁸ *Ibid.*, art. 112(2).

⁶²⁹ *Ibid.*, art. 112(3)(c).

⁶³⁰ *Ibid.*, art. 112(3)(b).

⁶³¹ *Ibid.*, art. 112(2)(c).

⁶³² *Ibid.*, art. 112(3)(a).

⁶³³ ['Assembly of States Parties: Officials at the ASP'](#) (*Coalition for the International Criminal Court*).

⁶³⁴ Rome Statute, art. 121.

⁶³⁵ *Ibid.*, art. 112(7).

⁶³⁶ *Ibid.*, art. 112(7)(a); [Rules of Procedure of the Assembly of States Parties](#), Rule 63.

⁶³⁷ *Ibid.*, art. 112(7)(b); [Rules of Procedure of the Assembly of States Parties](#), Rule 64.

⁶³⁸ *Ibid.*, art. 112(2)(f).

⁶³⁹ Rome Statute, art. 38.

⁶⁴⁰ [The Presidency'](#) (*ICC*).

Prosecutor.⁶⁴¹ The Presidency has responsibilities in the area of external relations, including representing the Court to the greater international community, maintaining relations with States and other entities and promoting public awareness and understanding of the Court.

ii. The Chambers⁶⁴²

The judiciary of the Court is divided into three Divisions that hear cases at the ICC:

- The Pre-Trial Division (composed of not less than six judges);⁶⁴³
- The Trial Division;⁶⁴⁴ and
- The Appeals Division (composed of the President and four other judges).⁶⁴⁵

When a panel of judges hears a case—whether in the pre-trial, trial or appeal phase—that panel of judges will be referred to as a “Chamber”. The Pre-Trial Chamber’s primary responsibility is to supervise how the ICC Prosecutor carries out her investigatory and prosecutorial activities, to guarantee the rights of suspects, victims and witnesses during the investigatory phase and to ensure the integrity of the proceedings it is presiding over.⁶⁴⁶ The Pre-Trial Chamber then decides whether or not to issue warrants of arrest or summons to appear before the Court, at the request of the Prosecutor and whether or not to confirm the charges against a person suspected of a crime.⁶⁴⁷ The Prosecutor must support each allegation charged with sufficient evidence to establish substantial grounds to believe that the person has committed the crime charged.⁶⁴⁸ The Chamber may also make determinations on the admissibility of situations and cases and on the participation of victims at the pre-trial stage.

Once the attendance of an accused is secured and the charges confirmed by a Pre-Trial Chamber, the Presidency assigns a Trial Chamber. A Trial Chamber’s primary function is to try the case in a fair and expeditious manner and with full respect for the rights of the accused and due regard for the protection of the victims and the witnesses. It also rules on the participation of victims and issues related to evidence at the trial stage.⁶⁴⁹ It further determines whether an accused is guilty or not guilty of the charges. The Prosecution must make the Trial Chamber satisfied of

⁶⁴¹ Rome Statute, art. 38(3)(a).

⁶⁴² *Ibid.*, art. 39.

⁶⁴³ As of April 2021, the judges assigned to the Pre-Trial Division are Judge Reine Alapini-Gansou (Benin), President of the Pre-Trial Division, Judge Marc Perrin De Brichambaut (France), Judge Antoine Kesia-Mbe Mindua (Democratic Republic of the Congo), Judge Péter Kovács (Hungary), Judge Tomoko Akane (Japan), Judge Rosario Salvatore Aitala (Italy).

⁶⁴⁴ As of April 2021, the judges assigned to the Trial Division are Judge Olga Venecia Del C. Herrera Carbuccia (Dominican Republic), President of the Trial Division, Judge Chang-ho Chung (Republic of Korea), Judge Raul Cano Pangalangan (Philippines), Judge Kimberly Prost (Canada), Judge Robert Fremr (Czech Republic), Judge Geoffrey A. Henderson (Trinidad and Tobago), and Judge Bertram Schmitt (Germany).

⁶⁴⁵ As of April 2021, the five judges in place are Judge Howard Morrison (UK), President of the Appeals Division, Judge Luz del Carmen Ibáñez Carranza (Peru), Judge Chile Eboe-Osuji (Nigeria), Judge Solomy Balungi Bossa (Uganda), Judge Piotr Hofmański (Poland).

⁶⁴⁶ Rome Statute, arts 56 and 57.

⁶⁴⁷ *Ibid.*, art. 58.

⁶⁴⁸ *Ibid.*, art. 61(5).

⁶⁴⁹ *Ibid.*, art. 64.

the accused's guilt beyond all reasonable doubt.⁶⁵⁰ If the accused is found guilty, it may impose a sentence of imprisonment for a specified number of years not exceeding thirty years or life imprisonment.⁶⁵¹ Financial penalties may also be imposed for the harm suffered by the victims, including compensation, restitution or rehabilitation.⁶⁵² The sentencing regime is addressed in Part Four.

The Appeals Chamber hears any challenges to decisions of the Pre-Trial Chamber or Trial Chamber, or to sentences imposed by the Trial Chamber.⁶⁵³ If the Appeals Chamber finds that the decision or sentence appealed from was materially affected by an error of fact or law, it can: (i) reverse or amend the decision or sentence; or (ii) order that a new trial take place.⁶⁵⁴ The Appeals Chamber can do the same if it finds that the proceedings were unfair in a way that affected the reliability of the decision or sentence.⁶⁵⁵

c) The ICC Prosecutor

The ICC Prosecutor, head of the Office of the Prosecutor, is a separate and independent organ of the ICC.⁶⁵⁶ Since 15 June 2012, Ms. Fatou Bensouda has been the Chief Prosecutor and has full authority over the management and administration of the Office. Ms. Bensouda's term of office expires on 15 June 2021.⁶⁵⁷ After that, Karim Khan QC will hold the office. The Prosecutor's Office is comprised of three sections:

- The Investigations Division, which is responsible for gathering and examining evidence, questioning suspected persons, as well as speaking to victims and prospective witnesses. The Rome Statute requires that the Investigations Division investigate incriminating and exonerating circumstances equally;⁶⁵⁸
- The Jurisdiction, Complementarity and Cooperation Division, with the support of the Investigation Division, assesses information received by the ICC and situations referred to the Court and analyses these situations and cases to determine their potential admissibility before the ICC; and
- The Prosecutions Division, which litigates cases before the Chambers.

As outlined above, the Prosecutor is responsible for: (i) conducting a preliminary examination;⁶⁵⁹ (ii) seeking authorisation of a full investigation if necessary;⁶⁶⁰ (iii) investigating a situation;⁶⁶¹ (iv) seeking necessary orders from the Court such as arrest warrants, summons or measures to protect witnesses or victims; (v) formulating charges

⁶⁵⁰ *Ibid.*, art. 66.

⁶⁵¹ *Ibid.*, art. 77.

⁶⁵² *Ibid.*, art. 77.

⁶⁵³ *Ibid.*, arts 81-85.

⁶⁵⁴ *Ibid.*, art. 83(2).

⁶⁵⁵ *Ibid.*, art. 83(2).

⁶⁵⁶ *Ibid.*, art. 42(1).

⁶⁵⁷ [ICC Bureau of Assembly of States Parties](#), Res ICC-ASP/18/INF.2, 18th Session, 11 April 2019, para. 29. See also ICC Secretariat of the Assembly of States Parties, [Election of the Prosecutor: Background Note](#), 6 July 2020.

⁶⁵⁸ *Ibid.*, art. 54(1)(a).

⁶⁵⁹ ICC, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, reg. 25.

⁶⁶⁰ Rome Statute, arts 12(2) and 15(3).

⁶⁶¹ *Ibid.*, art. 54.

against an accused; (vi) seeking confirmation of those charges with sufficient evidence to establish substantial grounds to believe a person committed the crime;⁶⁶² and (vii) conducting a trial or appeal before the ICC. At trial, it is for the Prosecutor to prove that the accused committed the crimes charged beyond reasonable doubt.⁶⁶³ To do so, she must present witnesses and documentary and physical evidence to the Court. These steps are explored fully in Parts Three, Four and Five.

d) The Registry

The Registry is in charge of the non-judicial aspects of the administration and servicing of the Court.⁶⁶⁴ It is headed by the Registrar,⁶⁶⁵ who is assisted by a Deputy Registrar. The Registry handles issues in relation to the defence (such as being admitted to practise before the Court), victims and witnesses, outreach and detention, judicial proceedings and all other administrative or judicial support necessary for the proper functioning of the Court.

The immediate office of the Registrar is divided into several sections: (i) the Office of the Controller, which assists in the administration of the Court in regards to financing; (ii) the security and safety section, which is responsible for the provision of security and safety to all participants in the ICC's proceedings; (iii) the legal advisory services section, which plays an important administrative and legal support role in relation to the Court; and (iv) the public information and documentation section, which ensures that the ICC's proceedings are public and accessible, particularly to those communities affected by the commission of crimes within the jurisdiction of the Court.⁶⁶⁶

The Registry is also responsible for ensuring that certain Divisions of the Court run properly. These are:

- The Common Administrative Services Division, which handles such issues as the financing of the ICC, accountancy services, logistical support, handling human resources and information and communication technology;
- The Court Services Division, which ensures the proper running of investigations of trials as a service provider for the protection of witnesses and operating the Detention Centre in the Netherlands. It will also translate and interpret proceedings in the Court and ensure court documents and evidence are filed and secured. Accordingly, it handles matters such as court management, detention services and management of the VWU (below); and
- The Victims and Counsel Division, which enables suspects and accused to be represented and supports defence counsel in the discharge of their mandate. It also assists victims with participation in proceedings before the Court. Specifically, it assists the defence teams, manages the VPRS, the OPCV, and the OPCD.⁶⁶⁷

⁶⁶² *Ibid.*, art. 61(5).

⁶⁶³ *Ibid.*, art. 66.

⁶⁶⁴ *Ibid.*, art. 43.

⁶⁶⁵ Mr. Peter Lewis is the current Registrar, elected on 28 March 2018.

⁶⁶⁶ ICC, '[The Registry](#)', ICC-PIDS-FS-10-002/08_En.

⁶⁶⁷ *Ibid.*

The VPRS is part of the Registry. It is a specialised section responsible for assisting victims to fully exercise their rights under the Rome Statute and to obtain legal assistance and representation, including, where appropriate, from the OPCV.⁶⁶⁸ The VPRS is in charge of disseminating the application forms for participation and reparations and assisting victims in filling them in, as well as providing them with the information necessary for them to exercise their rights under the Rome Statute.⁶⁶⁹

The VWU is also a part of the Registry. It makes it possible for victims and witnesses to testify and/or to participate in proceedings before the ICC by helping them. In short, it mitigates possible adverse effects incurred by their role as witnesses by providing protective measures, security arrangements, counselling and other appropriate assistance for those appearing before the Court and others who are at risk on account of giving evidence to the Court. The VWU also provides appropriate measures to protect the safety, dignity, privacy and physical and psychological well-being of victims, witnesses and other persons at risk. Finally, it advises participants in the proceedings, as well as organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance.⁶⁷⁰

There is some overlap concerning who is responsible for taking measures to protect witnesses and victims. As will be addressed in Part Five, while the Prosecutor decides to take or applies for protective measures from the Court, the VWU provides the measures, such as security arrangements, and recommends or advises other organs of the Court on measures to be taken. The VWU is a neutral service provider, serving the Prosecution, Defence and legal representatives of victims equally. The services of the VWU are activated by a referral from the Prosecutor or a request from the Prosecutor, Defence or other parties. There remains the ability for all parties to appeal to the Court, which is the ultimate arbiter of whether protective measures are provided to an individual, as well as the nature of those measures.

The OPCV seeks to ensure effective participation of victims in proceedings before the Court.⁶⁷¹ It is responsible for assisting victims to exercise their rights effectively, as well as offering its expertise to the victims and their legal representatives or representing victims itself in the courtroom. Members of the OPCV may be appointed as legal representatives of victims, providing their services free of charge.⁶⁷²

The OPCD is managed by the Registry, but is independent.⁶⁷³ It exists to represent and protect the rights of accused before the Court. Specifically, its tasks include representing the rights of the Defence during the initial stages of an investigation, supporting defence counsel with legal advice or appearing before the court on specific issues, and acting as duty counsel if the accused is yet to secure permanent counsel.⁶⁷⁴

⁶⁶⁸ [‘Frequently Asked Questions’ \(ICC\)](#).

⁶⁶⁹ *Ibid.*

⁶⁷⁰ Rome Statute, art. 43(6).

⁶⁷¹ [ICC, Regulations of the Court](#) (adopted 26 May 2004) ICC-BD/01-01-04, reg. 81. For more information, ‘Office of Public Counsel for Victims (ICC)’.

⁶⁷² Regulations of the Court, reg. 80.

⁶⁷³ *Ibid.*, reg. 77.

⁶⁷⁴ [‘The Office of Public Counsel for the Defence’ \(ICC\)](#).

e) The Defence

An effective defence is fundamental to ensuring that the ICC's proceedings are in conformity with the highest legal standards and due process rights of suspects and accused implicated in the proceedings before the Court. An accused is presumed innocent until proven guilty by the Prosecutor.⁶⁷⁵ An accused is also entitled to defend him or herself.⁶⁷⁶ The Rome Statute identifies minimum guarantees to ensure that an accused has a public, impartial and fair hearing.⁶⁷⁷ These minimum guarantees are explained in Part Four.

III. Ukraine, the ICC and the Rome Statute

This section outlines a chronology of Ukraine's engagement with the ICC. Ukraine initially signed the Rome Statute on 20 January 2000,⁶⁷⁸ but the Constitutional Court of Ukraine subsequently ruled that ratification would be unconstitutional.⁶⁷⁹ Later, after the Euromaidan Revolution and the outbreak of war in Eastern Ukraine, Ukraine "declared" that it accepted the Court's jurisdiction. However, it has still not ratified the Rome Statute or prosecuted those allegedly responsible for international crimes. More recently, promising signs have emerged of a commitment to ratifying the Rome Statute. In late November 2015, the President of Ukraine submitted a draft law to the Verkhovna Rada on amending the Constitution to permit ratification of the Rome Statute. On 2 June 2016, the Verkhovna Rada of Ukraine adopted the draft law.⁶⁸⁰ The amendment of the Constitution of Ukraine entered into force on 30 June 2019.⁶⁸¹ However, the GoU is yet to ratify the Rome Statute. These events will be explained below.

A. Ukraine and Its Relationship with the ICC Between 1998 and 2002

Ukraine attended and participated in the founding meeting of the Rome Statute, known as the Rome Conference.⁶⁸² Later that year, in October 1998, the Permanent Mission of Ukraine to the UN released a statement supporting the establishment of the ICC.⁶⁸³ The Mission also supported the inclusion of the crime of aggression in the Rome Statute, and expressed hope that the international community would agree upon a definition of the crime.⁶⁸⁴ Around two years

⁶⁷⁵ Rome Statute, art. 66.

⁶⁷⁶ *Ibid.*, art. 67.

⁶⁷⁷ *Ibid.*, art. 67.

⁶⁷⁸ [On Authorisation of V. Yelchenko to Sign the Rome Statute of the International Criminal Court on Behalf of Ukraine: Presidential Order No. 313](#) [Online resource]. - 11 December 1999.

⁶⁷⁹ Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, N 3-v/2001 of 11 July 2001 ("Constitutional Court Opinion"), para. 5.

⁶⁸⁰ [Law of Ukraine "On amendments to the Constitution of Ukraine \(in the field of judiciary\)" No. 1401-VIII](#) [Online resource] 2 June 2016.

⁶⁸¹ [Constitution of Ukraine](#) [Online resource], art. 124.

⁶⁸² UN, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome', A/CONF.183/13 (Vol. I) (15 June-17 July 1998), p. 75; More than 160 governments participated in the founding conference from 15 June-17 July 1998 in Rome, Italy.

⁶⁸³ Liudmyla Kakaulina, ['International Tools of Human Rights Protection in the Context of Transformation of Ukrainian Society'](#) (Viche, July 2009).

⁶⁸⁴ *Ibid.*

later, Ukraine signed the Rome Statute on 20 January 2000 without any formal reservations.⁶⁸⁵ However, Ukraine did not ratify the Rome Statute.

B. The Constitutional Court and the Rome Statute

In 2001, President Leonid Kuchma applied to the Constitutional Court under Article 151 of the Constitution of Ukraine⁶⁸⁶ for a decision on the conformity of the Rome Statute with the Constitution of Ukraine.⁶⁸⁷

The President, who was opposed to the ratification of the Rome Statute, argued that several provisions contradicted Ukraine's Constitution. For example, he argued that the principle of complementarity, which permits the ICC to exercise jurisdiction over Ukraine's sovereign territory under certain circumstances, would conflict with the Constitution.⁶⁸⁸ The President pointed out that Article 124 of the Constitution provides that the administration of justice is the 'exclusive competence of the courts' in Ukraine and judicial functions cannot be delegated to other bodies.⁶⁸⁹ It was argued that this created a conflict between the Rome Statute and Ukraine's Constitution.

The Court decided that the ratification of the Rome Statute would be unconstitutional due to the principle of complementarity.⁶⁹⁰ Specifically, the Court decided that the principle of complementarity offended Article 124 of the Constitution because it failed to preserve the sovereignty of Ukraine. The Court recognised the idea that the ICC is secondary to national jurisdictions and will only step in when they fail, but said that the ICC could exercise its powers and functions on *any* State Party, and has the power to find *any* case admissible if a State is unwilling or unable to genuinely conduct an investigation or prosecution.⁶⁹¹ The Court concluded that jurisdiction supplementary to the national Ukrainian system was not contemplated by the Constitution.⁶⁹² Therefore, under Part 9 of the Constitution, the Constitution itself needed to be amended before the Rome Statute could be ratified.⁶⁹³

⁶⁸⁵ [On Authorisation of V. Yelchenko to Sign the Rome Statute of the International Criminal Court on Behalf of Ukraine: Presidential Order No. 313](#) [Online resource]. 11 December 1999.

⁶⁸⁶ Art. 151 of the Constitution of Ukraine provides that the Constitutional Court of Ukraine, on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature.

⁶⁸⁷ ICRC has provided a concise analysis of the Constitutional Court's Opinion: International Committee of the Red Cross, Advisory Service on International Humanitarian Law, '[Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Court and Councils of State](#)', 01/2010 ("ICRC Rome Statute Issues").

⁶⁸⁸ Constitutional Court Opinion, para. 5. The Ministry of Foreign Affairs of Ukraine argued that the Statute did not contradict with the Constitution. *See Ibid.*, para. 11.

⁶⁸⁹ Constitution of Ukraine, art. 124.

⁶⁹⁰ Embodied in the Rome Statute, Preamble, para. 10 and arts 1, 17 and 20.

⁶⁹¹ Constitutional Court Opinion, part 2.1, para. 3.

⁶⁹² ICRC Rome Statute Issues, p. 11.

⁶⁹³ *Ibid.*

C. Ukraine and the ICC After 2002

After this opinion, other governmental entities encouraged Ukraine to amend its Constitution. For example, the Parliamentary Assembly of the Council of Europe, in Resolutions No. 1300 (2002)⁶⁹⁴ and No. 1336 (2003),⁶⁹⁵ urged Member States (including Ukraine) to take all necessary measures for accession to the Rome Statute and, if necessary, to make appropriate changes to national legislation as soon as possible. This position was further reiterated in the Resolution No. 1644 (2009) on the Cooperation with the ICC and its Universality.⁶⁹⁶

In 2005, Ukraine's aspirations regarding the ICC were declared in the Plan of Measures on Implementation of the Ukraine-EU Action Plan, approved by the Cabinet of Ministers of Ukraine.⁶⁹⁷ Among other things, the Decree sought to enhance cooperation, promote international justice and fight impunity with the support of the ICC. The measures to be taken to achieve fulfilment of this provision included, in particular, joining the Agreement on the Privileges and Immunities of the International Criminal Court and preparing proposals on ratifying the Rome Statute, including amendments to the Constitution of Ukraine.⁶⁹⁸

In 2006, the Ukraine-EU Action Plan was implemented.⁶⁹⁹ One of the five objectives of the Action Plan concerned the signing and ratification of the Agreement on the Privileges and Immunities of the ICC.⁷⁰⁰ Accordingly, the Ministry of Justice prepared a draft law.⁷⁰¹ The Verkhovna Rada adopted this law on 16 October 2008.⁷⁰²

On 29 January 2007, Ukraine acceded to the Agreement on the Privileges and Immunities of the International Criminal Court.⁷⁰³ This Agreement is designed to imbue officials from the ICC in the territory of each State Party with certain privileges and immunities to enable them to work and fulfil the ICC's purposes.⁷⁰⁴ In short, the immunities prevent prosecution for any activities carried out by the ICC. These are provided to representatives of States participating in the Assembly or subsidiary organs and representatives of intergovernmental organisations,⁷⁰⁵

⁶⁹⁴ Council of Europe Parliamentary Assembly, '[Risks for the integrity of the Statute of the International Criminal Court](#)', Res 1300 (2002) (adopted 25 September 2002), para. 14.

⁶⁹⁵ Council of Europe Parliamentary Assembly, '[Threats to the International Criminal Court](#)', Res 1336 (2003) (adopted 25 June 2003).

⁶⁹⁶ Council of Europe Parliamentary Assembly, '[Cooperation with the International Criminal Court \(ICC\) and its universality](#)', Res 1644 (2009) (adopted 27 January 2009), para. 3.

⁶⁹⁷ [On Approval of the 2005 Action Plan Ukraine - EU: Order of the Cabinet of Ministers of Ukraine No. 117](#) [Online resource]. 22 April 2005.

⁶⁹⁸ ICC, [Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3](#) (adopted at the first session on 3-10 September 2002) ("ICC Agreement on Privileges and Immunities").

⁶⁹⁹ [On Approving Measures for the Implementation of Action Plan Ukraine-EU in 2006: Order of the Cabinet of Ministers of Ukraine N 243-p](#) [Online resource]. 27 April 2006.

⁷⁰⁰ [Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, O.J.L. 161/3](#), 29 May 2014, arts 8 and 24(3).

⁷⁰¹ [On Accession of Ukraine to the Agreement on the Privileges and Immunities of the International Criminal Court: Draft Law N 0015](#) [Online resource]. 21 June 2006.

⁷⁰² [On Accession of Ukraine to the Agreement on the Privileges and Immunities of the International Criminal Court: Law of Ukraine N 254-V](#) [Online resource]. 18 October 2006.

⁷⁰³ Agreement on the Privileges and Immunities of the International Criminal Court, art. 3.

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*, art. 13.

representatives of states participating in the proceedings of the Court,⁷⁰⁶ Judges, the Prosecutor, Deputy Prosecutors, the Registrar,⁷⁰⁷ the Deputy Registrar and staff of the Prosecutor's Office and Registry,⁷⁰⁸ personnel recruited locally not otherwise covered by the Agreement,⁷⁰⁹ Counsel and persons assisting Defence Counsel,⁷¹⁰ witnesses,⁷¹¹ victims,⁷¹² experts⁷¹³ and others required to attend at the seat of the Court in The Hague.⁷¹⁴

In 2010, Ukraine attended the review conference of the Rome Statute held in Kampala, Uganda.⁷¹⁵ Ukraine's delegates attended the conference as official observers.⁷¹⁶ This conference was notable for the way in which it tackled the crime of aggression. The States Parties decided that the crime of aggression would not be adopted until a decision is taken after 1 January 2017 by the a two-thirds majority of States Parties (as is required for the adoption of an amendment to the Statute) and one year after the ratification or acceptance of the amendment by 30 States Parties, whichever is later.⁷¹⁷

D. Ukraine and the ICC in 2014-2015: The Declarations Accepting ICC Jurisdiction

The GoU has declared twice that it accepts the jurisdiction of the ICC.⁷¹⁸ Both Declarations have been, or have attempted to be, "limited" by the GoU in terms of time, geography and the persons or groups of persons that ICC jurisdiction may extend to.

⁷⁰⁶ *Ibid.*, art. 14.

⁷⁰⁷ *Ibid.*, art. 15.

⁷⁰⁸ *Ibid.*, art. 16.

⁷⁰⁹ *Ibid.*, art. 17.

⁷¹⁰ *Ibid.*, art. 18.

⁷¹¹ *Ibid.*, art. 19.

⁷¹² *Ibid.*, art. 20.

⁷¹³ *Ibid.*, art. 21.

⁷¹⁴ *Ibid.*, art. 22.

⁷¹⁵ ICC, ['Review Conference of the Rome Statute, Delegations to the Review Conference of the Rome Statute of the International Criminal Court', Kampala, 31 May-11 June 2010, RC/INF.1](#) (26 August 2010).

⁷¹⁶ *Ibid.*, p. 51.

⁷¹⁷ Aggression Resolution; Mauro Politi, 'The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead' (2012) 10(1) *Journal of International Criminal Justice* 267-288.

⁷¹⁸ [On Recognition of the Jurisdiction of the International Criminal Court 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 of 21 November 2013-22 February 2014: Declaration of the Verkhovna Rada of Ukraine No. 790-VII](#) [Online resource]. 25 February 2014. ("The First Declaration"); [Declaration of the Verkhovna Rada of Ukraine On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organisations "DPR" and "LPR", which led to extremely grave consequences and mass murder of Ukrainian nationals: Resolution of the Verkhovna Rada of Ukraine No. 145-VIII](#) [Online resource]. ("The Second Declaration").

a) The First Declaration

The first Declaration, made by the GoU in April 2014, declared that Ukraine accepts the jurisdiction of the ICC “for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Ukraine within the period between 21 November 2013 and 22 February 2014”.⁷¹⁹

This Declaration was targeted to cover the events of Euromaidan between 21 November 2013 and 22 February 2014 and the actions of Viktor Fedorovych Yanukovych, former President of Ukraine, along with his officials.⁷²⁰ The Declaration outlines the events that occurred during the specified dates. In particular, it identifies that “law enforcement agencies unlawfully used physical force, special means and weapons toward the participants of peaceful actions in Kyiv and other Ukrainian cities on the orders of senior officials of the state”. The Declaration claims that the “[e]xcess of power and office duties by officials as well as the commitment of other serious and grave crimes were systematic”.

The Declaration also outlines crimes that are alleged to have been committed, including:

- The killing of 100 nationals of Ukraine and other States;
- The injuring and mutilating of more than 2,000 persons, 500 of whom were left in a serious condition;
- Torture of the civilian population;
- Abduction and enforced disappearance of persons;
- Forceful and unlawful deprivation of liberty;
- Forceful transfer of persons to deserted places for the purpose of torture and murder;
- Arbitrary imprisonment of many persons in different cities in Ukraine;
- The brutal beating of persons; and
- Unlawful damaging of peaceful protestors’ property.

The Declaration alleges that these events amount to persecution carried out on political grounds, through the individual acts opposing the peaceful protests and the Euromaidan activities.

With regard to the perpetrators of the acts outlined above, the Declaration identifies the use of organised criminal groups to commit such acts. The persons identified as responsible specifically for crimes against humanity are:

- Viktor Yanukovych, former President of Ukraine;
- Viktor Pavlovych Pshonka, former Prosecutor General of Ukraine;
- Vitalii Yuriiovych Zakharchenko, former Minister of Internal Affairs of Ukraine; and
- Other officials who “issued and executed the manifestly criminal orders”.

⁷¹⁹ The First Declaration.

⁷²⁰ *Ibid.*

b) The Second Declaration

A second Declaration submitted by the GoU in September 2015 extended the time frame of the ICC’s jurisdiction beyond 22 February 2014.⁷²¹ It declared that Ukraine accepts the ICC’s jurisdiction over “crimes against humanity and war crimes [...] which led to extremely grave consequences and mass murder [...]”.⁷²² This document states that it accepts jurisdiction “in respect of crimes against humanity and war crimes, stipulated in Article 7 and Article 8 of the Rome Statute [...] committed on the territory of Ukraine starting from 20 February 2014 and to the present time”. The Declaration is expressly aimed at senior officials of the Russian Federation and leaders of the “terrorist organisations”—the “DNR” and “LNR”. The Declaration is of indeterminate duration, and covers events up to the present day.

The Declaration outlined ongoing armed aggression by the Russian Federation and “militant-terrorists” supported by the Russian Federation, during which parts of the State of Ukraine—Crimea and Sevastopol—were annexed and parts of the regions of Donetsk and Luhansk were occupied. The Declaration outlines recent “blatant” acts of violence by Russian and Russian-backed “militant terrorists”, including the shelling of civilians in Mariupol city on 24 January 2015 that killed 30 civilians and injured over 100 people. The Declaration also states that during this “undeclared war” a number of Ukrainian nationals have been illegally detained in the territory of the Russian Federation.

E. The Current Situation and Ratification

As a result of the first Declaration submitted by Ukraine on 17 April 2014,⁷²³ the ICC Prosecutor opened a preliminary examination that same month into the situation in Ukraine in order to establish whether the three criteria for opening an investigation were met (jurisdiction, admissibility and the interests of justice).⁷²⁴ On 11 December 2020, the Prosecutor announced the conclusion of the preliminary examination, finding “reasonable basis to believe a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine.”⁷²⁵ This is analysed in Part Three.

Ukraine has been strongly encouraged to make more efforts to ratify the Rome Statute. The EU-Ukraine Association Agreement signed on 27 June 2014 encourages Ukraine to work toward ratification and implementation of the Rome Statute.⁷²⁶ The Agreement mandates that the parties to the agreement cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute and its related instruments.⁷²⁷

⁷²¹ The Second Declaration.

⁷²² *Ibid.*

⁷²³ *Ibid.*

⁷²⁴ ‘Ukraine’ (ICC).

⁷²⁵ ICC, [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine](#) (11 December 2020).

⁷²⁶ [Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part](#), O.J.L 161/3, 29 May 2014, arts. 8 and 24(3).

⁷²⁷ *Ibid.*

According to an official statement from the Ministry of Foreign Affairs of Ukraine on 11 December 2014, the Ministry submitted a legislative package to the President of Ukraine which included necessary amendments to the Constitution of Ukraine, a draft law on the ratification of the Rome Statute together with ratification of the two 2010 Kampala amendments.⁷²⁸ According to the Ministry, the draft law includes recognition of ICC jurisdiction with respect to any crime over which the ICC has jurisdiction (genocide, war crimes and crimes against humanity) that was committed before the entry into force of the Rome Statute in Ukraine.⁷²⁹

On 16 January 2015, 155 MPs⁷³⁰ submitted a draft law to the Verkhovna Rada entitled “On Amending Article 124 of the Constitution of Ukraine” that would provide for the recognition of the provisions of the Rome Statute.⁷³¹ According to the explanatory memorandum, the bill was designed to create the constitutional preconditions for Ukraine’s recognition of the jurisdiction of the ICC under the terms stipulated by the Rome Statute. The bill proposed to amend Article 124 of the Constitution of Ukraine with the sixth part as follows: “Ukraine may recognize the jurisdiction of the International Criminal Court under the terms of the Rome Statute of the International Criminal Court”.⁷³²

On 29 January 2015, the Council of the European Union published a series of observations in a document entitled “Council Conclusions on Ukraine”.⁷³³ The Council encouraged the Ukrainian authorities to take legal steps swiftly so that the ICC can examine alleged crimes against humanity committed on the territory of Ukraine between 2014 and 2015.⁷³⁴ The Council reiterated the importance of moving forward with the ratification of the Rome Statute, as per the commitments it made in the EU Association Agreement.⁷³⁵

On 3 September 2015, the draft law proposing amendments to the Constitution of Ukraine was considered by the Constitutional Commission of Ukraine.⁷³⁶ The amendment to Article 124 of the Constitution was maintained after its consideration.⁷³⁷ This Article paved the way for ratification; while it was not actual ratification, it was an important stepping stone. It imbued the Verkhovna Rada with the power to recognise the Court’s jurisdiction.

In October 2015, the amendments to the Constitution developed by the Commission received positive support from the European Commission for Democracy through Law, also known as the “Venice Commission”.⁷³⁸ The Commission is the Council of Europe’s advisory body on constitutional matters. As part of its mandate, it can provide

⁷²⁸ [Opening remarks by the Permanent Representative Yuriy Sergeyev at the round table discussion on ‘Ukraine, accountability and International Criminal Court’](#) (11 December 2014).

⁷²⁹ *Ibid.*

⁷³⁰ [List of initiators of the Draft Law on Amending Article 124 of the Constitution of Ukraine, No. 1788](#) (16 January 2015).

⁷³¹ [On Amending Article 124 of the Constitution of Ukraine: Draft Law No. 1788](#) [Online resource]. - 16 January 2015.

⁷³² *Ibid.*, art. 124.

⁷³³ Council of the EU, [‘Foreign Affairs Council, Council Conclusion of Ukraine’](#), 31/15, 29 January 2015.

⁷³⁴ *Ibid.*, para. 5.

⁷³⁵ *Ibid.*

⁷³⁶ [Draft amendments to the Constitution of Ukraine in the field of judiciary as approved by the Constitutional Commission and forwarded to the Venice Commission](#), 3 September 2015.

⁷³⁷ *Ibid.*

⁷³⁸ Venice Commission, [‘Opinion on the Proposed Amendments to the Constitution of Ukraine’](#) (26 October 2015).

legal advice to Council of Europe member States and States wishing to bring their legal infrastructure into line with European standards.⁷³⁹

On 30 October 2015, the proposal was submitted to the President of Ukraine for consideration.⁷⁴⁰ In turn, on 25 November 2015, the President submitted the draft law No. 3524 on amending the Constitution for the consideration of the Verkhovna Rada.⁷⁴¹

The draft law that appeared on the official website of the Verkhovna Rada immediately resulted in heated debate.⁷⁴² One provision in the “Concluding and Transitional Provisions” chapter of the Constitution reads that the part of Article 124 of the Constitution concerning the right to ratify the Rome Statute becomes effective only three years after the day the law is published.⁷⁴³ It is said that the President introduced the three years’ deferral, although no official commentaries have been provided. The deferral became the subject of lengthy discussions during a seminar on the ICC in Ukraine organised by the PGA.⁷⁴⁴ At the seminar, MP Oksana Syroid, Deputy Speaker of the Verkhovna Rada, attempted to defend the transitional three-year period arguing, it would allow the adoption of necessary amendments to the Ukrainian criminal and criminal procedure laws. GRC, certain politicians, academics and representatives of PGA argued that the deferral was not reasonable.⁷⁴⁵

On 12 January 2016, the Constitutional Court of Ukraine started its hearing concerning the bill.⁷⁴⁶ According to the Constitution of Ukraine, a draft law which amends the Constitution will be considered by the Verkhovna Rada once there is an opinion from the Constitutional Court of Ukraine. In its opinion, the court will consider whether the draft law complies with Articles 157 and 158 of the Constitution.⁷⁴⁷ First, under Article 157, the Constitutional Court will check whether the draft law: (i) provides for the abolition or restriction of the rights and freedoms of Ukrainian citizens; (ii) whether it is aimed at removing the independence of or violates the territorial integrity of Ukraine; and (iii) whether the amendments would put Ukraine into martial law or a state of emergency.

Second, under Article 158, the Constitutional Court will check the timing of the amendments. Under Article 158, it is prohibited to submit the same constitutional amendments within one year of the same amendments being submitted if those amendments were considered but not adopted (in essence, the same amendments cannot be considered twice in a one-year period). The Court will then give its opinion.

⁷³⁹ [‘For democracy through law—The Venice Commission of the Council of Europe’](#) (Council of Europe).

⁷⁴⁰ [Constitutional Commission submitted the approved draft amendments to the Constitution of Ukraine to the President](#), 30 October 2015.

⁷⁴¹ [On the Amendments to the Constitution of Ukraine: Draft Law No.3524](#) [Online resource]. - 25 November 2015.

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.* Concluding and Transitional Provisions, para. 1.

⁷⁴⁴ [‘Parliamentary Seminar on the ICC in Ukraine, under high patronage of the Chairman of the Verkhovna Rada of Ukraine, received multi-party support for RS ratification’](#) (Parliamentarians for Global Action, 15 December 2015).

⁷⁴⁵ *Ibid.*

⁷⁴⁶ [‘Constitutional Court of Ukraine started hearing on the Draft Law on Amending the Constitution of Ukraine’](#) (CCU, 12 January 2016).

⁷⁴⁷ Constitution of Ukraine 1996, arts 158, 159.

At the 12 January 2016 hearing, Oleksii Filatov, presidential representative in the Constitutional Court, addressed, among others, the issue of ratification of the Rome Statute. According to Mr. Filatov, Ukraine is interested in accepting the jurisdiction of the Court.⁷⁴⁸ However, he believed that given the experience of Georgia and other states, Ukraine should be more cautious when deciding upon the ratification of the Rome Statute as it is a party to an ongoing armed conflict.⁷⁴⁹ It was argued that the transitional three-year period will allow Ukraine to adopt necessary national legislation and avoid certain risks from the ongoing conflict in Eastern Ukraine.⁷⁵⁰ These risks were not identified, but Mr. Filatov did note that these risks were from the point of view of the Ukrainian military, having had no choice but to participate in the conflict.⁷⁵¹

The position of the presidential representative is difficult to understand without further explanation. Further, it is at odds with other actions taken by the Government in relation to accepting ICC jurisdiction. Notably, Ukraine submitted Declarations to the ICC accepting its jurisdiction from 21 November 2013 and onwards without limitation. Therefore, the ICC will have jurisdiction over crimes during the conflict and Ukraine is obliged to cooperate with the ICC with few caveats.

The main differences between ratification and declarations accepting jurisdiction of the ICC will be addressed in Part Two. However, if the reasons underpinning the three-year delay for ratification concerned ensuring enhanced protection for the Ukrainian military from prosecution due to decisions made and actions taken during the ongoing conflict, the reasoning is flawed, as this cannot be stopped due to Ukraine filing its two Declarations.

On 30 January 2016, the Constitutional Court of Ukraine issued its Opinion.⁷⁵² The Court concluded that the draft law is in compliance with the provisions of Articles 157 and 158 of the Constitution.⁷⁵³ The Constitutional Court did not express any reservations about the draft law.

On 2 February 2016, the Opinion of the Constitutional Court was submitted to the Verkhovna Rada Committee on Legal Policy and Justice.⁷⁵⁴ On the same day, this committee delivered its Conclusion, recommending that the Verkhovna Rada of Ukraine preliminarily approve the draft law. The Verkhovna Rada did so during its plenary meeting on 2 February 2016. Under Article 155 of the Constitution, the draft law could now be adopted at the next session of the Verkhovna Rada of Ukraine if two-thirds of MPs vote in favour. On 2 June 2016, the Verkhovna Rada

⁷⁴⁸ [‘Ukraine defers the recognition of the jurisdiction of The Hague court because of the armed conflict’](#) (*Liga*, 12 January 2016).

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Ibid.*

⁷⁵¹ *Ibid.*

⁷⁵² [Opinion No.2-B/2016 of the Constitutional Court of Ukraine in case of application of the Verkhovna Rada of Ukraine on issuing the opinion on the conformity of the draft law on amending the Constitution of Ukraine \(in terms of justice\) with requirements of arts 157 and 158 of the Constitution of Ukraine](#) [Online resource]. - 30 January 2016.

⁷⁵³ *Ibid.*, para. 1.

⁷⁵⁴ [‘Chronology of consideration of the draft law No. 3524’](#) (*Verkhovna Rada*).

of Ukraine adopted the draft law.⁷⁵⁵ The amendment to Article 124 of the Constitution of Ukraine entered into effect on 30 June 2019.⁷⁵⁶

⁷⁵⁵ Law of Ukraine [“On amendments to the Constitution of Ukraine \(in the field of judiciary\)” No. 1401-VIII](#) [Online resource] 2 June 2016.

⁷⁵⁶ [Constitution of Ukraine](#) [Online resource], art. 124.

Part Two: Jurisdiction of the International Criminal Court

This Part considers the jurisdiction of the ICC and how it relates to Ukraine. First, this section will describe the consequences of Ukraine's two Declarations accepting the ICC's jurisdiction (geographically, temporally and who now falls within the ICC's reach). The second section will address the subject-matter jurisdiction of the Court, namely what crimes it can hear and try. Lastly, the section will consider whether and how the situation changes in terms of jurisdiction if Ukraine ratifies the Rome Statute.

Part Two(A): Declarations

I. Declarations: Where and When the ICC Has Jurisdiction

As noted in Part One, while Ukraine has not ratified the Rome Statute, Ukraine has “declared” that it accepts the jurisdiction of the ICC. It has made two Declarations, both of which have been, or have attempted to be, limited by the GoU in terms of the time, geography and by identifying certain persons or groups of persons. The GoU in April 2014 made the first Declaration.⁷⁵⁷ It is aimed at crimes alleged to have been committed during the Revolution of Dignity and the events of Euromaidan between 21 November 2013 and 22 February 2014. In September 2015, the GoU filed its second Declaration.⁷⁵⁸ It declares that Ukraine accepts the ICC's jurisdiction from 20 February 2014 without an end date. In other words, it is of indefinite duration. It is aimed at the conflict in Eastern Ukraine and alleged Russian aggression.

A. Declarations and Jurisdiction

As discussed in Part One, the Court only has jurisdiction in certain situations. One of the following must occur as a precondition to the exercise of jurisdiction:

- The State in question has “ratified”—in other words, officially agreed to—the Rome Statute—the governing law of the ICC;⁷⁵⁹

⁷⁵⁷ [On Recognition of the Jurisdiction of the International Criminal Court 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 of 21 November 2013-22 February 2014: Declaration of the Verkhovna Rada of Ukraine No. 790-VII](#) [Online resource]. - 25 February 2014. - (“The First Declaration”).

⁷⁵⁸ [Declaration of the Verkhovna Rada of Ukraine On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organisations “DPR” and “LPR”, which led to extremely grave consequences and mass murder of Ukrainian nationals”: Resolution of the Verkhovna Rada of Ukraine No. 145-VIII](#) [Online resource]. - 8 September 2015. (“The Second Declaration”).

⁷⁵⁹ Rome Statute, arts 13(a) and 14.

- The State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute;⁷⁶⁰
or
- The UNSC refers a situation to the Court.⁷⁶¹

If one of the above exists, the ICC may *exercise* its jurisdiction if: (i) a situation in a State within the jurisdiction of the Court has been referred to the Prosecutor by a State Party to the Rome Statute; (ii) the UNSC refers a situation in a State to the Prosecutor to launch an investigation; or (iii) the Prosecutor initiates an investigation *proprio motu* (on her own initiative) after receiving information from reliable sources such as information in a Declaration from a non-State Party, or information from reliable sources such as non-governmental organisations or UN bodies.⁷⁶²

As such, and as noted in Part One, the acceptance of the Court’s jurisdiction, whether by ratification of the Rome Statute or by a Declaration accepting the jurisdiction of the Court, is a precondition to the exercise of jurisdiction by the ICC. As Ukraine is not a State Party to the Rome Statute, it is therefore required to “invite” the Court to look at a situation on its territory or concerning its nationals; it must make a declaration in order to accept the jurisdiction of the Court with respect to the crimes of genocide, crimes against humanity and war crimes.

The relevant provision permitting a “Declaration” is Article 12(3) of the Rome Statute—“Preconditions to the Exercise of Jurisdiction”—which reads:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.⁷⁶³

This Article identifies what must be met before the Court will consider looking at a situation. This provision is a “consent” provision that permits the ICC to accept jurisdiction where it is invited into a State not party to the Rome Statute. A Declaration does not automatically seize the Court of a situation, or “trigger” jurisdiction. As such, it is important not to equate Declarations with referrals made under Article 13 that prompt the exercise of jurisdiction. Instead, Declarations made accepting the Court’s jurisdiction require an additional and separate trigger to allow the exercise of jurisdiction, either by the Prosecutor initiating an investigation *proprio motu*, by referral from a State Party, or referral by the UNSC.⁷⁶⁴

Although the ICC Prosecutor is under no statutory obligation to take any action as a result of the declaration, she has developed a policy to automatically initiate a “preliminary examination” into the situation.⁷⁶⁵ A preliminary

⁷⁶⁰ Rome Statute, art. 12(3).

⁷⁶¹ *Ibid.*, art. 13(b).

⁷⁶² Rome Statute, art. 13.

⁷⁶³ Rome Statute, art. 12(3).

⁷⁶⁴ *Ibid.*

⁷⁶⁵ Upon receipt of a referral or a valid declaration made pursuant to art. 12(3) of the Statute, the Prosecutor may open a preliminary examination of the situation *See* ICC, [Regulations of the Office of the Prosecutor](#) (23 April 2009) ICC-BD/05-01-09 (“Regulations of the Prosecutor”), reg. 25(1)(c). Although the Prosecutor is under no obligation to start a preliminary

examination is not an investigation. It is a process by which the Prosecutor considers all the information available to her in order to reach a fully informed determination on whether there is a reasonable basis to proceed with a full investigation.⁷⁶⁶

The Ukrainian Declarations give jurisdiction to the Court over criminal conduct covered by the Rome Statute that occurs on the territory of Ukraine or committed by a Ukrainian citizen. The Rome Statute provides:

2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.⁷⁶⁷

This means, in short, that the ICC could potentially have jurisdiction over any crime committed on Ukraine's territory or by a Ukrainian citizen. This raises several questions, including: (i) whether Ukraine can limit the jurisdiction of the Court through its Declarations; (ii) whether a foreign fighter—for example, a Russian citizen—fighting on Ukrainian soil and allegedly committing a crime in Ukraine could be held responsible by the ICC; and (iii) the legal effect of any amnesties on the ICC's jurisdiction.

This section will begin by assessing the legal effect of the Declarations, including whether the ICC's jurisdiction has been limited by the “targeted” Declarations submitted by Ukraine. It will then go on to assess the jurisdiction of the ICC in relation to these specific areas of concern.

B. Procedure on Making a Declaration

After a Declaration accepting the jurisdiction of the Court is made, the Court must confirm the validity of the Declaration with the State. It “must be express, unequivocal, and precise as to the crime(s) or situation it applies to”.⁷⁶⁸ The ICC Rules of Procedure and Evidence prescribe that when a State lodges a Declaration under Article 12(3), the Registrar shall inform the State concerned that the Declaration has the following effect:

- The acceptance of jurisdiction of the Court over crimes in Article 5 of relevance; and

examination upon the receipt of a declaration, recent practice suggests that she will automatically open a preliminary examination. *See* Preliminary Examinations Policy Paper, p. 18, para. 76.

⁷⁶⁶ Rome Statute, arts 15(2) and (3).

⁷⁶⁷ *Ibid.*, art. 12(2).

⁷⁶⁸ Stéphane Bourgon, ‘Jurisdiction Ratione Loci’, in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: a Commentary* (OUP, 2002), p. 563.

- That the provisions of Part 9 of the Rome Statute (on cooperation by a State with the ICC), and any rules in that Part concerning State Parties, shall apply.⁷⁶⁹

In short, the Registrar will confirm with the relevant government official that Ukraine accepts the legal consequences of lodging a Declaration. The rationale for this process is to stop the ICC conducting an examination of the situation before categorically confirming the State's full acceptance of the ICC's jurisdiction.⁷⁷⁰

II. Jurisdiction in the Context of the Ukrainian Situation

If it appears that a precondition to the jurisdiction of the Court exists, it must next be assessed whether the Court's jurisdiction is triggered. The Court can exercise its jurisdiction if the following questions are answered in the affirmative: (i) whether the crimes alleged are referred to in the Rome Statute; (ii) whether the crimes occurred after the Rome Statute's provisions entered into force for the State in question;⁷⁷¹ and (iii) whether they occurred in the specified territory or by a person of the specified nationality. The technical phrasing for these three factors is as follows:

- The crimes in question as referred to in Article 5 of the Rome Statute (jurisdiction *ratione materiae*). This translated as "material jurisdiction" but is more commonly known as "subject-matter jurisdiction";
- The crimes fulfil the temporal requirements under Article 11 of the Rome Statute (jurisdiction *ratione temporis*, known as "temporal jurisdiction"); and
- The crimes are covered by one of the alternate jurisdictional parameters in Article 12(2) (jurisdiction *ratione loci*, known as "territorial jurisdiction", or *ratione personae* known as "nationality jurisdiction").⁷⁷²

This section assesses whether the ICC's jurisdiction has been limited by the "targeted" Declarations submitted by Ukraine. It will then go on to assess the jurisdiction of the ICC in relation to specific areas of concern, namely Crimea and Eastern Ukraine, over foreign fighters on the territory of Ukraine and what impact amnesties may have on the ICC's ability to prosecute individuals.

A. Attempts to Limit or Target the ICC's Jurisdiction by the Declarations

This section relates to whether Declarations accepting the jurisdiction of the ICC might be targeted or limited in any way, such as who to target and for which crimes. As discussed above, the Ukrainian declarations are drafted in a way that seeks to limit the jurisdiction of the ICC with regard to the crimes committed, the perpetrators and the geographical scope and time-frame of jurisdiction. In short, the ICC Prosecutor will not accept these constraints and

⁷⁶⁹ ICC, [Rules of Procedure and Evidence](#), UN Doc. PCNICC/2000/1/Add.1 (2000) (as amended) ("Rules of Procedure and Evidence"), Rule 44.

⁷⁷⁰ John T. Holmes, 'Jurisdiction and Admissibility', in Roy S. Lee et al (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 325.

⁷⁷¹ Rome Statute, art. 11(2).

⁷⁷² *Situation in the Republic of Kenya* ([Authorisation Decision](#)) ICC-01/09-19 (31 March 2010) ("Kenya Authorisation Decision") para. 39; *Situation in the Republic of Côte d'Ivoire* ([Authorisation Decision](#)) ICC-02/11 (3 October 2011) ("Côte d'Ivoire Authorisation Decision"), para. 22.

will undoubtedly investigate all sides to the conflict and the crimes wherever they arise within Ukrainian territory within the relevant time period. The Court may, however, accept the time frame the Declarations have given, namely with jurisdiction beginning in November 2013 and onwards.

The Declarations purport to accept jurisdiction over crimes against humanity and war crimes in Ukraine.⁷⁷³ The first is largely targeted at events of the “Revolution of Dignity” (particularly the events in Kyiv) and the alleged actions of former President Yanukovich along with some of his senior officials. It accepts jurisdiction for crimes committed from 21 November 2013 to 22 February 2014. The second Declaration is aimed at the Russian Federation and the leader of the “terrorist organisations”, namely DPR and the LPR. The time frame of this Declaration overlaps with the first and accepts the ICC’s jurisdiction from 20 February 2014 onwards. It is of an indefinite duration going forward. Accordingly, it is clear that an attempt has been made by the GoU to limit the crimes to those committed by the previous regime and/or those allegedly committed by the separatists.

Article 12(3) of the Rome Statute provides that a declaration must include the “crime in question”. However, from the outset of the ICC, commentators have expressed “concerns that the wording of Article 12(3) of the Statute, and specifically the reference to the acceptance of jurisdiction “with respect to the crime in question”, would allow the Court to be used as a political tool” to enable non-States Parties to selectively accept the exercise of jurisdiction with regard to certain crimes or certain parties.⁷⁷⁴ As will be discussed, although the law is evolving, ICC practice to date has recognised these concerns and has generally opposed attempts by States to define or limit jurisdiction. This general prohibition on Declarations limiting the jurisdiction of the ICC, however, may not apply to Declarations limiting the Court’s jurisdiction in terms of time.

There are two parts to the general prohibition on Declarations limiting the jurisdiction of the Court: a general prohibition on “framing” the Court’s jurisdiction with a Declaration, and a caveat for framing the time period in which the ICC has jurisdiction. First, pursuant to the ICC’s Rules of Procedure and Evidence, after a Declaration has been made, the Registrar must inform the State in question of the fact that by a Declaration the State accepts the jurisdiction of the Court “with respect to the crimes referred to in Article 5 of relevance to the situation”.⁷⁷⁵ The significance of this rule is twofold: first, it explicitly demands that the country accept jurisdiction for *all* crimes of relevance, not just the ones identified in a declaration; and secondly, it has been interpreted by the ICC to restrict a State’s ability to frame a situation the way it wants and in turn limit the ICC’s jurisdiction.⁷⁷⁶

The ICC made this clear in the recent case of *Laurent Gbagbo*. The Court said that while States may seek to define the scope of their acceptance, they could not establish arbitrary parameters on a given situation. It will be for the Court to determine the parameters of the jurisdiction. Pre-Trial Chamber I of the ICC stated:

⁷⁷³ The Second Declaration, para. 1.

⁷⁷⁴ Sharon A Williams, ‘Article 12, Preconditions to the Exercise of Jurisdiction’ in Otto Triffterer (ed), *Commentary on the Rome Statute: Observers’ Notes, Article by Article* (Hart, 2008), pp. 559-560.

⁷⁷⁵ Rules of Procedure and Evidence, Rule 44.

⁷⁷⁶ *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision](#)) ICC-02/11-01/11-212 (15 August 2012), para. 59.

while States may indeed seek to define the scope of its acceptance, such definition cannot establish arbitrary parameters to a given situation as it must encompass all crimes that are relevant to it. Contrary to the Defence submission, the Chamber is of the view that it will be ultimately for the Court to determine whether the scope of acceptance, as set out in the declaration, is consistent with the objective parameters of the situation at hand.⁷⁷⁷

As summarised by one commentator, a State may not “have its cake and eat it” by issuing a declaration but attempting to have a say in the choice of accused.⁷⁷⁸ In other words, the ICC will not permit States to opportunistically pursue its enemies.⁷⁷⁹

Second, the possible exception to these hard rules concerns the potential for a State to define a specific time period for ICC action. This is relevant to Ukraine because the Declarations specify that the Court’s jurisdiction is accepted from November 2013 onwards. The *Gbagbo* case at the ICC also addressed this. The Côte d’Ivoire Declaration under Article 12(3) made on 18 April 2003 declared it accepted the jurisdiction of the Court for an indeterminate duration (“*pour une durée indéterminée*”).⁷⁸⁰ The Appeals Chamber took a broad view on the parameters of a Declaration.⁷⁸¹ It found:

[...] that the phrase “crime in question” in Article 12 (3) of the Statute neither limits the scope of a declaration to crimes that occurred in the past nor to crimes committed in a specific “situation”. A State may accept the jurisdiction of the Court generally. This is not to suggest that a State, when accepting the jurisdiction of the Court, may not further limit the acceptance of jurisdiction within the parameters of the Court’s legal framework. However, unless such a stipulation is made, the acceptance of jurisdiction is neither restricted to crimes that pre-date the declaration nor to specific “situations”.⁷⁸²

The Court appears to suggest that a State may define or frame the time period of the Declaration and accordingly limit the jurisdiction of the Court. However, the precise meaning of the Appeal Chamber’s ruling is unclear, as it did not explain which specific limitations to a Declaration under the Statute may be acceptable nor how this interacts with the Court’s legal framework. It does seem that time limits will be the only acceptable form of limitation on the Court’s jurisdiction.

Authoritative legal commentators agree with this stance. Professor Zimmermann argues that a State’s Declaration (such as Ukraine’s) can limit the time frame of the ICC’s jurisdiction.⁷⁸³ Another commentator suggests (prior to the

⁷⁷⁷ *Ibid.*, para. 60.

⁷⁷⁸ Harmen van der Wilt, ‘Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors’, in Carsten Stahn, *The Law and Practice of the International Criminal Court* (OUP, 2015), pp. 214-215.

⁷⁷⁹ Ruth Wedgwood, ‘Speech Three: Improve the International Criminal Court’, in Alton Frye (ed), *Toward an International Criminal Court?: Three Options Presented as Presidential Speeches* (New York: Council for Foreign Relations, 1999), p. 69.

⁷⁸⁰ [‘Republic of Côte d’Ivoire. Declaration’](#) (ICC) 18 April 2003, ICC-02/11-01/11-129-Anx16.

⁷⁸¹ *The Prosecutor v. Laurent Koudou Gbagbo* ([Judgment](#)) ICC-02/11-01/11OA2 (12 December 2012).

⁷⁸² *Ibid.*, para. 84.

⁷⁸³ Andreas Zimmermann, ‘Palestine and the International Criminal Court Quo Vadis: Reach and Limits of Declarations under art. 12(3)’ (2013) 11 *Journal of International Criminal Justice* (“Zimmermann”), pp. 312-313.

ICC's view in *Gbagbo* above) that there appears no reason why a State cannot impose a specific time period.⁷⁸⁴ Lastly, the Vienna Convention on the Law of Treaties (an international agreement outlining rules in relation to the interpretation of treaties) suggests that States may place appropriate limits on the parameters of their consent.⁷⁸⁵ As the Rome Statute is a treaty, this principle would appear directly applicable.

Conversely, it could be argued that the time limit caveat is difficult to understand in light of the clear prohibition on limitations in terms of crimes or perpetrators. The whole purpose of Rule 44 is to prevent States from dictating limits. As Zimmermann puts it:

[...] the very purpose of Rule 44 of the Rules of Procedure and Evidence, as adopted, is to exclude tailored declarations made under Article 12(3) of the ICC Statute, which would exclusively cover crimes committed by one side of a given conflict.⁷⁸⁶

This can be read in line with the warning from the ICC in the *Laurent Gbagbo* case that:

Rule 44 of the Rules was adopted in order to ensure that states that chose to stay out of the treaty could not use the Court "opportunistically", i.e. that the Court could not be used as a political tool allowing a state to accept the jurisdiction of the Court selectively in respect of certain crimes or certain parties to a conflict.⁷⁸⁷

The result, if permitted to its logical conclusion, may be perverse: a declaring State could frame the scope of its declaration such as to only (or at least mainly) cover crimes committed by the other party to a conflict.⁷⁸⁸ For example, this could include when a regime commits international crimes on its citizens from 2006 to 2008, a rebellion ensues which commits international crimes from 2008 to 2010 which is then quashed by an international force. The previous regime, if still in power, could ask the Court to consider international crimes from 2008 to 2010. Alternatively, if the rebels took power, they could accept the jurisdiction of the Court from 2006 to 2008 to crush dissent. Irrespective, the position of the Court appears to be clear. It seems a time frame, as featured in the Ukrainian Declaration (crimes starting from November 2013) could be permissible based on the Court's view in the *Gbagbo* case.

In conclusion, attempts to limit or target the jurisdiction by the ICC, by virtue of the Declarations made will almost certainly have little to no effect on the Court, other than for timing limitations. However, if attempts to frame the time period conflict with the general prohibition on limiting the consideration of crimes in a manner that appears politically expedient, it is likely that this would be deprecated. As a result, Ukraine cannot limit the crimes or perpetrators that face scrutiny from the ICC investigation and, potentially, prosecution. In other words, the ICC

⁷⁸⁴ Steven Freeland, 'How open Should the Door Be - Declarations by Non-States Parties under art. 12(3) of the Rome Statute of the International Criminal Court' (2006) *Nordic J. Int'l L.* 211, p. 234.

⁷⁸⁵ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, arts 34-35; *Ibid.*, p. 232.

⁷⁸⁶ Carsten Stahn, Mohamed M El Zeidy and Hector Olásalo, 'The International Criminal Court's Jurisdiction Revisited', (2005) 99 *AJIL* 421, p. 427; Zimmermann, pp. 315-316.

⁷⁸⁷ *The Prosecutor v. Laurent Koudou Gbagbo* ([Judgment](#)) ICC-02/11-01/11 OA 2 (12 December 2012), para. 58; *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision](#)) ICC-02/11-01/11-212 (15 August 2012), para. 59; Zimmermann, p. 316.

⁷⁸⁸ *Ibid.*

Prosecutor's ongoing preliminary examination will undoubtedly examine the criminal responsibility of all sides to the conflict most probably within the time frame indicated by Ukraine's two Declarations.

B. ICC Jurisdiction Over Disputed Territories: Crimea and Eastern Ukraine

This section considers the ICC's jurisdiction over the disputed territories of Crimea and Eastern Ukraine. In light of Eastern Ukraine's declaration of territorial independence, and the ICC's finding in its November 2016 report that Crimea was now part of the Russian Federation, this section considers whether the ICC would nevertheless have jurisdiction over crimes related to those regions.

a) ICC Jurisdiction Over Crimea

There have been questions raised as to whether the ICC has jurisdiction over events in Crimea despite it now being part of the Russian Federation, and as a result of Ukraine's 8 September 2015 Declaration. In light of Crimea being incorporated into the Russian Federation, it must be considered whether the Declaration covering the "territory of Ukraine" includes the territory of Crimea. As mentioned, when considering whether the Court has jurisdiction over particular events, it must be satisfied that the Court has: (i) temporal jurisdiction; (ii) subject-matter jurisdiction; and (iii) either territorial jurisdiction or nationality jurisdiction. These requirements will be discussed below.

i. Temporal Jurisdiction

The following timeline presents a representative sample of key events that have occurred in Crimea:⁷⁸⁹

- On 23 February 2014, pro-Russian protestors demonstrated in Crimea against the new government of the State;
- On 25 February 2014, a pro-Russian mayor of Sevastopol was appointed—Aleksey Chaly;
- On 26 February 2014, Crimean Tartars supportive of the new State government reportedly clashed with pro-Russian protestors in the region;
- On or around 27 February 2014, pro-Russian gunmen began to seize key buildings in the Crimean capital, Simferopol. This included the Crimean Parliament, where a Russian flag was raised. Unidentified gunmen in combat fatigues appeared at two airports in Crimea;
- On 1 March 2014, the Russian Parliament approved the use of force in Crimea to protect Russian interests;
- On 5 March 2014, President Vladimir Putin rejected calls to withdraw troops from Crimea on the basis that the "self-defence" troops were not under Russian command;
- On 6 March 2014, the pro-Russian leadership in Crimea voted to join Russia and instituted a referendum;

⁷⁸⁹ [Ukraine crisis: Timeline](#) (BBC, 13 November 2014); [Timeline: Political crisis in Ukraine and Russia's Occupation of Crimea](#) (Reuters, 8 March 2014); [Timeline: Key events in Ukraine's ongoing crisis](#) (Washington Post, 12 May 2014); [Ukraine crisis: timeline of major events](#) (The Telegraph, 5 March 2015); [Timeline: Ukraine's political crisis](#) (Al Jazeera, 20 September 2014).

- On 16 March 2014, Crimea's secession referendum on joining Russia was reportedly backed by 97% of voters; and
- On 18 March 2014, President Vladimir Putin signed a bill to incorporate Crimea into the Russian Federation.

As noted above, the GoU then submitted two Declarations to the ICC. The first covers events on the territory of Ukraine between 21 November 2013 and 22 February 2014.⁷⁹⁰ The second Declaration covers the time period from 20 February 2014 onwards and is aimed clearly at events in Crimea and Eastern Ukraine.⁷⁹¹ It declared that Ukraine accepts the ICC's jurisdiction over "crimes against humanity and war crimes [...] which led to extremely grave consequences and mass murder [...]".⁷⁹² It annexes a document that accepts jurisdiction of the Court for crimes against humanity and war crimes committed "on the territory of Ukraine starting from 20 February 2014 and to the present time".⁷⁹³

The Declarations cover the relevant period. Crimea was allegedly occupied between February and March 2014, and the annexation of Crimea occurred from late February (around the 27th). This is covered by the second Declaration submitted to the ICC that applies to "acts committed in the territory of Ukraine since 20 February 2014". As a result, the situation in Crimea falls within the temporal scope of the Declaration and is clearly covered by the temporal jurisdiction of the Court.

ii. Subject-Matter Jurisdiction

In early 2019, the ICC Office of the Prosecutor completed its preliminary analysis of subject-matter jurisdiction and assessed that there was a reasonable basis to believe that a number of crimes against humanity and war crimes had been committed both in the context of the situations in Crimea and in Eastern Ukraine.⁷⁹⁴ The list of the crimes considered by the OTP is provided in Part 1.

iii. Territorial or Nationality Jurisdiction

In addition to the above jurisdictional considerations, the Court will need to consider whether it has either territorial jurisdiction or nationality jurisdiction over the crime(s) in question. As noted above, the Rome Statute provides that the Court may exercise its jurisdiction over a crime committed on the territory of a declaring State ("territorial jurisdiction"), or committed by a person who is a national of the declaring State ("nationality jurisdiction").

1) Territorial Jurisdiction

First, the ICC may exercise territorial jurisdiction if the alleged crime was committed on the territory of a State that is a State Party or has declared its acceptance of the jurisdiction of the Court.⁷⁹⁵ In line with its recent jurisprudence,

⁷⁹⁰ The First Declaration.

⁷⁹¹ The Second Declaration.

⁷⁹² The Embassy of Ukraine, '[Compliments to the Registrar of the International Criminal Court](#)' (9 April 2014).

⁷⁹³ The Second Declaration.

⁷⁹⁴ 2019 Preliminary examinations report, para. 267,

⁷⁹⁵ Rome Statute, art. 12(2)(a).

the ICC can also exercise territorial jurisdiction where “at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.”⁷⁹⁶ Therefore, to assess whether the ICC has territorial jurisdiction over alleged crimes in Crimea, the ICC Prosecutor considered whether any alleged crimes that fall within the jurisdiction of the ICC after the territory of Crimea was taken over by Russia (around 27 February 2014) still fall within the territory of Ukraine—that is, whether Crimea was still a part of Ukraine during the relevant period. As will be discussed below, the ICC has answered the question in the affirmative and found that the Court has territorial jurisdiction over alleged crimes in Crimea.

First, the ICC Prosecutor has confirmed that she is looking at “any relevant crimes arising out of events in Crimea”.⁷⁹⁷ In other words, she appears to view the territorial jurisdiction of Ukraine as covering Crimea. This can then be delegated to the ICC through the Declaration. The ICC has confirmed this interpretation and accepted that it has jurisdiction over possible crimes under the jurisdiction of the Court—namely, genocide, crimes against humanity and war crimes—committed on the territory of Crimea by any nationality, including Ukrainians and Russians.⁷⁹⁸

Russia argues that Crimea is part of the Russian Federation and therefore Ukraine cannot delegate (declare) jurisdiction to the ICC.⁷⁹⁹ However, international law is unequivocal that territory cannot be forcibly annexed.⁸⁰⁰ As Crimean “independence” came about as a result of Russia’s seemingly unlawful use of force, the ICJ would likely find that this vitiated any subsequent claim to independence. As was said in the *Kosovo Opinion*: “the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”.⁸⁰¹

This view arguably applied to Georgia during the ICC Prosecutor’s preliminary examination into events there. The ICC Prosecutor has said that she considers the area of South Ossetia to be part of Georgia for the purposes of the investigation:

⁷⁹⁶ ICC, Case No. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, para. 64.

⁷⁹⁷ The Office of the Prosecutor, [‘Report on Preliminary Examination Activities’](#) (2015) (“2015 Report on Preliminary Examination Activities”) paras. 106 and 110.

⁷⁹⁸ Mark Kersten, [‘The ICC is Free to Investigate Ukraine since 2014. So What Now?’](#) (*Justice in Conflict*, 10 September 2015). “The Prosecutor, for example in the case of Cote D’Ivoire, has always made it clear that she intends to look at all sides of the conflict.”, - James Stewart, Deputy ICC Prosecutor, cited in Mark Kersten, [‘In the ICC’s Interest: Between ‘Pragmatism’ and ‘Idealism’?’](#) (*Justice in Conflict*, 16 July 2013).

⁷⁹⁹ On the issue of self-determination, general reading includes: Stefan Oeter, ‘Self-Determination’ in Bruno Simma et al (ed), *The Charter of the United Nations A Commentary* (3rd edn, OUP, 2012); James Crawford, *The Creation of States in International Law* (2nd edn, OUP, 2007); Romain Yakemtchouk, ‘Les conflits de territoires et de frontières dans les Etats de l’ex-URSS’ (1993) 39 *Annuaire français de droit international*, pp. 398-408; Malcolm N Shaw, ‘The Heritage of States: The Principles of Uti Possidetis Juris Today’ (1996) 67 *British Yearbook of International Law* 75-154.

⁸⁰⁰ UN, UN Charter, 24 October 1945, 1 UNTS XVI, art. 2; Aurel Sari, [‘Ukraine Insta-Symposium: When does the Breach of a Statute of Forces Agreement amount to an Act of Aggression? The Case of Ukraine and the Black Sea Fleet SOFA’](#) (*Opinio Juris*, 6 March 2014).

⁸⁰¹ ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports (2010) p. 403, para. 81.

The above crimes are alleged to have been committed on Georgian territory. Despite the South Ossetian declaration of independence of 29 May 1992 and its subsequent recognition by four UN Member States in 2008 onwards, South Ossetia is generally not considered an independent State and is not a Member State of the United Nations. A number of resolutions adopted by the UN General Assembly (UNGA) since 2009 refer to South Ossetia as a part of Georgia. For the purposes of this Application, the Prosecution considers that South Ossetia was a part of Georgia at the time of commission of the alleged crimes and occupied by Russia at least until 10 October 2008. As such, the Court may exercise jurisdiction over all alleged crimes committed on Georgian territory during the armed conflict period, irrespective of the nationality of the accused.⁸⁰²

It is likely that the ICC Prosecutor would apply the same reasoning to Crimea and the remit of the Court's territorial jurisdiction in relation to Ukraine.

Further, it appears that there is no requirement that the territorial jurisdiction conferred upon the Court is limited to territory over which a State actually exercises effective control.⁸⁰³ An example of this "control" principle is Cyprus, which ratified the Rome Statute in March 2002.⁸⁰⁴ This ratification gives the Court jurisdiction over northern Cyprus, even though Turkey has occupied it since 1974.⁸⁰⁵ This situation is likely to apply only to territory that at one point was clearly within the sovereignty of the State in question.⁸⁰⁶ This appears to be the prevailing view among international commentators.⁸⁰⁷ There does not seem to be any reason why these arguments do not apply equally to non-State, declaring parties (such as Ukraine) as it does to States Parties (such as Cyprus). In particular, the Rome Statute's provision on territorial jurisdiction applies equally to both States Parties as well as declaring States. Therefore, there does not appear to be a distinction between States Parties or declaring States when determining the remit of territorial jurisdiction.

Lastly, as the ICC was set up to end impunity,⁸⁰⁸ the ICC Prosecutor will be concerned with avoiding accountability gaps. In the event that Crimea was deemed to be outside the territorial jurisdiction of Ukraine, there would be little or no basis for prosecuting crimes within the jurisdiction of the court within that territory. This would foreshadow a

⁸⁰² *Situation in Georgia* ([Corrected Version of 'Request for authorisation of an investigation pursuant to article 15', 16 October 2015](#)) ICC-01/15-4-Corr2 (17 November 2015), para. 54.

⁸⁰³ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010) p. 285.

⁸⁰⁴ ['Cyprus'](#) (ICC).

⁸⁰⁵ Kypros Chrysostomides, *The Republic of Cyprus—A study in International Law* (Martinus Nijhoff, 2000), pp. 148-153; *Cyprus v. Turkey* ([Merits Judgment](#)) App. No. 25781/94 (10 May 2001) paras. 13-14; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1987).

⁸⁰⁶ Eugene Kontorovich, 'Israel/Palestine—The ICC's Uncharted Territory' (2013) 11(5) *Journal of International Criminal Justice* 979-999, pp. 990-991.

⁸⁰⁷ Michael Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, 2014) p. 222 *et seq.*, citing to Kypros Chrysostomides, *The Republic of Cyprus—A study in International Law* (Martinus Nijhoff, 2000) pp. 148-153, 155-157; John Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1987) p. 110; *Cyprus v. Turkey* ([Merits Judgment](#)) App. No. 25781/94 (10 May 2001) paras. 13-14; *Demopoulos et al. v. Turkey* (Admissibility Decision) App. No. 46113-99 (1 March 2010) para. 96.

⁸⁰⁸ See Rome Statute, Preamble, para. 5: 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.

situation in which a State could evade accountability by simply occupying a region of another state.⁸⁰⁹ To conclude, international law and previous ICC practice suggests that it is likely that the ICC would find that it has territorial jurisdiction over relevant crimes in Crimea.

2) Nationality Jurisdiction

Second, as the ICC has territorial jurisdiction over Crimea, an analysis of nationality jurisdiction is not vital as they are alternative bases for jurisdiction. Irrespective, if the ICC does not have territorial jurisdiction, it may have nationality jurisdiction, meaning that the ICC has jurisdiction over Ukrainian citizens who have committed crimes in Crimea or elsewhere.

The Rome Statute provides that the Court may exercise its jurisdiction where a State accepts jurisdiction and the person accused of a crime “is a national” of that State, irrespective of where the national committed the crime.⁸¹⁰ The tense used in this provision may be important. A literal reading of “is a national” suggests that the person is a national at the time of the decision on whether the ICC has jurisdiction or not. However, an interpretation that would give more purpose to the provision would suggest that “is a national” must be read with the rest of the provision in the Rome Statute (for instance, “territory of which the conduct in question occurred” referring to when the conduct occurred, or “the person accused of the crime” referring to the crime, not when they were charged by the ICC Prosecutor), meaning the decisive factor may be whether they were a national at the time of the crime in question, not at the time jurisdiction is determined.

A contemporary example arises from the crimes committed by ISIS in the Middle East. Most of their crimes are committed on the territories of Syria and Iraq. Many of the perpetrators consider themselves to now be part of ISIS. Syria and Iraq are not parties to the Rome Statute and have not accepted ICC jurisdiction. However, as noted by the ICC Prosecutor, the ICC could exercise nationality jurisdiction over the perpetrators. This permits the ICC to exercise jurisdiction over nationals from, among other States, Tunisia, Jordan, France, the UK, Germany, Belgium, the Netherlands and Australia that have travelled to Syria. However, in relation to ISIS particularly, the Prosecutor is of

⁸⁰⁹ [Ukraine: clear breaches of international law in Crimea](#) (*International Bar Association*, 20 February 2015); Daniel Wisheart, [‘The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?’](#) (*EJIL: Talk!*, 4 March 2014). It is likely that Russia’s intervention and acquisition of Crimea was unlawful. For support of this proposition: [‘The 1997 Black Sea Fleet Agreement between Russia and Ukraine’](#) (*Eric Posner Blog*, 5 March 2014); citing to, J.L. Black (ed), *Russia & Eurasia Documents Annual 1997: The Russian Federation* (vol 1, Academic International Press, 1998)p. 129; [‘On Violations of Ukraine’s Laws in Force and of Ukrainian Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine’](#) (*MFA*, 3 March 2014). Similar calls for independence from Abkhazia and South Ossetia have gone unsupported internationally: Malcolm N Shaw, ‘The Heritage of States: The Principles of Utī Possidetis Juris Today’ (1996) 67 *British Yearbook of International Law*, fn 218; Romain Yakemtchouk, ‘Les conflits de territoires et de frontières dans les Etats de l’ex-URSS’ (1993) 39 *Annuaire français de droit international*, p. 409; A V Lowe and Colin Warbrick (eds), ‘Current Developments: Public International Law - Recognition of States’ (1991) 41 *International and Comparative Law Quarterly*, pp. 473, 478; UNSC Res 822 (30 April 1993) UN Doc S/RES/822; UNSC Res 853 (29 July 1993) UN Doc S/RES/853; UNSC Res 876 (19 October 1993) UN Doc S/RES/876; UNSC Res 884 (12 November 1993) UN Doc S/RES/884; UNSC Res 896 (31 January 1994) UN Doc S/RES/896.

⁸¹⁰ Rome Statute, art. 12(2)(b).

the view that the jurisdictional basis for opening a preliminary examination is too narrow at this point.⁸¹¹ This is primarily because ISIS appears to be an organisation led mainly by nationals of Iraq and Syria (who the ICC would not have jurisdiction over for offences in those countries). Accordingly, the prospects of the ICC Prosecutor investigating and prosecuting those most responsible—which is the ICC Prosecutor’s focus—appears limited. In other words, the nationality jurisdiction combined with her focus on those most responsible means that she would only target those individuals who are nationals from States Parties and also leaders in ISIS; currently there appears to be very few individuals who fall into this category.

However, it may be that Ukrainian NGOs and state organs have information on Ukrainians (such as high-ranking military or SBU officials) assisting alleged Russian crimes in Crimea or in conflict areas in Eastern Ukraine. As a result of the Declarations, the ICC also has jurisdiction over such persons because of nationality jurisdiction, even in the unlikely event that the ICC Prosecutor assesses Crimea as outside Ukrainian’s territory. Therefore, such persons may be considered Ukrainian citizens, over whom Ukraine has jurisdiction and who, pursuant to the nationality principle, the ICC has jurisdiction over.

One final issue arises for consideration pursuant to the nationality jurisdiction. It may be argued that the people of Crimea are not Ukrainian citizens. This argument is flawed for the purposes of the ICC’s criminal investigation. The people of Crimea will still be considered to be part of Ukraine for the purposes of jurisdiction. Therefore, it is highly likely the Court will consider the people who were “formerly” Ukrainian citizens to still hold Ukrainian nationality for the purposes of an investigation.

iv. Conclusion

To conclude, the ICC Prosecutor holds that the Court has jurisdiction over Crimea.⁸¹² The Pre-Trial Chamber, when asked to authorise a full investigation, would likely to also hold that the Court has temporal, as well as territorial jurisdiction over crimes allegedly committed in Crimea by a person of any nationality. In the alternative, it is likely that Ukrainian nationals could be prosecuted for crimes in Crimea pursuant to the ICC’s jurisdiction over Ukrainian nationals.

b) ICC Jurisdiction over Eastern Ukraine

The same answer to the question of ICC jurisdiction over Crimea arguably applies to Eastern Ukraine. The region has not, however, attempted to join another recognised State, but instead has tried to form its own republics. This, as discussed below, is irrelevant for the purposes of the ICC’s territorial and nationality jurisdiction.

⁸¹¹ [‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS’ \(ICC, 8 April 2015\).](#)

⁸¹² [‘Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine’ \(ICC, 11 December 2020\).](#)

From the outset, like Crimea, the ICC Prosecutor considered all information from reliable sources to evaluate the situation in Ukraine including the region of Donbas.⁸¹³ The Prosecutor came to a view that the Court has jurisdiction temporally and either territorially or in terms of nationality in the region. The arguments in favour of such a view are considered in turn below.

First, the temporal jurisdiction of the ICC in terms of the conflict in the east is clearly satisfied.⁸¹⁴ The conflict in Eastern Ukraine appeared to begin around 7 April 2014 when protesters began to seize government buildings in Kharkiv, Donetsk and Luhansk in the east.⁸¹⁵ The Declarations give the ICC jurisdiction from 21 November 2013 until the present day. In particular, the second Declaration submitted to the ICC applies to “acts committed in the territory of Ukraine since 20 February 2014”. The conflict began around April 2014. Accordingly, the situation in Eastern Ukraine falls within the temporal scope of the Declaration and is clearly covered by the temporal jurisdiction of the Court.

Second, in terms of territorial jurisdiction, Eastern Ukraine appears to have been considered part of Ukraine for the purposes of the ICC Prosecutor’s preliminary examination. On 11 May, pro-Russian separatists organised a “referendum” on the sovereignty of the Donetsk and Luhansk regions, the results of which were allegedly falsified, did not satisfy basic democratic standards and violated the Constitution of Ukraine.⁸¹⁶ The referendum is problematic. Article 73 of the Constitution of Ukraine provides that “[i]ssues on altering Ukraine’s territory shall be resolved exclusively through an all-Ukrainian referendum”. The referendum was not an all-Ukraine referendum, and accordingly was not valid under the Constitution of Ukraine. To add credence to this, no legitimate State, even Russia, has recognised Eastern Ukraine as having acquired statehood. Therefore, while Eastern Ukraine may claim to be independent, it cannot be said to have acquired statehood.

Third, for nationality jurisdiction, it may be argued that the people in Eastern Ukraine are not Ukrainian citizens for the purposes of nationality jurisdiction. This argument is flawed for the purposes of the ICC’s criminal investigation. First and foremost, the people in the eastern conflict region have not changed their nationality legally. The Parliament of the LPR adopted a “declaration” on 27 May 2015 claiming citizenship of the LPR for those in the territory or who were born on it.⁸¹⁷ This declaration is not a law, but paves the way for a future act of parliament to be enacted. While the above and heritage to Russia is claimed, they remain Ukrainian for the purposes of international law as the State has not formally acquired statehood.⁸¹⁸ Therefore, it is highly likely the Court will consider the people who were “formerly” Ukrainian citizens to still be Ukrainian for the purposes of an investigation.

⁸¹³ 2015 Report on Preliminary Examination Activities.

⁸¹⁴ Rome Statute, art. 11.

⁸¹⁵ [‘Ukraine crisis: timeline of major events’](#) (*The Telegraph*, 5 March 2015); [‘Timeline: Key events in Ukraine’s ongoing crisis’](#) (*Washington Post*, 12 May 2014); [‘Ukraine crisis: Timeline’](#) (*BBC*, 13 November 2014).

⁸¹⁶ [‘The Farce of the ‘Referendum’ in Donbas’](#) (Centre for Eastern Studies, 14 May 2014).

⁸¹⁷ [‘Supreme Council “Luhansk People’s Republic” adopted a declaration on citizenship’](#) (*Forbes*, 27 May 2014).

⁸¹⁸ The Constitution of Ukraine requires a referendum across the country for the purposes of secession. See [Constitution of Ukraine: Law of Ukraine No. 254к/96-BP](#) [Online resource]. 28 June 1996, art. 73.

Overall, it appears highly likely that the Pre-Trial Chamber will conclude that the ICC has temporal and territorial or nationality jurisdiction, or both over the conflict in Eastern Ukraine.

c) ICC Jurisdiction over Foreign Fighters in Ukrainian Territory

This section considers whether the ICC would have jurisdiction to try foreign fighters who are alleged to have committed crimes on the territory of Ukraine. This concerns basic questions of temporal and territorial jurisdiction, addressing the question in relation to foreign fighters of any nationality other than Ukrainian.

Concerning temporal jurisdiction, the ICC has jurisdiction over crimes committed since 21 November 2013 onwards because of the Declarations. In relation to territorial jurisdiction, the recent preliminary examination into conflict in Georgia provides clear indicators regarding the ICC's territorial jurisdiction over foreign fighters. The application by the ICC Prosecutor to the Court seeking authorisation to open a formal investigation (on this, see Part Three) into the situation in Georgia indicates that she believes that crimes by Russian armed forces, particularly alleged indiscriminate and disproportionate attacks, were committed on the territory of Georgia.⁸¹⁹ While this is a preliminary view and requires further investigation, the Prosecutor clearly acted on the basis that she considered that the Court would have territorial jurisdiction over the crimes, even though they were committed by non-Georgians.⁸²⁰

In conclusion, based upon the position of the ICC Prosecutor, although the examination is not completed, it seems apparent that if a Russian citizen committed a crime on Ukrainian soil the ICC will have territorial jurisdiction over him or her by virtue of territorial jurisdiction.

d) Objections to Jurisdiction: Amnesties

There have been various discussions within Ukraine regarding the provision of amnesty to fighters in Eastern Ukraine to assist in bringing about the end of the conflict and reintegration and reconciliation of Ukrainian society. This section considers jurisdiction to prosecute international crimes despite certain individuals having an amnesty of some sort protecting them from prosecution for conduct during the conflict.

e) The Facts

There is already an agreement to take steps to provide an amnesty as outlined in the Minsk Agreements of September 2014 and February 2015; the latter Agreement mandates that the parties ensure a pardon and amnesty by “enacting

⁸¹⁹ *The Situation in Georgia* ([Request for authorisation of an investigation](#)) ICC-01/15-4-Corr (17 November 2015), paras 198-201.

⁸²⁰ *Ibid.*, para. 138: ‘Alleged involvement of Russian armed forces in the commission of crimes attributed to South Ossetian forces’; *Ibid.*, para. 198: ‘Alleged Indiscriminate and Disproportionate Attacks by Russian armed forces’; *Ibid.*, para. 65: ‘[...] the information available indicates that at least some members of the Russian armed forces participated in the commission of such crimes, while other members of the Russian armed forces acted passively in the face of such crimes, and still others acted to prevent and punish such crimes’.

the law” prohibiting the prosecution of persons in connection with events in Donetsk and Luhansk regions.⁸²¹ However, there is no outright amnesty in the Agreement itself—only a requirement to take steps to provide for one.

After the September Agreement, Ukrainian authorities adopted and later withdrew support for two draft amnesty laws formulated pursuant to the Minsk Protocol of 5 September.⁸²²

Since 2015, the “Normandy Four” talks involved discussions of amnesties. At the latest Normandy Four meetings on 9 December 2019 and 30 April 2020, Russia confirmed that committing Ukraine to declare an amnesty was one of its overriding goals and urged Ukraine to offer amnesty to members of separatist movements in Eastern Ukraine to accelerate national reconciliation.⁸²³ Responses of the Ukrainian side are mixed. For example, the Deputy Head of the Ukrainian delegation to the Trilateral Contact Group in Minsk Vitold Fokin stated that to stop the conflict, it is necessary to proclaim a full amnesty.⁸²⁴ The Minister of Interior of Ukraine immediately responded that Fokin’s statement is provocative and does not meet the national interests of Ukraine.⁸²⁵ Speaker of the Ukrainian Parliament also rejected the idea of full amnesties.⁸²⁶

f) The Law

Amnesties, which prohibit the prosecution of perpetrators of certain crimes in certain circumstances, are a topic of considerable disagreement. Some argue they provide impunity for those who took up arms against their State and undermine accountability and justice. Local communities may perceive a lack of accountability as a disservice to those who suffered at the hands of perpetrators. On the other hand, selective amnesties may play a role in allowing conflicts to end, promoting peace and a degree of reconciliation between warring sides in a conflict.⁸²⁷ For example,

⁸²¹ ‘5. [Ensure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine](#)’: ‘Full text of the Minsk Agreement’ (*Financial Times*, 12 February 2015); ‘[Provide pardon and amnesty by way of enacting a law that forbids persecution and punishment of persons in relation to events that took place in particular departments of Donetsk and Luhansk Oblasts of Ukraine](#)’: ‘Minsk agreement on Ukraine Crisis: text in full’ (*The Telegraph*, 12 February 2015); ‘[Minsk Agreement: Full text in English](#)’ (*UNIAN*, 12 February 2015).

⁸²² OHCHR, ‘[Report on the human rights situation in Ukraine](#)’, 15 December 2014, para. 24.

⁸²³ ‘[No breakthrough at the Normandy Four summit in Paris](#)’ (*Center for Eastern Studies*, 10 December 2019); [Moscow urges Kiev to offer amnesty to separatists](#) (*Anadolu Agency*, 30 April 2020).

⁸²⁴ ‘[Fokin supports a special status for the entire Donbas and not only SDDL](#)’ (*Novynarnya*, 30 August 2020).

⁸²⁵ ‘[Statements of the TCG member Fokin do not meet the interest of Ukraine - Avakov](#)’ (*Novynarnya*, 31 August 2020).

⁸²⁶ ‘[Ukraine is unlikely to follow a ‘special route’ on the matter of amnesties for the members of IAG, holds the speaker of the VR](#)’ (*Interfax Ukraine*, 31 August 2020).

⁸²⁷ The UN has at times encouraged amnesties. For example, in South Africa in the 1960s (UN SC Res 190, UN Doc S/5761, 9 June 1964; UN SC Res 191, UN Doc S/5773, 18 June 1964, UN SC Res 473, UN Doc S/RES/473, 13 June 1980; UN SC Res 581, UN Doc S/RES/581, 13 February 1986); Angola in 1994 (UN SC Resolutions 1055, UN Doc S/Res/1055, 8 May 1996; UN SC Res 1064, UN Doc. S/RES/1064, 11 July 1996); Croatia in 1997 (UN SC Res 1120); Sierra Leone in 2000 (UN SC Res 1315, UN Doc S/RES/1315 (2002), 14 August 2000); Afghanistan throughout 1991 and in 1994 (UNGAR 46/136, 46 UN GAOR Supp. (No. 49), UN Doc. A/46/49 (1991), 17 December 1991; UNGAR 47/141, 47 UN GAOR Supp. (No. 49), UN Doc. A/47/49 (1991), 18 December 1991; UNGAR 48/152, 48 UN GAOR Supp. (No. 49), UN Doc. A/48/49 (1993), 20 December 1991; UNGAR 49/207, 49 UN GAOR Supp. (No. 49), UN Doc. A/49/49 (1994), 23 December 1994); and Kosovo in 1999 (UNGAR 53/164, 53 UN GAOR Supp. (No 49), UN Doc. A/RES/53/164 (1999), 25 February 1999).

many may fear prosecution or persecution for rebelling against a State, and refuse to cease fighting whilst threat of criminal proceedings remains alive. An amnesty may address this concern.

The concept of amnesty in exchange for peace is not new. In fact, the ICRC even takes the position that IHL obliges States to endeavour to grant the “broadest possible” amnesties for participating in a non-international armed conflict.⁸²⁸ In other words, to ensure that participation in the conflict and crimes committed strictly as a consequence of fighting in a conflict cannot be prosecuted. However, IHL does not permit all amnesties and they must be carefully considered and focused. The scope of amnesties in IHL will be considered below.

While amnesties may be a common part of conflict, if Ukraine were to enact a law providing a blanket, or full, amnesty preventing prosecution of any and all criminal conduct committed during the conflict, it could be in breach of its IHL obligations. As noted, IHL provides that, at the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in the non-international armed conflict, with one exception: those who are suspected of or accused of war crimes or other international crimes should not escape investigation and prosecution.⁸²⁹ It is presumed, for the purpose of this Chapter, that the conflict in Ukraine is a non-international armed conflict. However, if the conflict were classified as an international armed conflict, a similar legal provision will apply.⁸³⁰ This provides that members of the armed forces of a Party to an international conflict are “combatants”, that is to say, they have the *right* to participate directly in hostilities, and not to be prosecuted as a consequence for IHL-compliant actions.⁸³¹ The specific and express obligation to provide an amnesty, however, only applies to non-international armed conflicts. For non-international and international armed conflicts, it appears that any amnesty does not include serious violations of IHL.

This sole exception to amnesties has an interesting genesis. As noted by the ICRC, it was the USSR that initially argued that amnesty should not be interpreted to mean that those suspected of war crimes or crimes against humanity

⁸²⁸ It is presumed, for the purpose of this report, that the conflict is a non-international armed conflict. If the conflict was classified as an international armed conflict, Additional Protocol I, art. 43(2) would apply. This provides that members of the armed forces of a Party to a conflict are combatants, that is to say, they have the right to participate directly in hostilities, and not to be prosecuted as a consequence: 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3 (“Additional Protocol I”) art. 43(2).

⁸²⁹ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977) 1125 UNTS 609 (“Additional Protocol II”) art. 6(5): “5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law (vol. I, Cambridge University Press, 2009) p. 612.

⁸³⁰ Additional Protocol I, art. 43(2).

⁸³¹ *Ibid.*; Hin-Yan Liu, *Law’s Impunity: Responsibility and the Modern Private Military Company* (Bloomsbury, 2015) p. 53.

could evade punishment.⁸³² There is little disagreement with this position.⁸³³ The ICRC agrees with this stance,⁸³⁴ as does the UN Secretary-General,⁸³⁵ and the UN Commission on Human Rights.⁸³⁶ The ICTY has said explicitly that war crimes may not be the object of an amnesty.⁸³⁷

The reason for exempting serious IHL violations from amnesty agreements is straightforward: it stops impunity for perpetrators of the most serious crimes of concern to the international community. It would also conflict with the likely duty on States such as Ukraine to investigate and prosecute persons suspected of having committed international crimes. While the law is in somewhat of a state of flux,⁸³⁸ depending on the nature of the offence, States may be obliged (either under international treaties or the “customary” practice in international law)⁸³⁹ to prosecute

⁸³² Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol II, Cambridge University Press, 2005) pp. 4032-4033, para. 716, citing to USSR, Statement at the CDDH, Official Records, Vol. IX, CDDH/I/SR.64, 7 June 1976, p. 319, para. 85.

⁸³³ As pointed out by the ICRC: *Ibid.*, pp. 4017-4044.

⁸³⁴ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol I, Cambridge University Press, 2009), p. 612.

⁸³⁵ Resolutions on Croatia and Sierra Leone, the UN Security Council confirmed that amnesties may not apply to war crimes: UN Security Council, Res 1120, 14 July 1997, UN Doc S/RES/1120 para. 7; UN Security Council, Res 1315 (14 August 2000) UN Doc S/RES/1315, preamble.

⁸³⁶ UN Commission on Human Rights, Res 2002/79 (25 April 2002) E/2002/23, para. 2.

⁸³⁷ The Tribunal said that national amnesties could not stop fundamental obligations under international law from taking effect. *See The Prosecutor v. Furundžija (Judgment)* IT-95-17/1-T (10 December 1998), paras 153-157.

⁸³⁸ Yasmin Naqvi, ‘Amnesty for war crimes: Defining the limits of international recognition’ (2003) 85 *International Review of the Red Cross* 851.

⁸³⁹ Genocide (The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, arts. I & IV); crimes against humanity (Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, para. 18; Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile* (Judgment) 26 September 2006, para. 114).

War crimes in an international armed conflict (customary international law (Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, (vol I, Cambridge University Press, 2009), pp. 607-611); the four Geneva Conventions’ obligation to search for persons allegedly responsible for grave violations of the Conventions). War crimes in a non-international armed conflict (customary international law (Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol I, Cambridge University Press, 2009), pp. 607-611); Common Article 3 of the four Geneva Conventions of 1949 and the Protocols Additional to the Geneva Conventions of 12 August 1949 (1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, adopted 12 August 1949; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, adopted 12 August 1949; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 UNTS 135, adopted 12 August 1949; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, adopted 12 August 1949; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3, adopted 8 June 1977; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, adopted 8 June 1977; 2005 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem [Protocol III], 2006 ATNIF 6, adopted 8 December 2005)].

Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), arts. 4.1, 4.2 and 7.1; *Prosecutor v. Anto Furundžija (Judgment)* case No. IT-95-17/1-T (10 December 1998) para. 155); enforced disappearance (UNGA, 2006 International Convention for the Protection of All Persons from Enforced Disappearance, Res A/RES/61/177, adopted 20 December 2006, arts. 6.1, 7.1, 11.1, 24.4);

international offences such as war crimes or crimes against humanity.⁸⁴⁰ The flux arises from the fluid nature of international law. It is particularly difficult to discern whether an obligation exists in relation to crimes against humanity. There is a suggestion that States owe an obligation to the international community (an obligation “*erga omnes*”) to prosecute genocide, war crimes and crimes against humanity.⁸⁴¹ Accordingly, there appears to be a duty.

There are two pertinent examples of this: Uganda and Sierra Leone—two post-conflict amnesty States. First, Uganda enacted the Amnesty Act 2000. This offered blanket amnesty for any and all members of the LRA who voluntarily surrendered. In July 2005, the ICC issued arrest warrants for senior members of the LRA for war crimes and crimes against humanity. It was the general consensus that the amnesty, whether arising from legislation or a negotiated agreement, could not be extended to cover serious violations of IHL and international law.⁸⁴²

An example of this in action is Sierra Leone. After the civil war in Sierra Leone, the Lomé Peace Accord was reached.⁸⁴³ The peace agreement provided for an amnesty. Subsequently, the Statute of the Sierra Leone Court provided explicitly that an amnesty granted to any person falling within the jurisdiction for crimes contained within the statute or other serious violations of IHL, shall not be a bar to prosecution.⁸⁴⁴

Victim’s right to obtain reparation and prompt, fair and adequate compensation; *Quinteros v. Uruguay*, [Communication No. 107/1981](#), in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol II (UN publication, Sales No. E.89.XIV.1); European Court of Human Rights, *Kurt v. Turkey* ([Judgment](#)) No. 24276/94 (25 May 1998); Inter-American Court of Human Rights, *Velásquez-Rodríguez Case* ([Judgement](#)) Series C, No. 4 (29 July 1988) para. 172.

⁸⁴⁰ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol I, Cambridge University Press, 2009), pp. 607-611: ‘States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.’

⁸⁴¹ Miša Zgonec-Rožej and Joanne Foakes, ‘[International Criminals: Extradite or Prosecute](#)’ (*Chatham House*, July 2013), p. 3 *citing* International Law Commission, ‘The obligation to extradite or prosecute (aut dedere aut judicare)’, Study by the Secretariat, 18 June 2010, UN Doc. A/CN.4/630, paras 126, 150; M. Cherif Bassiouni and Edward M. Wise, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, 1995), p. 52; Guy S. Goodwin-Gill, ‘Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute’, in Guy S. Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law, Essays in Honour of Ian Brownlie* 199 (Oxford: Clarendon Press, 1999), pp. 213, 220; *The Prosecutor v. Furundžija* (Judgement) IT-95-17/1-T (10 December 1998), para. 156; UN General Assembly Resolution 2840 (XXVI), 18 December 1971; UN General Assembly Resolution 3074 (XXVIII), 3 December 1973; UN Security Council Resolutions 1318 (2000), 1325 (2000), 1379 (2001), 1612, (2005) 1674 (2006) 1820 (2008); ECOSOC Resolution 1989/65, 24 May 1989; [Inter-Parliamentary Union \(IPU\) Resolution, 112th IPU Assembly](#), 8 April 2005, Doc. No. 13; [Organisation of American States General Assembly, Res 2225 \(XXXVI-0/06\)](#) 6 June 2006, p. 252; Raphaël van Steenberghe, ‘The Obligation to Extradite or Prosecute, Clarifying its Nature’ (2001) 9 *Journal of International Criminal Justice* 1089, p. 1100.

⁸⁴² See the discussion and references in: Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (OUP, 2010), p. 110.

⁸⁴³ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, Togo, 7 July 1999, art. IX, annexed to Letter dated 12 July 1999 from the Chargé d’Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, S/1999/77, 12 July 1999.

⁸⁴⁴ Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145, UN Doc S/2002/246, Annex II, adopted 16 January 2002, art. 10: ‘An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.’

g) Analysis

As demonstrated by the above discussion, Ukraine is permitted to provide an amnesty to those involved in the conflict in the east.⁸⁴⁵ Many other peace accords have provided for amnesties with exceptions for certain serious violations of IHL, which should be prosecuted. Examples include:

- The Guatemalan civil war (1960 to 1996) between the government and paramilitary organisations. The National Reconciliation Law of 1996 permitted an amnesty for all but the most serious war crimes perpetrated during the civil war;⁸⁴⁶
- The Colombian civil conflict (1964 onwards) between rebel/guerrilla fighters (particularly the Revolutionary Armed Forces of Columbia) against the Colombian government. The government enacted the Justice and Peace Law of 2005. This act granted amnesty for members of armed forces who decided to demobilise, but not for the most serious human rights abuses such as terrorism, kidnapping, or genocide;⁸⁴⁷
- The Algerian Civil War (1991 to 1998) between the secular Algerian government and various Islamist rebel groups. The Charter for Peace and National Reconciliation 2005 was enacted after a public referendum. It granted amnesty to all combatants who handed in their weapons, with the exceptions of those suspected of mass bombings, mass murder or rape;⁸⁴⁸ and
- The Croatian war (1991 to 1996) between Croatian government forces and forces loyal to the Socialist Federal Republic of Yugoslavia. The General Amnesty Act 1996 was enacted to provide an amnesty for those fighting in the conflict with the exception of those involved in the “most serious violations of humanitarian law”.⁸⁴⁹

The above principles can be applied to Ukraine’s situation. Ukraine is entitled to provide an amnesty to those who fought in the conflict in the east to prevent prosecution for their involvement in a war against Ukraine. However, if Ukraine adopts an amnesty law, it should include the full array of international crimes that can still be prosecuted despite the amnesty. As noted above, to comply properly with its international obligations, the list excluded from the amnesty should include Article 438 war crimes (under Article 438 of the Ukrainian Criminal Code) and other potential international crimes such as torture (Article 127 of the Ukrainian Criminal Code).⁸⁵⁰

⁸⁴⁵ Additional Protocol II, art. 6(5):

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

⁸⁴⁶ [‘Practice Relating to Rule 159. Amnesty’ \(ICRC\) citing Guatemala, National Reconciliation Law, 1996, art. 8.](#)

⁸⁴⁷ *Ibid.*

⁸⁴⁸ *Ibid.*

⁸⁴⁹ *Ibid.*

⁸⁵⁰ International Partnership for Human Rights, [‘Making Amnesty Work: Prospects of granting amnesty to the parties of the conflict in Eastern Ukraine’](#) (January 2016), pp. 6-7.

III. The Cooperation Consequences of Ukraine's Declaration

This section will consider the obligations placed on Ukraine subsequent to the Declarations accepting the ICC's jurisdiction. It will also address the consequences of a State's failure to cooperate.

A. *The Obligation to Cooperate with the ICC*

Ukraine must now cooperate with the ICC fully in its investigations and prosecutions. Article 12(3) (the provision which permits Declarations) clearly states that the State which has submitted the Declaration must cooperate with the Court without delay or exception under Part 9 of the Rome Statute (Articles 86-102). This Part applies equally to State and non-States Parties,⁸⁵¹ outlining general and specific cooperation obligations. Part 9 mandates cooperation with the Court to effect an investigation. It provides that States shall comply with, among other provisions, the provision of documents and records, identifying people, taking evidence, questioning people, executing searches or seizures,⁸⁵² surrender of persons to the court⁸⁵³ and provisional arrest.⁸⁵⁴ These will be discussed below in Part Two(C).

It is difficult to give real world examples of how Ukraine must cooperate with the ICC, as most cooperation requirements relate to matters that must remain out of the public eye, such as criminal investigations into war crimes, or confidential arrest warrants that the ICC may transmit to a State to arrest someone without the public knowing. Nevertheless, the following examples of Côte d'Ivoire and Uganda illustrate the ICC's experience with regard to the State's requirement to cooperate.

a) Côte d'Ivoire

In October 2003, Côte d'Ivoire submitted a Declaration regarding crimes committed on its territory since the events of 19 September 2002. The State said that the Declaration was still valid on 18 December 2010.⁸⁵⁵

On 23 June 2011, the Prosecutor requested authorisation from the Pre-Trial Chamber to open an investigation into the alleged crimes committed in Côte d'Ivoire since 28 November 2010 and invited victims to send their representations to the Court on 17 June 2011. The Chamber granted this on 3 October 2011.⁸⁵⁶

No express comment on cooperation was made in the ICC's Prosecutor's report on how the preliminary examinations were progressing that year.⁸⁵⁷ However, early cooperation with the ICC was apparently impressive. For example, Côte d'Ivoire quickly surrendered both Laurent Koudou Gbagbo (ex-President) and Charles Blé Goudé (former youth

⁸⁵¹ Rome Statute, art. 86.

⁸⁵² *Ibid.*, art. 93(1).

⁸⁵³ *Ibid.*, art. 89.

⁸⁵⁴ *Ibid.*, art. 98.

⁸⁵⁵ Côte d'Ivoire Authorisation Decision, para. 10.

⁸⁵⁶ OTP, '[Report on Preliminary Examination Activities](#)' (13 December 2011), para. 122.

⁸⁵⁷ OTP, '[Report on Preliminary Examination Activities](#)' (13 December 2011).

and employment minister and leader of a pro-Gbagbo militia group) to the Court for trial.⁸⁵⁸ Since then, however, State cooperation with the ICC subsequently appears much less impressive. For example, despite President Ouattara declaring to the Court that the judiciary in Côte d'Ivoire could not address the most serious crimes and prosecute those most responsible, the State put the wife of ex-President Gbagbo, Simone Gbagbo on trial in Côte d'Ivoire and refused to surrender her to the ICC, despite an ICC ruling in December 2014 indicating otherwise.⁸⁵⁹

b) Uganda

In December 2013, Uganda ratified the Rome Statute and made a referral of a situation on its territory concerning the long-running civil war with the LRA. Upon the issuance of a Declaration, ICC jurisdiction was extended back to 1 July 2002.⁸⁶⁰

Some suggest that Uganda has failed to cooperate with respect to those that they have failed to arrest. In 2005, five arrest warrants were issued, all for senior LRA commanders, including leader Joseph Kony. The arrest warrants were initially issued and secretly communicated to Uganda, the Democratic Republic of Congo (“DRC”) and Sudan in September 2005.⁸⁶¹ It has been argued that the whereabouts of most of the accused were well-known. Nevertheless, other than Dominic Ongwen (who surrendered to US forces in the CAR⁸⁶²) there has been a failure to make the appropriate arrests, which some argue “undermines the authority of the Court” and offends cooperation requirements of the ICC.⁸⁶³

The Government of Uganda did cooperate with the Court in the arrest and surrender of Ongwen. Given President Museveni’s vocal opposition to the ICC in recent years, many expected that Ongwen would be sent to Uganda to be prosecuted domestically after his surrender in the CAR. However, Museveni insisted the ICC try him. Despite this apparent show of cooperation, it has been suggested that this move “outsourced a potential political problem”, that is, it enabled Uganda to appear to be cooperating with international justice whilst ensuring that the ICCs focused remained only on the crimes committed by the rebels – and not those by the Museveni’s government.

B. Refusal to Cooperate

Refusal to cooperate with the ICC in accordance with the provisions of Article 9 may have negative consequences for Ukraine. If a declaring non-State Party (such as Ukraine) fails to cooperate, the Court can inform the ASP or, if

⁸⁵⁸ [‘Making Justice Count: Lessons from the ICC’s Work in the Côte d’Ivoire’](#) (HRW).

⁸⁵⁹ *Prosecutor v. Simone Gbagbo* ([Admissibility Appeal Judgment](#)), ICC-02/11-01/12-75-Red (27 May 2015); [‘Côte d’Ivoire. Surrender Simone Gbagbo to the ICC’](#) (*Human Rights Watch*, 11 December 2014).

⁸⁶⁰ *Situation in Uganda* ([Assignment Decision](#)) ICC-02/04-1 (5 July 2004) Letter of the Prosecutor of 17 June 2004.

⁸⁶¹ *Situation in Uganda* ([Decision](#)) ICC-02/04-01/05-27 (27 September 2005).

⁸⁶² [LRA rebel Dominic Ongwen surrenders to US forces in CAR](#) (*BBC News*, 7 January 2015); [Senior Lord’s Resistance Army commander surrenders to US troops](#) (*The Guardian*, 7 January 2015).

⁸⁶³ Hakan Friman, ‘Cooperation with the International Criminal Court: Some Thoughts on Improvements Under the Current Regime’, in Mauro Politi and Federica Gioia, *The International Criminal Court and National Jurisdictions* (Ashgate, 2008), pp. 96-97

the situation was referred by the UNSC to the Court, then a report will be made to them. Therefore, Ukraine could be referred to the ASP if it failed to cooperate with the ICC.⁸⁶⁴ Article 87(5)(b) provides:

Where a State not party to this Statute that has entered into an *ad hoc* arrangement or an agreement with the Court fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the ASP or, where the UNSC referred the matter to the Court, the UNSC.

The case of Omar Al-Bashir, former President of Sudan, is an example where a State has been referred to the ASP for failing to cooperate with the Court. In 2014, Al-Bashir visited several States and, despite a warrant for his arrest, those States failed to arrest him. Consequently, Pre-Trial Chamber II made a non-cooperation finding with regard to President Al-Bashir's visit to the DRC particularly concerning the DRC's deliberate refusal to arrest him.³⁶⁸ Subsequently, the decision was communicated to both the UNSC and ASP.³⁶⁹

The ICC did issue a finding of non-cooperation concerning the Libyan Government and referred the matter to the UNSC.³⁷¹ This was precipitated by Libya's failure to execute two requests for cooperation. In short, these requested that Libya surrender Saif Al-Islam Gaddafi, who had recently been indicted by the ICC and was physically located in Libya at the time, and to return documents seized from his legal team in 2012 in the area of Zintan, Libya. However, the UNSC merely emphasised strongly the importance of the Libyan Government's full cooperation with the ICC and the Prosecutor.³⁷²

No specific provision exists in the Rome Statute regarding the kind of measures that may be taken by the ASP upon receipt of the referral.³⁷⁶ The ASP does not have the authority to sanction a State, and it therefore appears that the Assembly's response to non-compliance is limited to taking diplomatic or other political action.³⁷⁷ A formal response would ordinarily follow from a referral to the ASP and the Assembly may adopt resolutions to "scold" the State responsible for non-compliance. Back channels of diplomacy no doubt will also be pursued to try and promote (or compel) cooperation.³⁷⁸

⁸⁶⁴ Rome Statute, art. 87(5)(b).

Part Two(B): What the International Criminal Court Has Jurisdiction over

This section seeks to identify the crimes that the ICC can investigate, prosecute and adjudicate, namely genocide, crimes against humanity and war crimes. It will initially focus on a general description of these three crimes. Within the crimes against humanity section, there will be a discussion concerning the ICC Prosecutor's 2015 preliminary examination report outlining initial findings in relation to the events during Euromaidan. Second, the section will turn to the crime of aggression. Lastly, this section will identify the ways in which a person can be responsible for one of the three crimes under the jurisdiction of the Court.

I. Offences under the Rome Statute

There are four crimes that may be tried by the ICC: genocide, war crimes, crimes against humanity and crime of aggression. For a crime to be established, two principal components must be shown: (i) the contextual, or “chapeau”, elements of the offence; and (ii) the individual act(s) committed in that context. The contextual elements are crucial and distinguish ordinary crimes from international crimes (i.e. murder compared to murder as a crime against humanity). For a successful prosecution, these contextual elements must be proven in addition to the specific acts that make up the conduct of the crime. Depending upon the crimes and modes of responsibility, these components will encompass various legal elements that must also each be proven beyond reasonable doubt. Each will be discussed below.

A. *Genocide*

While unlikely to be relevant to the Ukrainian situation, to establish genocide the following contextual elements are required:

- An act listed in Article 6 of the Rome Statute is committed; and
- It is committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.⁸⁶⁵

The acts in Article 6 that could constitute genocide are: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; or (v) forcibly transferring children of the group to another group.

⁸⁶⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, signed by Ukraine on 20 January 2000) 2187 UNTS 90 (“Rome Statute”), art. 6.

B. Crimes against Humanity

a) The contextual elements

Crimes against humanity have the following contextual elements:

- The occurrence of an “attack”;
- The attack was either widespread or systematic;
- The attack was directed against a civilian population;
- The attack was committed pursuant to, or in furtherance of, a State or organisational policy to commit such an attack;
- A “nexus” exists between the alleged crime and the attack;
- The accused had knowledge of the attack and the way in which his actions formed part of that attack.⁸⁶⁶

The ICC’s “Elements of Crimes” elaborate in part that:

[...] its provisions [article 7], consistent with article 22, must be strictly construed, taking into account that crimes against humanity [...] are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognised by the principal legal systems of the world.⁸⁶⁷

[...]

The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.⁸⁶⁸

The requirements that the attack be “widespread or systematic” and that there be a “policy” are complex. First, the “widespread or systematic” element is commonly termed as “disjunctive”—the attack should be either widespread *or* systematic.⁸⁶⁹ The terms “widespread” or “systematic” do not apply to the individual acts—such as, murder or persecution—and only to the attack as a whole.⁸⁷⁰ “Widespread” refers to victims or geographical scope. It has been

⁸⁶⁶ Rome Statute, art. 7. See also, ICC, Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (UN publication, Sales No. E.03.V.2 and corrigendum), part II.B (“ICC Elements of Crimes”), p. 5.

⁸⁶⁷ ICC Elements of Crimes, p. 5, para. 1.

⁸⁶⁸ *Ibid.*, p. 5, para. 2.

⁸⁶⁹ *Situation in the Republic of Kenya* ([Authorisation Decision](#)) ICC-01/09-19 (31 March 2010) (“Kenya Authorisation Decision”), para. 94.

⁸⁷⁰ *Ibid.*

found to be the large-scale nature of the attack and the number of targeted persons;⁸⁷¹ namely, it should be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.⁸⁷² It can also mean an attack carried out over a small or large geographical area, but directed against a large number of civilians.⁸⁷³ In the context of a widespread attack, the requirement of an organisational policy ensures that the attack, must still be thoroughly organised and follow a regular pattern.⁸⁷⁴

Alternatively, “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence.⁸⁷⁵ The systematic nature of an attack can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis”.⁸⁷⁶ Other factors that may be of relevance to

⁸⁷¹ *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* ([Decision on the Prosecution Application under Article 58\(7\) of the Statute](#)) ICC-02/05-01/07-1-Corr (27 April 2007), para. 62; *Ibid.*, (Confirmation Decision) ICC-01/04-01/07-717 (26 September 2008), para. 394; *Ibid.*, ([Decision on Warrant of Arrest](#)) ICC-02/05-01/09-3 (4 March 2009), para. 81; *The Prosecutor v. Jean Pierre Bemba Gombo* ([Decision](#)) ICC-01/05-01/08-424 (15 June 2009) para. 83; *The Prosecutor v. Callixte Mbarushimana* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/10-1 (28 September 2010), para. 24; *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (30 November 2011), para. 49; *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1123.

⁸⁷² *The Prosecutor v. Jean Pierre Bemba Gombo* ([Decision](#)) ICC-01/05-01/08-424 (15 June 2009), para. 83; *Ibid.*, ([Corrigendum to the Authorisation Decision](#)) ICC-01/09-19-Corr (31 March 2010), para. 95 referring to ICTR, *The Prosecutor v. Akayesu* ([Judgment](#)) ICTR-96-4-T 2 (2 September 1998), para. 580; *Prosecutor v. Musema* ([Judgment](#)) ICTR-96-13-A (27 January 2000), para. 204; *Situation in the Republic of Côte d'Ivoire* ([Corrigendum to Authorisation Decision](#)) ICC-02/11-14-Corr (3 October 2011), para. 53; *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (3 November 2011), para. 49.

⁸⁷³ *The Prosecutor v. Germain Katanga and Matheiu Ngudjolo Chui* ([Decision on the confirmation of charges](#)) ICC-01/04-01/07 (30 September 2008), paras. 394-395; *The Prosecutor v. Blaskić* ([Judgment](#)) IT-95-14-T (3 March 2000), para. 206; *The Prosecutor v. Kordić and Čerkez* ([Judgment](#)) IT-95-14/2-A (17 December 2004), para. 94. See also Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, 2005), p. 225, para. 656..

⁸⁷⁴ *The Prosecutor v. Germain Katanga and Matheiu Ngudjolo Chui* ([Decision on the confirmation of charges](#)) ICC-01/04-01/07 (30 September 2008), para. 396.

⁸⁷⁵ *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* ([Decision on the Prosecution Application under Article 58\(7\) of the Statute](#)) ICC-02/05-01/07-1-Corr (27 April 2007), para. 62; *Ibid.*, (Confirmation Decision) ICC-01/04-01/07-717 (26 September 2008), para. 394; *Ibid.*, ([Decision on Warrant of Arrest](#)) ICC-02/05-01/09-3 (4 March 2009), para. 81; *The Prosecutor v. Jean Pierre Bemba Gombo* ([Decision](#)) ICC-01/05-01/08-424 (15 June 2009), para. 83; *The Prosecutor v. Callixte Mbarushimana* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/10-1 (28 September 2010), para. 24; *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (30 November 2011), para. 49; *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1123.

⁸⁷⁶ Kenya Authorisation Decision, para. 96; *Situation in the Republic of Côte d'Ivoire* ([Corrigendum to Authorisation Decision](#)) ICC-02/11-14-Corr (3 October 2011), para. 54; *Ibid.*, ([Decision on Warrant of Arrest](#)) ICC-02/11-01/11-9-Red (30 November 2011), para. 49. See also *The Prosecutor v. Germain Katanga*, ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1123.

the assessment of whether an attack was systematic are the involvement of substantial public or private resources⁸⁷⁷ and the implication of high-level political and/or military authorities.⁸⁷⁸

Further, a “policy” refers, in essence, to the fact that a State or an organisation intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action. The ICC does not require that a formal design exist. Explicitly advanced motivations are of little importance.⁸⁷⁹ An attack that is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.⁸⁸⁰ In most cases, the existence of a State or organisational policy will be inferred from, among other things, repeated actions according to the same sequence, or preparations or mobilisation orchestrated or coordinated by a State or organisation.⁸⁸¹ It must involve the multiple commissions of acts. It must then be directed against any civilian population.⁸⁸² That population must be the primary target and not incidental to an attack.⁸⁸³

The difference between the “systematic” and “policy” requirements is not always easy to discern. If an attack directed against a civilian population appears to follow a pattern, then this may suggest a policy to attack by the nature of the pattern. This will, in turn, form evidence of a systematic attack.⁸⁸⁴ However, “policy” is a less demanding element than “systematic”.⁸⁸⁵ To establish a “policy”, it need only be demonstrated that the State or organisation meant to commit an attack against a civilian population.⁸⁸⁶ However the term systematic allows the nature of the attack to be characterised and realise a pattern of repeated conduct or the recurring or continuous perpetration of interlinked, non-random acts of violence that establish the existence of a crime against humanity.⁸⁸⁷

i. Examples of “Widespread or Systematic”

Two illustrative examples of the “widespread or systematic” elements arise in the ICC cases of *Gbagbo* and *Ruto, Kosgey and Sang*.

⁸⁷⁷ *The Prosecutor v. Callixte Mbarushimana* ([Confirmation Decision](#)) ICC-01/04-01/10 (16 December 2011) Dissenting Judgment of Judge Monageng, paras 23-25; Kenya Authorisation Decision, para. 96 *citing* ICTR, Trial Chamber, *The Prosecutor v. Jean-Paul Akayesu* ([Judgment](#)) ICTR-96-4-T (2 September 1998), para. 580.

⁸⁷⁸ *The Prosecutor v. Callixte Mbarushimana* ([Confirmation Decision](#)) ICC-01/04-01/10 (16 December 2011) Dissenting Judgment of Judge Monageng, paras 23-25 *citing* ICTY, Trial Chamber, *The Prosecutor v. Tihomir Blaskić* ([Judgment](#)) IT-95-14-T (3 March 2000), para. 203.

⁸⁷⁹ *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1107.

⁸⁸⁰ *The Prosecutor v. Jean Pierre Bemba Gombo* ([Decision](#)) ICC-01/05-01/08-424 (15 June 2009), para. 81.

⁸⁸¹ *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1109.

⁸⁸² *Ibid.*, para. 1102.

⁸⁸³ *Ibid.*, para. 1104.

⁸⁸⁴ *Ibid.*, para. 1111.

⁸⁸⁵ *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on the confirmation of charges](#)) ICC-02/11-01/11 (12 June 2014), para. 216. *See also* Darryl Robinson, ‘Crimes against Humanity: A Better Policy on ‘Policy’, in Carsten Stahn, *The Law and Practice of the International Criminal Court* (OUP, 2015), p. 730.

⁸⁸⁶ Rome Statute, art. 7; *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1113.

⁸⁸⁷ *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07-3436 (7 March 2014), para. 1113.

1) *The Prosecutor v. Gbagbo*

In *Gbagbo*, the Court issued clear guidance on crimes against humanity.⁸⁸⁸ It was alleged that Gbagbo was responsible for crimes against humanity of murder, rape, other inhumane acts, or alternatively attempted murder, and persecution. The Prosecutor relied on these crimes being committed during four particular incidents in Abidjan:

- Attacks on 16-19 December 2010 related to the demonstrations at the Ivorian Radio and Television building, killing 45, raping 16 women and girls and wounding at least 54 persons;
- An attack on 3 March 2011 against a women's demonstration in Abobo, killing seven and wounding three persons;
- The shelling of Abobo market and the surrounding area on 17 March 2011 which killed at least 40 and injured 60 persons; and
- An attack on Yopougon on or around 12 April 2011 in which 75 persons were killed, 22 women were raped and two persons were wounded.⁸⁸⁹

Other acts were also included in the charges, including rapes committed on 16 December 2010 at a demonstration and in the days following, as well as on 25 February 2011, where nine women were allegedly raped.⁸⁹⁰ There was also suppression, including the killing of up to 12 individuals at a demonstration between 27 and 29 November 2010 and killing demonstrators in addition to injuring others on 4 December 2010.⁸⁹¹ Others acts included raids on buildings which resulted in deaths,⁸⁹² and 22 other incidents which included firing at the civilian population; civilians being killed; individuals being abducted and detained in military camps; and acts such as burning people alive, looting, and individuals killed by mortar shelling.⁸⁹³

The Chamber considered whether the attack against civilians were therefore widespread or systematic. It found that the attack was large-scale in nature, and therefore *widespread*, because it:⁸⁹⁴

- Involved a large number of acts;
- Targeted and victimised a significant number of individuals;
- Extended over a time period of more than four months; and
- Affected the entire city of Abidjan, a metropolis of more than three million inhabitants.

Considering the cumulative effect of this series of violent acts, the Chamber was of the view that there were substantial grounds to believe that the attack was “widespread” within the meaning of Article 7(1) of the Statute.

⁸⁸⁸ *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on the confirmation of charges](#)) ICC-02/11-01/11 (12 June 2014).

⁸⁸⁹ *Ibid.*, para. 17.

⁸⁹⁰ *Ibid.*, para. 74.

⁸⁹¹ *Ibid.*, para. 75.

⁸⁹² *Ibid.*, para. 76.

⁸⁹³ *Ibid.*, para. 77.

⁸⁹⁴ *Ibid.*, paras 224-225.

It was further found to be a systematic attack because the evidence gave substantial grounds to believe:

- That preparations for the attack were undertaken in advance.⁸⁹⁵ Preparations were made politically using bribes and consolidating a grip on power as well as militarily to obtain weapons and combat materiel;⁸⁹⁶
- That the attack was planned and coordinated.⁸⁹⁷ Planning was achieved through regular meetings. There were also regular briefings through the general staff of the armed forces and an unhindered flow of information that kept Gbagbo informed of the situation.⁸⁹⁸ There also appeared to be a connection to the mobilisation of the youth for violent acts,⁸⁹⁹ and a lack of sanctions or prevention of violence.⁹⁰⁰
- In addition, the acts of violence analysed by the Chamber revealed a clear pattern of violence directed at pro-Ouattara demonstrators or activists,⁹⁰¹ and more generally against areas whose inhabitants were perceived to be supporters of Alassane Ouattara, such as Muslims.⁹⁰²

2) *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*

The Prosecutor alleged that each of the following crimes below were committed by at least one of the Accused as crimes against humanity in the context of a widespread or systematic attack against members of the civilian population:⁹⁰³ murder; deportation or forcible transfer; persecution for their political affiliation, allegedly committing murder, torture, and deportation or forcible transfer of population. This allegedly took place in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya.⁹⁰⁴

The case concerned election violence, dealing with events immediately after the presidential election results were announced (particularly from 30 December 2007 until 16 January 2008).⁹⁰⁵ The violence involved killings, injuries, displacement and property damage. The case alleged that an attack was carried out following a unified, concerted and criminal strategy by different groups of Kalenjin people in a variety of towns.⁹⁰⁶ It is alleged that the attack

⁸⁹⁵ *The Prosecutor v. Laurent Koudou Gbagbo* ([Decision on the confirmation of charges](#)) ICC-02/11-01/11, PTC-I (12 June 2014), paras 123-149.

⁸⁹⁶ *Ibid.*, paras 123-149.

⁸⁹⁷ *Ibid.*, paras 150-192.

⁸⁹⁸ *Ibid.*, paras 170-179.

⁸⁹⁹ *Ibid.*, paras 165-168.

⁹⁰⁰ *Ibid.*, paras 182-190.

⁹⁰¹ *Ibid.*, paras 24-51, 75-76.

⁹⁰² *Ibid.*, paras 52-72, 77.

⁹⁰³ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11-261-AnxA (23 January 2012), para. 22.

⁹⁰⁴ *Ibid.*

⁹⁰⁵ *Ibid.*, para. 167.

⁹⁰⁶ Including Turbo town, the greater Eldoret area (encompassing Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town, in the Uasin Gishu and Nandi Districts, the Republic of Kenya. *Ibid.*, para. 168.

targeted civilians, particularly ethnic groups perceived as supporters of the Party of National Unity (“PNU”) (largely hailing from the “Kikuyu”, “Kamba” and “Kisii” ethnic groups).⁹⁰⁷

The Chamber was of the view there was a plan to punish PNU supporters if the 2007 elections were rigged, focused on expelling them from specific locations.⁹⁰⁸ To carry out the plan, a network of perpetrators was allegedly established. The network seemingly had a command structure and an established hierarchy.⁹⁰⁹ Further, it allegedly possessed the means to carry out a widespread or systematic attack against the civilian population, as its members had access to and utilised a considerable amount of capital, guns, crude weapons and manpower.⁹¹⁰

The Chamber approached the “widespread” or “systematic” test separately. It found that there were substantial grounds to believe the attack was widespread.⁹¹¹ Viewed as a whole, the evidence showed that the attack was massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilian victims. The Court said “[t]his is demonstrated by the geographical scope of the attack, which covered four different locations in two districts (Uasin Gishu and Nandi) of the Rift Valley Province”.⁹¹² In the locations included in the charges, the amount of burning and destruction of properties, injuries and murders was among the highest in the whole Kenyan territory. As a consequence, the Uasin Gishu and Nandi Districts registered a number of victims that was among the largest of the post-election violence in Kenya.⁹¹³ The violence in the Uasin Gishu District (encompassing Turbo town and the greater Eldoret area) resulted in the death of more than 230, injury to 505 persons and the displacement of more than 5000 persons.⁹¹⁴ In the Nandi District (encompassing Kapsabet town and Nandi Hills town) at least seven people were murdered and a number of houses and business premises were looted and burnt.⁹¹⁵ Thousands of people in Kapsabet and in Nandi Hills were forced to seek refuge at the respective police stations or in camps for internally displaced persons in the surrounding areas.⁹¹⁶ As a result, the attack satisfied the “widespread” test.

Further, the Chamber found that there were substantial grounds to believe that the attack was “systematic”. Initially, the Chamber reminded itself that an attack is systematic when it implies the “organised nature of the acts of violence and the improbability of their random occurrence”.⁹¹⁷ First, the Chamber found that during the preparatory phase of the attack as well as during its execution, coordinators were in charge of identifying houses belonging to PNU supporters to be attacked in the different target locations. Some of these coordinators were later deployed on the

⁹⁰⁷ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11-261-AnxA (23 January 2012), paras 164-167.

⁹⁰⁸ *Ibid.*, para. 200.

⁹⁰⁹ *Ibid.*, para. 197.

⁹¹⁰ *Ibid.*, para. 220.

⁹¹¹ *Ibid.*, para. 176.

⁹¹² *Ibid.*, para. 176.

⁹¹³ *Ibid.*, paras 167-172, 176.

⁹¹⁴ *Ibid.*

⁹¹⁵ *Ibid.*

⁹¹⁶ *Ibid.*

⁹¹⁷ *Ibid.*, para. 179 citing Kenya Authorisation Decision, para. 96.

ground to assist the perpetrators and make sure that the selected properties were attacked and burnt down and that PNU supporters were victimised. Second, the evidence showed that the perpetrators approached the target locations simultaneously, in large numbers and from different directions, by vehicles, on foot or both. Third, the perpetrators erected roadblocks around such locations with a view toward intercepting PNU supporters attempting to flee, with the aim of eventually killing them. Finally, in the actual implementation of the attack, the physical perpetrators used petrol and other inflammable material to systematically burn down the properties belonging to PNU supporters.⁹¹⁸

Therefore, the Chamber found there were substantial grounds to believe that the attacks carried out by perpetrators from 30 December 2007 to 16 January 2008 against members of the communities believed to be supporting the PNU were both widespread and systematic.⁹¹⁹ The charges were confirmed against Ruto and Sang.⁹²⁰

b) Types of Crimes against Humanity

The individual acts constituting crimes against humanity are less extensive than war crimes. They include:

- Crime against humanity of murder.⁹²¹ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator killed one or more persons;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.⁹²²
- Crime against humanity of extermination.⁹²³ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population;
 - The conduct constituted, or took place as part of, a mass killing of members of a civilian population;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹²⁴

⁹¹⁸ *Ibid.*, para. 179.

⁹¹⁹ *Ibid.*, para. 180.

⁹²⁰ However, the charges were not confirmed against Kosgey as there was insufficient evidence to find substantial grounds to establish his criminal responsibility. *Ibid.*, para. 293.

⁹²¹ Rome Statute, art. 7(1)(a).

⁹²² ICC Elements of Crimes, p. 5.

⁹²³ Rome Statute, art. 7(1)(b).

⁹²⁴ ICC Elements of Crimes, p. 6.

- Crime against humanity of enslavement.⁹²⁵ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them to a similar deprivation of liberty;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹²⁶
- Crime against humanity of deportation or forcible transfer of population.⁹²⁷ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts;
 - Such person or persons were lawfully present in the area from which they were so deported or transferred;
 - The perpetrator was aware of the factual circumstances that established the lawfulness of such presence;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹²⁸
- Crime against humanity of imprisonment or other severe deprivation of physical liberty.⁹²⁹ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;
 - The gravity of the conduct was such that it was in violation of fundamental rules of international law;
 - The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

⁹²⁵ Rome Statute, art. 7(1)(c).

⁹²⁶ ICC Elements of Crimes, p. 6.

⁹²⁷ Rome Statute, art. 7(1)(d).

⁹²⁸ ICC Elements of Crimes, pp. 6-7.

⁹²⁹ Rome Statute, art. 7(1)(e).

- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹³⁰
- Crime against humanity of torture.⁹³¹ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
 - Such person or persons were in the custody or under the control of the perpetrator;
 - Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹³²
- Crime against humanity of rape.⁹³³ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
 - The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹³⁴
- Crime against humanity of sexual slavery.⁹³⁵ To prove this act, the ICC Prosecutor must show all of the following elements:

⁹³⁰ ICC Elements of Crimes, pp. 6-7.

⁹³¹ Rome Statute, art. 7(1)(f).

⁹³² ICC Elements of Crimes, p. 7.

⁹³³ Rome Statute, art. 7(1)(g)(1).

⁹³⁴ ICC Elements of Crimes, p. 8.

⁹³⁵ Rome Statute, art. 7(1)(g)(2).

- The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
 - The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹³⁶
- Crime against humanity of enforced prostitution.⁹³⁷ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent;
 - The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹³⁸
 - Crime against humanity of forced pregnancy.⁹³⁹ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁴⁰

⁹³⁶ ICC Elements of Crimes, p. 8.

⁹³⁷ Rome Statute, art. 7(1)(g)(3).

⁹³⁸ ICC Elements of Crimes, p. 9.

⁹³⁹ Rome Statute, art. 7(1)(g)(4).

⁹⁴⁰ ICC Elements of Crimes, p. 9.

- Crime against humanity of enforced sterilization.⁹⁴¹ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator deprived one or more persons of biological reproductive capacity;
 - The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁴²
- Crime against humanity of sexual violence.⁹⁴³ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent;
 - Such conduct was of a gravity comparable to the other offences in Article 7, paragraph 1 (g), of the Statute;
 - The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁴⁴
- Crime against humanity of persecution.⁹⁴⁵ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights;
 - The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such;

⁹⁴¹ Rome Statute, art. 7(1)(g)(5).

⁹⁴² ICC Elements of Crimes, p. 9.

⁹⁴³ Rome Statute, art. 7(1)(g)(6).

⁹⁴⁴ ICC Elements of Crimes, p. 10.

⁹⁴⁵ Rome Statute, art. 7(1)(h).

- Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law;
 - The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁴⁶
- Crime against humanity of enforced disappearance of persons.⁹⁴⁷ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator: (i) Arrested, detained or abducted one or more persons; or (ii) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons;
 - Either: (i) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (ii) Such refusal was preceded or accompanied by that deprivation of freedom;
 - The perpetrator was aware that: (i) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (ii) Such refusal was preceded or accompanied by that deprivation of freedom;
 - Such arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, a State or a political organisation;
 - Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organisation;
 - The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁴⁸

⁹⁴⁶ ICC Elements of Crimes, p. 10.

⁹⁴⁷ Rome Statute, art. 7(1)(i).

⁹⁴⁸ ICC Elements of Crimes, p. 11.

- Crime against humanity of apartheid.⁹⁴⁹ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator committed an inhumane act against one or more persons;
 - Such act was an act referred to in Article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts;
 - The perpetrator was aware of the factual circumstances that established the character of the act;
 - The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups;
 - The perpetrator intended to maintain such regime by that conduct;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁵⁰
- Crime against humanity of other inhumane acts.⁹⁵¹ To prove this act, the ICC Prosecutor must show all of the following elements:
 - The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
 - Such act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute;
 - The perpetrator was aware of the factual circumstances that established the character of the act;
 - The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
 - The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁵²

C. War Crimes

a) Contextual elements

The following “contextual elements” are required for war crimes:

- There must be a conflict of an international or non-international nature. War crimes do not apply to internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other similar acts;⁹⁵³

⁹⁴⁹ Rome Statute, art. 7(1)(j).

⁹⁵⁰ ICC Elements of Crimes, p. 12.

⁹⁵¹ Rome Statute, art. 7(1)(k).

⁹⁵² ICC Elements of Crimes, p. 12.

⁹⁵³ Rome Statute, arts. 8(2)(d) and (f).

- The crime must be committed during, and have a sufficient nexus to, the armed conflict;⁹⁵⁴ and
- The perpetrator must be aware of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with”.⁹⁵⁵

In addition to the contextual elements, individual acts are required to prove “war crimes”. A war crime is defined as behaviour that is in serious violation of the laws and customs applicable during war—whether that war is an international or a non-international armed conflict. This includes a range of behaviours, from torture and taking hostages to pillaging and directing attacks intentionally against civilians. Article 8 of the Rome Statute offers a comprehensive list of applicable acts. The parts below will outline when a conflict exists, the difference between an international and non-international armed conflict and the nexus between the conduct and the conflict.

i. Existence of an Armed Conflict

The first element required to be satisfied before a war crime is considered is the existence of an armed conflict. While neither the Rome Statute or the ICC’s “Elements of Crimes” (which assists the ICC in interpreting crimes listed in the Rome Statute) define what constitutes an “armed conflict” for the purposes of Article 8, the Trial Chamber in *Lubanga* (relying on the original formulation in the *Tadić* case from the ICTY)⁹⁵⁶ found that:

[...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the *whole territory* of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁹⁵⁷

Thus, there is a reference to armed violence between two States or between State authorities and organised armed groups. Each is discussed below.

ii. International Armed Conflicts

The war crimes provided in the Rome Statute (and, more generally, IHL as a whole) differentiate between crimes committed during an international armed conflict and a non-international armed conflict. With regards to international armed conflicts, Article 2(1) common to all four of the Geneva Conventions 1949 reads:

[...] the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,

⁹⁵⁴ Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, 2005) at 773-823, 833-847, 854-856.

⁹⁵⁵ Elements of Crimes, p. 13; Knut Dormann, *War Crimes under the Rome Statute of the ICC* (Cambridge University Press, 2003)p. 359.

⁹⁵⁶ *The Prosecutor v. Tadić* ([Appeals Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#)) IT-94-1-AR72 (2 October 1995) (“Tadić Interlocutory Appeal Decision”).

⁹⁵⁷ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 (14 March 2012) (“Lubanga Trial Judgment”), para. 533; *The Prosecutor v. Akayesu* ([Trial Judgment](#)) ICTR-96-4-T (2 September 1998) paras. 619-21 and 625.

even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁹⁵⁸

This identifies a declaration of war between States and the occupation of one by another. According to the ICRC:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.⁹⁵⁹

In *Lubanga*, the Chamber considered that an armed conflict was of an international character if:

it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international—or, depending upon the circumstances, be international in character alongside an internal armed conflict—if (i) another State intervenes in that conflict through its troops (direct intervention), or (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).⁹⁶⁰

In cases of alleged indirect intervention, it will be necessary to establish that the foreign State had “overall control” over the non-State actor in question, i.e., that it played a role in “organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping the group or providing operational support to it”.⁹⁶¹

iii. Non-International Armed Conflicts

The test for non-international armed conflicts is set out under Article 8(2)(f) of the Rome Statute which reads:

Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.⁹⁶²

⁹⁵⁸ Geneva Convention on Wounded and Sick in Armed Forces in the Field (adopted, entered into force 21 October 1950) 75 UNTS 31 (“Geneva Convention I”) art. 2; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted, entered into force 21 October 1950) 75 UNTS 85 (“Geneva Convention II”) art. 2; Geneva Convention Relative to the Treatment of the Prisoners of War (adopted, entered into force 21 October 1950) 75 UNTS 135 (“Geneva Convention III”) art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted, entered into force 21 October 1950) 75 UNTS 287 (“Geneva Convention IV”) art. 2.

⁹⁵⁹ ICRC, [Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field](#), Geneva, 12 August 1949: Commentary of 1952.

⁹⁶⁰ *Lubanga Trial Judgment*, para. 295. See also, *The Prosecutor v. Delalić et al. (Trial Judgment)* IT-99-36-T (16 November 1998) para. 183.

⁹⁶¹ *The Prosecutor v. Tadić (Appeals Judgment)* IT-94-1-A (15 July 1999) para. 137.

⁹⁶² The ICRC commentary on Common Article 3 provides useful criteria for determining whether a non-international armed conflict exists: ‘1. That the Party in revolt against the de jure Government possesses an organized military force, an

Therefore, in order to prove the existence of a non-international armed conflict, the prosecution will have to show: (i) a degree of organisation of the warring parties; and (ii) that the violence has reached a certain level of intensity.⁹⁶³

Prosecutors are not required to establish that the group exercised control over part of the territory of the State or that it acted under responsible command. The issue is whether it is sufficiently organised to be capable of carrying out protracted armed violence. In *Lubanga*, the Trial Chamber identified the following factors as being relevant to that analysis:

the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.⁹⁶⁴ None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was "organized".⁹⁶⁵

In relation to the second requirement, the violence must be more than sporadic or isolated to rise to the level of armed conflict and the courts have emphasised that acts of banditry, unorganised and short-lived insurrections, and terrorist activities are excluded from IHL.⁹⁶⁶ In *Mrkšić*, the ICTY reiterated the key indicia outlined in *Tadić* as follows:

the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.⁹⁶⁷

authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention. 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory. 3. (a) That the de jure Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.' [ICRC, Convention \(IV\) relative to the Protection of Civilian Persons in Time of War](#), Geneva, 12 August 1949, Commentary of 1958.

⁹⁶³ *The Prosecutor v. Dordević* ([Trial Judgment](#)) IT-05-87/1-T (23 February 2011) ("Dordević Trial Judgment") para. 1522.

⁹⁶⁴ *The Prosecutor v. Limaj et al* ([Trial Judgment](#)) IT-03-66-T (30 November 2005) ("Limaj Trial Judgment") para. 90; *The Prosecutor v. Haradinaj et al.* ([Trial Judgment](#)) IT-04-84-T (3 April 2008) para. 60; *The Prosecutor v. Bošković* ([Trial Judgment](#)) IT-04-82-T (10 July 2008) paras. 199-203.

⁹⁶⁵ *Lubanga Trial Judgment*, para. 537.

⁹⁶⁶ *Dordević Trial Judgment*, para. 1522.

⁹⁶⁷ *The Prosecutor v. Mrkšić et al.* ([Trial Judgment](#)) IT-95-13/1-T (27 September 2007) para. 407. *See also*, *Limaj Trial Judgment*, para. 90; *Prosecutor v. Tadić* ([Trial Judgment](#)) IT-94-1-T (7 May 1997) ("Tadić Trial Judgment"), paras. 565-567; *The Prosecutor v. Blaškić* ([Trial Judgment](#)) IT-95-14-T (3 March 2000) ("Blaškić Trial Judgment"), para. 64: 'it is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are part'.

Finally, it is emphasised that depending on the nature of the parties to the hostilities, it is possible for a non-international armed conflict and an international armed conflict to occur simultaneously on a single territory.⁹⁶⁸

iv. Armed Conflict and Nexus to the Alleged Violations

Once the existence of an armed conflict is established, IHL applies not just to the theatre of combat operations but within the whole territory of the State concerned.⁹⁶⁹ That is not to say that all crimes committed during an armed conflict may be characterised as war crimes. In order to fall within the scope of Article 8, the Prosecution must prove that the alleged perpetrator's conduct occurred "in the context of" and was "associated with" the armed conflict.⁹⁷⁰ Insisting on a nexus between the alleged offending and the armed conflict serves to distinguish between conduct which be properly prosecuted as a war crime and that which should only be punishable under domestic criminal law.

The Appeals Chamber of the ICTY in *Kunarac* considered the nature of this nexus requirement, stating that:

[...] a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.⁹⁷¹

In that case, the Court rejected the Defence's submission that this was akin to a "but for" test (a direct cause and effect). The Chamber considered that the "laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it".⁹⁷² Further, the "laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation".⁹⁷³

With the above in mind, the Court will have to be satisfied that there exists a sufficient geographical and temporal link between impugned conduct and the hostilities, and this will be a question of fact.⁹⁷⁴ The following factors, while not determinative, are particularly apposite when determining whether an offence qualifies as a war crime:

- The perpetrator is a combatant;

⁹⁶⁸ Tadić Interlocutory Appeal Decision, paras. 72-77; Lubanga Trial Judgment, para. 540; *The Prosecutor v. Germain Katanga* ([Trial Judgment](#)) ICC-01/04-01/07 (7 March 2014) ("Katanga Trial Judgment"), para. 1174.

⁹⁶⁹ *Prosecutor v. Bagilishema* ([Trial Judgment](#)) ICTR-95-1A-T (7 June 2001), para. 101.

⁹⁷⁰ ICC Elements of Crimes, p. 13.

⁹⁷¹ *The Prosecutor v. Dragoljub Kunarac et al.* ([Appeal Judgment](#)) IT-96-23 and IT-96-23/1-A (12 June 2002) ("Kunarac Appeal Judgment"), para. 58.

⁹⁷² Kunarac Appeal Judgment, para. 60.

⁹⁷³ *Ibid.*, para. 60.

⁹⁷⁴ *The Prosecutor v. Stakić* ([Appeal Judgment](#)) IT-97-24-A (22 March 2006) ("Stakić Appeals Judgment"), paras. 343-347.

- The victim is a non-combatant;
- The victim is a member of the opposing party;
- The act may be said to serve the ultimate goal of a military campaign; and
- The crime is committed as part of or in the context of the perpetrator's official duties.⁹⁷⁵

In *Rutaganda*, the International Criminal Tribunal for Rwanda ("ICTR") elaborated on the test formulated in *Kunarac et al.*:

First, the expression "under the guise of the armed conflict" does not mean simply "at the same time as an armed conflict" and/or "in any circumstances created in part by the armed conflict". For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime [...] By contrast, the accused in *Kunarac*, for example, were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part. Second, as paragraph 59 of the *Kunarac* Appeal Judgement indicates, the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one. Particular care is needed when the accused is a non-combatant.⁹⁷⁶

The ICC for its part has endorsed the approach of the *ad hoc* tribunals, such as the ICTY. The Trial Chamber in *Katanga* considered that:

the perpetrator's conduct must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct of the perpetrator and the conduct need not have taken place in the midst of battle.⁹⁷⁷

b) Individual Acts

The following are individual acts making up war crimes that can be committed during an international armed conflict:

- Grave breaches of the Geneva Conventions:
 - Wilful killing;
 - Torture or inhuman treatment, including biological experiments;
 - Wilfully causing great suffering, or serious injury to body or health;
 - Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
 - Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

⁹⁷⁵ *Kunarac* Appeal Judgment, para. 59. See also, *The Prosecutor v. Kamuhanda* ([Trial Judgment](#)) ICTR-95-54A-T, (22 January 2004) ("Kamuhanda Trial Judgment"), paras 734-735: '[t]hese criteria are not exhaustive of the factors indicating the existence of a close relationship between a particular offence and an armed conflict'.

⁹⁷⁶ *Rutaganda v. The Prosecutor* ([Appeal Judgment](#)) ICTR-96-3-A (26 May 2003), para. 570.

⁹⁷⁷ *Katanga* Trial Judgment, para. 1176.

- Unlawful deportation or transfer or unlawful confinement;
- Taking of hostages.⁹⁷⁸
- Other serious violations of the laws and customs of war:
 - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
 - Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - Killing or wounding treacherously individuals belonging to the hostile nation or army;

⁹⁷⁸ Rome Statute, art. 8(2)(a)(i)-(viii).

- Declaring that no quarter will be given;
- Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- Pillaging a town or place, even when taken by assault;
- Employing poison or poisoned weapons;
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123;
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.⁹⁷⁹

⁹⁷⁹ *Ibid.*, art. 8(2)(b)(i)-(xxvi).

- Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;⁹⁸⁰
- Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;⁹⁸¹
- Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.⁹⁸²

The list of war crimes in a non-international armed conflict includes:

- Violations of Article 3 common to the four Geneva Conventions:
 - Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - Taking of hostages;
 - The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.⁹⁸³
- Other serious violations of the laws and customs of war:
 - Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - Pillaging a town or place, even when taken by assault;

⁹⁸⁰ [ICC Assembly of States Parties, Resolution ICC-ASP/16/Res.4](#), 12th Plenary Meeting, 14 December 2017 (adopted by consensus).

⁹⁸¹ *Ibid.*

⁹⁸² *Ibid.*

⁹⁸³ *Rome Statute*, art. 8(2)(c)(i)-(iv).

- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
- Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- Killing or wounding treacherously a combatant adversary;
- Declaring that no quarter will be given;
- Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- Employing poison or poisoned weapons;
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;⁹⁸⁴
- Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production;⁹⁸⁵
- Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays;⁹⁸⁶
- Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices;⁹⁸⁷
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.⁹⁸⁸

⁹⁸⁴ *Ibid.*, art. 8(2)(e)(i)-(xv).

⁹⁸⁵ [ICC Assembly of States Parties, Resolution ICC-ASP/16/Res.4](#), 12th Plenary Meeting, 14 December 2017 (adopted by consensus).

⁹⁸⁶ *Ibid.*

⁹⁸⁷ *Ibid.*

⁹⁸⁸ [ICC Assembly of States Parties, Res ICC-ASP/18/ Res.5](#), 9th Plenary Meeting, 6 December 2019 (adopted by consensus).

II. The Crime of Aggression

The crime of aggression is identified as one of the four crimes that the ICC can prosecute in the Rome Statute.⁹⁸⁹ As mentioned in Chapter One, Part One, the Rome Statute provision on the crime of aggression became fully operational on 17 July 2018.

As is routine during international negotiations concerning the establishment of a treaty, the status of the crime of aggression came as a result of a compromise reached during the negotiations of the Statute of the Court in Rome.⁹⁹⁰ In short, in exchange for the promise to include the crime of aggression in the Rome Statute, it was not defined and its jurisdictional conditions were not outlined. The Statute effectively delays adopting the crime until a later date:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123⁹⁹¹ defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the UN Charter.⁹⁹²

A. Developments in 2010 on the Crime of Aggression

A Review Conference of the Rome Statute was held in Kampala, Uganda, between 31 May and 11 June 2010 to amend the Rome Statute to include a definition of the crime of aggression and set out the condition of the Court's jurisdiction over this crime.⁹⁹³ This amendment was the result of many years of preparatory work by the Special Working Group on the Crime of Aggression, which worked on the issue from 2003 to 2009, finally agreeing on a definition that was adopted during the Kampala conference.⁹⁹⁴ Thereafter, the conference focused primarily on negotiating how the ICC may try the crime of aggression.

B. The Components of the Crime of Aggression

a) Definition

After it was amended and adopted at the Kampala conference,⁹⁹⁵ Article 8bis defining the crime of aggression was inserted into the Rome Statute. It reads:⁹⁹⁶

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise

⁹⁸⁹ *Ibid.*, art. 5.

⁹⁹⁰ *Ibid.*, art. 5(2); International Criminal Court Assembly of States Parties, Res RC/Res.6, 13th Plenary Meeting, 11 June 2010 (adopted by consensus) (“Aggression Resolution”).

⁹⁹¹ Art. 121 of the Rome Statute pertains to ‘Amendments’ and art. 123 pertains to ‘Review of the Statute’.

⁹⁹² *Ibid.*, art. 5(2).

⁹⁹³ ICC, [‘Review Conference of the Rome Statute of the International Criminal Court’](#) (Kampala, 31 May-11 June 2010) (Official Records, RC/9/11).

⁹⁹⁴ *Ibid.*, Annex III, p. 45 *et seq.*

⁹⁹⁵ Aggression Resolution.

⁹⁹⁶ Following the procedure required under art. 121 of the Rome Statute.

control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁹⁹⁷

Accordingly, the provision that defines the crime is Article 8*bis* of the Rome Statute. This Article defines the overall crime of aggression as the planning, preparation, initiation or execution of an act of aggression by an individual in a leadership position who is able to “effectively” “exercise control” “or to direct the political or military action of a State”. Therefore, while the “crime of aggression” is an offence committed by an individual as opposed to the “act of aggression” committed by a State, an individual may only be shown to be guilty of the offence if it is proved that there has been an “act of aggression” committed by a State.

An “act” of aggression is defined as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the UN.⁹⁹⁸ It must be noted that the offence must have been committed and that threats are not sufficient pursuant to Article 8*bis* of the Statute.

⁹⁹⁷ Rome Statute, art. 8*bis*.

⁹⁹⁸ *Ibid.*, art. 8*bis*(2). *In particular*, the use of lawful self-defence cannot be regarded as an act of aggression according to [art. 51 of the UN Charter](#).

b) Who can Perpetrate an Act of Aggression?

The perpetrator of the act of aggression is a person who is in a position effectively to exercise control over or to direct the political or military action of a State.⁹⁹⁹

Annex II to the resolution adopted in Kampala further specifies the conditions for individual responsibility, providing that:

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

[...]

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.¹⁰⁰⁰

In technical terms, the “ingredients” that must be shown to attribute responsibility to an individual for the crime of aggression, are:

- The perpetrator planned, prepared, initiated or executed an act of aggression;
- The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression;
- The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed;
- The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations;
- The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations; and
- The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.¹⁰⁰¹

In sum, in addition to the condition about his or her leadership position, the perpetrator must have taken an active part in the act of aggression through the preparation, initiation or execution of this act. Notably, the perpetrator will remain liable even if it cannot be established that he or she knowingly continued a manifest violation of the UN Charter or a use of armed force inconsistent with the UN Charter. He or she must only be aware of the factual circumstances that established the objective characterisation of the use of armed force or other act of aggression that constitutes a manifest violation of the UN Charter.

⁹⁹⁹ *Ibid.*, art. 8bis.

¹⁰⁰⁰ Aggression Resolution, Annex II, ‘Introduction’.

¹⁰⁰¹ *Ibid.*, Annex II, ‘Elements’.

c) The Threshold for the Act of Aggression

Article 8*bis* sets a gravity threshold for an act to constitute a crime of aggression: the act of aggression must constitute a manifest violation of the UN Charter by its character, gravity and scale. Annex III to the Kampala resolution clarifies that the conditions of character, gravity and scale must be viewed cumulatively to determine whether an act of aggression constitutes a manifest violation of the UN Charter. No one component can be significant enough to satisfy the manifest standard by itself.¹⁰⁰²

d) Jurisdiction over the Crime of Aggression

As per the ASP decision of December 2017 on the activation of the crime of aggression, the Court may only exercise its jurisdiction over aggression committed after 17 July 2018. Consistent with the general prohibition provided by the Statute on the exercise of retroactive jurisdiction, the Court may not exercise jurisdiction over acts of aggression committed before this date. The Statute provides distinct jurisdictional requirements for the investigation and prosecution of the crime of aggression depending on whether the crime was referred to the ICC by a State, or the UN Security Council or the examination was launched by the Prosecutor on her own initiative.

i. Competence of the ICC Following a State Referral or Initiative by the Prosecutor

Article 15*bis* of the Statute defines the jurisdictional regime applicable to the situations when the ICC Prosecutor investigates and prosecutes acts of aggression either (i) through a referral by a State Party to the ICC Prosecutor; or (ii) on her own initiative.¹⁰⁰³ In these situations, the ICC may exercise its jurisdiction over the crime of aggression if it was committed by the nationals or on the territory of a State Party to the Statute that has ratified the Kampala Resolution as long as the relevant act occurs one year after the date of ratification.

The Court is unable to exercise jurisdiction over the crime of aggression if the crime was committed by the nationals or on the territory of a State that did not ratify the Statute.¹⁰⁰⁴ However, for State Parties, the State would have to opt out through lodging a declaration with the ICC Registrar stating that it does not accept jurisdiction over the crime of aggression.¹⁰⁰⁵

ii. Competence of the ICC following a referral by the Security Council

Article 15*ter* of the Statute allows the ICC to exercise its jurisdiction over the crime of aggression committed in the territory and by the nationals of any State when it is referred to the ICC Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter. There is no requirement for the involved States to consent to the investigation

¹⁰⁰² *Ibid.*, Annex III(7).

¹⁰⁰³ Pursuant to the Rome Statute, arts. 13(a)-(c).

¹⁰⁰⁴ Rome Statute, art. 15*bis*(5).

¹⁰⁰⁵ *Ibid.*, art. 15*bis*(4).

or prosecution, meaning the ICC may exercise its jurisdiction irrespective of whether or not the State in question is a party to the Statute and has ratified the Kampala Resolution.¹⁰⁰⁶

C. The Crime of Aggression and Ukraine and Russia

This section considers whether the ICC would have jurisdiction over the crime of aggression allegedly committed by the Russian officials against Ukraine. The question of whether the ICC should have subject-matter jurisdiction—in other words, whether the crime actually occurred—is outside the scope of this report. Moreover, as will be discussed, jurisdiction will likely bar any future prosecution for recent alleged acts of aggression that have been committed by Russia. This section will focus on whether prosecuting a State such as Russia for alleged aggression before the crime is adopted by the ICC (i.e., with a focus on alleged Russian aggression to date) would contravene a principle known as “non-retroactivity”. It will then address whether the Court may have temporal jurisdiction over acts of aggression which begin before the relevant Rome Statute provisions entered into force, but “continue” after the activation of the crime of aggression.

a) Non-Retroactivity

This section addresses the first question: can the crime of aggression be prosecuted for the aforementioned alleged conduct, namely aggressive conduct occurring before the crime of aggression actually became a crime in the Rome Statute? As mentioned above, the Court may not prosecute aggressive conduct that occurred before the crime was within the jurisdiction of the ICC. This is known as applying jurisdiction “retroactively” and is prohibited at the ICC.¹⁰⁰⁷ Article 11 states that the Court has jurisdiction only for crimes committed “after the entry into force” of a declaration or the Rome Statute. Article 24 states that no person shall be responsible criminally under the Rome Statute for conduct before the entry into force of the Statute (and the crimes it provides for). As one commentator suggests, the question of retroactivity is a non-concern for aggression because the Rome Statute is so explicit in prohibiting it.¹⁰⁰⁸

Further, the Special Working Group on the Crime of Aggression (which is a group set up by the ASP) has indicated the following:

- a. The crime of aggression’s provisions should only apply prospectively. There was no objection to spelling this out in the Rome Statute.

¹⁰⁰⁶ Aggression Resolution, Annex III(2).

¹⁰⁰⁷ Rome Statute, art. 24:

Article 24 Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

¹⁰⁰⁸ Jennifer Trahan, ‘A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon’ [2012] 33(4) U. Pa. J. Int’l L. (“Trahan”), pp. 924-925; SWGA, ‘[Report of the Special Working Group on the Crime of Aggression](#)’, ICC-ASP/7/20/Add.1, pp. 27-28, paras 40-41; SWGA, ‘[Non-paper on other substantive issues on aggression to be addressed by the Review Conference](#)’, ICC-ASP/7/20/Add.1, p. 36, paras 13-14.

b. The Special Working group advanced a suggestion to facilitate deeper discussion with the following amendments to Article 11 of the Rome Statute:

- i. It is understood that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].
- ii. It is understood that (for a State referral or when the Prosecutor initiates an investigation) the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.¹⁰⁰⁹

These comments from the Working group are not binding on the ASP. They are, however, persuasive in clarifying the elements of the crime. Accordingly, pursuant to the decision of the ASP of December 2017 on the activation of the crime of aggression, the Court may only exercise its jurisdiction over acts of aggression committed after 17 July 2018.

b) The Lack of an Exception for “Ongoing” Offences

This section considers whether there is an exception to the principle of non-retroactivity above. It could be argued that the crime of aggression is a “continuing” act, particularly in regards to occupation. This is relevant to the occupation of Crimea by the Russian Federation. There is an argument to suggest that the physically continuing act of an occupation could begin before the crime of aggression enters into force, and continue into a period when the crime is in force. In other words, the conduct is still occurring when it is criminalised. However, it appears that there is no such exception to the non-retroactivity principle to prosecute the offence because it is the initial act of aggression that forms the crime i.e., the initial activity and not the on-going activity is the focus of the crime. This is discussed below. First, a literal reading of the crime appears to suggest that the crime of aggression is a singular act. This would prevent the execution of an invasion or other act being the date of the crime. The Rome Statute provisions suggests a singular act as opposed to an ongoing act: “[t]he perpetrator planned, prepared, initiated or executed an act of aggression”.¹⁰¹⁰ These phrases, particularly “executed an act” suggests that the definition does not include a continuing course of conduct of aggression. It appears that the scope of the crime was intended to be limited to the initial execution of the aggressive act.

There is, however, an ongoing debate about whether the offence of “occupation”, which is considered an act of aggression, is an ongoing act and each day of occupation is a crime. One commentator recognises that on the one hand, the provision seems to suggest the crime is complete after the initial aggression and violence against a State, yet on the other hand, the reference to occupation suggests that the act of aggression may be an ongoing offence.¹⁰¹¹

¹⁰⁰⁹ SWGA, ‘[Report of the Special Working Group on the Crime of Aggression](#)’, ICC-ASP/7/20/Add.1, pp. 27-28, paras. 40-41; SWGA, ‘[Non-paper on other substantive issues on aggression to be addressed by the Review Conference](#)’, ICC-ASP/7/20/Add.1, p. 36, paras. 13-14.

¹⁰¹⁰ Rome Statute, art. 8bis(1); Elements of crimes, p. 43; ICC, ‘[Review Conference of the Rome Statute of the International Criminal Court](#)’ (Kampala, 31 May-11 June 2010) (Official Records, RC/9/11) Part I.

¹⁰¹¹ Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013) p. 394.

She settles on the view that the act of aggression is an ongoing offence, meaning each day is criminal. In particular, she notes that the crime reflects another international law principle—*jus ad bellum*—under which an act could continue for as long as the force continues to amount to a serious violation of the Charter of the UN.¹⁰¹²

Conversely, as briefly discussed above, the Rome Statute appears to suggest that the idea of an occupation relates more to the initial invasion or attack as being the act of aggression. Article 8bis(2)(a) includes “the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, *resulting from such invasion or attack*, or any annexation by the use of force of the territory of another State or part thereof [emphasis added]” as qualifying as an act of aggression.¹⁰¹³ The act of occupation therefore is termed as a result of an invasion or an attack, suggesting a singular act of aggression.

The term “occupation” is not further defined in the Rome Statute, but the 1907 Hague Regulations, which are a predecessor to the Geneva Conventions on the laws of war, define it in common sense terms of control: it is the actual placement of a territory “under the authority of the hostile army” and “extends only to the territory where such authority has been established and can be exercised”.¹⁰¹⁴ This also seems to focus on the initial placing of a territory under control of the hostile army as being the act of aggression.

Irrespective of the above, it is likely that any arguments concerning the prosecution of Russian officials for acts of aggression committed in Ukraine would be problematic. These arguments cannot escape from the fact that the Rome Statute states that any of acts of aggression acts, such as occupation—even though it may be ongoing in a literal sense—are committed by the initial acts of planning, preparation, initiation or execution of the occupation. Accordingly, any alleged crime of aggression that has already taken place prior to the time that the crime is prosecutable at the ICC, is unlikely to be able to be used to prosecute Russian nationals.

c) The Remaining Criteria for Jurisdiction

In the unlikely event that the ICC did consider that it has temporal jurisdiction over the crime of aggression in Ukraine, the ICC would need to consider whether the remainder of its jurisdictional requirements are fulfilled. The crime of aggression is special and does not fall within the ordinary rules of territorial and nationality jurisdiction applicable to genocide, crimes against humanity and war crimes. Instead, the Court needs the consent of States to proceed in most cases. As an example a non-State Party (such as Russia, which has not ratified the Rome Statute) that appears to have committed an act of aggression seemingly must give its consent to trigger the competence of the Court to adjudicate on alleged crimes of aggression by the individuals of that State.

¹⁰¹² *Ibid.*

¹⁰¹³ Rome Statute, art. 8bis(2)(a).

¹⁰¹⁴ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 187 CTS 227, 1 Bevans 631, art. 42.

The Rome Statute mandates, in relation to the crime of aggression, that: (i) the Court can exercise jurisdiction over a State Party unless the State has declared it does not accept such jurisdiction;¹⁰¹⁵ or (ii) for a non-State Party (such as Russia), the Court “shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory”.¹⁰¹⁶ Further, although a UNSC referral would give the Court jurisdiction whether or not the State was a State Party, for Ukraine there has been no UNSC referral in relation to the situation and Russia has a veto power in the event this issue were to arise.

There is some difficulty interpreting the above provision in relation to the concept of territorial or nationality jurisdiction: where is the crime of aggression committed? This is important. The Court has no jurisdiction over the crime of aggression when committed by the aggressor State’s nationals or on “its” territory. What if the aggression is by a non-State Party against a State Party (or one that has Declared it accepts the jurisdiction of the Court)?

The Special Working Group on the Crime of Aggression argues that in cases where the aggressor State is not party to the ICC’s Statute, but the victim State is, then the ICC should have jurisdiction. The Court should, it argues, have jurisdiction when the State in whose territory the aggression was committed does accept jurisdiction.¹⁰¹⁷ One commentator, Carrie McDougall, suggests that:

[...] a crime can equally be said to have been committed on the territory of the victim State, where the consequences of that conduct are felt. As such, the reference in article 12(2)(a) to ‘the State on the territory of which the conduct in question occurred’ is understood to apply to the territory of both the aggressor and victim States.¹⁰¹⁸

McDougall notes that an understanding confirming this interpretation was considered,¹⁰¹⁹ but deemed unnecessary.¹⁰²⁰

Conversely, more commentators argue against this interpretation, suggesting that the Statute is clear that if a non-State Party attacks a State Party (or a State that has Declared) there will be no jurisdiction. Roger Clark clarifies that the Working Group’s view concerning questions of territorial justification is only true for the crimes of genocide,

¹⁰¹⁵ Rome Statute, art. 15*bis*(4) (inserted by the Aggression Resolution).

¹⁰¹⁶ *Ibid.*, art. 15*bis*(5); (inserted by the Aggression Resolution).

¹⁰¹⁷ Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge, 2013) p. 221.

¹⁰¹⁸ SWGA, ‘Report of the Special Working Group on the Crime of Aggression’, ICC-ASP/7/20/Add.1, Annex III, paras. 28-29; SWGA, ‘Report of the Special Working Group on the Crime of Aggression’ ICC-ASP/7/SWGCA/2 (20 February 2009) paras. 38-39; SWGA, ‘Non-paper on other substantive issues on aggression to be addressed by the Review Conference’, ICC-ASP/7/20/Add.1, para. 12.

¹⁰¹⁹ SWGA, ‘Report of the Special Working Group on the Crime of Aggression’ ICC-ASP/7/SWGCA/2 (20 February 2009) para. 28.

¹⁰²⁰ Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013) p. 250; Claus Kress et al., ‘Negotiating the Understandings on the Crime of Aggression’, in Stefan Barriga and Claus Kress (eds.), *The Travaux Préparatoires Of The Crime Of Aggression* (Cambridge University Press, 2012) p. 82; Roger S. Clark, ‘Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court Kampala, 31 May-11 June 2010’ (2010) 2 *Goettingen Journal of International Law* 689-711.

crimes against humanity and war crimes, whereas aggression has a deliberately different jurisdiction regime.¹⁰²¹ He states that a citizen of a non-State Party who commits one of the *three* crimes on the territory of a State Party or declaring State will be subject to the ICC's jurisdiction. The provision in Article 15bis(5) is "aimed at upsetting this implication, specifically in respect of aggression, and preventing jurisdiction over aggression in such cases".¹⁰²² Accordingly, he interprets the Working Group's application of the jurisdictional rules for genocide, crimes against humanity and war crimes and as being inapplicable to the crime of aggression.

Kevin Jon Heller agrees that if a non-State Party attacks a State Party then there is no jurisdiction. Equally, if a non-State Party attacks a non-State Party, there is no jurisdiction.¹⁰²³ Heller recognises, like Clark, that the Court would not have jurisdiction if, for example, a State Party acted aggressively toward a non-State Party even though it would over war crimes, crimes against humanity and genocide.¹⁰²⁴

This limitation of the ICC's jurisdiction appears to curtail the prospects of prosecutions of individuals from non-State Parties that many countries around the world frequently contend commit the crime of aggression, such as USA, China or Russia. One commentator suggests that there will be a need for consent of the aggressor state and that this need for the consent of the aggressors is tantamount to saying that, short of a UNSC referral, the chances of prosecution are limited and confined to the:

[...] occurrence of unlikely circumstances (such as the ad hoc acceptance of the Court's jurisdiction under Article 12(3) of the Rome Statute by the same government allegedly responsible for an act of aggression) or to a drastic change in the governance of the non-State Party concerned, which would cause the new executive to seek the incrimination before the Court of the previous leadership.¹⁰²⁵

Therefore, it seems there is difficulty in suggesting the ICC would have jurisdiction in terms of Ukraine and Russia as a non-State Party committing an act of aggression against a State that has accepted the jurisdiction of the Court for the reasons stated above.

III. In Practice: Situation in Ukraine and the Prosecutor's Preliminary View

As noted above, the Office of the Prosecutor issued its Annual Report in December 2020 outlining its preliminary findings in relation to the examination into the situation in Ukraine, focusing on the assessment of the alleged crimes committed in Crimea and Eastern Ukraine.¹⁰²⁶ This part of the report outlines ICC Prosecutor's findings.

¹⁰²¹ Roger S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010', (2010) 2 Goettingen Journal of International Law 689-711, p. 705.

¹⁰²² *Ibid.*

¹⁰²³ Kevin Jon Heller, '[The Sadly Neutered Crime of Aggression](#)' (*Opinio Juris*, 13 June 2010).

¹⁰²⁴ *Ibid.*

¹⁰²⁵ Mauro Politi, 'The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead' (2012) 10 Journal of International Criminal Justice 267-288, p. 277.

¹⁰²⁶ 2020 Report on preliminary examination activities.

A. Euromaidan and the Prosecutor's Preliminary View

a) *The ICC Prosecutor's Annual Report*

On 11 December 2020, the ICC Prosecutor announced the conclusion of the preliminary examination in the situation in Ukraine.¹⁰²⁷ On 14 December 2020, the Office of the Prosecutor of the ICC released its Annual Report summarising its activities and findings concerning the ongoing and recently completed preliminary examinations, which includes Ukraine. The 2020 Report addressed activities that occurred between 1 December 2019 and 30 November 2020, identifying the progress of each situation. The report divides the “situations” into phases; for example, Bolivia and one of the Venezuelan referrals are in “Phase 2” of their preliminary examination, whilst another Venezuelan referral, Colombia, Guinea and the Philippines are in the “Phase 3”, and examinations into Palestine, Iraq/UK, Ukraine and Nigeria are completed. (see Parts One and Three).

Although the Annual Report mentions the current status of the Prosecutor's assessment of the Euromaidan events, it mainly focuses on the crimes which have allegedly occurred within the period from 22 February onwards in Crimea and Eastern Ukraine. In its 2015 Annual Report, the Office of the Prosecutor provided its legal assessment of the alleged crimes that occurred in the context of the Euromaidan events, which is outlined below.¹⁰²⁸ As of December 2020, when the latest Annual Report was publicised, the Office of the Prosecutor assessed whether the newly received information warrants revision of the 2015 view.¹⁰²⁹

In relation to alleged crimes committed during the Euromaidan events, the Office of the Prosecutor has received at least seven article 15 communications on the matter and continues to examine the additional information to determine whether its 2015 preliminary findings that human rights violations committed during the protests do not reach the threshold of crimes against humanity remain unchanged.¹⁰³⁰ Regarding the time period incorporating the second Declaration, the ICC Prosecutor's Office received over 48 communications concerning allegations of crimes. As a part of its admissibility assessment, the Office of the Prosecutor conducted a preliminary “mapping” of the reported violations and concluded that a range of war crimes and crimes against humanity appear to have been committed in Crimea and various war crimes might have been committed in Donbas (see Part One). The Office of the Prosecutor has also met with the Ukrainian authorities and representatives of civil society organisations and addressed its preliminary findings in relation to alleged crimes in Eastern Ukraine and Crimea and discussed the assessment of admissibility.

¹⁰²⁷ [‘Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine’ \(ICC, 11 December 2020\).](#)

¹⁰²⁸ Office of the Prosecutor of the ICC, [‘Report on Preliminary Examination Activities \(2015\)’](#) (12 November 2015), paras 77-110.

¹⁰²⁹ Office of the Prosecutor of the ICC, [‘Report on Preliminary Examination Activities \(2020\)’](#) (14 December 2020), para. 287.

¹⁰³⁰ Office of the Prosecutor of the International Criminal Court [‘Report on Preliminary Examination Activities 2020’](#) (14 December 2020), para. 287.

1) Individual Acts

Based on initial information, the Prosecutor believes there were killings, torture, persecution and other inhumane acts committed during Euromaidan. According to the Report, it seems that protest participants and other individuals were killed, some were subjected to torture and many suffered ill-treatment and other conduct, such as the excessive use of force causing serious injuries which would constitute “other inhumane acts” under the Rome Statute.¹⁰³¹ The Report also suggests that, in carrying out the above acts, the conduct may constitute persecution because members of the law enforcement targeted individuals on the basis of their actual or perceived political affiliation—their opposition to the Government.¹⁰³² The next report, issued in November 2016, and subsequent reports pay attention to the situation in Crimea and Eastern Ukraine.¹⁰³³

2) State Policy

According to the ICC Prosecutor, sufficient evidence exists to conclude that the crimes against civilians during the Maidan events could have constituted an attack against a civilian population and that it can be inferred that the attacks mentioned above were carried out pursuant to or in furtherance of a State policy aimed at suppressing the protest movement.¹⁰³⁴ The Prosecutor’s conclusion is based on an overall view of the political situation and repetition of violent conduct with particular regard to the following: coordination of, and cooperation with, anti-Maidan volunteers who violently targeted protesters (sometimes called “titushky”);¹⁰³⁵ the consistent failure of state authorities to take any meaningful or effective action to prevent or deter the repetition of incidents of violence (including to genuinely investigate or hold accountable the law enforcement units alleged to be responsible for serious ill-treatment of protest participants);¹⁰³⁶ and the apparent efforts to conceal or cover up alleged crimes.¹⁰³⁷

1) Widespread or Systematic Perpetration of the Crimes Has Not Been Established

i) Widespread

In relation to the “widespread” element, the ICC Prosecutor’s view at this time is that the alleged attack was limited in both its “intensity and geographic scope”.¹⁰³⁸ In particular, the ICC Prosecutor finds that although demonstrations continued for a three-month period and involved a large number of protestors, incidents during which the alleged crimes took place occurred sporadically and during a limited number of clashes and confrontations between the security forces and protestors (almost exclusively on 30 November 2013, 1 December 2013, 10-11 December 2013,

¹⁰³¹ Office of the Prosecutor of the ICC, [‘Report on Preliminary Examination Activities \(2015\)’](#) (12 November 2015), para. 90.

¹⁰³² *Ibid.*

¹⁰³³ Office of the Prosecutor of the ICC, [‘Report on Preliminary Examination Activities 2016’](#) (14 November 2016), paras 146-191..

¹⁰³⁴ Office of the Prosecutor of the ICC, [‘Report on Preliminary Examination Activities \(2015\)’](#) (12 November 2015), para. 93.

¹⁰³⁵ *Ibid.*

¹⁰³⁶ *Ibid.*

¹⁰³⁷ *Ibid.*

¹⁰³⁸ *Ibid.*, para. 96.

19-24 January 2014, and 18-20 February 2014).¹⁰³⁹ Further, the Report notes that the majority of alleged crimes occurred in a limited geographical area in Kyiv, namely confined to the specific locations where the protests were held, particularly in and around Maidan.¹⁰⁴⁰

The ICC Prosecutor also found that even though between 30 November 2013 and 20 February 2014, at least 700 civilians participating in or otherwise connected to the Maidan protests were injured by State security forces and *titushky*, it appears that only a portion of these injuries amount to an act under Article 7 of the Statute.¹⁰⁴¹ In other words, although the numbers are large, many of the acts of violence were less serious (even cumulatively) than the acts under Article 7(1) of the Statute.¹⁰⁴²

ii) *Systematic*

The ICC Prosecutor concluded that, *at this time*, there exists insufficient information to suggest the attack was systematic. In summary, the ICC Prosecutor considers that the alleged acts appear to have occurred in an infrequent and often more “reactive manner”, determined by the different circumstances as events developed during the demonstrations.¹⁰⁴³ In particular, the acts occurred in the context of an excessive, violent response by security forces to perceived threats to public order and their own security.¹⁰⁴⁴

Further, the information available does not appear to demonstrate a consistent pattern of Ukrainian security forces seeking out and attacking or violently targeting participants in the Maidan protest movement outside of the demonstration-related context. The Prosecutor also believes the incidents in which alleged crimes occurred appear to follow an irregular pattern of occurrence. In conclusion, the Prosecutor observed that: “[...] the alleged acts were rather a reaction to events, however unjustified and disproportionate, and aimed to limit the protests rather than being part of a deliberate, coordinated plan of violence methodically carried out against the protest movement”.¹⁰⁴⁵

b) *Discussion of the Prosecutor’s Findings*

The Prosecutor’s preliminary findings demonstrate that it is for the Ukrainian authorities and civil society to marshal their collective efforts to demonstrate the widespread or systematic nature of the attack against civilians during Euromaidan. The preliminary reports do not close the door on the prosecution of crimes against humanity at the ICC for the reasons described below.

First, it is important to note that the ICC Prosecutor has found that there is sufficient evidence to conclude that there was a State policy to attack civilians during the Maidan events. This is an important step towards the instigation of a

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ *Ibid.*, para. 97.

¹⁰⁴¹ *Ibid.*

¹⁰⁴² *Ibid.*

¹⁰⁴³ *Ibid.*, para. 99.

¹⁰⁴⁴ *Ibid.*

¹⁰⁴⁵ *Ibid.*

full investigation by the ICC. The nature of the policy to attack civilians inferred by the Prosecutor appears to be one that is an excessive violence at the lower ranks of pro-Government forces and a failure to curb the violence by the GoU, as opposed to a “top-down policy” where orders are being issued from the top to attack civilians.

However, despite the inference of a policy, it is clear that unless new evidence comes to light establishing more clearly the widespread or systematic nature of the attack, the ICC Prosecutor will likely not seek a formal investigation of the alleged crimes. Her preliminary assessment of the Maidan events may be reconsidered if new facts or information are brought to her attention that may be relevant to the assessment of the widespread or systematic nature of the alleged attack.

It is critical to note that the door is not closed to change the ICC Prosecutor’s assessment. Rather than viewing this preliminary conclusion as the end, Ukrainian stakeholders should use this opportunity to gather the relevant information that the ICC Prosecutor seeks. It is worth noting that shortly after the beginning of the preliminary examination, the ICC Prosecutor has received fewer communications (see above) in relation to Ukraine than some of the other situations being examined at the ICC. During the period 25 April 2014 - 12 November 2015, the Office of the Prosecutor of the ICC received around 20 communications relating to Euromaidan (crimes between 21 November 2013 to 22 February 2014), and 35 communications relating to the events in Crimea and Eastern Ukraine (crimes committed after 20 February 2014). This is in contrast to 66 communications the Prosecutor received concerning the situation in Palestine since 2014, 3,854 concerning Georgia since 2008, 112 concerning Afghanistan since 2007 and 173 concerning Colombia since 2004.

The latest Annual Report of 2020 states that since its previous assessment of the Euromaidan events, the Office of the Prosecutor has received new information on the matter and is currently considering the additional information to determine whether its 2015 preliminary findings outlined above remain the same.¹⁰⁴⁶

Accordingly, it is now for the civil society and State bodies of Ukraine to collectively focus their investigatory abilities on the following three principal deficiencies identified in the 2015 ICC Prosecutor’s Report:

- That the acts of violence were against a larger group of victims and/or covered a larger geographical area (e.g., in other locations in Ukraine outside of Independence Square in Kyiv) than currently identified in the information or facts submitted to date;
- That those acts of violence, including those in Kyiv, were sufficiently serious (whether considered singularly or cumulatively); and
- That the acts of violence were the result of a planned and calculated methodology or system and not merely the result of panicked, excessive or indiscriminate responses to the protest movement or other fast-moving events.

¹⁰⁴⁶ Office of the Prosecutor of the ICC, [‘Report on Preliminary Examination Activities 2020’](#) (14 December 2020), para. 287.

In addition to conducting these investigations, Ukrainian authorities have a critical role to play to demonstrate the full extent of the involvement of high-level officials in the events, the full extent of the plan, its geographical scope, the range of private or public resources used by those officials to organise and execute the attack and how it unfolded over those months.

B. Crimea, Eastern Ukraine and the Prosecutor's Preliminary View

As mentioned above, the 2020 Report addresses activities between 1 December 2019 and 30 November 2020, identifying the progress of each situation. As previously noted, as of 2020, the Office of the Prosecutor has completed its preliminary examination of subject-matter jurisdiction and an assessment of admissibility in the context of the situations in Crimea and Eastern Ukraine.¹⁰⁴⁷

In its subject-matter assessment of the situation in Eastern Ukraine, the Office of the Prosecutor did not address the commission of crimes against humanity, since the Prosecutor determined the existence of armed conflicts, which is the key element for war crimes. The Office of the Prosecutor's assessment regarding war crimes in Eastern Ukraine and Crimea will be discussed below.

a) The ICC Prosecutor's Annual Report

Regarding the mentioned elements, which are required to establish the commission of an armed conflict, the 2016 preliminary findings of the Prosecutor first stated that there is an international armed conflict between Ukraine and the Russian Federation on the territory of Crimea. Notwithstanding the fact that neither of the parties at most has not opened fire, the Prosecutor considers that the armed conflict has been carried on since 26 February 2014, since the moment Russian military men were engaged to establish control over the territory without the consent of Ukrainian government. The laws that regulate the rules of an international armed conflict shall apply from 18 March 2014 as the situation in Crimea and Sevastopol is in fact an ongoing occupation.¹⁰⁴⁸ The 2020 Report confirmed that the Office of the Prosecutor considers that the situation in Crimea and Sevastopol to factually amount to an ongoing state of occupation since 26 February 2014.¹⁰⁴⁹

As regards the situation in Eastern Ukraine, the Prosecutor has come to the preliminary conclusion that by 30 April 2014 the level of intensity of hostilities reached a level that would trigger the application of the law of armed conflict. Based on the information available, the Prosecutor has come to the conclusion that the level of organisation of armed groups operating in Eastern Ukraine, including the "LPR" and "DPR", had by the same time reached a degree sufficient for them to be parties to a non-international armed conflict. At the same time, communications on the

¹⁰⁴⁷ Office of the Prosecutor of the International Criminal Court "[Report on Preliminary Examination Activities 2020](#)" (14 December 2020), para. 287.

¹⁰⁴⁸ 2016 Report on preliminary examination activities, paras 157-158.

¹⁰⁴⁹ 2020 Report on preliminary examination activities, para. 278.

shelling and the detention of Ukrainian military personnel by the Russian side and vice-versa point to direct military engagement of the Russian side in the conflict.

Therefore, in its 2016 Annual Report, the Office of the Prosecutor asserted the existence of an international armed conflict in addition to a non-international armed conflict in Eastern Ukraine from 14 July 2014 at the latest.¹⁰⁵⁰ The 2020 Report suggests that the Office of the Prosecutor continues to consider the character of the ongoing armed conflicts and the possible alternative classifications, *i.e.* whether the non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could be in fact international.¹⁰⁵¹ In this regard, by 2019 the Office of the Prosecutor obtained information suggesting the exercise of overall control over armed groups in Eastern Ukraine by the Russian Federation.¹⁰⁵²

Concerning the subject-matter assessment in the situation in Crimea, the Office of the Prosecutor found a reasonable basis to believe that from 26 February 2014 onwards, the following acts of war crimes were committed: wilful killing; torture; outrages upon personal dignity; unlawful confinement; compelling protected persons to serve in the forces of a hostile Power; wilful deprivation of protected persons' rights of fair and regular trial; the transfer of parts of the population of the occupied territory outside this territory (with regard to the transfer of detainees in criminal proceedings and prisoners); seizing the enemy's property that is not imperatively demanded by the necessities of war, with regard to private and cultural property.¹⁰⁵³

As to the subject-matter jurisdiction with regard to Eastern Ukraine, the Report provides that from 30 April 2014 onwards, at least the following war crimes were allegedly committed: intentionally directing attacks against civilians and civilian objects; intentionally directing attacks against protected buildings; wilful killing/murder; torture and inhuman/cruel treatment; outrages upon personal dignity; rape and other forms of sexual violence.¹⁰⁵⁴ If the conflict is proven international, intentionally launching attacks that resulted in harm to civilians and civilian objects that was clearly excessive in relation to the military advantage anticipated (disproportionate attacks) and unlawful confinement might have been committed.¹⁰⁵⁵

b) Discussion of the Prosecutor's Findings

As regards the situation in Crimea and in the east of Ukraine, for the subject-matter jurisdiction assessment, the Office of the Prosecutor examined a large volume of information regarding allegations of crimes..

Importantly, the Office of the Prosecutor considered possible alternative classifications of the armed conflict(s) in Eastern Ukraine and whether an international armed conflict that exists between Ukraine and the Russian Federation

¹⁰⁵⁰ 2016 Report on preliminary examination activities, para. 189.

¹⁰⁵¹ 2020 Report on preliminary examination activities,, para. 281.

¹⁰⁵² *Ibid.*

¹⁰⁵³ *Ibid.*, para 278.

¹⁰⁵⁴ *Ibid.*, para. 280.

¹⁰⁵⁵ *Ibid.*, para. 280.

since 14 July 2014 at the latest and the otherwise non-international armed conflict that exists between Ukrainian armed forces and non-government armed groups since 30 April 2014 at the latest could in fact be a single international armed conflict between Russia and Ukraine. In light of this, the Ukrainian authorities and civil society should continue collecting the evidence of Russia's involvement in the armed conflict in Eastern Ukraine and submit the relevant information to the Office of the Prosecutor of the ICC.

Concerning the admissibility stage of its preliminary assessment in the contexts of the situations in Crimea and Eastern Ukraine, the Office of the Prosecutor analysed the national investigations and prosecutions of relevance to the ICC jurisdiction and concluded that all relevant authorities are unable, due to lack of access to witnesses, evidence and the territory, or unwilling to investigate and prosecute the alleged crimes.¹⁰⁵⁶ Further, the Office of the Prosecutor found the crimes purportedly committed in Crimea and Eastern Ukraine to be sufficiently grave to warrant an investigation.¹⁰⁵⁷

IV. Modes of Liability

To establish criminal responsibility for the crimes of genocide, crimes against humanity or war crimes, the alleged perpetrator must have been involved in the crime in a specific manner. This is known as the “mode” or “form” of liability by which a person is criminally liable. Article 25(3)(a) of the Rome Statute provides for the modes of liability applicable before the ICC.

These “modes” can be broken down into direct and indirect modes of liability. The ICC Prosecutor must identify *how* a person committed the crime in question. The ways in which a person can be responsible for a crime are lengthy. The Rome Statute divides the modes of liability into five main parts: (i) those that involve the commission of the crime individually, jointly with or through another person; (ii) ordering, soliciting or inducing commission; (iii) otherwise assisting or aiding and abetting the commission of the crime; (iv) contributing to the commission or attempted commission by a group of persons acting with a common purpose; and (v) responsibility as a commander or superior.

A. Commission [Article 25(3)(a)]

The Rome Statute outlines a variety of forms of commission, or “committing”, a crime. Article 25(3)(a) identifies the commission of a crime as an individual, joint and through another.¹⁰⁵⁸ The ICC has also interpreted Article 25(3)(a) to include a separate form of commission called indirect co-perpetration. Further, Article 25(3)(d) enumerates a mode of liability that arguably provides a prosecutor with an even greater weapon and is relevant to a

¹⁰⁵⁶ [Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine](#) (ICC, 11 December 2020).

¹⁰⁵⁷ 2020 Report on preliminary examination activities, para. 282.

¹⁰⁵⁸ Rome Statute, art. 25(3).

perpetrator who “in any other way contributes to the commission or attempted commission” of a crime “by a group of persons acting with a common purpose”. These are outlined below.

a) Individual Commission

This is the ordinary manner in which one might expect someone to commit a crime. It involves the direct physical commission of a criminal act. It covers conduct where an individual physically carries out a crime enumerated in the Rome Statute.¹⁰⁵⁹

Individual commission occurs when the alleged perpetrator carried out the objective elements of the offence and acted: (i) with intent and knowledge pursuant to Article 30 of the Statute, unless another subjective element is provided in the Statute or the Elements of Crimes; and (ii) if relevant, a specific subjective element (*dolus specialis*) when required by a particular crime, such as genocide.¹⁰⁶⁰

b) Joint Commission

Article 25(3)(a) envisions a crime committed not only by an individual acting alone or through another person, but also by an individual acting jointly with another.¹⁰⁶¹ Joint commission, known as co-perpetration, describes a scenario in which two or more persons each contribute to the commission of a crime.

Co-perpetration revolves around a common plan to commit a crime. The elements of this mode of liability involve a common plan between a group of persons and an essential contribution from the accused. In terms of their mind-set, they must also have intention and knowledge of the crime, a mutual awareness and acceptance of the likelihood that completing the common plan would result in the realisation of the crime being carried out and, lastly, an awareness of the factual circumstances to a degree which enables the person in question to jointly control the crime.

The commission of a crime “jointly with another” describes a scenario in which two or more persons each contribute to the commission of a crime. As set out in *Lubanga*, the elements of co-perpetration are: (i) the “existence of an agreement or common plan between two or more persons”;¹⁰⁶² (ii) a “co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime”;¹⁰⁶³ (iii) the subjective elements of the crime in question—knowledge and intent—pursuant to Article 30;¹⁰⁶⁴ (iv) the “suspect and the other co-perpetrators: (a) must all be mutually aware of the risk that implementing their common plan will result in the

¹⁰⁵⁹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01-06 (29 January 2007) para. 332; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01-04-01 (30 September 2008) para. 488.

¹⁰⁶⁰ *The Prosecutor v. Bosco Ntaganda* ([Decision on the Confirmation of Charges](#)) ICC-01/04-02/06 (9 June 2014) (“Ntaganda Confirmation of Charges Decision”) para. 136.

¹⁰⁶¹ *Lubanga Trial Judgment*, para. 980.

¹⁰⁶² *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on the Confirmation of Charges](#)) ICC-01/04-01/06-803-tEN (29 January 2007) (“Lubanga Confirmation of Charges Decision”) para. 343.

¹⁰⁶³ *Lubanga Confirmation of Charges Decision*, para. 346.

¹⁰⁶⁴ *Ibid.*, para. 349.

realisation of the objective elements of the crime; (b) must all mutually accept such a result by reconciling themselves with it or consenting to it”;¹⁰⁶⁵ and (v) the “suspect must be aware of the factual circumstances enabling him or her to jointly control the crime”.¹⁰⁶⁶

In the *Lubanga* Trial Judgement, the Court assessed that from September 2002 the accused, as President of the Congolese Patriotic Union/Popular Rally (“UPC/PR”) rebel group, had entered into a common plan to build an effective army and that he was involved in its implementation. Furthermore, the plan resulted in the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities, a consequence which occurred in the ordinary course of events.¹⁰⁶⁷ For Lubanga’s essential contribution, the Trial Chamber considered that the accused and his alleged co-perpetrators worked together and each of them made an essential contribution to the common plan.¹⁰⁶⁸ The Court particularly took note that, by virtue of his position as President and Commander-in-Chief, Lubanga was able to shape the policies and direct the activities of his alleged co-perpetrators.¹⁰⁶⁹

c) Commission through Another

Article 25(3)(a) also recognises commission “through another”. To hold an individual liable based on this mode of liability, known as indirect perpetration, it must be established that: (i) he exercised control over the crime carried out by one or several persons; (ii) he had intent and knowledge pursuant to Article 30 of the Statute, and a specific subjective element when required by a particular crime; and (iii) he was aware of the factual circumstances enabling him to exercise control over the crime.¹⁰⁷⁰

As concerns the first element, the Chamber noted that this control can take various forms, including the exertion of will over someone who bears no criminal responsibility, such as those who act under duress or who are afflicted by mental deficiency or impairment or the existence of an “organised apparatus of power”.¹⁰⁷¹ Where a crime is committed by members of an organised hierarchical apparatus of power, “[t]he highest authority does not merely order the commission of the crime but through his control over the organisation, essentially decides whether and how the crime would be committed”.¹⁰⁷² Thus, there are two criteria to establish indirect perpetration through an organisation, namely: (i) the existence of an “organised and hierarchical apparatus of power”, characterised by near-automatic obedience to orders; and (ii) the control exerted by the accused over the apparatus of power were such that

¹⁰⁶⁵ *Lubanga* Trial Judgment, para. 1018.

¹⁰⁶⁶ *Lubanga* Confirmation of Charges Decision, para. 366; Bemba Decision of the Confirmation of Charges, paras. 350-351; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01/04-01/07-717 (30 September 2008) (“Katanga and Ngudjolo Decision on Confirmation of Charges”) paras. 500-514, 527-539.

¹⁰⁶⁷ *Lubanga* Trial Judgment, para. 1136.

¹⁰⁶⁸ *Ibid.*, para. 1271.

¹⁰⁶⁹ *Ibid.*, para. 1270.

¹⁰⁷⁰ *Katanga* Trial Judgment, para. 1399.

¹⁰⁷¹ *Ibid.*, paras. 1402-1403.

¹⁰⁷² *Ibid.*, para. 1405, citing *Katanga and Ngudjolo Decision on Confirmation of Charges*, paras. 515 and 518.

he used it “so as to steer it intentionally towards the commission of a crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed”.¹⁰⁷³

d) Indirect Co-Perpetration

In addition, indirect co-perpetration as formulated by the ICC in *Katanga*, combines indirect perpetration (“through another person”) and co-perpetration (“jointly with another”). The ICC said that:

an individual who has no control over the person through whom the crimes would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual—one who controls the person used as an instrument—these crimes can be attributed to him on the basis of mutual attribution.¹⁰⁷⁴

The objective elements of indirect co-perpetration require a common plan, an essential contribution and control over an organised and hierarchal apparatus of power and execution of the crimes by almost automatic compliance with orders.¹⁰⁷⁵

In the applying this to the *Ntaganda* case, the Pre-Trial Chamber considered that Ntaganda was part of a common plan amongst members of the Congolese Patriotic Union/Patriotic Forces for the Liberation of Congo (“UPC/FPLC”) militia to assume military and political control over Ituri, particularly to take over non-Hema (ethnic) dominated areas and that the plan contained an element of criminality.¹⁰⁷⁶ Furthermore, the Chamber considered that he made essential contributions to the commission of the crimes and that in the absence of his particular contribution, the crimes would have been frustrated. Particularly, the Chamber noted he was instrumental in the organisation, coordination and execution of the crimes,¹⁰⁷⁷ including arranging for weapons to be transported, travelling to secure troops and liaising with subordinates.¹⁰⁷⁸

Concerning the subjective element, suspects must be mutually aware and mutually accept that implementing their common plan will result in the realisation of the objective element of the crimes.¹⁰⁷⁹ Further, the suspects must be aware of the factual circumstances enabling them to control the crimes jointly.¹⁰⁸⁰

¹⁰⁷³ *Ibid.*, para. 1411.

¹⁰⁷⁴ Katanga and Ngudjolo Decision on Confirmation of Charges, para. 493.

¹⁰⁷⁵ Ntaganda Confirmation of Charges Decision, paras. 104-135. *See also*: Bemba Decision of the Confirmation of Charges, paras. 350-351; Katanga and Ngudjolo Decision on Confirmation of Charges, paras. 500-514, 527-539.

¹⁰⁷⁶ Ntaganda Confirmation of Charges Decision, para. 105.

¹⁰⁷⁷ *Ibid.*, para. 108.

¹⁰⁷⁸ *Ibid.*, para. 110.

¹⁰⁷⁹ Katanga and Ngudjolo Decision on Confirmation of Charges, para. 533; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (29 January 2012) para. 333.

¹⁰⁸⁰ Katanga and Ngudjolo Decision on Confirmation of Charges, para. 538; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (29 January 2012) para. 333; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Decision on the Confirmation of Charges](#)) ICC-01/09-02/11-382-Red (23 January 2012) (“Francis Kirimi Muthaura, Uhuru Muigai

In *Ntaganda*, the Pre-Trial Chamber considered it relevant that Ntaganda had adopted the common plan together with other UPC/FPLC members, had regularly met those persons in the course of implementing the plan and had acted with the requisite mental element for the crimes to consider that he was aware and accepted that implementing the common plan would result in the fulfilment of the crimes. In addition, the fact that he held a high-ranking position demonstrated that he was aware of the factual circumstances enabling him to exercise joint control over the commission of the crimes through other persons.¹⁰⁸¹

B. Ordering, Soliciting or Inducing Commission

a) Soliciting or Inducing

This mode is provided for in Article 25(3)(b) of the Rome Statute. The ICC has held that the following objective and subjective elements must be fulfilled: (i) the person exerts influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out; (ii) the inducement has a direct effect on the commission or attempted commission of the crime; and (iii) the person is at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realisation of the act or omission.¹⁰⁸²

b) Ordering

Ordering means directing a person to commit an offence.¹⁰⁸³ Article 25(3)(b) of the Rome Statute refers to “ordering” the commission of a crime. It has been confirmed by the ICC in *Harun* that ordering under Article 25(3)(b) is a form of accessorial liability at the Court.¹⁰⁸⁴ In other words, acting as an accessory to assist the crime.

Ordering requires the satisfaction of the following objective and subjective elements: (i) the person was in a position of authority; (ii) the person instructed another person in any form to either: (a) commit a crime that in fact occurred or was attempted or (b) perform an act or omission in the execution of which a crime was carried out; (iii) the order had a direct effect on the commission or attempted commission of the crime; and (iv) the person was at least aware that the crime would be committed in the ordinary course of events as a consequence of the execution or implementation of the order.¹⁰⁸⁵

Kenyatta and Mohammed Hussein Ali Decision on the Confirmation of Charges”) para. 297; *The Prosecutor v. Bosco Ntaganda* ([Decision on the Prosecutor’s Application under 58](#)) ICC-01/04-02/06-36-Red (13 July 2012) para. 67.

¹⁰⁸¹ *Ntaganda* Confirmation of Charges Decision, para. 135.

¹⁰⁸² *Ibid.*, para. 153.

¹⁰⁸³ *The Prosecutor v. Sylvestre Mudacumura* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/12-1-Red (13 July 2012) para. 63; *Ntaganda* Confirmation of Charges Decision, para. 145.

¹⁰⁸⁴ *Ibid.*, citing *Lubanga* Confirmation of Charges Decision, paras. 320-321 and *Katanga and Ngudjolo* Decision on Confirmation of Charges, para. 517; *The Prosecutor v. Ahmad Harun and Ali Kushayb* ([Decision on the Prosecution Application under Article 58\(7\) of the Statute](#)), ICC-02/05-01/07 (27 April 2007), fn 100.

¹⁰⁸⁵ *The Prosecutor v. Sylvestre Mudacumura* (Decision on Warrant of Arrest) ICC-01/04-01/12-1-Red (13 July 2012) para. 63; *Ntaganda* Confirmation of Charges Decision, para. 145.

C. Otherwise Assisting or Aiding and Abetting the Commission of the Crime

Aiding and abetting involves the facilitation of an offence.¹⁰⁸⁶ Article 25(3)(c) provides that a person is criminally responsible for a crime if that person:

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

The ICC has not yet charged this mode of liability. Accordingly, without the jurisprudence, it is difficult to know how the ICC may interpret its elements. If ICTY case law is used as guidance to an ICC Chamber, aiding and abetting requires a three-step test: (i) the participant commits a crime punishable under the statute; (ii) the accused aids and abets the participant in the commission of the crime; and (iii) the accused acts with the awareness that his acts will assist the participant in the commission of the crime.¹⁰⁸⁷ The assistance may consist of an act or omission or occur before, during, or after the act of the principal offender.¹⁰⁸⁸ Criminal participation must have a direct and substantial effect on the commission of the offence.¹⁰⁸⁹

With regards to the subjective elements, an aider and abettor should have known that his acts would assist in the commission of the crime by the principal perpetrator and must be aware of the “essential elements” of the crime. At the ICTY, it was considered that the subjective elements for aiding and abetting do not require that the accused shared the intention of the principal perpetrator of such crime.¹⁰⁹⁰ However, Article 25(3)(c) of the ICC Statute specifically requires that the assistance be afforded “for the purpose of facilitating the commission” of the crime. It requires not only the knowledge that the accomplice aids and abets the principle perpetrator, but that he must “wish that his assistance shall facilitate the commission of a crime”.¹⁰⁹¹

¹⁰⁸⁶ Rome Statute, art. 25(3)(c).

¹⁰⁸⁷ *The Prosecutor v. Naser Orić* ([Judgement](#)) IT-03-68-T (30 June 2006) para. 269.

¹⁰⁸⁸ *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* ([Appeals Judgement](#)) IT-02-60-T (9 May 2007) para. 127; *The Prosecutor v. Tihomir Blaškić* ([Appeals Judgement](#)) IT-95-14-A (29 July 2004) para. 48; *The Prosecutor v. Mladen Naletilić and Vinko Martinović* ([Judgement](#)) IT-98-34-T (31 March 2003) para. 63; *The Prosecutor v. Moinina Fofana and Allieu Kondewa* ([Appeals Judgement](#)) SCSL-04-14-A (28 May 2008) para. 7.

¹⁰⁸⁹ *The Prosecutor v. Jean-Paul Akayesu* ([Judgment](#)) ICTR-96-4-T 2 (September 1998) paras. 691, 692. See also *The Prosecutor v. Delalić et al.* ([Judgement](#)) IT-96-21-T (16 November 1998) para. 326; *The Prosecutor v. Furundžija* ([Judgement](#)) IT-95-17/1-T (10 December 1998) paras. 223, 234; *The Prosecutor v. Aleksovski* ([Judgement](#)) IT-95-14/1-T (25 June 1999) para. 6.

¹⁰⁹⁰ *The Prosecutor v. Milan Lukić and Sredoje Lukić* ([Appeals Judgement](#)) IT-98-32/1-A (4 December 2012) para. 428; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* ([Judgement](#)) IT-02-60-T (17 January 2005) para. 727; *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu* ([Judgment](#)) IT-03-66-T (30 November 2005) para. 518; *The Prosecutor v. Milorad Krnojelac* ([Appeals Judgement](#)) IT-97-25 (17 September 2003) para. 51.

¹⁰⁹¹ Albin Eser, ‘Individual Criminal Responsibility’ in Antonio Cassese (eds), *The Rome Statute of the International Criminal Court: a Commentary* (OUP, 2002) p. 801.

D. Contribution to Commission [Article 25(3)(d)]

The Rome Statute provides that a person shall be criminally responsible if that person “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”.¹⁰⁹²

For the objective elements of this form of criminal responsibility it must be established that: (i) a crime within the jurisdiction of the Court has been attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; and (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.¹⁰⁹³ The following subjective elements are also required: (i) the contribution shall be intentional; and (ii) shall either be made: (a) with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.¹⁰⁹⁴

The definition of the criminal purpose of the group has been stated as encompassing the “presupposed specification of the criminal goal pursued; its scope, by pinpointing its temporal and geographic purview; the type, origins or characteristics of the victims pursued; and the identity of the members of the group”.¹⁰⁹⁵

Regarding what amounts to a contribution, the Trial Chamber has considered that “it is paramount that the accused’s contribution be connected to the commission of the crime and not solely to the activities of the group in a general sense” necessitating that it be proven there was a “significant contribution”.¹⁰⁹⁶ In *Katanga*, the Trial Chamber considered that this contribution was established for three reasons: (i) the accused had lent his assistance by travelling to Beni and forging alliances with military authorities there; (ii) by assuming the role of facilitator so as to establish smooth communication between the local commanders, the authorities in Beni and the APC soldiers; and (iii) by acquiring weapons and ammunition from Beni.¹⁰⁹⁷

¹⁰⁹² Rome Statute, art. 25(3)(d).

¹⁰⁹³ *The Prosecutor v. Mbarushimana* ([Decision Warrant of Arrest](#)) ICC-01/04-01/10-1 (28 September 2010) (“Mbarushimana Arrest Warrant Decision”) para. 39. *See also: The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (29 January 2012) para. 351; Francis Kiriimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Decision on the Confirmation of Charges, para. 421; *The Prosecutor v. Germain Katanga* ([Decision](#)) ICC-01/04-01/07-3371-tENG (15 May 2013) para. 16.

¹⁰⁹⁴ *Mbarushimana Arrest Warrant Decision*, para. 39, fn 66 and para. 44. *See also: The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Decision on the Confirmation of Charges](#)) ICC-01/09-01/11 (29 January 2012) para. 351; Francis Kiriimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Decision on the Confirmation of Charges, para. 421.

¹⁰⁹⁵ *Katanga Trial Judgment*, para. 1626.

¹⁰⁹⁶ *Ibid.*, para. 1632.

¹⁰⁹⁷ *Ibid.*, para. 1671.

E. Responsibility as a Commander or Superior

Command responsibility or superior responsibility concerns a superior's failure to act when he or she should have.¹⁰⁹⁸ To hold a commander responsible for the crimes of his subordinates, it must be established beyond reasonable doubt that: (i) there existed a superior-subordinate relationship between the superior and the perpetrator of the crime; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.¹⁰⁹⁹

Command responsibility is provided for by Article 28(a) of the Rome Statute. It provides that military commanders or persons effectively acting as a military commander will be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Pursuant to the *Bemba* Judgment, to prove criminal responsibility within the meaning of Article 28(a), it must be shown that the suspect: (i) was a military commander or a person effectively acting as such; (ii) had effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in Articles 6 to 8 of the Statute; (iii) failed to exercise control properly over subordinates which resulted in crimes being committed; (iv) knew or, due to the circumstances at the time, should have known that the subordinates were committing or about to commit any of the crimes set out in Articles 6 to 8 of the Statute; and (v) failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.¹¹⁰⁰

Superior responsibility is provided for by Article 28(b) of the Rome Statute and covers superior-subordinate relationships outside of the strict context of ranks where the position of a military commander is readily discernible. With respect to superior and subordinate relationships not described in Article 28(a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control as a result of his or her failure to exercise control properly over such subordinates, where:

- The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

¹⁰⁹⁸ Rome Statute, art. 28.

¹⁰⁹⁹ *Ibid.*

¹¹⁰⁰ Bemba Decision of the Confirmation of Charges, para. 407.

- The crimes concerned activities that were within the effective responsibility and control of the superior; and
- The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

The Rome Statute is reflective of the case law from the *ad hoc* tribunals (such as the ICTY), which established that there are three requirements to establish the responsibility of a superior within an organisation, namely:¹¹⁰¹ (i) the existence of a superior-subordinate relationship; (ii) the superior's failure to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions; and (iii) that the superior knew or had reason to know that a criminal act was about to be committed or had been committed.¹¹⁰²

So far, *Bemba* remains the only case adjudicated on the basis of command responsibility. While the Trial Chamber unanimously convicted Jean-Pierre Bemba Gombo pursuant to article 28(a) of the Statute, the Appeals Chamber, by majority, acquitted him. One of the most contested issues in this case was the meaning of “failure to take all necessary and reasonable measures”. Relying on the jurisprudence of the ICTY and ICTR, the Appeals Chamber noted that “an assessment of whether a commander took all ‘necessary and reasonable measures’ will require consideration of what measures were at his or her disposal in the circumstances at the time.”¹¹⁰³ In the same vein it added that Article 28 only requires commanders to do what is necessary and reasonable under the circumstances and therefore “it is not the case that a commander must take each and every possible measure at his or her disposal.”¹¹⁰⁴ It further stated that “The trial chamber must specifically identify what a commander should have done *in concrete*. Abstract findings about what a commander might theoretically have done are unhelpful and problematic, not least because they are very difficult to disprove. [...] It is not the responsibility of the accused to show that the measures he or she did take were sufficient.”¹¹⁰⁵

¹¹⁰¹ *The Prosecutor v. Bagilishema* ([Trial Judgment](#)) ICTR-95-1A-T (7 June 2001) para. 38; *The Prosecutor v. Delalić et al.* ([Trial Judgment](#)) IT-96-21 (16 November 1998) para. 346; *The Prosecutor v. Kayishema and Ruzindana* ([Trial Judgment](#)) ICTR-95-1;ICTR-96-10 (21 May 1999) paras. 208-231.

¹¹⁰² Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5 *Journal of International Criminal Justice* 159, p. 179.

¹¹⁰³ *Bemba* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08 A, 8 June 2018, para. 168.

¹¹⁰⁴ *Ibid.*, 169.

¹¹⁰⁵ *Ibid.*, 170.

Part Two(C): Ratification

This section addresses ratification of the Rome Statute.¹¹⁰⁶ It will first identify what ratification means for States. It will then compare ratification to the submission of a Declaration. The comparison will differentiate between ratification and Declarations politically, procedurally, jurisdictionally and in terms of the obligations and rights each jurisdictional path provides States. Thereafter, the section will identify the steps States need to take to ratify the Rome Statute and consider what steps Ukraine must take specifically. This will be analysed by referencing other domestic jurisdictions.

I. Ratification Defined

As outlined in Part One, when States agree to be bound fully by the provisions of the Rome Statute they are said to “ratify” it. Ratification is the formal act of a State consenting to be bound by a treaty.¹¹⁰⁷ To ratify the Rome Statute, a State will deposit a document containing this consent with the Secretary-General of the UN.¹¹⁰⁸ When a State has ratified the Rome Statute, it accepts the jurisdiction of the Court for crimes contained in Article 5 of the Rome Statute, namely genocide, crimes against humanity and war crimes.¹¹⁰⁹

Ukraine has not ratified the Rome Statute. Ukraine signed the Rome Statute on 20 January 2000 and acceded to the Agreement on the Privileges and Immunities of the International Criminal Court on 29 January 2007.¹¹¹⁰ Nevertheless, as of January 2021, Ukraine has not joined the 123 States Parties¹¹¹¹ by ratifying the Rome Statute, as required by Article 125(2) for States to become States Parties. Accordingly, Ukraine has not agreed to be fully bound by the instrument that gives jurisdiction to the ICC with respect to the crimes referred to in Article 5¹¹¹² of the Statute when committed on its territory or by its nationals.¹¹¹³ However, ratification is only one way to accept the jurisdiction of the ICC. As Ukraine has submitted two Declarations, it has accepted the jurisdiction of the ICC but not all of the Rome Statute’s provisions.¹¹¹⁴ The following section will discuss the difference between ratification and the submission of a Declaration.

¹¹⁰⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, signed by Ukraine on 20 January 2000) 2187 UNTS 90 (“Rome Statute”).

¹¹⁰⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 I.L.M. 679 (“Vienna Convention”), arts. 2(1)(b), 14(1) and 16.

¹¹⁰⁸ Rome Statute, art. 125(2).

¹¹⁰⁹ *Ibid.*, art. 12(1).

¹¹¹⁰ Ukraine is the first non-State Party to the Rome Statute to accede to the latter Agreement: [ICC, Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3](#) (adopted at the first session on 3-10 September 2002) (“ICC Agreement on Privileges and Immunities”).

¹¹¹¹ United Nations Treaty Collection, Depository, [Rome Statute of the International Criminal Court](#).

¹¹¹² Namely the crime of genocide, crimes against humanity and war crimes, and, subject to the completion of the conditions of art. 5(2), the crime of aggression.

¹¹¹³ Rome Statute, art. 12(1).

¹¹¹⁴ [On Recognition of the Jurisdiction of the International Criminal Court by Ukraine over Crimes against Humanity, Committed by Senior Officials of the State, which Led to Extremely Grave Consequences and Mass Murder of Ukrainian](#)

II. Ratification versus Declaration and Its Effect on ICC Jurisdiction

This section compares ratification of the Rome Statute, which leads to a country becoming a State Party to the ICC, to Declarations, where a State accepts ICC jurisdiction but remains a non-State Party. On initial review, the difference between a Declaration and ratification is not immediately apparent. However, there are some differences. These similarities and differences will be considered below in terms of politics, procedure, jurisdiction and obligations on a State.

A. Political/ Management Differences

The ratification of the Rome Statute means that the State, in the process of becoming a State Party to the Rome Statute, joins the ASP.¹¹¹⁵ As noted in Part One, the ASP is the management oversight and legislative body of the ICC. As a non-State Party, Ukraine does not have a vote or formal voice at the ASP. Non-States Parties, including Ukraine, have no right to intervene on issues concerning the maintenance and development of the Court.¹¹¹⁶ As an example, only a State Party may formally propose amendments to the Rome Statute, the Elements of Crimes (which interpret and define the crimes under the Rome Statute) or the Rules of Procedure and Evidence (which regulate how the Court conducts its proceedings).¹¹¹⁷ Further, as a non-State Party, it cannot formally affect the administration of the Court, including decisions concerning who is nominated or elected as the Prosecutor of the Court or who is nominated and elected as a Judge of the Court.¹¹¹⁸

If Ukraine were a State Party to the Rome Statute, it could directly propose and vote on the above, including changes to the crimes, the rules of procedure and evidence as well as on other essential issues such as the election of new Judges or Prosecutors.¹¹¹⁹ Most significantly in the current circumstances, Ukraine could have a hand in the development of the crime of aggression at the ICC, an issue of recent fundamental importance to Ukraine due to Russia's alleged activities in Crimea and Eastern Ukraine [see Part Two(B)].

B. Procedural Differences

A procedural difference between States that ratify and those that issue a Declaration relates to when the ICC Prosecutor opens a formal investigation into a "situation" or an allegation that crimes have occurred. When a State

[Nationals during Peaceful Protests within the period of 21 November 2013-22 February 2014: Declaration of the Verkhovna Rada of Ukraine No. 790-VII](#) [Online resource]. - 25 February 2014. - ("The First Declaration"); [Declaration of the Verkhovna Rada of Ukraine On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organisations "DPR" and "LPR", which led to extremely grave consequences and mass murder of Ukrainian nationals": Resolution of the Verkhovna Rada of Ukraine No. 145-VIII](#) [Online resource]. - 8 September 2015. - ("The Second Declaration").

¹¹¹⁵ Rome Statute, art. 125(2).

¹¹¹⁶ *Ibid.*, art. 112(7).

¹¹¹⁷ *Ibid.*, arts. 9(2), 51(2), 112(7) and 121.

¹¹¹⁸ *Ibid.*, arts. 36(4) and 42(4).

¹¹¹⁹ *Ibid.*, art. 121.

Party brings a situation to the attention of the ICC, it is known as a “referral”. A formal investigation may only be opened after a referral of a situation by a State Party, a referral by the UNSC or authorisation by the ICC Pre-Trial Chamber.¹¹²⁰ Accordingly, the ICC Prosecutor cannot open a formal investigation as a result of a Declaration. She must seek authorisation of the Pre-Trial Chamber. Therefore, while both a referral or a Declaration will mean that the Prosecutor opens a preliminary examination to consider whether to open a formal investigation as a matter of policy,¹¹²¹ the Prosecutor does not need to seek the ICC’s approval to continue to the next step (a formal investigation) where there has been a referral by either a State Party or the UNSC.¹¹²²

C. Differences of Temporal Jurisdiction

The ratification of the Rome Statute will only give the ICC jurisdiction over conduct taking place after it is ratified. Often, States become parties to the ICC due to an armed conflict involving their territory or citizens and the consequent need for accountability afterwards. However, ICC jurisdiction over recent crimes that have already taken place would not be covered by a State’s ratification.

This is resolved by making a Declaration, which permits retroactive application of ICC jurisdiction (so long as other legal principles are respected, such as the principle of legality which provides that the crime must have existed in law at the time of the accused’s allegedly criminal conduct).¹¹²³ For example, if Ukraine had not made two Declarations, ratification at this time would not give the ICC jurisdiction over alleged crimes already committed during Euromaidan and the conflict in Eastern Ukraine. Therefore, in order to encompass crimes committed before the present day, it would still have to complement its ratification with a Declaration.¹¹²⁴

Further, even if Ukraine ratified the Rome Statute now for potential crimes committed in the future, it seems the two Declarations still provide the Court with jurisdiction over future crimes whether or not Ukraine ratifies the Rome Statute. The second Declaration submitted by Ukraine on 8 September 2015 is open-ended and it gives jurisdiction to the Court over the crimes committed from 20 February 2014 onwards for an indefinite duration.¹¹²⁵ This will likely encompass new crimes occurring now and in the coming years.

The question of whether a Declaration will still be a valid basis for jurisdiction even though it was submitted a considerable time before the crime within the jurisdiction of the Court occurs has not been addressed at the ICC as

¹¹²⁰ *Ibid.*, arts. 13, 15 and 18.

¹¹²¹ OTP, [‘Policy Paper on Preliminary Examinations’, November 2013](#) (“Preliminary Examinations Policy Paper”), p. 2, para. 4; Regulation 25(1)(c) of the Office of the Prosecutor, upon receipt of a referral or a valid declaration made pursuant to art. 12(3) of the Statute, the Prosecutor opens a preliminary examination of the situation at hand: ICC, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09 (“Regulations of the Prosecutor”), reg. 25.

¹¹²² Rome Statute, arts. 13(c), 15 and 18.

¹¹²³ *Ibid.*, art. 11(2).

¹¹²⁴ In the past, the government of Uganda referred to the Prosecutor the situation concerning the Lord’s Resistance Army in December 2003. In addition to the referral, the government of Uganda has made a declaration under art. 12, para. 3, of the Rome Statute, accepting the jurisdiction of the Court as of the entry into force of the Rome Statute, and hence temporal jurisdiction of the Court extends back to 1 July 2002.

¹¹²⁵ The Second Declaration.

yet. However, it appears that the question may not turn out to be controversial in practice. The Côte d’Ivoire situation came close to addressing this question. It submitted a Declaration on 18 April 2003 accepting the jurisdiction of the Court from 19 September 2002 onwards.¹¹²⁶ The Prosecutor conducted a preliminary examination. After the post-election violence in November 2010, the Prosecutor requested that the Court authorise an investigation into the situation. The Court agreed to authorise an investigation, and used the Declaration as a basis for jurisdiction.¹¹²⁷ The Chamber did not specifically assess whether the Declaration made in 2003 could, on its own, cover crimes allegedly committed in 2010 or 2011.¹¹²⁸ However, the fact that the ICC opened an investigation is instructive. It appears that the ongoing Declaration (despite its age) was regarded as likely covering all future crimes. However, given the need for Declarations to be unequivocal to be valid, it may well be that the better course would be for an additional Declaration to be filed to bring the jurisdiction “up-to-date” or otherwise the ICC Registrar should seek additional verification of the validity of the previous declaration [see above Part Two(A) regarding the “Procedure On Making a Declaration”].

D. Differences in State Obligations

There are some provisions in the Rome Statute that refer explicitly to States Parties and may therefore on their face exclude States that have limited their acceptance of jurisdiction through Declarations. Accordingly, there are some differences between a States Party’s responsibilities and obligations and those of a non-ratifying State such as Ukraine. The differences will be discussed below.

a) Differences

The starting point is to note that Part 9 of the Rome Statute identifies the main body of obligations on States and non-States Parties. States Parties and non-States Parties are treated largely as equals as regards obligations under Part 9. According to Article 12(3) of the Rome Statute, a State that has made a Declaration accepting the jurisdiction of the Court must cooperate with the Court without any delay or exception in accordance with Part 9 of the Statute. It does not name other provisions. Consequently, such a State must cooperate, as any State Party must, on issues relating to, among other matters, the provision of documents and records, identification of people, taking of evidence, questioning of people, execution of searches or seizures and the protection of victims and witnesses.¹¹²⁹ There are, however, differences despite this Part of the Statute.

¹¹²⁶ République de Côte d’Ivoire, [‘Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale’](#) (18 April 2003).

¹¹²⁷ *The Situation in the Republic of Côte d’Ivoire* (Authorisation Decision) ICC-02/11-14 (3 October 2011) para. 15.

¹¹²⁸ *Ibid.*

¹¹²⁹ Rome Statute, Part 9.

First, non-States Parties may only be “invited” as opposed to “requested” by the Court to provide assistance on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.¹¹³⁰ This suggests a difference in formality and coerciveness of the nature of the request.¹¹³¹

Second, Article 70(4) encourages State Parties to extend its criminal laws to cover offences against the administration of justice of the Court (such as giving false evidence to the Court, or tampering with evidence). This does not apply to non-State Parties even if they have lodged a Declaration under Article 12(3).

Third, pursuant to Article 73, if a State Party is requested to disclose information in its control that was disclosed in confidence by another entity, then it must seek the consent of the originator to disclose that information. If the originator of the information is a State Party, it shall either consent to disclosure of the information or undertake to resolve the issue of disclosure with the Court, subject to the provisions of Article 72 which protects national security information. However, if the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.¹¹³²

Fourth, only a State Party is bound by the privileges and immunities afforded to the Court and some of its staff under the Rome Statute.¹¹³³ According to the Rome Statute, the Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary to fulfil its purpose.¹¹³⁴ This is afforded particularly but not solely to Judges, the Prosecutor, the Deputy Prosecutor and the Registrar when conducting business of the Court. They are afforded the same privileges and immunities as are accorded to heads of diplomatic missions and continue to be afforded such after their terms in office expire.¹¹³⁵ This particular difference is, however, not applicable to Ukraine because Ukraine has acceded¹¹³⁶ to the Agreement on the Privileges and Immunities of the International Criminal Court 2002 on 29 January 2007.¹¹³⁷ As the title suggests, this Agreement is designed to give certain privileges and immunities the Court in the territory of each State Party as is necessary to fulfil its purposes.¹¹³⁸ Therefore, there would be no difference in Ukraine’s obligations now, under the declaration, or as a ratifying State Party.

¹¹³⁰ *Ibid.*, art. 87(5)(a).

¹¹³¹ However, in the same manner as for State Parties, according to Article 87(5)(b) (in Part 9), if a non-State Party fails to cooperate with requests pursuant to any arrangement or agreement with the Court, the Court can refer the matter to the ASP or, if the situation was referred by the Security Council, to the Security Council.

¹¹³² Rome Statute, art. 73.

¹¹³³ *Ibid.*, art. 48.

¹¹³⁴ *Ibid.*, art. 48.

¹¹³⁵ *Ibid.*, art. 48.

¹¹³⁶ The difference between accession and ratification is limited; ratification is a State’s outright consent to be bound by a treaty. Accession is the act of accepting an offer to be bound by a treaty already negotiated and signed by other states. It has the *same* legal effect as ratification: Vienna Convention, arts. 2(1)(b), 14(1), 15 and 16.

¹¹³⁷ ICC Agreement on the Privileges and Immunities.

¹¹³⁸ *Ibid.*, art. 3.

Fifth, the ICC may only authorise the ICC Prosecutor to take specific investigative steps without having secured a State's cooperation if it is a State Party.¹¹³⁹ Article 57(3)(d) provides that the ICC Pre-Trial Chamber may 'authorise the Prosecutor to take specific investigative steps' in the territory of a State Party without having secured the cooperation of that State. The Pre-Trial Chamber will allow this request if it finds that the State Party "is clearly unable to execute a request for cooperation".¹¹⁴⁰ The specific use of "State Party" in this provision prohibits the Prosecutor from intervening in a sovereign State that has not ratified but simply declared it accepts the jurisdiction of the ICC. Therefore, it seems the Prosecutor could not use this provision to coercively secure the cooperation of Ukraine after requests under Part 9 and the remedies within that Part are exhausted. This affords some "protection" to non-States Parties to prevent the ICC Prosecutor from executing requests without the State having ratified the Rome Statute.

However, while Article 57(3)(d) may not apply to Ukraine, there is a similar coercive power under Part 9 that Ukraine is bound by. This is contained in Article 99(4) and it permits the ICC Prosecutor to execute a "request for assistance" directly on the territory of a State under certain conditions. In other words, this relates to a situation where the Prosecutor may execute a "request" directly on a State's territory even without the national authorities present. There are two examples in the provision of "non-compulsory measures", namely, the voluntary interview or taking evidence from a person and the examination of a public site. The interview of a witness can be conducted without national authorities if it is essential (for instance with national authorities seeking to influence the evidence of the witness). If a public site is examined by investigators, the scene must not be disturbed or modified by the investigators. This provision is limited to one of two circumstances. First, the crime must be alleged to have been committed on the territory of the State Party or declaring State, the case must have already been determined as admissible (see Part One) and when possible, consultations have taken place with the State concerned. Alternatively, the request may be executed following consultations with the State concerned and subject to the State's conditions or concerns (i.e., there must be consultations as opposed to "when possible" in the first condition). Further, the State is able to challenge an action by the ICC Prosecutor through an application to the ICC.¹¹⁴¹

Article 99(4) is not a coercive substitute for Article 57(3)(d), which applies only to States Parties. It is significantly more diluted than Article 57(3)(d). As noted above, Article 57(3)(d) cannot be used against Ukraine to obtain information that it may be unable to otherwise obtain coercively because Ukraine is not a State Party to the Rome Statute.¹¹⁴² The only comparable provision to execute investigative steps on the territory of declaring States such as Ukraine is Article 99 and it is subject to the conditions identified above, such as the need to engage in consultations

¹¹³⁹ Rome Statute, art. 57(3)(d).

¹¹⁴⁰ *Ibid.*, art. 57(3)(d).

¹¹⁴¹ Rome Statute, art. 99(4); [ICC, Regulations of the Court, ICC-BD/01-01-04](#), (adopted 26 May 2004) ("Regulations of the Court").

¹¹⁴² Rome Statute, art. 57(3)(d).

with the State in question. This affords some “protection” to non-States Parties to prevent the ICC Prosecutor executing requests without the State having ratified the Rome Statute.

b) Similarities

There are a number of similarities in the obligations imposed on States Parties and on declaring non-State Parties. There are a number of provisions in the Rome Statute that, as a consequence of Part 9, require declaring non-State Parties to assist the Court in varying regards in the same way as a State Party. These include, among other provisions:

- Assisting with arrest;¹¹⁴³
- Surrendering people to the Court;¹¹⁴⁴
- Identifying the whereabouts of persons;¹¹⁴⁵
- Taking evidence including testimony;¹¹⁴⁶ and
- Executing search and seizures.¹¹⁴⁷

Aside from the examples arising from the application of Part 9 to both State and non-State Parties, there are some Rome Statute provisions that also bind Ukraine. This is because Part 9 is interwoven into other provisions in the Statute which ostensibly only concern States Parties. Accordingly, the other provisions which are intertwined with Part 9 become relevant.

First, Article 59 demands that States Parties that receive a request for provisional arrest or for arrest and surrender must immediately take steps to arrest the person in accordance with Part 9. The provision provides that the Court may transmit requests for arrest and surrender of persons that must be executed and complied with.¹¹⁴⁸ Since Part 9 already binds a declaring non-State Party such as Ukraine, becoming a State Party would not change its obligations under this provision.

Second, as with States Parties, Ukraine as a declaring non-State Party could be asked to assist with securing compensation for victims of crimes that have been identified by the ICC. Article 75 of the Statute concerns reparations, in other words, compensation for victims of crimes perpetrated by the accused. Where the Court makes a reparations order, the Rome Statute provides that a “State Party” shall give effect to a reparations decision.¹¹⁴⁹ When the Court exercises its power under Article 75, the Court may rely upon certain Part 9 measures.¹¹⁵⁰ Those measures could include the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture,¹¹⁵¹ and “[a]ny other type of assistance which is not

¹¹⁴³ *Ibid.*, art. 92.

¹¹⁴⁴ *Ibid.*, art. 89.

¹¹⁴⁵ *Ibid.*, art. 93(1).

¹¹⁴⁶ *Ibid.*, art. 93(1).

¹¹⁴⁷ *Ibid.*, art. 93(1).

¹¹⁴⁸ *E.g.*, Rome Statute, art. 89.

¹¹⁴⁹ *Ibid.*, art. 75(5).

¹¹⁵⁰ *Ibid.*, art. 75(4).

¹¹⁵¹ *Ibid.*, art. 93(1)(k).

prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”.¹¹⁵² Measures used to give effect to an order under this provision would bind a non-State Party such as Ukraine.

Third, a State Party must give effect to fines or forfeitures ordered by the Court.¹¹⁵³ If a State Party cannot give effect to a forfeiture order, it must take steps to recover the property, proceeds or assets ordered by the Court.¹¹⁵⁴ The property or proceeds from the sale of assets must be transferred to the Court.¹¹⁵⁵ On the face of the provision, it would appear that it only applies to States Parties. However, the provisions of Part 9 of the Statute are broad and bind declaring non-States Parties to provide “assistance” to the Court in the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties, as well as any other assistance as necessary for the prosecution and investigation of crimes by the ICC.¹¹⁵⁶ Accordingly, in a strict sense, Ukraine would be under no direct obligation to enforce an order for a fine or forfeitures. It may, however, be asked to “assist” in enforcing an order under Part 9.

To conclude, although Ukraine, by virtue of its Declarations is bound by Part 9 to cooperate with the Court, there are some differences to be borne in mind between the obligations placed on States Parties and those placed on declaring non-States Parties. Overall, however, those differences in practical terms may not be significant.

E. The Steps Needed to Accept the Rome Statute

This section identifies the steps Ukraine may need to take in order to ratify the Rome Statute and fully “accept” its provisions. To fully accept the Rome Statute, Ukraine must first amend its Constitution to permit recognition of the Rome Statute, and proceed to “implement” the provisions of the Rome Statute into Ukraine’s domestic legal system.

States that wish to ratify the Rome Statute, but who face constitutional hurdles, have several options open to them. The Venice Commission (a part of the Council of Europe) has published a Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the ICC, which outlines four “solutions” that States might adopt:¹¹⁵⁷

- Insert a new provision into the constitution that allows constitutional problems to be overcome and avoids the need to include exceptions for all the relevant Articles;
- Revise all constitutional articles systematically that must be changed to comply with the Rome Statute;
- Introduce and/or apply a special procedure of approval by Parliament, as a consequence of which the Rome Statute may be ratified, despite the fact that some articles are in conflict with the constitution; or

¹¹⁵² *Ibid.*, art. 93(1)(l).

¹¹⁵³ *Ibid.*, art. 109.

¹¹⁵⁴ *Ibid.*, art. 109(2).

¹¹⁵⁵ *Ibid.*, art. 109(3).

¹¹⁵⁶ *Ibid.*, art. 93(1)(k) and (l).

¹¹⁵⁷ European Commission For Democracy Through Law (Venice Commission), [‘Report On Constitutional Issues Raised By The Ratification Of The Rome Statute Of The International Criminal Court’](#), CDL (2000) 104 rev., 15 December 2000, p. 10 (“Venice Commission Report on Constitutional Issues”).

- Interpret certain provisions of the constitution in such a way so as to avoid constitutional problems in terms of compatibility with the Rome Statute.¹¹⁵⁸

F. The Ukrainian Situation

Before examining the experience of States that have successfully ratified the Rome Statute, it is important to explain in brief Ukrainian developments toward ratification. As discussed in Part One, Ukraine's Constitutional Court found that the ICC can exercise its powers and functions on *any* State Party, and that it has the power to find *any* case admissible if a State is unwilling or unable to genuinely conduct an investigation or prosecution.¹¹⁵⁹ The Court concluded that this jurisdiction was supplementary to the national Ukrainian system and that such additional jurisdiction was prohibited by the Constitution.¹¹⁶⁰ Therefore, under Article 9 of the Constitution, it must be amended before the Rome Statute can be ratified.¹¹⁶¹

In light of the above decision, in 2008 the Venice Commission advised that a law be passed to permit the Verkhovna Rada to ratify the Rome Statute. The Venice Commission drafted a proposed "Article 128(3)" for the Ukrainian Constitution stipulating that Ukraine may recognise the jurisdiction of the ICC on conditions prescribed by the Rome Statute.¹¹⁶²

In 2015, the President of Ukraine proposed a law that seeks to address the ICC ratification question. By Decree 119/2015 of 3 March 2015, President Poroshenko established the Constitutional Commission of Ukraine with the task of preparing amendments to the current Constitution.¹¹⁶³ The President appointed Hanna Suchocka, member of the Venice Commission, as an international observer on the Constitutional Commission.¹¹⁶⁴

On 21 July 2015, the Venice Commission received a letter from Volodymyr Groysman, at the time Speaker of the Verkhovna Rada and Chair of the Constitutional Commission of Ukraine. The letter included proposed amendments

¹¹⁵⁸ *Ibid.*, p. 3.

¹¹⁵⁹ Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, N 3-v/2001 of 11 July 2001 ("Constitutional Court Opinion"), part 2.1, para. 3.

¹¹⁶⁰ Article 124 of the Ukrainian Constitution states that the administration of justice is the exclusive competence of the courts and that judicial functions cannot be delegated to other bodies or officials. The Constitutional Court noted that the jurisdiction of the ICC under the Rome Statute is complementary to national judicial systems. It concluded that para 10 of Preamble and art. 1 of the Statute were inconsistent with the provisions of paras. 1 and 3 of art. 124 of the Constitution of Ukraine, therefore Ukraine's accession to the Statute, according to art. 9 of the Constitution of Ukraine would be possible only after making corresponding amendments to it.

¹¹⁶¹ European Commission for Democracy Through Law (Venice Commission), ["Second Report On Constitutional Issues Raised by The Ratification of the Rome Statute of the International Criminal Court"](#), CDL-AD (2008) 031, 4 November 2008 ("Venice Commission Second Report"), paras. 14-15.

¹¹⁶² Opinion on the draft constitution of Ukraine (prepared by a working group headed by V.M. Shapoval) (CDLAD (2008)015), cited in Venice Commission Second Report, fn 10.

¹¹⁶³ European Commission for Democracy Through Law (Venice Commission) Preliminary Opinion On the Proposed Constitutional Amendments Regarding the Judiciary of Ukraine, CDL-PI (2015)016, Opinion No. 803/2015, 24 July 2015 ("Venice Commission Preliminary Opinion") paras. 1, 3.

¹¹⁶⁴ Venice Commission Preliminary Opinion, para. 1.

to the Constitution, proposed by the Working Group of the Constitutional Commission. The letter asked the Venice Commission to prepare an urgent opinion on these amendments.¹¹⁶⁵

Subsequently, in late November 2015, the President of Ukraine submitted a draft law to the Verkhovna Rada on amending the Constitution.¹¹⁶⁶ One provision of the draft law concerns the ICC. Article 124 of the draft law provides that:

Ukraine may recognise the jurisdiction of the International Criminal Court based on the provisions of the Rome Statute.

Subsequently, the Venice Commission expressed their strong support for the proposed amendment.¹¹⁶⁷ On 2 June 2016, the Verkhovna Rada of Ukraine adopted the draft law amending Article 124 of the Constitution of Ukraine.¹¹⁶⁸ Since the amendment became effective on 30 June 2019,¹¹⁶⁹ there are no obstacles for Ukraine to ratify the Rome Statute.

G. Ratification

Ukraine is not alone in grappling with the constitutionality of the Rome Statute in its national legal system. Indeed, the ICRC has conducted a comprehensive study into national jurisdictions and their approach to the Rome Statute. This survey provides a helpful analysis of various constitutional challenges that commonly arise with regard to the ratification of the Rome Statute and enables Ukraine's current impasse to be more fully understood.¹¹⁷⁰

The “catch-all” amendment provision is familiar to other States. It did not amend the conflicting provisions identified by the Constitutional Court (see Part One), but rather gave a power to Ukraine to recognise the Rome Statute. This is a solution that has been used by other States who grappled with similar constitutional problems, such as Belgium,¹¹⁷¹ Chile,¹¹⁷² Côte d'Ivoire and France.

¹¹⁶⁵ *Ibid.*, para. 4.

¹¹⁶⁶ [On Amending the Constitution of Ukraine \(in terms of justice\): Draft Law No.3524](#), - 25 November 2015.

¹¹⁶⁷ Venice Commission Preliminary Opinion, para. 17.

¹¹⁶⁸ Law of Ukraine [“On amendments to the Constitution of Ukraine \(in the field of judiciary\)”](#) No. 1401-VIII [Online resource] 2 June 2016.

¹¹⁶⁹ [Constitution of Ukraine](#) [Online resource], art. 124.

¹¹⁷⁰ ICRC, [‘Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State’](#), 01/2003.

¹¹⁷¹ Opinion of the Council of State of 21 April 1999 on a legislative proposal approving the Rome Statute on the International Criminal Court, Avis du Conseil d'état du 21 Avril 1999 sur un projet de loi “portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 Juillet 1998”, Parliamentary Document 2-239 (1999/2000), p. 94, cited in International Committee of the Red Cross, [‘Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Court and Councils of State’](#), 01/2010 (“ICRC Rome Statute Issues”) (“ICRC Rome Statute Issues”).

¹¹⁷² Rome Statute of the International Criminal Court (ICC) of 7 April 2002, Decisión del Tribunal Constitucional respecto de la constitucionalidad del Estatuto de Roma de la Corte Penal Internacional, 7 de abril de 2002, cited in ICRC Rome Statute Issues, p. 18.

First, Belgium's Council of State (Belgium's advisory and jurisdictional institution) found that, because of the Constitution, a Belgian tribunal could not give up its power in favour of the ICC. This was because the Belgian Constitution demands that no person may be taken against his or her will from a Belgian judge that Belgian law has assigned to him or her.¹¹⁷³ Accordingly, the Council of State recommended an amendment to the Constitution. The Belgian Government ratified the Statute before the Constitution was amended, reasoning that it had time to make the necessary constitutional and legislative amendments before the ratification of 60 States was achieved and the Rome Statute entered into force. Upon ratification, the Constitution was not amended. The Government and ICRC argued that the Rome Statute would have direct effect in domestic law and would therefore prevail over any contrary legal provisions, including constitutional provisions.¹¹⁷⁴

The Government of Chile faced the same issue. The Chilean Constitutional Court found that the Rome Statute envisaged a new jurisdiction that the Constitution did not permit. As the ICC was, in the Court's view, a supranational Court, a Constitutional amendment was needed to recognise its powers in domestic law and give it jurisdiction in Chile.¹¹⁷⁵ The Government amended the Statute with a provision stating that "[t]he State of Chile may recognize the jurisdiction of the International Criminal Court in the terms provided in the treaty approved in the city of Rome, on 17 July 1998 by, the Diplomatic Conference of Plenipotentiaries of the United Nations concerning the establishment of that Court".¹¹⁷⁶ Chile also reaffirmed the principle of complementarity and inserted a provision that it would cooperate with the Court subject to Chilean law.¹¹⁷⁷ Having made the necessary Constitutional amendments, Chile deposited its instrument of ratification with the UN on 29 June 2009, thereby ratifying the Rome Statute.¹¹⁷⁸

Côte d'Ivoire's experience was similar to that of Ukraine. It signed the Rome Statute in 1998, but did not ratify it at that time. In 2003, the Côte d'Ivoire Constitutional Council took issue with the complementary jurisdiction of the ICC in relation to its own Constitution. It opined that the ICC's ability to declare admissible and try a case already before a national court was a violation of State sovereignty.¹¹⁷⁹ Côte d'Ivoire, however, lodged two Declarations (as

¹¹⁷³ Opinion of the Council of State of 21 April 1999 on a legislative proposal approving the Rome Statute on the International Criminal Court, Avis du Conseil d'état du 21 Avril 1999 sur un projet de loi "portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 Juillet 1998", Parliamentary Document 2-239 (1999/2000), p. 94, cited in ICRC Rome Statute Issues, p. 3.

¹¹⁷⁴ Rapport fait au nom de la Commission des relations extérieures et de la défense, Exposé introductif du Vice-premier Ministre et Ministre des Affaires étrangères, Doc. Parl. 2-329/2, 1999/2000, pp. 1-5, cited in ICRC Rome Statute Issues, p. 3.

¹¹⁷⁵ Rome Statute of the International Criminal Court (ICC) of 7 April 2002, Decisión del Tribunal Constitucional respecto de la constitucionalidad del Estatuto de Roma de la Corte Penal Internacional, 7 de abril de 2002, cited in ICRC Rome Statute Issues, p. 18.

¹¹⁷⁶ ['Chile's Constitution of 198 with Amendments through 2012'](#) (Constitute Project, 2012) p. 67, art. 24.

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ ['Chile becomes 109th State Party to the International Criminal Court'](#) (Parliamentarians for Global Action, 2009).

¹¹⁷⁹ Constitutional Council Decision No. 002/CC/SG of 17 December 2003 on the compatibility of the Rome Statute of the International Criminal Court with the Ivorian Constitution [Décision Conseil Constitutionnel N°002/CC/SG du 17 décembre 2003 relative à la conformité à la Constitution du Statut de Rome de la Cour pénale internationale] cited in ICRC Rome Statute Issues, p. 23.

Ukraine has) on 18 April 2003.¹¹⁸⁰ Subsequently, in 2012, the National Assembly adopted two bills that revised the Constitution to allow ratification of the Rome Statute and authorised the Head of State to ratify the Rome Statute, respectively. The former included an amendment to the Constitution, according to which “[t]he Republic may recognise the jurisdiction of the International Criminal Court under the Treaty signed on 17 July 1998”.¹¹⁸¹ The State subsequently deposited its instrument of ratification on 15 February 2012 with the UN.¹¹⁸²

Further, the French experience of ratification sheds light on other obstacles to ratification. In 1999, the French Government requested that the French Constitutional Council rule on whether ratification of the Rome Statute would raise any constitutional issues. Unlike the situations outlined above, the Constitutional Council found that the complementarity jurisdiction of the ICC was compatible with the Constitution, due to the provision that cases are admissible before the ICC only when the State is unwilling or unable genuinely to investigate or prosecute the case and thereby it had no impact upon France’s sovereignty.¹¹⁸³ France saw this provision as clear and well defined. It was derived, according to the Court, from the international law principle that treaties (such as the Rome Statute) must be executed in good faith. Accordingly, the principle would only arise if France failed in its duty to prosecute.¹¹⁸⁴

Nevertheless, the French Constitutional Council considered other aspects of ratification unconstitutional. For instance, the Constitutional Council took issue with Article 99(4) of the Rome Statute concerning the ICC Prosecutor’s ability to execute a request for assistance for matters such as questioning of persons or service of documents directly on the territory of a State Party.¹¹⁸⁵ The Constitutional Council opined that while “the Prosecutor may, even in circumstances where a national judicial authority is not unavailable, take certain investigatory measures outside the presence of the authorities of the requested State on the latter’s territory” and that the “authority granted to the Prosecutor to take such measures without the presence of the competent French judicial authorities may violate the essential conditions of the exercise of national sovereignty”.¹¹⁸⁶ It therefore found that this provision violated the Constitution and ratification required a constitutional amendment.¹¹⁸⁷

Further, the Constitutional Council took exception to the ICC being able to accept jurisdiction “[...] merely as a result of the application of an Amnesty Act or a national statute of limitations; in such circumstances, France, without being unwilling or unable, could be obliged to arrest a person and surrender him or her to the Court by reason of offences

¹¹⁸⁰ [ICC, Côte d’Ivoire ratifies the Rome Statute, ICC-ASP-20130218-PR873](#), 18 February 2013.

¹¹⁸¹ UNGA, ‘[Report of the Independent Expert on the Situation of Human Rights in Côte d’Ivoire, Mr. Doudou Diène](#)’ (7 January 2013) 22nd Session, A/HRC/22/66.

¹¹⁸² Coalition for the ICC, ‘[2013 Status of the Rome Statute Around the World](#)’ (2013) p. 16; ‘[Côte d’Ivoire](#)’ ([Parliamentarians for Global Action](#)).

¹¹⁸³ Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) Décision 98-408 DC du 22 Janvier 1999 (Traité portant statut de la Cour pénale internationale), Journal Officiel, 24 January 1999, p. 1317, cited in ICRC Rome Statute Issues, p. 1.

¹¹⁸⁴ *Ibid.*

¹¹⁸⁵ Rome Statute, art. 99(4).

¹¹⁸⁶ Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) Décision 98-408 DC du 22 Janvier 1999 (Traité portant statut de la Cour pénale internationale), Journal officiel, 24 January 1999, p. 1317, cited in Venice Commission Report on Constitutional Issues, p. 10.

¹¹⁸⁷ *Ibid.*

which, under French law, were covered by an amnesty or a limitation period; this would amount to a violation of the essential conditions of the exercise of national sovereignty”.¹¹⁸⁸ As a consequence, France adopted a constitutional provision that solved all the constitutional problems raised above.¹¹⁸⁹ The solution adopted by the French government was to insert a provision into the Constitution which read: “The Republic may recognise the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998”.¹¹⁹⁰ The government was of the view that this Article met the constitutional concerns.¹¹⁹¹

As may be seen, the solution of inserting an overarching provision into the Constitution appears to be similar to the approach suggested by the Ukrainian draft law of November 2015.¹¹⁹² As noted above, Article 124 of the draft law provides that “Ukraine may recognise the jurisdiction of the International Criminal Court based on the provisions of the Rome Statute”. This approach has the advantage of implicitly amending the constitutional provisions in question without opening an extensive debate on individual amendments and provisions.¹¹⁹³ In other words, any concerns about the incompatibility of Ukrainian laws with the provisions of the Rome Statute should be removed by this single provision, as opposed to amending each provision in the Constitution which has the potential to be violated by ratification, with a caveat to say the provision applies even with the Rome Statute in force. Accordingly, a single provision is a simple solution to allay any concerns about the compatibility of the provisions of the Rome Statute with the Constitution.

H. Domestic Implementation

With ratification or submission of the Declarations, Ukraine must consider how to implement the provisions of the Rome Statute, particularly the substantive and procedural provisions. This section identifies specific implementation problems that may arise and how they may be addressed.

The implementation of the Rome Statute’s provisions concerns how to ensure that Ukraine is able to effectively perform its obligations under the Statute. Domestication of the Rome Statute is important because, as a consequence of the Declarations and after ratification of the Rome Statute, Ukraine is and will be required to provide the ICC with its full cooperation and be able to investigate and prosecute the crimes therein.¹¹⁹⁴ As discussed in detail below, ensuring that a State’s domestic law complies fully with the provisions of the Rome Statute is critical.

¹¹⁸⁸ *Ibid.*

¹¹⁸⁹ *Ibid.*

¹¹⁹⁰ Constitutional Law No. 99-568, July 8, 1999, inserting in Title VI of the Constitution, Article 53-2 with regard to the International Criminal Court, J.O. No. 157, July 9, 1999, 10 175, cited in ICRC Rome Statute Issues, p. 3.

¹¹⁹¹ ‘[Cour pénale internationale, adoption du projet de loi constitutionnelle](#)’ (Ministry of Justice of France, 1999).

¹¹⁹² [On Amending the Constitution of Ukraine \(in terms of justice\): Draft Law No.3524.](#) - 25 November 2015.

¹¹⁹³ [Rights & Democracy and The International Centre for Criminal Law Reform and Criminal Justice Policy, ‘International Criminal Court: Manual for Ratification and Implementation of the Rome Statute’](#) (May 2000) appendix I.

¹¹⁹⁴ The International Centre for Criminal Law Reform and Criminal Justice Policy, ‘[International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute](#)’ (3rd ed, 2008), p. 16.

a) When Should Implementation Occur and What Should Be Implemented?

This section identifies when Ukraine should implement the Rome Statute provisions and certain concerns that should be addressed now by Ukraine. It considers this question first in relation to the timing of implementation and the obligations arising from the two Declarations submitted by Ukraine. It then addresses this issue in relation to five broad areas: (i) the crimes, modes of liability and other substantive provisions of the Rome Statute; (ii) immunity for heads of State; (iii) the limitation period on when international crimes can be prosecuted; (iv) cooperation with the Court; and (v) other provisions which require consideration of their implementation now, prior to ratification of the Rome Statute.

i. The Timing of Implementation

The first question to be considered is whether the practice of Ukraine's political system favours implementation prior to, at the time of or after ratification or accession to an international treaty. In line with ordinary Ukrainian practice, it appears that it would be consistent to implement the Rome Statute's provisions after or simultaneously with ratification.¹¹⁹⁵ The procedure for implementation seems to be governed by a domestic Ukrainian law. The Law of International Agreements of Ukraine governs the procedure for the conclusion, performance and termination of international treaties.¹¹⁹⁶ As with the likely majority of States globally,¹¹⁹⁷ Ukraine has no legal requirement to modify its domestic legislation before ratifying the Rome Statute. However, as State practice elsewhere has shown, there is little doubt that full domestication of the Rome Statute will likely require at least some domestic implementing legislation due to the uniqueness and complexity of its provisions.¹¹⁹⁸ The Law on International Agreements however provides that implementation should occur simultaneously with ratification.¹¹⁹⁹ There appears to be no reason why implementation of the Rome Statute's most important provisions cannot begin now, particularly in light of the Declarations submitted by Ukraine to the ICC [see Part Two(A)].

Waiting until after ratification to implement the Rome Statute's provisions ignores the reality of the Declarations which have already been submitted by Ukraine. These Declarations permit the ICC to take action in Ukraine now, including the ability to find a case admissible at the ICC and to demand that Ukraine hand over an accused it wishes to try, or to conduct of a full investigation which demands Ukraine's cooperation under Part 9 of the Rome Statute [see Part Two(A)]. Further, the principle of complementarity (which Ukraine is now bound by under the Declarations) requires States to ensure that their criminal courts are able to exercise jurisdiction over criminal conduct amounting to crimes under the Rome Statute. If they cannot, an accused and a case will be taken from Ukraine and tried at the ICC. Therefore, at a minimum, this involves ensuring that the domestic system is able to effectively investigate and

¹¹⁹⁵ Under the former law: Myroslava Antonovych, 'Implementation of International Human Rights Norms in Ukrainian Legislation' (1996) 3(1) Annual Survey of Int'l & Comp. Law.

¹¹⁹⁶ [On International Treaties: Law of Ukraine No.1906-IV](#) [Online resource]. 29 June 2004. art. 9(2)(7).

¹¹⁹⁷ The International Centre for Criminal Law Reform and Criminal Justice Policy, '[International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute](#)', March 2008, 3rd Edn, pp. 13 – 14.

¹¹⁹⁸ *Ibid.*

¹¹⁹⁹ [On International Treaties: Law of Ukraine No.1906-IV](#) [Online resource]. 29 June 2004., art. 9(2)(7).

prosecute a similar range of criminal conduct. This will primarily involve implementing or amending legislation to ensure that the crimes and modes of liability provided for in the Rome Statute may be prosecuted under domestic Ukrainian legislation. The general principles and concepts of international criminal law, such as the modes of liability and available defences, need to also be incorporated and any bars to prosecution, such as statutes of limitations, immunities and limitations of jurisdictions must be addressed.

Accordingly, a delay ignores the current legal situation after the two Declarations have been submitted. It also may potentially cause problems for Ukraine that will lead to investigations by the ICC Prosecutor or trials at the ICC being delayed. Indeed, it is likely that a failure to ensure an effective system of handling international crimes cases (through implementation, below) may lead to a finding under the complementarity provisions that Ukraine is unable to investigate or prosecute cases genuinely due to a lack of a proper legal framework.

ii. The Crimes and Other Substantive Provisions

As a result of the above, particularly with regard to the undue delay in ratifying the Rome Statute, implementation of the Rome Statute's provisions first may be the most prudent course of action. In sum, this would require the Verkhovna Rada to amend the Criminal Code and other laws to ensure they reflect the obligations and activities envisaged by the provisions of the Rome Statute. This approach would ensure that domestic courts were immediately able to prosecute the core Rome Statute crimes under the appropriate modes of liability, prior to ratification of the Rome Statute. This section first identifies the obligations on Ukraine to implement the provisions of the Rome Statute. It then identifies problematic areas of the Ukrainian Criminal Code which must be addressed.

First, as a result of the obligations under the Declarations, Ukraine must seize this opportunity to bring its general criminal law into line with international standards. It should be noted that the "procedural and institutional reforms needed to comply with international due process standards often entail far-reaching and long-term law reform efforts, and Rome Statute implementation should not be too closely tied to such efforts if doing so would risk indefinite delay".¹²⁰⁰ As discussed in Part Three, a critical question for the ICC will be whether Ukraine is willing or able to pursue the prosecution of ICC suspects for substantially the same conduct as that considered at the ICC. Therefore, if domestic prosecutions of potentially high-level actors are to take place in Ukraine, and Ukraine wishes to maintain its right to conduct its own trials, it is essential that the Rome Statute's substantive law, including crimes, are properly reflected in Ukrainian domestic law.

As an aside, these implementing steps may give rise to arguments against the retroactive prohibition of criminal conduct.¹²⁰¹ This principle dictates that there should be no criminalisation of an act without an express provision in the legal code criminalising such an act or course of conduct. In other words, a person cannot be found guilty of an

¹²⁰⁰ The International Centre for Criminal Law Reform and Criminal Justice Policy, [‘International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute’](#) (3rd ed., March 2008)

¹²⁰¹ International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967) ("ICCPR") art. 15; Universal Declaration of Human Rights, G.A. Res 217A (III) U.N. Doc A/810 at 71 (1948) ("UDHR") art. 11(2).

act if that act was not criminalised on the date of its commission. However, this principle is not violated where the conduct to be prosecuted already existed as a crime under international law, such as crimes against humanity.¹²⁰² As was the case in Uganda, the Government was able to enact legislation making crimes against humanity a domestic crime with the intention of prosecuting conduct occurring before the crime became part of domestic Ugandan law.¹²⁰³ In another example, the European Court of Human Rights (“ECHR”) held that the prosecution of two individuals for a crime against humanity committed in 1949 was not a retroactive application of the offence because it was a crime under international law, even if it was not expressly provided for in domestic law.¹²⁰⁴

Where States have not implemented the same crimes contained in the Rome Statute, then “ordinary crimes” under the pre-existing domestic law will be prosecuted, such as the offence of torture instead of the war crime of torture.¹²⁰⁵ It should be noted that there is no prohibition in ICC law on states choosing to prosecute international crimes as ordinary crimes.¹²⁰⁶ However, this approach brings with it a myriad of questions that are highly relevant to the question of whether Ukraine maintains its wish to try its own leadership domestically, rather than the ICC insisting on trying the cases in The Hague.

As described in Part Three, in the event that the ICC Prosecutor concludes that the State is not willing or able to genuinely investigate or prosecute the same case as hers, she will conclude that the case is admissible and apply to the Court to maintain the case at the ICC. The question of the appropriateness of the State’s efforts to prosecute domestically, including the adequacy of prosecuting national crimes in lieu of international crimes, will be a principal focus of this determination.

This complementarity principle is established in Article 17(1)(a) to (c) of the Rome Statute and affirmed in paragraph 10 of the Preamble and Article 1 of the Statute which states that the Court shall be “complementary to national criminal jurisdictions”. The principle reflects the concern that the Rome Statute and the Court should not intrude on the sovereignty of State Parties.¹²⁰⁷ Complementarity can be described as concerning whether genuine investigations

¹²⁰² ICCPR, art. 15(1). For another example, see the situation of Senegal and the Hissène Habré trial (Valentina Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’ (2011) *Journal of International Criminal Justice* 1-19).

¹²⁰³ Human Rights Watch, ‘[Justice for Serious Crimes before National Courts- Uganda’s International Crimes Division](#)’ (January 2012) p. 14.

¹²⁰⁴ *Kolk and Kislyiy v. Estonia* (Decision on Admissibility) Applications no. 23052/04 and 24018/04 (17 January 2006). See also, Antonio Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The *Kolk and Kislyiy v. Estonia* Case before the ECHR’ (2006) 4(2) *Journal of International Criminal Justice* 410-418.

¹²⁰⁵ Jann Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1 *Journal of International Criminal Justice* 86, pp. 95-99; Astrid Reisner Coracini, ‘Evaluating domestic legislation on the customary crime of aggression under the Rome Statute’ in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) p. 733.

¹²⁰⁶ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ([Decision](#)) ICC-01/11-01/11 (31 May 2013) paras. 85-86 and fns 138-139; *The Prosecutor v. Francis Kiriimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Judgment](#)) ICC-01/09-02/11-274 (30 August 2011) paras. 85 and 88; *The Prosecutor v. Hadzihasanović* ([Judgment](#)) IT-01-47-T (15 March 2006) para. 260.

¹²⁰⁷ William A Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (OUP, 2010) p. 336.

and prosecutions are being conducted at a national level sufficient to warrant a finding that the ICC does not have the right to try the relevant cases. It involves an analysis by the ICC Prosecutor of steps taken by national courts to investigate or prosecute the alleged crimes against specific individuals encompassed by the preliminary examination.¹²⁰⁸

In sum, for the ICC Prosecutor (and subsequently the Pre-Trial Chamber) to be satisfied that the domestic investigation covers the same “case” as that before a Court, it must be demonstrated that: (i) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and (ii) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court.¹²⁰⁹ Evidentially, prosecuting using ordinary crimes makes it more difficult to show that the same conduct is being prosecuted. Moreover, as many commentators have recognised, labelling certain conduct as an international crime, rather than an ordinary, domestic crime, can bring with it enormous benefits, specifically with regards to history-telling,¹²¹⁰ fighting impunity¹²¹¹ and restoring international peace and security.¹²¹² These issues are explained in more detail in GRC’s report entitled “The Enforcement of International Humanitarian Law in Ukraine”.

Second, the Rome Statute’s crimes and modes of liability should be implemented for the benefit of Ukraine’s domestic system. After submitting the Declarations, Ukraine should criminalise the crimes and modes of liability contained in the Rome Statute. This may be achieved by either: (i) interpreting the pre-existing criminal codes to

¹²⁰⁸ Rome Statute, arts. 18(1) and 19(2)(b).

¹²⁰⁹ *Situation in Libya in the Case of The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ([Gaddafi Admissibility Decision](#)) ICC-01/11-01/11 (31 May 2013) (“Gaddafi Admissibility Decision”) paras. 61, 74 and 76 to 77. The Chamber recalls that the “same person, same conduct” test was initially elaborated in: *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06-8-Corr (24 February 2006) para. 31. This test was later recalled in: *The Prosecutor v. Ahmad Muhammad Harun* (“Ahmad Harun”) and *Ali Muhammad Ali Abd-Al-Rahman* (“Ali Kushayb”) ([Decision](#)) ICC-02/05-01/07-I-Corr (27 April 2007) para. 24; *The Prosecutor v. Germain Katanga* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/07-4 (6 July 2007) para. 20 (public redacted version in ICC-01/04-01/07-55); *The Prosecutor v. Mathieu Ngudjolo Chui* ([Decision on Warrant of Arrest](#)) ICC-01/04-01/07-262 (6 July 2007) para. 21. The same approach was followed in: *The Prosecutor v. Kony et al* ([Admissibility Decision](#)) ICC-02/04-01/05-377 (10 March 2009) paras. 17-18; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Admissibility Decision](#)) ICC-01/09-01/11-101 (30 May 2011) para. 54; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Admissibility Decision](#)) ICC-01/09-02/11-96 (30 May 2011) para. 48. This jurisprudence of the Pre-Trial Chambers was later confirmed by the Appeals Chamber which, however, referred to ‘the same individual and substantially the same conduct’: *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Judgment](#)) ICC-01/09-02/11-274 (30 August 2011) para. 39.

¹²¹⁰ See generally, Elinor Fry, *The Contours of International Prosecutions: As Defined by Facts Charges, and Jurisdiction* (Eleven International Publishing, 2015) pp. 14-15, citing to Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press, 2010) pp. 30-5; John Jackson, ‘Faces of Transnational Justice: Two Attempts to Build Common Standards Beyond National Boundaries’, in John Jackson et al. (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Hart Publishing, 2008) p. 226. See also Report of the UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc S/2004/616 (23 August 2004) para. 38.

¹²¹¹ Jens David Ohlin, ‘Goals of International Criminal Justice and International Criminal Procedure’, in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) p. 59.

¹²¹² Elinor Fry, *The Contours of International Prosecutions: As Defined by Facts Charges, and Jurisdiction* (Eleven International Publishing, 2015) p. 14.

cover the same crimes as the Rome Statute; or, more likely, (ii) by adopting an express and specific act of law. The adoption of a specific act of law can be achieved by either repeating the provisions of the Rome Statute in Ukraine's domestic criminal code or in a supplementary criminal code specifically for international crimes, or criminalising the conduct by reference. In other words, it could incorporate the provisions of the Rome Statute by stating that the provisions of the Rome Statute are incorporated into Ukrainian law. The act should also identify the modes of liability by which the crimes can be committed (see above).¹²¹³

Concerning the interpretation of the law, the pre-existing framework for the prosecution of international crimes in Ukraine is concerning. Instead of legislative reform, there is the (less certain) route of allowing the judicial system to (re)interpret existing military or ordinary criminal law. For example, for the conflict in Eastern Ukraine, Ukraine may rely upon Article 438 of the Criminal Code that criminalises certain war crimes.¹²¹⁴ However, the Article suffers from vagueness and a lack of specification. It provides:

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of methods of warfare prohibited by international instruments, or any other violations of rules of the warfare recognised by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions, -
shall be punishable by imprisonment for a term of eight to twelve years.
2. The same acts accompanied with an intended murder-
shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.¹²¹⁵

Theoretically, a court could interpret this provision as incorporating a wide range of war crimes recognised by the Geneva Conventions (which circumscribe many of the laws of war which must be adhered to) an approach that might ensure compliance with the Rome Statute. However, as identified in GRC's report entitled "The Domestic Implementation of International Humanitarian Law in Ukraine", this provision may be too vague. The provision incorporates international crimes by "referencing" them, and, in turn, incorporating them into domestic law. This would include criminalisation of all violations of the laws of war listed in the Geneva Conventions and Additional Protocols, as well as other violations enforced by other treaties ratified by Ukraine.

This approach, however, seems vague. In particular, there does not appear to be a way of prosecuting crimes against humanity under Ukrainian law. The crime does not exist in Ukraine's domestic criminal code and it does not appear to be capable of incorporation into Article 438. The suggestion and the concerns over the vagueness of this Article questions whether it respects the principles of legality and culpability. In sum, both principles rest upon ensuring that any conduct that leads to penal sanctions is particularised in a manner that is sufficiently clear, specific and certain

¹²¹³ Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), *Importing Core International Crimes into National Law* (2nd edn, Torkel Opsahl, Oslo, 2010) p. 7, ("Bergsmo Importing Core Crimes").

¹²¹⁴ [Criminal Code of Ukraine: Law of Ukraine No. 2341-III](#) [Online resource]. 05 March 2001, art. 438.

¹²¹⁵ [Criminal Code of Ukraine, as amended \(Vidomosti Verkhovnoi Rady \(VVR\), 2001, # 25-26, p. 131\)](#) 1 September 2001, unofficial translation.

so that the culpability at its core, and the proportionate sanction to be applied, is sufficiently foreseeable and accessible to those to whom it is to be applied.

The principle of legality is a core legal tenet and fundamental human rights principle which holds that no crime or punishment can exist without a valid legal ground.¹²¹⁶ This principle entails that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.¹²¹⁷

The ECHR has interpreted the principle of legality as embodying the principle that only the law can define a crime and prescribe a penalty.¹²¹⁸ In this regard, the law must not be “extensively construed to an accused’s detriment”, nor can it be unclearly defined, meaning “the individual can know from the wording of the relevant provision and, if needs be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable”.¹²¹⁹ In other words, criminal liability for certain conduct should be sufficiently foreseeable and accessible at the time of its commission.¹²²⁰

In addition, the principle of culpability is a basic prerequisite for criminal liability in most societies.¹²²¹ Culpability in criminal law is synonymous with moral blameworthiness, and as such necessitates that the law is well defined so as to attribute criminal responsibility. The principle of culpability comprises two elements: (i) the requirement of criminal responsibility *per se*, i.e. the person should only be punished if they are guilty of a crime; and (ii) the requirement of proportionality between the personal guilt and the punishment.¹²²²

Moreover, this degree of specificity enhances the effectiveness of the penal regime as a whole. Domestic judges, prosecutors and other domestic legal professionals must clarify and interpret domestic law in light of principles of international law with which they may not be familiar. This is a complex and challenging endeavour even when domestic legislation criminalising specific conduct is carefully and expressly particularised.

¹²¹⁶ UDHR, art. 11; ICCPR, art. 15; European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950) 213 UNTS 221, art. 7.

¹²¹⁷ ICCPR, art. 15.

¹²¹⁸ European Court of Human Rights, *Kokkinakis v. Greece* ([Judgment](#)) App No 14307/88 (25 May 1993).

¹²¹⁹ *Ibid.*

¹²²⁰ Bert Swart, ‘Modes of International Criminal Liability’, in Antonio Cassese (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) p. 92.

¹²²¹ Stefanie Bock, ‘The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute’ (2013) 9 *Utrecht Law Review* 184, p. 184.

¹²²² Gerhard Werle and Boris Burghardt, ‘Establishing Degree of Responsibility: Modes of Participation in Article 25 of the ICC Statute’, in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014) p. 304.

Accordingly, in instances relating to generalised provisions such as Article 438, there may be a high degree of uncertainty with regards to culpability, in other words, what conduct is intended to be criminalised and what penalty should be attached to that individual act and culpability.

Similar criticism may also be made of relying on domestic crimes within the Criminal Code as a method for the criminal enforcement of international crimes. Although they are unlikely to give rise to breaches of the principle of legality and culpability *per se*, they do create problems of certainty, specificity and practical effectiveness. Moreover, although these provisions provide legal professionals such as judges and prosecutors with more familiar provisions and less demanding requirements, in many instances, they will fail to adequately reflect the totality of conduct or the seriousness of the violation or crime.

By their nature, war crimes are some of the most heinous and serious crimes known to humankind.¹²²³ As a rule, international standards offer a broader scope of protection and a larger basis for prosecutions than national “ordinary crimes” legislation. In some cases, certain conduct/crimes will not exist in national legislation.¹²²⁴ In many other cases, the penalties provided for by national law will not be appropriate in the context of armed conflicts, or with regards to the seriousness of the crime in question.¹²²⁵

Therefore, as a general proposition, Ukrainian legal measures require substantial modification to produce an effective IHL enforcement system based on the appropriate criminalisation of specific conduct. However, in the final analysis, the legality and effectiveness of Article 438 will be decided on a case-by-case basis, taking into account the specific circumstances of the conduct, specific crimes within the Criminal Code and any existing domestic crimes or other legal measures that may be relevant. However, even in the hands of skilful, knowledgeable legal professionals, it must be noted that, in general, Article 438 is likely to create serious obstacles to effective prosecutions and the repression of relevant IHL violations.

In conclusion, for the reasons stated, the Criminal Code of Ukraine, even when read purposively alongside the Military Manual, fails to provide a coherent or comprehensive basis for effective penal sanction of all relevant IHL violations. It requires a number of modifications to include all serious violations of IHL and to provide an effective penal regime with appropriate sanctions for the range of prohibited conduct.

Alternatively, legislative reform appears preferential, especially in the absence of crimes against humanity in Ukraine’s Criminal Code. Arguably, the reliance on the pre-existing provisions risks criticism from the international community for a reliance on a deficient provision. In particular, in a civil law system, this leaves the fate of the law’s development in the hands of each individual case in the courts of Ukraine. This risks inconsistent application of the provision in that some courts may interpret it in line with international standards while others may not. Accordingly,

¹²²³ Julio Bacio Terracino, ‘National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC’ (2007) *Journal of International Criminal Justice* 431, p. 431.

¹²²⁴ [‘Methods of incorporating punishment into criminal law - Factsheet’](#) (ICRC, 31 October 2013).

¹²²⁵ *Ibid.*

Ukraine could implement the provisions of the Rome Statute by enacting a detailed act of the Verkhovna Rada to amend the Criminal Code to include the crimes and modes of liability as they appear in the Rome Statute.¹²²⁶ The benefit of express criminalisation is that it leaves little room for doubt about the remit of the offences. A vague provision which criminalises, for example, “international crimes” allows legal arguments about what international crimes are and what the ingredients of those crimes are (see above), of which there are different interpretations.

There are two ways of writing out such a specific law: (i) the adoption of a specific act of law repeating the provisions of the Rome Statute in Ukraine’s domestic criminal code by inserting the provisions in the existing Criminal Code or in a supplementary criminal code specifically for international crimes; or (ii) criminalising the conduct by reference. In other words, it could incorporate the provisions of the Rome Statute by stating that the provisions of the Rome Statute are incorporated into Ukrainian law. The act should also identify the modes of liability by which the crimes can be committed (see above).¹²²⁷ The two options are equally appropriate.

These two options have been adopted by different countries. For example, in New Zealand the implementing law specifically provides that genocide, war crimes and crimes against humanity as provided for by the Rome Statute are offences under the domestic law of New Zealand.¹²²⁸ The United Kingdom Act takes a similar approach by incorporating Rome Statute crimes by reference.¹²²⁹ Canadian legislation provides that the ICC crimes are indictable offences under Canadian law, and goes on to define each crime in detail for the purposes of national prosecutions of the ICC crimes.¹²³⁰ Canada establishes the crimes through custom, but defines custom as including Articles 6, 7 and 8 of the Rome Statute¹²³¹ so as to ensure compliance.

Alternatively, the German government ratified the Rome Statute on 11 December 2000 and passed the Code of Crimes Under International Law (Völkerstrafgesetzbuch) around two years later on 21 June 2002.¹²³² The Law provides for universal jurisdiction over genocide, crimes against humanity and war crimes.¹²³³ It has been noted that this acts as a standalone criminal code and is not incorporated into the existing criminal code of Germany.¹²³⁴ It was further reported that this decision was made as a matter of expediency: the difficulties in incorporating principles such as command responsibility into one chapter of its criminal code were not insignificant and Germany had a desire

¹²²⁶ Bergsmo Importing Core Crimes, p. 7.

¹²²⁷ *Ibid.*

¹²²⁸ [New Zealand ICC Act](#), ss 9, 10 and 11 cited in Human Rights Watch, [‘International Criminal Court Making The International Criminal Court Work A Handbook for Implementing the Rome Statute’](#), Vol. 13, No. 4(G), September 2001, Annex 1 (“HRW Implementation Handbook”).

¹²²⁹ [International Criminal Court Act 2001](#) cited in HRW Implementation Handbook, Annex 1.

¹²³⁰ [Canadian ICC Act, s. 4\(3\)](#), cited in HRW Implementation Handbook, Annex 1.

¹²³¹ Christopher Waters, *British and Canadian Perspective on International Law* (2006: Martinus Nijhoff Publishers) p. 38.

¹²³² [The German Draft Code on International Crimes](#) (“Völkerstrafgesetzbuch”).

¹²³³ Act Introducing the Code of Crimes Under International Law (Gesetz zur Einführung des Völkerstrafgesetzbuchs) BGBl.2002 I, p. 2254 (Federal Law Gazette of the Federal Republic of Germany), 26 June 2002, as cited in Bergsmo Importing Core Crimes, p. 19.

¹²³⁴ Bergsmo Importing Core Crimes, p. 19.

to send out an important and “reassuring” message about its prosecution of such serious crimes.¹²³⁵ Unlike the States considered above, Germany defined the crimes of genocide, crimes against humanity and war crimes using terminology familiar to Germany, without restricting the scope of the crimes under the Rome Statute.

On balance, it is advised that the provisions of the Rome Statute should be implemented and incorporated into Ukraine’s domestic law before ratification. It seems that a specific enactment repeating the provisions of the Rome Statute is a safe way to avoid any criticism of the Ukrainian domestic system.¹²³⁶ Further, in light of the complementarity provisions, it is more likely that Ukraine could retain its domestic prosecutions as opposed to the ICC demanding to try them instead of Ukraine.

iii. Immunity

Ukraine should also take steps to implement the Rome Statute’s immunity provisions immediately. The provisions state that the Rome Statute applies to all persons equally, irrespective of their official capacity, including whether or not they are a President or government official.¹²³⁷ There should be no cases of a person being exempt from criminal responsibility because of their official position.¹²³⁸ These provisions allow the ICC Prosecutor to charge, for example, a former President of Ukraine. However, a Ukrainian prosecutor could not because of Article 105 of the Ukrainian Constitution, which grants the President of Ukraine immunity during his or her term in office. Accordingly, Ukraine should amend its Constitution to reflect the Rome Statute in this regard.

It should be noted, however, that Ukraine’s Constitutional Court was of the view that this provision on immunity was not in contradiction with the Constitution of Ukraine. The reason provided was that the crimes under the jurisdiction of the ICC were crimes under international law, as recognised by custom or international treaties binding upon Ukraine.¹²³⁹ The immunities were applicable, it opined, only to national proceedings and not international jurisdictions.¹²⁴⁰ This is problematic. It appears to suggest that Ukraine is unwilling to contemplate national proceedings against the President. As discussed above, the Rome Statute recognises in its Preamble that it is the duty of States to prosecute first and foremost and the ICC should only step in when a State is unwilling or unable to prosecute genuinely. Ukraine must accept its responsibility to prosecute crimes under the Rome Statute domestically when committed by any actor in the political or military leadership. As explained in Part Two(A), as a consequence of the filing of two Declarations, Ukraine has provided the ICC with jurisdiction to prosecute those cases if the evidence exists and it shows itself to be unable or unwilling to do so genuinely. Therefore, in terms of implementation of the immunity provisions after ratification of the Statute, it is advisable that a provision is adopted to recognise that

¹²³⁵ *Ibid.*

¹²³⁶ *Ibid.*, p. 7.

¹²³⁷ Rome Statute, art. 27.

¹²³⁸ *Ibid.*

¹²³⁹ Constitutional Court Opinion, part 2.1, para. 3.

¹²⁴⁰ *Ibid.*, part 2.2.

the provision in Article 105 of the Constitution does not apply to crimes of an international nature in a domestic setting.

The battle between constitutional immunity for heads of States and Article 27 of the Rome Statute is not new. Norway encountered a similar issue. Article 5 of the Norwegian Constitution provides that the “[...] King’s person is sacred; he cannot be censured or accused/ The responsibility rests with his Council”.¹²⁴¹ It was suggested that Article 27 of the Rome Statute concerns purely jurisdictional provisions and does not contain obligations for States.¹²⁴² It was argued that Norway could still maintain its immunity before Norwegian courts in relation to the King.¹²⁴³ However, it was also recognised that a conflict may well arise in relation to the cooperation provisions in Part 9 of the Rome Statute, which include by implication the obligation to surrender the head of state if mandated by the Court. The immunity provision therefore must be interpreted to include surrender to a foreign Court.¹²⁴⁴ This is entirely possible for Ukraine with the Constitutional Court’s opinion on the immunity provisions.

Belgium’s Council of State also found that Article 27 was incompatible with the constitutional immunities for the King and members of parliament.¹²⁴⁵ The following domestic constitutional bodies found the same:¹²⁴⁶ France;¹²⁴⁷ Luxembourg;¹²⁴⁸ Chile;¹²⁴⁹ Côte d’Ivoire;¹²⁵⁰ and Madagascar.¹²⁵¹ To overcome this, both France and Luxembourg adopted a catch-all measure in the Constitution. As noted above, the French Constitution was amended with a catch-all provision stipulating that the Republic of France may recognise the jurisdiction of the ICC.¹²⁵² The Constitution

¹²⁴¹ Rolf Einar Fife, ‘Norway’ in Claus Kreß (ed.), *The Rome Statute and Domestic Legal Orders: Constitutional issues, cooperation and enforcement* (vol 2, Editrice il Sirente, 2005) p. 291.

¹²⁴² *Ibid.*

¹²⁴³ *Ibid.*

¹²⁴⁴ *Ibid.*

¹²⁴⁵ Opinion of the Council of State of 21 April 1999 on a legislative proposal approving the Rome Statute on the International Criminal Court, Avis du Conseil d’état du 21 Avril 1999 sur un projet de loi “portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 Juillet 1998”, Parliamentary Document 2-239 (1999/2000), p. 94, cited in ICRC Rome Statute Issues, p. 3.

¹²⁴⁶ ICRC Rome Statute Issues, pp. 29-30.

¹²⁴⁷ Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) Décision 98-408 DC du 22 Janvier 1999 (Traité portant statut de la Cour pénale internationale), Journal Officiel, 24 January 1999, p. 1317, cited in ICRC Rome Statute Issues, p. 1.

¹²⁴⁸ Opinion of the Council of State of 21 April 1999 on a legislative proposal approving the Rome Statute on the International Criminal Court, Avis du Conseil d’état du 21 Avril 1999 sur un projet de loi “portant assentiment au Statut de Rome de la Cour pénale internationale, fait à Rome le 17 Juillet 1998”, Parliamentary Document 2-239 (1999/2000), p. 94, cited in ICRC Rome Statute Issues, p. 3.

¹²⁴⁹ Rome Statute of the International Criminal Court (ICC) of 7 April 2002, Decisión del Tribunal Constitucional respecto de la constitucionalidad del Estatuto de Roma de la Corte Penal Internacional, 7 de abril de 2002, cited in ICRC Rome Statute Issues, p. 18.

¹²⁵⁰ Constitutional Council Decision No. 002/CC/SG of 17 December 2003 on the compatibility of the Rome Statute of the International Criminal Court with the Ivorian Constitution [Décision Conseil Constitutionnel N°002/CC/SG du 17 décembre 2003 relative à la conformité à la Constitution du Statut de Rome de la Cour pénale internationale] cited in ICRC Rome Statute Issues, p. 23.

¹²⁵¹ Decision No. 11-HCC/D1 of 21 March 2006 regarding Law No. 2005-35 authorizing ratification of the Rome Statute of the International Criminal Court [Décision n°11-HCC/D1 du 21 mars 2006 relative à la loi n°2005- 035 autorisant la ratification du Statut de Rome de la Cour Pénale Internationale], cited in ICRC Rome Statute Issues, p. 30.

¹²⁵² Constitution of the Republic of France, art. 53(2).

of Luxembourg was amended with a catch-all provision similar to that of France, providing in Article 118 that “[t]he provisions of the Constitution are not an obstacle to the approval of the Statute of the International Criminal Court, done at Rome on 17 July 1998, and to the execution of the obligations that result under the conditions specified by the said Statute”.¹²⁵³

Georgia had a different experience. The issue of immunity was debated, and some suggested the French solution. The Rome Statute was ratified by Georgia without amendments made to the Constitution because “it was agreed that with respect to immunities amendment to the Constitution was not indispensable”.¹²⁵⁴ In other words, Article 75 of the Constitution did not afford absolute immunity to the President. The provision permits impeachment and criminal proceedings thereafter. If there is an unsuccessful impeachment, criminal responsibility is not possible. At the same time, it does not prohibit surrender to the ICC.¹²⁵⁵ Accordingly, the immunity was not effective in the face of serious allegations of criminal conduct and impeachment and an amendment was not deemed necessary.

Conversely, other states have found that the provision was compatible with their respective Constitutions. Costa Rica, for instance, found that the immunity in its Constitution for members of parliament could not prevent the ICC from bringing proceedings against individuals.¹²⁵⁶ The Albanian Constitutional Court provided an opinion nearly identical to the Ukrainian Constitutional Court. The immunity, it was found, provided protection only from domestic proceedings.¹²⁵⁷ Moldova’s constitutional body found the provision to be compatible,¹²⁵⁸ as did the Honduran Supreme Court.¹²⁵⁹ Spain’s Council of State found that the provision was compatible because it did not affect the exercise of immunity provisions for members of parliament, but simply transferred powers to the ICC.¹²⁶⁰ An inventive argument was advanced as regards the immunity of the Spanish King.¹²⁶¹ It was found that official acts of the King had to be countersigned to be effective. The Council found that the countersigning official would bear individual responsibility, and the King would be relieved of responsibility. The Council justified this by the nature of parliamentary monarchies, stating that it is the political system which must be held responsible, not the

¹²⁵³ [‘Luxembourg’s Constitution of 1868 with Amendments through 2009’](#) (*Constitute Project*).

¹²⁵⁴ *Ibid.*

¹²⁵⁵ *Ibid.*

¹²⁵⁶ Rome Statute of the International Criminal Court (ICC) of 7 April 2002, Decisión del Tribunal Constitucional respecto de la constitucionalidad del Estatuto de Roma de la Corte Penal Internacional, 7 de abril de 2002, cited in ICRC Rome Statute Issues, p. 18.

¹²⁵⁷ Decision No. 186 of 23 September 2002 of the Constitutional Court of the Republic of Albania, cited in ICRC Rome Statute Issues, p. 29.

¹²⁵⁸ Decision for the control of the conformity with the constitution with certain provisions of the International Criminal Court, No. 22, of 2 October 2007, Hotarire pentru controlul constitutionalitati unor prevederi din Statutul Curtii Penale Internationale nr. 22 din 02.10.2007, cited in ICRC Rome Statute Issues, p. 30.

¹²⁵⁹ Opinion of the Supreme Court of Justice of 24 January 2002, Dictamen de la Corte Suprema de Justicia del 24 de enero de 2002, cited in ICRC Rome Statute Issues, p. 29.

¹²⁶⁰ Opinion of the Council of State of 22 August 1999 (on the Rome Statute), Dictamen del Consejo de Estado de 22 de Agosto de 1999 (sobre el Estatuto de Roma), No. 1.37499/99/MM. n° 1.374/99/MM, cited in ICRC Rome Statute Issues, p. 29.

¹²⁶¹ ICRC Rome Statute Issues, p. 7.

monarch.¹²⁶² This opinion, if accurately reported by the ICRC, would prove to be a blow to the fight against impunity, effectively permitting the King to enjoy immunity while anyone who countersigns his laws will be criminally responsible while he continues to be in power.

Overall, in light of Article 27 of the Rome Statute and State practice outlined above, a constitutional amendment should be drafted broadly to ensure that Article 105 of the Constitution does not apply to crimes of an international nature—namely, genocide, crimes against humanity and war crimes. An “interpretation” that the provision on immunity will not apply in certain circumstances is risky. It may be predicated on the lifting of immunity, impeachment or other constitutional procedure to remove the immunity. Accordingly, the chance to prosecute a high level official or former President would be contingent on political processes and not on a prosecution and trial as criminal proceedings should be. Therefore, a catch-all provision to ensure Article 105 is amended would ensure that there is no impunity for international crimes.

iv. Limitations on the Prosecution of International Crimes

Ukraine should also ensure that other aspects of its Criminal Code are in conformity with the Rome Statute. By way of example, Ukraine has a statute of limitations that will need to be amended in order to properly implement the provisions of the Rome Statute. Indeed, Article 49 of the Criminal Code provides that no person shall be prosecuted after a certain period of time has elapsed. This provision should not be relevant to the ICC’s jurisdiction,¹²⁶³ an exception yet to be recognised in Ukrainian law. Instead, Ukraine should adopt a provision that properly recognises the inapplicability of the limitation law to Rome Statute crimes—genocide, crimes against humanity and war crimes.

v. Cooperation

For amendments concerning cooperation and relations with the ICC, insofar as they do not concern admissibility, the amendments should be implemented immediately so as to ensure the swift transition from a society that does not recognise the Rome Statute to one that does. As discussed, Ukraine must comply with the duties and obligations outlined in Part 9 of the Rome Statute. The codification of Part 9 into domestic law will ensure proper compliance with the relevant duties and obligations which will inevitably arise if the ICC Prosecutor commences a full investigation into alleged crimes.

A key issue facing Ukraine at the moment in terms of implementation is the cooperation obligations Ukraine has bound itself to under Part 9 of the Rome Statute [see above in Part Two(A)]. As a consequence of the two Declarations submitted by Ukraine, Ukraine is now bound by a specific cooperation regime with the ICC. The ICC may demand Ukraine comply with its obligations under Part 9 of the Rome Statute by cooperating with the Court at any time. A State’s obligation to cooperate with the ICC requires implementation of the Rome Statute’s cooperation provisions, primarily contained within Part 9. As discussed in detail in Part Two(A), the obligation requires ensuring that ICC

¹²⁶² *Ibid.*

¹²⁶³ Rome Statute, art. 29.

investigations may take place within the domestic jurisdiction, including ensuring that domestic courts and other State authorities provide full cooperation in obtaining records and documents (including official records and documents), the locating and seizure of the assets of the accused, enabling searches and seizures of potential evidence, locating and protecting witnesses and arresting and surrendering persons accused of crimes by the Court.¹²⁶⁴ These obligations have already arisen for Ukraine under the Rome Statute because of the two Declarations. Accordingly, it is vital that these provisions be immediately implemented.

vi. Other Provisions to Be Addressed during Implementation

Further, it is advised that Ukraine recognises that certain provisions, which on their face seem inimical to the Rome Statute, are indeed not. These should be recognised as falling within the “catch-all” provision which amends the Constitution. Some examples are provided below. Alternatively, the provisions identified above and below could be amended individually but this risks omitting potential arguments being raised of unconstitutionality of select Articles of the Rome Statute. Accordingly, in addition to the above, the following select examples should also be recognised as falling within the “catch-all” provision:

- The prohibition of the transfer of citizens to a foreign state in Article 25 of the Constitution of Ukraine;
- The prohibition on “extraordinary and special courts” in Article 125 which was raised as an argument by the then-President in the Constitutional Court case on ratification of the Rome Statute in 2002 (see Part One) but was discounted by the Court; and
- The provision (Article 64) which appears to prevent the serving of sentences in other States be amended to recognise the ICC’s competence to sentence Ukrainians to spend their conviction in alternative jurisdictions.

In light of the Declarations and any future ratification, these types of issues must be addressed in order to ensure an effective implementation of the Rome Statute’s Part 9 provisions. Whilst some may not appear overly problematic at this stage, addressing any anomalies, apparent divergence or inconsistencies promptly will ensure a smooth discourse between the Court and Ukraine when, as is inevitable, queries concerning the legality of cooperation and associated issues arise.

b) Overview: How Should Domestic Legislation Implement the Rome Statute?

There are a variety of options available to Ukraine concerning how to effectively implement the Rome Statute in domestic legislation. First, the implementation of the provisions identified above, such as on complementarity and cooperation, can take place through one all-encompassing act of law, which implements all aspects of the Rome Statute’s provisions on cooperation and complementarity to reflect the obligations created by submission of the two Declarations and amends domestic legislation accordingly. Alternatively, Ukraine can adopt several individual laws implementing new provisions of the Rome Statute and amending existing legislation as necessary. For crimes specifically, Ukraine could either leave the question of whether its domestic code incorporates all international crimes

¹²⁶⁴ Amnesty International, [‘The International Criminal Court: Checklist for Effective Implementation’](#) (2000) p. 2.

to the domestic Courts at each and every hearing, or it could incorporate the domestic offences by way of an express enactment by the Verkhovna Rada. These are, in part, addressed above.

These questions are very complex and are addressed to a degree in GRC's report entitled "The Domestic Implementation of International Humanitarian Law in Ukraine". However, the subject needs to be studied in greater depth to arrive at a proper conclusion on what means of implementation is most appropriate for Ukraine. It is not easy to discern the proper approach for Ukraine, however, it initially appears that an express enactment by the Verkhovna Rada, which details the provisions identified above comprehensively and exhaustively, is the safest means of moving forward with this issue. With regards to the Rome Statute crimes, as well as other provisions such as modes of liability and defences, this can be done either by "reference" to the Rome Statute or by defining the provisions with regard to Ukrainian terminology. Whichever path Ukraine chooses to take, after ratification the immediate wholesale implementation of the Rome Statute's provisions will be vital, including the crimes, modes of liability and other provisions in the Rome Statute. These questions, as noted, are complicated and require meticulous study by the Verkhovna Rada to consider their impact on the Ukrainian legal system.

Part Three: Preliminary Examinations

I. Introduction

This Part considers the preliminary examination phase of ICC involvement in a situation. As noted in Part One, a preliminary examination is the initial process by which the Prosecutor considers all the information available to her in order to decide whether there is a reasonable basis to proceed with a formal investigation. This Part will consider each stage of the preliminary examination process in detail and the legal issues which arise as a consequence.

II. Preliminary Examinations: Overview

The ICC Prosecutor carries out the preliminary examination in order to determine whether the ICC should launch a full criminal investigation and potential prosecution into the situation under consideration. During the preliminary examination, the ICC Prosecutor will attempt to collect all the information necessary to reach a determination of whether there is a reasonable basis to proceed with a full, formal investigation. It is important to point out that no trial or full investigation can occur before a preliminary examination has been conducted.

The ICC will have jurisdiction over a situation if one of the following three preconditions exists: (i) the State in question has ratified the Rome Statute;¹²⁶⁵ (ii) the State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute;¹²⁶⁶ or (iii) the UNSC refers a situation to the Court.¹²⁶⁷

If one of these preconditions exists, the ICC may *exercise* its jurisdiction if: (i) a situation has been referred to the Prosecutor by a State Party; (ii) the UNSC refers a situation to the Prosecutor to launch an investigation; or (iii) the Prosecutor initiates an investigation *proprio motu* (on her own initiative) on the basis of information received from reliable sources, including from a State’s Declaration.¹²⁶⁸

If this happens, the Prosecutor will open a “preliminary examination” into the situation at hand as a matter of policy.¹²⁶⁹ It must be noted, however, that a preliminary examination is not an investigation. It is a process by which the Prosecutor considers all the information available to her in order to reach a fully informed determination on whether there is a “reasonable basis” to proceed with a full investigation.¹²⁷⁰

¹²⁶⁵ Rome Statute, arts. 13(a) and 14.

¹²⁶⁶ *Ibid.*, art. 12(3).

¹²⁶⁷ *Ibid.*, art. 13(b).

¹²⁶⁸ *Ibid.*, art. 13.

¹²⁶⁹ Upon receipt of a referral or a valid declaration made pursuant to Article 12(3) of the Statute, the Prosecutor may open a preliminary examination of the situation (ICC, [Regulations of the Office of the Prosecutor](#), 23 April 2009, ICC-BD/05-01-09 [“Prosecutor Regulations”, reg 25(1)(c)]. Although the Prosecutor is under no obligation to start a preliminary examination upon the receipt of a declaration, recent practice suggests that she will automatically open a preliminary examination. See [Preliminary Examinations Policy Paper](#), p. 18, para. 76.

¹²⁷⁰ Rome Statute, arts. 15(2) and (3).

According to the Rome Statute, the preliminary examination must be performed in a comprehensive and thorough manner and must continue until the ICC Prosecutor has clarity on whether there is a “reasonable basis” to proceed with an investigation.¹²⁷¹ In this context, a “reasonable basis” means “there exists a sensible or reasonable justification for the belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”.¹²⁷² It does not necessarily mean that all the information “point toward only one conclusion”.¹²⁷³ The information at this early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’”.¹²⁷⁴

The ICC Prosecutor is under a statutory mandate to conduct the preliminary examination independently, impartially and objectively,¹²⁷⁵ which includes the need to act independently of instructions from any external source. The Prosecutor recognises that she will not be constrained or bound by States naming potential perpetrators,¹²⁷⁶ or irrelevant criteria, such as geopolitical implications.¹²⁷⁷ Any information will be used to consider incriminating and exonerating evidence equally in order to establish the truth of the situation at hand.¹²⁷⁸ The Prosecutor will cast her net widely to seek information from reliable sources such as States, members of civil society or UN organs.¹²⁷⁹ The Prosecutor may also receive written and oral testimony at the seat of the Court.¹²⁸⁰ The Prosecutor also has the option to conduct field missions for the purpose of consulting with competent national authorities, affected communities, and relevant stakeholders, such as civil society organisations.¹²⁸¹

In deciding whether to open a full investigation, the preliminary examination must consider the following three factors:

- Jurisdiction: The Court can prosecute the crime of aggression committed after 17 July 2018, genocide, war crimes or crimes against humanity committed after 1 July 2002 or after the date a State accepts the jurisdiction of the Court (for Ukraine the date is 21 November 2013, when the first Declaration was submitted).¹²⁸² The Court can only prosecute persons who commit a crime on the territory of or who are nationals of a State Party or a declaring State.¹²⁸³ In line with its recent jurisprudence, the ICC can exercise territorial jurisdiction where “at least one legal element of a crime within the jurisdiction of the Court or part

¹²⁷¹ Preliminary Examinations Policy Paper, p. 21, para. 90.

¹²⁷² Kenya Authorisation Decision, para. 35.

¹²⁷³ *Ibid.*, para. 34.

¹²⁷⁴ *Ibid.*, para. 27.

¹²⁷⁵ Rome Statute, arts. 21(3), 42 and 54; Preliminary Examinations Policy Paper, p. 7, paras. 26-33.

¹²⁷⁶ Preliminary Examinations Policy Paper, p. 7, para. 27.

¹²⁷⁷ *Ibid.*, p. 8, para. 229.

¹²⁷⁸ Rome Statute, art. 54(1)(a); The Prosecutor Regulations, reg. 34(1).

¹²⁷⁹ *Ibid.*, arts. 14(2) and 15(2); Rules of Procedure and Evidence, r. 104.

¹²⁸⁰ *Ibid.*

¹²⁸¹ Preliminary Examinations Policy Paper, p. 20, para. 85.

¹²⁸² Rome Statute, art. 11.

¹²⁸³ *Ibid.*, art. 12(2).

of such a crime is committed on the territory of a State Party.”¹²⁸⁴ The Prosecutor has jurisdiction over matters the UNSC has referred;¹²⁸⁵

- **Admissibility:** The ICC is a Court of last resort. This principle encompasses the concepts of complementarity and gravity.¹²⁸⁶ It is a last resort jurisdiction intended to complement national justice systems only when they do not or are unwilling or unable to carry out genuinely any investigations and prosecutions of alleged perpetrators.¹²⁸⁷ Second, the Prosecutor must consider whether a case is of sufficient gravity to justify further action by the Court;¹²⁸⁸ and
- **Interests of justice:** In light of the gravity of the crimes and interests of victims, the Prosecutor will consider whether there are substantial reasons to believe that an investigation would not serve the interests of justice.¹²⁸⁹

The preliminary examination into Ukraine, and all preliminary examinations, happens in four phases:

- *Phase one:* an initial assessment of all the information received as communicated to the ICC Prosecutor;
- *Phase two:* the formal commencement of a preliminary examination focusing on whether the alleged crimes fall within the jurisdiction of the Court;
- *Phase three:* the consideration of issues relating to the admissibility of the crimes alleged;
- *Phase four:* the consideration of issues relating to the interests of justice; and
- *Report:* the conclusion of the preliminary examination by way of an “Article 53(1) Report”.¹²⁹⁰

Once the above considerations have been made, one of the following decisions relating to a full investigation will be made:

- A refusal to initiate an investigation because the information falls short of the factors outlined above;¹²⁹¹
- A need to continue to collect information on crimes and/or relevant national proceedings to establish a sufficient factual and legal basis to give a conclusive determination; or
- Proceed to initiate an official ICC criminal investigation on the basis that the factors outlined above are satisfied. In some circumstances, this requires judicial authorisation from the ICC.¹²⁹²

¹²⁸⁴ ICC, Case No. ICC-RoC46(3)-01/18, [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), 6 September 2018, para. 64.

¹²⁸⁵ *Ibid.*, art. 12(2).

¹²⁸⁶ *Ibid.*, art. 17(1)(a)-(c) (complementarity) and Art. 17(1)(d) (gravity).

¹²⁸⁷ *Ibid.*, arts. 1 and 17.

¹²⁸⁸ *Ibid.*, art. 17(1)(d).

¹²⁸⁹ As discerned from the Rome Statute, art. 53(1)(a)-(c).

¹²⁹⁰ Preliminary Examinations Policy Paper, paras. 77-84.

¹²⁹¹ Rome Statute, art. 53(1)(a)-(d).

¹²⁹² Preliminary Examinations Policy Paper, para. 14.

A. Time for Conducting a Preliminary Examination

The length of time needed to complete these phases and conduct a preliminary examination varies from situation to situation. Colombia is in phase three and is sixteen years into a preliminary examination.¹²⁹³ Ukraine's preliminary examination lasted more six years.¹²⁹⁴ Iraq's preliminary examination concluded in 2006 and was reopened eight years later with new information.¹²⁹⁵ Accordingly, the four phases have no set timetable.

As is evident from these examples, in practice there is a wide range of timeframes for the preliminary examination process to take place. This can be seen as a deliberate choice by the drafters of the Rome Statute reflecting the fact that some preliminary examinations will move quickly while others will result in many missions to the affected countries (there have been nine thus far in Guinea) and repeated requests for information from sources, including governments.

III. Phase One: Screening

Phase one of the preliminary examination can best be understood as representing the “screening phase”. This phase encompasses the initial assessment of all the information and official communications received by the ICC Prosecutor, during which the Prosecutor will analyse and verify the information, filter out information on crimes falling outside the ICC's jurisdiction and identify crimes that appear to fall within the jurisdiction of the Court.

Specifically, this phase will see information received by the ICC Prosecutor sorted into the following categories: (i) information outside the ICC's jurisdiction; (ii) information about a situation already under preliminary examination; (iii) information about a situation already under investigation or prosecution; and (iv) information that is not manifestly outside the ICC's jurisdiction and which is not related to a preliminary examination, investigation, or prosecution.

A. Sending Information to the ICC Prosecutor

Under the Rome Statute, individuals or organisations may submit to the Prosecutor information on crimes within the jurisdiction of the Court. These are known as “communications”. Furthermore, the Statute states that the Prosecutor may seek additional information from any States, intergovernmental or non-governmental organisations or individuals she deems necessary in the performance of her duties. This section will look at the different ways information can be submitted to the Court and how it can inform the work of the Prosecutor.

As noted, Article 15 of the Rome Statute permits the Prosecutor to receive information from a variety of entities, namely States, organs of the UN, inter-governmental or non-governmental organisations or other reliable sources that she deems appropriate.¹²⁹⁶ She may also receive written or oral testimony at the seat of the Court. When such

¹²⁹³ 2019 Preliminary Examination Report, para. 84.

¹²⁹⁴ 2020 Preliminary Examination Report, para. 289.

¹²⁹⁵ *Ibid.*, para. 155.

¹²⁹⁶ Rome Statute, art. 15

information is received, the Prosecutor must protect the confidentiality of the information and testimony and take measures accordingly.¹²⁹⁷

The ICC provides practical guidance on how to submit information to the Court. The ICC website directs you from “[i]f you would like to submit information on alleged crimes to the Prosecutor”, to a section entitled “What should be included in a communication sent to the Office”.¹²⁹⁸ This section provides useful guidance for anyone wishing to send information to the Prosecutor. It notes that the Rome Statute does not expressly specify what information to be sent to the Prosecutor should contain. Further, it states that if the information for a situation “does not provide sufficient guidance for an analysis that could lead to a determination that there is a reasonable basis to proceed, the analysis is concluded and the sender informed”.¹²⁹⁹ Those who send information are encouraged to send it in English or French, but informal translations will be sought for other languages.¹³⁰⁰ It states, in full:

The Statute does not specify what the communication should contain. The Office analyses all communications received and the extent of the analysis is affected by the detail and substantive nature of the information available. If the available information does not provide sufficient guidance for an analysis that could lead to a determination that there is a reasonable basis to proceed, the analysis is concluded and the sender informed. This decision is provisional and may be revised in the event that new information is forthcoming.

Senders are advised to submit information in English or French, the working languages of the Court. Arabic, Chinese, Russian and Spanish are also official languages of the Court. Where information is submitted in a language other than these, the Office will endeavour to obtain informal translations where possible.¹³⁰¹

The receipt of communications is an ongoing process and may be considered at any time. The ICC Prosecutor may even continue to receive communications during the time she is writing her final report at the end of a preliminary examination.¹³⁰² Still, communications are analysed mainly during the first and second phases of a preliminary examination (out of the four phases). As of 11 April 2011, the ICC Prosecutor had received a total of 9,146 communications for preliminary examinations.¹³⁰³ By the end of November 2018, the Prosecutor had considered information on crimes from numerous sources and even open sources, and a total of 13,273 communications had been received.¹³⁰⁴ Of course, not all communications are strictly relevant but all must be considered individually.

An example of NGOs submitting such “communications” would be the situation in Georgia. Georgian human rights organisations representing victims managed to stress the desire of victims who survived the conflict in August 2008

¹²⁹⁷ Rules of Procedure and Evidence, r. 46.

¹²⁹⁸ [‘What should be included in a Communication sent to the Office?’ \(ICC\)](#).

¹²⁹⁹ *Ibid.*

¹³⁰⁰ *Ibid.*

¹³⁰¹ [‘What should be included in a Communication sent to the Office?’ \(ICC\)](#).

¹³⁰² Office of the Prosecutor, [‘Report on Preliminary Examination Activities 2014’](#), 2 December 2014, para. 194.

¹³⁰³ OTP, [‘Weekly Briefing issue no. 82’](#), 5-11 April 2011, p. 4.

¹³⁰⁴ ICC, [‘Report on Preliminary Examination Activities 2018’](#) (5 December 2018), para. 18.

to restore justice, by way of three means: consultations, public reports and communications to the Prosecutor.¹³⁰⁵ The views of victims in communications and consultations with organisations were reasons to argue that there were no interests of justice reasons militating against admissibility.¹³⁰⁶

It is apparent that information on crimes is vital during a preliminary examination. If the information is of use to the ICC, the Prosecutor will no doubt wish to meet the organisations that provided it in phase two.

During the preliminary examination of the situation in Iraq, the ICC Prosecutor met with the organisations that submitted the new information that re-opened the preliminary examination after it was originally closed, and also with the government of the UK.¹³⁰⁷ In the Ukraine preliminary examination, the ICC Prosecutor requested information from Ukrainian civil society organisations and from the government.¹³⁰⁸ In the Afghanistan preliminary examination, ICC Prosecutor officials met with Afghan civil society groups and international NGOs.¹³⁰⁹ In the “flotilla case”,¹³¹⁰ the ICC Prosecutor reviewed the reports of four commissions that had looked into the incident previously.¹³¹¹ In the Honduran preliminary examination, the ICC Prosecutor requested information from Honduras’s Truth and Reconciliation Commission and also took into consideration a report by an alternative Truth Commission established by human rights NGOs.¹³¹² Additionally, in this phase of the Nigerian preliminary examination, the ICC Prosecutor utilized connections with academics and researchers that specialise in Nigeria.¹³¹³

IV. Phase Two: Jurisdiction

This phase represents the formal commencement of a preliminary examination. During this phase the preliminary examination will focus on whether the Court has the jurisdiction to try the issues highlighted by the preliminary examination. Specifically, it will focus on whether the alleged crimes fall within the subject-matter jurisdiction of the ICC. This analysis is conducted with regards to all communications and pieces of information that were not rejected in phase one, and also information from referrals from States Parties or the UNSC, Declarations lodged pursuant to Article 12(3), open source information or testimony received at the seat of the Court.¹³¹⁴

This phase will see the Prosecutor conduct a thorough analysis of the facts and a legal assessment of the crimes allegedly committed. During this phase, the ICC Prosecutor will pay particular attention to crimes committed on a large scale, as part of a plan or pursuant to a policy. During phase two, the ICC Prosecutor holds consultations with

¹³⁰⁵ ICC, ‘[Situation in Georgia, Summary of the Prosecution’s Request for authorisation of an investigation pursuant to Art. 15](#)’, 13 October 2015, para. 43.

¹³⁰⁶ *Ibid.*, para. 45.

¹³⁰⁷ *Ibid.*, p. 13, para. 55.

¹³⁰⁸ *Ibid.*, pp. 16-17, para. 71.

¹³⁰⁹ Office of the Prosecutor, ‘[Report on Preliminary Examination Activities 2013](#)’, November 2013, (“2013 Preliminary Examination Report”), p. 13, para. 54.

¹³¹⁰ Referred to by the ICC as the case of ‘Registered vessels of Comoros, Greece, and Cambodia’.

¹³¹¹ 2013 Preliminary Examination Report, p. 24, para. 101.

¹³¹² Office of the Prosecutor, ‘[Report on Preliminary Evaluation Activities 2012](#)’, November 2012, (“2012 Preliminary Examination Report”), p. 14, paras. 61-62.

¹³¹³ 2012 Preliminary Examination Report, p. 21, para. 91.

¹³¹⁴ Preliminary Examinations Policy Paper, para. 81.

government authorities, national and international NGOs, and representatives of affected groups,¹³¹⁵ and liaises with various UN and international organisations.¹³¹⁶ At the end of phase two, an “Article 5 Report” will be submitted to the Prosecutor.¹³¹⁷

As noted above, this phase addresses issues relating to the jurisdiction of the Court. Jurisdiction requires an analysis of whether a crime falling under the Rome Statute may have been committed (subject-matter jurisdiction), whether it was committed on the territory of the relevant country or by one of its citizens (territorial or personal jurisdiction) and whether it was committed within the time frame of the relevant instrument permitting jurisdiction (temporal jurisdiction), such as a declaration or ratification of the Rome Statute.

A. Activities of the Prosecutor during Phase Two

During phase two, and as stated above, the ICC Prosecutor will hold consultations with government authorities, members of civil society, representatives of affected groups, various UN and international organisations.¹³¹⁸

Phase two will also see officials of the ICC Prosecutor go on missions to affected areas. For instance, preliminary examination of the situation in Honduras lasted between 2010 and 2015 and in the first four years, the ICC Prosecutor had gone on three missions to Tegucigalpa, Honduran capital.¹³¹⁹ The latest mission was to verify information received and to gather further information on crimes allegedly committed against the civilian population,¹³²⁰ as well as on allegations of crimes committed in a particular region.¹³²¹ During the 2011 Honduran mission, ICC Prosecutor officials met with the Attorney General, the Human Rights Attorney, the General Prosecutor, the Sub-Secretary of Justice, and the Sub-Secretary of Human Rights.¹³²² In 2012, ICC Prosecutor officials went on a mission to Nigeria at the invitation of the Attorney General of the Federation and the Minister of Justice for the purpose of gathering information on crimes committed and also receiving information from Nigerian authorities on national proceedings.¹³²³ This mission also included extensive consultations with the President, Attorney General, representatives of affected states, the Inspector General of Police, chairpersons of various panels of investigations, EU Ambassadors to Nigeria, and international and local NGOs.¹³²⁴

Further, during phase two, officials of the ICC Prosecutor will also meet, when requested, to explain the preliminary examination process and mechanisms, as happened in Ukraine’s preliminary examination in 2014 when ICC

¹³¹⁵ In the case of Honduras, *campesino* groups from the Bajo Aguan region. Office of the Prosecutor, [‘Report on Preliminary Examination Activities 2014’](#), 2 December 2014 (“Honduras 2014 Preliminary Examination Report”), p. 10, para. 39.

¹³¹⁶ Honduras 2014 Preliminary Examination Report, p. 10, para. 39.

¹³¹⁷ *Ibid.*

¹³¹⁸ *Ibid.*

¹³¹⁹ 2014 Preliminary Examination Report, p. 10, para. 38.

¹³²⁰ *Ibid.*

¹³²¹ The Bajo Aguan region of Honduras: 2014 Preliminary Examination Report, p. 10, para. 39.

¹³²² Office of the Prosecutor, [‘Report on Preliminary Evaluation Activities 2011’](#), 13 December 2011, p. 10, para. 43.

¹³²³ 2012 Preliminary Examination Report, p. 21, para. 93.

¹³²⁴ *Ibid.*, pp. 21-22, para. 94.

Prosecutor officials met with members of the Parliamentary Committee on the Rule of Law and Justice.¹³²⁵ Once the Prosecutor has completed its analysis of the facts of the case and finished its legal assessment, an “Article 5 Report” will be submitted to the Prosecutor for consideration of whether the situation falls within the jurisdiction of the Court.¹³²⁶

V. Phase Three: Admissibility

A. Overview

Phase three of the preliminary examination process considers the admissibility of the alleged crimes, looking specifically at the principle of complementarity and the gravity of the crimes alleged. During this phase, information regarding subject-matter jurisdiction will continue to be gathered, particularly in the event that crimes may be ongoing. At the end of phase three, an “Article 17 Report” will be submitted to the Prosecutor relating to admissibility considerations.¹³²⁷

Complementarity involves the examination of the existence of relevant national proceedings in relation to the alleged situation or case under consideration.¹³²⁸ For gravity, the ICC Prosecutor takes into account both quantitative and qualitative considerations. As stipulated in Regulation 29(2) of the Regulations of the Prosecutor, the factors that guide the ICC Prosecutor’s assessment include the scale, nature, manner of commission of the crimes, and their impact on victims.¹³²⁹ The requirements of both complementarity and gravity will be examined further below.

a) Activities of the Prosecutor during Phase Three

During phase three, the ICC Prosecutor continues to verify and gather information and also works to refine her legal assessment of admissibility. As such, attempts are made to fill in gaps in the information on issues that inform the central questions of whether national investigations or prosecutions have commenced, to what extent and whether the apparent crimes appear sufficiently grave.

Accordingly, information concerning the attribution of incidents, the military or civilian character of targets, and the number of casualties are important,¹³³⁰ as is information on national proceedings.¹³³¹ For example, during the preliminary examination of Georgia in 2014, the ICC Prosecutor sent a letter to the Georgian authorities asking for information on “concrete, tangible and pertinent evidence” and “genuine” national investigations or prosecutions against those who appear to bear the greatest responsibility for the most serious crimes from the August 2008 armed

¹³²⁵ 2014 Preliminary Examination Report, p. 17, para. 72.

¹³²⁶ Preliminary Examinations Policy Paper, para. 81.

¹³²⁷ *Ibid.*, para. 82.

¹³²⁸ *Ibid.*, p.2, para. 6.

¹³²⁹ *Ibid.*, p. 15, para. 61.

¹³³⁰ Afghanistan: 2014 Preliminary Examination Report, p. 23, para. 99.

¹³³¹ Georgia: 2014 Preliminary Examination Report, p. 36, para. 150 and 153; Nigeria: 2014 Preliminary Examination Report, p. 44, para. 185.

conflict.¹³³² Subsequently, the ICC Prosecutor reviewed information contained in a report submitted in response to the letter of request.

The ICC Prosecutor also undertakes missions to relevant countries during phase three.¹³³³ Such missions include consultation missions, as well as participation in academic seminars and conferences on relevant topics. For example, in 2012, the ICC Prosecutor conducted two missions to Bamako, Mali, to evaluate information and sources on alleged crimes and to enhance cooperation with stakeholders, such as civil society organisations, and to meet with government officials and officials from the Economic Community of West African States.¹³³⁴ In 2013, a mission to Afghanistan was conducted pursuant to the preliminary examination into crimes committed in that country in order to meet with Afghan civil society and international NGOs and to participate in a seminar at Kabul University on peace, reconciliation, and transitional justice.¹³³⁵ In 2013, the Prosecutor conducted missions to Nigeria to consider national investigations and prosecutions.¹³³⁶ ICC Prosecutor officials met with representatives from the Federal High Court of Nigeria, the Director of Public Prosecutions, the Office of the National Security Advisor, the Nigerian Human Rights Commission, and senior officers from the Police and State Security Service.¹³³⁷

The Colombian preliminary examination has also involved various missions. In April and June 2013, two missions were sent to Bogota, Colombia, with a view to gathering information on national proceedings, to meet with various stakeholders and to participate in public events on international criminal law.¹³³⁸ Later in 2013, another mission was sent to Colombia, where the ICC Prosecutor met with senior officials from the Office of the Attorney General, members of national civil society, international NGOs and international organisations. ICC Prosecutor officials also participated in a conference on transitional justice.¹³³⁹ A mission was also conducted in Göttingen, Germany, during the preliminary examination of Colombia in order for the ICC Prosecutor to participate in an academic seminar on the legal framework for peace.¹³⁴⁰ Another mission, also facilitated by the Colombian government, took place from 1 to 13 February and from 11 to 14 May 2015 to follow up on national proceedings relevant to the preliminary examination.¹³⁴¹

The ICC Prosecutor also conducted missions during its preliminary examinations in 2014. In January 2014, the ICC Prosecutor visited Moscow, Russia, for the third time in relation to the Georgian preliminary examination. During this visit, the ICC Prosecutor officials held consultations with the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Defence, and with members of the Investigative Committee of the Russian Federation.¹³⁴²

¹³³² 2014 Preliminary Examination Report, p. 36, para. 152.

¹³³³ Preliminary Examinations Policy Paper, para. 85.

¹³³⁴ 2012 Preliminary Examination Report, p. 41, paras. 192-193.

¹³³⁵ 2014 Preliminary Examination Report, p. 23, para. 98.

¹³³⁶ 2013 Preliminary Examination Report, pp. 50-51, para. 224.

¹³³⁷ *Ibid.*, p. 51, para. 225.

¹³³⁸ Colombia: 2013 Preliminary Examination Report, p. 36, paras. 147 and 148.

¹³³⁹ Colombia: 2014 Preliminary Examination Report, p. 31, paras. 128.

¹³⁴⁰ *Ibid.*

¹³⁴¹ *Ibid.*, p. 31, para. 129. 2015 Preliminary Examination Report, p. 38, para. 161.

¹³⁴² *Ibid.*

Additionally, in the same year, a fifth mission to Georgia was undertaken to receive updates on national proceedings from the Office of the Chief Prosecutor.¹³⁴³ Also in 2014, a mission to Guinea was conducted, the ninth during the course of the preliminary examination into that country.¹³⁴⁴ This mission's purpose was to follow up on national investigations, including any gaps or shortfalls in them, and to assess the prospects for domestic trials.¹³⁴⁵ Consultations were held with the panel of investigative judges on the case, judicial and political authorities, victims' representatives, and relevant international actors.¹³⁴⁶ Two missions to Guinea were conducted under phase three in 2013.¹³⁴⁷

During phase three examinations, the ICC Prosecutor will also continue to examine potential gender-based crimes pursuant to her policy on sexual and gender-based crimes,¹³⁴⁸ particularly with regard to the issue of admissibility. For example, in relation to the Guinea preliminary examination, officials of the ICC Prosecutor participated in the Global Summit to End Sexual Violence in Conflict in London, UK, and met with the Panel of Judges and the UN Judicial Expert to follow up on "concrete investigative steps taken in relation to the national investigation" and discussed potential areas for technical assistance.¹³⁴⁹ In 2014, the Prosecutor also issued a statement encouraging Guinean authorities to continue to ensure swift justice for victims, with particular attention to sexual and gender-based crimes.¹³⁵⁰ The ICC Prosecutor held meetings with the UN Judicial Expert and Panel of Judges in The Hague, as well, on the progress of the national investigation and issues relating to sexual crimes and protection of victims and witnesses.¹³⁵¹

The ICC Prosecutor may also hold consultations at the seat of the Court with relevant government officials, as it did during the Guinea preliminary examination in 2014.¹³⁵² Additionally, it will share information it deems relevant with national authorities during phase three of the preliminary examination. For example, during the preliminary examination into the situation in Colombia in 2013, the ICC Prosecutor sent a letter to the Colombian authorities, including the Constitutional Court, sharing her views on issues of national investigations for lower-ranking perpetrators and suspended sentences.¹³⁵³ Similarly, in 2013 during the course of the Georgian preliminary examination, the Prosecutor accepted an invitation from the Georgian Chief Prosecutor to give a presentation to national investigators and prosecutors on crimes falling under the jurisdiction of the ICC.¹³⁵⁴ During the Nigerian preliminary examination, the Prosecutor accepted an invitation by the Nigerian Attorney General to speak at a

¹³⁴³ 2014 Preliminary Examination Report, p. 36, para. 152.

¹³⁴⁴ *Ibid.*, p. 40, para. 165.

¹³⁴⁵ *Ibid.*

¹³⁴⁶ *Ibid.*

¹³⁴⁷ 2013 Preliminary Examination Report, p. 45, para. 197.

¹³⁴⁸ Afghanistan: 2014 Preliminary Examination Report, pp. 23-24, para. 101.

¹³⁴⁹ 2014 Preliminary Examination Report, p. 40, para. 166.

¹³⁵⁰ *Ibid.*, p. 40, para. 167.

¹³⁵¹ *Ibid.*, p. 40, para. 168.

¹³⁵² *Ibid.*, p. 40, para. 169.

¹³⁵³ 2013 Preliminary Examination Report, p. 36, para. 149.

¹³⁵⁴ *Ibid.*, p. 41, para. 175.

seminar in Abuja, Nigeria, on the observance of human rights and international humanitarian law norms in internal security operations. During this trip, the Prosecutor also spoke with the Nigerian President and civilian and military leaders related to investigations of alleged violations of IHL in internal security operations.¹³⁵⁵ Contact is also maintained with organisations assisting victims, such as in the Guinea preliminary examination.¹³⁵⁶

B. The Complementarity Provisions

The principle of admissibility encompasses the concepts of complementarity and gravity.¹³⁵⁷ The present discussion is limited to the issue of complementarity. It is this aspect of the admissibility question that will focus upon the appropriateness/sufficiency of the State's domestic investigations and trials. The complementarity principle is established in Articles 17(1)(a) to (c) and affirmed in paragraph 10 of the Preamble and Article 1 of the Statute. It provides that the ICC shall be "complementary to national criminal jurisdictions".¹³⁵⁸ Complementarity can be described as concerning whether genuine investigations and prosecutions are being conducted at a national level sufficient to warrant a finding that the ICC does not have the right to try the relevant cases. It involves an analysis by the ICC Prosecutor of steps taken by national courts to investigate or prosecute the alleged crimes against specific individuals encompassed by the preliminary examination.¹³⁵⁹

When addressing issues of complementarity, the ICC Prosecutor will need to consider: (i) the likely groups of persons subject to investigation; and (ii) the crimes within the jurisdiction of the Court that are likely to be the focus of an investigation.¹³⁶⁰ The ICC Prosecutor must then consider:

- Whether there are, or have been, national investigations or prosecutions relevant to the preliminary examination.¹³⁶¹ If not, then this factor alone is sufficient to make the case admissible at the ICC;¹³⁶²
- If there have been national investigations or prosecutions, the ICC Prosecutor will assess whether these relate to the potential cases being examined by the ICC Prosecutor. Principal amongst the questions raised are whether the same person and the same conduct are being investigated by the ICC Prosecutor and whether the focus is on those most responsible for the most serious crimes;
- If the answer is yes, the ICC Prosecutor will examine whether the national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings.¹³⁶³

¹³⁵⁵ 2014 Preliminary Examination Report, pp. 44-45, para. 186.

¹³⁵⁶ 2014 Preliminary Examination Report, p. 40, para. 165; 2013 Preliminary Examination Report, p. 45, para. 198.

¹³⁵⁷ Rome Statute, arts. 17(1)(a)-(c) (complementarity) and 17(1)(d) (gravity).

¹³⁵⁸ *Ibid.*, Preamble.

¹³⁵⁹ *Ibid.*, arts. 18(1) and 19(2)(b).

¹³⁶⁰ Kenya Authorisation Decision, paras. 50, 182 and 188; *Situation in the Republic of Côte d'Ivoire* (Authorisation Decision) ICC-02/11-14 (3 October 2011) paras. 190-191 and 202-204.

¹³⁶¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Judgment](#)) ICC-01/04-01/07-1497 (25 September 2009) ("Katanga Judgment on the Appeal of the Decision on the Admissibility of the Case"), para. 78.

¹³⁶² *Ibid.*

¹³⁶³ Preliminary Examinations Policy Paper, para. 49; The ICC has said that the evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as

- In considering an unwillingness to prosecute, the ICC will consider: (i) the existence of proceedings designed to shield an individual from ICC jurisdiction; (ii) an unjustifiable delay in the proceedings; and (iii) whether the proceedings fail to be impartial or independent;¹³⁶⁴
- In considering an inability to prosecute, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings;
- In the event that the ICC concludes that the national proceedings are either unwilling or unable, the ICC will (subject to the other ICC requirements) have jurisdiction over the crimes.

As such, the principle of complementarity, in addition to explaining when the ICC should, or should not, exercise jurisdiction over a specific case, provides a useful barometer for assessing the appropriateness/sufficiency of the current efforts of the GoU to prosecute international crimes arising from, or connected to, the conflict in Crimea and Eastern Ukraine. In particular, and as will be discussed, even though the GoU has initiated prosecutions for war-related crimes, the available information suggests that the investigations and prosecutions address the smallest fraction of the IHL violations occurring in conflict areas. Moreover, those investigations and prosecutions are predicated upon specific national crimes and not international crimes.

a) Assessment One: Whether There Is, or Has Been, an Investigation or Prosecution of the Case by the State

As provided above, the ICC will consider whether there are ongoing or completed investigations or prosecutions of a situation under consideration by the ICC by a State that has jurisdiction over it. Inactivity by a State satisfies the complementarity requirements.¹³⁶⁵ To satisfy this criterion, at least one State with jurisdiction over the case must be actively investigating or prosecuting the case.¹³⁶⁶

b) Assessment Two: Same Person and Conduct Test

For the ICC to be satisfied that the domestic investigation covers the same “case” as that before a Court, it must be demonstrated that: (i) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and (ii) the conduct that is subject to the national investigation is substantially the same conduct as that which is alleged in the proceedings before the Court.¹³⁶⁷ The domestic

the scope of the investigative powers of the persons in charge of the investigation ... which are significant to the question of whether there is no situation of ‘inactivity’ at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings”: Al-Senussi Admissibility Decision, para. 210.

¹³⁶⁴ Rome Statute, art. 17(2); Preliminary Examinations Policy Paper, paras. 51-58; Gaddafi Admissibility Decision, paras. 199-215; Al-Senussi Admissibility Decision, para. 235.

¹³⁶⁵ *The Prosecutor v. Thomas Lubanga Dyilo* (Decision) ICC-01/04-01/06-8 (24 February 2008) (“Lubanga Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006”) para. 29.

¹³⁶⁶ *Ibid.*, para. 30.

¹³⁶⁷ Gaddafi Admissibility Decision, paras. 61, 74, 76 and 77: The Chamber recalled that the “same person, same conduct” test was initially elaborated in Lubanga Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006, para. 31. This test was later recalled in: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*

investigation and prosecution of a case must correspond in specific respects to the case being examined by the ICC.¹³⁶⁸ Therefore, capturing the nature and gravity of the crime is vital.¹³⁶⁹

In circumstances where the State pursues only investigations and prosecutions into ordinary domestic crimes (as opposed to international crimes), the ICC will consider whether the ordinary crimes cover the same conduct as the conduct the ICC wishes to prosecute—namely, war crimes, crimes against humanity or genocide.¹³⁷⁰ To satisfy this part of the criterion, the State must be taking “concrete and progressive investigative steps to ascertain whether the person is responsible for the conduct alleged against him before the Court”.¹³⁷¹ This may include interviewing witnesses, collecting documentary evidence or carrying out forensic analysis.¹³⁷² The State must be investigating substantially the same conduct and what this means will vary on a case-by-case basis, according to the facts and circumstances of each case. An individualised analysis of the facts is required for each matter.¹³⁷³

The “same person, same conduct test” was first elaborated in *Lubanga*.¹³⁷⁴ In that case, the national judicial system had taken a great deal of action towards investigation, including the issuance of two warrants of arrest and the holding of the relevant suspect (Thomas Lubanga Dyilo) in the *Centre Penitenciaire et de Reeducation de Kinshasa*.¹³⁷⁵ Nevertheless, these actions were deemed insufficient to make the case inadmissible because the national proceedings, although encompassing the same person, did not encompass the same conduct that was the subject of the case before the Court.¹³⁷⁶ In particular, the Chamber noted that the warrants of arrest issued by the DRC made no reference to

([Decision](#)) ICC-02/05-01/07-I-Corr(27 April 2007) para. 24; *The Prosecutor v. Germain Katanga* ([Decision](#)) ICC-01/04-01/07-4 (6 July 2007) para. 20; *The Prosecutor v. Mathieu Ngudjolo Chui* ([Decision](#)) ICC-01/04-01/07-262 (6 July 2007) para. 21; *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Arrest Warrant Decision) ICC-02/05-01/09-2-Conf (4 March 2009), para. 50 (public redacted version in ICC-02/05-01/09-3); *The Prosecutor v. Bahr Idriss Abu Garda* ([Decision](#)) ICC-02/05-02/09-I-Conf (7 May 2009) para. 4. The same approach was taken by Pre-Trial Chamber II in *The Prosecutor v. Konyet al.* ([Admissibility Decision](#)) ICC-02/04-01/05-377 (10 March 2009), paras. 17-18; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ([Admissibility Decision](#)) ICC-01/09-01/11-101 (30 May 2011) para. 54; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Admissibility Decision](#)) ICC-01/09-02/11-96 (30 May 2011) para. 48. Lastly, the same position was adopted by Pre-Trial Chamber III in *The Prosecutor v. Jean-Pierre Bemba Gombo* (Arrest Warrant Decision) ICC-01/05-01/08-14-tENG (10 June 2008) para. 16.

¹³⁶⁸ *Lubanga Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006*, para. 31.

¹³⁶⁹ Bruce Broomhall, ‘The International Criminal Court: A Checklist for National Implementation’ in M Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (Nouvelles Etudes Penales, 1999) pp. 113, 149-151. *See also* Darryl Robinson, ‘The Rome Statute and Its Impact on National Law’ in A Cassese et al, *The Rome Statute of the International Criminal Court* (OUP, 2002) p. 1861; Linda E Carter, ‘The Principle of Complementarity and the International Criminal Court: the Role of *Ne Bis in Idem*’ (2010) 8 Santa Clara Journal of International Law 165, p. 194.

¹³⁷⁰ Rome Statute, arts. 17(1) and 20(3). *See also* Gaddafi Admissibility Decision, para. 85-88; Al-Senussi Admissibility Decision, para. 66.

¹³⁷¹ Al-Senussi Admissibility Decision, para. 66, citing Gaddafi Admissibility Decision, paras. 54, 55 and 73; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Judgment](#)) ICC-01/09-02/11-274 (30 August 2011) paras. 1 and 40: These investigative steps may include “interviewing witnesses, suspects collecting documentary evidence, or carrying out forensic analysis”.

¹³⁷² *Ibid.*

¹³⁷³ Gaddafi Admissibility Decision, para. 77; Al-Senussi Admissibility Decision, para. 66.

¹³⁷⁴ *Lubanga Decision concerning Pre Trial Chamber I’s Decision of 10 February 2006*, para. 31.

¹³⁷⁵ *Ibid.*, para. 36.

¹³⁷⁶ *Ibid.*, para. 37.

the alleged policy and practice of enlisting child soldiers and thus the DRC could not be “considered to be acting in relation to the specific case before the Court”.¹³⁷⁷

Further, satisfaction of this criterion is not dependent upon the *legal categorisation* of the conduct but the conduct itself that is the focus of the national proceedings.¹³⁷⁸ Accordingly, the question does not rest upon whether the investigation or prosecution was for international crimes or ordinary domestic crimes. It was a deliberate decision of the drafters of the Rome Statute not to distinguish between ordinary crimes and international crimes, and instead focus on the “conduct” prosecuted.¹³⁷⁹ Rather, if the investigation or prosecution covers the same conduct, irrespective of this dichotomy, the ICC will deem it sufficient to reach a finding of inadmissibility.¹³⁸⁰ As observed, “[t]he question of whether domestic investigations are carried out with a view to prosecuting ‘international crimes’ is not determinative of an admissibility challenge”,¹³⁸¹ and “a domestic investigation or prosecution for ‘ordinary crimes’, to the extent that the case covers the same conduct, shall be considered sufficient”.¹³⁸² Accordingly, as outlined and expressly found by the ICC, the absence of domestic legislation allowing the prosecution of war crimes, crimes against humanity or genocide, whilst creating “admissibility” obstacles, does not *per se* render a case admissible at the ICC.¹³⁸³

Further guidance on the “same conduct” test may be found in the ICC’s Libya complementarity determination. It was argued in the case of *Al-Senussi* (ex-Minister of Intelligence of Libya) that the fact that the international crime of persecution could not be charged at the national level (although it might be considered at the sentencing stage) due to a lack of local law, should lead to a judicial finding that Libya was not investigating the same case and that the case was therefore admissible before the ICC.¹³⁸⁴ The ICC Appeals Chamber was not persuaded.¹³⁸⁵ It approved the finding of the Pre-Trial Chamber that in the circumstances there was no need to charge the international crime of persecution (even though the ICC case was principally premised on this crime). The requirement that the domestic case cover substantially (but not precisely) the same conduct provided Libya with a degree of flexibility when deciding how to pursue the case at the domestic level. An assessment of whether the “domestic case sufficiently mirrors the case before the court” is required.¹³⁸⁶

¹³⁷⁷ *Ibid.*, paras. 37-39.

¹³⁷⁸ *Al-Senussi* Admissibility Decision, para. 66.

¹³⁷⁹ Gaddafi Admissibility Decision, paras. 86-87 and fns 138-139, citing Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 1995, G.A., 50th Sess., Supp. No. 22, A/50/22, paras. 43, 179.

¹³⁸⁰ Gaddafi Admissibility Decision, para. 88.

¹³⁸¹ *Ibid.*, para. 85.

¹³⁸² *Ibid.*, para. 88.

¹³⁸³ *Ibid.*, para. 88.

¹³⁸⁴ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ([Al-Senussi Admissibility Appeal Judgment](#)) ICC-01/11-01/11 OA 6 (24 July 2014) (“Al-Senussi Admissibility Appeal Judgment”) para. 118.

¹³⁸⁵ *Ibid.*, para. 118.

¹³⁸⁶ *Ibid.*, para. 119.

In determining that the conduct underlying the charge of persecution was sufficiently covered by the Libyan proceedings,¹³⁸⁷ the Appeals Chamber considered the various offences envisaged at the domestic level and the overall context of the case that was underpinned by crimes against civilians and the use of the security forces to suppress those demonstrating against a political regime.¹³⁸⁸ Furthermore, as to the specific element of targeting a group or person based on political, racial or other groups—as required for persecution—the Appeals Chamber accepted that a Libyan judge could include discrimination on grounds constituting the international crime of persecution as an aggravating feature during sentencing.¹³⁸⁹ Accordingly, it is possible for a State to pursue a technically different offence, if the facts are appropriately and substantially included and the gravity and magnitude of the alleged offence is at some stage incorporated.¹³⁹⁰

Similar issues arose in *Saif Al-Islam Gaddafi*. Here the ICC Prosecutor sought to charge Saif Al-Islam Gaddafi with a long list of alleged acts of murder and persecution as crimes against humanity.¹³⁹¹ At the domestic level, Libya was investigating Gaddafi for a range of charges covering the same factual incidents as the ICC’s murder and persecution charges. However, in the domestic case they were neither charged specifically as persecution or crimes against humanity.¹³⁹²

In considering the matter, the ICC Pre-Trial Chamber raised “specific concerns regarding the ordinary crimes in relation to which Mr Gaddafi was being investigated”.¹³⁹³ Nevertheless, they ruled that the same case was being investigated.¹³⁹⁴ For the persecution charge, one of the Chamber’s main concerns was that the omission of a persecutory intent under the crime itself did not sufficiently capture his conduct. However, the Pre-Trial Chamber

¹³⁸⁷ *Ibid.*, para. 122.

¹³⁸⁸ *Ibid.*, para. 120.

¹³⁸⁹ *Ibid.*, para. 121.

¹³⁹⁰ Lorraine Finlay, ‘Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute’ (2008-2009) 15 U.C. David Journal of International Law and Policy 221, p. 229.

¹³⁹¹ Gaddafi Admissibility Decision, para. 79-83: Namely, Gaddafi allegedly used his control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi’s regime; in particular, that Gaddafi activated the Security Forces under his control to kill and persecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi’s regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 to at least 28 February 2011.

¹³⁹² Gaddafi Admissibility Decision, para. 37: Libya argued that the investigation concerned the same individual conduct by Gaddafi as the murder and persecution alleged by the ICC Prosecutor. The charges covered crimes against the person with a broad temporal scope and financial crimes dating back to 2006. The geographic scope was also said to take place in numerous places throughout Libya; para. 112-2: The ordinary crimes charged were intentional murder, torture, incitement to civil war, indiscriminate killings, misuse of authority against individuals, arresting people without just cause, and unjustified deprivation of personal liberty pursuant to articles 368, 435, 293, 296, 431, 433 and 434 of the Libyan Criminal Code. In addition, the potential charges of: insulting constitutional authorities pursuant to article 195, devastation, rapine and carnage pursuant to article 202, civil war pursuant to article 203, conspiracy pursuant to article 211, attacks upon the political rights of a Libyan pursuant to article 217, arson pursuant to article 297, spreading disease among plants and livestock pursuant to article 362, concealment of a corpse pursuant to article 294, aiding members of a criminal association pursuant to article 322, use of force to compel another pursuant to article 429, and search of persons pursuant to article 432 of the Libyan Criminal Code.

¹³⁹³ *Ibid.*, para. 108.

¹³⁹⁴ *Ibid.*, para. 113.

resolved this anomaly by concluding (similar to its conclusion in *Al-Senussi*) that “although persecutory intent is not an element of any of the crimes against Mr Gaddafi, it is an aggravating factor which is taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code”.¹³⁹⁵

The Pre-Trial Chamber found that the plethora of charges advanced by Libya did not cover “all aspects of the offences” to be brought under the Rome Statute.¹³⁹⁶ However, these charges had the potential to “sufficiently capture” his conduct along with the persecutory intent under “articles 27 and 28 of the Libyan Criminal Code”.¹³⁹⁷

A key concern for the Chamber was clearly whether the crimes charged covered the gravity of the offences adequately. In this respect, the critical questions will often revolve around whether the ordinary crimes charged contain similar physical and mental elements, as well as whether they are able to be properly contextualised as part of a widespread or systematic attack on a civilian population (to correspond to crimes against humanity) or through a nexus to an armed conflict (to correspond to war crimes). As must be clear, these latter contexts mark the scope, magnitude and gravity of the specific conduct and are often difficult to encompass through the elements constituting ordinary crimes.

In making this “same conduct, same case” assessment, the ICC will also consider the domestic crimes sentencing regime. As noted, a significant disparity in sentence may be a factor weighing against “allowing” the State to continue the prosecution domestically.¹³⁹⁸ Domestic crimes may not provide for an adequate or comparable penal sanction and this will militate against a finding that the “same case” is being prosecuted at the domestic level. For some domestic offences, this issue may be more easily resolved. For example, depending upon the State in question, a domestic offence of murder may attract similar sentencing to a crime against humanity—both attracting the most severe penalties.¹³⁹⁹ However, with other offences this convergence may be less obvious: pillage prosecuted as mere theft may attract a vastly different sentence.¹⁴⁰⁰

Therefore, although charging domestic offences may be sufficient, such an approach must be considered less than ideal and an uncertain endeavour. It is difficult to predict the ICC’s precise calculation when considering domestic charges and weighing them against their own findings concerning genocide, crimes against humanity and war crimes. Attempting to assess the correspondence between international crimes against domestic (ordinary) crimes is not a precise science. There can be real difficulty determining what ordinary crime should be charged to adequately capture conduct alleged to constitute an international crime. In the final analysis, it places the State at a heightened risk of

¹³⁹⁵ *Ibid.*, para. 111.

¹³⁹⁶ *Ibid.*, para. 113.

¹³⁹⁷ *Ibid.*

¹³⁹⁸ Bruce Broomhall, ‘The International Criminal Court: A Checklist for National Implementation’ in M Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (Nouvelles Etudes Penales, 1999) p. 149.

¹³⁹⁹ Jann Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1 *Journal of International Criminal Justice* 86, p. 97.

¹⁴⁰⁰ *Ibid.*, p. 97

losing the admissibility argument on the basis of inaction resulting from domestic law and practice prohibiting a narrow range of conduct than does the ICC Statute.¹⁴⁰¹

c) *Third assessment: Whether the National Proceedings Are Vitiating by an Unwillingness or Inability to Genuinely Carry Out the Proceedings*

If the ICC deems that there is relevant investigative or prosecutorial activity at the domestic level concerning the same conduct, the next assessment will be to determine whether these proceedings represent a genuine attempt to hold the individual accountable for their conduct. As previously noted, a determination of either unwillingness *or* inability is sufficient to remove a case from the domestic jurisdiction and “admissible” before the ICC.¹⁴⁰²

i. “Unwilling”

The first criterion requires an assessment of whether a State is “unwilling” to genuinely conduct national proceedings into the case. In order to determine unwillingness in a particular case, the ICC will consider whether: (i) the domestic proceedings were or are being undertaken; (ii) a decision was made at the domestic level for the purpose of shielding a person from criminal responsibility; (iii) there has been an unjustifiable delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and (iv) the proceedings are not conducted impartially or independently and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹⁴⁰³

Pre-Trial Chamber I at the ICC addressed the issue of unwillingness in the *Al-Senussi* decision on admissibility.¹⁴⁰⁴ After concluding that there was a relevant investigation at the domestic level, the Pre-Trial Chamber assessed whether conditions existed which indicated that Libya was unwilling to genuinely carry out proceedings against Al-Senussi.¹⁴⁰⁵

When determining whether Libya was unwilling genuinely to carry out the proceedings, the Pre-Trial Chamber recognised that any assessment of the willingness (and ability) to carry out appropriate proceedings must be assessed in light of the relevant domestic law and procedures.¹⁴⁰⁶ Additionally, it stated that the State must substantiate the

¹⁴⁰¹ *Ibid.*, pp. 96-97, citing to Bruce Broomhall, ‘The International Criminal Court: A Checklist for National Implementation’ in M Cherif Bassiouni (ed), *ICC Ratification and National Implementing Legislation* (Nouvelles Etudes Penales, 1999) p. 149.

¹⁴⁰² *Ibid.*; Preliminary Examinations Policy Paper, para. 49; Al-Senussi Admissibility Decision, para. 210: evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation which are significant to the question of whether there is no situation of ‘inactivity’ at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings.

¹⁴⁰³ Rome Statute, art. 17(2); Preliminary Examinations Policy Paper, para. 50-55.

¹⁴⁰⁴ Al-Senussi Admissibility Decision, para. 169-293.

¹⁴⁰⁵ *Ibid.*, para. 202.

¹⁴⁰⁶ *Ibid.*, para. 208.

concrete circumstances of the case, and an evidentiary debate on unwillingness or inability only arises when there are doubts as to the genuineness of the domestic proceedings.¹⁴⁰⁷

Concerning Libya’s unwillingness to carry out criminal proceedings, the Pre-Trial Chamber considered a number of issues, including: (i) the quantity and quality of evidence collected by Libya as part of their investigation of the suspect, Al-Senussi; (ii) the scope, methodology and resources of the investigation; (iii) the recent progress of the case, namely the transfer of it to the Accusation Chamber;¹⁴⁰⁸ and (iv) other comparable proceedings being conducted.¹⁴⁰⁹

Regarding the need to consider whether the Government of Libya was shielding Al-Senussi from criminal responsibility for crimes within the jurisdiction of the Court,¹⁴¹⁰ the Chamber considered that there was no indication that this was the case such as to warrant a finding of “unwillingness” on this basis.¹⁴¹¹

Concerning whether the Libyan proceedings were tainted by an unjustified delay that was inconsistent with an intent to bring Al-Senussi to justice, the Chamber observed that in the specific circumstances of the case—which had broad temporal, geographic and material parameters—a period of less than 18 months between the commencement of the investigation and the referral of the case against Al-Senussi to the Accusation Court could not be considered to constitute an unjustified delay.¹⁴¹² Thus, the Chamber was satisfied that the national investigations were not being conducted in a manner that was inconsistent with the intent to bring Al-Senussi to justice.¹⁴¹³

Concerning the independence and impartiality of the national proceedings, not only must it be shown that the proceedings were not being conducted independently or impartially, the determination also requires a demonstration that the proceedings were not conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.¹⁴¹⁴

The Appeals Chamber in the *Al-Senussi* case noted that the consideration of impartiality and independence is familiar in the area of human rights law and human rights standards.¹⁴¹⁵ However, it noted that the determination of independence and impartiality “is not one that involves an assessment of whether the due process rights of a suspect have been breached *per se*”.¹⁴¹⁶ The notions of independence and impartiality must, however, be seen in light of Article 17(2)(c) which is primarily concerned with whether the national proceedings are being conducted in a manner that would enable the suspect to evade justice.¹⁴¹⁷

¹⁴⁰⁷ *Ibid.*

¹⁴⁰⁸ *Ibid.*, para. 289

¹⁴⁰⁹ *Ibid.*

¹⁴¹⁰ *Ibid.*, para. 202.

¹⁴¹¹ *Ibid.*, para. 290.

¹⁴¹² *Ibid.*, paras. 227-229 and 291.

¹⁴¹³ *Ibid.*, para. 292.

¹⁴¹⁴ Rome Statute, art. 17(2)(c); *Al-Senussi Admissibility Appeal Judgment*, para. 220.

¹⁴¹⁵ *Al-Senussi Admissibility Appeal Judgment*, para. 220.

¹⁴¹⁶ *Ibid.*, para. 230.

¹⁴¹⁷ *Ibid.*, para. 221.

In this case, the Chamber considered that there might be circumstances where violations of the suspect's rights will be egregious enough for a finding that the proceedings are "inconsistent with an intent to bring that person to justice".¹⁴¹⁸ When discussing egregious violations of the suspect's rights, the Appeals Chamber noted that proceedings that were little more than predetermined preludes to executions would be sufficient to render a case inadmissible.¹⁴¹⁹

In addition to this more extreme example, less extreme circumstances may also suffice, such as where when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. Whether a case will ultimately be admissible in such circumstances will necessarily depend upon its precise facts.¹⁴²⁰

ii. "Unable"

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. Factors that should be considered include: (i) a lack of necessary personnel, such as judges, investigators, or prosecutors; (ii) a lack of substantive or procedural penal legislation to criminalise crimes under the ICC's jurisdiction rendering the system "unavailable"; (iii) a lack of access rendering the system "unavailable"; (iv) obstruction by uncontrolled elements rendering the system "unavailable"; and (v) amnesties or immunities rendering the system "unavailable".¹⁴²¹

It is difficult to properly gauge how inability will be adjudged in concrete terms. It is case- and situation-specific. In the *Lubanga* case, the ICC determined that DRC's judicial system was "able" within the meaning of Article 17. In making this determination, it took account of certain changes in the DRC's national judicial system, which resulted in, *inter alia*, the issuance of two warrants of arrest by the competent DRC authorities for Mr. Lubanga and resulted in proceedings against him.¹⁴²²

In the *Al-Senussi* case, the ICC focused on whether Libya was unable to obtain the necessary evidence and testimony as a result of a "total or substantial collapse or unavailability" of the national judicial system.¹⁴²³ Whilst making this determination, the Pre-Trial Chamber examined the evidence already gathered by Libya and the stage of the proceedings reached at the national level to determine if relevant factual circumstances existed that prevented these steps.¹⁴²⁴ In particular, the Chamber considered the security situation in Libya, specifically the absence of effective

¹⁴¹⁸ *Ibid.*

¹⁴¹⁹ *Ibid.*, para. 230.

¹⁴²⁰ *Ibid.*

¹⁴²¹ ICC, '[Informal Expert Paper: The Principle of Complementarity in Practice](#)', ICC-01/04-01/07-1008-AnxA (30 March 2009) para. 50.

¹⁴²² Lubanga Decision concerning Pre Trial Chamber I's Decision of 10 February 2006, para. 36

¹⁴²³ *Ibid.*, para. 295.

¹⁴²⁴ Al-Senussi Admissibility Decision, para. 296.

protection programmes for witnesses and the fact that certain detention facilities were yet to be transferred under the authority of the Ministry of Justice, as critical questions having a direct and relevant bearing on the investigation.¹⁴²⁵

The Pre-Trial Chamber determined that the domestic proceedings had not been prejudiced by the security challenges as demonstrated by the “progressive and concrete investigative” steps already taken. The fact that Libya had been able to provide a considerable amount of evidence collected as part of its investigation was a critical fact.¹⁴²⁶ The Pre-Trial Chamber stated that the evidence need not comprise all possible evidence and that there was no indication that evidence collection had ceased.¹⁴²⁷ As such, the Chamber decided that, taking into account all the relevant circumstances, a concrete examination did not lead to a conclusion that there was an inability to obtain relevant evidence or testimony. Therefore, no inference arose that Libya was not able to carry out proceedings genuinely.¹⁴²⁸

Conversely, in *Gaddafi*, the Pre-Trial Chamber ruled that Libya was unable to obtain the necessary information and evidence to carry out the proceedings against Gaddafi in compliance with Libyan national law.¹⁴²⁹ In particular, the Chamber noted that Libya had not yet been able to secure the transfer of Gaddafi from his place of detention under the custody of the Zintan militia into State authority.¹⁴³⁰ Further, the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection resulted in a lack of capacity to obtain the necessary testimony for the proceedings.¹⁴³¹

It should also be noted that the broad phrase “otherwise unable to carry out its proceedings” under Article 17(3) serves as a catch-all clause of inability to cover “a variety of situations that may arise during domestic proceedings”.¹⁴³² It provides the ICC with the broadest of discretions in assessing ability. The phrase within Article 17(3) may include an assessment of procedural rights such as the availability of lawyers for suspects that constitute an impediment to the progress of proceedings.¹⁴³³ For example, in *Al-Senussi*, the defence argued that the Libyan authorities were “otherwise unable” to conduct genuine proceedings against Al-Senussi given that he has had no access to legal representation and other fundamental rights had allegedly been violated.¹⁴³⁴ The Chamber observed that Libya’s capacity to carry out proceedings was not effected *per se* by the security situation, and that recent court appearances had not been prevented.¹⁴³⁵ Libya argued that it was making efforts to appoint a lawyer and the delays

¹⁴²⁵ *Ibid.*, para. 297.

¹⁴²⁶ *Ibid.*, paras. 297-299.

¹⁴²⁷ *Ibid.*, para. 298.

¹⁴²⁸ *Ibid.*, para. 301.

¹⁴²⁹ Gaddafi Admissibility Decision, para. 205.

¹⁴³⁰ *Ibid.*, para. 206.

¹⁴³¹ *Ibid.*, para. 209.

¹⁴³² John T Holmes, ‘Complementarity: National Courts Versus the ICC’ in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002) p. 678; Mohamed ElZeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill, 2008) p. 224

¹⁴³³ Gaddafi Admissibility Decision, paras. 212-214.

¹⁴³⁴ Al-Senussi Admissibility Decision, para. 183.

¹⁴³⁵ *Ibid.*, para. 303.

were not insurmountable but due to the transitional context and security difficulties and did not amount to inability.¹⁴³⁶

The Pre-Trial Chamber ruled that the problem of legal representation *could* become fatal to the progress of proper proceedings.¹⁴³⁷ However, the decision had to be made at the time of the admissibility proceedings.¹⁴³⁸ The Chamber noted that, in contrast to the previous *Gaddafi* decision, Gaddafi was not under the control of the State as Al-Senussi was,¹⁴³⁹ as well as the fact that several local lawyers indicated their willingness to represent Al-Senussi.¹⁴⁴⁰ The Chamber had no reason to dispute this and so found that it could not conclude that Al-Senussi's case would be impeded from proceeding further on the grounds that Libya would be unable to adequately address the security concerns and ensure proper legal representation.¹⁴⁴¹ It therefore was not able to conclude that Libya was unable to otherwise carry out its proceedings.¹⁴⁴² This is one example of how the ICC may proceed in relation to this residual category.

d) Admissibility Not Contested by a State

When a State elects to do nothing, in other words, when it chooses not to exercise its jurisdiction over a particular case, this is considered to be inactivity on the part of the State. Such a situation occurred in *Katanga and Chui*.¹⁴⁴³ The Court said that the case of a State which may not want to protect an individual but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her is a form of "unwillingness", which is not expressly provided for in Article 17 of the Statute.¹⁴⁴⁴ The ICC has said that it considers that a State that chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must still be considered as lacking the will referred to in Article 17.¹⁴⁴⁵

The ICC went as far as to say that this form of unwillingness "is in line with the object and purpose of the Statute, in that it fully respects the drafters' intention "to put an end to impunity while at the same time adhering to the principle of complementarity".¹⁴⁴⁶ This principle, it was said, is designed to protect the sovereign right of States to exercise their jurisdiction when they wish to do so.¹⁴⁴⁷ As holders of the right to exercise jurisdiction, States may waive it,

¹⁴³⁶ *Ibid.*, para.306.

¹⁴³⁷ *Ibid.*, para.307.

¹⁴³⁸ *Ibid.*, para.307.

¹⁴³⁹ *Ibid.*, para.308.

¹⁴⁴⁰ *Ibid.*, para.308.

¹⁴⁴¹ *Ibid.*, para.308.

¹⁴⁴² *Ibid.*, para.309.

¹⁴⁴³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Reasons](#)) ICC01/04–01/07-1213-tENG (16 June 2009) paras.77-78.

¹⁴⁴⁴ *Ibid.*

¹⁴⁴⁵ *Ibid.*, para. 77; Gideon Boas, James L. Bischoff, Natalie L. Reid, *International Criminal Law Practitioner: International Criminal Procedure* (Cambridge University Press, 2011) p. 79.

¹⁴⁴⁶ *Ibid.*; William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011) p. 194.

¹⁴⁴⁷ *Ibid.*

just as they may choose not to challenge the admissibility of a case, even if there are objective grounds for it to do so.¹⁴⁴⁸

This is supported by an informal expert paper¹⁴⁴⁹ that addresses the reality of uncontested admissibility. Various factual examples exist concerning uncontested admissibility, such as situations where the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.¹⁴⁵⁰ Other examples include situations where the ICC has accumulated strong evidence against a leadership group and a suspect flees to a third State that is not interested in competing for jurisdiction¹⁴⁵¹ or where a State is incapacitated by mass crimes and agrees that a consensual division of labour is the most logical approach.¹⁴⁵²

Finally, groups divided by conflict may oppose prosecutions by the other, fearing biased proceedings, and yet agree to leadership prosecution by an international court, as it is seen as neutral and impartial.¹⁴⁵³ Rather than apathy, such forms of inactivity could be viewed as a step taken to enhance the delivery of effective justice and as consistent with the Rome Statute. Consequently, by considering such issues under “unwillingness”, the ICC ensures the proper working of the principle of complementarity.

e) The Burden of Proof

Now that the ICC Prosecutor has declared particular conduct that has occurred in Ukraine as admissible and will apply for an authorisation of a formal investigation, the burden of proof for proving that the case is inadmissible before the Pre-Trial Chamber—and as such should be tried in Ukraine should the state insist on handling certain cases—would fall on Ukraine. As such, Ukraine would be required to substantiate the investigatory or prosecutorial steps it is taking to meet the principle of complementarity. Mere assurances made by Ukraine would not suffice.

It should be noted that this is not an easy burden to discharge. In *Al-Senussi*, the Pre-Trial Chamber decided:

the evidence that the State is requested to provide in order to demonstrate that it is investigating or prosecuting the case is not only ‘evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes’ but extends to ‘all material capable of proving that an investigation is ongoing’, including, for example, directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the [domestic] investigation of the case, to the extent that they demonstrate that [the national]

¹⁴⁴⁸ *Ibid.*

¹⁴⁴⁹ Xabier Agirre, Antonio Cassese, Rolf Einar Fife, Hakan Friman, Christopher K. Hall, John T. Homes, Jann Kleffner, Hector Olasolo, Norul H. Rashid, Darryl Robinson, Elizabeth Wilmschurst, Andreas Zimmermann, ‘[The principle of complementarity in practice](#)’, ICC-01/04-01/07-1008-AnxA (30 March 2009) para. 59 (“Informal Expert Paper on Complementarity”).

¹⁴⁵⁰ *Ibid.*, p. 18, para. 59.

¹⁴⁵¹ *Ibid.*, p. 19.

¹⁴⁵² *Ibid.*

¹⁴⁵³ *Ibid.*

authorities are taking concrete and progressive steps to ascertain whether [the person] is responsible for the conduct [alleged in the proceedings before] the Court.¹⁴⁵⁴

Notably, the ICC said that the expression “the case is being investigated” must be understood as requiring the taking of “concrete and progressive investigative steps” to ascertain whether the person is responsible for the conduct alleged against him before the Court.¹⁴⁵⁵ As held by the Appeals Chamber, these investigative steps may include “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.¹⁴⁵⁶ Further, the assessment of the subject matter of the domestic proceedings must focus on the alleged conduct and not on its legal characterisation. Indeed, “[t]he question of whether domestic investigations are carried out with a view to prosecuting ‘international crimes’ is not determinative of an admissibility challenge”¹⁴⁵⁷ and “a domestic investigation or prosecution for ‘ordinary crimes’, to the extent that the case covers the same conduct, shall be considered sufficient”.¹⁴⁵⁸

In *Al-Senussi*, at the Pre-Trial level, it was held that in making a determination of admissibility, it is not the role of the Chamber to determine the strength of a State’s evidence, or whether it is strong enough to determine criminal responsibility.¹⁴⁵⁹ The Chamber must simply find that the domestic authorities are taking concrete steps to investigate the accused’s responsibility in relation to the case before the Court.¹⁴⁶⁰

A Chamber’s admissibility determination of inactivity therefore requires an in-depth analysis into the investigative or prosecutorial actions of a State and the timing of those actions. However, the determination requires the active participation of a State seeking a ruling of inadmissibility on a basis of inactivity, as the State may not just assert an investigation. Rather, it must provide evidence on the merits of its national case and material capable of demonstrating an investigation. Only then may a Chamber determine that, based on activity, a case could be deemed to be inadmissible.

C. The Gravity Provisions

In addition to the principle of complementarity, the Prosecutor, both during the preliminary examination and at the Pre-Trial Chamber, is required to consider the “gravity” of the crimes alleged as part of the admissibility requirements. The purpose of the ICC’s gravity requirement is to confine the subject-matter jurisdiction of the court to the most serious crimes of international concern.¹⁴⁶¹

¹⁴⁵⁴ *Al-Senussi* Admissibility Decision, para. 66 (viii).

¹⁴⁵⁵ *Gaddafi* Admissibility Decision, paras. 54, 55 and 73. See also, *The Prosecutor v. Saif Al-Islam Gaddafi* ([Decision](#)) ICC–01/11–01/11–239 (7 December 2012) para. 11.

¹⁴⁵⁶ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ([Judgment](#)) ICC–01/09–02/11–274 (30 August 2011) paras. 1 and 40.

¹⁴⁵⁷ *Ibid.*, para. 85.

¹⁴⁵⁸ *Ibid.*, para. 88.

¹⁴⁵⁹ *Al-Senussi* Admissibility Decision, para. 66 (vii).

¹⁴⁶⁰ *Ibid.*

¹⁴⁶¹ *Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC–01/04–01/06 (24 February 2006) para. 41.

According to Article 17(1)(d) of the Rome Statute, a case is inadmissible before the Court if it “is not of sufficient gravity to justify further action by the Court”. The assessment of “gravity” at this stage should be conducted against the backdrop of a potential case and it questions: (i) whether the persons or groups of persons that are likely to be the object of an investigation include those who bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation.¹⁴⁶² When assessing these questions, the factors that should be taken into account include the scale, nature, manner or commission of the crimes and their impact on victims.¹⁴⁶³

As to the first requirement of gravity, the Chamber considers that it involves a “generic assessment” of responsibility. Such an assessment should be general in nature and compatible with the pre-investigative stage into a situation, or alleged crimes.¹⁴⁶⁴

As to the second criterion of what constitutes “sufficient gravity”, this has been subject to some confusion at the ICC. In *Lubanga* and *Ntaganda*, the Appeals Chamber rejected the Pre-Trial Chamber’s approach to the issue but failed to promulgate its own guidelines. The Pre-Trial Chamber rejected the request to issue a warrant of arrest against Bosco Ntaganda on the basis that the case was inadmissible due to insufficient gravity.

The Chamber said that the gravity provisions are intended to ensure that the Court investigates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.¹⁴⁶⁵ The Pre-Trial Chamber initially outlined factors,¹⁴⁶⁶ which were later identified as being cumulative requirements.¹⁴⁶⁷ These were all, however, rejected by the Appeals Chamber (see below).¹⁴⁶⁸ The requirements were that: (i) the conduct be large-scale or systematic;¹⁴⁶⁹ (ii) there be “social alarm”;¹⁴⁷⁰ (iii) that “the person falls within the category of most senior leaders of the situation under investigation”;¹⁴⁷¹ and (iv) the person be in the “category of most senior leaders suspected of being most

¹⁴⁶² Kenya Authorisation Decision, paras. 50 and 188; *Situation in the Republic of Côte d’Ivoire* ([Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire](#)) ICC–02/11–14 (3 October 2011), paras. 202–204.

¹⁴⁶³ Regulation 29(2) of the Regulations of the Office of the Prosecutor; *The Prosecutor v. Abu Garda* ([Decision on the Confirmation of Charges](#)) ICC–02/05–02/09–243–Red (8 February 2010) para. 31; ICC–01/09–19–Corr, para. 188; *Situation in the Republic of Côte d’Ivoire* ([Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire](#)) ICC–02/11–14 (3 October 2011) paras. 203–204; Preliminary Examinations Policy Paper, p. 15, para. 61.

¹⁴⁶⁴ Kenya Authorisation Decision, para. 60.

¹⁴⁶⁵ *The Prosecutor v. Bosco Ntaganda* (Decision on the Prosecutor’s Application for Warrants of Arrest, art. 58) ICC–01/04–01/06–1–US–Exp–Corr (10 February 2006) (“Ntaganda Arrest Warrant”) para. 51.

¹⁴⁶⁶ *Ibid.*, paras. 54 and 62.

¹⁴⁶⁷ *Ibid.*, paras. 64, 65, 66, 85 and 89; *Situation in the Democratic Republic of the Congo* ([Judgment](#)) ICC–01/04–169 (13 July 2006) paras. 70–71; Gideon Boas, James L. Bischoff, Natalie L. Reid, B. Don Taylor III, *International Criminal Law Practitioner: International Criminal Procedure* (vol 3, Cambridge University Press, 2011) p. 84.

¹⁴⁶⁸ *Ibid.*

¹⁴⁶⁹ Ntaganda Arrest Warrant, paras. 47, 64 and 66.

¹⁴⁷⁰ *Ibid.*, paras. 47 and 64.

¹⁴⁷¹ *Ibid.*, para. 64(ii).

responsible”, given the role he or she played within his or her organisation and the role played by the organisation within the overall commission of crimes.¹⁴⁷²

On the requirement of the “most senior leader”, according to the Appeals Chamber, the Pre-Trial Chamber’s application of the test to the facts demonstrated the stringency of the requirement that a person be at the top of an entity, organisation or armed group in question.¹⁴⁷³ In *Ntaganda*, the Pre-Trial Chamber considered factors such as the authority to sign peace agreements, to decide, change or implement policies and the fact that Lubanga had greater authority.¹⁴⁷⁴ It found that a military commander ranked second or third within a major armed group was not senior enough.¹⁴⁷⁵

The Appeals Chamber quashed the decision in application of the *Ntaganda* decision. It rejected the requirement that the conduct must be systematic or large-scale to be admissible because, in their view, this approach blurred the distinction between the “most responsible” question and the elements of the offences for war crimes and crimes against humanity.¹⁴⁷⁶ The Appeals Chamber also dismissed the “social alarm” requirement due to the fact that it did not appear in the Statute and would depend on subjective and contingent reactions to crimes rather than objective gravity.¹⁴⁷⁷ It dismissed the restriction of cases to the most senior leaders as it would send a message that middle and lower-level perpetrators would be free from the ICC’s reach. Finally, the Appeals Chamber rejected a categorical test for a person’s level of responsibility¹⁴⁷⁸ and remanded the case to the Pre-Trial Chamber for reconsideration.¹⁴⁷⁹

In *Abu Garda*, Pre-Trial Chamber I clarified various factors that should be assessed in determining the gravity of crimes for the purpose of determining this aspect of admissibility, including quantitative facts such as the nature, manner, and impact of the alleged attack.¹⁴⁸⁰ The Pre-Trial Chamber also outlined the importance of conducting a qualitative assessment of the crime, including the extent of damage caused, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.¹⁴⁸¹ Commentators have assessed that this approach represents a fairly low threshold, since most cases will present at least some of the factors that are needed to support a finding of sufficient gravity.¹⁴⁸²

¹⁴⁷² *Ibid.*, para. 64(iii).

¹⁴⁷³ *Ibid.*, para. 54.

¹⁴⁷⁴ *Ibid.*, paras. 86-88.

¹⁴⁷⁵ *Ibid.*, para. 89.

¹⁴⁷⁶ *Situation in the Democratic Republic of the Congo (Judgment)* ICC-01/04-169 (13 July 2006) paras. 70-71; Gideon Boas, James L. Bischoff, Natalie L. Reid, B. Don Taylor III, *International Criminal Law Practitioner: International Criminal Procedure* (vol 3, Cambridge University Press, 2011) p. 84.

¹⁴⁷⁷ *Ibid.*, para. 72.

¹⁴⁷⁸ *Ibid.*, paras. 73-77.

¹⁴⁷⁹ *Ibid.*, para. 91.

¹⁴⁸⁰ *The Prosecutor v. Bahar Idriss Abu Garda (Decision on the Confirmation of Charges)* ICC-02/05-02/09 (8 February 2010) para. 30.

¹⁴⁸¹ *Ibid.*, para. 32.

¹⁴⁸² E.g., Margaret M. Deguzman, ‘The International Criminal Court’s Gravity Jurisprudence at Ten’ (2013) 12 Wash. U.Global Stud. L. Rev. 475, p. 481.

Pre-Trial Chamber II in the *Situation in the Republic of Kenya* also considered the gravity threshold¹⁴⁸³ and adopted the same quantitative and qualitative approach as taken by Pre-trial Chamber I in *Abu Garda*. Additionally, the Chamber noted that, in regard to the qualitative analysis, it is not the number of victims that matter, but the existence of some aggravating or qualitative factors attached to the commission of the crime that makes it grave.¹⁴⁸⁴

VI. Phase Four: Interests of Justice

This phase examines considerations with regards to the “interests of justice” test outlined in Article 53.¹⁴⁸⁵ During this phase, the Prosecutor, taking into account the gravity of the crime and the interests of victims, must assess whether there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice.

What is in the interests of justice is difficult to define. It is a broad discretionary power which the Prosecutor appears never to have exercised. The official definition from the ICC Prosecutor recognises that this is a countervailing consideration. As noted, the Prosecutor must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice.¹⁴⁸⁶

In 2007, the Prosecutor published the ‘Policy Paper on the Interests of Justice’.¹⁴⁸⁷ The paper emphasises three key points: (i) that the exercise of the Prosecutor’s discretion is exceptional in its nature and there is a presumption in favour of investigation or prosecution wherever the criteria established in Article 53(1) (a) and (b) or Article 53(2)(a) and (b) have been met; (ii) the criteria for its exercise will naturally be guided by the object and purpose of the Statute—namely the prevention of serious crimes of concern to the international community through ending impunity; and (iii) that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Prosecutor.¹⁴⁸⁸

The Prosecutor does make clear that the interests of justice should *not* be read to include all issues related to peace and security. The Prosecutor notes that this is not a “conflict management tool” requiring the Prosecutor to assume the role of mediator in political negotiations.¹⁴⁸⁹

Further, the Paper notes factors that will be considered: the gravity of the crime, the interests of the victims and the particular circumstances of the accused.¹⁴⁹⁰ There are other factors that are of potential relevance. First, the Prosecutor

¹⁴⁸³ *The Prosecutor v. Bahar Idriss Abu Garda* ([Decision on the Confirmation of Charges](#)) ICC–02/05–02/09 (8 February 2010) para. 482.

¹⁴⁸⁴ *Ibid.*, para. 62.

¹⁴⁸⁵ Preliminary Examinations Policy Paper, pp. 16-17, paras. 67-71.

¹⁴⁸⁶ *Ibid.*, para. 10; Office of the Prosecutor, ‘Report on Preliminary Examination Activities’ (2015) p. 3, para. 8.

¹⁴⁸⁷ Office of the Prosecutor, [‘Policy Paper on the Interests of Justice’](#), September 2007.

¹⁴⁸⁸ *Ibid.*, p. 1.

¹⁴⁸⁹ Preliminary Examinations Policy Paper, para. 69.

¹⁴⁹⁰ *Ibid.*, pp. 4-7.

may wish to consider whether other justice mechanisms exist.¹⁴⁹¹ The ICC does act complementarily to national jurisdictions, but theory continuously develops concerning the pursuit of justice. The Prosecutor fully endorses the role of domestic prosecutions, truth seeking, reparations programmes, institutional reform and traditional justice mechanisms in the pursuit of broader justice. There is no further explanation of how this factor would be considered or why it is relevant to this test.¹⁴⁹²

Second, peace processes may be of relevance. While the test should not be construed so broadly as to include all issues of peace and security, it seems in certain situations that security, political, development and justice issues cannot be ignored.¹⁴⁹³ Notably, the UNSC can intervene in these matters. The Council may defer ICC action under Article 16, which provides that “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”.¹⁴⁹⁴ This, however, does not displace or form part of the obligation of the Prosecutor to consider the interests of justice.

Overall, there is a strong presumption that investigations and prosecutions are in the interests of justice and a decision not to proceed on the grounds of the interests of justice would be “highly exceptional”.¹⁴⁹⁵ The Prosecutor *will* proceed if the other admissibility criteria are met, unless there are specific circumstances that provide substantial reasons to believe the interests of justice would not be served by an investigation at that time.¹⁴⁹⁶

However, in 2019, the Pre-Trial Chamber rejected Prosecution’s request to proceed with an investigation for alleged crimes against humanity and war crimes on the territory of Afghanistan because the interests of justice would not be served.¹⁴⁹⁷ Despite finding that jurisdictional and admissibility requirements were met, the Pre-Trial Chamber held that “the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited. Accordingly, it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively contributing to it.”¹⁴⁹⁸ The Pre-Trial Chamber added that “victims’ expectations will not go beyond little more than aspirations.”¹⁴⁹⁹

¹⁴⁹¹ *Ibid.*, pp. 7-8.

¹⁴⁹² *Ibid.*, pp. 7-8.

¹⁴⁹³ *Ibid.*, p. 8.

¹⁴⁹⁴ Rome Statute, art. 16.

¹⁴⁹⁵ Preliminary Examinations Policy Paper, para. 71.

¹⁴⁹⁶ *Ibid.*, para. 67.

¹⁴⁹⁷ *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17, 12 April 2019.

¹⁴⁹⁸ *Ibid.*, para. 96.

¹⁴⁹⁹ *Ibid.*

The Prosecution filed an appeal against this decision and in 2020 the Appeals Chamber authorised the investigation.¹⁵⁰⁰ The Appeals Chamber held that the Pre-Trial Chamber erred in law by seeking to make a positive determination that the initiation of an investigation was in the interests of justice, instead of deferring to the Prosecution, at this stage of the proceedings, on this matter.¹⁵⁰¹ The Appeals Chamber clarified that “article 53(1) of the Statute is formulated in the negative – the Prosecutor must consider whether there are ‘reasons to believe that an investigation would not serve the interests of justice’ and need not affirmatively determine that an investigation would be in the interests of justice, as suggested by the Pre-Trial Chamber.”¹⁵⁰²

VII. The Outcome: The Article 53(1) Report

At the end of phase four, an “Article 53(1) Report” will be completed. This Report provides the basis for the ICC Prosecutor’s determination of whether requesting a full investigation would not be in the interests of justice. In the event the Prosecutor is satisfied that there is a reasonable belief that crimes within the jurisdiction of the ICC have been committed, that the cases are admissible, sufficiently serious and there is no substantial interest of justice reason to not proceed, she will request the Pre-Trial Chamber to open a full investigation.

The reasonable belief standard has been interpreted to mean a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court “has been or is being committed”.¹⁵⁰³ Either way, the ICC Prosecutor will outline her findings in an Article 53(1) Report.¹⁵⁰⁴

The Article 53(1) Report will contain one of three findings:

- A refusal to initiate an investigation because the information falls short of the factors outlined above;¹⁵⁰⁵
- A need to continue to collect information on crimes and/or relevant national proceedings to establish a sufficient factual and legal basis to give a conclusive determination; or
- A decision that the factors outlined above are satisfied and proceed to initiate an official ICC criminal investigation. This requires judicial authorisation from the ICC.¹⁵⁰⁶

The Article 53(1) Report on Ukraine is pending.

¹⁵⁰⁰ *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, 5 March 2020.

¹⁵⁰¹ *Ibid.*, para. 39.

¹⁵⁰² *Ibid.*, para. 49.

¹⁵⁰³ Preliminary Examinations Policy Paper, p. 2, para. 5; Kenya Authorisation Decision, para. 35.

¹⁵⁰⁴ Office of the Prosecutor, [‘Situation in the Central African Republic II, art. 53\(1\) Report’](#) (24 September 2014).

¹⁵⁰⁵ Rome Statute, art. 53 (1) (a)-(c).

¹⁵⁰⁶ *Ibid.*, art. 15; Kenya Authorisation Decision, paras. 17-69; Preliminary Examinations Policy Paper, p. 4, para. 14.

VIII. Investigation

This section addresses how an investigation is conducted at the ICC. It begins by outlining how an investigation commences, comparing investigations to preliminary examinations, the powers and duties of the ICC Prosecutor during investigations and how a case proceeds to trial.

A. *How a Full Investigation Begins*

Article 53 of the Statute compels the Prosecutor to seek to commence a full investigation unless, based on the information she has scrutinised as the result of her preliminary examination, she makes the determination that there is no “reasonable” basis to proceed under the jurisdiction and reach of the Statute.¹⁵⁰⁷

As discussed, in doing so, the Statute compels the Prosecutor to consider: (i) whether the evidence provides a reasonable basis to believe that a crime has, or is being, committed within the jurisdiction of the Court;¹⁵⁰⁸ (ii) whether the case is currently admissible under the provisions of Article 17;¹⁵⁰⁹ and (iii) taking into account the gravity of the crime and the interests of the victims, whether there are substantial grounds to believe the investigation would not serve the interests of justice.¹⁵¹⁰

It is important to note at this point that the decision-making process is an ongoing one and the Prosecutor may, at any time, reconsider her decision based on receiving new facts and information.¹⁵¹¹ Similarly, the Statute allows for the Prosecutor, in making her decision, to seek additional information from States, organs of the UN, members of civil society or other reliable sources that she feels is appropriate given the circumstances.¹⁵¹²

a) *The Decision to Proceed*

If the Prosecutor comes to the conclusion that there is a reasonable basis to initiate a full investigation, she must open an investigation,¹⁵¹³ or depending on how the matter was raised, seek permission of the Pre-Trial Chamber to open an investigation. If the Prosecutor decides to open an investigation on her own volition, which is the situation in the case of Ukraine, she must ask the ICC Pre-Trial Chamber for authorisation to proceed.¹⁵¹⁴ If the Court believes there is a “reasonable basis” to proceed with an investigation, and the case “appears” to fall within the jurisdiction of the Court, then it must authorise the commencement of an investigation.¹⁵¹⁵ The ICC Prosecutor does not need the Court’s permission to launch an investigation if she has a State referral from an ICC member-state,¹⁵¹⁶ or a UNSC

¹⁵⁰⁷ Rome Statute, art. 53(1).

¹⁵⁰⁸ Rome Statute, art. 53(1)(a).

¹⁵⁰⁹ *Ibid.*, art. 53(1)(b).

¹⁵¹⁰ *Ibid.*, art. 53(1)(c).

¹⁵¹¹ *Ibid.*, art. 53(4); Rules of Procedure and Evidence, r. 49(2).

¹⁵¹² *Ibid.*, art. 15(3); Rules of Procedure and Evidence, r. 104(2).

¹⁵¹³ *Ibid.*, art. 53.

¹⁵¹⁴ *Ibid.*, art. 15(3).

¹⁵¹⁵ *Ibid.*, art. 15(4).

¹⁵¹⁶ *Ibid.*, arts. 14(1) and 15(1).

referral.¹⁵¹⁷ On the other hand, if the Pre-Trial Chamber decides that the Prosecutor has not made the case for a full investigation, the Prosecutor can make further submissions to the Chamber based on any new evidence or information that she later finds. The Prosecutor must send notice of the decision, along with her reasoning, in a manner that prevents any danger to the safety, well-being or privacy of those who provided information to her.¹⁵¹⁸

b) The Decision Not to Proceed

Similarly, if, in the course of her deliberations, the Prosecutor determines: (i) that there is an insufficient legal or factual basis to seek an arrest warrant or summons under Article 58;¹⁵¹⁹ (ii) that the case is inadmissible under Article 17;¹⁵²⁰ or (iii) that an investigation would not serve the interests of justice, then she is compelled to inform the Pre-Trial Chamber and the entity which initiated the action—whether it be by way of State referral under Article 14, or the Security Council under Article 13(b)—of her conclusion and the reasons for it.¹⁵²¹

At this point, the State which made the original referral under Article 14, or the UNSC which initiated the action under Article 13(b), could request the Pre-Trial Chamber to review the Prosecutor’s decision not to initiate a full investigation. After considering such a request, the Pre-Trial Chamber has the power to ask the Prosecutor to reconsider her decision.¹⁵²²

Additionally, the Pre-Trial Chamber could decide to review the Prosecutor’s decision without a request from an initiating entity if the decision has been made solely on the basis that the Prosecutor did not think an investigation would be in the interests of justice. In this case, such a decision would have to be confirmed by the Pre-Trial Chamber in order to become effective.¹⁵²³

B. Procedure for Authorisation to Commence an Investigation

When the Prosecutor sends notice to the Pre-Trial Chamber of her determination that there is a reasonable basis to launch a full investigation, she must also send a written request to the Pre-Trial Chamber to authorise such an investigation.¹⁵²⁴ Before this can take place, the Rules of Procedure and Evidence place a duty on the Prosecutor to inform all victims known to her, the VWU or their legal representatives, of the decision, unless she determines that doing so could pose a danger to the well-being or integrity of the investigation.¹⁵²⁵

¹⁵¹⁷ *Ibid.*, art. 12(2).

¹⁵¹⁸ Rules of Procedure and Evidence, r. 49(1).

¹⁵¹⁹ Rome Statute, art. 53(2)(a).

¹⁵²⁰ *Ibid.*, art. 53(2)(b).

¹⁵²¹ *Ibid.*, art. 53(2)(c); Rules of Procedure and Evidence, r. 105(1).

¹⁵²² *Ibid.*, art. 53(3)(a).

¹⁵²³ *Ibid.*, art. 53(3)(b).

¹⁵²⁴ Rules of Procedure and Evidence, r. 50(2).

¹⁵²⁵ *Ibid.*, r. 50(1).

Informing the victims of her intention to seek authorisation from the Pre-Trial Chamber allows victims to make written representations to the Pre-Trial Chamber¹⁵²⁶ which, in turn, could be used by the Chamber to decide which procedures should be followed.¹⁵²⁷ Depending on the type of submissions made by victims and their merits, at this point the Pre-Trial Chamber could also decide to hold a hearing to elicit more information from the victims.¹⁵²⁸

C. Powers and Duties of the Prosecutor during the Investigation Stage

It is the job of the investigation division at the ICC Prosecutor's office to investigate. If a full investigation is opened, investigators will interview alleged victims and witnesses in Ukraine. The investigators can receive and request evidence as necessary from Ukraine and other states or entities. If the ICC Prosecutor wishes to conduct investigations on the territory of Ukraine, she must contact Ukraine and request permission.

Ukraine is generally under an obligation to allow such requests. Even though the Prosecutor must request permission, this is largely *pro forma*, as Ukraine is under an obligation to "cooperate with the Court without any delay or exception in accordance with Part 9 [of the Rome Statute]".¹⁵²⁹ If the ICC Prosecutor seeks to take certain investigative steps within Ukraine without its cooperation, the Prosecutor must apply to the Pre-Trial Chamber for permission. In turn, the Pre-Trial Chamber will ask Ukraine whether it has any views on the application. However, this should be necessary in only limited situations, considering Ukraine's requirement to cooperate.

The Statute places a duty on the Prosecutor to investigate each and every aspect of the crime, including all facts and pieces of evidence pertaining to it, in order to assess whether there is any criminal responsibility that falls under the jurisdiction of the Statute.¹⁵³⁰ Further, the Statute makes it clear that the purpose of the Prosecutor's investigation is to establish truth, rather than to prove guilt.¹⁵³¹ As such, the provisions of the Statute make clear that the Prosecutor must investigate not only incriminating evidence and information, but also pieces of evidence and information that would potentially exonerate the accused, in order to paint a full picture of the events in question. Throughout the whole investigation, the Prosecutor is also obliged to take all appropriate measures and precautions to respect the interests and personal circumstances of all victims and witnesses the Prosecutor encounters during the investigatory process, having in mind at all times the nature of the alleged crimes and the physiological and psychological effects they could have had on those involved.¹⁵³²

With those obligations in mind, the investigatory powers afforded to the Prosecutor are wide. In the course of the investigatory process, the Prosecutor can collect and examine any evidence she feels is necessary and relevant to the

¹⁵²⁶ *Ibid.*, r. 50(3).

¹⁵²⁷ Rules of Procedure and Evidence, r. 50(4).

¹⁵²⁸ *Ibid.*, r. 50(4).

¹⁵²⁹ Rome Statute, art. 12(3).

¹⁵³⁰ *Ibid.*, art. 54(1)(a).

¹⁵³¹ *Ibid.*, art. 54(1)(a).

¹⁵³² *Ibid.*, art. 54(1)(b).

case,¹⁵³³ as well as questioning potential suspects, including victims and witnesses.¹⁵³⁴ The Prosecutor is also given the power to enter into her own arrangements with States, intergovernmental organisations or individuals in order to elicit information which otherwise may not have been obtainable, providing the agreements are not deemed to be inconsistent with the law of the Statute.¹⁵³⁵

The Rules of Procedure and Evidence of the Court provides guidelines as to how the Prosecutor should carry out her investigation in order to ensure the evidential value of information is maintained to the highest standards and the rights of those involved in the investigation are respected. For example, the Prosecutor is obligated to maintain a record of all statements made by any persons questioned in connection with the investigation¹⁵³⁶ that should be signed by all persons present¹⁵³⁷ in order to ensure nothing can later be retracted. Moreover, when questioning takes place of someone who has been arrested or has received a summons to appear, the Rules set out that the questioning should be recorded, either by audio equipment or audio-visual equipment.¹⁵³⁸

One of the most useful powers the Prosecutor has during the investigatory process is the ability to conduct on-the-ground investigations.¹⁵³⁹ Article 86 of the Statute places a general obligation on all States party to the Statute to fully cooperate with all investigations initiated by the Prosecutor into alleged crimes committed within the Court's jurisdiction.¹⁵⁴⁰ This means, should the Prosecutor wish to investigate in the territory of a State Party, that State would be compelled to assist and cooperate with the Prosecutor. Should the State Party decide not to cooperate with the Prosecutor, the Court could refer the State to the ASP or, alternatively, to the UNSC in the event that the UNSC referred the matter to the Court.¹⁵⁴¹

Part 9 provides a detailed list of the types of cooperation States Parties have agreed to provide to the Court (and by extension to the Prosecutor) which covers virtually any investigative activity that the Prosecutor may need to undertake as part of her investigation. States Parties agree to assist the Prosecutor's investigation in a number of ways,¹⁵⁴² including: (i) surrendering a person to the Court;¹⁵⁴³ (ii) identifying and providing the whereabouts of persons or the location of items;¹⁵⁴⁴ (iii) assisting in the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;¹⁵⁴⁵ (iv) providing the questioning of any person being investigated or prosecuted;¹⁵⁴⁶ (v) facilitating the voluntary appearance of persons

¹⁵³³ *Ibid.*, art. 54(3)(a).

¹⁵³⁴ *Ibid.*, art. 54(3)(b).

¹⁵³⁵ *Ibid.*, art. 54(3)(d).

¹⁵³⁶ Rules of Procedure and Evidence, r. 111(1).

¹⁵³⁷ *Ibid.*, r. 111(1).

¹⁵³⁸ *Ibid.*, r. 112(1).

¹⁵³⁹ Rome Statute, art. 54(2).

¹⁵⁴⁰ *Ibid.*, art. 86.

¹⁵⁴¹ *Ibid.*, art. 87(7).

¹⁵⁴² *Ibid.*, art. 93.

¹⁵⁴³ *Ibid.*, art. 89.

¹⁵⁴⁴ *Ibid.*, art. 93(1)(a).

¹⁵⁴⁵ *Ibid.*, art. 93(1)(b).

¹⁵⁴⁶ *Ibid.*, art. 93(1)(c).

as witnesses or experts before the Court;¹⁵⁴⁷ (vi) providing the examination of places or sites, including the exhumation and examination of grave sites;¹⁵⁴⁸ (vii) executing searches and seizures;¹⁵⁴⁹ (viii) providing the protection of victims and witnesses and the preservation of evidence;¹⁵⁵⁰ (ix) identifying, tracing and freezing or seizing the proceeds, property and assets and instrumentalities of crimes;¹⁵⁵¹ as well as (x) any other type of assistance requested by the Prosecutor which is not prohibited by the law of the requested State.¹⁵⁵²

In the event that the Prosecutor wishes to pursue her investigation in the territory of a State not party to the Statute, the Statute gives her the power to enter into an agreement via the Court to invite the State to provide assistance on the basis of an *ad hoc*, one-off arrangement,¹⁵⁵³ such as in Ukraine. In the event the State enters into this agreement but then fails to cooperate with the Prosecutor in the course of her investigation, the State could then be referred to the ASP or the UNSC.¹⁵⁵⁴

The issue of collecting evidence in the territory of another State is also governed by the Rules. Rule 115 provides that, whenever possible, the Pre-Trial Chamber should invite States which are asked to cooperate with Prosecutor's investigation to share their views of the request.¹⁵⁵⁵ The Pre-Trial Chamber must then take the views of the requested State into account when coming to a decision as to whether the request of the Prosecutor is well-founded.¹⁵⁵⁶

D. Power of the Prosecutor to Request an Arrest or a Summons

Another power given to the Prosecutor is the ability to request the Pre-Trial Chamber to issue an arrest warrant or a summons for a person who the Prosecutor reasonably believes, as a result of her investigation, has committed a crime within the jurisdiction of the court.¹⁵⁵⁷ The powers to arrest an individual or to summons him or her are outlined below.

a) Arrest Warrant

If necessary, the ICC Prosecutor can apply to the Pre-Trial Chamber to issue a warrant for a person's arrest. The Statute states the Pre-Trial Chamber must issue an arrest warrant where the Prosecutor has sufficiently proved that the arrest is necessary to: (i) ensure the person's appearance at a subsequent trial;¹⁵⁵⁸ (ii) ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) prevent the person from continuing with

¹⁵⁴⁷ *Ibid.*, art. 93(1)(e)

¹⁵⁴⁸ *Ibid.*, art. 93(1)(g).

¹⁵⁴⁹ *Ibid.*, art. 93(1)(h).

¹⁵⁵⁰ *Ibid.*, art. 93(1)(j).

¹⁵⁵¹ *Ibid.*, art. 93(1)(k).

¹⁵⁵² *Ibid.*, art. 93(1)(l).

¹⁵⁵³ *Ibid.*, art. 87(5)(a).

¹⁵⁵⁴ *Ibid.*, art. 87(5)(b).

¹⁵⁵⁵ Rules of Procedure and Evidence, r. 115(1).

¹⁵⁵⁶ *Ibid.*, r. 115(2).

¹⁵⁵⁷ Rome Statute, art. 58(1)(b)(i).

¹⁵⁵⁸ *Ibid.*, art. 58(1)(b)(ii).

the commission of the crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.¹⁵⁵⁹

The application the Prosecutor makes to the Chamber to request an arrest warrant must be detailed, containing identifying information of the person sought,¹⁵⁶⁰ which crimes (within the jurisdiction of the court) the person is alleged to have committed,¹⁵⁶¹ a statement of facts which are alleged to have constituted those crimes,¹⁵⁶² a summary of the evidence against the accused¹⁵⁶³ and the reasons why the Prosecutor believes arrest is necessary.¹⁵⁶⁴

The arrest warrant must contain, among others matters, a specific reference to the crimes within the jurisdiction of the Court that the person is alleged to have committed and a concise statement of the facts that are alleged to constitute the crimes.¹⁵⁶⁵ An arrest warrant will be issued only if the Prosecution demonstrates ‘reasonable grounds to believe that the suspect is criminally responsible of a crime under the ICC statute’.¹⁵⁶⁶ If it is not drafted with enough specificity, it will be rejected.¹⁵⁶⁷

If the Chamber is satisfied that the Prosecutor has made a valid application for the arrest warrant, that there are reasonable grounds to believe the accused has committed the crime alleged (based on the evidence provided by the Prosecutor) and that the arrest is necessary, the Chamber will then issue the arrest warrant. For the arrest warrant to be valid it must contain the same information included in the Prosecutor’s application to the Chamber, with the exception of a summary of the evidence and the reasons why the Prosecutor believed the arrest was necessary.¹⁵⁶⁸

Once an arrest warrant is issued the Court may then request the provisional arrest or the arrest and surrender of any person named in the arrest warrant from States Parties, or non-States Parties the Court has contracted with.¹⁵⁶⁹ At any time after the arrest warrant is issued, the Prosecutor may request that the Pre-Trial Chamber amend the arrest warrant by modifying or adding to the crimes listed in the original application.¹⁵⁷⁰

Practically speaking, the ICC may face limitations on its capabilities to forcibly secure the attendance of some alleged perpetrators. In short, the ICC does not have its own police or arresting force. It must rely upon State cooperation and local capabilities. For example, in the case of Uganda, persons fighting against the government have proven

¹⁵⁵⁹ *Ibid.*, art. 58(1)(b)(iii).

¹⁵⁶⁰ *Ibid.*, art. 58(2)(a).

¹⁵⁶¹ *Ibid.*, art. 58(2)(b).

¹⁵⁶² *Ibid.*, art. 58(2)(c).

¹⁵⁶³ *Ibid.*, art. 58(2)(d).

¹⁵⁶⁴ *Ibid.*, art. 58(2)(e).

¹⁵⁶⁵ ICC Statute, art. 58, paras. 3 (for arrest warrant) and 7 (for summon to appear).

¹⁵⁶⁶ *Prosecutor v. Al Bashir* ([Arrest Warrant Decision](#)) ICC–02/05–01/09–3 (4 March 2009) para. 31.

¹⁵⁶⁷ In *The Prosecutor v. Mudacumura* ([Decision on the Prosecutor's Application under Art. 58](#)) ICC–01/04–613 (31 May 2012) where—for the first time at the ICC—Pre-Trial Chamber II rejected the Prosecution’s application for arrest warrant on the basis of its lack of specificity. It was later resubmitted and granted; *The Prosecutor v. Mudacumura* ([Decision on the Prosecutor's Application under Art. 58](#)) ICC–01/04–01/12–1–Red (13 July 2012).

¹⁵⁶⁸ Rome Statute, art. 58(3).

¹⁵⁶⁹ *Ibid.*, art. 58(5).

¹⁵⁷⁰ *Ibid.*, art. 58(6).

difficult to arrest. In 2005, the ICC issued warrants for the arrest of Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen as part of the Uganda investigation. In January 2015, Ongwen voluntarily surrendered himself to American forces in the CAR. The others are still at large or identified as dead. In the case of Sudan, in 2009, the ICC issued a warrant for the arrest of Omar Al-Bashir—former President of Sudan. He has remained at large since 2009. In June 2015, South Africa was heavily criticised for refusing to arrest him in their country despite being a State Party to the Rome Statute.

b) Summons to Appear

The procedure the Prosecutor uses to apply to the Chamber to issue a summons to appear is almost identical to that of an arrest warrant, with the differences being what needs to be proven by the Prosecutor's application and what information needs to be included in the summons to appear.

Unlike for an arrest warrant, there is no need for the Chamber to be satisfied that the summons to appear will ensure the person does not obstruct or endanger the investigation or court proceedings, or does not continue with the commission of the crime alleged. Instead, the Chamber only has to be satisfied that: (i) there are reasonable grounds to believe that the person committed the crime alleged;¹⁵⁷¹ and (ii) that a summons is sufficient to ensure the person's appearance.¹⁵⁷² Similarly, the summons to appear issued by the Chamber must include the same information contained in the arrest warrant while also including the specific date on which the accused should appear.¹⁵⁷³

E. The Start of an ICC case

a) First Appearance in the Courtroom

Once an arrest warrant or a summons to appear has been issued under Article 58, the person subject to the warrant or summons will appear before the Pre-Trial Chamber in the presence of the Prosecutor.¹⁵⁷⁴ During this time, the Chamber will ensure the accused is aware of the crimes he or she is alleged to have committed, as well as of his or her rights under the Statute, including, in the event the accused is detained on an arrest warrant, the right to apply to the Chamber to be released before the trial commences.¹⁵⁷⁵

As well as making the accused aware of their rights under the Statute, the Pre-Trial Chamber also uses this short hearing to deal with a number of administrative issues, such as setting the date to hold a hearing to confirm the

¹⁵⁷¹ *Ibid.*, art. 58(7).

¹⁵⁷² *Ibid.*, art. 87(7).

¹⁵⁷³ *Ibid.*, art. 58(7)(b).

¹⁵⁷⁴ Rules of Procedure and Evidence, r. 121.

¹⁵⁷⁵ Rome Statute, art. 60(1).

charges against the accused (the “confirmation hearing”).¹⁵⁷⁶ The Chamber will also make decisions regarding the disclosure of evidence between the Prosecutor and the defence team(s).¹⁵⁷⁷

The Rules set out that the Prosecutor must provide a detailed description of the charges she intends to bring against the accused, together with a list of evidence she intends to present to the Pre-Trial Chamber and the accused no later than 30 days before the date of the confirmation hearing.¹⁵⁷⁸ Similarly, where the Prosecutor intends to amend the charges she will bring against the accused, she must inform all parties no later than 15 days before the confirmation hearing, along with the new evidence relating to the amended charge.¹⁵⁷⁹

Likewise, the accused must present any evidence he or she wishes to use at the confirmation hearing to the Chamber no later than 15 days before the hearing.¹⁵⁸⁰ Pursuant to Rule 121(8), all evidence presented after the expiration of these time limits, or any extension of these time limits, whether that of the Prosecutor or the accused, will not be considered by the Court.

b) Confirmation of Charges before Trial

The confirmation of charges hearing must take place within a “reasonable time” after the accused’s surrender or voluntary appearance before the Court.¹⁵⁸¹ During the confirmation hearing the Prosecutor, in the presence of the Chamber, the accused and the counsel of the accused, will confirm which charges she wishes to bring against the accused based on the conclusions of her investigation.¹⁵⁸²

Although it is preferable, in the interests of justice, for the accused to be present during the confirmation of charges hearing, the Pre-Trial Chamber, may, on the request of the Prosecutor or on its own motion, decide to hold the hearing in the absence of the accused in the event that the accused has waived their right to be present¹⁵⁸³ or is unable to attend for any other reason.¹⁵⁸⁴ In this case, the hearing would usually continue with the accused being represented by their counsel.

During the hearing, the Presiding Judge of the Pre-Trial Chamber will ask for the list of charges the Prosecutor has decided to file against the accused to be read out before the Chamber.¹⁵⁸⁵ Once the charges have been read and the

¹⁵⁷⁶ A confirmation hearing must be carried out within a ‘reasonable time’ pursuant to Rome Statute, art. 61(1); Rules of Procedure and Evidence, r. 121(1).

¹⁵⁷⁷ Rules of Procedure and Evidence, r. 121(2).

¹⁵⁷⁸ *Ibid.*, r. 121(3).

¹⁵⁷⁹ *Ibid.*, r. 121(5).

¹⁵⁸⁰ *Ibid.*, r. 121(6).

¹⁵⁸¹ Rome Statute, art. 61(1).

¹⁵⁸² *Ibid.*, art. 61(1).

¹⁵⁸³ Rules of Procedure and Evidence, r. 124.

¹⁵⁸⁴ Rome Statute, art. 61(2).

¹⁵⁸⁵ Rules of Procedure and Evidence, r. 122(1).

Presiding Judge has ruled on how the hearing shall take place, the Prosecutor must then support each charge with sufficient evidence to establish “substantial grounds” to believe that the accused has committed the crime alleged.¹⁵⁸⁶

The accused may then: (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; or (iii) present their own contradictory evidence.¹⁵⁸⁷ Once the Chamber has listened to the arguments presented by the Prosecutor and the accused, the Chamber will ask for final statements to be made¹⁵⁸⁸ before coming to a judgment as to whether there is sufficient evidence to establish substantial grounds to believe the accused committed the crimes as charged.

Based on the evidence and arguments provided by the Prosecutor and the accused, the judges of the Pre-Trial Chamber have the power to decide either to: (i) confirm the charges and commit the person to the Trial Chamber for a full trial;¹⁵⁸⁹ (ii) decline to confirm the charges as a result of determining there is a lack of evidence to support them;¹⁵⁹⁰ or (iii) adjourn the hearing.¹⁵⁹¹ If the Pre-Trial Chamber decides to adjourn the hearing, it may request that the Prosecutor consider: (i) providing further evidence; (ii) conducting further investigations; or (iii) amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.¹⁵⁹²

In the event the Pre-Trial Chamber decides not to confirm one of the charges requested by the Prosecutor, the Prosecutor could still ask the Chamber to reconsider, should more evidence relating to that charge be found.¹⁵⁹³ Similarly, if the Prosecution wishes to amend, add, or substitute charges based on new evidence or information, the Pre-Trial Chamber may order a further additional hearing.¹⁵⁹⁴

Once the charges have been confirmed, the Court must then notify the accused of the confirmation of the charges against him or her¹⁵⁹⁵ and the decision to commit him or her to the Trial Chamber. At this point, the Presidency of the Court will then order a Trial Chamber to be constituted to try the accused and all records of the Pre-Trial Chamber will be sent to the Trial Chamber. This marks the end of the pre-trial stage.

Unlike the confirmation procedures at the ICTY, ICTR, and the Special Court for Sierra Leone (“SCSL”), the ICC’s procedure is a mini-trial involving an assessment of whether there are “substantial grounds to believe that the person committed each of the crimes charged”.¹⁵⁹⁶ Consequently, it provides a real opportunity for the parties and the Trial Chamber to arrive at a shared understanding of the case being advanced.

¹⁵⁸⁶ Rome Statute, art. 61(5).

¹⁵⁸⁷ *Ibid.*, art. 61(6).

¹⁵⁸⁸ Rules of Procedure and Evidence, r. 122(8).

¹⁵⁸⁹ Rome Statute, art. 61(7)(a).

¹⁵⁹⁰ *Ibid.*, art. 61(7)(b).

¹⁵⁹¹ *Ibid.*, art. 61(7)(c).

¹⁵⁹² *Ibid.*, art. 61(7)(c).

¹⁵⁹³ *Ibid.*, art. 61(8).

¹⁵⁹⁴ Rome Statute, art. 61(9).

¹⁵⁹⁵ Rules of Procedure and Evidence, r. 129.

¹⁵⁹⁶ Rome Statute, art. 61(7).

The theoretical rigours of this process contrast with those at the ICTY, the ICTR and the SCSL. At the ICTY and ICTR, the reviewing Judge merely had to examine each count in the indictment and (a selection of) the supporting evidence provided by the Prosecution to determine whether a *prima facie* case has been established.¹⁵⁹⁷ At the SCSL, the process rests upon a case summary drafted by the Prosecution¹⁵⁹⁸ and an assessment of whether the indictment charged the suspect with a crime within the jurisdiction of the Special Court and whether the allegations in the accompanying case summary would, if proven, amount to the crime or crimes as particularised in the indictment.¹⁵⁹⁹ In other words, the Prosecution did not have to demonstrate the sufficiency of the evidence to the *prima facie* standard, only the sufficiency of the drafting by the Prosecution of the case summary.¹⁶⁰⁰ As a consequence, the Prosecution had to provide no meaningful notice of its case and no indication of the forensic journey ahead. The trier of fact or the accused learns little about the charges during these judicial processes.

By contrast, at the ICC the Prosecutor must provide a “Document Containing the Charges” which should contain a statement of the facts and a sufficient legal and factual basis to bring the person to trial. It should include the relevant facts and their legal characterisation to allow a proper exercise of jurisdiction by the Pre-Trial Chamber.¹⁶⁰¹ It must contain sufficient facts to ensure that they meet the crimes within the ICC’s jurisdiction and must also include the precise form of participation in accord with the ICC Statute.¹⁶⁰² Both parties have the opportunity to present evidence and witnesses may be called.

The Pre-Trial Chamber is tasked with determining whether there is sufficient evidence to establish “substantial grounds to believe that the person committed each of the crimes charges”¹⁶⁰³ and the Prosecution must offer “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”,¹⁶⁰⁴ that must go beyond a mere theory or suspicion.¹⁶⁰⁵ It is the duty of the Prosecutor to furnish all facts underpinning the charges and to present evidence in relation to each legal requirement of the crime.¹⁶⁰⁶

The Pre-Trial Chamber must assess whether the material facts underpinning the charges are specific enough to clearly inform the suspect of the charges against him or her, so that he or she is in a position to prepare properly his or her

¹⁵⁹⁷ ICTY Rules of Procedure and Evidence, r. 47(E); ICTR Rules of Procedure and Evidence, r. 47(E).

¹⁵⁹⁸ C. Rose, ‘Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes’ 7 *Journal of International Criminal Justice* (2009), 358.

¹⁵⁹⁹ SCSL Rules of Procedure and Evidence, r. 47(E).

¹⁶⁰⁰ See e.g. *Prosecutor v. Sesay et al.* ([Decision Approving the Indictment and Order for Non-Disclosure](#)) SCSL-03-01-I (7 March 2003) para. 2.

¹⁶⁰¹ Rome Statute, art. 61(3).

¹⁶⁰² Regulations of the Court, ICC-BD/01-03-11, 29 June 2012, reg 52.

¹⁶⁰³ Rome Statute, art. 61(7).

¹⁶⁰⁴ *Prosecutor v. Thomas Lubanga Dyilo* ([Decision on the Confirmation of Charges](#)) ICC-01/04-01/06-803-tEN (29 January 2007) para. 39.

¹⁶⁰⁵ *Ibid.*, para. 37.

¹⁶⁰⁶ *Prosecutor v. Jean-Pierre Bemba Gombo* ([Decision](#)) ICC-01/05-01/08-424 (25 June 2009) paras. 206-209, 299-300, 311-312.

defence. Finally, if the Prosecution wishes to add charges to the Document Containing the Charges after their confirmation, a new confirmation hearing will need to take place.¹⁶⁰⁷

¹⁶⁰⁷ Rome Statute, art. 61(9); Rules of Procedure and Evidence, r. 128. Håkan Friman, Helen Brady, Matteo Costi, Fabrizio Guariglia and Carl-Friedrich Stuckenberg, 'Charges' in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP, 2013) pp. 381, 449-450.

Part Four: Information, Evidence, and Trials

This section of the Report addresses three main issues. First, it addresses the role of evidence at the ICC, particularly the different types of evidence that can be used by the Court and in what circumstances the evidence will be admitted into ICC proceedings. The second issue concerns whether members of NGOs or other individuals may be called to testify after their involvement with an investigation. Finally, the section analyses the ICC trial process and the sentencing procedure.

I. Evidence at the International Criminal Court

A variety of evidence may be admissible at the ICC: live testimony, written testimony, documentary evidence, physical evidence and expert evidence. The ICC has a significant degree of discretion in considering all types of evidence—a discretion regarded as necessary given the nature of the cases that will come before the ICC.¹⁶⁰⁸ This section will look at the types of evidence that may be used during proceedings at the ICC as well as addressing issues relating to admissibility and reliability. Finally, the section will look at civil society groups and consider when members of these groups may be compelled to give evidence before the Court.

This section should be read in conjunction with GRC’s Basic Investigative Standards App for legal professionals and first responders to international crimes. The guide is designed to identify and explain the basic standards that anyone collecting information or evidence of international crimes in Ukraine should follow.

A. Types of Information/Evidence at the Preliminary Examination Stage

In summary, the requests for authorisation for a full investigation in the situations in Georgia, Kenya and the Côte d’Ivoire have largely relied upon documentary evidence. Although there are witness interviews included or referenced, they comprise a small portion of the overall information. Such evidence includes items such as maps, NGO and UN reports, official documents and other documentary items like photographs. The reports can come from NGO such as Human Rights Watch and International Crisis Group or official bodies such as the Council of Europe and the UN. Many of the reports include references to testimonial, documentary and physical evidence. Accordingly, the Prosecutor is satisfied to arrive at her assessment concerning the need for a full investigation on the basis of (authoritative) reports of second hand information.

B. Flexible Approach to the Admissibility of Evidence

When evidence is presented to the ICC, the Court must consider whether it is permissible to use it and rely on it. This is known as the “admissibility of evidence”. The Rome Statute permits the Court to “rule on the relevance or

¹⁶⁰⁸ *The Prosecutor v. Thomas Lubanga Dyilo* ([Corrigendum to Decision on the Admissibility of Four Documents](#)) ICC-01/04-01/06 (20 January 2011) para. 24; Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan and Christopher Gosnell, *Cassese’s International Criminal Law* (OUP, 2013) p. 380.

admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness”.¹⁶⁰⁹ The Prosecutor should “assess freely all evidence submitted in order to determine its relevance or admissibility”.¹⁶¹⁰

The ICC takes a flexible approach to the admissibility of evidence. It emphasises that in its assessment of documentary evidence, admissibility is a distinct question from the evidentiary weight that the Chamber may ultimately attach to it once the entire case record is before it.¹⁶¹¹ On the other hand, the ICC Judges have shown a willingness to use Article 69(4) of the Statute as a means of controlling admissibility and the trial record. Article 69(4) provides the discretion to exclude evidence on the basis of its relevance or admissibility, taking into account any prejudice such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness.¹⁶¹²

This regime has led to decisions on admissibility that stand in stark contrast to those at the *ad hoc* Tribunals. The approach by the *ad hoc* tribunals such as the ICTY is seemingly to admit the evidence but to consider its reliability when determining its weight. Several commentators, who point out that it is “consistent with the free system of evidence that the Tribunal has adopted”, have endorsed this approach.¹⁶¹³ Unlike evidence at the *ad hoc* tribunals like the ICTY, which is rarely ruled inadmissible on the basis of unreliability, in both the trials held as of now (*Lubanga* and *Katanga*) a large part of the Prosecution’s evidence was rejected because it was determined to be unreliable.¹⁶¹⁴

C. Oral Testimony

The ICC, as with all international tribunals,¹⁶¹⁵ has a stated preference for oral evidence.¹⁶¹⁶ That is, evidence from a witness physically given in the ICC’s courtrooms. An accused at the ICC has the right to “examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf”.¹⁶¹⁷ This preference arises from Article 69(2), which states that “the testimony of a witness at trial shall be given in person”. The oral presentation of evidence has been seen as providing the best opportunity for a party to challenge the evidence of an opposing party and for the Trial Chambers to evaluate the credibility of the presented evidence.

¹⁶⁰⁹ Rome Statute, art. 69(4).

¹⁶¹⁰ Rules of Procedure and Evidence, r. 63(2).

¹⁶¹¹ For instance, on documentary evidence: *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ([Decision](#)) ICC-01/09-01/11-1353 (10 June 2014) para. 18; *Ibid.*, ([Decision](#)) ICC-01/09-01/11 (4 February 2015) para. 19.

¹⁶¹² *The Prosecutor v. Thomas Lubanga Dyilo* ([Redacted Decision](#)) ICC-01/04-01/06-2595-Red (7 March 2011) para. 47.

¹⁶¹³ Almiro Rodrigues and Cécile Tournaye, ‘Hearsay Evidence’, in Richard May et al (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001) p. 303; Richard May and Marieke Wierda, *International Criminal Evidence* (Ardsley, NY: Transnational, 2002) pp. 109-10.

¹⁶¹⁴ *The Prosecutor v. Germain Katanga* ([Judgment](#)) ICC-01/04-01/07 (7 March 2014) para. 117; *The Prosecutor v. Mathieu Ngudjolo* ([Judgment](#)) ICC-01/04-02/12 (18 December 2012) para. 117; *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 (14 March 2012) paras. 739-740, 752 and 758.

¹⁶¹⁵ Statute of the International Criminal Tribunal for the former Yugoslavia, SC Res. 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc S/RES/827, art. 21(4)(e) (1993); Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, UN SCOR, 49th Sess., 3453d mtg, UN Doc S/R.ES/955 & Annex, art. 20(4)(e) (1994); Statute of the Special Court for Sierra Leone, 2178 UNTS 145 (16 January 2002) art. 17(4)(e) (2002).

¹⁶¹⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo* ([Admissibility](#)) ICC-01/05-01/08 (24 June 2010) para. 76.

¹⁶¹⁷ Rome Statute, art. 67(1)(e).

The Rome Statute states explicitly that any exception to the principle of orality shall not be prejudicial or inconsistent with the rights of the accused.¹⁶¹⁸ Rule 68 of the Rules of Procedure and Evidence provided for the sole exception to oral testimony.¹⁶¹⁹ However, in December 2013, Rule 68 was amended, as discussed below.

D. Out of Court Statements

In rare circumstances, the evidence of a witness does not need to be given orally in a courtroom. This is known as using “out of court statements”. The admissibility of out of court statements is determined under Rule 68 of the ICC Rules of Procedure and Evidence.¹⁶²⁰ At the 12th Plenary Meeting of the ASP (27 November 2013), a resolution was adopted to enact measures to amend the Rules of Procedure and Evidence.¹⁶²¹ Now, the Trial Chamber is permitted to introduce the previously recorded audio or video testimony of a witness, or the transcript of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and certain conditions in Rule 68 are met (outlined below).

Originally, Rule 68 permitted the introduction of a previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, only if the witness was present before the Chamber and he or she did not object, and the Prosecutor *and* the Defence had the opportunity to examine the witness during the recording.¹⁶²² Rule 68 did not contain an express limitation preventing the admission of evidence concerning the acts and conducts of the Accused. However, neither did it contain the opposite.¹⁶²³ The amendments significantly widened the ambit of Rule 68 and increased the instances in which prior recorded testimony could be introduced in lieu of oral testimony.¹⁶²⁴ Like the *ad hoc* tribunals, the amendments were adopted in order to “allow the judges of the Court to reduce the length of Court proceedings and streamline evidence presentation by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused”.¹⁶²⁵

When admitting prior written testimony, it need not have a sworn oath or declaration. The oath, although not a requirement to admit a prior recorded testimony, is a factor in favour of its admission.¹⁶²⁶ When it does not concern

¹⁶¹⁸ *Ibid.*, art. 69(2).

¹⁶¹⁹ On the ICC’s practice regarding the admission of written witness evidence prior to December 2013 amendment. Fergal Gaynor, Dov Jacobs, Mark Klamburg and Vladimir Tochilovsky, ‘Law of Evidence’ in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP, 2013) pp. 1044 and 1062.

¹⁶²⁰ Rules of Procedure and Evidence, r. 68.

¹⁶²¹ ICC Assembly of States Parties, Res ICC-ASP/12/Res.7, 12th Plenary Meeting, 27 November 2013.

¹⁶²² *The Prosecutor v. Thomas Lubanga Dyilo* ([Redacted Decision](#)) ICC-01/04-01/06-2595-Red (7 March 2011) para. 45.

¹⁶²³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo* ([Decision](#)) ICC-01/04-01/07-2362 (30 June 2011) para. 17.

¹⁶²⁴ ICC Assembly of States Parties, Res ICC-ASP/12/Res.7, 12th Plenary Meeting, 27 November 2013.

¹⁶²⁵ ICC Working Group on Amendments, ‘Report of the ICC Working Group on Amendments’, ICC-ASP/12/44, 24 October 2013, para. 8.

¹⁶²⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ([Decision](#)) ICC-01/09-01/11 (19 August 2015) para. 65

sworn testimony, the Chamber may consider the fact that a statement was signed and is accompanied by a declaration that it is true to the best of the witness' knowledge as indicia of reliability.¹⁶²⁷

Under Rule 68, the Court must consider whether one of the following grounds is applicable: (i) the Prosecutor and Defence had an opportunity to examine the witness during the recording; (ii) the prior testimony goes to proof of matter other than the acts and conduct of the accused and so, either relates to issues not materially in dispute, is cumulative or corroborative by other witnesses who will give oral testimony of similar facts, relates to background information, it is in the interests of justice and is of sufficient reliability; (iii) concerns the subsequent death of someone due to testify or who is unable to testify due to obstacles that cannot be overcome with reasonable diligence; and (iv) concerns a person who has been subjected to interference.¹⁶²⁸

If it is to be introduced on the grounds (ii) of Rule 68, the testimony must be accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. This declaration applies only to part (ii) of the Rule. These declarations are relevant when the Court comes to assess reliability of any prior-recorded testimony under any of the above rules, but are only mandatory under (ii).¹⁶²⁹ Under (ii), accompanying declarations may not contain any new information and should be witnessed by a person authorised to do so with the witness confirming the identity of the testifying person, assurance that he or she is making the declaration voluntarily, that the contents are true to the best of that person's knowledge and belief and they may be prosecuted if found to be giving false testimony.¹⁶³⁰

The International Bar Association ("IBA"), while welcoming the proposed amendment, has rightly raised concerns regarding the application of the amended Rule 68, noting, among other things, that "[b]roadly speaking, the proposed amendments borrow heavily from the provisions and practices of the two *ad hoc* tribunals [ICTY and ICTR], particularly those of the ICTY".¹⁶³¹ Further, the IBA expressed concern regarding the broad category of material that is potentially admissible under Rule 68.¹⁶³² Whereas the ICTY and ICTR only allow statements or transcripts to be admissible under the equivalent rules from within the same jurisdiction, Rule 68 allows for the admission of witness statements, audio recordings, video recording and transcripts of proceedings from national jurisdiction and/or other fora.¹⁶³³ Regarding the admission of evidence relating to the acts and conduct of the accused, it emphasised the

¹⁶²⁷ *Ibid.*, para. 65; *The Prosecutor v. Milan Lukić and Sredoje Lukić* ([Judgement](#)) IT-98-32/1-A (4 December 2012) para. 566.

¹⁶²⁸ Rules of Procedure and Evidence, r. 68.

¹⁶²⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ([Decision](#)) ICC-01/09-01/11 (19 August 2015) para. 32.

¹⁶³⁰ *Ibid.*

¹⁶³¹ International Bar Association, '[IBA ICC Programme Legal Opinion: Rule 68 Amendment Proposal](#)' (12 November 2013) ("IBA Legal Opinion") p. 5.

¹⁶³² *Ibid.*

¹⁶³³ IBA Legal Opinion, p. 4.

associated inherent risks of a reduction in the confrontational principle and emphasised the crucial importance of keeping the use of these rules as an exceptional measure.¹⁶³⁴

E. Documentary Evidence

Documentary evidence is a broad term used to refer to items that document something. It can include UN reports, posts on social media or even radio broadcast recordings. The ordinary way of introducing documentary items into evidence is through a witness,¹⁶³⁵ but they can be submitted without a witness. This does not entail a lower standard of relevance or admissibility; the fact that a witness adduces it without authentication will be considered in assessing admissibility.¹⁶³⁶ The ICC has a three-step approach when evaluating motions for the admission of documentary evidence: relevance, probative value and then weighing the probative value against its potential prejudicial effect.¹⁶³⁷

First, each item of evidence must be individually assessed for relevance and probative value (including authenticity), before being admitted into evidence.¹⁶³⁸ Relevance is defined as whether the evidence tendered makes the existence of a fact at issue more or less probable.¹⁶³⁹

The party should explain the relevance of a specific factual proposition and how the piece of evidence tendered makes this factual proposition more probable or less probable.¹⁶⁴⁰ Probative value is measured on two bases: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case.¹⁶⁴¹

Second, with regards to the requirement of reliability, this concept is most easily defined as authenticity,¹⁶⁴² as well as other qualities that show that, when considered alone, the evidence could reasonably be believed.¹⁶⁴³ Key factors to assess reliability include the source, the nature and the characteristics of the item.¹⁶⁴⁴ The ICC has stated clearly that unauthenticated evidence, by definition, has no probative value.¹⁶⁴⁵ Unless the proposed evidence is self-

¹⁶³⁴ *Ibid.*

¹⁶³⁵ Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP, 2013) p. 1063; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Directions](#)) ICC-01/04-01/07 (1 December 2009) para. 95.

¹⁶³⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision](#)) ICC-01/04-01/07 (17 December 2010) (“Katanga Bar Table Decision”) para. 12.

¹⁶³⁷ *Ibid.*, para. 14; *Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06-1399 (13 June 2008) paras. 27, 28 and 31.

¹⁶³⁸ Katanga Bar Table Decision, para. 13; *Prosecutor v. Thomas Lubanga Dyilo* ([Corrigendum to Decision](#)) ICC-01/04-01/06-2694-Corr (9 March 2011) para. 12.

¹⁶³⁹ *Ibid.*

¹⁶⁴⁰ Katanga Bar Table Decision, para. 16.

¹⁶⁴¹ *Ibid.*, para. 20.

¹⁶⁴² *Ibid.*, para. 22-25.

¹⁶⁴³ *Ibid.*, para. 26.

¹⁶⁴⁴ *Ibid.*, para. 27.

¹⁶⁴⁵ *Ibid.*, para. 22.

authenticating or the parties agree on its authenticity, the tendering party needs to provide authenticating evidence, otherwise it will be found inadmissible.¹⁶⁴⁶

The ICC has further held that a document, although authentic, may be unreliable.¹⁶⁴⁷ It has also rejected evidence on the basis that, in the absence of information regarding the circumstances in which a document was drafted or obtained, it is inadmissible.¹⁶⁴⁸ In deciding whether to permit such evidence, the Court will consider:

- The nature and origin of the documentary evidence;
- The relevance of the information contained in the document to matters at issue in the case;
- Whether the content of the document is easily understandable or requires further explanation or interpretation;
- If the information pertains exclusively to the historical background and/or contextual elements of the case, the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or whether there are alternative sources of information on the same issue;
- The original purpose for which the document was created and to whom it was addressed. For example, whether a document was made in the context of legal proceedings or has a purely private character;
- Whether it is possible to ascertain from the content of the document itself what its sources are and whether they can be easily verified;
- Whether it is possible to ascertain the method used to compile and process the information contained in the document; and
- Whether there are any doubts as to the authenticity of the document.¹⁶⁴⁹

a) Specific Types of Authentication and Assessments of Reliability

The ICC has made several instructive comments on the reliability and authentication of certain categories of documentary evidence:

- Open-source information: material which is publicly available from an open source will only require the tendering party to provide verifiable information about where the item can be obtained. If the item of evidence is no longer publicly available at the time it is tendered, the party should clearly indicate this and provide the date and location from which it was obtained;
- Official documents: official documents that are not publicly available from official sources are not self-authenticating and must be certified by the relevant authority. When the author of a public document is an

¹⁶⁴⁶ *Ibid.*, para. 23.

¹⁶⁴⁷ Lubanga Trial Judgment, para. 109.

¹⁶⁴⁸ *Ibid.*, para. 1087.

¹⁶⁴⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Directions](#)) ICC-01/04-01/07 (1 December 2009) para. 100; Fergal Gaynor, Dov Jacobs, Mark Klamburg and Vladimir Tochilovsky, 'Law of Evidence' in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP, 2013) p. 1065.

identified representative or agent of an official body or organisation, such as a member of the executive, public administration or the judiciary, that document will be presumed authentic if it has been signed by the identified official and the authenticity of that signature is not called into question;

- Official documents with no identified author but whose origin is immediately apparent from the documents themselves (e.g. from a letterhead or logo) may be acceptable without certification, unless its authenticity has been challenged by one of the parties. Generally, documents that do not bear extrinsic indications as to their origin and author must always be authenticated by way of attestation or affidavit from an identified representative of the originating organisation;
- Private documents: private documents that can be readily authenticated by the party against whom they are tendered will be presumed authentic, unless such party challenges the authenticity and provides evidence to that effect. Private documents whose authenticity is dependent upon a connection with a third person or organisation must be authenticated by independent evidence. Such evidence must provide proof of authorship or adoption and integrity. If the date of the document cannot be inferred from the document itself, evidence of it should also be provided. Clearly, any form of authentication by the alleged author of the document is preferable;
- Videos, films, photographs and audio recordings: Before video or audio material can be admitted, the ICC will request evidence of originality and integrity. If this can be established, this type of exhibit may often be admitted as evidence that speaks for itself and may be regarded, in this respect, as real evidence. Since the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard.¹⁶⁵⁰

Second, the ICC will also consider whether it can, alone, be reasonably believed.¹⁶⁵¹ In other words, is it reliable? The (non-exhaustive) indicia of reliability are:

- Source: whether the source of the information has an allegiance to one of the parties in the case or has a personal interest in the outcome of the case, or whether there are other indicators of bias;
- Nature and characteristics of the item of evidence: for example, whether the evidence is an audio or video recording, automatically generated, or testimonial in nature. Other factors may include the public or private character of the information;
- Contemporaneousness: whether the information was obtained and recorded simultaneously or shortly after the events to which it pertains or whether the record was created at a later stage;
- Purpose: whether the document was created for the specific purpose of these criminal proceedings or for some other reason;
- Adequate means of evaluation: whether the information and the way in which it was gathered can be independently verified or tested. Although there is no prohibition on hearsay before the Court, the Chamber

¹⁶⁵⁰ Katanga Bar Table Decision, para. 24.

¹⁶⁵¹ *Ibid.*, para. 26.

is conscious of the inherent risks in this type of evidence. It may therefore take such risks into consideration when attributing the appropriate probative value to items of evidence consisting mainly or exclusively of hearsay.¹⁶⁵²

There are different types of documents that may seem more reliable than others. These are considered below.

i. Reliability of Reports from UN Agencies

A report from a UN agency is considered to be reliable on its face. However, any assessment of reliability may be impacted if the report does not reveal the author's identity and the sources of information in sufficient detail, or is predicated largely on hearsay information that is remote from the source.¹⁶⁵³

ii. Reliability of Reports from NGOs, IGOs and Third-Party States

Reports from independent private organisations, governmental bodies or third-party States can be considered *prima facie* reliable if they provide "sufficient guarantees of non-partisanship and impartiality".¹⁶⁵⁴ They should provide sufficient information on their sources and the methodology used to analyse evidence upon which it bases factual claims. Reliability may be seriously questioned if the sources are not identified or the contents are based on hearsay.¹⁶⁵⁵

iii. Reliability of Press Reports and Media Articles

Media reports often fail to provide detailed information about their sources. Opinion evidence is only admissible from an expert. As a result, if there is no evidence as to the background of the journalists or the sources they are reporting, it is unlikely to be of sufficient probative value.¹⁶⁵⁶

iv. Reliability of Letters, Manifestos, Political Statements and Similar Documents

These documents will likely only provide opinion-based evidence. If they mention military or political events, they should be admissible only if the authors are reporting in a reliable and objective way.¹⁶⁵⁷ More likely than not, they will contain assertions which severely reduce their probative value.¹⁶⁵⁸

F. Physical Evidence

Physical evidence is the traditional form of evidence. It includes actual objects such as a knife or a gun. When considering the admissibility of physical evidence, the Court will consider the items under the above rules on the

¹⁶⁵² *Ibid.*, para.27.

¹⁶⁵³ *Ibid.*, para.29.

¹⁶⁵⁴ *Ibid.*, para.30.

¹⁶⁵⁵ *Ibid.*

¹⁶⁵⁶ *Ibid.*, para.31.

¹⁶⁵⁷ *Ibid.*, para.32.

¹⁶⁵⁸ *Ibid.*, para.33.

relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.¹⁶⁵⁹

To ensure reliability and admissibility of physical evidence, the “chain of custody” is crucial. The chain of custody is the record of the physical item’s location once it is removed from the scene or person in an investigation.¹⁶⁶⁰ The Prosecutor is responsible for the chain of custody in the course of investigations by her Office.¹⁶⁶¹ The chain of custody must be uninterrupted and all evidence must constantly only be in the possession of authorised individuals. The chain must be recorded and detailed.¹⁶⁶² To this effect, the Prosecutor will maintain a database. This will ensure the proper registration and storage of all information collected during the investigation.¹⁶⁶³ The Prosecutor must attribute a unique evidence registration number as early as possible after collection. It must record all the relevant circumstances of the collection and the chain of custody.¹⁶⁶⁴ A failure to comply with these rules can entail the exclusion of the evidence. However, as discussed above, the ICC has a flexible approach to evidence. In *Lubanga*, the ICC permitted evidence to be admitted despite being obtained from a search in violation of the right to privacy of the person who owned the property.¹⁶⁶⁵ Accordingly, ensuring a proper chain of custody is vital, but there is some flexibility concerning when the value of physical evidence is impugned sufficiently to lead to exclusion from the ICC’s courtrooms.

G. Expert Evidence

Expert evidence is the written or oral testimony of an expert who is able to give the Court the benefit of their opinion on an issue not ordinarily within the Court’s expertise, such as forensic medicine or military tactics.¹⁶⁶⁶ The Court may appoint an expert or a group of experts of its own volition or after being requested by the parties to the proceedings to do so.¹⁶⁶⁷ The experts will be selected from a pre-prepared list. The experts on the list will already have had their qualifications verified and they will have undertaken to uphold the interests of justice when admitted to the list.¹⁶⁶⁸ The Chamber, when appointing an expert, will determine the subject of their report.¹⁶⁶⁹

¹⁶⁵⁹ Rome Statute, art. 69(4).

¹⁶⁶⁰ Amal Alamuddin, ‘Collection in Evidence’ in Karim A. A. Khan, Caroline Buisman and Christopher Gosnell, *Principle of Evidence in International Criminal Justice* (OUP, 2010) p. 294.

¹⁶⁶¹ Rules of Procedure and Evidence, r. 10.

¹⁶⁶² ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (23 April 2009) reg 22.

¹⁶⁶³ *Ibid.*, reg 23(2).

¹⁶⁶⁴ *Ibid.*, reg 23(2).

¹⁶⁶⁵ Amal Alamuddin, ‘Collection in Evidence’ in Karim A.A. Khan, Caroline Buisman and Christopher Gosnell, *Principle of Evidence in International Criminal Justice* (OUP, 2010) p. 294, citing *The Prosecutor v. Thomas Lubanga Dyilo* ([Confirmation Decision](#)) ICC-01/04-01/06 (29 January 2007).

¹⁶⁶⁶ Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijhoff Publishers, 2008) p. 467.

¹⁶⁶⁷ ICC, [Regulations of the Court](#), ICC-BD/01-01-04 (adopted 26 May 2004) (“Regulations of the Court”) reg 44.

¹⁶⁶⁸ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on the Procedures for Instructing Expert Witnesses](#)) ICC-01/04-01/06 (10 December 2007) para. 24.

¹⁶⁶⁹ Regulations of the Court, reg 44(5).

In *Gbagbo*, the Court appointed three experts from a list to assist in determining whether Gbagbo was able to meaningfully exercise his right before the Court. In other words, whether he was medically fit to be able to take part in the Court proceedings.¹⁶⁷⁰ Following expert evidence, the Court decided that Gbagbo was able to participate but that it needed to make adjustments to the Court's procedure to enable Gbagbo to participate meaningfully, including shorter court sessions and rest breaks.¹⁶⁷¹ Accordingly, if the evidence of the expert is relevant, the expert's qualifications and expertise will determine whether he or she can give evidence or not to the Court.

II. Members of Civil Society and Evidence at the ICC

This section analyses situations when representatives of civil society, or members of NGOs, can be called upon to testify before proceedings at the ICC or to hand over information in their possession to the ICC. The section is divided into four main parts. First, the section identifies the basic obligations of the ICC Prosecutor to disclose evidence to other parties, such as the accused in criminal proceedings. It will then identify when civil society members and members of civil society can cooperate and testify before the ICC on a voluntary basis. In the two sections following that, the section will identify exceptions to the disclosure rules at the ICC. It will consider when members of civil society could be compelled to testify in a case at the ICC or reveal information to the ICC.

A. Overview of Basic Pre-Trial Disclosure Obligations

First, it is appropriate to identify the Prosecutor's obligations to disclose certain information before the trial of an accused begins. For pre-trial proceedings, there are the following disclosure obligations relating to Prosecution witnesses:¹⁶⁷²

- The Prosecutor must provide the Defence with the names of witnesses whom the prosecutor intends to call to testify and copies of any prior statements made by those witnesses.¹⁶⁷³
- Thereafter, the Prosecutor must tell the Defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.¹⁶⁷⁴

The Prosecutor must, subject to caveats outlined below, permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor that are material to the preparation of the Defence or are intended for use by the Prosecutor as evidence for the confirmation hearing or the trial.¹⁶⁷⁵

¹⁶⁷⁰ *The Prosecutor v. Gbagbo* ([Decision](#)) ICC-02/11-01/11-286-Red (2 November 2012).

¹⁶⁷¹ *Ibid.*, para. 101-102.

¹⁶⁷² Rules of Procedure and Evidence, r. 76.

¹⁶⁷³ *Ibid.*, r. 76(1).

¹⁶⁷⁴ *Ibid.*, r. 76(2).

¹⁶⁷⁵ Rules of Procedure and Evidence, r. 77.

Similarly, the Defence must permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the Defence, which are intended for use by the Defence as evidence for the purposes of the confirmation hearing or at trial.¹⁶⁷⁶

In line with this,¹⁶⁷⁷ the Defence must notify the Prosecutor of any intention to:

- Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;¹⁶⁷⁸ or
- Raise grounds for excluding criminal responsibility provided for in Article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.¹⁶⁷⁹

Failure to provide notice does not limit the right to raise matters.¹⁶⁸⁰ If grounds for excluding criminal responsibility under Article 31(3) are raised,¹⁶⁸¹ notice should be given to the Prosecutor and the Trial Chamber.¹⁶⁸²

There are restrictions on disclosure. Rule 81, in sum, provides that the following is restricted: internal documents, information that disclosing may prejudice further investigations, confidential information which protects witnesses or victims, protected witnesses, confidential information which protects witness or victims in possession of the defence. The principles are:¹⁶⁸³

¹⁶⁷⁶ *Ibid.*, r. 78.

¹⁶⁷⁷ *Ibid.*, r. 79.

¹⁶⁷⁸ *Ibid.*, r. 79(1)(a).

¹⁶⁷⁹ *Ibid.*, r. 79(1)(b).

¹⁶⁸⁰ *Ibid.*, r. 79(3).

¹⁶⁸¹ Rome Statute, art. 31(3):

- (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
- (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.

¹⁶⁸² Rules of Procedure and Evidence, r. 80.

¹⁶⁸³ *Ibid.*, r. 81.

- Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure;¹⁶⁸⁴
- Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the Defence.¹⁶⁸⁵
- Where steps have been taken to ensure the confidentiality of information, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles.¹⁶⁸⁶ The Chamber can authorise the non-disclosure of their identity prior to the commencement of the trial.¹⁶⁸⁷
- Where material or information is in the possession or control of the Defence that is subject to disclosure, it may be withheld in circumstances similar to those that would allow the Prosecutor to rely on Article 68, paragraph 5 (protection mechanisms) and a summary thereof submitted instead.¹⁶⁸⁸

There are other restrictions on disclosure of protected material or information such as:¹⁶⁸⁹ (i) if the Prosecutor calls a witness to introduce into evidence any material or information which has been protected under Article 54, paragraph 3(e), a Chamber may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality;¹⁶⁹⁰ and (ii) where material or information is in the possession or control of the Prosecutor that is protected under Article 54(3)(e),¹⁶⁹¹ the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.¹⁶⁹² The Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.¹⁶⁹³

B. Testifying Voluntarily at the ICC

Second, there is nothing to prohibit representatives of civil society, in principle, from being called as a witness or to provide “*amicus curiae*” submissions (giving arguments on issues before the Court) on a voluntary basis before the

¹⁶⁸⁴ *Ibid.*, r. 81(1).

¹⁶⁸⁵ *Ibid.*, r. 81(2).

¹⁶⁸⁶ *Ibid.*, r. 81(3).

¹⁶⁸⁷ *Ibid.*, r. 81(4).

¹⁶⁸⁸ *Ibid.*, r. 81(6).

¹⁶⁸⁹ Rules of Procedure and Evidence, r. 82.

¹⁶⁹⁰ *Ibid.*, r. 82(3).

¹⁶⁹¹ Rome Statute, art. 53(3)(e).

¹⁶⁹² Rules of Procedure and Evidence, r. 82(1).

¹⁶⁹³ *Ibid.*, r. 82(2).

ICC. Additionally, members of NGOs can assist the Office of the Prosecutor as intermediaries to identify and contact witnesses. This section will consider each of these modes of cooperation.

a) Acting as Amicus Curiae

Civil society representatives can be invited (or given permission)¹⁶⁹⁴ to submit observations to the Court either in writing or orally. This will be on a single issue and the role is known as *amicus curiae*. At any stage, the ICC may, if it considers it desirable for the proper determination of a case, invite or grant leave to a state, organisation or person to submit observations on any issue the ICC considers appropriate.¹⁶⁹⁵ The Prosecutor and Defence would have the opportunity to respond to any such observations.¹⁶⁹⁶ If granted permission, the civil society representative should file their written observations with the Registrar.¹⁶⁹⁷

b) Testifying

Civil society representatives can be called to testify by the Prosecutor or the Defence, on the investigation or research they have conducted into a specific crime.¹⁶⁹⁸ The civil society representative can enter into contact with the ICC Prosecutor or Defence by providing notice to one or more of the parties indicating that they will submit information to them. In particular, the ICC Prosecutor may seek or receive additional information from States, organs of the UN, intergovernmental or non-governmental organisations or other reliable sources that he or she deems appropriate and may receive written or oral testimony at the seat of the Court.¹⁶⁹⁹ If a civil society witness is called, the accused is entitled to have the witness examined.¹⁷⁰⁰

c) Acting as an Intermediary

Civil society representatives could agree to operate as intermediaries, particularly in order to identify and contact witnesses. An intermediary is someone who facilitates contact between one of the organs or units of the ICC on the one hand, and victims, witnesses, beneficiaries and affected communities on the other. The label of “intermediary” does not necessarily imply that the organ or unit of the ICC has requested the individual or organisation to assist. An intermediary might be chosen by a victim or another person to assist them in making contact with an organ or unit of the Court or Counsel. He or she may also be self-appointed.¹⁷⁰¹

¹⁶⁹⁴ Request submitted by the Women’s Initiative for Gender Justice on 7 September 2006 for leave to participate as *amicus curiae* in art. 61 confirmation proceedings.

¹⁶⁹⁵ Rules of Procedure and Evidence, r. 103(1)

¹⁶⁹⁶ *Ibid.*, r. 103(2).

¹⁶⁹⁷ Rules of Procedure and Evidence, r. 103(3).

¹⁶⁹⁸ Human Rights Watch, ‘The International Criminal Court: How Non-Governmental Organizations Can Contribute to the Prosecution of War Criminals’ (September 2004) p. 17.

¹⁶⁹⁹ Rome Statute, art. 15(2).

¹⁷⁰⁰ *Ibid.*, art. 67(1)(e).

¹⁷⁰¹ [‘Guidelines governing the relations between the Court and intermediaries’](#) (ICC) p. 5.

The use of intermediaries by the ICC Prosecutor has been the subject of a degree of controversy. During the first case at the ICC, the *Lubanga* case, the defence alleged that witness testimony had been fabricated at the instigation of Prosecution’s intermediaries. Witnesses, including the first Prosecution witness—an alleged former child soldier—stated that intermediaries had coached their testimony. In its decision on the use of intermediaries, the Trial Chamber ordered the Prosecutor to call appropriate representatives “to testify as to the approach and the procedures applied to intermediaries”.¹⁷⁰²

Consequently, the ICC released guidelines to govern relations between the Court and intermediaries in March 2014.¹⁷⁰³ The guidelines aim to contribute to the proper oversight of all intermediaries. There is also a Code of Conduct¹⁷⁰⁴ and a Model Contract for intermediaries.¹⁷⁰⁵ The Code of Conduct and the Guidelines provide a number of guidelines to regulate the use and conduct of intermediaries. They define their roles and function. In short, an “intermediary” is defined as an individual or organisation that, on request of an organ or unit of the Court or Counsel, conducts one or more of the activities mentioned in Section 1 of the Guidelines Governing the Relations between the Court and Intermediaries.¹⁷⁰⁶ In section one of the Guidelines, the following main roles of intermediaries are identified:

- Assisting with outreach and public information activities in the field;
- Assisting a party or participant to conduct investigations by identifying evidentiary leads and/or witnesses and facilitating contact with potential witnesses;
- Assisting (potential) victims in relation to submission of an application, request for supplementary information and/or notification of decisions concerning representation, participation or reparations;
- Communicating with a victim/witness in situations in which direct communication with the Court could endanger the safety of the victim/witness;
- Liaising between Legal Representatives and victims for the purposes of victim participation and/or reparations (namely, compensation); and
- Assisting the ICC’s Trust Fund for Victims both in its mandate related to reparations ordered by the Court against a convicted person and in using other resources for the benefit of victims’ subject to the provisions of Article 79 of the Rome Statute.¹⁷⁰⁷

The Guidelines describe a range of intermediary activities as well as how to: (i) document and identify a contract between the Court and an intermediary; (ii) identify and select intermediaries; (iii) support intermediaries; and (iv) provide an intermediary with security and protection.

¹⁷⁰² *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06 (31 May 2010) para. 146.

¹⁷⁰³ *Ibid.*

¹⁷⁰⁴ ‘[Code of Conduct of Intermediaries](#)’ (ICC) March 2014.

¹⁷⁰⁵ ‘[Model Contract for Intermediaries](#)’ (ICC) March 2014.

¹⁷⁰⁶ ‘[Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries](#)’ (ICC) March 2014; ‘[Code of Conduct of Intermediaries](#)’ (ICC) March 2014.

¹⁷⁰⁷ *Ibid.*, s. 1.

The document also warns that intermediaries are not considered part of a legal representatives' team, and therefore do not benefit from legal professional privilege (a form of legal confidentiality between a lawyer and the person they represent) for their communications with the victim or the legal representatives. This is a factor that legal representatives will have to take into consideration when determining which information to entrust to intermediaries.¹⁷⁰⁸ The Code of Conduct identifies certain principles intermediaries should adhere to and bear in mind when carrying out their work:

- Section 3: Integrity: the importance of adhering to the policies, laws and practices of the Court; not participate in activities or corrupt practices such as receiving a gift, benefit or service or offering such to any person; not to abuse the relationship with the Court such as deliberate conduct jeopardizing the safety or wellbeing of persons or any abusive or threatening behaviour;
- Section 4: Confidentiality: the importance of ensuring persons with whom they have contact are protected; making every effort to ensure any material is maintained securely; not disclosing any classified material unless authorised;
- Section 5: Security: an intermediary must not engage in deliberate conduct which is likely to place at risk the security of any other person or the intermediary's own security;
- Section 6: Personal conduct: the importance of treating all persons equally; acting fairly and in good faith; not to make commitments to victims or witnesses they cannot fulfil; not harass, intimidate, pressure, bribe or compel anyone to engage in dealings with the court;
- Section 7: Duties toward the court: the duty to report any breaches of the Code; to always pay particular attention to the integrity of any information received whether collected in written, oral or any form; to ensure that any such information reflects accurately the details and views of the person as conveyed to the intermediary; the duty not to deceive the court; not make public statements on behalf of the court; and
- Section 8: Procedures to be followed in case of a breach of a duty: in the event of a breach of the code of conduct, action will be taken by the appropriate organ of the Court (see Part One).

Accordingly, while civil society representatives could agree to operate as intermediaries, there are rules surrounding their engagement with the ICC.

C. Exceptions to Witnesses Being Compelled to Testify at the ICC

Fourth, it is likely that representatives of civil society enjoy "qualified privilege". This means that they likely cannot be compelled to answer questions revealing confidential sources before the ICC. In other words, while the ICC could summon representatives of civil society and NGOs to appear before the ICC, it could not compel them to answer questions which could infringe upon confidentiality against their will.

¹⁷⁰⁸ ['Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries'](#) (ICC, March 2014) p. 6.

From the outset, a myriad of legal provisions must be borne in mind. Article 64 of the Rome Statute notes that the Trial Chamber has the power to “[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States”¹⁷⁰⁹ and to “[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties”.¹⁷¹⁰

On the other hand, Article 54 requires the that the Prosecutor “respect the interests and personal circumstances of victims and witnesses” and states that the Prosecutor may “[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents”. Moreover, Article 69 provides that “[t]he Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence”.

This ties in with Rule 73 of the Rules of Procedure and Evidence, which concerns privileged communications made in the context of a “class of professional or other confidential relationships” where those communications are made in the course of a confidential relationship with a reasonable expectation of privacy and non-disclosure and where confidentiality is essential to the nature and type of the relationship between the person and the confidant and recognition of the privilege would further the objective of the Rome Statute.¹⁷¹¹ This is directly analogous to the ICRC¹⁷¹² being entitled to an absolute privilege due to the expectation that it will remain true to its objectives (addressed below).¹⁷¹³

Most importantly, where anyone—such as a civil society representative—provides confidential information to the prosecutor then the Trial Chamber may not compel that witness to answer any question relating to the material or information or its origin if the witness declines to answer on grounds of confidentiality.¹⁷¹⁴

In the *Brima* case at the SCSL,¹⁷¹⁵ the Trial Chamber declined to issue an order for the Prosecution guaranteeing that a witness, who was a human rights officer with the UN, would not be compelled to answer any questions during cross-examination identifying his confidential sources. The decision of the Trial Chamber was challenged in the Appeals Chamber. The Appeals Chamber overturned this decision.¹⁷¹⁶ The Appeals Chamber granted an order permitting the witness to testify without being compelled to answer questions in cross-examination on the grounds

¹⁷⁰⁹ Rome Statute, art. 64(6)(b).

¹⁷¹⁰ *Ibid.*, art. 64(6)(d).

¹⁷¹¹ Rules of Procedure and Evidence, r. 73(2).

¹⁷¹² *Ibid.*, r. 73(4).

¹⁷¹³ *The Prosecutor v. Blagoje Simić and others* ([Decision](#)) IT-95-9-PT (27 July 1999).

¹⁷¹⁴ Rules of Procedure and Evidence, r. 82(3); Rome Statute, art. 54(3)(E).

¹⁷¹⁵ *Prosecutor v. Brima and others* ([Decision](#)) SCSL-2004-16-AR 73 (26 May 2006).

¹⁷¹⁶ *Ibid.*, para. 36

of confidentiality.¹⁷¹⁷ In coming to this conclusion, the Appeals Chamber acknowledged the “privileged relationship” and the public interest arising out of the work of human rights officers.¹⁷¹⁸

The Appeals Chamber held that the special interest of human rights officers who have provided confidential information to the Prosecutor are adequately covered by Rule 70, which can be interpreted as protecting confidential information from disclosure and protecting the provider from certain aspects of compellability. That said, the SCSL recognised the overriding obligation of the Court to protect the fairness of the trial and the need to consider excluding evidence to secure a fair trial.¹⁷¹⁹ As noted above, a similar provision applies in the ICC.¹⁷²⁰

In *Simić*, the ICTY recognised an absolute privilege for information obtained by the ICRC.¹⁷²¹ The facts were that a former ICRC employee that had visited detention camps in Yugoslavia in the course of his official duties as an ICRC translator contacted the ICTY and offered his assistance in the prosecution of Blagoje Simić. The ICRC vehemently objected to him doing so. In its decision in *Simić*, the ICTY relied on the unique characteristics of the ICRC. The absolute privilege of the ICRC has been imported into the ICC’s Rules of Procedure and Evidence.¹⁷²² The trial chamber held that the ICRC had a “right under customary international law to non-disclosure of the [i]nformation”.¹⁷²³

The separate opinion of Judge David Hunt is important. It approaches the ICRC as an NGO, not as a special international entity¹⁷²⁴ and therefore, could be subject to the same rules as other NGOs in the field. Judge Hunt concluded that a test should be applied on whether NGO information is disclosable: the Court should weigh “whether the evidence to be given by the witness in breach of the obligations of confidentiality owed by the ICRC is so essential to the case of the relevant party... as to outweigh the risk of serious consequences of the breach of confidence in the particular case”.¹⁷²⁵ The test was neutral because “powerful public interest[s]” were present on both sides of the issue.¹⁷²⁶ In applying this, he identified an interest in the protection of the ICRC’s adherence to its obligations of confidentiality and neutrality because the willingness of warring parties to grant full access to the ICRC is dependent upon its adherence to these principles.¹⁷²⁷ Conversely, he recognised that there was also an interest in ensuring the availability of relevant evidence to the courts, so that they might facilitate just outcomes.¹⁷²⁸

¹⁷¹⁷ *Ibid.*, IV. Disposition.

¹⁷¹⁸ *Ibid.*, para. 33.

¹⁷¹⁹ *Ibid.*, para. 34; *The Prosecutor v. Milošević* ([Decision](#)) IT-02-54-AR108bis&AR73.3 (23 October 2002) para. 26.

¹⁷²⁰ Rules of Procedure and Evidence, r. 82(3); Rome Statute, art. 54(3).

¹⁷²¹ *The Prosecutor v. Blagoje Simić and others* ([Decision](#)) IT-95-9-PT (27 July 1999).

¹⁷²² Kate Mackintosh, ‘Note for Humanitarian Organizations on Cooperation with International Tribunals’ (2004) 86 *Int’l Rev. Red Cross* 131, p. 133.

¹⁷²³ *The Prosecutor v. Blagoje Simić and others* ([Decision](#)) IT-95-9-PT (27 July 1999) para. 74.

¹⁷²⁴ *The Prosecutor v. Blagoje Simić and others* ([Separate Opinion of Judge David Hunt](#)) IT-95-9-PT (27 July 1999).

¹⁷²⁵ *Ibid.*, para. 35.

¹⁷²⁶ *Ibid.*, para. 17.

¹⁷²⁷ *Ibid.*, para. 14.

¹⁷²⁸ *Ibid.*, para. 17.

Ultimately, Judge Hunt concluded that the risks associated with disclosure outweighed the obstacles posed by the exclusion of the evidence.¹⁷²⁹ In spite of the neutrality of Judge Hunt’s test, the application of this test to most cases involving NGOs will result in the exclusion of evidence.¹⁷³⁰ This will be a strong and persuasive authority for when the ICC decides upon the issue.¹⁷³¹ Indeed at the ICTR, the trial chamber said the ICRC privilege does not open the floodgates for others and it was an inapposite privilege when the national Red Cross societies are acting independent of the ICRC.¹⁷³² In *Radoslav Brđanin*,¹⁷³³ the ICTY recognised a qualified privilege for information obtained by war correspondents.¹⁷³⁴ Some suggest war correspondents’ qualified privilege in the *Brđanin* case at the ICTY will apply by analogy to NGOs.¹⁷³⁵ Either way, there appear to be several ways in which qualified privilege may apply to protect confidential sources allowing NGO members to be summoned to the ICC, but not compelled to answer questions impeding upon confidentiality.

D. Exceptions to Witnesses Being Compelled to Produce Notes at the ICC

It is possible that civil society representatives could be compelled to produce their information and notes to the ICC. There are, however, exceptions to this rule. This section identifies those exceptions. First, it discusses what may happen to information handed to a State in confidence. Second, it discusses the potential use of information handed to the ICC Prosecutor in confidence. Then, the section discusses the concept of qualified privilege (defined and discussed above in relation to compelling a witness to testify about facts within that witness’ knowledge). Lastly, the section considers what may happen to internal documents—such as, handwritten notes or internal e-mails—produced by an NGO or other entity that were not intended to be disclosed.

a) Confidential Information Given to a State

The ICC has the power to request that a State Party provide a document or information in its custody, possession or control that was disclosed to it in confidence “by a State, intergovernmental-organisation or international

¹⁷²⁹ *Ibid.*, para.41.

¹⁷³⁰ HRW, ‘[How Nongovernmental Organizations Can Contribute to the Prosecution of War Criminals](#)’ September 2004, p. 17.A

¹⁷³¹ Kate Mackintosh, ‘Note for Humanitarian Organizations on Cooperation with International Tribunals’ (2004) 86 Int’l Rev. Red Cross 131, p. 138.

¹⁷³² *The Prosecutor v. Muvunyi* ([Reasons](#)) ICTR-2000-55A-T (15 July 2005) para. 19 (noting that ‘[a]s stated by an ICTY Chamber in the Simić case, such finding ‘does not ‘open the floodgates’ in respect of other organizations’” and asserting ‘that the ICC’s Rules of Procedure and Evidence similarly grant such privilege only to the ICRC, and not to any other organization’). The Chamber in this case failed to reach the question of whether such national societies enjoyed an independent privilege because no evidence was presented by the defence ‘to suggest that the [Belgian Red Cross Society] has an international testimonial privilege in respect of the information in the possession of its employees.’).

¹⁷³³ *The Prosecutor v. Brđanin and Tadić* ([Interlocutory Appeal](#)) IT - 99-36 AR73.9 (11 December 2002).

¹⁷³⁴ *Ibid.*

¹⁷³⁵ *The Prosecutor v. Radoslav Brđanin and Momir Talić* ([Decision](#)) IT-99-36-AR73.9 (11 December 2002); Megan A. Fairlie, ‘Evidentiary Privilege of Journalists Reporting in Areas of Armed Conflict—Evidence in War Crimes Trials—Rule-Making Process of ICTY’ (2004) 98 Am. J. Int’l L. 805, p. 809; John R.W.D. Jones, ‘The Gamekeeper-Turned-Poacher’s Tale’ (2004) 2 J. Int’l Crim. Just. 486, 491; Kate Mackintosh, ‘Note for Humanitarian Organizations on Cooperation with International Tribunals’ (2004) 86 Int’l Rev. Red Cross 131, p. 460.

organisation”.¹⁷³⁶ If a State Party is so requested, it must seek the consent of the originator, such as an NGO, to disclose that document or information.¹⁷³⁷

The rule covers scenarios when the information has been given to a State strictly in confidence. If a State is aware of information then it must request, if the ICC asks that State to do so, the relevant organisation to disclose the original document or information. It is possible that the originator will refuse to consent. Crucially, for Ukraine and NGOs in Ukraine, where there is a refusal to consent, the relevant Article states:

If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.¹⁷³⁸

Therefore, a document or piece of information a State Party has that an NGO has provided specifically in confidence is likely to remain confidential.

b) Confidential Information Given to the ICC Prosecutor

Alternatively, information or documents may have been given to the ICC Prosecutor and asked to be kept confidential. If this has been requested, then they may not be disclosed providing that the information is used by the Prosecutor only to generate new information from her investigation. Articles 54(3)(d) and (e) state that the ICC Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtained on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.

Interestingly, in *Lubanga*, a considerable portion of the evidence gathered was by way of confidentiality agreements, and some of it was “exculpatory”.¹⁷³⁹ In other words, it tended to disprove the Prosecution’s allegations against the accused. The ICC Appeals Chamber has said that this provision will be used incorrectly if the agreement results in a substantial body of exculpatory evidence that should ordinarily be handed to the defence.¹⁷⁴⁰ Furthermore, if the Prosecutor does introduce protected material into evidence, the Chamber may not order the production of additional evidence received from the provider, nor may it summon the provider as a witness. Accordingly, if an NGO indicates clearly that information is confidential and not to be used then it will not be disclosed. It will be used merely to generate further evidence.

¹⁷³⁶ Rome Statute, art. 73.

¹⁷³⁷ *Ibid.*

¹⁷³⁸ *Ibid.*

¹⁷³⁹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06 (13 June 2008) paras. 14-19; Sabine Swoboda, ‘The ICC Disclosure Regime—A Defence Perspective’ (2008) 19 Criminal Law Forum 449, p. 463.

¹⁷⁴⁰ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 OA 13 (21 October 2008) paras. 59 and 101.

c) Confidentiality of Internal Documents

Notes and documents produced for internal purposes only may remain confidential insofar as the documents are intended to remain inside the organisation which produced the document (as opposed to being intended to be relied upon by a party in the proceedings). However, Human Rights Watch warns that “NGOs could potentially be forced to disclose information that they intended to keep confidential”.¹⁷⁴¹ This is correct. There can be no guarantees. This section identifies the protection from disclosure afforded to internal documents.

First, the ICC Rules of Procedure and Evidence provide that internal documents prepared by a party are not subject to disclosure.¹⁷⁴² It states that: “[r]eports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure”.¹⁷⁴³ This category of information is generally known as internal “work product”. The ICC has expanded upon this list to identify the following as internal “work product”:

- i) all preliminary examination reports; ii) information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies; iii) information related to the prosecution’s objectives and techniques of investigation; iv) analyses and conclusions derived from evidence collected by the ICC Prosecutor; v) investigator’s interview notes that are reflected in the witness statements or audio-video recording of the statement; vi) investigator’s subjective opinions or conclusions that are recorded in the investigator’s interview notes; and vii) internal correspondence.¹⁷⁴⁴

The question of what is internal “work product” arose in *Lubanga*. It was questioned to what extent an investigator’s notes taken during an interview may be disclosable or redacted. On 5 November 2010, the Trial Chamber questioned why there was late disclosure of an investigator’s notes from an interview. The problem with the memorandum that was disclosed was that it was redacted. A particular paragraph that was redacted included a negative assessment of the credibility of a witness based on the witness’ failure to provide certain documents. The Trial Chamber said that the Prosecutor was justified in withholding the investigator’s notes concerning the assessment of the witness’ credibility on the basis that it was an internal work product. That said, the Chamber appeared to note that this might not always hold true. Nevertheless, the Trial Chamber held that the Prosecution conducted themselves appropriately in deeming the assessment to be an internal work product.¹⁷⁴⁵

It should be noted, however, that there is a distinction between notes in an interview and writing out draft statements of a witness’ evidence. These drafts would constitute prior statements. The rules are clear about prior statements. Under Rule 76 of the ICC Rules of Procedure and Evidence, prior statements are disclosable to the defence. These

¹⁷⁴¹ International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3 (Part.II-A) (2002) (“Rules of Procedure and Evidence”) rule 85; [‘A Guide for the Participation of Victims in the Proceedings of the Court’ \(ICC\)](#).

¹⁷⁴² Rules of Procedure and Evidence, r. 81.

¹⁷⁴³ *Ibid.*

¹⁷⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo* ([Redacted Decision](#)) ICC-01/04-01/06 (20 January 2011) para. 18.

¹⁷⁴⁵ *Ibid.*, para. 18.

are made only when witnesses are questioned about their knowledge of the case in the course of its investigation.¹⁷⁴⁶ This likely does not apply, for instance, to material from an interview concerning a witness' security.¹⁷⁴⁷ Therefore, notes written by civil society representatives may not be covered by qualified privilege. Human Rights Watch is right to point out that notes may be disclosable, and this should be borne in mind when writing them.

III. Trial

So far this Part has addressed two issues: firstly, how information pertaining to alleged crimes falling within the jurisdiction of the ICC can be communicated to the Prosecutor to inform her early investigations; and secondly, how information and evidence can be used by the Court once proceedings are underway. The following section will focus on what happens during the trial phase at the ICC, in particular, the process the trial follows and the rights of the accused.

A. Preparation for Trial

From the very first moment the Trial Chamber is constituted, the Chamber will usually designate¹⁷⁴⁸ one of their members to be responsible for the preparation of the trial and to facilitate the fair and expeditious conduct of the proceedings, for example, by ensuring that evidence is disclosed by both sides in a timely fashion.¹⁷⁴⁹ Once this is done, the Chamber will preside over a "status conference", often including the Prosecutor and Defence, in order to set the date for when the trial will commence. Once all parties come to an agreement on when is most suitable, this date should then be communicated to all those participating in the proceedings¹⁷⁵⁰ and, in turn, made public.

At this stage, prior to the commencement of the trial, the Prosecutor or Defence can raise with the Chamber any issues they have regarding the forthcoming trial. This can be anything from challenging the jurisdiction of the court, or the admissibility of the case,¹⁷⁵¹ to bringing motions relating to the conduct of the trial.¹⁷⁵² All motions made to the Chamber must be made in writing and, unless the motion relates to a private, one-party only procedure (known as "*ex parte*"), must be served on the other party.¹⁷⁵³

B. Opening Pleas

One of the first acts the Trial Chamber carries out is to read the charges the Prosecutor has brought against the accused, as confirmed by the Pre-Trial Chamber. The Statute sets out that the Trial Chamber, once satisfied that the

¹⁷⁴⁶ *The Prosecutor v. Bosco Ntaganda* ([Redacted Decision](#)) ICC-01/04-02/06-840-Conf-Exp (18 August 2015) para. 53; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.* ([Decision](#)) ICC-01/05-01/13-1227 (9 September 2015) para. 9.

¹⁷⁴⁷ *The Prosecutor v. Bosco Ntaganda* ([Decision](#)) ICC-01/04-02/06-840-Conf-Exp (18 August 2015) para. 54.

¹⁷⁴⁸ Rules of Procedure and Evidence, r. 132*bis*(1).

¹⁷⁴⁹ *Ibid.*, r. 132*bis*(2).

¹⁷⁵⁰ *Ibid.*, r. 132.

¹⁷⁵¹ *Ibid.*, r. 133.

¹⁷⁵² *Ibid.*, r. 134.

¹⁷⁵³ *Ibid.*, r. 134(1).

accused understands the nature of the charges (if needed, with the help of simultaneous translation) he or she is then given the option to plead “guilty” or “not guilty” to the charges.¹⁷⁵⁴

It is important to note that the offer of a “guilty” plea by the accused has no guarantee of being accepted by the Chamber. Instead, when the accused makes an admission of guilt the Trial Chamber must first determine whether: (i) the accused understands the nature and consequences of the admission of guilt; (ii) the admission has been voluntarily made by the accused after sufficient consultation with his or her defence counsel; and (iii) the admission is consistent with the facts of the case that are contained in the charges and the evidence brought by the Prosecutor.¹⁷⁵⁵

Only when the Chamber is certain that each of the elements above are satisfied will it consider the admission of guilt to be sound and the accused recorded as convicted of the crime charged in the trial record.¹⁷⁵⁶ Should the Trial Chamber not be satisfied that each of the elements are met, the Trial Chamber is then compelled to disregard the admission of guilt and order that the trial be continued under the ordinary trial procedures provided for by the Statute and, should the presiding judge feel the admission of guilt could interfere with the fairness of the trial, order for another Trial Chamber to adjudicate the case.¹⁷⁵⁷

Similarly, the Trial Chamber also has the power to ignore the admission of guilt and continue the trial under the ordinary trial procedures if it decides that a more complete presentation of the facts is required in the interests of justice (in particular, in the interests of the victims). In order to establish whether this is the case, the Rules permit the judges of the Trial Chamber to invite the views and opinions of the Prosecutor and the Defence.¹⁷⁵⁸ In the event the Trial Chamber decides a more complete presentation of the facts is required, the Chamber may take steps to request that the Prosecutor present additional evidence or transfer the trial to another Trial Chamber, as in the paragraph above.¹⁷⁵⁹

C. Rights of the Accused During Trial

Should the accused plead not guilty, from that point on the onus is on the Prosecutor to show that the accused is guilty beyond a reasonable doubt. As per the Statute, everyone who appears before the court has the fundamental right to be presumed innocent until proved guilty in accordance with the laws and procedures of the Court.¹⁷⁶⁰

The Statute makes it clear that throughout the whole trial, from the first opening statements to the moment the judgement is delivered, the accused should be afforded the minimum rights and privileges to ensure the trial is fair, impartial and the powers of the Prosecution and Defence are balanced.¹⁷⁶¹ The provisions of Article 67 entitle the

¹⁷⁵⁴ Rome Statute, art. 64(8)(a).

¹⁷⁵⁵ *Ibid.*, art. 65(1).

¹⁷⁵⁶ *Ibid.*, art. 65(2).

¹⁷⁵⁷ *Ibid.*, art. 65(3).

¹⁷⁵⁸ Rules of Procedure and Evidence, r. 139.

¹⁷⁵⁹ Rome Statute, art. 65(4).

¹⁷⁶⁰ *Ibid.*, art. 66.

¹⁷⁶¹ *Ibid.*, art. 67.

accused to: (i) be promptly informed of the charges in the language he/she fully understands;¹⁷⁶² (ii) be given adequate time and facilities to prepare his defence and communicate with his counsel in confidence;¹⁷⁶³ (iii) to be tried without undue delay;¹⁷⁶⁴ (iv) to be provided with legal aid should he/she be unable to afford their own defence;¹⁷⁶⁵ (v) to examine witnesses or have witnesses examined by their counsel;¹⁷⁶⁶ (vi) to have access to an interpreter, when and if necessary, in order to fully understand the proceeding;¹⁷⁶⁷ and (vii) not to be compelled to testify, confess guilt and remain silent without determination of guilt or innocence.¹⁷⁶⁸

D. Trial Procedure

The Presiding Judge of the Chamber can choose to give directions on how the trial should proceed, and the manner in which evidence should be submitted, at the same time he invites a plea from the accused—at the start of the Trial.¹⁷⁶⁹ If no directions are given, the Prosecutor and the Defence may attempt to agree on the order and manner in which the evidence shall be submitted to the Trial Chamber.¹⁷⁷⁰ In the event no consensus is reached, the Presiding Judge will then give directions.

No matter what directions are given, all witness who appear before the Trial Chamber will be examined in the same manner. Firstly, the party that submits evidence by way of a witness has the right to examine that witness on the basis of their evidence. Thus begins the “examination-in-chief”. One of the purposes of the examination-in-chief is to provide clarity to the Court on the evidence that is being delivered. Once the examination-in-chief has been concluded, the other party will then have the right to question that witness about matters related to the witness’ testimony, its reliability, and the credibility of the witness and other relevant matters—this is the “cross-examination”.¹⁷⁷¹ Finally, the members of the Trial Chamber have the right to question the witness, either before, during or after the witness has been examined by the other parties.¹⁷⁷² Unless otherwise directed by the Trial Chamber, no witness should be present when the testimony of another witness is given.¹⁷⁷³

Before any testimony is delivered, all witnesses are required to sign an undertaking as to the truthfulness and accuracy of the evidence they are about present to the Chamber.¹⁷⁷⁴ Article 69 provides that the Prosecutor and Defence may choose to submit any evidence relevant to the case.¹⁷⁷⁵ However, as discussed above, the Chamber reserves the right

¹⁷⁶² *Ibid.*, art. 67(1)(a).

¹⁷⁶³ *Ibid.*, art. 67(1)(b).

¹⁷⁶⁴ *Ibid.*, art. 67(1)(c).

¹⁷⁶⁵ *Ibid.*, art. 67(1)(d).

¹⁷⁶⁶ *Ibid.*, art. 67(1)(e).

¹⁷⁶⁷ *Ibid.*, art. 67(1)(f).

¹⁷⁶⁸ *Ibid.*, art. 67(1)(g).

¹⁷⁶⁹ *Ibid.*, art. 64(8).

¹⁷⁷⁰ Rules of Procedure and Evidence, r. 140.

¹⁷⁷¹ *Ibid.*, r. 140(2)(b).

¹⁷⁷² *Ibid.*, r. 140(2)(c).

¹⁷⁷³ *Ibid.*, r. 140(3).

¹⁷⁷⁴ Rome Statute, art. 61(1).

¹⁷⁷⁵ Rome Statute, art. 69(3).

to rule any evidence submitted as being inadmissible for the purposes of the trial.¹⁷⁷⁶ Similarly, the Chamber also reserves the right to request the submission of any evidence not offered by the Prosecutor or Defence that it considers necessary for the determination of the truth.¹⁷⁷⁷

Throughout all the proceedings of the Trial, due to the often sensitive and distressing nature of the crimes alleged, the Trial Chamber is under an ongoing obligation to take all appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.¹⁷⁷⁸ In certain circumstances, this could mean the Chamber could decide, for example, to make an exception to the rule that all proceedings should be held in public, and order that some of the trial take place in private.¹⁷⁷⁹ This exception would be particularly apt in the case of a victim of sexual violence or in the case of children presenting evidence. In deciding such exceptions, the Statute compels the Chamber to take heed of all the circumstances, particularly with regards to how such an exception could hinder the fairness of the trial.¹⁷⁸⁰

Similarly, where witness testimony could lead to the “grave endangerment” of the security or wellness of the witness, or his or her family, the Statute allows the Prosecutor to withhold this evidence and instead to submit a summary of the evidence to the Court in its place.¹⁷⁸¹ Again, the Statute makes clear these exceptions should only be exercised in a manner that would not be prejudicial to, or inconsistent with, the rights of the accused to a fair and impartial trial.

IV. Closure of Evidence and Closing Statements

Once all witnesses have been heard and all evidence has been presented before the Chamber, the presiding judge will then declare that the submission of evidence has ended. The Chamber will then invite the Prosecutor and the Defence to make their closing statements.¹⁷⁸² The closing statements give the Prosecutor and the Defence the chance to remind the Chamber of the evidence and facts they have presented before them, as well as to reiterate the arguments that support their respective cases.

V. Deliberations

Once the Prosecutor and the Defence have both made their closing statements, the judges of the Trial Chamber shall retire to deliberate the points raised during the trial and begin to come to a judgment as a group.¹⁷⁸³ The Rules set out at this point, all those who participated in the proceedings of the trial shall be informed of the date on which the Trial

¹⁷⁷⁶ *Ibid.*, art. 69(4).

¹⁷⁷⁷ *Ibid.*, art. 69(2).

¹⁷⁷⁸ *Ibid.*, art. 68(1).

¹⁷⁷⁹ *Ibid.*, art. 68(2).

¹⁷⁸⁰ *Ibid.*, art. 68(2).

¹⁷⁸¹ *Ibid.*, art. 68(5).

¹⁷⁸² Rules of Procedure and Evidence, r. 141.

¹⁷⁸³ *Ibid.*, r. 142.

Chamber will come to its decision, and, that the decision should be made within “a reasonable period of time” after the Trial Chamber has retired to deliberate.¹⁷⁸⁴

VI. Judgement

In order for any verdict to be made, the ICC Statute states that all of the judges of the Chamber must be present at each stage of the trial and throughout their deliberations.¹⁷⁸⁵ However, provisions exist for members of the Chamber to be replaced with alternative judges, should any of the original panel be unable, for any reason, to continue to attend the Chamber.¹⁷⁸⁶

The Statute stipulates that the verdict the Chamber reaches must be a decision based on its “evaluation of the evidence and the entire proceedings”,¹⁷⁸⁷ and must not exceed the facts and circumstances described in the charges which were transferred to the Chamber from the Pre-Trial Chamber. In reaching their verdict, the Statute compels the Chamber to make an attempt to come to a unanimous decision, however, in the event a unanimous decision cannot be reached, the Statute permits a decision to be reached by a majority of the judges.¹⁷⁸⁸ When a decision is reached by way of a majority decision, a summary of the decision should contain the views of both the majority and minority judges.¹⁷⁸⁹ From the moment the Chamber retires to begin its deliberations, all aspects of proceedings must remain secret. Only when the decision, along with a full and reasoned statement supporting it, has been distributed should the Chamber’s verdict be known.¹⁷⁹⁰

If the verdict is “guilty”, the Chamber will proceed to sentence the accused. If it is not guilty, the accused is released and the proceedings will come to an end.

VII. Sentencing

This section considers the sentencing regime of the ICC. First, the section gives an overview of the purpose of sentencing, before looking at the applicable principles ICC judges must consider when sentencing a convicted person. The section then considers the legal framework behind sentencing, the discretionary powers of judges and the appeal process.

A. Purpose of Sentencing

The aim of sentencing perpetrators is two-fold: to punish and to deter. First, sentencing aims to ensure that perpetrators of the most serious crimes do not go unpunished.¹⁷⁹¹ Through the punishment of a convicted person, sentencing is seen to contribute to the fostering of reconciliation and the restoration of peace in the concerned

¹⁷⁸⁴ *Ibid.*, r. 142(2).

¹⁷⁸⁵ Rome Statute, art. 74(1).

¹⁷⁸⁶ *Ibid.*

¹⁷⁸⁷ *Ibid.*, art. 74(2).

¹⁷⁸⁸ *Ibid.*, art. 74(3).

¹⁷⁸⁹ *Ibid.*, art. 74(5).

¹⁷⁹⁰ *Ibid.*, art. 74(4).

¹⁷⁹¹ *The Prosecutor v. Germain Katanga* ([Sentence](#)) ICC-01/04-01/07 (23 May 2014) para. 38.

communities. The sentence responds to a “need for truth and justice voiced by the victims and their family members”, is an “expression of society’s condemnation of the criminal act and of the person who committed it” and is “also a way of acknowledging the harm and suffering caused to the victims”.¹⁷⁹² Second, it is believed that sentencing will act as a deterrent to those planning to commit the most serious crimes in the future and will therefore contribute to the prevention of such crimes.¹⁷⁹³

When determining a sentence, the Trial Chamber has substantial discretionary power,¹⁷⁹⁴ since it has to: (i) examine the relevance and weight of all factors including mitigating and aggravating circumstances; (ii) balance all factors it considers relevant; (iii) consider the proportionality of the sentence; and (iv) decide upon what facts and circumstances should be taken into account in the determination of the sentence. The Court may impose two types of sentence: a prison sentence and a financial sentence. The financial sentence is ancillary to the final sentence.

B. Procedure of the Sentencing Stage

In the event of a conviction, the Trial Chamber holds a separate sentencing hearing. Pursuant to Article 76(4) of the Statute, the sentence is pronounced in public and, when possible, in the presence of the accused. According to Article 76(1), the sentence is determined by the Trial Chamber based on the evidence presented and the submissions made during the trial deemed relevant to the sentence.

A further hearing of any additional evidence or submissions relevant to the sentence can be held, save for when the accused made an admission of guilt pursuant to Article 64 of the Statute. This hearing has to be made at the request of the Prosecutor or the accused, or on the own motion of the Chamber.¹⁷⁹⁵ Pursuant to Rule 143, the Presiding Judge sets the date of the additional hearing, which can be postponed exceptionally by the Trial Chamber either on its own motion or at the request of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings, pursuant to Rules 89 and 91.

a) Types of Sentences that can be Imposed

The Court may impose two types of sentence: a prison sentence and a financial sentence. The financial sentence is ancillary to the final sentence. Any person convicted of a crime referred to in Article 5 of the Statute may be sentenced to prison for a term up to 30 years,¹⁷⁹⁶ or exceptionally a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.¹⁷⁹⁷ In addition to imprisonment, a convicted person may be ordered to:

¹⁷⁹² *Ibid.*

¹⁷⁹³ *Ibid.*, para. 37.

¹⁷⁹⁴ As the Appeal Chamber reminds it in the appeal confirmation sentence in Lubanga case, the Chamber “enjoys broad discretion in determining a sentence” *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 (1 December 2014) (“Lubanga Sentence Appeal Judgment”) para. 1.

¹⁷⁹⁵ Pursuant to art. 76(2) of the Rome Statute.

¹⁷⁹⁶ Rome Statute, art. 77(1)(a).

¹⁷⁹⁷ *Ibid.*, art. 77(1)(b).

- Pay a fine under the criteria provided for in Rule 146 of the Rules;¹⁷⁹⁸
- Forfeit proceeds, property and assets derived directly or indirectly from the crime committed, without prejudice to the rights of bona fide third parties.¹⁷⁹⁹

According to Rule 146(5), failure to pay the fine may result in an extension of the period of imprisonment following a motion by the Presidency of the Court or at the request of the Prosecutor when all available enforcement measures have been exhausted.¹⁸⁰⁰ The period of extension of the term of imprisonment must not exceed a quarter of such term or five years, whichever is less, and may not lead to a total period of imprisonment in excess of 30 years. Under Rule 146(6), in order to determine whether to order an extension of sentence, the Presidency shall sit in private and hear the views of the sentenced person, who can be assisted by counsel.

b) Factors to Be Taken into Consideration when Deciding on a Prison Sentence

The Chamber, when considering the appropriate sentence, takes into account the evidence presented and submissions made during the trial that are relevant to the sentence.¹⁸⁰¹

Where a person has been convicted for more than one crime, a sentence for each crime will be pronounced in addition to a joint sentence specifying the total period of imprisonment.¹⁸⁰² This joint sentence will be, at minimum, equal to the highest individual sentence pronounced, and not greater than 30 years' imprisonment or a life imprisonment if the conditions of Article 77(1)(b) of the Statute apply.¹⁸⁰³

Once the sentence has been imposed, the Court can deduct the time that the convicted person spent in detention previous to the Sentencing Decision in accordance with a Court order. If time was spent in detention not pursuant to an order of the Court, but for conduct underlying the crime, then the Court can also deduct this time.¹⁸⁰⁴

c) Financial Penalties

In addition to imprisonment, a convicted person may be ordered to pay a fine under certain criteria,¹⁸⁰⁵ and forfeit proceeds, property and assets derived directly or indirectly from the crime committed, without prejudice to the rights of bona fide third parties.¹⁸⁰⁶

When deciding whether to impose a fine, the Court should take into account: (i) whether imprisonment is a sufficient penalty; (ii) the financial situation of the convicted person; (iii) factors as described in Rule 145 concerning the

¹⁷⁹⁸ *Ibid.*, art. 77(2)(a).

¹⁷⁹⁹ *Ibid.*, art. 77(2)(b).

¹⁸⁰⁰ Rules of Procedure and Evidence, rs 217 to 222.

¹⁸⁰¹ Rome Statute, art. 76(1).

¹⁸⁰² *Ibid.*, art. 78(3).

¹⁸⁰³ Art. 77(2)(b) of the Statute dictates that a term of life imprisonment has to be justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

¹⁸⁰⁴ Rome Statute, art. 78(2).

¹⁸⁰⁵ *Ibid.*, art. 77(2)(a).

¹⁸⁰⁶ *Ibid.*, art. 77(2)(b).

determination of a sentence; and (vi) whether and to what degree the crime was motivated by personal financial gain.¹⁸⁰⁷ The amount of the fine is also set in accordance to: (i) the damages and injuries caused; (ii) the proportionate gains derived from the crime by the perpetrator; and (iii) the wealth of the convicted person as the fine cannot exceed 75 per cent of the value of his identifiable assets, liquid or realisable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependents.¹⁸⁰⁸ Failure to pay the fine may result in an extension of the period of imprisonment.¹⁸⁰⁹

When decided whether to order forfeiture in relation to specific proceeds, property or assets can be ordered by the Court on two conditions: (i) it must be evidenced that they derive directly or indirectly from the crime; and (ii) it will not cause prejudice to the rights of bona fide third parties.¹⁸¹⁰ The Chamber must hold an additional hearing to hear and consider evidence as to the identification and location of specific proceeds, property or assets derived directly or indirectly from the crime before issuing an order of forfeiture when the conditions mentioned above are satisfied.¹⁸¹¹ A bona fide third party must be given notice by the Chamber and will then be able to submit relevant to the issue.¹⁸¹²

The Chamber may order the money or property collected from fines or forfeiture to be transferred to the ICC's Trust Fund by way of an order after the representative of the Fund have been able to submit written or oral observations.¹⁸¹³

C. Approach to Sentence

The Chamber, when considering the appropriate sentence, takes into account the evidence presented and submissions made during the trial that are relevant to the sentence.¹⁸¹⁴ The circumstances that the Court will take into account when making a determination of sentence are listed in Article 78 and Rule 145. Namely, the Court will take into account: (i) the gravity of the crime; (ii) the individual circumstances of the convicted person and other factors such as those listed in Rule 145, including (iii) the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; (iv) the degree of participation of the convicted person; (v) the degree of intent; (vi) the circumstances of the manner, time and location; and (vii) the age, education, social and economic condition of the convicted person.¹⁸¹⁵ In addition, the Chamber must take into account any mitigating and aggravating circumstances.¹⁸¹⁶ Finally, the sentence must reflect the culpability of the convicted person,¹⁸¹⁷ balance all the relevant factors described above, including mitigating and

¹⁸⁰⁷ Rules of Procedure and Evidence, r. 146(1).

¹⁸⁰⁸ *Ibid.*, r. 146(2).

¹⁸⁰⁹ *Ibid.*, r. 146(5).

¹⁸¹⁰ Rome Statute, art. 77(2)(b).

¹⁸¹¹ Pursuant to rule 147(1) and (4) of the Rules.

¹⁸¹² Rules of Procedure and Evidence, r. 147(2) and (3).

¹⁸¹³ Rome Statute, art. 79(2); Rules of Procedure and Evidence, r. 148.

¹⁸¹⁴ *Ibid.*, art. 76(1).

¹⁸¹⁵ Rome Statute, art. 78.

¹⁸¹⁶ Rules of Procedure and Evidence, r. 145(2).

¹⁸¹⁷ *Ibid.*, r. 145(1)(a).

aggravating factors and consider the circumstances both of the convicted person and of the crime.¹⁸¹⁸ It is important that the sentence is proportionate to the crime(s) committed, and accordingly, a sentence may be appealed if it is considered disproportionate.¹⁸¹⁹ It should be noted that this list is not exhaustive. However, the Court must examine all the factors enumerated above.

In the *Lubanga* Sentencing Appeal, the Appeals Chamber recalled that “[t]he weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber’s exercise of discretion”. However, a Trial Chamber’s failure to consider one of the mandatory factors listed in Rule 145(1)(b) of the Rules of Procedure and Evidence can amount to a legal error.¹⁸²⁰

In exercising its discretionary power, the Chamber may rely upon its previous decisions, as well as the decisions of other courts and tribunals, although these are not directly applicable under the sentencing laws of the Rome Statute. Indeed, it has been recognised that the *ad hoc* Tribunals “are in a comparable position to the Court in the context of sentencing”.¹⁸²¹ Nevertheless, given the need to individualise the sentence, previous sentencing is “but one factor among a host of others which must be taken into account when determining the sentence”.¹⁸²²

These factors are addressed below in relation to the two sentencing decisions of the ICC—*Katanga* and *Lubanga*.

a) The Evidence in the Case

First, the evidence presented and submissions made during the trial that are relevant to the sentence will be taken into consideration.¹⁸²³ The extent of the evidence and submissions that may be taken into account when determining the sentence is crucial to both the adversarial principle and fairness of the trial. In practice, whether this provision means that evidence that may be taken into account for determining the sentence is limited to that relating to the facts and circumstances described in the charges has been an issue. In the *Katanga*¹⁸²⁴ and *Lubanga*¹⁸²⁵ Sentencing Decisions, the Defence argued that the facts and circumstances that can be taken into account are limited to those in the Confirmation Decision, since taking into account elements not investigated during the trial would be unfair.¹⁸²⁶ However, in the *Lubanga* case, the Chamber ruled that none of the provisions applicable to sentencing limit the factors to those described in the Confirmation Decision, and that therefore “the evidence admitted at this stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the Defence has had a reasonable opportunity to address them”.¹⁸²⁷

¹⁸¹⁸ *Ibid.*, r. 145(1)(b).

¹⁸¹⁹ Rome Statute, art. 81(2)(a).

¹⁸²⁰ *Lubanga* Sentence Appeal Judgment, para. 1.

¹⁸²¹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Sentence](#)) ICC-01/04-01/06 (10 July 2012) (“*Lubanga Sentence*”) para. 12.

¹⁸²² *Lubanga* Sentence Appeal Judgment, paras. 76-77.

¹⁸²³ Rome Statute, art. 76(1).

¹⁸²⁴ *The Prosecutor v. Germain Katanga* ([Sentence](#)) ICC-01/04-01/07 (23 May 2014) (“*Katanga Sentence*”) para. 27.

¹⁸²⁵ *Lubanga* Sentence, para. 27.

¹⁸²⁶ *Ibid.*

¹⁸²⁷ *Ibid.*, para. 29.

b) Gravity of the Crime

Second, the gravity of the crime is one of the keys determining factors of the sentence.¹⁸²⁸ Neither the Statute nor the Rules provide guidance as to how to characterise and weigh the gravity of the offences committed. The individual circumstances of the accused are not defined, but do seem to overlap with the age, education, social and economic condition of the convicted person, which have to be taken into account by the Chamber.

In *Lubanga*, the Chamber, referring to ICTY jurisprudence,¹⁸²⁹ opined that the gravity of the crime is one of the principal factors to be considered in the determination of the sentence.¹⁸³⁰ Similarly, in *Katanga* the Chamber considered gravity to be the first step in the determination of a proportionate sentence.¹⁸³¹

Neither the Statute nor the Rules provide guidance as to how to characterise and weigh the gravity of the offences committed. The jurisprudence of the Court, however, does offer some insight. In the *Katanga* Sentencing Decision, it was noted that each crime forming the grounds of the criminal conviction is not necessarily of equivalent gravity and that therefore the Chamber must examine the gravity of each separately. The Chamber thus elucidated that crimes committed against persons are considered to have a higher degree of gravity than those targeting property.¹⁸³² Further, according to the Chamber “the gravity criterion must be assessed from both a quantitative and a qualitative standpoint”.¹⁸³³

The gravity of the crime has to be examined in relation to the particular circumstances of the case. For example, in *Lubanga*, the Chamber noted that children are particularly vulnerable and that the particular negative, physical and mental effects of recruiting and using children during hostilities can be considered as part of the circumstances that affect the Chamber’s determination of gravity.¹⁸³⁴

It appears that the examination of the gravity has to be distinct from the examination of the other factors, such as the individual circumstances of the convicted person, the degree of participation, the degree of intent, the extent of the damage caused and so on.¹⁸³⁵ In *Katanga*, in order to determine the gravity of the crime, the Chamber examined the nature and degree of participation of the convicted person in the commission of the crime,¹⁸³⁶ the harm caused to the victims and their relatives, the violence and the scale of the crimes committed and the discriminatory dimension of the attack, which is enumerated as an aggravating circumstance under Rule 145(2)(b). The factors listed above also

¹⁸²⁸ *Ibid.*, para. 36.

¹⁸²⁹ *The Prosecutor v. Nikolic* ([Sentencing](#)) IT-94-2-S (18 December 2003) para. 144; Mark Jennings, ‘Article 78: Determination of the Sentence’ in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes* (Hart, 2008) p. 1436.

¹⁸³⁰ *Lubanga* Sentence, para. 36.

¹⁸³¹ *Katanga* Sentence, para. 42.

¹⁸³² *Ibid.*, para. 43.

¹⁸³³ *Ibid.*, para. 43.

¹⁸³⁴ *Lubanga* Sentence, paras. 37-42.

¹⁸³⁵ Rule 145(1) of the Rules of Procedure and Evidence states, before enumerating factors to consider ‘[i]n addition to the factors mentioned in article 78, paragraph 1, [the Court shall] give consideration to...’, which suggests that these factors are to be examined separately from the gravity of the crime.

¹⁸³⁶ *Katanga* Sentence, para. 43.

encompass several factors enumerated under Rule 145(1)(c). A thorough discussion of the interrelationship between the different factors and circumstances is provided below.

The Chamber, in both *Katanga*¹⁸³⁷ and *Lubanga*,¹⁸³⁸ affirmed that factors taken into account when assessing the gravity of the crime cannot additionally be taken into account as aggravating circumstances and *vice versa*. The Chamber has the power to choose when a relevant circumstance should be taken into account as a characteristic of the gravity of the crime or as an aggravating circumstance. This discretion is important because one or more aggravating circumstances may open the possibility for the Chamber to impose a life sentence.¹⁸³⁹

c) Individual Circumstances of the Convicted Person

Third, the Statute does not specify what has to be taken into account as “the individual circumstances of the convicted person” pursuant to Article 78(1). However, in Rule 145(1)(c), it is specified that “the age, education, social and economic condition of the convicted person” have to be taken into account by the Chamber.

In the *Lubanga* Sentencing Decision, the Chamber examined these factors methodically. The Chamber found that given Lubanga was “intelligent and well-educated”, “he would have understood the seriousness of the crimes of which he has been found guilty”, and that this “marked level of awareness on his part is a relevant factor in determining the appropriate sentence”.¹⁸⁴⁰

d) Aggravating Circumstances

Fourth, the aggravating circumstances the Court must take into account are:¹⁸⁴¹

- Prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
- Abuse of power or official capacity—i.e. the accused committed the crimes in question by virtue of a position of power;
- Commission of the crime where the victim is particularly defenceless;
- Commission of the crime with particular cruelty and where there were multiple victims;
- Commission of the crime for any motive involving discrimination;¹⁸⁴²
- Other circumstances, which although not enumerated above, by virtue of their nature, are similar to those mentioned.¹⁸⁴³

¹⁸³⁷ *Ibid.*, para. 35.

¹⁸³⁸ *Lubanga* Sentence, para. 35.

¹⁸³⁹ Rules of Procedure and Evidence, r. 145(2)(b).

¹⁸⁴⁰ *Lubanga* Sentence, para. 55.

¹⁸⁴¹ Rules of Procedure and Evidence, r. 145(2)(b).

¹⁸⁴² Namely gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

¹⁸⁴³ Rules of Procedure and Evidence, r. 145(2)(b).

Since any aggravating factors “established by the Chamber may have a significant effect on the overall length of the sentence” it is considered necessary that they are established beyond reasonable doubt rather than on the balance of probabilities.¹⁸⁴⁴

In the *Katanga* Sentencing Decision, the Chamber rejected three of the four aggravating circumstances advanced by the Prosecution as they were already taken into account in the examination of the gravity of the crimes. As such, the Chamber only analysed abuse of power or official capacity as an aggravating factor.¹⁸⁴⁵ Similarly, in the *Lubanga* Sentencing Decision, pursuant to the double counting principle, the Chamber refused to take into account the fact that the crime was committed against particularly defenceless victims, namely children as an aggravating factor since this had already been taken into account in determining the gravity of the crime.¹⁸⁴⁶

When considering abuse of power or official capacity as an aggravating circumstance, the Chamber has referred to ICTY jurisprudence¹⁸⁴⁷ to clarify that two elements are needed to be demonstrated, namely that: (i) the convicted person exercised some authority; and (ii) he abused that authority, such as by using his influence to promote the commission of crime.¹⁸⁴⁸ The Appeals Chamber in *Lubanga* affirmed that the Trial Chamber must take into account not only the position of authority but also the manner in which this authority was exercised.¹⁸⁴⁹ In *Katanga*, the Chamber considered that Katanga “had the power to determine the needs, and to decide not only whether to allocate weapons but also the quantity of ammunition to be allocated and, to that end, to give instructions which were obeyed”, to conclude that he had exercised authority but had not abused it.¹⁸⁵⁰

For the aggravating circumstance of discrimination pursuant to Rule 145(2)(b)(v), it must be proven that the discrimination was deliberate in the commission of the crime.¹⁸⁵¹ In his dissenting opinion, Judge Bontio considered that even if Lubanga had not deliberately discriminated against children, his crime resulted in such discrimination and so he should be held responsible as such.¹⁸⁵²

In general, not only must the existence of the aggravating factor be proven beyond a reasonable doubt, it must also be attributable to the convicted person in a manner that reflects his culpability.¹⁸⁵³ For instance, the Trial Chamber did not consider the punishment of children below fifteen years of age as an aggravating factor because it had not occurred during the “ordinary course of events” of the crimes committed, there was nothing to suggest that he ordered, encouraged or was aware of the punishments and they could not otherwise be attributed to him.¹⁸⁵⁴ Similarly, with

¹⁸⁴⁴ *Ibid.*

¹⁸⁴⁵ *Katanga* Sentence, paras. 70-71.

¹⁸⁴⁶ *Lubanga* Sentence, para. 78.

¹⁸⁴⁷ ICTY, *The Prosecutor v. Milošević* ([Appeal](#)) IT-98-29/1-A (12 November 2009) para. 302; ICTY, *The Prosecutor v. Hadžihasanović and Amir Kubura* ([Appeal](#)) IT-01-47-A (22 April 2008) para. 320.

¹⁸⁴⁸ *Lubanga* Sentence, para. 75.

¹⁸⁴⁹ *Ibid.*, para. 84.

¹⁸⁵⁰ *Katanga* Sentence, para. 74.

¹⁸⁵¹ *Lubanga* Sentence, para. 81.

¹⁸⁵² Dissenting opinion of Judge Odio Benito in *Lubanga* Sentence, para. 21.

¹⁸⁵³ *Lubanga* Sentence, para. 69.

¹⁸⁵⁴ *Ibid.*, para. 59.

regard to sexual violence as an aggravating factor under Rule 145(2)(b)(iv), the Chamber considered that it must be proven beyond reasonable doubt that: (i) there had been sexual violence against child soldiers; and (ii) that “this can be attributed to Mr Lubanga in a manner that reflects his culpability”.¹⁸⁵⁵ Accordingly, the Chamber examined whether the sexual violence occurred “in the ordinary course” of the crimes, whether he “ordered or encouraged” it, “was aware of it” or whether “it could otherwise be attributed to him in a way that reflects his culpability”.¹⁸⁵⁶

e) Mitigating Circumstances

Fifth, the mitigating circumstances expressly identified by the Rules are:¹⁸⁵⁷

- The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; and
- The convicted person’s conduct after the act, including any efforts by the person to compensate the victims or cooperate with the Court.¹⁸⁵⁸

Mitigating circumstances must be established with respect to a balance of probabilities, namely, that something is more likely than not.¹⁸⁵⁹

Mitigating circumstances are relevant only for diminishing the sentence and do not lessen the gravity of the crime.¹⁸⁶⁰ Rule 145(2)(a) does not provide an exhaustive list of mitigating factors and thus provides the Chamber with broad discretionary power. Factors that have been considered include: (i) necessity; (ii) peaceful motives and demobilisation orders;¹⁸⁶¹ (iii) cooperation with the Court;¹⁸⁶² (iv) personal circumstances of the convicted person (age, family life, the implication of and hardship as a result of lengthy separation from family and his reputation);¹⁸⁶³ (v) the convicted persons’ subsequent conduct (i.e. contribution to the peace and reconciliation process and statement of remorse and sympathy for the victims);¹⁸⁶⁴ and (vi) violation of the rights of the Defence.¹⁸⁶⁵

Cooperation with the Court was considered as a mitigating circumstance, pursuant to Rule 145(2)(a)(ii), in both *Lubanga* and *Katanga*. The Rules reference “any cooperation” with the Court without demanding the particular degree of cooperation required, in contrast to the Rules of Procedure and Evidence of the *ad hoc* Tribunals that

¹⁸⁵⁵ *Ibid.*, para. 69.

¹⁸⁵⁶ *Ibid.*, para. 74.

¹⁸⁵⁷ Rules of Procedure and Evidence, r. 145(2)(a).

¹⁸⁵⁸ *Ibid.*; Therefore, in the determination of the sentence, the Chamber can take into account facts that have not been possibly examined during the Trial such as cooperation with the Court, which may conflict with art. 76(1) of the Statute.

¹⁸⁵⁹ *Ibid.*, para. 34.

¹⁸⁶⁰ *Katanga Sentence*, para. 77.

¹⁸⁶¹ *Lubanga Sentence*, para. 83-87.

¹⁸⁶² *Ibid.*, paras. 88-91; *Katanga Sentence*, paras. 122-129.

¹⁸⁶³ *Ibid.*, paras. 78-88.

¹⁸⁶⁴ *Ibid.*, paras. 89-143.

¹⁸⁶⁵ *Ibid.*, paras. 130-140.

require a “substantial cooperation”.¹⁸⁶⁶ In *Katanga* it was concluded that cooperation need not be substantial but “must exceed mere good behaviour” in order to be considered a mitigating circumstance.¹⁸⁶⁷ Thus, the Chamber took into account his lengthy testimony, his readiness to answer questions from the parties and his voluntary offering of information, but did not take into account his attendance and good behaviour in court as it considered this to be “behaviour any Chamber may expect of any accused person”.¹⁸⁶⁸

In the *Lubanga* Sentencing Decision, the Chamber noted that despite “onerous circumstances”,¹⁸⁶⁹ the convicted person was “respectful and cooperative throughout the proceedings” and proved “notable cooperation with the Court”.¹⁸⁷⁰ The Chamber characterised his cooperation as “notable”, which appears to be a higher requirement than “any cooperation” as provided for in the Rules. In sum, cooperation with the Court has only been considered as a mitigating factor when that cooperation exceeded mere good behaviour or occurred in particularly difficult circumstances.

Reintegration and rehabilitation potential are also important factors. Indeed, the Chamber gave weight, although limited,¹⁸⁷¹ to Katanga’s family situation as a father of young children on two grounds, namely: (i) the well-being of the children who were not responsible for the crime of their father; and (ii) the reintegration guarantee that strong family ties ensure.¹⁸⁷²

The convicted person’s subsequent conduct, such as his contribution to the peace and reconciliation process and expressions of remorse or sympathy for the victims,¹⁸⁷³ can also be taken into account to mitigate the sentence. The Chamber has provided that for a convicted person’s contribution to the peace and reconciliation process to be considered, such efforts must be both palpable and genuine without the need to demand results.¹⁸⁷⁴ Regarding statements of remorse and sympathy for the victims, the Chamber has noted that such statements must be sincere in order to be taken into account.¹⁸⁷⁵ Expressions of sympathy or genuine compassion may also be taken into account,

¹⁸⁶⁶ *Ibid.*, para. 126: ‘on the one hand, the jurisprudence of the [ad hoc] tribunals progressively became more flexible and that, on the other, the Chambers have more leeway in the assessment of fact, and what does or does not amount to substantial cooperation.’, referring to the two following cases: ICTY, *Prosecutor v. Blagojević and Jokić* ([Judgment on Appeal](#)) IT-02-60-A (9 May 2007) para. 344; and ICTY, *Prosecutor v. Goran Jelisić* ([Judgment on Appeal](#)) IT-95-10-A (5 July 2001) para. 126.

¹⁸⁶⁷ *Katanga* Sentence, para. 127.

¹⁸⁶⁸ *Ibid.*, para. 128.

¹⁸⁶⁹ According to the Chamber, the convicted person was “put under considerable unwarranted pressure by the conduct of the prosecution during the trial”, *Lubanga* Sentence, para. 97.

¹⁸⁷⁰ *Ibid.*, para. 91.

¹⁸⁷¹ *Katanga* Sentence, para. 144.

¹⁸⁷² *Ibid.*, para. 85.

¹⁸⁷³ *Katanga* Sentence, para. 38.

¹⁸⁷⁴ *Ibid.*, para. 91.

¹⁸⁷⁵ *Katanga* Sentence, para. 117; ICTY, *Prosecutor v. Momir Nikolić* ([Sentencing](#)) IT-02-60/1-A (8 March 2006) para. 117; ICTY, *Prosecutor v. Dragan Nikolić* ([Sentencing](#)) IT-94-2-S (18 December 2003) para. 242; ICTY, *Prosecutor v. Plavšić* ([Sentencing](#)) IT-00-39&40/1-S (27 February 2003) para. 81.

although they will be given less weight than a statement of remorse,¹⁸⁷⁶ provided that they are also sincere, genuine and not mere convention.¹⁸⁷⁷

The Trial Chamber has also affirmed that¹⁸⁷⁸ if a convicted person's fundamental rights were violated, it would be appropriate to take that into account during sentencing.¹⁸⁷⁹ However, only violations to which he was subjected to whilst in detention on behalf of the Court can be ruled upon, since the Statute does not permit the Court to rule on the legality of a country's detention procedures or to consider whether they were flawed.¹⁸⁸⁰ Only the violations concerning a procedure undertaken before the Court during the detention on behalf of the Court may be taken into account.¹⁸⁸¹

Finally, it should be noted that, similarly to the determination of aggravating circumstances, the Chamber should carefully consider the weight to be given to each mitigating circumstance. For example, "necessity" has been considered as irrelevant as a mitigating factor to justify the practice of using child soldiers.¹⁸⁸² Furthermore, the *Lubanga* Chamber also considered that "peaceful motives" were of "limited relevance" given that child soldiers were persistently used and recruited despite the demobilisation orders and public statements he made.¹⁸⁸³

The *Katanga* Chamber noted that the convicted person's age (he was twenty-four at the time) should be considered in the context of several other local commanders who were also the same age and that his free will could not be questioned.¹⁸⁸⁴ Similarly, his "good" reputation as a combatant was irrelevant as this related to his military character,¹⁸⁸⁵ although his reputed "kindly and protective disposition" towards civilians in his community (not towards the population of victims of his crime) could be considered because other combatants tended to cause them trouble.¹⁸⁸⁶ However, these mitigating circumstances could not play a "determinant role considering the nature of the crimes of which he was convicted and which were committed against the majority Hema civilians of Bogoro" and were consequently given very limited weight.¹⁸⁸⁷

¹⁸⁷⁶ The Chamber bases its ruling on the ICTY jurisprudence in *The Prosecutor v. Strugar* ([Appeal](#)) IT-01-42-A (17 July 2008) para. 366.

¹⁸⁷⁷ *Katanga* Sentence, para. 118.

¹⁸⁷⁸ Recalling ICTR jurisprudence: ICTR, *The Prosecutor v. Laurent Semanza* ([Decision](#)) ICTR-97-20-A (31 May 2000) para. 6-b; ICTR, *The Prosecutor v. Jean Bosco Barayagwiza* ([Judgment](#)) ICTR-97-19-AR72 (31 March 2000) para. 75; ICTR, *The Prosecutor v. Kajelijeli* ([Judgement](#)) ICTR-98-44A-A (23 May 2005) para. 325.

¹⁸⁷⁹ *Katanga* Sentence, para. 136.

¹⁸⁸⁰ *Ibid.*, para. 136, p. 54.

¹⁸⁸¹ *Ibid.*, para. 137.

¹⁸⁸² *Lubanga* Sentence, para. 87.

¹⁸⁸³ *Ibid.*, para. 87.

¹⁸⁸⁴ *Katanga* Sentence, paras. 81-83.

¹⁸⁸⁵ *Ibid.*, para. 86.

¹⁸⁸⁶ *Ibid.*, paras. 87-88.

¹⁸⁸⁷ *Ibid.*, para. 88.

f) Participation and Other Factors

Sixth, there are other factors that may be considered during sentencing including level of participation and consequent damage caused. In *Katanga*, the Chamber recalled that Article 25 of the Statute (individual criminal responsibility) does not impose a “hierarchy of blameworthiness” or “a scale of punishment” between the liability of a perpetrator of a crime and that of an accessory to a crime. The Chamber thus concluded that the degree of participation and intent must be “assessed *in concrete*, on the basis of the Chamber’s factual and legal findings in its Judgment”.¹⁸⁸⁸

In *Lubanga*, the Chamber considered that intent and participation, as well as “his essential contribution” were an “important foundation for the sentence to be passed by the Chamber”.¹⁸⁸⁹ In determining Lubanga’s “essential contribution to the common plan”, the Chamber decided that it was sufficient that he “agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri” and “was aware that, in the ordinary course of events, [the conscription, enlisting and use of children under the age of 15] would occur” without needing to establish the intent to conscript, enlist and use children under the age of 15.¹⁸⁹⁰ The Chamber also took into account the position of authority held by Mr Lubanga within the UPC/FPLC to establish the degree of his participation in the crimes for which he was convicted.¹⁸⁹¹

Rule 145(1)(c) also refers to the extent of the damage caused. When considering the large-scale and widespread nature of the crimes committed, a precise number established beyond reasonable doubt¹⁸⁹² was not necessary in *Lubanga*. Instead, only a determination that the crime was widespread, with a “significant number of children [that] were used as military guards and as escorts or bodyguards” was necessary.¹⁸⁹³

g) Relationship between Factors

As is demonstrated above, it is difficult to draw a clear distinction between the different factors to be taken into account when determining sentence as many are closely linked. For instance, Article 78 of the Statute refers to the individual circumstances of the convicted person, which is very similar to the consideration of “age, education, social and economic condition of the convicted person” in Rule 145(1)(c), which in turn is closely tied to the mitigating circumstance linked to “individual circumstances” described in Rule 145(2)(a)(i). Consequently, on balance it appears that what matters is that the Court take into account all factors found in Rule 145 and Article 78 so that the sentence is proportionate to the offence committed and the culpability of the perpetrator. Thus, despite Articles 78 and Rule 145 providing a list of mandatory factors to be taken into account, in both *Lubanga* and *Katanga* it was not considered necessary, once the gravity of the crime had been considered and the individual circumstances of the

¹⁸⁸⁸ *Ibid.*, para. 61.

¹⁸⁸⁹ Lubanga Sentence, paras. 52-53.

¹⁸⁹⁰ *Ibid.*, para. 52.

¹⁸⁹¹ *Ibid.*, paras. 52, 97.

¹⁸⁹² We can deduct from this that the Chamber considers that every factor which will tend to worsen the sentence of the accused has to be proven beyond reasonable doubt similarly to aggravating circumstances and on the contrary to mitigating circumstances established on the basis of a balance of probabilities.

¹⁸⁹³ Lubanga Sentence, paras. 49-50.

perpetrator and the mitigating and aggravating circumstances were examined, to consider each other remaining factor separately.

In the *Lubanga* Sentencing Appeal, the Appeals Chamber considered three interpretations possible with regard to the interaction between the factors in Article 78(1) of the Statute and those of Rule 145(1)(c), namely: (i) the factors listed in Article 78(1)(a) are separate from those listed in Rule 145(1)(c) and so should be considered separately;¹⁸⁹⁴ (ii) some of the factors of Rule 145(1)(c) are subsumed by the factors set out in Article 78(1) of the Statute, but others remain separate factors;¹⁸⁹⁵ and (iii) the factors listed in Rule 145(1)(c) could be seen as part of, and must be taken into account for the purpose of assessing, the factors of Article 78(1).¹⁸⁹⁶

With that in mind, the Appeals Chamber determined that “regardless of which interpretation is followed, the issue is whether the Trial Chamber considered all the relevant factors and made no error in the weighing and balancing exercise of these factors in arriving at the sentence”.¹⁸⁹⁷ In a partially strong dissenting opinion, Judge Sang-Hyun Song opined that the Appeals Chamber should have provided further guidance in order to ensure consistent sentencing practice.¹⁸⁹⁸ He considers there to be three overall factors to take into account when determining a sentence: (i) the gravity of the crime, including the factors pursuant to Rule 145(1)(c); (ii) aggravating and mitigating circumstances pursuant to Rule 145(2); and (iii) the individual circumstances of the convicted person pursuant to Article 78(1) of the Statute, including the age, education, social and economic condition of the convicted person as set out in the Rule 145(1)(c).

In light of the Sentencing Appeal, it is clear that, whatever interpretation one takes, all factors enumerated in Article 78 and Rule 145 must be examined by the Chamber when determining the length of a sentence, even if they are not considered expressly.¹⁸⁹⁹ The Appeals Chamber will examine whether the Trial Chamber gave adequate weight to the requisite factors.¹⁹⁰⁰

h) Determination of the Length of the Sentence

A life sentence may be imposed when “justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances”.¹⁹⁰¹ Having both considered that there were no relevant aggravating circumstances, the *Lubanga* and *Katanga* Trial Chambers abandoned consideration of a life sentence.¹⁹⁰²

¹⁸⁹⁴ Lubanga Sentence Appeal Judgment, para. 62.

¹⁸⁹⁵ *Ibid.*, para. 63.

¹⁸⁹⁶ *Ibid.*, para. 64.

¹⁸⁹⁷ *Ibid.*, para. 66.

¹⁸⁹⁸ Partly dissenting opinion of Judge Sang-Hyun Song in Lubanga Sentence Appeal Judgment, para. 1.

¹⁸⁹⁹ Lubanga Sentence Appeal Judgment, paras. 70-71.

¹⁹⁰⁰ *Ibid.*, para. 72.

¹⁹⁰¹ Rules of Procedure and Evidence, r. 145(3).

¹⁹⁰² Lubanga Sentence, para. 96; Katanga Sentence, para. 144.

In *Lubanga*, the Prosecution argued that in order to avoid discrepancies in sentencing there should be a starting point for all sentences set at approximately 80% of the statutory maximum (24 years), which could then be lowered or increased based on aggravating or mitigating factors.¹⁹⁰³ However, the Chamber held that there is no established principle of law or relevant jurisprudence under Article 21 (applicable law) binding the judge to such a baseline, and that the sentence should always be proportionate to the crime pursuant to Article 81(2)(a), which tends to oppose the idea of a baseline.¹⁹⁰⁴ Instead, the Chamber takes into account all the factors, discussed above, to decide the length of sentence handed down.

In both *Lubanga* and *Katanga*, the joint sentence was equal to the highest individual sentence pronounced, but did not exceed it, as allowed by Article 78(3). *Lubanga* was sentenced to thirteen years' imprisonment for having committed, jointly with other persons, the crime of the conscription of children under the age of fifteen into the UPC; twelve years for enlisting children under the age fifteen into the UPC; and fourteen years for using them to actively participate in hostilities. The joint sentence imposed, and thus the total time of imprisonment, was fourteen years pursuant to Article 78(3) of the Statute.¹⁹⁰⁵ In his dissenting opinion, Judge Odio Benito considered that each conviction should have been given the same sentence—fifteen years—because despite being “separate and distinct” under the Rome Statute, they were all the result of the same plan implemented by *Lubanga* and his co-perpetrators which resulted in the damage to victims and their families.¹⁹⁰⁶

i) Deduction of Time Spent in Detention

Time may be deducted from the sentence, on a discretionary basis, for time spent in detention prior to sentence in accordance with an order of the Court or otherwise in connection to the underlying crime.¹⁹⁰⁷

Regarding time spent in detention pursuant to an order of the Court, the Chamber has concluded that time previously spent in detention is relevant when it was part of the “process of bringing the Appellant to justice for the crimes that form the subject-matter of proceedings before the Court”.¹⁹⁰⁸ Thus, in *Katanga*, the one-month period between the notification to the Congolese authorities and *Katanga*'s transfer to the Court was part of the process of bringing him to the Court and could therefore be deducted from his sentence.¹⁹⁰⁹

Concerning time spent in detention otherwise in connection to the underlying crime, the *Lubanga* Trial Chamber concluded that it had not been proven, on the balance of probabilities, that he had previously been detained in the

¹⁹⁰³ *Lubanga* Sentence, para. 92.

¹⁹⁰⁴ *Ibid.*, para. 93.

¹⁹⁰⁵ *Ibid.*, para. 99.

¹⁹⁰⁶ Dissenting opinion of Judge Odio Benito on the Decision on sentence in *Lubanga* Sentence, para. 25.

¹⁹⁰⁷ Rome Statute, art. 78(2).

¹⁹⁰⁸ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 OA 7 (13 February 2007) para. 121.

¹⁹⁰⁹ *Katanga* Sentence, paras. 158 and 168.

DRC for the conduct underlying the crimes he had been convicted for before the ICC and that this time could therefore not be deducted from his sentence.¹⁹¹⁰

It was affirmed in *Katanga* that, “only a period of detention for acts constituting the same crimes of which the accused person is convicted may be deducted from the sentence pronounced”.¹⁹¹¹ Thus, since the Chamber considered that time spent in detention in the DRC by Katanga was not for the conduct making up his convictions, this time could not be deducted from his sentence.¹⁹¹² Judge Van den Wyngaert gave a dissenting opinion on the matter. She considered it was unfair to hold the ambiguity in the reasons for his detention in the DRC against Katanga¹⁹¹³ and that it is sufficient that the “conduct underlying the crime” is “in principle” covered by the national investigation that justified the detention.¹⁹¹⁴

D. Appeal of the Sentence

a) Legal Framework and Procedure

The Prosecutor or the convicted person can appeal the sentencing decision on the grounds of disproportion between the crime and the sentence.¹⁹¹⁵ The Appeals Chamber’s primary task in this situation is to “review whether the Trial Chamber’s role made any errors in sentencing the convicted person” that may affect the propriety of the decision.¹⁹¹⁶

The Appeals Chamber’s role is not to determine which sentence is appropriate, unless it has found that the sentence imposed by the Trial Chamber was “disproportionate” to the crime and it cannot make a determination of whether the sentence is appropriate.¹⁹¹⁷ Article 83(2) of the Statute further specifies that the Appeals Chamber can amend the sentence or order a new trial before a different Trial Chamber if it finds that the proceedings appealed were unfair in a way that affected the reliability of the sentence, or that the sentence appealed from was materially affected by error of fact or law or procedural error. The Appeals Chamber may also remand a factual issue to the original Trial Chamber for it to determine and report back accordingly, or may itself call evidence to determine the issue.

The sentencing decision of the Appeals Chamber, which is vested with all the powers of the Trial Chamber,¹⁹¹⁸ is taken by a majority of the judges and is delivered in open court pursuant to Article 83(4) of the Statute, with or without the presence of the person convicted pursuant to Article 83(5) of the Statute. The judgment must state the reasons on which it is based pursuant to Article 83(4) of the Statute. When the person convicted has appealed the sentence, it cannot be amended to his or her detriment pursuant to Article 83(2) of the Statute.

¹⁹¹⁰ Lubanga Sentence, para. 102.

¹⁹¹¹ *Ibid.*, para. 159.

¹⁹¹² *Ibid.*, para. 166.

¹⁹¹³ *Ibid.*, para. 3.

¹⁹¹⁴ *Ibid.*, para. 4.

¹⁹¹⁵ Rome Statute, art. 81(2).

¹⁹¹⁶ Lubanga Sentence Appeal Judgment, para. 2.

¹⁹¹⁷ Rome Statute, art. 83(3).

¹⁹¹⁸ *Ibid.*, art. 83(1).

During the appeal procedure, the convicted person remains in custody pursuant to Article 81(3)(a) of the Statute but the sentence is suspended during the period allowed for the appeal and for the duration of the appeal proceedings, pursuant to Article 81(4) of the Statute. Nevertheless, according to Article 81(3)(b) when a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except if the Prosecutor is also appealing, then the release may be subject to the condition of Article 81(3)(c).

Pursuant to Rule 149 of the Rules, the rules governing proceedings and the submission of evidence in the Appeals Chamber are the same as those applied in the Pre-Trial Chamber and Trial Chamber.

An appeal against a sentence can be filed with the Registrar within 30 days from the date on which the party filing the appeal is notified of the sentence, except if the time limit is extended for good cause. Once this time limit is over, the sentence is regarded as final.¹⁹¹⁹ The Registrar notifies all parties who participated in the proceedings before the Trial Chamber that an appeal has been filed.¹⁹²⁰ Any party who has filed an appeal may discontinue the appeal at any time before the judgment has been delivered and under the conditions set out in Rule 152.

E. Standard of Review for Appeals against Sentencing Decisions

The Appeals Chamber has considered that the standard of review established by the Appeals Chamber in relation to appeals raised pursuant to Article 82(1) of the Statute also applies to sentencing decisions.¹⁹²¹ The conditions justifying appellate interference are: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on a patently incorrect conclusion of fact or procedural error; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.¹⁹²²

A Trial Chamber's failure to consider one of the mandatory factors related to sentencing may be considered to be a legal error. For example, the *Lubanga* Sentencing Appeal noted the Trial Chamber's failure to consider one of the mandatory factors listed in Rule 145(1)(b) amounted to a legal error as this forms part of the overall framework provided for a Trial Chamber's determination of a proportionate sentence.¹⁹²³ However, the Appeals Chamber further recalled the discretionary power of the Trial Chamber when giving weight and balancing to each individual factor. As such, the Appeals Chamber will intervene only when the Trial Chamber's exercise of discretion in determining the sentence is: (i) based on an erroneous interpretation of the law; (ii) exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, is so unreasonable as to constitute an abuse of discretion.¹⁹²⁴

¹⁹¹⁹ Rules of Procedure and Evidence, r. 150.

¹⁹²⁰ *Ibid.*, r. 151.

¹⁹²¹ *Lubanga Sentence Appeal Judgment*, paras. 41-42.

¹⁹²² Rome Statute, art. 83(2).

¹⁹²³ *Lubanga Sentence Appeal Judgment*, para. 42.

¹⁹²⁴ *Ibid.*, paras. 43-44.

Finally, as regards the material effect of an error of law, fact or procedural error, as provided for in Article 83(2), the Appeals Chamber has concluded that such an error is only established if the Trial Chamber's exercise of discretion led to a disproportionate sentence.¹⁹²⁵

In principle, it is the appellant that must demonstrate an error arising from the Sentencing Decision. Errors, whether factual or legal, made in the Conviction Decision are, in principle, immaterial for the purposes of the Sentencing Appeal.¹⁹²⁶ Nevertheless, where arguments are raised for the first time in the Sentencing Appeal but which challenge findings made in the Conviction Decision, the Appeals Chamber will "decide in the abstract whether they can be considered in the context of the present appeals".¹⁹²⁷

F. Revision of the Sentence

The sentence can also be revised pursuant to Article 84 of the Statute, on three possible grounds: (i) new evidence has been discovered that was not available at the time of the trial, where such unavailability was not wholly or partially attributable to the party making application, and is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (ii) it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; or (iii) one or more of the judges who participated in the confirmation of the charges or conviction has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office.

The application for revision is made to the Appeals Chamber by the convicted person or, after death, by spouses, children, parents or a person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, pursuant to Article 84(1) of the Statute. The application for revision shall be in writing, setting out the grounds on which the revision is sought with the supporting material available, pursuant to Rule 159(1) of the Rules.

The Appeals Chamber, if it finds that the application has merit, can: (i) reconvene the original Trial Chamber; (ii) constitute a new Trial Chamber; or (iii) retain jurisdiction over the matter. In any case, the Appeals Chamber will hear the parties and determine whether the judgment should be revised.¹⁹²⁸ Pursuant to Rule 159(2) and (3), the decision on whether the application has merit will be taken by a majority of the judges of the Appeals Chamber, supported by reasons in writing and be sent to the applicant and, if possible, to all the parties. Pursuant to Rule 161(2) and (3), the Chamber exercises all the powers of the Trial Chamber and the rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers, and the determination of the revision is governed by the applicable provisions of Article 83(4), discussed above under the appeal procedure.

¹⁹²⁵ *Ibid.*, para. 45.

¹⁹²⁶ *Ibid.*, para. 48.

¹⁹²⁷ *Ibid.*, para. 50.

¹⁹²⁸ Rome Statute, art. 84(2); Rules of Evidence and Procedure, r. 161(1)

G. Enforcement Overview

States have an important role to play in making sure the sentences delivered by the ICC are carried out. A list of States that have declared a willingness to accept sentenced persons is established and maintained by the Registrar.¹⁹²⁹

A person sentenced to imprisonment shall be designated a State from the list of States that have indicated acceptance of such persons.¹⁹³⁰ The State will then either accept or reject the person.¹⁹³¹ When designating a State, or any conditions to be attached, the Court must take into account five factors, namely: (i) the principle that States Parties should share responsibility for enforcing sentences; (ii) the application of international treaty standards on treatment of prisoners; (iii) the views of the sentenced person; (iv) the nationality of the sentenced person; and (v) other factors concerning the circumstances of the crime or person, or effective enforcement of the sentence.¹⁹³²

If the sentenced person is subject to fines and forfeiture, States Parties must give effect to orders from the Court in accordance with their domestic law.¹⁹³³ If a State Party cannot give effect to a forfeiture order, it must take steps to recover the property, proceeds or assets ordered by the Court.¹⁹³⁴ The property or proceeds from sale of assets must be transferred to the Court.¹⁹³⁵

Despite these provisions referring to States Parties, Ukraine may still be bound to follow them. It seems Ukraine would not be bound to execute the order, and particularly not to transfer the funds to the Court. However, Ukraine is obliged to provide assistance to the Court in the identification, tracing and freezing or seizing of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties, as well as any other assistance as necessary.¹⁹³⁶ There would be no obligation on Ukraine, it seems, to enforce an order for a fine or accept a prisoner of the Court. Ukraine may, however, enter into *ad hoc* agreements with the Court concerning these matters.¹⁹³⁷

For reparations, where a Court makes an order, the Rome Statute provides that a State Party shall give effect to a decision under this Article.¹⁹³⁸ This expressly applies to States Parties; however, Article 75 also provides that the Court may seek to make use of measures in Part 9 to give effect to a reparations order. This would bind Ukraine to comply with the Court's requests in a broad sense. This would include the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture,¹⁹³⁹ and

¹⁹²⁹ Rules of Procedure and Evidence, r. 200, permits the Court to enter into agreements with states concerning persons sentenced by the Court.

¹⁹³⁰ Rome Statute, art. 103(1)(a).

¹⁹³¹ *Ibid.*, art. 103(1)(c).

¹⁹³² *Ibid.*, art. 103(3).

¹⁹³³ *Ibid.*, art. 109(1).

¹⁹³⁴ *Ibid.*, art. 109(2).

¹⁹³⁵ *Ibid.*, art. 109(3).

¹⁹³⁶ *Ibid.*, art. 93(1)(k) and (l).

¹⁹³⁷ *Ibid.*, art. 87(5); Rules of Procedure and Evidence, r. 200.

¹⁹³⁸ Rome Statute, art. 75(5).

¹⁹³⁹ *Ibid.*, art. 93(1)(k).

“[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”.¹⁹⁴⁰ It therefore seems that the ICC could reasonably request that Ukraine execute steps to secure a reparations order, and in doing so, effectively execute an order for reparations. Thus, there seems little difference in the ratification of this provision as opposed to Ukraine’s present situation; the obligation on Ukraine would however be apparent and this ambiguity could be resolved should the Government decide not to argue against the duty to execute certain requests to assist with reparations under Part 9.

¹⁹⁴⁰ *Ibid.*, art. 93(1)(l).

Part Five: Victims and Witnesses

I. Victim Participation and Their Views at the ICC

A. Introduction

This section looks at the different ways victims and witnesses of international crimes can engage with the ICC. The section begins by looking at the different types of victims recognised by the ICC, before addressing how potential victims can achieve the official status of a victim. The section then outlines the process that allows victims to participate in ICC proceedings, before focusing on the measures available to assist and protect victims and witnesses who do participate. Finally, the section explores the concept of reparations at the ICC, focusing specifically on the types of reparations available and who can benefit from them.

B. Victims

The ICC recognises two types of victims for the purposes of participation in ICC proceedings:

Individuals who have suffered harm as a result of one of the ICC crimes (genocide, crimes against humanity and war crimes); and
Organisations or institutions, when their property dedicated to certain purposes (religion, education, art, science or charitable and humanitarian purposes, or historic monuments or hospitals) is harmed as a result of one of the ICC crimes.¹⁹⁴¹

There are two schemes of participation for victims before the ICC: the submission of “representations” and “observations”, and participation in the strict sense of being physically present at the Court.¹⁹⁴² First, the Rome Statute permits the representations of victims on the authorisation of investigations initiated by the Prosecutor.¹⁹⁴³ Likewise, Article 19(3) of the Rome Statute permits the representations of victims with regards to challenging the jurisdiction of the Court or the admissibility of a case. Second, as regards the participation scheme, Article 68(3) of the Rome Statute provides for wide-ranging victim participation before the seat of the Court. Finally, as will be discussed in detail at the end of this section, a separate victim reparation scheme exists under the Article 75 of the Rome Statute.

¹⁹⁴¹ International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3 (Part.II-A) (2002) (“Rules of Procedure and Evidence”) rule 85; [‘A Guide for the Participation of Victims in the Proceedings of the Court’ \(ICC\)](#).

¹⁹⁴² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, signed by Ukraine on 20 January 2000) 2187 UNTS 90 (“Rome Statute”) art. 68(3); Rules of Procedure and Evidence, r. 89; Carsten Stahn, Hector Olasolo and Kate Gibson ‘Participation of victims in pre-trial proceedings of the ICC’ (2006) 4 *Journal of International Criminal Justice*, pp. 219, 224; Gilbert Bitti and Hakan Friman, ‘Participation of victims in the proceedings’, in Lee Roy et al (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, New York, 2001) pp. 456 and 459.

¹⁹⁴³ Rome Statute, art. 15(3).

a) Qualifying as a Victim

A victim must be a natural or legal person and able to prove that he, she or it (in the case of organisations or institutions) suffered harm resulting from a crime falling within the ICC's jurisdiction (see Parts One and Two).¹⁹⁴⁴ Moreover, victims must be able to show that a causal link exists between the crime and the harm suffered.¹⁹⁴⁵

If a victim believes they are able to prove they qualify for the status of a victim and wish to participate, the individual, organisation or institution should submit a request to the Registry subdivision named the VPRS in writing, preferably before the beginning of the phase of the proceedings in which they wish to be involved.¹⁹⁴⁶ Once an application for participation is received at the Court, it will be passed for consideration to a Chamber of judges that is dealing at that time with the situation or case.

The Chamber will decide on a case-by-case basis whether the applicant meets the criteria to be considered a victim.¹⁹⁴⁷ Once the applicant is considered to be a victim within the meaning of the Rome Statute, the Chamber will then move to consider whether the victim meets the criteria to be entitled to participate in proceedings.

b) Victim Participation in Proceedings

When deciding whether to allow the victim to participate in proceedings before the Court, the Chamber must make an assessment based on the individual circumstances of the application. There are three requirements for participation listed in Article 68(3) of the Statute:

Whether there is sufficient personal interest for participation;¹⁹⁴⁸
Whether such participation is appropriate at the procedural stage in question;¹⁹⁴⁹ and
Whether it would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁹⁵⁰

¹⁹⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on Victims' Participation](#)) ICC-01/04-01/06-1119 (18 January 2008) ("Lubanga Participation Decision") paras. 87-94; *Situation in the Democratic Republic of the Congo* ([Decision on the Applications for Participation](#)) ICC-01/04-101-Corr (17 January 2006) ("Congo Participation Decision") para. 79; *Situation in Uganda* ([Decision on Victims' Applications](#)) ICC-02/04-101 (10 August 2007) ("Uganda Participation Decision").

¹⁹⁴⁵ *Ibid.*

¹⁹⁴⁶ 'Forms' (ICC).

¹⁹⁴⁷ Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2012) 44 Case W. Res. J. Int'l L. 475, pp. 481-482.

¹⁹⁴⁸ The personal interest must relate specifically to the concrete proceedings against a particular person. The key question is whether the contents of the victim's application either establish that there is a real "evidential link" between the victim and the evidence which the Court will be considering, leading to the conclusion that the victim's personal interests are affected, or, determine whether the victim was affected by an issue arising during the trial because his or her personal interests are in a real sense engaged by it: *Lubanga Participation Decision*, para. 95.

¹⁹⁴⁹ There is a tendency to focus not on the appropriateness of the participation and its consistency with fair trial standards and rights of the accused, but rather define the modalities of participation to permit the accused's interests to be safeguarded: *Congo Participation Decision*, para. 58: '...the core consideration, when it comes to determining the adverse impact on the investigation alleged by the Office of the Prosecutor, is the extent of the victim's participation and not his or her participation as such.'

¹⁹⁵⁰ Rome Statute, art. 68(3).

If the Chamber is satisfied that, based on the criteria above, the individual is entitled to participate in Court proceedings, the next step is for the Chamber to decide the way, or the mode, in which the participation could take place. As seen in the examples below, certain forms of participation can only take place when specific criteria have been met. In every instance, participation is solely at the discretion of the Chamber.¹⁹⁵¹

c) Ways of Participating

As identified in the previous section, victims can actively participate in proceedings at the ICC. This section identifies the specific ways in which victims can participate in such proceedings if permitted to do so. The means of participation are numerous, from the participation of lawyers to victims making statements during the trial, or conducting investigations to calling witnesses during a trial.

i. Participation of Legal Representatives

The legal representatives of victims may attend and participate in proceedings only in accordance with an express order handed down by the Chamber.¹⁹⁵² Specifically, legal representatives can participate,¹⁹⁵³ question witnesses, experts or the accused¹⁹⁵⁴ only if, in the view of the Chamber, it would assist in the determination of the truth, and if in this sense the Court has “requested” the evidence.¹⁹⁵⁵ The Court can also allow appropriate questions to be put forward by victims whenever the evidence under consideration engages their personal interests.¹⁹⁵⁶

ii. Leading Evidence

The right to lead evidence of guilt or innocence lies primarily with the parties.¹⁹⁵⁷ However, the Rome Statute and the Rules do not preclude the possibility of victims leading evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during trial proceedings.¹⁹⁵⁸ Moreover, in *Lubanga*, the Appeals Chamber expressly recognised the right of victims to lead evidence pertaining to the guilt or innocence as well as to challenge the admissibility or relevance of the evidence during trial.¹⁹⁵⁹

¹⁹⁵¹ Rules of Procedure and Evidence, r. 89(1); *The Prosecutor v. Germain Katanga and Mathieu Chui* ([Decision on the Modalities of Victim Participation at Trial](#)) ICC-01/04-01/07 (22 January 2010) (“Katanga Modalities”), para. 45.

¹⁹⁵² Rules of Procedure and Evidence, r. 91(2); Katanga Modalities, para. 45.

¹⁹⁵³ Rules of Procedure and Evidence, r. 91(1); Katanga Modalities, para. 45.

¹⁹⁵⁴ Rules of Procedure and Evidence, r. 91(3)(a); Katanga Modalities, para. 45.

¹⁹⁵⁵ Rome Statute, art. 69(3); Rules of Procedure and Evidence, r. 91(3); Katanga Modalities, para. 46.

¹⁹⁵⁶ Katanga Modalities, para. 46.

¹⁹⁵⁷ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 OA 9 OA 10 (11 July 2008) para. 93.

¹⁹⁵⁸ *Ibid.*, para. 94.

¹⁹⁵⁹ *Ibid.*, para. 105.

iii. Victims and Victim Representative Making Statements at Trial

Victims are expressly authorised to make statements during proceedings if permission has been sought from the Chamber for this purpose.¹⁹⁶⁰ In most cases, if not all, the Chamber permitted the legal representatives of the victims to make opening and closing statements at the trial.¹⁹⁶¹

iv. Questioning a Witness, an Expert or the Accused

When a legal representative wishes to question a witness, expert or the accused, he or she must apply to the Chamber to do so.¹⁹⁶² The Chamber will then issue a ruling, while taking into account “the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to [the Rome Statute provision which permits victims to participate in proceedings] Article 68, paragraph 3”.¹⁹⁶³ The questioning of witnesses is one of the ways in which the legal representative of a victim may present their views and concerns before the Chamber.¹⁹⁶⁴

In practice, this means they will have an opportunity to question witnesses after the Prosecution’s examination-in-chief or after its cross-examination of a Defence witness.¹⁹⁶⁵ Any application for this purpose must state how the intended question is relevant and must comply with a procedure that has been defined by the Chamber, whether for questions relevant to compensation for victims (known as “reparations”),¹⁹⁶⁶ anticipated questions¹⁹⁶⁷ or unanticipated questions.¹⁹⁶⁸ Anticipated questions are pre-determined questions that a victim’s lawyer or victim knows in advance they may wish to ask of a witness, whereas unanticipated questions are questions that the victim or lawyer did not expect to need to put to a witness, but their evidence in Court directly affects the interests of a victim.¹⁹⁶⁹

v. Tendering Incriminating or Exculpatory Evidence

The Rome Statute does not explicitly state that there is a right of victims to call a witness or to tender documentary evidence.

¹⁹⁶⁰ Rules of Procedure and Evidence, r. 89(1).

¹⁹⁶¹ Katanga Modalities, para. 68; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Corrigendum Directions](#)) ICC-01/04-01/07-1665-Corr (1 December 2009) paras. 1 and 2; *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on the schedule and conduct of the confirmation hearing](#)) ICC-01/04-01/06-678 (07 November 2006) para 4; *The Prosecutor v. Callixte Mbarushimana*, ([Transcript of Confirmation of Charges Hearing](#)) ICC-01/04-01/10-T-6-Red2-ENG (16 September 2011) pages 38-49 for the opening statement by the Legal Representatives of Victims.

¹⁹⁶² Rules of Procedure and Evidence, r. 91(3)(a).

¹⁹⁶³ Katanga Modalities, para. 73.

¹⁹⁶⁴ *Ibid.*, para. 74.

¹⁹⁶⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Corrigendum Directions](#)) ICC-01/04-01/07-1665-Corr (1 December 2009) paras. 18, 37 and 42.

¹⁹⁶⁶ Decision on rule 140, paras. 84-86.

¹⁹⁶⁷ *Ibid.*, paras. 87-88.

¹⁹⁶⁸ *Ibid.*, para. 89; Katanga Modalities, para. 77.

¹⁹⁶⁹ *Ibid.*, paras. 87-89.

The Court has stated that the Chamber is authorised to request the submission of all evidence that it considers necessary for the determination of the truth. Accordingly, as outlined above, it has ruled that, in order to allow victims to participate meaningfully in the trial, the Trial Chamber may, where appropriate, authorise them to tender evidence. Nevertheless, it stated that the combined effect of Articles 68(3) and 69(3) of the Statute and Rule 91(3) of the Rules is that the legal representatives of the victims must seek the prior leave of the Trial Chamber for this purpose.¹⁹⁷⁰

In the *Lubanga* case, victims were permitted to introduce evidence and to challenge the admissibility of evidence. The Trial Chamber said that the right to introduce evidence during trials before the Court is not limited to the parties.¹⁹⁷¹

1) Calling One or More Victims to Give Evidence at Trial

The Chamber will grant a legal representative for victims the opportunity to call one or more victims to give evidence under oath at trial.¹⁹⁷² There seems to be no distinction drawn between victims and witnesses who the legal representative wishes to call.¹⁹⁷³ In *Lubanga*, the Chamber permitted three victims to give evidence under oath at the conclusion of the Prosecution's case.¹⁹⁷⁴ On the other hand, the Court will not authorise testimony from victims who wish to remain anonymous to the Defence.¹⁹⁷⁵

vi. Victim as Witness for a Party

The ICC considers that neither the Statute nor the Rules prohibit victim status from being granted to a person who is already a prosecution or defence witness.¹⁹⁷⁶ Similarly, Rule 85 of the Rules does not prohibit a person who has been granted status of “victim” from later giving evidence on behalf of a party.¹⁹⁷⁷

1) The Possibility of Tendering Documentary Evidence

The Statute does not preclude the possibility of a legal representative of a victim asking for documentary evidence to be admitted at trial.¹⁹⁷⁸ To do this, the victim must make a written application showing how the documents they intend to present are relevant and how they may contribute to the determination of the truth.¹⁹⁷⁹

¹⁹⁷⁰ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 OA 9 OA 10 (11 July 2008) paras. 86-105; Katanga Modalities, para. 81.

¹⁹⁷¹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on Victims' Participation](#)) ICC-01/04-01/06- 1119 (18 January 2008) para. 108.

¹⁹⁷² Katanga Modalities, para. 86; Decision on rule 140, paras. 7, 19-32 and 45-48.

¹⁹⁷³ Katanga Modalities, para. 85.

¹⁹⁷⁴ *The Prosecutor v. Thomas Lubanga Dyilo* (Decision) ICC-01/04-01/06-2002-Conf (26 June 2009) (*see also* the public version filed on 9 July 2009, ICC-01/04-01/06-2032).

¹⁹⁷⁵ Katanga Modalities, para. 92.

¹⁹⁷⁶ *Ibid.*, para. 110.

¹⁹⁷⁷ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision on certain practicalities](#)) ICC-01/04- 01/06-1379 (5 June 2008); Katanga Modalities, para. 110.

¹⁹⁷⁸ Katanga Modalities, para. 98.

¹⁹⁷⁹ *Ibid.*, para. 99.

vii. Challenging Admissibility

A challenge to the admissibility and relevance of evidence [Article 69(4)] is another way victims can express their views and concerns during a trial.¹⁹⁸⁰ Challenges must permit a victim, who has information that evidence cannot be admitted or is irrelevant, to be transmitted to the Chamber.

viii. Disclosure of Incriminating or Exculpatory Information

There is no obligation on the victims and their legal representatives to disclose to the Defence any evidence in their possession, whether incriminatory or exculpatory in nature.¹⁹⁸¹ The Court noted in *Katanga* that neither the Statute nor the Rules impose such an obligation.¹⁹⁸² The Court reasoned that, since the victims do not have a right to present evidence, but rather only the possibility of applying to the Chamber for leave to present evidence, there can be “no justification” for obliging victims to disclose to the parties any evidence in their possession.¹⁹⁸³ Notably, however, the Appeals Chamber said that:

[i]f the Trial Chamber decides that the evidence should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced and depending on the circumstances it could order one of the parties to present the evidence, call the evidence itself, or order the victims to present the evidence.¹⁹⁸⁴

ix. Possibility of Conducting Investigations

The fact that victims could present incriminatory or exculpatory evidence during the trial does not mean they are entitled to conduct investigations in order to establish the guilt of the accused.¹⁹⁸⁵ This would be tantamount to appointing assistant prosecutors and could adversely affect the fairness of proceedings. Nevertheless, as indeed they themselves propose in their observations, the legal representatives of the victims may conduct investigations in order to collect information with a view to establishing the existence, nature and extent of the harm suffered by their clients.

x. Access to Confidential Documents and Evidence in the Record

The Rules permit victims or their legal representatives to consult the record of the proceedings, subject, where appropriate, to any restrictions concerning confidentiality or the protection of national security information.¹⁹⁸⁶ In order to promote effective participation, the *legal representative* must be able to consult all the public and confidential decisions and documents in the record of the case, with the exception of any document classified as *ex parte*.¹⁹⁸⁷

¹⁹⁸⁰ *Katanga Modalities*, para. 104.

¹⁹⁸¹ *Ibid.*, para. 105.

¹⁹⁸² *Ibid.*

¹⁹⁸³ *Ibid.*

¹⁹⁸⁴ *Ibid.*, para. 106.

¹⁹⁸⁵ *Ibid.*, para. 102.

¹⁹⁸⁶ Rules of Procedure and Evidence, r. 131(2); *Katanga Modalities*, para. 119.

¹⁹⁸⁷ *Katanga Modalities*, paras. 121-22.

C. Other Ways Victims Can Participate in ICC Proceedings

In addition to the examples above, there are a number of other ways victims may be able to participate in proceedings at the ICC, including:¹⁹⁸⁸

- Attending and participating in the hearings before the Court;¹⁹⁸⁹
- Presenting their views and concerns;¹⁹⁹⁰
- Making representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation;¹⁹⁹¹
- Requesting a Chamber to order measures to protect their safety, psychological well-being, dignity and privacy;¹⁹⁹² and
- Requesting a Chamber to order special measures.¹⁹⁹³

D. Facilitating Victim Participation at the ICC

There are a number of ICC bodies established to assist victims and to facilitate their participation before the ICC, including The OPCV, the VPRS, and the VWU. This section will outline the activities undertaken by each of these bodies, as well as address the important role civil society plays in assisting victims and witnesses before the ICC.

a) ICC Entities

There are a number of ICC bodies established to assist victims at the Court. The OPCV¹⁹⁹⁴ is responsible for helping victims exercise their rights and for representing them before the Chambers.¹⁹⁹⁵ In addition, before the Chamber has

¹⁹⁸⁸ Participation of victims in proceedings has a legal basis in Art. 68(3) of the Rome Statute, which reads as follows: Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

¹⁹⁸⁹ Rules of Procedure and Evidence, r. 91(2).

¹⁹⁹⁰ Rome Statute, art. 68(3); Rules of Procedure and Evidence, r. 89.

¹⁹⁹¹ Rome Statute, art. 15(3); Rules of Procedure and Evidence, r. 50(3).

¹⁹⁹² Rome Statute, art. 68(1); Rules of Procedure and Evidence, r. 87(1).

¹⁹⁹³ Rome Statute, art. 68(1); Rules of Procedure and Evidence, r. 88(1).

¹⁹⁹⁴ The OPCV was established on 19 September 2005.

¹⁹⁹⁵ ICC, [Regulations of the Court](#), ICC-BD/01-01-04, (adopted 26 May 2004) (“Regulations of the Court”) regs 80 and 81. Specifically, in accordance with Regulation 81(4) of the Regulations of the Court, the tasks of the Office of Public Counsel for victims shall include:

- (a) Providing general support and assistance to the legal representative of victims and to victims, including legal research and advice and, on the instruction or with the leave of the Chamber, advising on and assisting with the detailed factual circumstances of the case;
- (b) Appearing, on the instruction or with the leave of the Chamber, in respect of specific issues;
- (c) Advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims’ applications to participate in the proceedings, when applications pursuant to rule 89 are pending, or when a legal representative has not yet been appointed;
- (d) Acting when appointed under regulation 73 or regulation 80; and

allowed the victims to participate in proceedings, the OPCV protects their interests by attempting to raise general awareness about victims' issues and by offering its legal expertise to potential victims.¹⁹⁹⁶

The VPRS¹⁹⁹⁷ is a specialised section within the Registry responsible for helping victims and groups of victims fully exercise their rights under the Rome Statute and in obtaining legal assistance and representation, including, where appropriate, from the OPCV. The VPRS is also in charge of disseminating the application forms required for participation and reparations, as well as for assisting victims fill them in.

The VWU makes it possible for victims and witnesses to testify and/or to participate in the proceedings while mitigating any possible adverse effects incurred by their status. The VWU is responsible for providing protective measures, security arrangements, counselling and other means of assistance to witnesses and victims appearing before the Court and others who are at risk on account of testimony. The VWU also takes other appropriate measures to protect the safety, dignity, privacy, and physical and psychological well-being of victims, witnesses and other persons at risk. Finally, the VWU advises participants in the proceedings, as well as organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance.¹⁹⁹⁸

b) The Role of Civil Society

Members of civil society can play a number of important roles in relation to the proceedings before the ICC. As noted in Parts Three and Four, NGOs, in addition to serving as a link between the Court, victims and witnesses, can provide information about the Court to interested parties, provide information to the Office of the Prosecutor since they often have knowledge of the situation and direct contact with the victims, and submit *amicus curiae*. Local NGOs are especially important in certain cases considering the distance between the ICC and affected communities, and in others due to the lack of cooperation between the Court and the State concerned.

NGOs can send the information gathered from victims and witnesses to the Court, inform victims and witnesses about different possibilities of participation in the Court proceedings, and help victims and witnesses get legal representation to represent them at any stage of the trial. Considering the broad role NGOs can play, it is essential that they are able to provide accurate information to victims and witnesses, which is possible only if they have knowledge about the Court and proceedings taking place before it.

(e) Representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice.

¹⁹⁹⁶ Carsten Stahn and Göran Sluiter, *The Emerging Practice of the International Criminal Court* (Brill, 2009) p. 694.

¹⁹⁹⁷ The VPRS is established on the basis of the Regulation 86(9) of the Regulations of the Court.

¹⁹⁹⁸ Rome Statute, art. 43(6).

E. ICC Bodies' Approach to Victim Participation

Due to the time and resource constraints of the Court, the VPRS must, when and if possible, group applications according to common themes such as time, circumstance or issue.¹⁹⁹⁹ In *Bemba*, 722 applications to participate in the proceedings were grouped into four according to the location of the harm.²⁰⁰⁰ Remarkably, in *Katanga*, there were around 4,121 participating victims.²⁰⁰¹ The impact of this on trials is clear; there is the potential for delayed, cumbersome trials that involve such a high number of victims being permitted to participate in some form. There is also the unfortunate delay for victims who may need to wait over two years for their status as victims to be approved.²⁰⁰² After obtaining victim status, they were jointly represented (as a collective) by a legal representative.²⁰⁰³ As of November 2011, the ICC had received a total 9,910 applications for victim participation.²⁰⁰⁴

The Court changed its position in 2011 when it realised it could no longer ignore the difficulties posed by the sheer number of victims applying to participate in proceedings.²⁰⁰⁵ In *Gbagbo*, the Court implemented a partly collective application approach, whereby victims would be encouraged to group together.²⁰⁰⁶ In *Lubanga*, the representatives of the four victims were allowed to present their views individually through three legal representatives in written and oral form on the procedural and substantive issues prior to the trial process.²⁰⁰⁷

¹⁹⁹⁹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06-1022 (9 November 2007) para. 19; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision on the Treatment of Applications for Participation](#)) ICC-01/04-01/07-933-tENG (26 February 2009) para. 4; *The Prosecutor v. Jean-Pierre Bemba Gombo* ([Decision on 722 applications by victims to participate in the proceedings](#)) ICC-01/05-01/08-1017 (18 November 2010) para. 62.

²⁰⁰⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo* ([Decision on 722 applications by victims to participate in the proceedings](#)) ICC-01/05-01/08-1017 (18 November 2010) para. 62.

²⁰⁰¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Order](#)) ICC-01/04-01/07-1328 (22 July 2009) paras. 2-4; International Criminal Court 'Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings' ICC-ASP/11/22 (5 November 2012) para. 4, n. 6.

²⁰⁰² Mariana Pena, 'Victim Participation in the International Criminal Court: Achievements Made and Challenges Lying Ahead' (2009) 16 ILSA J. Int'l. & Comp. L. 497, p. 512.

²⁰⁰³ REDRESS Trust, '[The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future](#)' (October 2012), p. 16.

²⁰⁰⁴ Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2012) 44 Case W. Res. J. Int'l L. 475, p. 482.

²⁰⁰⁵ In the first half of 2011, the number of applications submitted per month increased by 207% from the average number submitted in the whole of 2010: International Criminal Court, Assembly of States Parties, 'Report of the Bureau on Victims and Affected Communities and Trust Fund for Victims' ICC-ASP/10/31 (5 November 2012) p. 3.

²⁰⁰⁶ *The Prosecutor v. Laurent Koudou Gbagbo* ([Second Decision on Issues Related to the Victims' Application Process](#)) ICC-02/11-01/11 (5 April 2012) para. 10:

The details required in the Registry's proposed forms would be sufficient to determine whether an applicant qualifies as a victim under rule 85. The information contained in the Registry's proposed individual application fulfilled the requirements of Regulation 86 by providing details such as the victim's identity and address, a description of the harm suffered from a crime within the Court's jurisdiction, a description of the incident, supporting documentation, and information on the affected personal interests of the victim. Further, the collective application form contains sufficiently detailed information to allow the legal representative to fulfil their obligation pursuant to Art. 68(3) of the Statute and rules 90 and 91 of the rules.

²⁰⁰⁷ E.g. *The Prosecutor v. Thomas Lubanga Dyilo* ([Second Review](#)) ICC-01/04-01/06-924 (11 June 2007).

The Kenya Cases further refined the victim application process.²⁰⁰⁸ The new approach implemented a dual approach that is dependent on the level of the victims' desired participation.²⁰⁰⁹ First, for victims wishing to present their views individually in Court or via video-link, they should go through the procedure under Rule 89 of the Rules of Procedure and Evidence, which involves a written application to the Registrar which is transmitted to the Chamber to determine the application.²⁰¹⁰ Second, for victims wishing to participate without personally appearing before the court, they are permitted to present their views through a common legal representative for the victims (without going through Rule 89).²⁰¹¹ They need only register with the VPRS with their names, contact details and information of the harm suffered. The common legal representative will then verify if they are eligible to participate in the case.²⁰¹² This representative can also present the views of unregistered victims provided the representative considers that they qualify as victims.²⁰¹³

II. Protection of Victims and Witnesses

A. Overview

In accordance with Article 68(1) of the Rome Statute, the ICC must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, particularly during its investigation and prosecution of crimes. Appropriate measures are numerous and fall into three categories: (i) protective measures;²⁰¹⁴ (ii) special measures;²⁰¹⁵ and (iii) other measures for the protection of victims and witnesses.²⁰¹⁶ Protective measures are those that shield and protect witnesses or victims from possible harm and special measures are those that assist and facilitate vulnerable witnesses when giving evidence at the ICC.

B. When Are Protective Measures Ordered?

Protective measures may be ordered by the ICC to protect a victim, a witness or any other person at risk as a result of giving testimony in proceedings at the ICC. The ICC can order protective measures either upon:

- The motion of the Prosecutor;
- The motion of the Defence;
- The request of a witness or a victim or his or her legal representative; or

²⁰⁰⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ([Decision on Victim's Representation and Participation](#)) ICC-01/09-01/11 (3 October 2012); *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ([Decision on Victims' Representation and Participation](#)) ICC-01/09-02/11-498 (3 October 2012).

²⁰⁰⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ([Decision on Victim's Representation and Participation](#)) ICC-01/09-01/11 (3 October 2012) para. 25.

²⁰¹⁰ *Ibid.*, para. 25.

²⁰¹¹ *Ibid.*, para. 26.

²⁰¹² *Ibid.*, paras. 49-50.

²⁰¹³ *Ibid.*, para. 52.

²⁰¹⁴ Rules of Procedure and Evidence, r. 87.

²⁰¹⁵ *Ibid.*, r. 88.

²⁰¹⁶ Rules of Procedure and Evidence, r. 112(4); Regulations of the Courts, regs 21, 41, 42, 101; ICC, [Regulations of the Registry](#), ICC-BD/03-02-06 (entered into force 6 March 2006) ("Regulations of the Registry") regs 79 and 100.

- Its own motion, and after having consulted with the VWU.²⁰¹⁷

The ICC Prosecutor takes protective measures, or requests that they be taken, in relation to her witnesses during the investigation and prosecution phase of proceedings.²⁰¹⁸ The Prosecutor should ordinarily request protective measures from the Court, unless she wishes to take ordinary “day-to-day” protective measures such as ensuring confidentiality, when she can take those measures without going to the Court.

There is no fixed test to determine who is “at risk”. The ICC has said that, irrespective of the precise description of the test, protection shall be afforded to “any witness, following careful investigation, if he or she is exposed [...] to an evidence-based (“established”) danger of harm or death”.²⁰¹⁹ This should be interpreted in a sufficiently flexible and purposive manner to ensure proper protection.

The Court has said in-Court measures should only be granted exceptionally after a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused.²⁰²⁰ It can be discerned from this that there is a need for objective evidence, as opposed to a subjective fear or suspicion, to show a witness is genuinely at risk of being hurt.

The Prosecutor uses risk assessments to determine the need for protective measures by reference to the individual circumstances of a witness, such as the nature of the testimony and the environment in which the individual operates, for example, whether prior security incidents or threats have occurred.

The role of the VWU is separate: while the Prosecutor decides to take or apply to the Court for protective measures, the VWU provides the measures, such as security arrangements, and recommends or advises other organs of the Court on measures to be taken. The VWU is a neutral service provider, serving the Prosecution, the Defence and legal representatives of victims equally.²⁰²¹ The services of the VWU are activated by a referral from the Prosecutor or a request from the Prosecutor, Defence or other parties. There remains the ability to go to Court for all parties, which is the ultimate arbiter of protective measures.²⁰²²

a) Examples of Protective Measures

There is no exhaustive list of protective measures that may be granted during proceedings but protective measures will usually be aimed at controlling the flow of information, disclosure and confidentiality. Examples of protective measures applied by the Court could include:

- Filing proceedings under seal;

²⁰¹⁷ Rules of Procedure and Evidence, r. 87.

²⁰¹⁸ Rome Statute, arts. 54(3)(f) and 68(1).

²⁰¹⁹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06 (16 December 2008) paras. 27-29.

²⁰²⁰ *The Prosecutor v. Bosco Ntaganda* ([Decision](#)) ICC-01/04-02/06 (15 September 2015) para. 6

²⁰²¹ ‘[Victims and Witnesses Unit](#)’ (ICC).

²⁰²² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ([Decision](#)) ICC-01/04-01/07 OA 7 (26 November 2008) paras. 93 and 97.

- Disclosing redacted filings and documents (after expunging names and identifying details from the record);
- Ordering specific instructions for accessing and handling information;
- Prohibiting participants from disclosing identifying information;
- Not disclosing, or delaying the disclosure of, witness identities and other information identifying the witness to the defendant;
- Permitting testimony via electronic means (such as video link), from behind a screen or using voice/image distortion;
- Using pseudonyms throughout the proceedings;
- Holding proceedings in camera (private sessions);
- Reading all or part of a witness' statement in private session;
- Evacuating victims from an area where they may be in danger; and
- Permitting a legal representative, psychologist or family member to attend Court during the testimony of the victim or witness.²⁰²³

C. When May Special Measures Be Ordered?

In much the same way as with protective measures, the Prosecution, Defence, a witness or a victim may apply to the Court for special measures to be implemented.²⁰²⁴ Similarly, the Court may order special measures to be put in place on its own motion, having consulted with the VWU.²⁰²⁵ In all instances, special measures will be implemented with the aim of facilitating the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence.²⁰²⁶

In order to protect victims and witnesses, including those entitled to special measures, NGOs working with them have the possibility of insisting on confidentiality in case the ICC requests that they hand over certain information, including statements taken from victims, victims' names and other research data. The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purposes of generating new evidence, unless the provider of the information consents.²⁰²⁷ The ICC Appeals Chamber has said that this provision will be used incorrectly if the agreement results in a substantial body of exculpatory evidence that should ordinarily be handed to the Defence.²⁰²⁸ In addition, if the Prosecutor does introduce such protected material into evidence, the Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the

²⁰²³ Rules of Procedure and Evidence, r. 87.

²⁰²⁴ *Ibid.*, r. 88(1).

²⁰²⁵ *Ibid.*

²⁰²⁶ Rules of Procedure and Evidence, r. 88(1).

²⁰²⁷ Rome Statute, art. 54(3)(e).

²⁰²⁸ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 OA 13 (21 October 2008) paras. 59 and 101.

purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.²⁰²⁹ These issues are discussed in more detail in Part Four.

Wherever the witness gives evidence, either at the Court or over video-link from another location, a psychologist will assess the vulnerable witness,²⁰³⁰ in order to review the decision on whether the witness should testify. This assessment will also identify any appropriate special measures that should be taken.²⁰³¹ The witness will be given a chance to consent to the special measures.²⁰³² An assessment report will then be made to the Trial Chamber.²⁰³³ Immediately post-trial, after the vulnerable witness has finished giving testimony, there will be a debriefing and a check on the mental state of the witness.²⁰³⁴

a) Examples of Special Measures

A good example of a special measure intended to facilitate the testimony of a victim or witness is the “familiarisation process” often used by the ICC. The purpose of the familiarisation process is to assist witnesses to better understand the Court’s proceedings and the precise role played by each of the participants in the proceedings. The familiarisation process also provides witnesses with an opportunity to acquaint themselves with the individuals who may examine them in Court.²⁰³⁵ Legal representatives may be present during the familiarisation process.²⁰³⁶ Aside from this example, the Court has broad discretion power to determine what special measures would facilitate the testimony of a vulnerable witness adequately. Examples of other special measures could include:

- Permitting a support assistant, family member or psychologist or other person, such as from the VWU, to accompany the witness in court;
- Ordering a psychologist to attend during the testimony of a traumatised victim or witness;
- Permitting a witness to give evidence via video-link, or placing a screen between the witness and accused;
- Ensuring that the witness clearly understands he or she is under a strict legal obligation to tell the truth when testifying; and
- Controlling the manner of questioning a witness carefully.²⁰³⁷

²⁰²⁹ Rules of Procedure and Evidence, r. 82(2).

²⁰³⁰ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06 OA 13 (21 October 2008) para. 10.

²⁰³¹ *Ibid.*, para. 10; Rules of Procedure and Evidence, r. 88.

²⁰³² *Ibid.*, para. 12.

²⁰³³ *Ibid.*

²⁰³⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo* (Protocol) ICC-01/05-01/08 (25 October 2010) para. 22.

²⁰³⁵ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06-1049 (30 November 2007); Katanga Modalities, para. 79.

²⁰³⁶ *The Prosecutor v. Thomas Lubanga Dyilo* ([Decision](#)) ICC-01/04-01/06-1351 (23 May 2008) para. 39; Katanga Modalities, para. 79.

²⁰³⁷ Guido Acquaviva, Nancy Combs, Mikaela Heikkilä, Suzannah Linton, Yvonne McDermott, Sergey Vasiliev, ‘Trial Process’ in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds) *International Criminal Procedure: Principles and Rules* (OUP, 2013) pp. 848-850.

D. The Witness Protection Programme and Relocation

The Witness Protection Programme and the relocation of victims and witness is administered by the Registrar and is dependent on the cooperation of States Parties.²⁰³⁸ An application to enrol into the programme can be filed with the Registry (VWU) by the Prosecutor, or by counsel (i.e., victim counsel or Defence counsel).²⁰³⁹ The VWU will then evaluate the information provided. What will follow is an extensive interview of the witness and their family members as well as an analysis of other information available to the VWU.²⁰⁴⁰ At all times, the relocation of victims should be seen as an option of last resort due to the significant impact it can have on the life of an individual.²⁰⁴¹

The key question as to whether the VWU will recommend enrolment in the programme is “if the threshold in relation to the level of risk has been met”.²⁰⁴² Unfortunately, the precise criteria are confidential and redacted from court filings.²⁰⁴³ The last reported success rate (in 2010) of successful relocations is around 40%.²⁰⁴⁴ Due to resource constraints, lesser measures have been commonly used in an effort to protect witnesses and victims, such as safe houses, police patrolling, closed protection, enhanced surveillance and others.²⁰⁴⁵ The ICC has prohibited the Prosecution from preventatively relocating a victim or witness, except in extraordinary circumstances where the victim or witness faces “serious threat of imminent harm”.²⁰⁴⁶

III. Reparations

Reparations are forms of compensation intended to address the harm suffered by victims of crimes and may include restitution, rehabilitation, and also other measures. In essence, reparations seek to recognise and address harms suffered by victims and publicly affirm that victims are rights-holders entitled to a remedy.²⁰⁴⁷ The ICC is the first international criminal court to be able to make a convicted perpetrator pay reparations to victims of his crimes.²⁰⁴⁸

²⁰³⁸ Rules of Procedure and Evidence, r. 16(4).

²⁰³⁹ Regulations of the Registry, r. 96.

²⁰⁴⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo* ([Victims and Witnesses Unit’s Observations](#)) ICC-01/05-01/08-72-Red (18 August 2008) para. 25; Markus Eikel, ‘Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice’ (2012) Criminal Law Forum 23, p. 125.

²⁰⁴¹ Silvana Arbia, ‘The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits’ (2010) 36 Commonwealth Law Bulletin, p. 522.

²⁰⁴² *The Prosecutor v. Jean-Pierre Bemba Gombo* ([Victims and Witnesses Unit’s Observations](#)) ICC-01/05-01/08-72-Red (18 August 2008) para. 8.

²⁰⁴³ Markus Eikel, ‘Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice’ (2012) Criminal Law Forum 23, p. 126.

²⁰⁴⁴ Review Conference to the Rome Statute, ‘Report of the Court on Cooperation: Update’ RC/2 (11 May 2010) para. 19.

²⁰⁴⁵ [‘Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court’](#) (ICC, 29-30 January 2009) p. 3; [‘Summary Report on the Seminar on Protection of Victims and Witnesses Appearing Before the International Criminal Court’](#) (ICC, 24 November 2010) p. 3.

²⁰⁴⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Prosecution’s Observations) ICC-01/04-01/07 (26 November 2008) paras. 26-39.

²⁰⁴⁷ [‘Reparations’](#) (International Center for Transitional Justice).

²⁰⁴⁸ At the Extraordinary Chambers in the Courts of Cambodia (hybrid Court), Civil Parties can seek moral and collective reparation.

A. Purpose of Reparations

Reparations fulfil two main purposes, “to oblige those responsible for serious crimes to repair the harm they caused to victims” and to ensure that offenders account for their acts.²⁰⁴⁹ Reparations – i.e., compensation – are meant to address harm suffered by victims, and may include restitution,²⁰⁵⁰ compensation, rehabilitation, and also other measures. Compensation and restitution include fines or forfeitures against the convicted person, and the Court can order reparations be paid through the Trust Fund.²⁰⁵¹ Rehabilitation and other measures include medical services and healthcare, psychological, psychiatric and social assistance to support victims suffering from grief and trauma and also relevant legal or social services.²⁰⁵² It may include measures to facilitate reintegration into society or address shame.²⁰⁵³

B. Who Can Receive Reparations?

The Court can grant individual reparations or collective reparations to a group or community or both, and may also include symbolic reparations, preventative or transformative reparations.

According to the Rules, reparations may be granted to direct victims and also to indirect victims, such as family members of direct victims, those who attempted to prevent the crimes, and those who suffered harm while helping or intervening on behalf of victims.²⁰⁵⁴ Reparations can also be granted to legal entities, including non-governmental organisations, non-profits, government departments, schools, hospitals and so on.²⁰⁵⁵

C. The Nature of the Reparations Hearing

Special procedural rules exist for the reparations process. It is important to note that the victim does not need to have participated in the court proceedings (as a victim) previously to engage in the reparations process.²⁰⁵⁶

A decision on reparations must be requested by the victims in writing, in a substantial application that differs from other participation applications,²⁰⁵⁷ as the Court will only act on its own motion in exceptional circumstances.²⁰⁵⁸ The Statute and Rules seem to foresee that the reparation decision would normally be taken within the regular trial

²⁰⁴⁹ *Ibid.*, para. 2.

²⁰⁵⁰ The UN Basic Principles says this should ‘restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.’ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147 (“UN Basic Principles”)

²⁰⁵¹ Rome Statute, art. 75(2).

²⁰⁵² UN Basic Principles, principle 21.

²⁰⁵³ *The Prosecutor v. Thomas Lubanga Dyilo* ([Amended order for reparations](#)) ICC-01/04-01/06 A A 2 A 3 (3 March 2015) (“Amended Reparations Order”) paras. 67(iii), (iv) and (v)

²⁰⁵⁴ Rules of Procedure and Evidence, r. 85.

²⁰⁵⁵ *Ibid.*, r. 85(b).

²⁰⁵⁶ *Ibid.*, r. 96.

²⁰⁵⁷ *Ibid.*, r. 95.

²⁰⁵⁸ Elisabeth Baumgartner, ‘Aspects of victim participation in the proceedings of the International Criminal Court’ (2008) 90 *International Review of the Red Cross* 870, p. 431.

proceedings: Article 76(3) of the Statute suggests that if a separate sentencing hearing had been requested, reparations would be dealt with in a distinct sentencing proceeding of that nature or even, where necessary, in another additional reparation hearing.

In any form of reparation procedure, the Court considers representations from or on behalf of the convicted person, victims, other interested persons or interested States. Then, it will issue an order against a convicted person directly. The order will specify appropriate reparations to, or in respect of, victims such as restitution, compensation or rehabilitation. On occasion, the ICC may award reparations out of the ICC Trust Fund under Article 75.²⁰⁵⁹

Unlike victims' representations in other proceedings, the questioning in a reparation hearing is more comprehensive, and cannot be limited to written observations or submissions pursuant to Rule 91(4). On the contrary, the victim representative can, subject to leave by the Chamber concerned, even question witnesses, experts and the person concerned. Reparation hearings aim at establishing injury, harm or loss resulting from a crime committed by the convicted person. Pre-Trial Chamber II has already indicated that the standard of proof with regard to the nexus element of the victim definition is much higher for reparation purposes than for other stages of the proceedings.²⁰⁶⁰ Awarding reparations on a collective basis is explicitly provided for in Rule 97(1), which also stipulates that such awards may be handled by the Trust Fund "where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate".

Victims and the convicted person(s) may take part in the proceedings and the Chamber can appoint experts to assist in determining things like the extent of damage, loss, or injuries and what type of reparations are most appropriate.²⁰⁶¹ Victims (or their legal representatives) and the convicted person(s), as well as other "interested persons and interested states", may make observations on the reports of the experts.²⁰⁶²

D. The Test

Compensation should be considered with three conditions: (i) the economic harm is significantly quantifiable; (ii) an award would be appropriate and proportionate (bearing in mind the gravity of the crime and circumstances of the case); and (iii) with the available funds, the result is feasible.²⁰⁶³ Rehabilitation includes medical services and healthcare, psychological, psychiatric and social assistance to support victims suffering from grief and trauma and also relevant legal or social services.²⁰⁶⁴

²⁰⁵⁹ The Trust Fund is established pursuant to Article 79 of the Rome Statute.

²⁰⁶⁰ Uganda Participation Decision, para. 14.

²⁰⁶¹ *Ibid.*

²⁰⁶² Rules of Procedure and Evidence, r. 97(2).

²⁰⁶³ *The Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations) IC-01/04-01/06-3129-AnxA (3 April 2015) para. 37. Referring to the UN Basic Principles, principle 20.

²⁰⁶⁴ *Ibid.*, para. 42. Referring to the UN Basic Principles, principle 21.

E. Payment of Reparations: The Establishment of the Trust Fund

The ICC set up the Trust Fund in 2002 under Article 79 of the Rome Statute. Its mandate includes two prongs: (i) to implement Court-ordered reparations; and (ii) to provide physical, psychological, and material support to victims and their families.²⁰⁶⁵ The second part of the mandate is independent of Court-ordered reparations, and allows for more timely assistance to victims and assistance for a broader class of victims than the judicial process allows.

F. Payment

Voluntary contributions and private donors fund the reparations fund. There is also a reparations reserve in the case of a Court-ordered reparation against an indigent convicted perpetrator.²⁰⁶⁶ In other words, if the ICC is unable to seize sufficient assets from the convicted individual, the reparations reserve will be relied upon.²⁰⁶⁷

G. Enforcement of Reparations Decisions

The Court is empowered to make reparations orders. In other words, it may provide for compensation to victims of crimes of perpetrators convicted at the Court. Where the Court makes an order, the Rome Statute provides that a “State Party” shall give effect to that judgement. This expressly applies to States Parties; however, Article 75 also provides that the Court may seek to make use of measures in Part 9 to give effect to a reparations order.

In effect, this would largely bind Ukraine to comply with the Court’s requests—if Ukraine refused to comply it would be seen as being in breach of its duty to cooperate with the Court in line with Part 9. This would make Ukraine responsible for the identification, tracing and freezing or seizure of proceeds, property and assets of crimes for the purpose of eventual forfeiture. Therefore, it seems that the ICC could reasonably request that Ukraine execute steps to secure a reparations order, and in doing so, effectively execute an order for reparations.

H. Reparations Examples: Lubanga, Al Mahdi and Katanga

Lubanga was the first reparations decision and order issued by the ICC, and as such has implications for future decisions.

The reparations order was issued in March 2015. It included this important provision: that the ICC “introduce[s] a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice”, or a criminal punishment against a convicted individual, “towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims”.²⁰⁶⁸

²⁰⁶⁵ *Ibid.*

²⁰⁶⁶ ‘[Financial Information](#)’ (*Trust Fund for Victims*).

²⁰⁶⁷ See, *The Prosecutor v. Bosco Ntaganda* ([Reparations Order](#)) ICC-01/04-02/06 (08 March 2021).

²⁰⁶⁸ Amended Reparations Order, para. 1.

The Chamber further noted that reparations fulfil two main purposes. First, they “oblige those responsible for serious crimes to repair the harm they caused to victims”.²⁰⁶⁹ Second, they “ensure that offenders account for their acts”.²⁰⁷⁰ In the Appeals decision, it stated a reparations order must contain five essential elements:

- It must be directed against the convicted person;
- It must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order;
- It must specify, and provide reasons for, the type of reparations ordered;
- It must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted; and
- It must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.²⁰⁷¹

Another matter considered in the amended order in the *Lubanga* case was the consideration that the “harm” caused means “hurt, injury or damage” and does not have to be direct, but must be personal to the victim.²⁰⁷² It may be material, physical, or psychological.²⁰⁷³ There also must be a causal link between the harm and the commission of the crime within the jurisdiction of the ICC.²⁰⁷⁴ In the immediate case, there must be a “but/for” relationship between the crime and harm, and Mr. Lubanga’s crimes must be the “proximate cause” of the harm for which reparations are sought.²⁰⁷⁵ This causal link must be established in the reparations phase with a standard less than the “beyond a reasonable doubt” standard required at the trial.

Victims are to be treated fairly and equally, whether or not they participated in the main trial proceedings, and the Court shall take into account the needs of all victims.²⁰⁷⁶ The Court also uses a gender-inclusive approach and has a goal of gender parity in reparations.²⁰⁷⁷ During the reparations phase, victims and their families and communities should be able to participate in the process and receive support so their participation is “substantive and effective”.²⁰⁷⁸ The Court should also consult with victims on the identities of beneficiaries and their priorities.²⁰⁷⁹

²⁰⁶⁹ *Ibid.*, para. 2.

²⁰⁷⁰ *Ibid.*, para. 2.

²⁰⁷¹ *The Prosecutor v. Thomas Lubanga Dyilo* ([Judgment](#)) ICC-01/04-01/06-3129 (3 March 2015) para. 1.

²⁰⁷² Amended Reparations Order, para. 10.

²⁰⁷³ *Ibid.*

²⁰⁷⁴ *Ibid.*, para. 11.

²⁰⁷⁵ *Ibid.*, para. 59.

²⁰⁷⁶ *Ibid.*, paras. 12 and 14.

²⁰⁷⁷ *Ibid.*, para. 18.

²⁰⁷⁸ *Ibid.*, para. 29.

²⁰⁷⁹ *Ibid.*, para. 32.

As ordered, the ICC Trust Fund made submissions to the Chamber in the *Lubanga* reparations matter.²⁰⁸⁰ The focus of this submission was on collective reparations. There was discussion of individual needs such as medical or psychological assistance; however, the bulk of the views were about collective programmes such as socio-economic support, integration, group opportunities for former child soldiers and community engagement programmes. The Trust Fund appeared to focus on collective reparations and rehabilitative measures with community outreach programmes. For reparations, the Trust Fund considered Mr. Lubanga's liability by reference to:

- The number of potentially eligible victims;
- The extent and forms of harm;
- The cost to redress that harm; and
- Administrative costs related to the process of implementing reparations.²⁰⁸¹

The crimes were noted to be widespread and involving a lot of children. The Trust Fund looked at all potential victims, not just those engaged in the process. It could not name a number of potential victims. The Trust Fund had to rely on accounts by NGOs to assess how many victims there potentially was. It had to estimate the figure at 3,000 direct and indirect potential victims.²⁰⁸²

It outlined potential rehabilitation measures and other measures, such as medical care, psychological help, and reintegration measures like education or sustainable work opportunities.²⁰⁸³ Other measures included outreach programmes and commemorations. It also addressed money; the Trust Fund was prepared to submit one million Euros from its reparations reserve to complement and fund the collective reparations programme.²⁰⁸⁴

Before the judgment, the Trust Fund partnered with an institution already in DRC and contributed large sums to:

- Four medical projects;
- One psychological project;
- Five reintegration projects such as community therapy and vocational training; and
- Three symbolic reparations projects such as education.²⁰⁸⁵

It appears that the total cost of these projects plus the reparations for victims totalled around 7,429,901 US Dollars [or 189,090,231 UAH (Ukrainian Hryvnia)].

In *Al Mahdi*, the Court addressed individual and collective reparations for the destruction of cultural property and heritage. In 2016, Ahmad Al Faqi Al Mahdi was found guilty of the war crime of intentionally directing attacks

²⁰⁸⁰ *The Prosecutor v. Thomas Lubanga Dyilo* ([Filing on Reparations and Draft Implementation Plan](#)) ICC-01/04-01/06(3 November 2015).

²⁰⁸¹ *Ibid.*, para. 218.

²⁰⁸² *Ibid.*, para. 253.

²⁰⁸³ *Ibid.*, paras. 181, 258-263.

²⁰⁸⁴ *The Prosecutor v. Thomas Lubanga Dyilo* ([Filing on Reparations and Draft Implementation Plan](#)) ICC-01/04-01/06-3177-AnxA (3 November 2015) Annex, para. 174.

²⁰⁸⁵ *Ibid.*, pp. 124 *et seq.*

against religious and historic buildings (Protected Buildings) in Timbuktu, Mali, in June and July 2012, and sentenced to nine years' imprisonment. The Trial Chamber's Reparations Order from 2017 held Mr Al Mahdi liable for 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu.²⁰⁸⁶

The Trial Chamber found that four groups were harmed by the crimes for which Mr Al Mahdi is responsible: 1) the guardian families who were responsible for the maintenance of the sites, 2) the other faithful inhabitants of Timbuktu, 3) the rest of the population in Mali, and 4) the international community. However, the Trial Chamber held that the latter two groups do not require additional reparative measures, "as those directed at the local population of Timbuktu inherently will effectively address the broader harm suffered by Malians and by the international community as a whole. In other words, the measures directed at the more specific harm will by necessary implication address the more general harm."²⁰⁸⁷

Individual reparations were awarded only to those whose livelihoods exclusively depended upon the Protected Buildings, such as persons who earned a livelihood by maintaining and protecting the Protected Buildings, certain business owners whose only purpose was to sell sand perceived as holy from the sites of the Protected Buildings – but not owners of businesses with broader purposes who have been harmed by the loss of the Protected Buildings.²⁰⁸⁸

The Appeals Chamber in 2018 confirmed the holding of the Trial Chamber that individual reparations for economic loss be awarded "only to those whose livelihoods exclusively depended upon the Protected Building".²⁰⁸⁹

As regards the method for the implementation of individual reparations, the Appeals Chamber ruled that "Victim applicants, who the Trust Fund for Victims finds, as a result of the administrative screening, ineligible for individual reparations, are entitled to request that the Trial Chamber review the assessment by the Trust Fund for Victims. The Trial Chamber may also review the assessment by the Trust Fund for Victims *proprio motu*."²⁰⁹⁰ The Appeals Chamber added that these victims are entitled to have their identities concealed from the accused.²⁰⁹¹

Collective reparations were ordered to address the economic harm caused to the community of Timbuktu and the emotional distress suffered as a result of the attack on the Protected Buildings.²⁰⁹² The Trial Chamber proposed some modalities for this type of reparations, such as "community-based educational and awareness raising programmes to promote Timbuktu's important and unique cultural heritage, return/resettlement programmes, a 'microcredit system' that would assist the population to generate income, or other cash assistance programmes to restore some of Timbuktu's lost economic activity".²⁰⁹³

²⁰⁸⁶ [Al Mahdi case: Reparations Order becomes final](#), 8 March 2018.

²⁰⁸⁷ *Al Mahdi* Reparations Order, ICC-01/12-01/15, 17 August 2017, para. 54.

²⁰⁸⁸ *Ibid.*, para. 81.

²⁰⁸⁹ *Al Mahdi* Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15 A, 8 March 2018, para. 43.

²⁰⁹⁰ *Ibid.*, para. 1(ii).

²⁰⁹¹ *Ibid.*, para. 1(i).

²⁰⁹² *Al Mahdi* Reparations Order, ICC-01/12-01/15, 17 August 2017, para. 104.

²⁰⁹³ *Ibid.*, para. 67.

In *Katanga*, two specific issues were addressed during the reparations proceedings: 1) the assessment of harm in situations where there are many applicants for reparations, and 2) the concept of transgenerational harm. Germain Katanga was found guilty in 2014 of one count of crime against humanity and four counts of war crimes committed on 24 February 2003 during the attack on the village of Bogoro (DRC), and was sentenced to twelve years' imprisonment.²⁰⁹⁴

Although the Appeals Chamber confirmed the Trial Chamber's Reparations Order for the most part, it criticized the latter's approach to individually set out findings in respect of all 341 applications in order to identify the harms in questions. The Appeals Chamber stressed that such approach leads to unnecessary delays in the reparations proceedings and that it should be employed if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations.²⁰⁹⁵

Five applicants in this case who were born after the attack on Bogoro applied for reparations for the transgenerational psychological harm which is "a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter."²⁰⁹⁶ They alleged harm suffered on account of their parents' experience during the attack.²⁰⁹⁷ While the Trial Chamber found that these applicants were "in all likelihood" suffering from transgenerational harm, it held that it could not establish the causal nexus between the trauma suffered and the attack on Bogoro.²⁰⁹⁸ The Appeals Chamber found this explanation contradictory²⁰⁹⁹ and directed the Trial Chamber to carry out a new assessment of these applications, providing sufficient reasons for its eventual conclusion.²¹⁰⁰

In a new proceeding dealing exclusively with the transgenerational harm, the Trial Chamber took note of different explanations for the transgenerational transmission of trauma: 1) the epigenetic transmission theory in neuropsychiatry based on the study of parent-to-child transmission of epigenetic marks that retain a memory of traumatic events experienced by the parents; and 2) the social transmission theory which focuses instead on the impact of upbringing and emotional learning on the child's emotional development.²¹⁰¹ It also considered that the closer the date of birth of the applicant to the date of the attack, the more likely it is that the attack had an impact on

²⁰⁹⁴ ICC, Case Information Sheet, [The Prosecutor v. Germain Katanga](#), (On 24 March 2017, Trial Chamber II issued the Order for Reparations, setting the amount for which Mr Katanga is liable at USD 1 million. The Chamber also ordered that reparations be awarded to 297 victims identified in the form of a symbolic award of USD 250 per victim and the following four types of collective reparations: (1) support for housing; (2) support for education; (3) support for income-generating activity; and (4) psychological support; [ICC, Katanga case: Trial Chamber II dismisses the reparations applications for transgenerational harm](#), 19 July 2018).

²⁰⁹⁵ *Katanga* Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07 A3 A4 A5, 8 March 2108, paras. 1 and 3.

²⁰⁹⁶ *Katanga* Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07, 24 March 2017, para. 132.

²⁰⁹⁷ *Ibid.*, 133.

²⁰⁹⁸ *Ibid.*, 134.

²⁰⁹⁹ *Katanga* Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07 A3 A4 A5, 8 March 2108, paras. 238.

²¹⁰⁰ *Ibid.*, para. 1.

²¹⁰¹ *Katanga* Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04-01/07, 19 July 2018, para. 11.

the applicant.²¹⁰² However, there was evidence that the parents’ suffering “is combined with other anxieties such as those triggered by insecurity in the region as well as other contextual factors”, and that the tensions in Bogoro had started to escalate two years before the attack.²¹⁰³ Consequently, the Trial Chamber again reached the conclusion that the causal nexus between the harm suffered by the five applicants and the attack on Bogoro has not been demonstrated to the standard of proof of a balance of probabilities.

I. How to Apply for Reparations

Victims may apply for reparations at any time. The Trial Chamber can initiate the process of its own volition, but this is much less likely.²¹⁰⁴ To do so, victims apply through the VPRS by providing the information required in Rule 94 of the Rules. This information includes the: (i) identity and address of the applicant victim; (ii) description of injury, loss or harm; (iii) location and date of the incident and if possible the identity of the person or persons believed to be responsible for the injury, loss or harm; (iv) where restitution of assets, property or tangible items is sought, a description of the item(s); (v) claims for compensation; (vi) claims for rehabilitation and other remedies; and (vii) all relevant documentation possible, including any witnesses. The ICC has created a standard form with this information, which can be used to apply for either participation or reparations or both, to simplify the application process.²¹⁰⁵

²¹⁰² *Ibid.*, para. 29.

²¹⁰³ *Ibid.*, paras. 30-31.

²¹⁰⁴ Antonio Cassese, *International Criminal Law* (2nd edn, OUP, 2008) p. 423.

²¹⁰⁵ [‘Forms’](#) (*International Criminal Court*).

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