Ukraine and the International Criminal Court
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December 2016

This document was prepared by Global Rights Compliance.

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Disclaimer

This publication was funded by the UK Government as part of the “International Criminal Court and International Humanitarian Law Reform” project implemented by Global Rights Compliance LLP. The views expressed in it are those of the author(s) and may not coincide with the official position of the UK Government.
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List of Abbreviations

ASP – Assembly of the States Parties
CAR – Central African Republic
DPR – Donetsk People’s Republic
DRC – Democratic Republic of 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 Organization
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 Leone
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

Between September 2015 and March 2016, Global Rights Compliance ("GRC") examined Ukraine’s relationship with the International Criminal Court ("ICC") and its governing law—the Rome Statute. This report presents GRC’s findings in a two-Chapter Report. 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 center 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 Ukraine may use the ICC to target alleged criminals; (ii) whether the ICC will have jurisdiction over crimes relating to Crimea; (iii) whether the ICC will have jurisdiction over the downing of Malaysia Airlines MH17 and whether a domestic prosecution is more likely; (iv) whether the ICC can prosecute foreign fighters (e.g. Russians) who have committed crimes in Ukraine; and (v) 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 a 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. Ukraine is currently in this preliminary examination phase. Part Three of each Chapter discusses the issues surrounding this initial stage.
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. It identifies how individuals, states, and governmental and non-governmental organisations 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 non-governmental organisations (“NGOs”) and other types of “first responders”—ie. 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 Yanukovych’s decision to suspend Ukraine’s integration into the EU: rather than signing an Association Agreement with the European Union (“EU”), Yanukovych took a $15 billion loan from the Russian Federation, understood by some to be a bribe not to sign the EU agreement. 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”), 90 people were killed from 18-20 February alone, with reports alleging that most of the deaths resulted from sniper fire. Between December 2013 and February 2014, 121 people were killed. Lacking a defence for this attack on protesters and losing his mandate to govern, President Yanukovych 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) began showing up in the Autonomous Republic of Crimea. In addition to occupying government buildings and acquiring de facto control over the region, they...

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5 Ibid.
6 See e.g. ‘In the Crimea there is an armed invasion of Russia—Kunitsyn’ The Ukrain’ska Pravda (28 February 2014) [www.pravda.com.ua/news/2014/02/28/7016712/]. See also ‘Putin acknowledges Russian military serviceman were in Crimea’ Russia Times (17 April 2014) [www.rt.com/news/crimea-defense-russian-soldiers-108/] accessed 22 April 2016.
arranged for a “referendum” on the question of Crimean annexation to the Russian Federation to be held on 16 March 2014. This referendum violated the Ukrainian Constitution and its execution is alleged to have been riddled with electoral irregularities. The referendum results indicated that more than 95% of voters supported joining the Russian Federation. 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. International condemnation soon followed.

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.

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7See Constitution of Ukraine, Art. 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-рp/2014 [Online resource].—14 March 2014. - Access: <http://zakon0.rada.gov.ua/laws/show/v002p710-14> (last visited: 22 April 2016).

8The 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 <www.un.org.ua/images/stories/Report_15_April_2014_en.pdf> accessed 22 April 2016.

997% of Crimean population voted for joining Russia’ Tyzhden.ua (Kyiv, 17 March 2014) <http://tyzhden.ua/Videoloop/105065> accessed 22 April 2016.


11For 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) UN Doc. A/RES/68/262 <www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E5C-8CD3-CF6E4FF97D7A/res_68_262.pdf> accessed 22 April 2016.

Just after 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 Russian-speaking population in Ukraine. 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). Shortly thereafter, locals declared Donetsk the “Donetsk People’s Republic” (“DPR”) and Luhansk the “Luhansk People’s Republic” (“LPR”).

Since April 2014, the Ukrainian government has been conducting an “Anti-Terror Operation” in eastern Ukraine. The conflict has had devastating consequences for the people who live there: according to Ukraine’s Ministry of Social Policy, as of May 2016, the number of internally displaced persons (“IDPs”) in Ukraine totalled around 1.6 million. Further, human rights organisations and activists have reported numerous violations of IHL and international human rights law.

The reported violations include:

- Mistreatment of persons deprived of their liberty, whether soldiers hors de combat or civilians;
- Indiscriminate shelling of residential areas;
- Attacking and/or looting of cultural property;
- Using cultural property for military purposes and as venues where human rights abuses have taken place and/or as ad hoc detention centres;
- Inhumane and degrading treatment;

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• Torture; and
• 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, e.g. by flying a white flag signaling a truce and then attacking the enemy).  

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

From mid-April 2014 to mid-August 2016, the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) recorded nearly 31,814 casualties (9,578 fatalities and 22,236 injuries) suffered by the Armed Forces of Ukraine, civilians and members of armed groups in the conflict area in eastern Ukraine. An additional 298 people were killed when Malaysia Airlines flight MH17 was shot down in July 2014.

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. 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. 

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, both sides began to violate the agreement almost immediately. As of November 2016, neither the GoU nor the separatists have come into full compliance with the terms of Minsk II.

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19 Ibid.


21 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) <www.un.org/sg/statements/index.asp?nid=8350> accessed 22 April 2016.

22 Ibid.

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.

The ICC: A Global Criminal Court

The ICC is the first permanent, autonomous international criminal court. It is fully independent.24 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.25 The Rome Statute entered into force on 1 July 2002.26 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.27

As of November 2016, there are 124 State Parties to the Rome Statute.28 States become a formal party to the Rome Statute through “ratification”, “accession”, “approval” or “acceptance” of the Statute.29 Ratification is the formal act of a State consenting to be bound by a treaty.30 To ratify, a State will deposit a document containing this consent with the Secretary-General of

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24 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) <www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf> accessed on 24 March 2016 (“Relationship Agreement”).
26 ‘About the Court’ (<www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx> accessed 24 March 2016.
27 Rome Statute, Preamble, para. 5.
29 Rome Statute, art. 125.
the United Nations (“UN”).\textsuperscript{31} Accession, approval or acceptance have the same effect as ratification.\textsuperscript{32} The Rome Statute continues to be the basis for the Court’s existence and its authority.

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.

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.\textsuperscript{33} The Rome Statute also mentions that the Court has jurisdiction over the crime of aggression,\textsuperscript{34} even though this crime is not actively prosecuted by the Court to date. A provision in the Rome Statute empowering the ICC to try crimes of aggression will not be adopted until a decision is taken after 1 January 2017 by a two-thirds majority of States Parties, and one year after the ratification or acceptance of the amendment by 30 State Parties, whichever is later.\textsuperscript{35} The crime of aggression is addressed in more detail in Chapter Two, Part Two.

Who Can Be Tried?
The Court can only try “natural persons”.\textsuperscript{36} 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 regard to the evidence gathered, bear the greatest responsibility for the crimes committed.\textsuperscript{37} More recently, the ICC Prosecutor has begun to

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\textsuperscript{31} Rome Statute, art. 125(2).
\textsuperscript{32} Vienna Convention, arts. 2(1)(b), 14(2) and 15.
\textsuperscript{33} Rome Statute, art. 5.
\textsuperscript{34} ibid., art. 5(d).
\textsuperscript{36} 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.
consider prosecuting lower-level perpetrators if their conduct has been particularly grave or received extensive notoriety.\textsuperscript{38}

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.\textsuperscript{39}

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.\textsuperscript{40} These issues will be further addressed in Chapter Two, Part Two.

\textbf{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;\textsuperscript{41} (ii) the State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute;\textsuperscript{42} or (iii) the United Nations Security Council (“UNSC”) refers a situation to the Court.\textsuperscript{43}

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 \textit{proprio motu} (on her own initiative) on the basis of information received from reliable sources, including from a State’s Declaration.\textsuperscript{44}

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.\textsuperscript{45} 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 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


\textsuperscript{39} Rome Statute, art. 27.

\textsuperscript{40} Ibid., art. 27.

\textsuperscript{41} Ibid., arts. 13(a) and 14.

\textsuperscript{42} Ibid., art. 12(3).

\textsuperscript{43} Ibid., art. 13(b).

\textsuperscript{44} Ibid., art. 13.

\textsuperscript{45} 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 <www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 23 March 2016.
of the Court.\textsuperscript{46} 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.\textsuperscript{47} The Prosecutor has jurisdiction over matters the UNSC has referred;\textsuperscript{48}

- 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.\textsuperscript{49} 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;\textsuperscript{50} 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.\textsuperscript{51}

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 his or her own volition, she must ask the ICC Pre-Trial Chamber for authorisation to proceed.\textsuperscript{52} The ICC Prosecutor does not need the Court’s permission to launch an investigation if she has a State referral\textsuperscript{53} or a referral from the UN Security Council.\textsuperscript{54} 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 of justice reason to not proceed, they will authorise a full investigation to be opened.\textsuperscript{55} 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.\textsuperscript{56} Once the named individuals appear in front of the Court and if the charges are

\textsuperscript{46} Rome Statute, art. 11.  
\textsuperscript{47} Ibid., art. 12(2).  
\textsuperscript{48} Ibid., art. 12(2).  
\textsuperscript{49} 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’.  
\textsuperscript{50} Rome Statute arts. 1 and 17.  
\textsuperscript{51} As discerned from the Rome Statute, art. 53(1)(a) - (c); Preliminary Examinations Policy Paper.  
\textsuperscript{52} Rome Statute, art. 15(3).  
\textsuperscript{53} Ibid., arts. 14(1) and 15(1).  
\textsuperscript{54} Ibid., art. 12(2).  
\textsuperscript{55} 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.  
\textsuperscript{56} Rome Statute, art. 58(1)(b)(i).
confirmed by the Court, the trial can begin. This process is explained in detail in Chapter Two, Part Four.

**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. 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.

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

The 14th session of the ASP was held from 18 - 26 November 2015. A representative of the Government was present to observe the proceedings; as a non-state party, however, Ukraine has no right to vote on ASP matters. The topics discussed during this session provide an indication of the Court’s priorities for 2016 and the issues most salient to international criminal justice.

**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

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58 *Ibid.*, art. 34.
59 Established pursuant to art. 112 of the Rome Statute.
63 Rome Statute, art. 112(2).
64 *Ibid.*, art. 121.
relations. 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:

- 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;

- 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. 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. It may also impose financial penalties for the harm suffered by the victims, including compensation, restitution or rehabilitation; 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. 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. 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. 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 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.

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”.

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68 Rome Statute, art. 39.
69 Rome Statute, arts. 56 and 57. In January 2016, the judges assigned to the Pre-Trial Division are Judge Cuno Tarfusser (Italy), President of the Pre-Trial Division, Judge Marc Perrin De Brichambaut (France), Judge Antoine Kesia-Mbo Mindua (Democratic Republic of the Congo), Judge Péter Kovács (Hungary), Judge Chang-ho Chung (Republic of Korea); Judge Raul Pangalangan (Philippines).
70 Rome Statute, art. 66.
71 Ibid., art. 77. In January 2016, the Judges assigned to the Trial Division are Judge Chile Eboe-Osuji (Nigeria), President of the Trial Division, Judge Joyce Aluoch (Kenya), Judge Kuniko Ozaki (Japan), Judge Olga Venecia Del C. Herrera Carbuccia (Dominican Republic), Judge Robert Fremr (Czech Republic), Judge Geoffrey A. Henderson (Trinidad and Tobago), and Judge Bertram Schmitt (Germany).
72 Ibid., arts. 81-85.
73 Ibid., art. 83(2).
74 Ibid., art. 83(2). In January 2015, the five judges in place are Judge Sanji Mmasenono Monageng (Botswana), President of the Appeals Division, Judge Silvia Alejandra Fernández De Gurmendi (Argentina), Judge Christine Van den Wyngaert (Belgium), Judge Howard Morrison (UK), Judge Piotr Hofmański (Poland).
75 Ibid., art. 83(2).
The ICC Prosecutor

The ICC Prosecutor, head of the Office of the Prosecutor, is a separate and independent organ of the ICC.\textsuperscript{76} Since 15 June 2012, it has been led by Ms. Fatou Bensouda, who has full authority over the management and administration of the Office. 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;\textsuperscript{77}

- 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;\textsuperscript{78} (ii) seeking authorisation of a full investigation;\textsuperscript{79} (iii) the investigation of a situation;\textsuperscript{80} (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;\textsuperscript{81} 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.\textsuperscript{82} 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.

The Registry

The Registry is in charge of the non-judicial aspects of the administration and servicing of the Court.\textsuperscript{83} It is headed by the Registrar,\textsuperscript{84} 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

\textsuperscript{76}Ibid., art. 42(1).
\textsuperscript{77}Ibid., art. 54(1)(a).
\textsuperscript{78}Regulations of the Prosecutor, reg 25.
\textsuperscript{79}Rome Statute, arts. 12(2) and 15(3).
\textsuperscript{80}Ibid., art. 54.
\textsuperscript{81}Ibid., art. 61(5).
\textsuperscript{82}Ibid., art. 66.
\textsuperscript{83}Ibid., art. 43.
\textsuperscript{84}Mr. Herman von Hebel is the current Registrar, elected on 8 March 2013.
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").

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. 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.

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.

The OPCV seeks to ensure effective participation of victims in proceedings before the Court. 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.

The OPCD is managed by the Registry, but is independent. 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.

87 Ibid.
88 Rome Statute, art. 43(6).
90 Regulations of the Court, reg 80.
91 Ibid., reg 77.
92 ‘The Office of Public Counsel for the Defence’ (ICC) <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/defence/office%20of%20public%20counsel%20for%20the%20defence/Pages/the%20office%20of%20public%20counsel%20for%20the%20defence.aspx> accessed 23 March 2016.
The Defence

An accused is entitled to defend him or herself through a lawyer or without a lawyer. 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. The Rome Statute identifies minimum guarantees to ensure that an accused has a public, impartial and fair hearing.

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, but in 2001 the Constitutional Court of Ukraine ruled that full ratification would be unconstitutional. 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 Ukraine for a decision on the conformity of the Rome Statute with the Constitution of Ukraine. 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. Conversely, as the President pointed out, Article 124 of the Constitution provides that the administration of justice is the ‘exclusive

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93 Rome Statute, art. 67.
94 Ibid., art. 66.
95 Ibid., art. 67.
98 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 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.
competence of the courts’ in Ukraine and judicial functions cannot be delegated to other bodies.\textsuperscript{101} 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 complementarity\textsuperscript{102} 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.\textsuperscript{103} 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.\textsuperscript{104} The Court concluded that any jurisdiction supplementary to the national Ukrainian system was not allowed by the Constitution.\textsuperscript{105} Therefore, under Part 9 of the Constitution, the Constitution itself must be amended before the Rome Statute could be ratified.\textsuperscript{106}

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.\textsuperscript{107} 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”\textsuperscript{108} and preparing proposals on ratifying the Rome Statute, including amendments to the Constitution of Ukraine.

In 2006, the Ukraine-EU Action Plan was implemented.\textsuperscript{109} As noted, one of the five objectives of the Action Plan concerned the signing and ratification of the Agreement on the Privileges

\textsuperscript{101} Constitution of Ukraine, art. 124.
\textsuperscript{102} Rome Statute, Preamble, para. 10 and arts. 1, 17 and 20.
\textsuperscript{103} ICRC Rome Statute Issues, p. 11.
\textsuperscript{104} Constitutional Court Opinion, part 2.1, para. 3.
\textsuperscript{105} ICRC Rome Statute Issues, p. 11.
\textsuperscript{106} Ibid.
and Immunities of the ICC. Accordingly, the Ministry of Justice prepared a draft law. The Verkhovna Rada adopted this law on 16 October 2008.

On 29 January 2007, Ukraine acceded to the Agreement on the Privileges and Immunities of the International Criminal Court. 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. 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, attending the conference as official observers. 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.

More recently, the GoU has declared twice that it accepts the jurisdiction of the ICC. 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 judging the authors and accomplices of acts committed on the territory of Ukraine within the period between 21 November 2013 and 22 February 2014.”

110 Ibid., para. 17.
112 Ibid.
113 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.
114 ICC Agreement on the Privileges and Immunities,art. 3.
116 Ibid., p. 51.
119 The First Declaration.
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. 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. 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 […].” It also annexed a Declaration outlining several paragraphs appearing to explain the decision. This document states that it accepts jurisdiction “in respect

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120 Ibid.
121 The Second Declaration.
122 Ibid.
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 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 Luhanski 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 2014,123 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).124 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.125

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.126 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.127

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.128 According to the Ministry, the draft law includes recognition of ICC jurisdiction

123Ibid.
126 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).
127Ibid.
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.\textsuperscript{129}

On 16 January 2015, 155 Members of Parliament ("MPs")\textsuperscript{130} 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.\textsuperscript{131} 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.\textsuperscript{132} 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.\textsuperscript{133} In turn, on 25 November 2015, the President submitted draft law No. 3524 on amending the Constitution for the consideration of the Verkhovna Rada.\textsuperscript{134}

The draft law that appeared on the Rada’s official website immediately resulted in heated debate.\textsuperscript{135} 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.\textsuperscript{136} 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.\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{129} Ibid.
\item \textsuperscript{132} 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 <http://constitution.gov.ua/work/item/id/16> accessed 27 March 2016.
\item \textsuperscript{133} ‘Constitutional Commission submitted the approved draft amendments to the Constitution of Ukraine to the President’ (5, 30 October 2015) <www.5.ua/suspilstvo/Konstytutsiina-komisia-napravyla-Prezydentu-zatverdzhenni-proekt-zmin-do-Konstytutsii-shchodo-pravosuddia-97116.html> accessed 27 March 2016.
\item \textsuperscript{135} Ibid.
\item \textsuperscript{136} Ibid., Concluding and Transitional Provisions, para. 1.
\end{itemize}
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 criminal procedure laws. GRC, certain politicians, academics and representatives of PGA argued that the deferral was not reasonable.\textsuperscript{138}

On 12 January 2016, the Constitutional Court of Ukraine started its hearing on the draft law.\textsuperscript{139} Oleksii Filatov, 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.\textsuperscript{140} 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.\textsuperscript{141} 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.\textsuperscript{142} 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.\textsuperscript{143}

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.

On 30 January 2016, the Constitutional Court of Ukraine issued its Opinion.\textsuperscript{144} The Court opined that the draft law is in compliance with the procedural provisions of Articles 157\textsuperscript{145} and

\textsuperscript{138}Ibid.
\textsuperscript{141}Ibid.
\textsuperscript{142}Ibid.
\textsuperscript{143}Ibid.
\textsuperscript{145}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.
On 2 February 2016, the Opinion of the Constitutional Court was submitted to the Verkhovna Rada’s Committee on Legal Policy and Justice. According to the Rules of the Verkhovna Rada of Ukraine, 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. A preliminary approval will permit the Rada to adopt the bill at the next session of Parliament.

On the same day, the Committee on Legal Policy and Justice delivered its Conclusion, recommending that the Verkhovna Rada preliminarily approve the draft law. Accordingly, the Rada preliminarily approved the draft law of amending the Constitution in during its plenary meeting on 2 February 2016. Under Article 155 of the Constitution, the draft law can now be adopted at the next session of the Verkhovna Rada if two-thirds of MPs vote in favour of it.

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146 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.

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


150 Ibid.

151 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.
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.

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. 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. 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.

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.”

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 Statute. A Declaration does

152 The First Declaration.
153 The Second Declaration.
154 Rome Statute, art. 12(3).
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.\(^{155}\)

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.\(^{156}\) 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.\(^{157}\)

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.\(^{158}\) 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.

### 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?;\(^{159}\) 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

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\(^{155}\)Ibid., art. 13.

\(^{156}\) 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.

\(^{157}\) Rome Statute, arts. 15(2) and (3).

\(^{158}\) Rome Statute, art. 12(2).

\(^{159}\) Ibid., art. 11(2).
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; the downing of Malaysia Airlines flight MH17; 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.

**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 limit the jurisdiction of the ICC with regard to the crimes committed, the perpetrators, geographical scope and the time-frame of jurisdiction. The ICC Prosecutor will not accept these constraints and 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 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. The first is largely targeted at crimes allegedly occurring during the Euromaidan Revolution and the actions of former President Yanukovych 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.

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

160 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.
161 The Second Declaration, para. 1.
of the Court “with respect to the crimes referred to in Article 5 of relevance to the situation”.

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.

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. 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. In other words, the ICC will not permit States to opportunistically pursue its enemies.

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”). The Appeals Chamber took a broad view on the parameters of a declaration. 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. 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. Another commentator suggested—prior the Gbagbo 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.

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164 Ibid., para. 60.
169 Ibid., para. 84.
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 ICC Prosecutor or the Court itself. 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 current preliminary examination and any subsequent investigation and prosecution will not be defined by the terms of the declarations but by the evidence discovered after a review of all relevant crimes and perpetrators.

**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 and 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.

**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”\(^1\) and the Russian Federation as “assum[ing] control over Crimea”.\(^2\) 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)\(^3\), 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.

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.\(^4\) On or around 27 February 2014, pro-Russian gunmen began to

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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.176 From the outset, it should be noted that the ICC Prosecutor has confirmed that she is looking at “any relevant crimes arising out of events in Crimea”.177

**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.

**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.

**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.178 Therefore, to assess whether the ICC has 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. As will be discussed below, the ICC is likely to find that the Court has territorial jurisdiction over alleged crimes in Crimea.

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176 The Second Declaration.
178 Rome Statute, art. 12(2)(a).
International law is unequivocal that territory cannot be forcibly annexed. 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. 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. 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. An example of this “control” principle is Cyprus, which ratified the Rome Statute in March 2002. This ratification gives the Court jurisdiction over northern Cyprus, even though Turkey has occupied it since 1974. This situation is likely to apply only to territory that at one point was clearly within the sovereignty of the State in question. This view appears to be the prevailing view among international commentators. 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.

Lastly, as the ICC was set up to end impunity, 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

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181 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.


187 Rome Statute, Preamble, para. 5.
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.188

To conclude, international law and ICC practice suggest that it is likely the ICC would find that it has territorial jurisdiction over relevant crimes in Crimea.

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.189 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.190 This is primarily because ISIS appears to be an


189 Rome Statute,art. 12(2)(b).

190 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS’ (ICC, 8 April 2015) <www.icc-
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.

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.

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,
tried 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 has already announced that she will consider
all information from reliable sources to consider the situation in Ukraine including the regions
of Luhansk and Donetsk, which together make up the “Donbas” region. 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.
The conflict in eastern Ukraine appeared to begin around 7 April 2014 when protesters began

\[\text{cpi.int/en\_menus/icc/press\%20and\%20media/press\%20releases/Pages/otp-stat-08-04-2015-1.aspx} \text{ accessed 28 March 2016.}\]

\[\text{191 2015 Preliminary Examination Report, para. 110.}\]

\[\text{192 Rome Statute, art. 11.}\]
to seize government buildings in Kharkiv, Donetsk and Luhansk. 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. 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. 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. 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.

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Jurisdiction and the Downing of MH17

The following section will discuss the main issues related to various bases of jurisdiction to prosecute those responsible for the MH17 disaster. In particular, it will discuss where a trial may eventually be held if those responsible for the downing of the flight are arrested, including separate prosecutions in individual States, at the ICC or at an international tribunal set up by the States most affected by the incident.

Summary of the Facts

On 17 July 2014, Flight MH17 was en route from Amsterdam to Kuala Lumpur with a total of 298 people on board. It flew over eastern Ukraine, where it vanished from the radar without a distress signal. The plane crashed at a site in Donetsk Oblast.197

Western nations have attributed blame for the downing of MH17 to the Ukrainian separatists who, it is alleged, fired a missile supplied by Russia. U.S. Officials from the Office of Director of National Intelligence claim there is a “solid case” that a Buk missile was fired at the aircraft from eastern Ukraine.198

A Dutch-led team that included representatives from the Netherlands, Australia, Malaysia, Belgium and Ukraine began investigations into the downing of the aircraft and, in September 2014, their preliminary report indicated that MH17 broke up mid-air after being hit by “numerous objects” that “pierced the plane at high velocity” from outside the cabin and above the level of the cockpit floor.199 In August 2015, the team announced that fragments of a suspected Russian missile system had been found at the crash site.200

The Dutch Safety Board released technical investigative reports into the downing of MH17 in October 2015. In short, it reported that the crash was caused by the detonation of a model 9n314M warhead, fitted to a 9M38-series missile that was fired from a Buk surface-to-air missile system.201

Where Will A Trial Be Held?

Once the investigation comes to a close and the case turns to prosecution, the question of where the perpetrators will be prosecuted for the alleged crimes arises. The likely possibilities are:

- Separate prosecutions, all taking place in one jurisdiction;

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199 Ibid.
Separate prosecutions in each of the nine nations that lost their nationals; The ICC; or Another international criminal tribunal.

Separate Prosecutions and Jurisdictional Claims

The States most affected by the downing of MH17 all appear to have different “claims” to jurisdiction over the prosecution of those responsible for the incident. The competing claims that could be used to assert the right to prosecute those responsible for the downing are considered below.

First, Ukraine appears to have the “primary” jurisdictional claim to prosecute the people responsible because the incident occurred on its territory and was allegedly committed by one or more of its citizens. This is known as the territoriality principle, which is often perceived as “sovereignty in action”.\(^\text{202}\) It is universally recognised that a State may assert jurisdiction over activities in its own territory.\(^\text{203}\) The territoriality principle will apply where conduct either takes place within a nation’s borders (known as subjective territoriality), or the effects of the conduct are felt within the borders (known as objective territoriality).\(^\text{204}\)

Second, the aircraft was allegedly downed by Ukrainian citizens, which would give Ukraine jurisdiction to prosecute based on the concept of nationality jurisdiction. Nationality jurisdiction is generally accepted as a jurisdictional basis in international criminal law.\(^\text{205}\) It provides that a State has jurisdiction over the conduct of its nationals, at home or abroad. The nationality principle is based on the view that a sovereign State is entitled to regulate the conduct of its own nationals anywhere, for the reason that such nationals owe a duty to obey the State’s laws even when they are outside the State.\(^\text{206}\)

Third, different countries lost citizens as a result of the incident, including 154 Dutch citizens, 27 Australian citizens, 9 UK citizens and others. Each may have a claim to jurisdiction based on “passive personality” jurisdiction. The principle is defined as the exercise of jurisdiction by a “victim” State over crimes committed against its nationals while they were abroad.\(^\text{207}\) The principle is based on the duty of a State to protect its nationals abroad\(^\text{208}\) and is concerned with


the effect of crimes, rather than the location where they occurred.209 As one commentator notes, however, passive personality has been "more strongly contested than any other type of competence".210 Nevertheless, the exercise of this type of jurisdiction does exist and there is historical precedent. As an example, Chilean dictator Augusto Pinochet was arrested in the UK in 1998 after a Spanish Judge issued an arrest warrant for him based on his involvement in human rights abuses on the grounds that some of the victims of the abuses committed in Chile were against Spanish citizens.

Finally, Malaysia holds the registration for the aircraft in question, which gives Malaysia jurisdiction pursuant to an international agreement known as the Montréal Convention.211 The Montréal Convention jurisdiction is a Convention agreed on by various States in 1971. It provides the basis for two forms of jurisdiction when it involves crimes related to aircraft. First, it recognises territorial jurisdiction (which Ukraine would have). Second, it provides jurisdiction to prosecute crimes committed against aircraft to the State where the aircraft is registered.212

A similar situation arose in the Lockerbie bombing proceedings. This case involved the bombing of American aircraft, PanAm Flight 103, while it flew over Scotland on 21 December 1988. It exploded and came down in the town of Lockerbie in Scotland, killing 259 people aboard and 11 on the ground.213 To try the case, a Scottish Court was established in the Netherlands to prosecute Libyan suspects.214 As the criminal conduct occurred in the UK, the UK was able to claim jurisdiction by virtue of territorial jurisdiction (as reflected in the Montréal Convention) and the passive personality principle. The US could claim jurisdiction under the Montréal Convention due to the PanAm aircraft’s registration being in America.215 These appear to be useful illustrations for consideration of how the prosecution of the events that led to the downing of MH17 might develop.

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212 Montréal Convention, art. 5(1).


215 Montréal Convention, art. 5(1); Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law (Intersentia, 2005)p. 165.
The ICC

The ICC could have jurisdiction to try the persons responsible for the downing of MH17 because the Declarations submitted by Ukraine extend to the territory of eastern Ukraine and cover the relevant time period. MH17 was downed on 17 July 2014 as it flew over eastern Ukraine. The crash site was in the Donetsk region of Ukraine. This is clearly covered by the Declaration of 8 September 2015.\textsuperscript{216} The ICC Prosecutor has confirmed that she is monitoring the investigations into the MH17 incident.\textsuperscript{217}

As outlined in Chapter Two, Part Three, even if the Declarations provide a jurisdictional basis upon which to proceed, the Prosecutor will need to consider whether the matter is “admissible”. In other words, the Prosecutor will consider, independent of whether crimes occurred that it has jurisdiction over, whether the ICC has the power to initiate criminal proceedings. For this to occur, the Prosecutor will need to consider whether there are investigations into the specific case that the ICC will focus on.\textsuperscript{218} Pursuant to the description of the ICC as “complementary” to the national jurisdictions described above, if other investigations are ongoing, the ICC Prosecutor will typically not intervene, so long as such investigations or criminal proceedings demonstrate a willingness or ability to carry out proceedings genuinely. These matters are considered below.

As mentioned, there is already a Dutch-led criminal investigation underway that released technical investigative reports in October 2015. This investigation would therefore fall within the complementarity provisions requiring that “the case is being investigated by a State which has jurisdiction over it”. Furthermore, “concrete and progressive”\textsuperscript{219} steps have already been taken towards the investigation and prosecution, including the publication of preliminary conclusions and analysis of the wreckage. There are also frequent reports of discussions on the issue between the concerned State Parties. With such an international investigation, there can be little doubt of the willingness or ability to pursue the proceedings genuinely. Accordingly, the ICC would likely conclude that the case is not admissible at the ICC and refuse to try the case.

An International Tribunal

Despite the competing jurisdictional claims, it appears most likely that the concerned states will “pool” their jurisdictional rights and establish an international criminal tribunal to be jointly implemented. In September 2015, it was reported that some of the concerned States—


\textsuperscript{217} 2015 Preliminary Examination Report.


\textsuperscript{219} Gaddafi Admissibility Decision, paras. 54, 55 and 73. See also, The Prosecutor v. Saif Al-Islam Gaddafi (Decision requesting further submissions) ICC-01/11-01/11-239 (7 December 2012) para. 11; 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.
Australia, Belgium, Malaysia, the Netherlands and Ukraine—would meet at the UN General Assembly to discuss how to proceed with criminal investigations. It was reported that Julia Bishop—Australia’s Foreign Minister—indicated that States may choose to establish their own tribunal. She said such a court, which does not require UN approval, could be established through a treaty “by all of the grieving countries, however many lost citizens”. Ukrainian Foreign Minister Pavlo Klimkin also noted the potential for a tribunal for MH17 based on an agreement among the five most concerned States. The Australian foreign minister suggested that the closest analogy to this type of treaty-based court was the Lockerbie court.

Extradition of Accused Persons

There is the prospect that a foreign citizen (e.g., a Russian citizen) was involved in the downing of MH17. In this case, the Tribunal or States responsible for the Tribunal could request that the foreign State, such as Russia, hand the individual over to the Tribunal for trial. This is known as extradition.

In the event that a Russian national was involved in the downing of the aircraft, it is possible that an extradition request to the Russian Government would be rejected. If this occurs, the Montréal Convention (which is signed by, and binds, Russia) would become relevant. The Convention provides that, in a situation in which a State (such as Russia) is in possession of an offender accused of committing an offence abroad (such as the downing of MH17), the State must either extradite that individual to a requesting State or “[s]ubmit the case to its competent authorities for the purpose of prosecution” in accordance with the appropriate laws.

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222 Montréal Convention.
223 See Montréal Convention, art. 1:
1. Any person commits an offence if he unlawfully and intentionally:
   (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
   (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
   (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
   (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
   (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.
2. Any person also commits an offence if he:
   (a) attempts to commit any of the offences mentioned in paragraph 1 of this article; or
   (b) is an accomplice of a person who commits or attempts to commit any such offence.
of that State.\textsuperscript{224} The Netherlands, Ukraine and Malaysia are also parties to the Convention.\textsuperscript{225} In these circumstances, Russia would be legally bound to extradite the accused person to one of those requesting States or prosecute that person in Russia.\textsuperscript{226} However, no recourse exists if a State fails to extradite unless the UNSC authorises such recourse against a UN Member State.\textsuperscript{227}

\textit{Conclusion}

To conclude, there appears to be a distinct possibility that concerned States will opt for an independent tribunal located in the Netherlands. Given the various jurisdictional claims, this will likely be outside the ordinary Dutch (or any national) court system, but governed by an amalgamation of domestic laws (e.g., Ukrainian and Malaysian) and international laws.

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.

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.\textsuperscript{228} 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.\textsuperscript{229}

\textsuperscript{224} Montréal Convention, art. 7: "[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."


\textsuperscript{226} Montréal Convention, art. 8: The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may as its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.


\textsuperscript{228} The Situation in Georgia (Request for authorisation of an investigation) ICC-01/15-4-Corr (17 November 2015) paras. 198-201.

\textsuperscript{229} 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’;
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.

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. However, there is no outright amnesty provision in the Minsk Agreements—only a requirement to take steps to provide for them.

Recently, the draft law “On the exemption from prosecution and punishment of persons taking part in events on the territory of the Donetsk and Luhansk Oblasts” was developed pursuant to the Minsk Agreements. The draft provides amnesty to people who committed crimes as part of armed groups or were involved in acts by such groups in the areas of Donetsk and Luhansk from 22 February 2014 onwards. Moreover, it provides that there are certain categories of crimes not covered by the amnesty. These include genocide under Article 442 of the Criminal Code of Ukraine, murder, hostage-taking, rape under Article 152 of the Criminal Code of Ukraine and other offences. These offences could still be prosecuted. The list of crimes excluded from the amnesty does not include war crimes listed under Article 438 or Article 127 regarding the crime of torture. In other words, war crimes and torture seemingly may not be prosecuted.

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-

\[\text{Ibid., para. 65:} [\ldots] \text{the information available indicates that at least some members of the Russian armed forces participated in the commission of such crimes, while other members of the Russian armed forces acted passively in the face of such crimes, and still others acted to prevent and punish such crimes.}\]


\[232 \text{Ibid.}\]

\[233 \text{Ibid.}\]

\[234 \text{Ibid., pp. 6-7.}\]
In other words, to ensure 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. There is little disagreement with this position. The ICRC agrees with this stance, as does the UN, the UN Commission on Human Rights (“UNCHR”) and the UN Secretary-General. The International Criminal Tribunal for the former Yugoslavia (“ICTY”) has said explicitly that war crimes may not be the object of an amnesty. Further, while the law is in somewhat of a state of flux, depending on the nature

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235 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.


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


239 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.


242 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 - 7.

of the offence, States may be obliged to prosecute international offences such as war crimes or crimes against humanity.

An example of this in action is Sierra Leone. After the civil war in Sierra Leone, the Lomé Peace Accord was reached. 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.

These principles can be applied to Ukraine’s draft law on the provision of amnesty. Ukraine is entitled and encouraged to provide amnesty to those participating in the conflict. However, if Ukraine presses ahead with the present draft amnesty law, it should be amended to 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


245 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).


248 ‘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.’


250 ‘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.’
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).\textsuperscript{248}

**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.

**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,\textsuperscript{249} 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;\textsuperscript{250} (vi) the surrender of persons to the court;\textsuperscript{251} and (vii) provisional arrest.\textsuperscript{252} These will be discussed in detail below in Part Two, “Ratification”.

**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.\textsuperscript{253}

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.\textsuperscript{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 diplomatic or other political action.\textsuperscript{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.\textsuperscript{378}


\textsuperscript{249}Rome Statute, art. 86.

\textsuperscript{250}Ibid., art. 93(1).

\textsuperscript{251}Ibid., art. 89.

\textsuperscript{252}Ibid., art. 98.

\textsuperscript{253}Ibid., art. 87(5)(b).
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.254 To ratify the Rome Statute, a State will deposit a document containing this consent with the Secretary-General of the UN.255

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 2007.256 Nevertheless, as of August 2016, Ukraine has not joined the 124 States Parties257 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 5258 of the Statute when committed on its territory or by its nationals.259

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.

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,260 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).261

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.262 Therefore, while a Declaration will lead to the Prosecutor automatically

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254 Vienna Convention, arts. 2 (1) (b), 14 (1) and 16.
255 Rome Statute, art. 125(2).
256 Ukraine is the first non-State Party to the Rome Statute to accede to the latter Agreement.
258 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.
259 Rome Statute, art. 12(1).
260 Ibid., arts. 9(2), 51(2), 112(7), 121.
261 Ibid., arts. 36(4), 42(4).
262 Ibid., arts. 13 and 18.
opening a preliminary examination, 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.

**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. There is no reason to suggest that this will not cover new developments in the coming years.

**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. This suggests a difference in the formality of the request. 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

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263 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.

264 The Second Declaration.

265 Rome Statute, art. 87(5)(a).

266 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.
to provide the document or information because of a pre-existing obligation of confidentiality to the originator.267

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.268 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.269 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.270 This particular difference is, however, not applicable to Ukraine because Ukraine has acceded271 to the 2002 Agreement on the Privileges and Immunities of the International Criminal Court on 29 January 2007.272 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.273 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.274 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”.275 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-State 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.

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267 Ibid., art. 73.
268 Ibid., art. 48.
269 Ibid., art. 48.
270 Ibid., art. 48.
271 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.
272 ICC Agreement on Privileges and Immunities.
273 Ibid., art. 3.
274 Rome Statute, art. 57(3)(d).
275 Ibid., art. 57(3)(d).
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;\(^{276}\)
- Surrendering people to the Court;\(^{277}\)
- Identifying the whereabouts of persons;\(^{278}\)
- Taking evidence including testimony;\(^{279}\)
- Executing search and seizures.\(^{280}\)

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.\(^{281}\) 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.\(^{282}\) 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,\(^{283}\) 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”.\(^{284}\) 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.

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.

Crimes: What the ICC Has Jurisdiction Over

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\(^{276}\)Ibid., art. 92.  
\(^{277}\)Ibid., art. 89.  
\(^{278}\)Ibid., art. 93(1).  
\(^{279}\)Ibid., art. 93(1).  
\(^{280}\)Ibid., art. 93(1).  
\(^{281}\)Ibid., art. 75(5)  
\(^{282}\)Ibid., art. 75(4).  
\(^{283}\)Ibid., art. 93(1)(k).  
\(^{284}\)Ibid., art. 93(1)(l).
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 recent preliminary examination report outlining initial findings in relation to the events during Euromaidan will be discussed.

Offences under the Rome Statute
There are three crimes that may be tried by the ICC: genocide, war crimes and crimes against humanity. 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.

Genocide
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.285

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.

Crimes Against Humanity
The Law
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;

285 Rome Statute, art. 6.
- 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.  

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. The terms “widespread” or “systematic” do not apply to the individual acts—such as murder or persecution—but to the attack as a whole. “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; it “should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”. It can also mean an attack carried out over a small or large geographical area, but either way directed against a large number of civilians. Alternatively, “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence. 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”. Other factors that may be of relevance to the assessment of whether an

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288 Ibid.


attack was systematic are the involvement of substantial public or private resources and the implication of high-level political and/or military authorities.

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. An attack that is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion. 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. It must involve the multiple commission of acts. It must then be directed against a civilian population. That population must be the primary target and not incidental to an attack.

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;
- 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;
- Crime against humanity of enslavement;
- Crime against humanity of deportation or forcible transfer of population;
- Crime against humanity of imprisonment or other severe deprivation of physical liberty;
- Crime against humanity of torture;

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297 Prosecutor v. Jean-Pierre Bemba Gombo (Decision on the confirmation of charges) ICC-01/05-01/08-424 (15 June 2009) para. 81.

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

299 Ibid., para. 1102.

300 Ibid., para. 1104.

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

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

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

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

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

306 Rome Statute, art. 7(1)(f); ICC Elements of Crimes, p. 7.
• Crime against humanity of rape;\textsuperscript{307}
• Crime against humanity of sexual slavery;\textsuperscript{308}
• Crime against humanity of enforced prostitution;\textsuperscript{309}
• Crime against humanity of forced pregnancy;\textsuperscript{310}
• Crime against humanity of enforced sterilization;\textsuperscript{311}
• Crime against humanity of sexual violence;\textsuperscript{312}
• Crime against humanity of persecution, which entails the severe deprivation of a victim of their fundamental rights because of their identity;\textsuperscript{313}
• Crime against humanity of enforced disappearance of persons;\textsuperscript{314}
• Crime against humanity of apartheid, which entails the institutionalised regime of systematic oppression or domination by one racial group over any other racial group;\textsuperscript{315}
• 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.\textsuperscript{316}

Crimes Against Humanity and Euromaidan

The Prosecutor is currently conducting a preliminary examination into the situation in Ukraine. As part of that, the Prosecutor is considering the events during the Euromaidan Revolution and whether any crimes against humanity within the jurisdiction of the Court were committed.

On 12 November 2015, the ICC Prosecutor’s Office released its Annual Report summarising its activities and findings concerning ongoing preliminary examinations, which includes Ukraine.\textsuperscript{317} For Ukraine, the report focuses on whether crimes against humanity were perpetrated during the Euromaidan protests.

\textit{Preliminary Findings of the ICC Prosecutor}

Based on the limited information available to the ICC Prosecutor at this stage, she concluded that insufficient evidence exists to conclude that the attack on civilians during Euromaidan, pursuant to a State policy, was either widespread or systematic.

\textsuperscript{307}Rome Statute, art. 7(1)(g)(1); ICC Elements of Crimes, p. 8.
\textsuperscript{308}Rome Statute, art. 7(1)(g)(2); ICC Elements of Crimes, p. 8.
\textsuperscript{309}Rome Statute, art. 7(1)(g)(3); ICC Elements of Crimes, p. 9.
\textsuperscript{310}Rome Statute, art. 7(1)(g)(4); ICC Elements of Crimes, p. 9.
\textsuperscript{311}Rome Statute, art. 7(1)(g)(5); ICC Elements of Crimes, p. 9.
\textsuperscript{312}Rome Statute, art. 7(1)(g)(6); ICC Elements of Crimes, p. 10.
\textsuperscript{313}Rome Statute, art. 7(1)(h); ICC Elements of Crimes, p. 10.
\textsuperscript{314}Rome Statute, art. 7(1)(i); ICC Elements of Crimes, p. 11.
\textsuperscript{315}Rome Statute, art. 7(1)(j); ICC Elements of Crimes, p. 12.
\textsuperscript{316}Rome Statute, art. 7(1)(k); ICC Elements of Crimes, p. 12.
\textsuperscript{317}2015 Preliminary Examination Report.
The Report does not address war crimes as constituting possible crimes committed during Euromaidan, likely because the key prerequisite was not met—the existence of an armed conflict. Further, genocide is not addressed, presumably because public information from the events during Euromaidan does not suggest acts were done with an intent to destroy a national, ethnic, racial or religious group. The report is largely limited to a discussion of the individual components of crimes against humanity as outlined below.

**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.\(^318\) 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. \(^319\) The next report, issued in November, 2016, pays attention to the situation in Crimea and Eastern Ukraine.\(^320\)

**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.\(^321\) 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”);\(^322\) 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);\(^323\) and the apparent efforts to conceal or cover up alleged crimes.\(^324\)

*Widespread or Systematic Perpetration of the Crimes Has Not Been Established*

**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”.\(^325\) In particular, the ICC Prosecutor finds that although demonstrations continued for a three-month period and involved

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\(^{318}\)Ibid., para. 90.

\(^{319}\)Ibid.

\(^{320}\) 2016 Report on preliminary study.

\(^{321}\) 2015 Report on preliminary study, para. 93.

\(^{322}\)Ibid.

\(^{323}\)Ibid.

\(^{324}\)Ibid.

\(^{325}\)Ibid., para. 96.
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, 19-24 January 2014, and 18-20 February 2014). 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.

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. 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.

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. 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.

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”.

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 report does not close the door on the prosecution of crimes against humanity at the ICC for the reasons described below.

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326 Ibid.
327 Ibid., para. 97.
328 Ibid.
329 Ibid.
330 Ibid., para. 99.
331 Ibid.
332 Ibid.
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 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 so far the ICC Prosecutor has received fewer communications (see above) in relation to Ukraine than some of the other situations being examined at the ICC. The Prosecutor has received 20 communications relating to Euromaidan (crimes between 21 November 2013 to 22 February 2014), and 35 relating to the conflict in the east (crimes committed after 20 February 2014). This is in contrast to the 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.

Accordingly, it is now for civil society and State bodies to collectively focus their investigatory abilities on the following three principal deficiencies identified in the 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.

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.
**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;\(^{333}\)
- The crime should be committed during, and have a sufficient nexus to, the armed conflict;\(^{334}\) 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”;\(^{335}\)

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.\(^{336}\)

- Other serious violations of the laws and customs of war:

\(^{333}\) Rome Statute, arts. 8(2)(d) and (f).
\(^{336}\) Rome Statute, art. 8(2)(a)(i)-(viii).
o Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

o Intentionally directing attacks against civilian objects, that is, objects that are not military objectives;

o 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;

o 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;

o Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended and are not military objectives;

o Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

o 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;

o 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;

o 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;

o 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;

o Killing or wounding treacherously individuals belonging to the hostile nation or army;

o Declaring that no quarter will be given;

o Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war;
o Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

o 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;

o Pillaging a town or place, even when taken by assault;

o Employing poison or poisoneous weapons;

o Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

o 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;

o 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;

o Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

o 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;

o Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

o 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;

o 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;

o Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.337

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

- Violations of Article 3 common to the four Geneva Conventions:

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337 Rome Statute, art. 8(2)(b)(i)-(xxvi).
o Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

o Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

o Taking of hostages;

o 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.\(^{338}\)

- Other serious violations of the laws and customs of war:

  o Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

  o 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;

  o 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;

  o 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;

  o Pillaging a town or place, even when taken by assault;

  o 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;

  o Conscription or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

  o 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;

  o Killing or wounding treacherously a combatant adversary;

  o Declaring that no quarter will be given;

  o 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

\(^{338}\)Ibid., art. 8(2)(c)(i)-(iv).
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.339

**The Crime of Aggression**

**Overview**

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).340 However, the ICC cannot prosecute the crime of aggression at present.341

The provision that defines the crime is Article 8bis 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.

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.342 It must be noted that the offence must have been committed and that threats are not sufficient pursuant to Article 8bis 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;

339 Rome Statute, art. 8(2)(e)(i)-(xv).
340 Ibid., art. 5.
341 Ibid., arts. 5(2) and 121.
• 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.\(^{343}\)

As noted, the Court cannot exercise its power over the crime of aggression at present. There are two recent additions to the Rome Statute concerning the Court’s jurisdiction to try the crime. The provisions of both Article 15bis and 15ter provide that the Court will not be able to exercise its jurisdiction with respect to crimes of aggression until:

• One year passed after at least 30 State Parties have ratified or accepted the amendments; and

• A decision is taken by two-thirds\(^{344}\) of State Parties to activate the jurisdiction at any time after 1 January 2017.

The Court may exercise its jurisdiction over the crimes of aggression only once both of the above mentioned conditions are fulfilled.\(^{345}\) As of August 2016, 30 States Parties to the Rome Statute have ratified the necessary amendments on the crime of aggression.\(^{346}\)

The Crime of Aggression and Ukraine

This section considers whether the ICC would have jurisdiction over the crime of aggression allegedly committed by Russia against Ukraine. It should be noted that whether the ICC would have subject-matter jurisdiction, i.e. whether the crime actually occurred, is speculative. This overview will focus on whether prosecuting a State such as Russia for alleged aggression before the crime is adopted by the ICC would contravene a principle known as “non-retroactivity”. Relatelly, it will then address whether the Court may have temporal jurisdiction over acts of aggression which begin before the crime is adopted, but “continue” after it is adopted. The subject is dealt with in detail in Chapter Two.

The crime of aggression appears to be important to Ukraine. There are many who have branded Russia’s alleged activities in eastern Ukraine and particularly Crimea as an act of aggression.\(^{347}\) President Putin even acknowledged that Russian troops in early 2014 entered

\(^{343}\) Aggression Resolution, Annex II ‘Elements’.

\(^{344}\) Rome Statute, art. 121(3).

\(^{345}\) Aggression Resolution, Annex III(3).


the region of Crimea and took control, thereby providing some modicum of support that an act of aggression occurred.\textsuperscript{348} Further, the Russian Federation expressly considered the region of Crimea as now being the Republic of Crimea and having “acceded”, or joined, the Russian Federation.\textsuperscript{349} President Putin has accepted that there are “Russian military specialists” in eastern Ukraine, but not regular forces.\textsuperscript{350} However, the Organisation for Security and Cooperation in Europe (“OSCE”) has encountered regular personnel in eastern Ukraine identifying themselves openly as Russian military.\textsuperscript{351}

Non-Retroactivity

In short, it is unlikely that the Court could 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.\textsuperscript{352} 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). Accordingly, there is little doubt that the ICC cannot prosecute the crime of aggression until after aggression jurisdiction is fully activated (in 2017 at the earliest). As one commentator suggests, the question of retroactivity is a non-concern for aggression because the Rome Statute is so explicit in prohibiting it.\textsuperscript{353}


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.

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. Even though the crime of aggression is not yet prosecutable, there is an argument to suggest the physically continuing act of 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, as will be discussed in Chapter Two of this Report in more detail, an analysis of the prevailing law suggests because it is the initial act of aggression that forms the crime, there may be no such exception or circumvention of the non-retroactivity principle to allow prosecution of the offence.

In short, 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. Therefore, the act of occupation is the result of an invasion or an attack, suggesting a singular act of aggression. In this sense, the crime is not likely to be seen as a continuing offence.

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”. This seems to focus on the initial placing of a territory under control of the hostile army as being the act of aggression.

Overall, despite these iterations, the debate is unsettled. It will not be settled until the ICC determines the matter. 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, it seems that 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 Russia.

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

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354 Rome Statute, art. 8bis(2)(a).
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.

**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.\(^3\)\(56\)

**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.\(^3\)\(57\) Joint commission, known as co-perpetration, describes a scenario in which two or more persons each contribute to the commission of a crime.

**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.\(^3\)\(58\)

**Indirect Co-Perpetration**
Indirect co-perpetration combines indirect perpetration (“through another person”) and co-perpetration (“jointly with another”).\(^3\)\(59\) 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.\(^3\)\(60\) Suspects must also be mutually aware and mutually accept that implementing

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\(^3\)\(57\) *The Prosecutor v. Thomas Lubanga Dyilo (Judgment)* ICC-01/04-01/06 (14 March 2012) para. 980.

\(^3\)\(58\) *The Prosecutor v. Germain Katanga (Judgment)* ICC-01/04-01/07 (7 March 2014) para. 1399.


\(^3\)\(60\) *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)*
their common plan will result in the realisation of the objective element of the crimes; and the suspects must be aware of the factual circumstances enabling them to control the crimes jointly.

**Ordering, Soliciting or Inducing Commission**

**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.

**Ordering**

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

**Otherwise Assisting or Aiding and Abetting the Commission of the Crime**

Aiding and abetting involves the facilitation of an offence. 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. The assistance may consist of an act or omission or occur...
before, during, or after the act of the principal offender. Criminal participation must have a direct and substantial effect on the commission of the offence.

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. 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”.

**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”. 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. 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.

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371 Rome Statute,art. 25(3)(d).


373Mbarushimana Arrest Warrant Decision, para. 39, fn 66 and para. 44: recognises the various interpretations of the word “intentional” as applied toart. 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 underart. 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.
**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. 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.

**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.

**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. To ratify the Rome Statute, a State will give a document containing this consent to the Secretary-General of the UN.

**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 in Ukraine, the country must first amend the constitution to permit recognition of the Rome Statute, and then proceed to “implement” the provisions of the Rome Statute into Ukraine’s domestic legal system.

**Ratification**

As a result of a Constitutional Court decision outlined in Part One, Ukraine must amend its Constitution before it can 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. The Court concluded that jurisdiction supplementary to the national Ukrainian system was not contemplated by the Constitution. Therefore, under Part 9 of the Constitution, the Constitution itself must be amended before the Rome Statute can be ratified.

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374 Rome Statute, art. 28.
375 Vienna Convention, arts. 2 (1) (b), 14 (1) and 16.
376 Rome Statute, art. 125(2).
377 Constitutional Court Opinion, part 2.1, para. 3.
378 ICRC Rome Statute Issues, p. 11.
379 Ibid.
More recently, in late November 2015, the President of Ukraine submitted a draft law to the Verkhovna Rada on amending the Constitution. 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.”

This seeks to amend the Constitution of Ukraine with a “catch-all” provision. It does not seek to amend the offending provisions identified by the Constitutional Court (see Part One), but rather gives 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, Chile 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. Côte d’Ivoire, however, did lodge two Declarations (as Ukraine has) on 18 April 2003. 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”. The State subsequently deposited its instrument of ratification on 15 February 2012 with the UN.

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

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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.\(^{387}\) It therefore found that this provision violated the Constitution and ratification required a constitutional amendment.\(^{388}\) As a consequence, France adopted a constitutional provision that solved all the constitutional problems raised above.\(^{389}\) 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”.\(^{390}\) The government was of the view that this Article addressed the constitutional concerns.\(^{391}\)

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 draft law of November 2015.\(^{392}\) 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.\(^{393}\) 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.

**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

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\(^{389}\) Ibid.


cooperation and be able to investigate and prosecute the crimes therein.\textsuperscript{394} 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.

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.\textsuperscript{395} As with the likely majority of States globally,\textsuperscript{396} 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.\textsuperscript{397} 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.\textsuperscript{398}

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\textsuperscript{397} ibid.pp. 13-14.

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 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).399 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 counties 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.400 The United Kingdom Act takes a similar approach by incorporating Rome Statute crimes by reference.401 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.402 Canada establishes the crimes through custom, but defines custom as including Article 6, 7, and 8 of the Rome Statute403 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 2002.404 The Law provides for universal jurisdiction over genocide, crimes against humanity and war crimes.405 It has been noted that this acts as a standalone Criminal Code

and is not incorporated into the existing criminal code of Germany. 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. 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. 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.

407 Ibid.
408 Rome Statute, Preamble.
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 a full investigation were met (jurisdiction, admissibility and the interests of justice). 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. This section outlines what the ICC Prosecutor will now consider during the preliminary examination into the situation in Ukraine. It will then contemplate how a formal investigation may come about and what it involves.

Preliminary Examinations

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; (ii) the State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute; or (iii) the UNSC refers a situation to the Court. 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.

411 Rome Statute, arts. 13(a) and 14.
412 Ibid., art. 12(3).
413 Ibid., art. 13(b).
414 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. If the Prosecutor receives one of the above, she will open a “preliminary examination” into the situation at hand as a matter of policy. 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. 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). 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. The Prosecutor has jurisdiction over matters the UNSC has referred;

- 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; 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.

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. It does not necessarily mean that all the information “points toward only one conclusion.” The information at this early stage is neither expected to be “comprehensive” or “conclusive.”

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 will encompass four “phases” in order to fully determine the situation or case before her:

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415 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.

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

417 Ibid., art. 11.

418 Ibid., art. 12(2).

419 Ibid., art. 12(2).

420 Ibid., arts. 1 and 17.

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

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

423 Ibid., para. 34.

424 Ibid., para. 27.
• 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”.

The length of time needed to complete these phases and conduct a preliminary examination varies from situation to situation. Honduras’ preliminary examination has been ongoing for five years and is still in phase two. Ukraine is also in phase two, but the preliminary examination has only been ongoing for around a year and a half. Colombia is in phase three and is eleven years into a preliminary examination. Iraq’s preliminary examination concluded in 2006 and was reopened eight years later with new information. Accordingly, the four phases have no set timetable. The four phases are outlined and explained below in turn.

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.

During this phase and the remainder of the preliminary examination, the ICC Prosecutor must act independently, impartially and objectively, 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 and will cast its net widely to seek information from States, members of civil society and UN organs and other credible sources. The Prosecutor may also receive written and oral testimony at the seat of the

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425 Preliminary Examinations Policy Paper, paras. 77-84.
428 Ibid.,p. 25, para. 103.
429 Ibid.,p11,paras. 42-43.
430 Rome Statute,art. 15(3); Rules of Procedure and Evidence,r. 104(2).
432 Preliminary Examinations Policy Paper,p. 7, para. 27.
433 Rome Statute,arts. 14(2) and 15(2); Rules of Procedure and Evidence,r. 104.
Court. The Prosecutor 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.

**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, and various UN and international organisations. 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 sometime after 2017). 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.

**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

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434 Ibid.
436 In the case of Honduras, campesino groups from the Bajo Aguan region. 2014 Preliminary Examination Report, p. 10, para. 39.
437 Ibid.
438 Rome Statute, art. 5.
national investigations or prosecutions have commenced, to what extent and whether the apparent crimes appear sufficiently grave.

As noted above, the principle of admissibility encompasses the concepts of complementarity and gravity. 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. 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. If not, then this factor alone is sufficient to make the case admissible at the ICC.

- 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. 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. 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 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.

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439 Ibid., arts. 17(1)(a)-(c) (complementarity) and art. 17(1)(d) (gravity).
440 Ibid., arts. 18(1) and 19(2)(b).
442 Ibid.
443 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.
Next, the ICC Prosecutor must consider whether a case is of sufficient gravity to justify further action by the Court. In line with the above, the ICC Prosecutor must consider each potential case that would likely arise from the investigation of a situation. 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.

**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.

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.

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. 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.

**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;
• 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.\textsuperscript{453}

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.\textsuperscript{454}

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, 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).\textsuperscript{455} 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.

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.\textsuperscript{456}

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.\textsuperscript{457} 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.\textsuperscript{458} She must also send notice of this decision, along with her reasoning, in a

\textsuperscript{453} Preliminary Examinations Policy Paper, p. 4, para. 14.
\textsuperscript{454} Rome Statute, art. 53(4); Rules of Procedure and Evidence, r. 49(2).
\textsuperscript{455} Rome Statute, arts. 15(1)-(3); Rules of Procedure and Evidence, r. 50.
\textsuperscript{456} Ibid., art. 53(1).
\textsuperscript{457} Ibid., art. 15(3); Rules of Procedure and Evidence, r. 50(2).
\textsuperscript{458} Rules of Procedure and Evidence, r. 50(1).
manner that prevents any danger to the safety, well-being or privacy of those who provided information to her.\textsuperscript{459}

If the Pre-Trial Chamber, upon examination of the request for authorisation from the Prosecutor, concludes that there is a “reasonable basis”\textsuperscript{460} 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.\textsuperscript{461} 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.

\textit{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;\textsuperscript{462} (ii) that the case is inadmissible under Article 17;\textsuperscript{463} 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.\textsuperscript{464}

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.\textsuperscript{465}

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.\textsuperscript{466}

\textit{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

\begin{itemize}
\item[459] Rules of Procedure and Evidence, r. 49(1).
\item[460] 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: Kenya Authorisation Decision, paras. 27-35.
\item[461] Rules of Procedure and Evidence, Rule 50(6).
\item[462] Rome Statute, art. 53(2)(a).
\item[463] Ibid., art. 53(2)(b).
\item[464] Ibid., art. 53 (2)(c): Rules of Procedure and Evidence, Rule 105(1).
\item[465] Ibid., art. 53(3)(a).
\item[466] Ibid., art. 53(3)(b).
\end{itemize}
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.

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]”. 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. Further, the Statute makes it clear that the purpose of the Prosecutor’s investigation is to establish truth rather than to prove guilt. 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.

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, as well as questioning potential suspects, including victims and witnesses. 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.

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 ways including (i) surrendering a person to the Court; (ii)

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467 Ibid., art. 12(3).
468 Ibid., art. 54(1)(a).
469 Ibid., art. 54(1)(a).
470 Ibid., art. 54(1)(b).
471 Ibid., art. 54(3)(a).
472 Ibid., art. 54(3)(b).
473 Ibid., art. 54(3)(d).
474 Ibid., art. 93.
475 Ibid., art. 89.
identifying and providing the whereabouts of persons or the location of items,\textsuperscript{476} (iii) assisting in the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports deemed necessary by the ICC;\textsuperscript{477} (iv) providing the questioning of any person being investigated or prosecuted;\textsuperscript{478} (v) facilitating the voluntary appearance of persons as witnesses or experts before the Court;\textsuperscript{479} (vi) providing the examination of places or sites, including the exhumation and examination of grave sites;\textsuperscript{480} (vii) executing searches and seizures;\textsuperscript{481} (viii) providing the protection of victims and witnesses and the preservation of evidence;\textsuperscript{482} (ix) identifying, tracing and freezing or seizing the proceeds, property and assets and instrumentalities of crimes;\textsuperscript{483} as well as (x) any other type of assistance requested by the Prosecutor which is not prohibited by the law of the requested State.\textsuperscript{484}

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 \textit{ad hoc}, one-off arrangement.\textsuperscript{485} 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.\textsuperscript{486}

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 fora person who the Prosecutor reasonably believes, as a result of her investigation, has committed a crime within the jurisdiction of the court.\textsuperscript{487} 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 Lukwia 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.

\begin{thebibliography}{99}
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\item \textsuperscript{476}Ibid., art. 93(1)(a).
\item \textsuperscript{477}Ibid., art. 93(1)(b).
\item \textsuperscript{478}Ibid., art. 93(1)(c).
\item \textsuperscript{479}Ibid., art. 93(1)(e).
\item \textsuperscript{480}Ibid., art. 93(1)(g).
\item \textsuperscript{481}Ibid., art. 93(1)(h).
\item \textsuperscript{482}Ibid., art. 93(1)(j).
\item \textsuperscript{483}Ibid., art. 93(1)(k).
\item \textsuperscript{484}Ibid., art. 93(1)(l).
\item \textsuperscript{485}Ibid., art. 87(5)(a).
\item \textsuperscript{486}Ibid., art. 87(5)(b).
\item \textsuperscript{487}Ibid., art. 58(1)(b)(i).
\end{thebibliography}
(“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, President of Sudan since 1993. 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.

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.\(^{488}\) 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.\(^{489}\)

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”).\(^{490}\) The Chamber will also make decisions regarding the disclosure of evidence between the Office of the Prosecutor and the defence team(s).\(^{491}\)

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.\(^{492}\)

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,\(^{493}\) or is unable to attend for any other reason.\(^{494}\) 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.\(^{495}\) Once the charges have been read and the Presiding Judge has ruled on how the hearing shall take place, the

\(^{488}\) Rules of Procedure and Evidence, Rule 121.

\(^{489}\) Rome Statute, art. 60(1).

\(^{490}\) 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).

\(^{491}\) Rules of Procedure and Evidence, r. 121(2).

\(^{492}\) Rome Statute, art. 61(1).

\(^{493}\) Rules of Procedure and Evidence, r. 124.

\(^{494}\) Rome Statute, art. 61(2).

\(^{495}\) Rules of Procedure and Evidence, r. 122(1).
Prosecutor must then support each charge with sufficient evidence to establish "substantial grounds" to believe that the accused has committed the crime alleged.\textsuperscript{496}

The accused may then: (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; or (iii) present their own contradictory evidence.\textsuperscript{497} Once the Chamber has listened to the arguments presented by the Prosecutor and the accused, the Chamber will ask for final statements to be made\textsuperscript{498} 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"\textsuperscript{499} and the Prosecution must offer "concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations,"\textsuperscript{500} which must go beyond a mere theory or suspicion.\textsuperscript{501} 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.\textsuperscript{502}

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;\textsuperscript{503} (ii) decline to confirm the charges as a result of determining there is a lack of evidence to support them;\textsuperscript{504} or (iii) adjourn the hearing\textsuperscript{505} 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.\textsuperscript{506}

\begin{itemize}
  \item \textsuperscript{496}Rome Statute, art. 61(5).
  \item \textsuperscript{497}Ibid., art. 61(6).
  \item \textsuperscript{498}Rules of Procedure and Evidence, r. 122(8).
  \item \textsuperscript{499}Rome Statute, art. 61(7).
  \item \textsuperscript{500}The Prosecutor v. Thomas Lubanga Dyilo (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN (29 January 2007) para. 39.
  \item \textsuperscript{501}Ibid., para. 37.
  \item \textsuperscript{502}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.
  \item \textsuperscript{503}Rome Statute, art. 61(7)(a).
  \item \textsuperscript{504}Ibid., art. 61(7)(b).
  \item \textsuperscript{505}Ibid., art. 61(7)(c).
  \item \textsuperscript{506}Ibid., art. 61(7)(c).
\end{itemize}
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.

Sending Information to the ICC Prosecutor

The Prosecutor will receive information during the preliminary examination from almost 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.507 The receipt of communications is an ongoing process and may be considered at any time.508

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”.509 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”.510 Those who send information are encouraged to send it in English or French, but informal translations will be sought for other languages.511

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:

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507 Rules of Procedure and Evidence, r. 46.
509 ‘What should be included in a Communication sent to the Office?’ (ICC) <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/siac/Pages/default.aspx> accessed 14 January 2015.
510 Ibid.
511 Ibid.
• 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;
• Documentary evidence, used to refer to items which document something. It can include UN reports, posts on social media or even 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.\textsuperscript{512} 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 through 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.

Basic Investigative Standards

GRC has produced a guide on the Basic Investigative Standards for first responders to international crimes. The guide is designed to identify and explain the basic standards that anyone collecting evidence of international crimes in Ukraine should adhere to.

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.

\textsuperscript{512}\textit{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, \textit{Cassese’s International Criminal Law} (OUP, 2013)p. 380.
From the very first moment the Trial Chamber is constituted, the Chamber will usually designate 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. 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, to bringing motions to somehow change the conduct of the trial.

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.

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. 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. 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; (ii) to be given adequate time and facilities to prepare his defence and communicate with his counsel in confidence (in other words, in secret); (iii) to be tried without undue delay; (iv) to be provided with legal aid should he/she be unable to afford their own defence; (v) to question witnesses in Court or have witnesses questioned by their counsel; (vi) to have access to an interpreter, when and if necessary, in order to fully

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513 Rules of Procedure and Evidence, r. 132 bis(1).
514 Ibid., r. 132 bis(2).
515 Ibid., r. 133.
516 Ibid., r. 134.
517 Rome Statute, art. 64(8)(a).
518 Ibid., art. 66.
519 Ibid., art. 67.
520 Ibid., art. 67(1)(a).
521 Ibid., art. 67(1)(b).
522 Ibid., art. 67(1)(c).
523 Ibid., art. 67(1)(d).
524 Ibid., art. 67(1)(e).
understand the proceeding;\textsuperscript{525} and (vii) not to be forced to testify, confess guilt and remain silent without determination of guilt or innocence.\textsuperscript{526}

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.\textsuperscript{527} The Judges can ask questions themselves.\textsuperscript{528}

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.\textsuperscript{529} 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.\textsuperscript{530} 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.\textsuperscript{531}

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.\textsuperscript{532} 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.\textsuperscript{533} A verdict will then be reached. The verdict must be a decision based on an “evaluation of the evidence and the entire proceedings”,\textsuperscript{534} 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

\begin{itemize}
\item \textsuperscript{525}Ibid., art. 67(1)(f).
\item \textsuperscript{526}Ibid., art. 67(1)(g).
\item \textsuperscript{527}Rome Statute, art. 68(1).
\item \textsuperscript{528}Rome Statute, art. 68(2).
\item \textsuperscript{529}Rome Statute, art. 68(2).
\item \textsuperscript{530}Rome Statute, art. 68(2).
\item \textsuperscript{531}Rome Statute, art. 74(2).
\end{itemize}
when the decision, along with a full and reasoned statement supporting it, has been distributed should the Chamber’s verdict be known.\textsuperscript{535}

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.

Sentencing

The aim of sentencing perpetrators found guilty beyond reasonable doubt is two-fold: to punish and to deter. First, sentencing aims to ensure that perpetrators of the most serious crimes do not go unpunished.\textsuperscript{536} 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”.\textsuperscript{537} 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.\textsuperscript{538}

When determining the length of a sentence, the Trial Chamber has substantial discretionary power,\textsuperscript{539} 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.

Prison

Any person convicted of a crime referred to in the Rome Statute—namely, genocide, crimes against humanity or war crimes—\textsuperscript{540} may be sentenced to prison for a term up to 30 years,\textsuperscript{541} or exceptionally a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.\textsuperscript{542}

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.\textsuperscript{543} The

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\textsuperscript{535}Ibid., art. 74(4).
\textsuperscript{536}The Prosecutor v. Germain Katanga (Sentence) ICC-01/04-01/07 (23 May 2014) para. 38.
\textsuperscript{537}Ibid.
\textsuperscript{538}Ibid., para. 37.
\textsuperscript{539}As the Appeal Chamber reminds it in the appeal confirmation sentence in Lubanga case, the Chamber ‘enjoys broad discretion in determining a sentence’. SeeProsecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 (1 December 2014) para. 1.
\textsuperscript{540}Rome Statute, art. 5.
\textsuperscript{541}Ibid., art. 77(1)(a).
\textsuperscript{542}Ibid., art. 77(1)(b).
\textsuperscript{543}Ibid., art. 76(1).
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) 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. In addition, the Chamber must take into account any mitigating and aggravating circumstances.

The gravity of the crime is one of the key determining factors of the sentence. 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:

- 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 of where there were multiple victims;
- Commission of the crime for any motive involving discrimination; and
- Other circumstances that, although not enumerated above, by virtue of their nature, are similar to those mentioned.

Mitigating circumstances include:

- Circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; and

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544 Ibid., art. 78.
545 Rules of Procedure and Evidence, r. 145(2).
546 The Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 (1 December 2014) para. 36.
547 Rules of Procedure and Evidence, r. 145(2)(b).
548 Namely gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.
549 Rules of Procedure and Evidence, r. 145(2)(b).
550 Ibid., r. 145(2)(b).
The convicted person’s conduct after the act, including any efforts by the person to compensate the victims or cooperate with the Court.\textsuperscript{551}

Finally, the sentence must reflect the culpability of the convicted person,\textsuperscript{552} 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.\textsuperscript{553} 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.\textsuperscript{554}

**Financial Penalties**

In addition to imprisonment, a convicted person may be ordered to pay a fine under certain criteria,\textsuperscript{555} 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.\textsuperscript{556}

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.\textsuperscript{557} 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.\textsuperscript{558} Failure to pay the fine may result in an extension of the period of imprisonment.\textsuperscript{559}

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.\textsuperscript{560} 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.\textsuperscript{561} A bona fide third party must be given notice by the Chamber and will then be able to submit relevant to the issue.\textsuperscript{562}

\textsuperscript{551}Ibid., r. 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.

\textsuperscript{552}Rules of Procedure and Evidence, r. 145(1)(a).

\textsuperscript{553}Ibid., r. 145(1)(b).

\textsuperscript{554}Ibid., art. 81(2)(a).

\textsuperscript{555}Ibid., art. 77(2)(a).

\textsuperscript{556}Ibid., art. 77(2)(b).

\textsuperscript{557}Rules of Procedure and Evidence, r. 146(1).

\textsuperscript{558}Ibid., r. 146(1)-(2).

\textsuperscript{559}Ibid., r. 146(5).

\textsuperscript{560}Rome Statute, art. 77(2)(b).

\textsuperscript{561}Rules of Procedure and Evidence, r. 147(1) and (4).

\textsuperscript{562}Rules of Procedure and Evidence, r. 147(2) and (3).
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.⁵⁶³ 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.⁵６⁴

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.⁵⁶⁵

A person sentenced to imprisonment shall be designated a State from the list of States that have indicated acceptance of such persons.⁵⁶⁶ The State will then either accept or reject the person.⁵⁶⁷ 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.⁵⁶⁸

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.⁵⁶⁹ 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.⁵⁷⁰ The property or proceeds from sale of assets must be transferred to the Court.⁵⁷¹

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.⁵⁷² There would be no obligation on Ukraine, it seems, to enforce an order for a fine or accept a prisoner of the Court.

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⁵⁶³ Rome Statute, art. 81(2).
⁵⁶⁴ The Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 A 4 A 6 (1 December 2014) para. 2.
⁵⁶⁵ Rules of Procedure and Evidence, r. 200, permits the Court to enter into agreements with states concerning persons sentenced by the Court.
⁵⁶⁶ Rome Statute, art. 103(1)(a).
⁵⁶⁷ Ibid., art. 103(1)(c).
⁵⁶⁸ Ibid., art. 103(3).
⁵⁶⁹ Ibid., art. 109(1).
⁵⁷⁰ Ibid., art. 109(2).
⁵⁷¹ Rome Statute, art. 109(3).
⁵⁷² Ibid., arts. 93(1)(k) and (l).
Ukraine may, however, enter into ad hoc agreements with the Court concerning these matters.\textsuperscript{573}

\textsuperscript{573}Ibid., art. 87(5); Rules of Procedure and Evidence, r. 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.

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.

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, and war crimes); 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.  

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:

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Whether there is sufficient personal interest for participation;\textsuperscript{575}

Whether such participation is appropriate at the procedural stage in question;\textsuperscript{576} and

Whether it would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.\textsuperscript{577}

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.\textsuperscript{578}

The legal representatives of victims may attend and participate in proceedings only in accordance with an express order handed down by the Chamber.\textsuperscript{579} Specifically, legal representatives can participate,\textsuperscript{580} question witnesses, experts or the accused\textsuperscript{581} 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.\textsuperscript{582} The Court can also allow appropriate questions to be put forward by victims whenever the evidence under consideration engages their personal interests.\textsuperscript{583}

\textbf{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 \textit{amicus curiae} briefs, in addition to serving as a link between the Court, victims and witnesses. Local NGOs are in certain cases especially 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.

\textsuperscript{575} 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:\textit{The Prosecutor v. Thomas Lubanga Dyilo} (Decision on Victims’ Participation) ICC-01/04-01-06-1119 (18 January 2008) para. 95.

\textsuperscript{576} 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: \textit{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.”

\textsuperscript{577} \textit{Rome Statute},art. 68(3).

\textsuperscript{578} \textit{Rules of Procedure and Evidence},r. 89(1); Katanga Modalities, para. 45.

\textsuperscript{579} \textit{Ibid.},r. 91(2); Katanga Modalities, para. 45.

\textsuperscript{580} \textit{Ibid.},r. 91(1); Katanga Modalities, para. 45.

\textsuperscript{581} \textit{Ibid.},r. 91(3)(a); Katanga Modalities, para. 45.

\textsuperscript{582} \textit{Rome Statute},art. 69(3); \textit{Rules of Procedure and Evidence},r. 91(3); Katanga Modalities, para. 46.

\textsuperscript{583} Katanga Modalities, para. 46.
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.

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;\(^{584}\) (ii) special measures;\(^{585}\) and (iii) other measures for the protection of victims and witnesses.\(^{586}\) 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.

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”\(^{587}\). 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

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584 Rules of Procedure and Evidence, r. 87.
585 Ibid., r. 88.
586 Ibid., r. 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.
587 Prosecutor v. Thomas Lubanga Dyilo, Decision, ICC-01/04-01/06-1557 (16 December 2008) para. 27.
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.

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.588

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.589 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.590

At the location of testimony, a psychologist will assess the vulnerable witness,591 in order to review the decision on whether the witness should testify. This assessment will also identify any appropriate special measures that could be taken.592 The witness will be given a chance

588 Rules of Procedure and Evidence, r. 88(1).
589 Rome Statute, art. 54(3)(e).
590 Rules of Procedure and Evidence, r. 82(2).
591 Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 OA 13 (21 October 2008) para. 10.
592 Ibid., para. 10; Rules of Procedure and Evidence, r. 88.
to consent to the special measures.\textsuperscript{593} An assessment report will then be made to the Trial Chamber.\textsuperscript{594} 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.\textsuperscript{595} Legal representatives may be present during the familiarisation process.\textsuperscript{596} 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.

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.\textsuperscript{597} 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").\textsuperscript{598} 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.\textsuperscript{599} It may include measures to facilitate reintegration into society or address shame.\textsuperscript{600} 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 victims.\textsuperscript{601} Reparations can also be granted to legal entities, including NGOs, non-profits, government departments, schools, hospitals, etc.\textsuperscript{602}

\textsuperscript{593}Ibid., para. 12.
\textsuperscript{594}Ibid.
\textsuperscript{595}The Prosecutor v. Thomas Lubanga Dyilo (Decision) ICC-01/04-01/06-1049 (30 November 2007) para. 39; Katanga Modalities, para. 79.
\textsuperscript{596}Ibid.
\textsuperscript{598}Rome Statute, art. 75(2).
\textsuperscript{599}The Prosecutor v. Thomas Lubanga Dyilo (Order for Reparations)ICC-01/04-01/06-3129-AnxA (3 April 2015) para. 42. Referring to the UN Basic Principles, principle 21.
\textsuperscript{600}The Prosecutor v. Thomas Lubanga Dyilo (Amended order for reparations) ICC-01/04-01/06 A A 2 A 3 (3 March 2015) para. 258.
\textsuperscript{601}Rules of Procedure and Evidence, r. 85.
\textsuperscript{602}Ibid., r. 85(b).
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. 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.

The Court has a Trust Fund to implement reparations orders and to provide physical, psychological, and material support to victims and their families. 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. 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. 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

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603 Ibid., r. 96.
605 Ibid.
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 simply the application process.608

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

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.

The ICC

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. 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.

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.

As of November 2016, there are 124 States Parties to the Rome Statute. States become a formal party to the Rome Statute through “ratification”, “accession”, “approval” or “acceptance”. Ratification is the formal act of a State consenting to be bound by a treaty. Accession is used when a State accepts an offer or chance to become a party to a treaty that has already

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610 Rome Statute, Preamble, para. 5.
612 Vienna Convention, arts. 2(1)(b), 14(2) and 15.
been negotiated and signed by other States. 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. 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. The Rome Statute continues to be the basis for the Court’s existence and its authority.

The ICC is a fully independent institution. For example, it 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.

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

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.

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. The Rome Statute also states that the Court has jurisdiction over the crime of aggression, even though the Court’s jurisdiction over this crime has not been activated yet. A provision in the Rome Statute empowering the ICC to try crimes of aggression will not be adopted until a decision is taken after 1 January 2017 by a two-thirds majority of States Parties, and one year after the ratification or acceptance of the amendment.

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617 Ibid., arts. 2(1)(b) and 15. ‘Glossary’ (UN Treaty Collection) accessed 24 March 2016.
619 Rome Statute, art. 125.
620 Ibid., Preamble, para. 9.
622 Ibid., art. 1.
623 Ibid., art. 2.
624 Rome Statute, art. 115.
625 Ibid., art. 116.
626 Ibid., art. 5.
627 Ibid., art. 5(d).
by 30 States Parties, whichever is later. The crime of aggression is addressed in more detail in Part Two.

**Who can be tried?**

The Court can only try “natural persons”. 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. More recently, the ICC Prosecutor began to consider prosecuting lower-level perpetrators if their conduct has been particularly grave or received extensive notoriety. 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.

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.

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. These issues will be further addressed in Part Two.

**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; (ii) the State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute; or (iii) the UNSC refers a situation to the Court.

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629 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.


632 Ibid.

633 Rome Statute, art. 27.

634 Ibid, art. 27.

635 Ibid, arts. 13 (a) and 14.

636 Ibid, art. 12(3).

637 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.\(^\text{638}\)

If the Prosecutor receives one of the above, she will open a “preliminary examination” into the situation at hand as a matter of policy.\(^\text{639}\) 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.\(^\text{640}\) 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.\(^\text{641}\) The Prosecutor has jurisdiction over matters the UNSC has referred;\(^\text{642}\)

- **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.\(^\text{643}\) 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;\(^\text{644}\) 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.\(^\text{645}\)

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

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\(^{638}\)Ibid., art. 13.

\(^{639}\) 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.

\(^\text{640}\) Rome Statute, art. 11.

\(^\text{641}\) Ibid., art. 12(2).

\(^\text{642}\) Ibid., art. 12(2).

\(^\text{643}\) 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 jurisdictions’.

\(^\text{644}\) Ibid., arts. 1 and 17.

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.646 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.647 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.648 Once the named individuals appear in front of the Court and if the Court confirms the charges,649 the trial can begin. This is explained fully in Part Four.

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.650 The OPCV and Defence teams are not official organs of the Court.

The ASP

The ASP is the governing body of the ICC.651 It is responsible for managerial oversight and legislative decision-making.652 The ASP is composed of a representative from each State Party that has ratified or acceded to the Rome Statute.653 It convenes annually to discuss issues essential to the functioning of the Court and its future.654

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.655 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.656

In addition, there is a Bureau whose main function is to assist the ASP. Meeting at least once per year,657 it is representative of the members of the ASP and assists in the discharge of the

646 Ibid., arts. 12(2) and 15(3).
647 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 (Authorisation Decision) ICC-01/09-19-Corr (31 March 2010) (“Kenya Authorisation Decision”) paras. 27-35.
648 Rome Statute, art. 58(1)(b)(i).
649 Ibid., art. 61.
650 Ibid., art. 34.
651 Established pursuant to art. 112 of the Rome Statute.
653 Ibid.
655 Rome Statute, art. 112.
656 Ibid., art. 112(2).
657 Ibid., art. 112(3)(c).
ASP’s responsibilities. The ASP regularly considers the Bureau’s reports and activities. The President of the Bureau (provided for by the Rome Statute) calls for and heads Bureau meetings and chairs ASP sessions. 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.

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. If it cannot, a two-thirds majority must agree on matters of substance, and a simple majority must agree matters of procedure. 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-cooperation and formally request the uncooperative State to respect its obligations under the Rome Statute (on sanctioning uncooperative States, see Part Two—“Declarations”).

The Latest ASP Meeting

Recently, the 14th session of the ASP was held from 18-26 November 2015. A representative of the GoU was present to observe the proceedings. However, as a non-State Party, the representative had no right to vote on ASP decisions. The topics discussed during this session provide an indication of the current issues considered most salient to international criminal justice.

One issue that was repeatedly highlighted as a priority for the Court was the prosecution of sexual and gender-based violence. In her address to the ASP, the ICC Prosecutor mentioned the importance of addressing gender-based crimes and noted the steps her office is taking to include such crimes in prosecutions. This is reflected in her approach to ICC

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658 Ibid., art. 112(3)(b).
659 Ibid., art. 112(2)(c).
660 Ibid., art. 112(3)(a).
662 Rome Statute, art. 121.
663 Ibid., art. 112(7).
666 Ibid., art. 112(2)(f).
670 ICC, ‘Statement by the ICC Prosecutor at the opening of the 14th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court’ (18 November 2015) <www.icc-
cases. For example, the ICC Prosecutor informed the Pre-Trial Chamber in September 2015 that it would bring additional charges in the case of Dominic Ongwen, a former commander in the Lord’s Resistance Army (“LRA”) in Uganda, related to sexual violence, including forced marriage, torture, rape and sexual slavery, as well as seeking to highlight the gender-related aspect of other crimes.671

Further, the ASP voted this year to delete Article 124 from the Rome Statute in its entirety.672 Article 124 allowed States, upon ratification of the Rome Statute, to declare that they did not accept the jurisdiction of the ICC over war crimes committed by its nationals or on its territory for seven years after the Statute entered into force in the State. The deletion of this Article, previously used only by France and Colombia,673 strengthens the fight against impunity for international crimes.

During ASP annual meetings, every State Party has the right to request amendments to the agenda to call for discussion about specific topics and request decisions made on such issues.674 This year, Kenya and South Africa requested amendments to the ASP agenda, which were subsequently accepted.675

Kenya’s proposal concerned a decision made by the Trial Chamber this year in the case of Ruto and Sang regarding Rule 68 of the Rules of Evidence and Procedure, which allows prior-recorded testimony (such as statements written by witnesses) to be admissible at trial.676 Kenya claimed that this decision violated the principle of “non-retroactivity” and the fair trial rights of the accused because the prior-recorded testimony was taken before the rule was enacted.677 Kenya therefore requested that the ASP recognise that the rule could not be applied retroactively and could not therefore be utilised in circumstances where the ICC investigation commenced before the 12th Session of the ASP (2013) when Rule 68 was adopted.678

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678 ibid.
Following Kenya’s requests, the final report of the 14th Session “reaffirms” the ASP’s understanding that amended Rule 68 concerning prior recorded witness evidence should not be applied retroactively. However, the final report is not binding on States or the ICC and the language of Kenya’s proposals did not feature in the final ASP Resolution on Strengthening of the International Criminal Court and the Assembly of States Parties (“Omnibus Resolution”) which identifies the ASP’s agreed resolutions arising from that Session that were adopted by the whole ASP.

In addition to these discussions, the continued need for cooperation by States Parties for the proper functioning of the Court was a clear focal point during the Session. The issue of non-cooperation has been a major problem in 2015, particularly with regard to Sudanese President Omar Al-Bashir who is currently facing two ICC arrest warrants (for genocide, crimes against humanity and war crimes). During 2015, Al-Bashir attended four official State-organised events, including an event in June held in South Africa for the 25th African Union Summit. As a State Party to the Rome Statute, South Africa had an obligation to arrest Al-Bashir, but failed to execute the arrest warrants during his visit.

Consequently, South Africa requested a discussion on the “application and implementation” of Articles 97 and 98 of the Rome Statute. Article 97 provides that where a State Party to the Rome Statute receives a request for cooperation and it identifies problems that may impede or prevent the execution of the request, the requested State shall consult with the Court in order to resolve the matter. Article 98 concerns the duty to arrest and obtain the surrender of those with, among other privileges, diplomatic immunity. South Africa claimed that there was no procedure apparent in consultations required by Article 97, and that there was apparently a need to discuss differing interpretations of Article 98 in regard to the duty to arrest and surrender persons despite diplomatic immunity.

No concrete decisions were made regarding South Africa’s proposed amendments to the agenda. However, the ASP did adopt a Resolution on cooperation that focused on strengthening effective and expeditious prosecutions of international crimes through enhanced international cooperation. The Resolution expressed concern that arrest warrants or surrender requests against 13 persons remain outstanding and urged States to cooperate fully.

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684 ibid.

in accordance with their obligation to arrest and surrender persons to the Court. It emphasised the importance of States observing their obligations under the Rome Statute, particularly the obligations to cooperate contained in Part 9, including the obligation to arrest and surrender persons to the ICC. While the Resolution did not name South Africa as a culprit of non-cooperation, it did stress that the non-execution of cooperation requests affects the Court’s work negatively, particularly “when it concerns the arrest and surrender of individuals subject to arrest warrants”.

In response to the issue of non-compliance, the Omnibus Resolution “[c]alls upon States Parties to comply with their obligations under the Rome Statute, in particular the obligation to cooperate in accordance with Part 9”. The Resolution also called upon States Parties to consider entering into voluntary agreements or arrangements with the Court and explore possibilities for facilitating further cooperation and communication between the Court and other international and regional organisations.

The Kenyan and South African proposals were widely criticised by actors in the international justice system due to concerns that they undermined the Court’s independence and mandate. In sum, it was argued that attempts to have these issues ruled upon by the Assembly conflicts with the role of the ICC judiciary and the principle of the separation of powers and therefore risks politicising judicial proceedings. Sending it to the ASP—the Parliamentary body at the ICC—resulted in the politicisation of the judicial proceedings. In particular, Kenya’s proposal demanded discussion by the ASP of issues currently at issue before the ICC Trial Chamber in the case. Indeed, the issue raised concerning the retroactive use of Rule 68 had already been challenged by Ruto’s defence team and was at that time under consideration by the ICC Appeals Chamber.

Finally, and in relation to the conflict in Ukraine, a number of side events and panels were held each day involving members of the Assembly, the ICC and civil society to discuss topical issues in international criminal justice. This year, an event on “[p]romoting accountability for violations of international humanitarian law and international crimes committed in the context of the conflict in eastern Ukraine” was co-hosted by the International Partnership for Human Rights.

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686 Ibid., para. 2.
687 Ibid., para. 1.
688 Ibid., para. 9.
689 Ibid., paras. 13 and 23.
and the International Federation for Human Rights. During the discussion, panellists (including lawyers, victim representatives and members of Ukrainian civil society involved in the monitoring and documentation of violations) were given the opportunity to discuss alleged crimes targeting civilians during the Maidan events, in Crimea and in eastern Ukraine. Panellists stressed the need for real accountability in Ukraine and the role of the international community in assisting in capacity building in this regard. It has been reported that many present could not accept Ukrainian amnesty laws afforded to alleged perpetrators in light of the numbers of people who lost their lives during the crisis.

**The Chambers**

The Presidency

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. 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 Prosecutor. 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.

The Chambers

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),
- The Trial Division

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693 Ibid.
694 Rome Statute, art. 38.
696 Ibid., art. 39.
697 Ibid., art. 39.
698 In January 2016, the judges assigned to the Pre-Trial Division are Judge Cuno Tarfusser (Italy), 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 Chang-ho Chung (Republic of Korea); Judge Raul Pangalangan (Philippines).
699 In January 2016, the judges assigned to the Trial Division are Judge Chile Eboe-Osuji (Nigeria), President of the Trial Division, Judge Joyce Aluoch (Kenya), Judge Kuniko Ozaki (Japan), Judge Olga Venecia Del C. Herrera Carbuccia (Dominican Republic), Judge Robert Fremr (Czech Republic), Judge Geoffrey A. Henderson (Trinidad and Tobago), and Judge Bertram Schmitt (Germany).
The Appeals Division (composed of the President and four other judges).  

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. 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. The Prosecutor must support each allegation charged with sufficient evidence to establish substantial grounds to believe that the person has committed the crime charged. 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. It further determines whether an accused is guilty or not guilty of the charges. The Prosecution must make the Trial Chamber satisfied of the accused’s guilt beyond all reasonable doubt. 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. Financial penalties may also be imposed for the harm suffered by the victims, including compensation, restitution or rehabilitation. 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. 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. 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.

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700 In January 2015, the five judges in place are Judge Sanji Mmasenono Monageng (Botswana), President of the Appeals Division, Judge Silvia Alejandra Fernández de Gurmendi (Argentina), Judge Christine Van den Wyngaert (Belgium), Judge Howard Morrison (UK), Judge Piotr Hofmański (Poland).
701 Rome Statute, arts. 56 and 57.
702 Ibid., art. 58.
703 Ibid., art. 61(5).
704 Ibid., art. 64.
705 Ibid., art. 66.
706 Ibid., art. 77.
707 Ibid., art. 77.
708 Ibid., arts. 81-85.
709 Ibid., art. 83(2).
710 Ibid., art. 83(2).
The ICC Prosecutor

The ICC Prosecutor, head of the Office of the Prosecutor, is a separate and independent organ of the ICC.\(^{711}\) Since 15 June 2012, Ms. Fatou Bensouda has been the Chief Prosecutor and has full authority over the management and administration of 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;\(^{712}\)

- 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;\(^{713}\) (ii) seeking authorisation of a full investigation if necessary;\(^{714}\) (iii) investigating a situation;\(^{715}\) (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;\(^{716}\) 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.\(^{717}\) 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.

The Registry

The Registry is in charge of the non-judicial aspects of the administration and servicing of the Court.\(^{718}\) It is headed by the Registrar,\(^{719}\) 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

\(^{711}\) Ibid., art. 42(1).
\(^{712}\) Ibid., art. 54(1)(a).
\(^{713}\) ICC, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, reg 25.
\(^{714}\) Rome Statute, arts. 12(2) and 15(3).
\(^{715}\) Ibid., art. 54.
\(^{716}\) Ibid., art. 61(5).
\(^{717}\) Ibid., art. 66.
\(^{718}\) Ibid., art. 43.
\(^{719}\) Mr. Herman von Hebel is the current Registrar, elected on 8 March 2013.
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.720

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.721

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.722 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.723

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.724

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721 Ibid.
723 Ibid.
724 Rome Statute, art. 43(6).
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 the 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.\textsuperscript{725} 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.\textsuperscript{726}

The OPCD is managed by the Registry, but is independent.\textsuperscript{727} 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.\textsuperscript{728}

\textit{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.\textsuperscript{729} An accused is also entitled to defend him or herself.\textsuperscript{730} The Rome Statute identifies minimum guarantees to ensure that an accused has a public, impartial and fair hearing.\textsuperscript{731} These minimum guarantees are explained in Part Four.

\textbf{Ukraine, the ICC and the Rome Statute}


\textsuperscript{726} Regulations of the Court, reg 80.

\textsuperscript{727} Ibid., reg 77.

\textsuperscript{728} ‘The Office of Public Counsel for the Defence’ (ICC) <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/defence/office%20of%20public%20counsel%20for%20the%20defence/Pages/the%20office%20of%20public%20counsel%20for%20the%20defence.aspx> accessed 23 March 2016.

\textsuperscript{729} Rome Statute, art. 66.

\textsuperscript{730} Ibid., art. 67.

\textsuperscript{731} Ibid., art. 67.
This section outlines a chronology of Ukraine’s engagement with the ICC. Ukraine initially signed the Rome Statute on 20 January 2000, but the Constitutional Court of Ukraine subsequently ruled that ratification would be unconstitutional. 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. However, the GoU has delayed ratification for three years. These events will be explained below.

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. Later that year, in October 1998, the Permanent Mission of Ukraine to the UN released a statement supporting the establishment of the ICC. 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. Around two years later, Ukraine signed the Rome Statute on 20 January 2000 without any formal reservations. However, Ukraine did not ratify the Rome Statute.

The Constitutional Court and the Rome Statute

In 2001, President Leonid Kuchma applied to the Constitutional Court under Article 151 of the Constitution of Ukraine for a decision on the conformity of the Rome Statute with the Constitution of Ukraine. The Constitutional Court and the Rome Statute

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734 Ibid.


736 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.

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. 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. 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. 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. The Court concluded that jurisdiction supplementary to the national Ukrainian system was not contemplated by the Constitution. Therefore, under Part 9 of the Constitution, the Constitution itself must be amended before the Rome Statute could be ratified.

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) and No. 1336 (2003), 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.

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. Among other things, the Decree sought to enhance cooperation, promote

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740 Constitutional Court Opinion, para. 5. The Ministry of Foreign Affairs of Ukraine argued that the Statute did not offend the Constitution: Ibid. para. 11.
741 Constitution of Ukraine, art. 124.
742 Embodied in the Rome Statute, Preamble, para. 10 and arts. 1, 17 and 20.
743 Constitutional Court Opinion, part 2.1, para. 3.
744 ICRC Rome Statute Issues, p. 11.
745 Ibid.
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.\(^\text{750}\)

In 2006, the Ukraine-EU Action Plan was implemented.\(^\text{751}\) 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.\(^\text{752}\) Accordingly, the Ministry of Justice prepared a draft law.\(^\text{753}\) The Verkhovna Rada adopted this law on 16 October 2008.\(^\text{754}\)

On 29 January 2007, Ukraine acceded to the Agreement on the Privileges and Immunities of the International Criminal Court.\(^\text{755}\) 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.\(^\text{756}\) 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, judges, representatives of states participating in the proceedings of the Court, judges, the Prosecutor, Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of the Prosecutor’s Office and Registry, personnel recruited locally not otherwise covered by the Agreement, Counsel and persons assisting Defence Counsel, witnesses, victims, experts and others required to attend at the seat of the Court in The Hague.\(^\text{757}\)


\(^{755}\)Agreement on the Privileges and Immunities of the International Criminal Court, p. 3.

\(^{756}\)Agreement on the Privileges and Immunities of the International Criminal Court, art. 3.

\(^{757}\)Ibid., art. 13.

\(^{758}\)Ibid., art. 14.

\(^{759}\)Ibid., art. 15.

\(^{760}\)Ibid., art. 16.

\(^{761}\)Ibid., art. 17.

\(^{762}\)Ibid., art. 18.

\(^{763}\)Ibid., art. 19.

\(^{764}\)Ibid., art. 20.

\(^{765}\)Ibid., art. 21.

\(^{766}\)Ibid., art. 22.
In 2010, Ukraine attended the review conference of the Rome Statute held in Kampala, Uganda. Ukraine’s delegates attended the conference as official observers. 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.

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. 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.

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”.

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. 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 “excess 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:


768 Ibid., p. 51.


771 The First Declaration.

772 Ibid.
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 PavlovychPshonka, former Prosecutor General of Ukraine;
- Vitalii YuriiovychZakharchenko, former Minister of Internal Affairs of Ukraine; and
- Other officials who “issued and executed the manifestly criminal orders”.

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. 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 […]”. 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.

The Current Situation and Ratification

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 investigation were met (jurisdiction, admissibility and the interests of justice). On 12 November 2015, the Prosecutor released a Report outlining the progress of her preliminary examinations around the world, including in relation to Ukraine. This is analysed in Part Three.

Recently, 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. 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.

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. 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.

On 16 January 2015, 155 MPs 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

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775 Ibid.
779 Ibid.
781 Ibid.
the provisions of the Rome Statute. 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 as follows: “Ukraine may recognize the jurisdiction of the International Criminal Court under the terms of the Rome Statute of the International Criminal Court.”

On 29 January 2015, the Council of the European Union published a series of observations in a document entitled “Council Conclusions on Ukraine”. 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. 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.

On 3 September 2015, the draft law proposing amendments to the Constitution of Ukraine was considered by the Constitutional Commission of Ukraine. The amendment to Article 124 of the Constitution was maintained after its consideration. This Article paves the way for ratification; while 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.

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”. The Commission is the Council of Europe’s advisory body on constitutional matters. As part of its mandate, it can provide legal advice to Council of Europe member States and States wishing to bring their legal infrastructure into line with European standards.

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784 Ibid. art. 124.
786 Ibid. para. 5.
787 Ibid.
789 Ibid.
On 30 October 2015, the proposal was submitted to the President of Ukraine for consideration.\textsuperscript{792} 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.\textsuperscript{793}

The draft law that appeared on the official website of the Verkhovna Rada immediately resulted in heated debate.\textsuperscript{794} 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.\textsuperscript{795} 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.\textsuperscript{796} 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.\textsuperscript{797}

On 12 January 2016, the Constitutional Court of Ukraine started its hearing concerning the bill.\textsuperscript{798} 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.\textsuperscript{799} 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.

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.


\textsuperscript{794} Ibid.

\textsuperscript{795} Ibid. Concluding and Transitional Provisions, para. 1.


\textsuperscript{797} Ibid.


\textsuperscript{799} Constitution of Ukraine 1996,art. 159; Constitution of Ukraine 1996,art. 158.
According to Mr. Filatov, Ukraine is interested in accepting the jurisdiction of the Court. However, he believes 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 on-going armed conflict. 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. 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.

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. The Court concluded that the draft law is in compliance with the provisions of Articles 157 and 158 of the Constitution. 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. 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 can now be adopted at the next session of the Verkhovna Rada of Ukraine if two-thirds of MPs vote in favour.

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801 Ibid.
802 Ibid.
803 Ibid.
805 Ibid., para. 1.
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

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. 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. 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.

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;809
- The State in question has “declared” that it accepts the jurisdiction of the ICC without ratifying the Statute;810 or
- The UNSC refers a situation to the Court.811

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.812


809 Rome Statute, arts. 13(a) and 14.

810 Rome Statute, art. 12(3).

811 Ibid., art. 13(b).

812 Rome Statute, art. 13.
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.\(^\text{813}\)

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 \textit{proprio motu}, by referral from a State Party, or referral by the UNSC.\(^\text{814}\)

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.\(^\text{815}\) 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.\(^\text{816}\)

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:

\(^{813}\) Rome Statute, art. 12(3).

\(^{814}\) Ibid.

\(^{815}\) Ibid.

\(^{816}\) Rome Statute, arts. 15(2) and (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. 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 the ICC would have jurisdiction over the downing of Malaysian Airlines flight MH17; (iii) 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 (iv) 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.

**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”. 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
- 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.

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.

**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

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817 Ibid., art. 12(2).
entered into force for the State in question; 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”).

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, the downing of Malaysia Airlines flight MH17, over foreign fighters on the territory of Ukraine and what impact amnesties may have on the ICC’s ability to prosecute individuals.

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 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. The first is largely targeted at events of the “Revolution of Dignity” (particularly the events in Kyiv) and the alleged actions of former President Yanukovych 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.

821 Rome Statute, art. 11(2).
822 Rome Statute, art. 11(2).
823 The Second Declaration, para. 1.
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.824 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”.825 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.826

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. The ICC said:

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.827

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.828 In other words, the ICC will not permit States to opportunistically pursue its enemies.829

825 Rules of Procedure and Evidence, r. 44.
826 The Prosecutor v. Laurent Koudou Gbagbo (Decision) ICC-02/11-01/11-212 (15 August 2012) para. 59.
827 Ibid.,para. 60.
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”). The Appeals Chamber took a broad view on the parameters of a Declaration. 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”.

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. Another commentator suggests (prior to the ICC’s view in Gbagbo above) that there appears no reason why a State cannot impose a specific time period. 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. 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.836

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.837

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.838 For example, this could include when a regime commits international crimes on it 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 are unlikely to have 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 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.

**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.

**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

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838 Ibid.
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.

**Temporal Jurisdiction**

The following timeline presents a representative sample of key events that have occurred in Crimea:^839

- 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;
- 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. ^840 The second

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^840 The First Declaration.
Declaration covers the time period from 20 February 2014 onwards and is aimed clearly at events in Crimea and eastern Ukraine. 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 [...]”. 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”.

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.

Subject-Matter Jurisdiction

Absent an opportunity to assess the available information concerning whether crimes against humanity, genocide or war crimes have been committed (subject-matter jurisdiction), the question of whether these crimes occurred remains unclear. However, it should be noted that the ICC does not currently have jurisdiction over the crime of aggression [as discussed in Part Two(B)], only for crimes against humanity, genocide and war crimes.

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”).

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. Therefore, to assess whether the ICC has territorial jurisdiction over alleged crimes in Crimea, the ICC Prosecutor will need to consider whether any alleged crimes that fall within the jurisdiction of the ICC after the territory of Crimea was occupied 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”. 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.

Russia argues that Crimea is part of the Russian Federation and therefore Ukraine cannot delegate (declare) jurisdiction to the ICC. However, international law is unequivocal that territory cannot be forcibly annexed. 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)”.

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:

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

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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.\footnote{\textit{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.}

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.\footnote{William A. Schabas, \textit{The International Criminal Court: A Commentary on the Rome Statute} (OUP, 2010)p. 285.} An example of this “control” principle is Cyprus, which ratified the Rome Statute in March 2002.\footnote{‘Cyprus’ (ICC) <https://www.icc-cpi.int/en_menus/asp/states%20parties/asiaeurope/pages/cyprus.aspx> accessed 2 April 2016.} This ratification gives the Court jurisdiction over northern Cyprus, even though Turkey has occupied it since 1974.\footnote{Kypros Chrysostomides, \textit{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, \textit{Recognition and the United Nations} (Cambridge: Grotius, 1987).} This situation is likely to apply only to territory that at one point was clearly within the sovereignty of the State in question.\footnote{E Eugene Kontorovich, ‘Israel/Palestine—The ICC’s Uncharted Territory’ (2013) 11(5) Journal of International Criminal Justice 979-999, pp. 990-991.} This appears to be the prevailing view among international commentators.\footnote{Michael Vagias, \textit{The Territorial Jurisdiction of the International Criminal Court} (Cambridge University Press, 2014)p. 222 et seq., citing to Kypros Chrysostomides, \textit{The Republic of Cyprus—A study in International Law} (Martinus Nijhoff, 2000)pp. 148-153, 155-157; John Dugard, \textit{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.} 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,\footnote{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’.} 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 situation in which a State could evade accountability by simply occupying a region of another state.\footnote{\textit{Ukraine: clear breaches of international law in Crimea’} (International Bar Association, 20 February 2015) <www.ibanet.org/Article/Detail.aspx?ArticleUid=0b6a41e4-bca2-4234-8b3e-9cb027b98607> accessed 28 March 2016; Daniel Wisehart, ‘The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?’ (\textit{EJIL: Talk!}, 4 March 2014) <www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russia’s-intervention/> accessed 28 March 2016. 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) <ericposner.com/the-1997-black-sea-fleet-agreement-between-russia-and-ukraine/> accessed 28 March 2016; citing to, J.L. Black (ed), \textit{Russia & Eurasia} (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.} 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.

**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.\(^{*}660\) 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 the view that the jurisdictional basis for opening a preliminary examination is too narrow at this point.\(^{*}661\) 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

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\(^{*}660\) Rome Statute, art. 12(2)(b).

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 Crimean and Ukrainian NGOs 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.

Conclusion
To conclude, the ICC would likely have 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.

**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 invalid for the purposes of the ICC’s territorial and nationality jurisdiction.

From the outset, like Crimea, the ICC Prosecutor has already announced that she will consider all information from reliable sources to consider the situation in Ukraine including the region of Donbas. The Prosecutor will still be required to consider whether the Court has jurisdiction temporally and 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. 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. The Declarations

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863 Rome Statute,art. 11.
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 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. 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. 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. 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.

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

Jurisdiction and the Downing of MH17

The following section will discuss the main issues related to various bases of jurisdiction to prosecute those responsible for the MH17 disaster. In particular, it will discuss where a trial may eventually be held if perpetrators for the downing of the flight are arrested, including separate prosecutions in individual States, at the ICC or at an international tribunal set up...
between the States most affected by the incident. The section will also briefly consider how accused persons may be brought into custody by a State or international tribunal, as well as how people may be found responsible before an international tribunal.

**The Facts**

On 17 July 2014, Flight MH17 was *en route* from Amsterdam to Kuala Lumpur with a total of 298 people on board. It flew over eastern Ukraine, where it vanished from the radar without a distress signal. The plane was brought down and crashed at a site in the Donetsk area of Ukraine. Western nations have attributed blame for the downing of MH17 to the Ukrainian separatists who, it is alleged, fired a missile supplied by Russia. USA officials from the Office of Director of National Intelligence claim there is a “solid case” that a Buk missile was fired at the aircraft from eastern Ukraine. They also claim the most plausible explanation is that the separatists mistook it for another aircraft. The evidence with regards to these conclusions largely concerns:

- Images showing a surface to air missile launcher in the area;
- Voice recordings of pro-Russian rebels seemingly admitting to bringing the airliner down; and
- Social media activity indicating separatist involvement.

The voice recordings include three telephone calls:

- Between separatist leader Igor Bezler and Colonel Vasily Geranin of Russian military intelligence;
- Between a man named “The Greek” and someone named “Major”; and
- Between a fighter of the separatist fighters and Cossak Commander Nikolai Kozitsyn.

The first phone call (between Bezler and Geranin) seemingly implicates Russia.

A Dutch-led team that included representatives from the Netherlands, Australia, Malaysia, Belgium and Ukraine began investigating the downing of the aircraft and, in September 2014, their preliminary report indicated that MH17 broke up mid-air after being hit by “numerous objects” that “pierced the plane at high velocity” from outside the cabin and above the level of

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the cockpit floor. In August 2015, the team announced that fragments of a suspected Russian missile system had been found at the crash site.

The Dutch Safety Board released technical investigative reports into the downing of MH17 in October 2015. In short, it reported that the crash was caused by the detonation of a model 9N314M warhead, fitted to a 9M38-series missile that was fired from a Buk surface-to-air missile system. The Report recommended the following:

- States govern their airspace but rarely close it during conflict. Therefore, the following needs attention: timely closure of airspace or restriction of its use; providing information on the conflict to other parties; and proper coordination between military air traffic control services;
- Risk assessments. Commercial airline operators cannot take it for granted that unrestricted airspace above a conflict area is safe. They should make their own risk assessment in this situation; and
- Operators of commercial airlines’ accountability. It is not clear which flights fly over conflict areas. Airliners should actively provide this information to reach an informed opinion on routes to be flown and routes that have been flown recently.

The criminal investigation was expected to conclude in February 2016. The investigation appears to be ongoing.

Where Will a Trial Be Held?

Once the investigation comes to a close and the case turns to prosecution, a question arises of where the perpetrators will be prosecuted for the alleged crimes. The likely possibilities are:

- Separate prosecutions, all taking place in one jurisdiction;
- Separate prosecutions in each of the nine nations that lost its nationals on the day of this crime;
- The ICC; or
- An international criminal tribunal.

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Separate Prosecutions and Jurisdictional Claims

The States most affected by the downing of MH17 all appear to have different “claims” to jurisdiction over the prosecution of those responsible for the incident. These competing claims, which could be used to assert the right to prosecute those responsible for the downing, are considered below.

First, Ukraine appears to have the “primary” jurisdictional claim to prosecute the people responsible. This is because the incident occurred on its territory and allegedly by its citizens. This is known as the territoriality principle, which is often perceived as sovereignty in action. It is universally recognised that a State may assert jurisdiction over activities occurring in its own territory. Indeed, one commentator states that the foundational principles of State sovereignty are: “(1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of a non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.”

The territoriality principle will apply where conduct either takes place within a nation’s borders (known as subjective territoriality), or the effects of the conduct are felt within the borders (known as objective territoriality).

Second, the downing of the aircraft was allegedly done by Ukrainian citizens, which would give Ukraine jurisdiction to prosecute based on the concept of nationality jurisdiction. As noted throughout this report, nationality jurisdiction provides that a State has jurisdiction over the conduct of its nationals, at home or abroad.

Third, different countries lost citizens as a result of the incident, including 154 Dutch citizens, 27 Australian citizens, 9 UK citizens and others. Each may have a claim to jurisdiction based on “passive personality” jurisdiction. The principle is defined as the exercise of jurisdiction by a “victim” State over crimes committed against its nationals while they were abroad. The
principle is based on the duty of a State to protect its nationals abroad and is concerned with the effect of crimes, rather than the location where it occurred. As one commentator notes, however, passive personality is “more strongly contested than any other type of competence”. Nevertheless, the exercise of this type of jurisdiction does exist and has been used. As an example, Chilean dictator Augusto Pinochet was arrested in the UK in 1998 after a Spanish Judge issued an arrest warrant for him based on his involvement in human rights abuses on the grounds that some of the victims of the abuses committed in Chile were Spanish citizens.

It has also been argued that the passive personality principle can legitimately be invoked as a basis on which to prosecute war crimes. States have a “right” to prosecute war crimes committed against their nationals. One commentator highlights as an illustration the Washio Awochi trial in which “a Japanese national was prosecuted by a Netherlands Court Martial for forcing Dutch women into prostitution in a club in Batavia”.

Finally, Malaysia holds the registration for the aircraft in question, which gives Malaysia jurisdiction pursuant to an international agreement known as the Montréal Convention. The Montréal Convention jurisdiction is a Convention agreed by various States in 1971. It provides a basis for two forms of jurisdiction when it involves crimes related to aircraft. First, it recognises territorial jurisdiction (which Ukraine would have). Second, it provides jurisdiction over offences against aircraft to the State where the aircraft is registered to prosecute crimes committed against aircraft. Article 5(1) of the Convention states:

Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

(a) when the offence is committed in the territory of that State;
(b) when the offence is committed against or on board an aircraft registered in that State; […]

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889 Montréal Convention, art. 5(1).
A similar situation arose in the Lockerbie bombing proceedings. This case involved a bombing of an American PanAm Flight 103 while it flew over Scotland on 21 December 1988. It crashed in the town of Lockerbie in Scotland, killing 259 people aboard and 11 on the ground.\textsuperscript{890} To try the case, a Scottish Court was established in the Netherlands to prosecute Libyan suspects.\textsuperscript{891} As the criminal conduct occurred in the UK, the UK was able to claim jurisdiction by virtue of territorial jurisdiction (as reflected in the Montréal Convention) and the passive personality principle. The US could claim jurisdiction under the Montréal Convention because the PanAm aircraft was registered in America.\textsuperscript{892} These illustrations are highly relevant and apposite to the circumstances that led to the downing of MH17 and how accountability processes might develop.

**Jurisdiction of the ICC**

The Prosecutor may proceed on the basis of Ukraine’s Declarations that cover both the time frame and location of the accident. The ICC could have jurisdiction to try the downing of MH17 because the Declarations submitted by Ukraine extend to the territory of eastern Ukraine and cover the relevant time period. MH17 was downed on 17 July 2014 as it flew over eastern Ukraine. The crash site was in the Donetsk area of Ukraine. This is clearly covered by the declaration of 8 September 2015 that expressly covers that time and area.\textsuperscript{893} The ICC Prosecutor has confirmed she is monitoring the on-going multi-country investigations into the MH17 incident.\textsuperscript{894} The questions she will ask and the likely answers are discussed below.

As outlined in Parts One and Three, the Prosecutor will need to consider whether the matter is admissible before the ICC. First, the Prosecutor will consider whether there are already domestic investigations initiated into the specific case that will be focused upon by the ICC.\textsuperscript{895} The answer with regard to MH17 is yes. Therefore, the Prosecutor will consider whether such investigations or proceedings are vitiated by an unwillingness or inability to carry out proceedings genuinely? The answer appears to be no.

As mentioned, there is already a Dutch-led criminal investigation underway that released technical investigative reports in October 2015.\textsuperscript{896} This investigation would therefore fall within the complementarity provisions requiring that “the case is being investigated by a State which


\textsuperscript{891}Ibid.

\textsuperscript{892}Montréal Convention,art. 5(1); Montréal Convention,art. 5(1); Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law (Intersentia, 2005)p. 165.

\textsuperscript{893}The Second Declaration.

\textsuperscript{894}2015 Report on Preliminary Examination Activities.


has jurisdiction over it”. Furthermore, “concrete and progressive” steps have already been taken towards the investigation and prosecution, including the publication of preliminary conclusions and analysis of the wreckage. There are also frequent reports of discussions on the issue between the concerned State Parties. With such an international investigation, there can be little doubt of the willingness or ability to pursue the proceedings genuinely. Accordingly, the ICC Prosecutor would likely conclude that the case is not admissible at the ICC.

An International Criminal Tribunal

Despite all the above competing jurisdictional claims, it appears that the most likely scenario will be that the States will avoid asserting any primary jurisdictional entitlement. Instead, they will likely “pool” their jurisdictional rights and establish an international criminal tribunal that they will all jointly implement.

In September 2015, it was reported that some of the concerned States—Australia, Belgium, Malaysia, the Netherlands and Ukraine—would meet at the UN General Assembly to discuss how to progress the criminal investigations. It was reported that Australian Foreign Minister Julia Bishop indicated that the States may choose to establish their own tribunal. She said such a court, which does not require UN approval, could be established through a treaty “by all of the grieving countries, however many lost citizens”. Ukrainian Foreign Minister Pavlo Klimkin, also noted the potential for a tribunal for MH17 based on an agreement among the five most concerned States. The Australian Foreign Minister further reported that the closest analogy to this type of treaty-based court was the Scottish panel established in the Netherlands to prosecute the Lockerbie case.

In these circumstances, the concerned States may agree to a multi-party treaty that includes a Statute reflecting the pooling of jurisdictions. It should be noted that in order to create an international tribunal specifically for the MH17 incident, States are not obliged to obtain UNSC approval. The States involved did approach the UNSC for an international tribunal to be set up by the UNSC to try crimes related to MH17. There was a draft Statute tabled with the draft Resolution to the UNSC. Russia vetoed the draft Resolution. Nonetheless, States concerned appear to be maintaining an impetus for justice independently of the UN. While they may still agree with the UN’s overall aims and objectives concerning the tragedy, they may reach agreement between the States independently.

Extradition of Accused Persons

It is possible that a foreign citizen (particularly a Russian citizen) was involved in the downing of MH17. In such a case, the Tribunal or States responsible for the Tribunal could request that the foreign State, such as Russia, hand the individual over to the Tribunal for trial. This is known as extradition.

In the event that a Russian national were involved in the downing of the aircraft, it is possible that an extradition request to the Russian Government would be rejected. If this occurs, the Montréal Convention (which is signed by, and binds Russia) would become relevant. The Convention provides that, in a situation in which a State (such as Russia) is in possession of an offender accused of committing an offence abroad (such as the downing of MH17) the State must either extradite that individual to a requesting State or “[s]ubmit the case to its competent authorities for the purpose of prosecution” in accordance with the appropriate laws of that State. The Netherlands, Ukraine and Malaysia are all signatories to the Convention. In these circumstances, Russia would be legally bound to extradite the accused person to one of those requesting States or prosecute that person in Russia. However, no recourse exists if a State fails to extradite unless the UNSC authorises such recourse against

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901 Montréal Convention.
902 Montréal Convention, art. 1:

1. Any person commits an offence if he unlawfully and intentionally:
(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:
(a) attempts to commit any of the offences mentioned in paragraph 1 of this article; or
(b) is an accomplice of a person who commits or attempts to commit any such offence.

903 Montréal Convention, art. 7:

‘[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.


905 Montreal Convention, art. 8:
The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may as its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
a UN Member State. Accordingly, the States have tools at their disposal to pressure Russia into extraditing a suspect involved in the MH17 incident.

In the event that the Tribunal cannot physically get an accused to the tribunal, the tribunal may conduct trials *in absentia*. This means that the Tribunal can put an individual on trial despite the fact that the individual is not physically present for the trial. However, trials *in absentia* commonly attract criticism from the international community for their human rights implications, for depriving an accused of a meaningful opportunity to be able to challenge the case against him. However, there is no prohibition in international human rights law against trials *in absentia*, although their use must be carefully circumscribed.

**Modes of Responsibility and Defences**

If a Tribunal were set up under the draft Statute identified above in relation to the “pooled” jurisdiction idea, and the prosecution of an individual took place, the Court would be required to consider whether the individual committed a crime and how they could be said to be responsible for that crime. It may also be asked to consider the defences of an individual to discharge him or her of criminal responsibility.

There are different ways an individual can commit a crime. The means of how individuals may be criminally responsible for a crime are referred to as modes of liability. The ICC’s modes of liability are considered in detail in Part Two(B). In the context of MH17, two particular modes of liability worth addressing are direct participation in the conduct that downed the aircraft and command responsibility for the conduct of subordinates who downed the aircraft. These will be considered in relation to the draft Statute of the potential new MH17 Tribunal.

First, direct participation is the ordinary manner in which one might expect someone to commit a crime. It involves direct commission of a criminal act physically or planning on doing so. It seems likely that a Prosecutor would need to prove the accused physically carried out a certain crime and also did that intentionally and with knowledge of the circumstances or the consequences of the act. This is a relevant mode of liability.

Second, although it is generally accepted that Russian commanders did not push the button that fired the suspected missile, it has been suggested that they could have supplied the missile and possibly given orders to shoot at a plane. Depending on the circumstances, they could be found responsible under the principle of command responsibility. Under Article 14(a) of the draft Statute, such persons may be held responsible for crimes committed by forces under their “effective command and control, or effective authority and control […] as a result of his or her failure to exercise control properly over forces”, where:

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907 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171,art. 14
909 Draft Statute,art. 9.
910 Ibid.,art. 14.
• 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.

Alternatively, pursuant to Article 14(b), a superior may be found criminally responsible for crimes 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;

• 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.

In sum, under either provision concerning the responsibility of commanders or other superiors, the prosecution would depend on whether: (i) there was effective command or control; (ii) the commander or superior knew or ought to have known about the commission of crimes; and (iii) the commander or superior failed to take the necessary and reasonable steps to prevent or punish the commission of the crimes. If these above elements were established at the tribunal, it may be possible to establish criminal responsibility of any Russian military commander involved in the downing of MH17.

There are likely defences to the crimes alleged to have been committed. If the Prosecutor fails to establish the guilt of the accused in the case beyond all reasonable doubt, or a successful defence is made out, the accused will be discharged of criminal responsibility. It may be a defence for an accused to challenge one of the elements of the above modes of liability. If he or she does so, the Prosecutor may have difficulty proving their case. For example, a commander of the unit in question which apparently shot down the plan may be able to challenge the fact he had effective control or that he or she did know or ought to have known about the crime. Alternatively, there are specific defences that could be advanced by an accused. For example, certain pieces of intelligence suggest the separatists genuinely believed the airliner was a military aircraft and not a civilian airliner. Article 16 of the draft Statute provides that a mistake of fact "shall be a ground for excluding criminal responsibility for a war crime only if it negates the mental element required by the crime". This may therefore be an arguable defence.

**Conclusion**

To conclude, given the shared investigation and the on-going discussions (evidencing a desire to share jurisdiction) it is likely that concerned States will opt for an independent tribunal situated in the Netherlands. This will likely be outside the ordinary Dutch (or any national) court
system, but governed by an amalgamation of domestic (largely Ukrainian and Malaysian) and international laws.

**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.\(^{911}\) 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.\(^{912}\)

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.

**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.

**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 the law” prohibiting the prosecution of persons in connection with events in Donetsk and Luhansk regions.\(^{913}\) However, there is no outright amnesty in the Agreement itself—only a requirement to take steps to provide for one.

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\(^{911}\) *The Situation in Georgia (Request for authorisation of an investigation) ICC-01/15-4-Corr* (17 November 2015) paras. 198-201.

\(^{912}\) 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’.

\(^{913}\) 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) <www.ft.com/intl/cms/s/0/21b8f98e-b2a5-11e4-
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.\footnote{OHCHR, ‘Report on the human rights situation in Ukraine’, 15 December 2014, para. 24 <www.ohchr.org/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf> accessed 29 March 2016.} More recently, the “Normandy Four” talks in the first week of October 2015 also involved discussions of amnesties. It has been reported that Russia insisted on the adoption of a new “amnesty law” to fully pardon separatists before elections could be held in Donbas. Ukraine rejected this proposal. \footnote{‘Ukraine defies Russia’s demands to pardon militants prior to Donbas elections’ (UNIAN, 5 October 2015 <www.unian.info/politics/1143411-ukraine-defies-russias-demands-to-pardon-insurgents-prior-to-donbas-elections.html> accessed 29 March 2016.}} In an announcement on 5 October 2015, the deputy Chief of Ukraine’s President Administration, Kostiantyn Yeliseiev, made clear that Ukraine refuted all attempts to adopt a new amnesty law “especially considering the fact that automatic pardon would be provided to all militants of the DPR and LPR. He also explained that a full amnesty should not be the responsibility of the government prior to local elections. He said that a decision on amnesty “should be taken by legally elected authorities”.\footnote{Ibid.}

Recently, the draft law entitled “On the exemption from prosecution and punishment of persons taking part in events on the territory of the Donetsk and Luhansk Oblasts” was developed pursuant to the Minsk agreements.\footnote{International Partnership for Human Rights, ‘Making Amnesty Work: Prospects of granting amnesty to the parties of the conflict in Eastern Ukraine’ (January 2016)p. 6 <http://iphronline.org/wp-content/uploads/2016/01/ENG-Making-amnesty-work-January-2016.pdf> accessed 27 March 2016.} The draft provides for an amnesty from 22 February 2014 for people who committed crimes as part of armed groups or were involved in acts by such groups in the areas of Donetsk and Luhansk.\footnote{ Ibid.} Moreover, it provides that there are certain categories of crimes not covered by the amnesty.\footnote{Ibid.} These include genocide under Article 442 of the Criminal Code of Ukraine, murder, hostage taking, rape under Article 152 of the Criminal Code of Ukraine and other offences. These offences could still be prosecuted. The list of crimes excluded from the amnesty does not include war crimes listed under Article 438 or Article 127 regarding the crime of torture.\footnote{Ibid., pp 6-7} In other words, war crimes and torture seemingly could not be prosecuted.

**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. 921 For example, 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. 922 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. 923 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. 924 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. 925 The specific and express obligation to provide an amnesty, however, only applies to non-international armed conflicts.


922 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).

923 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.

924 Additional Protocol I art. 43(2).

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 could evade punishment. There is little disagreement with this position. The ICRC agrees with this stance as does the UN Secretary-General, and the UN Commission on Human Rights. The ICTY has said explicitly that war crimes may not be the object of an amnesty.

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 depending on the nature of the offence, States may be obliged (either under international treaties or the “customary” practice in international law)

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


929 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.


931 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 - 7.


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)p. 607-611); the four Geneva Conventions’ obligation to search for persons allegedly responsible for grave violations of the Conventions).


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* (Judgement) case No. IT-95-17/1-T (10 December 1998) para. 155); enforced disappearance...
to prosecute international offences such as war crimes or crimes against humanity. 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. 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.

An example of this in action is Sierra Leone. After the civil war in Sierra Leone, the Lomé Peace Accord was reached. The peace agreement provided for an amnesty. Subsequently, the Statute of the Sierra Leone Court provided explicitly that an amnesty granted to any person

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934 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.’


falling within the jurisdiction for crimes contained within the statute or other serious violations
of IHL, shall not be a bar to prosecution.\footnote{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.’}  

Analysis
As demonstrated by the above discussion, Ukraine is permitted to provide an amnesty to those
involved in the conflict in the east.\footnote{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.} 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;\footnote{Practice Relating to Rule 159. Amnesty (ICRC)-www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter44_rule159_sectionb> accessed 29 March 2019, citing to Guatemala, National Reconciliation Law, 1996,art. 8.}\footnote{Ibid.}

- 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;\footnote{Ibid.}\footnote{Ibid.}

- 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;\footnote{Ibid.}

- 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”.\footnote{Ibid.}

The above principles can be applied to Ukraine’s draft law on the provision of an amnesty. 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 presses ahead with the present draft amnesty law, it should be amended to include the full array of international crimes that can still be prosecuted despite the amnesty. As noted above, the law excludes the following crimes from the amnesty law: genocide under Article 442 of the Criminal Code of Ukraine, murder, hostage taking, rape under Article 152 of the Criminal Code of Ukraine, and so forth.\footnote{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.’}
Ukraine and other offences. However, 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).944

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.

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,945 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,946 surrender of persons to the court947 and provisional arrest.948 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.

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 2010.949

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

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945 Rome Statute,art. 86.
946 Ibid.,art. 93(1).
947 Ibid.,art. 89.
948 Ibid.,art. 98.
949 Côte d’Ivoire Authorisation Decision, para. 10.
and invited victims to send their representations to the Court on 17 June 2011. The Chamber granted this on 3 October 2011. 950

No express comment on cooperation was made in the ICC’s Prosecutor’s report on how the preliminary examinations were progressing that year. 951 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 and employment minister and leader of a pro-Gbagbo militia group) to the Court for trial. 952 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. 953

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. 954

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. 955 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 CAR 956) 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. 957

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

955 Situation in Uganda (Decision) ICC-02/04-01/05-27 (27 September 2005).
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.

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 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.\footnote{Rome Statute, art. 87(5)(b).} 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, 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.\footnote{Subsequently, the decision was communicated to both the UNSC and ASP.} The ICC did issue a finding of non-cooperation concerning the Libyan Government and referred the matter to the UNSC.\footnote{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.

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.\footnote{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.} 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.
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 recent 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.

Offences under the Rome Statute

There are three crimes that may be tried by the ICC: genocide, war crimes and crimes against humanity. 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.

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.\(^{959}\)

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.

Crimes against Humanity

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.960

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.961

[...]
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.962

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.963 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.964 “Widespread” refers to victims or geographical scope. It has been found to be the large-scale nature of the attack and the number of targeted persons;965 namely,

962 Ibid., p. 5, para. 2.
964 Ibid.
it should be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.966 It can also mean an attack carried out over a small or large geographical area, but directed against a large number of civilians.967 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.968

Alternatively, "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.969 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”.970 Other factors that may be of relevance to the assessment of whether an attack was systematic are the involvement of substantial public or private resources971 and the implication of high-level political and/or military authorities.972

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.973 An attack that is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.974 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

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968Ibid., para. 396.


970Kenya Authorisation Decision, para. 96; Situation in the Côte d’Ivoire (Corrigendum to Authorisation Decision) ICC-02/11-14-Corr (3 October 2011) para. 54; Ibid., (Decision on warrant of arrest against) 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.


coordinated by a State or organisation.\textsuperscript{975} It must involve the multiple commissions of acts. It must then be directed against any civilian population.\textsuperscript{976} That population must be the primary target and not incidental to an attack.\textsuperscript{977}

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.\textsuperscript{978} However, “policy” is a less demanding element than ”systematic”.\textsuperscript{979} To establish a “policy”, it need only be demonstrated that the State or organisation meant to commit an attack against a civilian population.\textsuperscript{980} 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.\textsuperscript{981}

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.

\textit{The Prosecutor v. Gbagbo}

In \textit{Gbagbo}, the Court issued clear guidance on crimes against humanity.\textsuperscript{982} 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

\textsuperscript{975}The Prosecutor v. Germain Katanga (Judgment) ICC-01/04- 01/07-3436 (7 March 2014) para. 1109.
\textsuperscript{976}Ibid., para. 1102.
\textsuperscript{977}Ibid., para. 1104.
\textsuperscript{978}Ibid., para. 1111.
\textsuperscript{980}Rome Statute,art. 7; The Prosecutor v. Germain Katanga (Judgment) ICC-01/04- 01/07-3436 (7 March 2014) para. 1113.
\textsuperscript{981}The Prosecutor v. Germain Katanga (Judgment) ICC-01/04- 01/07-3436 (7 March 2014) para. 1113.
\textsuperscript{982}The Prosecutor v. Laurent Koudou Gbagbo (Decision on the confirmation of charges) ICC-02/11-01/11 (12 June 2014).
- 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.\textsuperscript{983}

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.\textsuperscript{984} 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.\textsuperscript{985} Others acts included raids on buildings which resulted in deaths,\textsuperscript{986} 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.\textsuperscript{987}

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 \textit{widespread}, because it:\textsuperscript{988}

- 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.

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.\textsuperscript{989} Preparations were made politically using bribes and consolidating a grip on power as well as militarily to obtain weapons and combat materiel;\textsuperscript{990}

- That the attack was planned and coordinated.\textsuperscript{991} 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

\textsuperscript{983}\textit{Ibid.}, para. 17.
\textsuperscript{984}\textit{Ibid.}, para. 74.
\textsuperscript{985}\textit{Ibid.}, para. 75.
\textsuperscript{986}\textit{Ibid.}, para. 76.
\textsuperscript{987}\textit{Ibid.}, para. 77.
\textsuperscript{988}\textit{Ibid.}, paras. 224-225.
\textsuperscript{989}\textit{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.
\textsuperscript{990}\textit{Ibid.}, paras. 123-149.
\textsuperscript{991}\textit{Ibid.}, paras. 150-192.
situation. There also appeared to be a connection to the mobilisation of the youth for violent acts, and a lack of sanctions or prevention of violence.

- In addition, the acts of violence analysed by the Chamber revealed a clear pattern of violence directed at pro-Ouattara demonstrators or activists, and more generally against areas whose inhabitants were perceived to be supporters of Alassane Ouattara, such as Muslims.

**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: murder; deportation or forcible transfer; 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.

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). 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. It is alleged that the attack 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.

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. To carry out the plan, a network of perpetrators was allegedly established. The network seemingly had a command structure and an established hierarchy. 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.1004

The Chamber approached the “widespread” or “systematic” test separately. It found that there were substantial grounds to believe the attack was widespread.1005 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”.1006 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.1007 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.1008 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.1009 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.1010 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”.1011 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 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.1012

1004 Ibid., para. 220.
1005 Ibid., paras. 176.
1006 Ibid., para. 176.
1007 Ibid., paras. 167-172, 176.
1008 Ibid.
1009 Ibid.
1010 Ibid.
1011 Ibid., para. 179, citing to Kenya Authorisation Decision, para. 96.
1012 Ibid., para. 179.
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.\textsuperscript{1013} The charges were confirmed against Ruto and Sang.\textsuperscript{1014}

**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.**\textsuperscript{1015} 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.\textsuperscript{1016}

- **Crime against humanity of extermination.**\textsuperscript{1017} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  - 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.\textsuperscript{1018}

- **Crime against humanity of enslavement.**\textsuperscript{1019} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  - 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;

\textsuperscript{1013}Ibid., para. 180.
\textsuperscript{1014} 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.
\textsuperscript{1015} Rome Statute, art. 7(1)(a).
\textsuperscript{1016} ICC Elements of Crimes, p. 5.
\textsuperscript{1017} Rome Statute, art. 7(1)(b).
\textsuperscript{1018} ICC Elements of Crimes, p. 6.
\textsuperscript{1019} Rome Statute, art. 7(1)(c).
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.\textsuperscript{1020}

• Crime against humanity of deportation or forcible transfer of population.\textsuperscript{1021} To prove this act, the ICC Prosecutor must show all of the following ingredients:

  o 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;
  
  o Such person or persons were lawfully present in the area from which they were so deported or transferred;
  
  o The perpetrator was aware of the factual circumstances that established the lawfulness of such presence;
  
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  
  o 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.\textsuperscript{1022}

• Crime against humanity of imprisonment or other severe deprivation of physical liberty.\textsuperscript{1023} To prove this act, the ICC Prosecutor must show all of the following ingredients:

  o The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;
  
  o The gravity of the conduct was such that it was in violation of fundamental rules of international law;
  
  o The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
  
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  
  o 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.\textsuperscript{1024}

\textsuperscript{1020} ICC Elements of Crimes,p. 6.
\textsuperscript{1021} Rome Statute,art. 7(1)(d).
\textsuperscript{1022} ICC Elements of Crimes,pp. 6-7.
\textsuperscript{1023} Rome Statute,art. 7(1)(e).
\textsuperscript{1024} ICC Elements of Crimes,pp. 6-7.
• Crime against humanity of torture.\textsuperscript{1025} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  o The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
  o Such person or persons were in the custody or under the control of the perpetrator;
  o Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  o 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.\textsuperscript{1026}

• Crime against humanity of rape.\textsuperscript{1027} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  o 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;
  o 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;
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  o 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.\textsuperscript{1028}

• Crime against humanity of sexual slavery.\textsuperscript{1029} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  o 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;

\textsuperscript{1025} Rime Statute,art. 7(1)(f).
\textsuperscript{1026} ICC Elements of Crimes,p. 7.
\textsuperscript{1027} Rome Statute,art. 7(1)(g)(1).
\textsuperscript{1028} ICC Elements of Crimes,p. 8.
\textsuperscript{1029} Rome Statute,art. 7(1)(g)(2).
o The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;

o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

o 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.\textsuperscript{1030}

- Crime against humanity of enforced prostitution.\textsuperscript{1031} To prove this act, the ICC Prosecutor must show all of the following ingredients:

  o 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;

  o 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;

  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

  o 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.\textsuperscript{1032}

- Crime against humanity of forced pregnancy.\textsuperscript{1033} To prove this act, the ICC Prosecutor must show all of the following ingredients:

  o 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;

  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

  o 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.\textsuperscript{1034}

\textsuperscript{1030} ICC Elements of Crimes, p. 8.
\textsuperscript{1031} Rome Statute, art. 7(1)(g)(3).
\textsuperscript{1032} ICC Elements of Crimes, p. 9.
\textsuperscript{1033} Rome Statute, art. 7(1)(g)(4).
\textsuperscript{1034} ICC Elements of Crimes, p. 9.
• Crime against humanity of enforced sterilization.\textsuperscript{1035} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  
  o The perpetrator deprived one or more persons of biological reproductive capacity;
  
  o The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent;
  
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  
  o 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.\textsuperscript{1036}

• Crime against humanity of sexual violence.\textsuperscript{1037} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  
  o 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;
  
  o Such conduct was of a gravity comparable to the other offences in Article 7, paragraph 1 (g), of the Statute;
  
  o The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
  
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  
  o 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.\textsuperscript{1038}

• Crime against humanity of persecution.\textsuperscript{1039} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  
  o The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights;
  
  o 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;

\textsuperscript{1035} Rome Statute, art. 7(1)(g)(5).
\textsuperscript{1036} ICC Elements of Crimes, p. 9.
\textsuperscript{1037} Rome Statute, art. 7(1)(g)(6).
\textsuperscript{1038} ICC Elements of Crimes, p. 10.
\textsuperscript{1039} Rome Statute, art. 7(1)(h).
o 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;

o 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;

o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

o 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.\textsuperscript{1040}

- Crime against humanity of enforced disappearance of persons.\textsuperscript{1041} To prove this act, the ICC Prosecutor must show all of the following ingredients:

  o 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;

  o 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;

  o 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;

  o Such arrest, detention or abduction was carried out by, or with the authorisation, support or acquiescence of, a State or a political organisation;

  o 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;

  o The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time;

  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

  o 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.\textsuperscript{1042}

\textsuperscript{1040} ICC Elements of Crimes,p. 10.
\textsuperscript{1041} Rome Statute,art. 7(1)(i).
\textsuperscript{1042} ICC Elements of Crimes,p. 11.
• Crime against humanity of apartheid.\textsuperscript{1043} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  o The perpetrator committed an inhumane act against one or more persons;
  o 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;
  o The perpetrator was aware of the factual circumstances that established the character of the act;
  o 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;
  o The perpetrator intended to maintain such regime by that conduct;
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  o 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.\textsuperscript{1044}

• Crime against humanity of other inhumane acts.\textsuperscript{1045} To prove this act, the ICC Prosecutor must show all of the following ingredients:
  o The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
  o Such act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute;
  o The perpetrator was aware of the factual circumstances that established the character of the act;
  o The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
  o 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.\textsuperscript{1046}

\textit{In Practice: Events in Ukraine and the Prosecutor’s Preliminary View}

As noted above, the ICC Prosecutor is currently conducting a preliminary examination into the situation in Ukraine. As part of that, the Prosecutor is considering the events during Euromaidan, the situation in Crimea and in the Eastern Ukraine and whether any crimes within the jurisdiction of the Court were committed. In November 2016, the Prosecutor released a report outlining her preliminary findings in relation to her examination into the situation in

\textsuperscript{1043} Rome Statute,art. 7(1)(j).
\textsuperscript{1044} ICC Elements of Crimes,p. 12.
\textsuperscript{1045} Rome Statute,art. 7(1)(k).
\textsuperscript{1046} ICC Elements of Crimes,p. 12.
It focused not only on the first Declaration, but also on the crimes which have allegedly occurred within the period from 22 February and onwards. This section outlines the ICC Prosecutor’s findings.

The ICC Prosecutor’s Annual Report

On 14 November 2016, the ICC Prosecutor released her annual Preliminary Examination Report summarising her Office’s activities and findings concerning ongoing preliminary examinations, which includes Ukraine. The 2016 Report addressed activities that occurred between 1 November 2015 and 30 September 2016, identifying the progress of each situation. The report divides the "situations" into phases; for example, Republic of Burundi, Gabonese Republic, Palestine, Iraq/UK and Ukraine are in “Phase 2” of their preliminary examinations (see Parts One and Three).

As previously noted, the ICC Prosecutor is examining information to ascertain whether there is a reasonable basis to believe that genocide, crimes against humanity, or war crimes have been committed in the territory of Ukraine (or by Ukrainian citizens) beginning on 21 November 2013. In relation to alleged crimes committed in Ukraine between 21 November 2013 and 22 February 2014 (the first Declaration submitted by the GoU, specifically related to the events surrounding the Maidan attacks), the ICC Prosecutor has received 20 communications with information on alleged crimes [see Part Two(B)]. Concerning the time period incorporating the second Declaration, the ICC Prosecutor’s Office received over 48 communications concerning allegations of crimes. There was also a single joint communication about the events on the Maidan from 13 civil society organisations. The Prosecutor has also met with Ukrainian authorities and representatives of civil society organisations and analysed publicly available information from several non-governmental and intergovernmental organisations.

The Law

The Report does not address war crimes as constituting possible crimes during the events of Euromaidan, but within the context of the situations in Crimea and Eastern Ukraine, as it is solely on those territories where the Prosecutor acknowledges the existence of an armed conflict, which is the key prerequisite for such crimes. Further, genocide is not addressed: presumably because public information from the events in Ukraine does not suggest that acts were done with an intent to destroy a national, ethnic, racial or religious group. The individual components of crimes against humanity are outlined below and those of war crimes are outlined in the next Part.

For a crime against humanity to have been perpetrated, the following “ingredients” must be established:

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1048 2015 Preliminary Examination Report.
• There was an act committed outlined in Article 7(1)(a) to (k) of the Rome Statute (e.g., murder, persecution or other inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health);

• The act was committed “as part” (i.e., nexus between the acts of the perpetrator and the attack) of a “widespread or systematic attack”;

• The attack was directed against any civilian population (the State or organisational policy requirement, which involves multiple commission of acts in Article 7(1); and

• The perpetrator had knowledge of the attack.\textsuperscript{1049}

The Prosecutor’s Legal Analysis of Crimes against Humanity

In relation to the stated elements for establishing a crime against humanity, the Prosecutor’s preliminary conclusions are that there is not enough information to find that any crimes occurred during the events of Euromaidan for which it would have jurisdiction. The ICC Prosecutor’s preliminary conclusions may change as and when new information is made available to her; in particular, the Prosecutor will be examining information received in October 2016. The ICC Prosecutor’s preliminary conclusions are discussed below.

Based on initial information, the Prosecutor believes there were killings, torture, persecution and other inhumane acts committed, yet the information provided does not allow the conclusion that the attack on civilian population was systematic or widespread in the context of Article 7 of the Rome Statute.\textsuperscript{1050}

Regarding the situation in Crimea, the Prosecutor stated that, according to the information provided, a great number of incidents of harassment and intimidation of the Crimean Tatar population and other Muslims residents of the peninsula may be established, as well as the killings and abductions of those who oppose the occupation of Crimea committed by the “Crimean self-defence” paramilitary group, incidents of ill-treatment and a great number of detention incidents.\textsuperscript{1051}

The Report also suggests that incidents of killing, disappearance, torture, sexual crimes and detention of civilian persons committed in Eastern Ukraine both by governmental and non-governmental forces have been documented.\textsuperscript{1052} Under the condition that all the above mentioned elements (see previous Part) are proved, such crimes may constitute crimes against humanity.

Discussion of the Prosecutor’s Findings

The preliminary report does not close the door on the prosecution of crimes against humanity at the ICC, for the reasons described below. The Prosecutor’s preliminary findings suggest that it is for the Ukrainian authorities and civil society to marshal their collective efforts to ensure

\textsuperscript{1049} Rome Statute,art. 7.
\textsuperscript{1050} 2016 Preliminary Examination Report, para. 189.
\textsuperscript{1051} \textit{Ibid.}, paras. 172-175.
\textsuperscript{1052} \textit{Ibid.}, paras. 178-183.
that she has all the information relevant to demonstrate the widespread or systematic nature of the attacks against civilians during Euromaidan, in Crimea and in Eastern Ukraine.

First, regarding Euromaidan events, it is important to note that the ICC Prosecutor has found that there is sufficient evidence to conclude that there was an attack against civilians under Article 7(2)(a) of the Rome Statute. However, despite the inference of a policy, it is clear that unless new information or 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.

However, 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, if such information exists - to prove that acts of violence were directed against larger group of victims and/or covered larger territory; that they were serious enough (each of them individually or collectively); and that they occurred as a result of planned and thoroughly developed method or system and were not the result of panic, excessively intensive and chaotic reaction to the protest movement or to other events of rush dynamics. It is worth noting that so far the ICC Prosecutor has received fewer communications (see above) in relation to Ukraine than some of the other situations being examined at the ICC. For example, the Prosecutor has received 86 communications concerning the situation in Palestine since 2014, 3,854 concerning Georgia since 2008, 112 concerning Afghanistan since 2007 and 173 concerning Colombia since 2004.

Second, regarding the situations in Crimea and in the East of Ukraine the Prosecutor has not reached any conclusion as to whether the mentioned crimes constitute crimes against humanity. Therefore, a significant number of victims, high number of alleged crimes and their occurrence over the whole Crimean territory and Eastern Ukraine respectively indicate that crimes against humanity could have been occurring from 22 February 2014 onwards. In addition, the Prosecutor has outlined that a great number of crimes in Crimea were committed against the ethnic group of Crimean Tatars, which may also constitute an element necessary to establish that crimes against humanity have been committed.

Hence, 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.

War Crimes

**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;\(^\text{1053}\)

• The crime must be committed during, and have a sufficient nexus to, the armed conflict;\(^\text{1054}\) 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”.\(^\text{1055}\)

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.

Existence of an Armed Conflict

The first “ingredient” 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\(^\text{1056}\)) found that:


\[\ldots\] 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.\(^\text{1057}\)

\(^{1053}\) Rome Statute, arts. 8(2)(d) and (f).


Thus, there is a reference to armed violence between two States or between State authorities and organised armed groups. Each is discussed below.

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, 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.

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.

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).

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

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“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.”

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.

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.

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.

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.”

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.\textsuperscript{1066} 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.\textsuperscript{1067}

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.\textsuperscript{1068}

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.\textsuperscript{1069} 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.\textsuperscript{1070} 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.\textsuperscript{1071}

\begin{thebibliography}{9}
\bibitem{Dordevi\'{c}2007} Dordevi\'{c}, Trial Judgment, para. 1522.
\bibitem{Mrkšić2007} 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.
\bibitem{Tadić2000} 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.
\bibitem{Katanga2014}ICC Elements of Crimes, p. 13.
\end{thebibliography}
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”. 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”. 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. The following factors, while not determinative, are particularly apposite when determining whether an offence qualifies as a war crime:

- The perpetrator is a combatant;
- 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.

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.

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.\textsuperscript{1077}

**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;
  - Unlawful deportation or transfer or unlawful confinement;
  - Taking of hostages.\textsuperscript{1078}

- **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;

\textsuperscript{1077} Katanga Trial Judgment, para. 1176.

\textsuperscript{1078} Rome Statute, art. 8(2)(a)(i)-(viii).
o Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

o 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;

o 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;

o 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;

o 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;

o Killing or wounding treacherously individuals belonging to the hostile nation or army;

o Declaring that no quarter will be given;

o Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

o Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

o 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;

o Pillaging a town or place, even when taken by assault;

o Employing poison or poisoned weapons;

o Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

o 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;

o 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;
- Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. 1079

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. 1080

- 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

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1079 Ibid., art. 8(2)(b)(i)-(xxvi).
1080 Ibid., art. 8(2)(c)(i)-(iv).
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;

- 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.\(^{1081}\)

### In Practice: Situation in Ukraine and the Prosecutor’s Preliminary View

As noted above, the ICC Prosecutor issued a second report in November 2016 outlining her preliminary findings in relation to her examination into the situation in Ukraine within the period

which had been stated in Declarations on the acceptance of the jurisdiction of the ICC (from 21 November 2013 onwards). This part of the report outlines ICC Prosecutor’s findings.

The ICC Prosecutor’s Annual Report

As mentioned above, the 2016 Report addresses activities between 1 November 2015 and 30 September 2016, identifying the progress of each situation. As previously noted, the ICC Prosecutor examines information to ascertain whether there is a reasonable basis to believe that genocide, crimes against humanity or war crimes have been committed in the territory of Ukraine (or by Ukrainian citizens) since 21 November 2013, as the Office of the Prosecutor of the ICC has received 20 communications with information on alleged crimes in Ukraine within the first Declaration and over 48 communications within the frames of the second Declaration.

The Law

The report is focused more on the establishment of the existence of an armed conflict than on the analysis either individual crimes in Crimea and in the East of Ukraine constitute war crimes. The Prosecutor recognizes existence of the main prerequisite of such crimes, which is the existence of an armed conflict.

To conclude that a war crime was committed, the existence of the following elements of crime shall be established:

- There must be a conflict of an international or non-international nature.
- The committed crime shall fall under the provisions of Article 8(2)(a) - (e) of the Rome Statute (e.g. intended murder, torture or inhuman treatment, unlawful, wanton and extensive destruction and appropriation of property, not justified by military necessity);
- The crime must be committed as a “part” (thus nexus to the armed conflict existed) of an armed conflict;
- The perpetrator was aware of the attack.

The Prosecutor’s Legal Analysis of War Crimes

Regarding the mentioned elements, which are required to establish the commission of an armed conflict, the preliminary findings of the Prosecutor state 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 hasn’t 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.
As regards the situation in the East of 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 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, the Prosecutor points to 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.\(^{1085}\)

Based on the initial information, in the Prosecutor’s opinion incidents of killing and the abduction of those who oppose the occupation of Crimea committed by the “Crimean self-defence”, ill-treatment and great number of detention incidents and as a consequence of the currently imposed change of citizenship, men of conscription age residing in Crimea became subject to mandatory Russian military service requirements.\(^{1086}\)

The report also states that incidents of killing, attacks on civilian objects, disappearances, torture, sexual violence and detention of civilians occurred, allegedly committed by both state and non-state forces.\(^{1087}\) In all cases the above mentioned elements are proved (see previous part) such crimes may constitute war crimes.

Analysis on the Prosecutor’s Findings

As regards the situation in Crimea and in the East of Ukraine, the Prosecutor hasn’t come to any conclusions as to whether the above mentioned crimes shall be considered war crimes. However, on the basis of the received information the Prosecutor’s Office has created a broad data base which embraces over 800 crimes allegedly committed since 20 February 2014. The Prosecutor’s Office is still analysing the facts of these crimes with an aim to establish whether they fall under the jurisdiction of the ICC with a view to the preliminary conclusion on the existence of an armed conflict. The Prosecutor’s Office will continue gathering information regarding alleged crimes.

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.\(^{1088}\) However, the ICC cannot prosecute the crime of aggression at present.

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

\(^{1085}\) 2016 Report on preliminary examination activities, para. 189.
\(^{1086}\) *Ibid*, para. 172-175.
\(^{1087}\) *Ibid*, para. 178-183.
\(^{1088}\)*Ibid*, art. 5.
negotiations of the Statute of the Court in Rome.\textsuperscript{1089} 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 123\textsuperscript{1090} 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.\textsuperscript{1091}

**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.\textsuperscript{1092} 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.\textsuperscript{1093} Thereafter, the conference focused primarily on negotiating how the ICC may try the crime of aggression.

**The Components of the Crime of Aggression**

**Definition**

After it was amended and adopted at the Kampala conference,\textsuperscript{1094} Article 8\textsuperscript{bis} defining the crime of aggression was inserted into the Rome Statute. It reads:\textsuperscript{1095}

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 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:

\textsuperscript{1089}Ibid., art. 5(2); International Criminal Court Assembly of States Parties, Res RC/Res.6, 13\textsuperscript{th} Plenary Meeting, 11 June 2010 (adopted by consensus) (“Aggression Resolution”).

\textsuperscript{1090}Art. 121 of the Rome Statute pertains to ‘Amendments’ and art. 123 pertains to ‘Review of the Statute’.

\textsuperscript{1092}Ibid., art. 5(2).


\textsuperscript{1094}Ibid., Annex III, p. 45 et seq.

\textsuperscript{1095}Aggression Resolution.

\textsuperscript{1096}Following the procedure required under art. 121 of the Rome Statute.
(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.\textsuperscript{1096}

Accordingly, the provision that defines the crime is Article 8\textsuperscript{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.\textsuperscript{1097} It must be noted that the offence must have been committed and that threats are not sufficient pursuant to Article 8\textsuperscript{bis} of the Statute.

\textbf{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.\textsuperscript{1098}

Annex II to the resolution adopted in Kampala further specifies the conditions for individual responsibility, providing that:

\textsuperscript{1096} Rome Statute,art. 8\textsuperscript{bis}.

\textsuperscript{1097}ibid.,art. 8\textsuperscript{bis}(2). \textit{In particular}, the use of lawful self-defence cannot be regarded as an act of aggression according to art. 51 of the UN Charter<www.un.org/en/documents/charter/chapter7.shtml> accessed 28 October 2015.

\textsuperscript{1098}ibid.,art. 8\textsuperscript{bis}. 
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.\textsuperscript{1099}

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.\textsuperscript{1100}

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.

\textit{The Threshold for the Act of Aggression}

Article 8bis 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.\textsuperscript{1101}

\textsuperscript{1099} Aggression Resolution, Annex II, ‘Introduction’.

\textsuperscript{1100} Ibid., Annex II, ‘Elements’.

\textsuperscript{1101} Ibid., Annex III(7).
**Jurisdiction over the Crime of Aggression**

The Court cannot exercise its power over the crime of aggression at present. There are two recent additions to the Rome Statute concerning the Court’s jurisdiction to try the crime. The provisions of both Articles 15bis and 15ter provide that the Court will not be able to exercise its jurisdiction with respect to crimes of aggression until:

- One year passed after at least 30 States Parties have ratified or accepted the amendments; and
- A decision is taken by two-thirds\(^{1102}\) of States Parties to activate the jurisdiction at any time after 1 January 2017.

The Court may exercise its jurisdiction over the crimes of aggression only once both of the above mentioned conditions are fulfilled.\(^{1103}\) As of August 2016, 30 States Parties ratified the necessary amendments on the crime of aggression.\(^{1104}\)

Competence of the ICC Following a State Referral or Initiative by the Prosecutor

Article 15bis of the Rome Statute gives competence, once the Court’s jurisdiction over the crime of aggression is activated, to the ICC Prosecutor to investigate and prosecute crimes of aggression on its own initiative, and gives competence to States Parties to refer a crime of aggression to the Prosecutor of the ICC.\(^{1105}\)

The same Article imposes additional conditions to the exercise of the Court's jurisdiction by State referral or when the Prosecutor starts an examination on her own volition. First, the Court does not have jurisdiction over crimes of aggression involving States that are not parties to the Rome Statute, whether such a non-State Party is an aggressor or the victim of an aggression.\(^{1106}\) Second, the Court does not have jurisdiction over crimes of aggression involving States Parties to the Rome Statute that have opted-out of the Court’s jurisdiction over the crime of aggression. States Parties can do so by lodging a declaration with the Registrar.\(^{1107}\)

Competence of the ICC following a referral by the Security Council

Article 15ter of the Rome Statute gives competence to the UNSC, once the Court’s jurisdiction over the crime of aggression is activated, to refer a situation to the Prosecutor of the Court to investigate. There is no requirement for the involved States to give any type of consent to the investigation, as specified in Annex III of the Kampala resolution:

It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, para. (b) of the Statute

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\(^{1102}\)Rome Statute, art. 121(3).

\(^{1103}\)Aggression Resolution, Annex III(3).

\(^{1104}\)For a full list of the States Parties that have ratified the crime of aggression amendments, see 'Status of ratification and implementation,' The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression,” <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> accessed August 2016.

\(^{1106}\)Pursuant to the Rome Statute, arts. 13(a)-(c).

\(^{1107}\)Rome Statute, art. 15bis(5).

\(^{1108}\)Ibid., art. 15bis(4).
irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.\textsuperscript{1108}

**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 Russia 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”. Relatedly, it will then address whether the Court may have temporal jurisdiction over acts of aggression that begin before the crime is adopted, but “continue” after it is adopted.

The crime of aggression is significant in the context of recent events in Ukraine. There are many who have branded Russia’s alleged activities in eastern Ukraine and particularly Crimea as being an act of aggression.\textsuperscript{1109} President Putin has acknowledged that Russian troops in early 2014 entered the region of Crimea and took control.\textsuperscript{1110} The region of Crimea is now the “Republic of Crimea” and has been incorporated into the Russian Federation.\textsuperscript{1111} President Putin has accepted that there are “Russian military specialists” in eastern Ukraine, but not regular forces.\textsuperscript{1112} However, the OSCE has encountered regular personnel in eastern Ukraine identifying themselves openly as Russian military.\textsuperscript{1113}

\textsuperscript{1108}Aggression Resolution, Annex III(2).


\textsuperscript{1110} ‘Putin admits Russian forces were deployed to Crimea’ (Reuters, 17 April 2014) <http://uk.reuters.com/article/russia-putin-crimea-idUKL6N0N921H20140417> accessed 28 March 2016.


\textsuperscript{1113} ‘Latest from OSCE Special Monitoring Mission (SMM) to Ukraine based on information received as of 19:30 (Kyiv time)’ (OSCE, 2 August 2015) <www.osce.org/ukraine-smm/175736> accessed 28 March 2016.
**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 becomes a crime in the Rome Statute? In short, it is unlikely that the Court will be able to prosecute this aggressive conduct any time after 2017 (when the crime may be activated). Such a course would appear to be the application of jurisdiction “retroactively”, which is prohibited at the ICC.\(^{1114}\)

The Rome Statute prohibits the retroactive application of crimes. 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 a general proposition therefore, there is little doubt that the ICC cannot prosecute the crime of aggression until after aggression jurisdiction is fully activated (in 2017 at the earliest). As one commentator suggests, the question of retroactivity is a non-concern for aggression because the Rome Statute is so explicit in prohibiting it.\(^{1115}\)

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.
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.\(^{1116}\)

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\(^{1114}\) Rome Statute,art. 24: Art. 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.


These comments from the Working group are not binding on the ASP. They are, however, persuasive in clarifying the elements of the crime. The Working Group, in its advice to the ASP, is clear. Accordingly, it appears that the crime of aggression cannot be used to prosecute an act of a State which takes place before the crime is adopted.

**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 seeming occupation of Crimea by the Russian Federation. Even though the crime of aggression is not yet prosecutable, there is an argument to suggest the physically continuing act of an occupation could begin before the crime of aggression is activated, and continue into a period when the crime is activated. In other words, the conduct is still occurring when the conduct 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”. 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. 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.

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”.

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1119 *ibid.*
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". This also seems to focus on the initial placing of a territory under control of the hostile army as being the act of aggression.

Overall, despite these iterations, the debate is unsettled. It will not be settled until the ICC determines the matter. These arguments, however, do not seem to be able to escape from the interpretation of the Rome Statute 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, it seems that 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 Russia.

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.

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; 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". 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

\[1120\] Rome Statute, art. 8bis(2)(a).

\[1121\] 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.

\[1122\] Rome Statute, art. 15bis(4) (inserted by the Aggression Resolution).

\[1123\] Ibid., art. 15bis(5); (inserted by the Aggression Resolution).
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.\(^{1124}\) One commentator, Carrie McDougall, suggests that:

\[\ldots\] 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.\(^{1125}\)

McDougall notes that an understanding confirming this interpretation was considered,\(^ {1126}\) but deemed unnecessary.\(^ {1127}\)

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, crimes against humanity and war crimes, whereas aggression has a deliberately different jurisdiction regime.\(^ {1128}\) 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”.\(^ {1129}\) 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.\(^ {1130}\) Heller recognises, like Clark, that the Court would not have jurisdiction if, for

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1129 ibid.

example, a State Party acted aggressively toward a non-State Party even though it would over war crimes, crimes against humanity and genocide.\footnote{Ibid.}

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:

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[...\text{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.}]\footnote{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.}
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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.

**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.

**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.\footnote{Rome Statute, art. 25(3).}

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 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.

**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.1134

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.1135

**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.1136 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”;1137 (ii) a “co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime”;1138 (iii) the subjective elements of the crime in question—knowledge and intent—pursuant to Article 30;1139 (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 realisation of the objective elements of the crime; (b) must all

1135 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.
1136 Lubanga Trial Judgment, para. 980.
1138 Lubanga Confirmation of Charges Decision, para. 346.
1139 Ibid., para. 349.
mutually accept such a result by reconciling themselves with it or consenting to it";¹¹⁴⁰ and (v) the "suspect must be aware of the factual circumstances enabling him or her to jointly control the crime".¹¹⁴¹

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.¹¹⁴² 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.¹¹⁴³ 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.¹¹⁴⁴

**Commission through Another**

Article 25(3)(a) also recognises commission “through another”. To hold an individual liable based on this mode of liability, 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.¹¹⁴⁵

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".¹¹⁴⁶ 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”.¹¹⁴⁷ 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 he used it

¹¹⁴⁰Lubanga Trial Judgment, para. 1018.
¹¹⁴²Lubanga Trial Judgment, para. 1136.
¹¹⁴³Ibid., para. 1271.
¹¹⁴⁴Ibid., para. 1270.
¹¹⁴⁵Katanga Trial Judgment, para. 1399.
¹¹⁴⁶Ibid., paras. 1402-1403.
¹¹⁴⁷Ibid., para. 1405, citing Katanga and Ngudjolo Decision on Confirmation of Charges, paras. 515 and 518.
“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”.

**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.

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.

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/FPFLC") 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. 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, including arranging for weapons to be transported, travelling to secure troops and liaising with subordinates.

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. Further, the suspects must be aware of the factual circumstances enabling them to control the crimes jointly.

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1148 Ibid., para. 1411.
1149 Katanga and Ngudjolo Decision on Confirmation of Charges, para. 493.
1150 See also: Katanga and Ngudjolo Decision on Confirmation of Charges, paras. 350-351; Katanga and Ngudjolo Decision on Confirmation of Charges, paras. 500-514, 527-539.
1151 Katanga and Ngudjolo Decision on Confirmation of Charges, para. 105.
1152 Ibid., para. 108.
1153 Ibid., para. 110.
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.\(^{1156}\)

**Ordering, Soliciting or Inducing Commission**

**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.\(^{1157}\)

**Ordering**

Ordering means directing a person to commit an offence.\(^{1158}\) 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.\(^{1159}\) 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.\(^{1160}\)

**Otherwise Assisting or Aiding and Abetting the Commission of the Crime**

Aiding and abetting involves the facilitation of an offence.\(^{1161}\) Article 25(3)(c) provides that a person is criminally responsible for a crime if that person:

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\(^{1156}\) Ntaganda Confirmation of Charges Decision, para. 135.

\(^{1157}\) Ibid., para. 153.

\(^{1158}\) 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.

\(^{1159}\) 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.

\(^{1160}\) 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.

\(^{1161}\) Rome Statute, art. 25(3)(c).
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.\footnote{1162} The assistance may consist of an act or omission or occur before, during, or after the act of the principal offender.\footnote{1163} Criminal participation must have a direct and substantial effect on the commission of the offence.\footnote{1164}

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.\footnote{1165} 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".\footnote{1166}

**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”.\footnote{1167}

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. 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.

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.”

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.” 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.

Responsibility as a Commander or Superior

Command responsibility or superior responsibility concerns a superior’s failure to act when he or she should have. 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.

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 command.

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1170 Katanga Trial Judgment, para. 1626.

1171 Ibid., para. 1632.

1172 Ibid., para. 1671.

1173 Rome Statute, art. 28.

1174 Ibid.
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.  

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;

- 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:  

1176 (i) the existence of a superior-subordinate relationship; (ii) the superior's failure to take the necessary and reasonable measures to prevent the criminal

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1175 *Bemba* Decision of the Confirmation of Charges, para. 407.
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.\textsuperscript{1177}

Part Two(C): Ratification

This section addresses ratification of the Rome Statute.\textsuperscript{1178} 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.

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.\textsuperscript{1179} To ratify the Rome Statute, a State will deposit a document containing this consent with the Secretary-General of the UN.\textsuperscript{1180} 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.\textsuperscript{1181}

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.\textsuperscript{1182} Nevertheless, as of April 2016, Ukraine has not joined the 124 States Parties\textsuperscript{1183} 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 5\textsuperscript{1184} of the Statute when committed on its territory or by its nationals.\textsuperscript{1185} 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.\textsuperscript{1186} The

\textsuperscript{1180}Rome Statute, art. 125(2).
\textsuperscript{1181}Ibid., art. 12(1).
\textsuperscript{1184}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.
\textsuperscript{1185}Rome Statute, art. 12(1).
following section will discuss the difference between ratification and the submission of a Declaration.

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.

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. 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. 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). 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.

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. 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)].
**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 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. 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, 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.

**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). 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.

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

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1194 Rome Statute, arts. 13(c), 15 and 18.
1195 *Ibid.*, art. 11(2).
1196 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.
crimes committed from 20 February 2014 onwards for an indefinite duration. 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 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. 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. The Chamber did not specifically assess whether the Declaration made in 2003 could, on its own, cover crimes allegedly committed in 2010 or 2011. 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”].

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.

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

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1197 The Second Declaration.  
1199 The Situation in the Republic of Côte d’Ivoire (Authorisation Decision) ICC-02/11-14 (3 October 2011) para. 15.  
1200 Ibid.
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. This suggests a difference in formality and coerciveness of the nature of the request.

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.

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. 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. 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. This particular difference is, however, not applicable to Ukraine because Ukraine has acceded to the Agreement on the Privileges and Immunities of the International Criminal Court 2002 on 29 January 2007.

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.

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1202 Ibid., art. 87(5)(a).
1203 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.
1204 Rome Statute, art. 73.
1205 Ibid., art. 48.
1206 Ibid., art. 48.
1207 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.
1208 ICC Agreement on the Privileges and Immunities.
1209 Ibid., art. 3.
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.\textsuperscript{1211} 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”.\textsuperscript{1212} 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.\textsuperscript{1213}

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.\textsuperscript{1214} 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

\textsuperscript{1211} Rome Statute, art. 57(3)(d).
\textsuperscript{1212} Ibid., art. 57(3)(d).
\textsuperscript{1214} Rome Statute, art. 57(3)(d).
consultations 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.

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;\textsuperscript{1215}
- Surrendering people to the Court;\textsuperscript{1216}
- Identifying the whereabouts of persons;\textsuperscript{1217}
- Taking evidence including testimony;\textsuperscript{1218} and
- Executing search and seizures.\textsuperscript{1219}

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 interwoven 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.\textsuperscript{1220} 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.\textsuperscript{1221} When the Court exercises its power under Article 75, the Court may rely upon certain Part 9 measures.\textsuperscript{1222} 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

\textsuperscript{1215}Ibid., art. 92.
\textsuperscript{1216}Ibid., art. 89.
\textsuperscript{1217}Ibid., art. 93(1).
\textsuperscript{1218}Ibid., art. 93(1).
\textsuperscript{1219}Ibid., art. 93(1).
\textsuperscript{1220}E.g., Rome Statute, art. 89.
\textsuperscript{1221}Ibid., art. 75(5).
\textsuperscript{1222}Ibid., art. 75(4).
forfeiture,\textsuperscript{1223} 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”.\textsuperscript{1224} 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.\textsuperscript{1225} 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.\textsuperscript{1226} The property or proceeds from the sale of assets must be transferred to the Court.\textsuperscript{1227} 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.\textsuperscript{1228} 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.

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:\textsuperscript{1229}

- 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.

\begin{itemize}
\item \textsuperscript{1223}Ibid., art. 93(1)(k).
\item \textsuperscript{1224}Ibid., art. 93(1)(l).
\item \textsuperscript{1225}Ibid., art. 109.
\item \textsuperscript{1226}Ibid., art. 109(2).
\item \textsuperscript{1227}Ibid., art. 109(3).
\item \textsuperscript{1228}Ibid., art. 93(1)(k) and (l).
\end{itemize}
• 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
• Interpret certain provisions of the constitution in such a way so as to avoid constitutional problems in terms of compatibility with the Rome Statute.¹²³⁰

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.¹²³¹ The Court concluded that this jurisdiction was supplementary to the national Ukrainian system and that such additional jurisdiction was prohibited by the Constitution.¹²³² Therefore, under Article 9 of the Constitution, it must be amended before the Rome Statute can be ratified.¹²³³

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.¹²³⁴

More recently, 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.¹²³⁵ The President appointed Hanna Suchocka, member of the Venice Commission, as an international observer on the Constitutional Commission.¹²³⁶

¹²³⁰Ibid., p. 3.
¹²³²Article 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 para10 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.
¹²³⁶Venice Commission Preliminary Opinion, para. 1.
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 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.1237

Subsequently, in late November 2015, the President of Ukraine submitted a draft law to the Verkhovna Rada amending the Constitution.1238 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.1239

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.1240

The proposed draft law to amend the Constitution of Ukraine with a “catch-all” provision is familiar to other States. It does not seek to amend the offending provisions identified by the Constitutional Court (see Part One), but rather gives 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,1241 Chile,1242 Côte d’Ivoire and France.

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

1237Ibid., para. 4.
1239Venice Commission Preliminary Opinion, para. 17.
or her will from a Belgian judge that Belgian law has assigned to him or her. 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.

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. 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”. Chile also reaffirmed the principle of complementarity and inserted a provision that it would cooperate with the Court subject to Chilean law. Having made the necessary Constitutional amendments, Chile deposited its instrument of ratification with the UN on 29 June 2009, thereby ratifying the Rome Statute.

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. Côte d’Ivoire, however, lodged two Declarations (as Ukraine has) on 18 April 2003. Subsequently, in 2012, the National Assembly adopted two bills that revised

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1247 Ibid.
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”. The State subsequently deposited its instrument of ratification on 15 February 2012 with the UN.

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. 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.

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. 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”. It therefore found that this provision violated the Constitution and ratification required a constitutional amendment.

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 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”. As a consequence, France adopted a constitutional provision that solved all the constitutional problems raised above. 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”. The government was of the view that this Article met the constitutional concerns.

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. 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. 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.

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 attend cases against Ukrainian citizens who are in custody in Ukraine.

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to investigate and prosecute the crimes therein. As discussed in detail below, ensuring that a State’s domestic law complies fully with the provisions of the Rome Statute is critical.

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.

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. 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. As with the likely majority of States globally, 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. The Law on International Agreements however provides that implementation should occur simultaneously with ratification. 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 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.

The Crimes and Other Substantive Provisions

As a result of the above, particularly with regard to the proposed undue delay in ratifying the Rome Statute (see Part One concerning the three-year delay of ratification of 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”. 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, 

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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.\(^{1271}\) 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 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.\(^{1272}\) 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.\(^{1273}\) 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.\(^{1274}\)

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.\(^{1275}\) It should be noted that there is no prohibition in ICC law on states choosing to prosecute international crimes as ordinary crimes.\(^{1276}\) 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.\footnote{\textit{Rome Statute}, arts. 18(1) and 19(2)(b).} 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.\footnote{\textit{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: \textit{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: \textit{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; \textit{The Prosecutor v. Germain Katanga (Decision on Warrant of Arrest) ICC-01/04-01/07-55}; \textit{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: \textit{The Prosecutor v. Kony et al (Admissibility Decision) ICC-02/04-01/05-377} (10 March 2009) paras. 17-18; \textit{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; \textit{The Prosecutor v. Francis Kimri 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’: \textit{The Prosecutor v. Francis Kimri Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Judgment) ICC-01/09-02-11-274} (30 August 2011) para. 39.} 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.\footnote{\textit{See generally, Elinor Fry, \textit{The Contours of International Prosecutions: As Defined by Facts Charges, and Jurisdiction} (Eleven International Publishing, 2015) pp. 14.} Evidently, 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,\footnote{\textit{OUP, 2010} p. 336.} fighting impunity and restoring international peace and security.\footnote{\textit{An Introduction to International Criminal Justice and International Criminal Procedure}, in G. Sluiter et al. (eds), \textit{International Criminal Procedure: Principles and Rules} (Oxford University Press, 2013) p. 59.} 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 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). 1283

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. 1284 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. 1285

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.

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1283 Morten Bergsmo, Mads Harlem and Nobuo Hayashi (eds), Importing Core International Crimes into National Law (2nd edn, Torkel Opsahl, Oslo, 2010)p. 7


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 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. 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.

The ECHR has interpreted the principle of legality as embodying the principle that only the law can define a crime and prescribe a penalty. 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”.

In other words, criminal liability for certain conduct should be sufficiently foreseeable and accessible at the time of its commission.

In addition, the principle of culpability is a basic prerequisite for criminal liability in most societies. 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

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1286 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.
1287 ICCPR, art. 15.
1289 Ibid.
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. 1292

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.

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. 1293 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. 1294 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. 1295

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

1295 Ibid.
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, 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. 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).1297 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.1298 The United Kingdom Act takes a similar approach by incorporating Rome Statute crimes by reference.1299 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.1300 Canada establishes the crimes through custom,
but defines custom as including Articles 6, 7, and 8 of the Rome Statute\textsuperscript{1301} 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.\textsuperscript{1302} The Law provides for universal jurisdiction over genocide, crimes against humanity and war crimes.\textsuperscript{1303} It has been noted that this acts as a standalone criminal code and is not incorporated into the existing criminal code of Germany.\textsuperscript{1304} 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 to send out an important and “reassuring” message about its prosecution of such serious crimes.\textsuperscript{1305} 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.\textsuperscript{1306} 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.

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.\textsuperscript{1307} There should be no cases of a person being exempt from criminal responsibility because of their official position.\textsuperscript{1308} 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

\textsuperscript{1304} Bergsmo Importing Core Crimes,p. 19.
\textsuperscript{1305} Ibid.
\textsuperscript{1306} Ibid.,p. 7.
\textsuperscript{1307} Rome Statute,art. 27.
\textsuperscript{1308} Ibid.
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. The immunities were applicable, it opined, only to national proceedings and not international jurisdictions. 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 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”. It was suggested that Article 27 of the Rome Statute concerns purely jurisdictional provisions and does not contain obligations for States. It was argued that Norway could still maintain its immunity before Norwegian courts in relation to the King. 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. 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. The following domestic constitutional

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1309 Constitutional Court Opinion, part 2.1, para. 3.
1310 Ibid., part 2.2.
1312 Ibid.
1313 Ibid.
1314 Ibid.
bodies found the same: France, Luxembourg, Chile, Côte d’Ivoire, and Madagascar. 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. The Constitution 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”.

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”. 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. 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. The Albanian Constitutional Court provided an opinion nearly identical to the Ukrainian

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1322 Constitution of the Republic of France, art. 53(2).
1324 Ibid.
1325 Ibid.
Constitutional Court. The immunity, it was found, provided protection only from domestic proceedings.\textsuperscript{1327} Moldova’s constitutional body found the provision to be compatible,\textsuperscript{1328} as did the Honduran Supreme Court.\textsuperscript{1329} 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.\textsuperscript{1330} An inventive argument was advanced as regards the immunity of the Spanish King.\textsuperscript{1331} 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 monarch.\textsuperscript{1332} 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.

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,\textsuperscript{1333} an exception yet to be recognised in Ukrainian law. Instead, Ukraine should adopt a provision that properly

\textsuperscript{1328} 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.
\textsuperscript{1331}ICRC Rome Statute Issues,p. 7.
\textsuperscript{1332}Ibid.
\textsuperscript{1333} Rome Statute,art. 29.
recognises the inapplicability of the limitation law to Rome Statute crimes—genocide, crimes against humanity and war crimes.

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 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. 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.

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

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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.

**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 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 Investigations

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.

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;\(^\text{1335}\) (ii) the State in question has "declared" that it accepts the jurisdiction of the ICC without ratifying the Statute;\(^\text{1336}\) or (iii) the UNSC refers a situation to the Court.\(^\text{1337}\)

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 \textit{proprio motu} (on her own initiative) on the basis of information received from reliable sources, including from a State’s Declaration.\(^\text{1338}\)

If this happens, the Prosecutor will open a “preliminary examination” into the situation at hand as a matter of policy.\(^\text{1339}\) 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.\(^\text{1340}\)

\(^{1335}\) Rome Statute, arts. 13(a) and 14.

\(^{1336}\) Ibid., art. 12(3).

\(^{1337}\) Ibid., art. 13 (b).

\(^{1338}\) Ibid., art. 13.

\(^{1339}\) 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.

\(^{1340}\) 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. 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’”. It does not necessarily mean that all the information “point toward only one conclusion”. The information at this early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’”.

The ICC Prosecutor is under a statutory mandate to conduct the preliminary examination independently, impartially and objectively, 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, or irrelevant criteria, such as geopolitical implications. Any information will be used to consider incriminating and exonerating evidence equally in order to establish the truth of the situation at hand. The Prosecutor will cast her net widely to seek information from reliable sources such as States, members of civil society or UN organs. The Prosecutor may also receive written and oral testimony at the seat of the Court. 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.

In deciding whether to open a full investigation, the preliminary examination must consider the following three factors:

- 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 the date is 21 November 2013, when the first Declaration was submitted). 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. The Prosecutor has jurisdiction over matters the UNSC has referred.
- Admissibility: The ICC is a Court of last resort. This principle encompasses the concepts of complementarity and gravity. 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. Second, the Prosecutor must consider whether a case is of sufficient gravity to justify further action by the Court; 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.

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”.

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;
- 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.

**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

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1358 As discerned from the Rome Statute, art. 53(1)(a)-(c).
1359 Preliminary Examinations Policy Paper, paras. 77-84.
1360 Rome Statute, art. 53(1)(a)-(d).
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.

**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. 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.

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”. 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”. Those who send information are encouraged to send it in English or French, but informal translations will be sought for other languages. 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

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1362 *Rome Statute*, art. 15

1363 *Rules of Procedure and Evidence*, r. 46.

1364 “What should be included in a Communication sent to the Office?” (ICC) <www.icc-cpi.int/en_menues/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/siac/Pages/default.aspx> accessed 14 January 2015.


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.¹³⁶⁷

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.¹³⁶⁸ 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 9146 communications for preliminary examinations.¹³⁶⁹ By the end of October 2015, the Prosecutor had considered information on crimes from numerous sources and even open sources, and a total of 11,568 communications had been received.¹³⁷⁰ 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 to restore justice, by way of three means: consultations, public reports and communications to the Prosecutor.¹³⁷¹ 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.¹³⁷²

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 phase two, which is the formal start of the preliminary examination process, the ICC Prosecutor holds consultations with government authorities, national and international NGOs, and representatives of affected groups,¹³⁷³ and liaises with various UN and international organisations.¹³⁷⁴

¹³⁶⁷ ‘What should be included in a Communication sent to the Office?’ (ICC) <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/siac/Pages/default.aspx > accessed 29 March 2016.
¹³⁷¹ ICC, ‘Situation in Georgia, Summary of the Prosecutor’s Request for authorisation of an investigation pursuant to Art. 15’, 13 October 2015, para. 43 <www.icc-cpi.int/iccdocs/otp/Art_15_Application_Summary-ENG.pdf#search=article%202015%20communication> accessed 29 March 2016.
¹³⁷² Ibid., para. 45.
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.\textsuperscript{1375} In the Ukraine preliminary examination, the ICC Prosecutor requested information from Ukrainian civil society organisations and from the government.\textsuperscript{1376} In the Afghanistan preliminary examination, ICC Prosecutor officials met with Afghan civil society groups and international NGOs.\textsuperscript{1377} In the “flotilla case”,\textsuperscript{1378} the ICC Prosecutor reviewed the reports of four commissions that had looked into the incident previously.\textsuperscript{1379} 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.\textsuperscript{1380} Additionally, in this phase of the Nigerian preliminary examination, the ICC Prosecutor utilized connections with academics and researchers that specialise in Nigeria.\textsuperscript{1381}

**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. Honduras’s preliminary examination has been ongoing for five years and is still in phase two.\textsuperscript{1382} Ukraine is also in phase two but the preliminary examination has only been ongoing for around a year-and-a-half.\textsuperscript{1383} Colombia is in phase three and is eleven years into a preliminary examination.\textsuperscript{1384} Iraq’s preliminary examination concluded in 2006 and was reopened eight years later with new information.\textsuperscript{1385} 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.

\textsuperscript{1375}Ibid., p. 13, para. 55.
\textsuperscript{1376}Ibid., pp. 16-17, para. 71.
\textsuperscript{1378}Referred to by the ICC as the case of ‘Registered vessels of Comoros, Greece, and Cambodia’.
\textsuperscript{1379}2013 Preliminary Examination Report,p. 24, para. 101.
\textsuperscript{1381}2012 Preliminary Examination Report,p. 21, para. 91.
\textsuperscript{1383}2014 Preliminary Examination Report,p. 14, para. 59.
\textsuperscript{1384}Ibid., p. 25, para. 103.
\textsuperscript{1385}Ibid., p11, paras. 42-43.
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.1386

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. At the end of phase two, an “Article 5 Report” will be submitted to the Prosecutor.1387

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.

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.1388

Phase two will also see officials of the ICC Prosecutor go on missions to affected areas. As of 2014, the ICC Prosecutor had gone on three missions to Tegucigalpa as part of the Honduran preliminary examination.1389 The latest mission was to verify information received and to gather further information on crimes allegedly committed against the civilian population,1390 as well as on allegations of crimes committed in a particular region.1391 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.1392 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

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1386 Preliminary Examinations Policy Paper, para. 81.
1387 Ibid.
1388 Ibid.
1390 Ibid.
Phase Three: Admissibility

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.

Complementarity involves the examination of the existence of relevant national proceedings in relation to the alleged situation or case under consideration. 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. The requirements of both complementarity and gravity will be examined further below.

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.

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1393 2012 Preliminary Examination Report, p. 21, para. 93.
1394 Ibid., pp. 21-22, para. 94.
1396 Preliminary Examinations Policy Paper, para. 81.
1397 Ibid., para. 82.
1398 Ibid., p. 2, para. 6.
1399 Ibid., p. 15, para. 61.
Accordingly, information concerning the attribution of incidents, the military or civilian character
of targets, and the number of casualties are important, as is information on national
proceedings. 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 conflict. 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. 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.
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. In 2013, the Prosecutor conducted missions to Nigeria to consider
national investigations and prosecutions. 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.

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. 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. 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.
Another mission, also facilitated by the Colombian government, took place from 1 to 13

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Report, p. 44, para. 185.
1402 2014 Preliminary Examination Report, p. 36, para. 152.
1403 Preliminary Examinations Policy Paper, para. 85.
1407 Ibid., p. 51, para. 225.
1408 Colombia: 2013 Preliminary Examination Report, p. 36, paras. 147 and 148.
1410 Ibid.
February and from 11 to 14 May 2015 to follow up on national proceedings relevant to the preliminary examination.\textsuperscript{1411}

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.\textsuperscript{1412} 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.\textsuperscript{1413} Also in 2014, a mission to Guinea was conducted, the ninth during the course of the preliminary examination into that country.\textsuperscript{1414} 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.\textsuperscript{1415} Consultations were held with the panel of investigative judges on the case, judicial and political authorities, victims’ representatives, and relevant international actors.\textsuperscript{1416} Two missions to Guinea were conducted under phase three in 2013.\textsuperscript{1417}

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,\textsuperscript{1418} 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.\textsuperscript{1419} 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.\textsuperscript{1420} 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.\textsuperscript{1421}

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.\textsuperscript{1422} 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,

\begin{footnotesize}
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\item\textsuperscript{1411}Ibid., p. 31, para. 129. 2015 Preliminary Examination Report, p. 38, para. 161.
\item\textsuperscript{1412}Ibid.
\item\textsuperscript{1413}2014 Preliminary Examination Report, p. 36, para. 152.
\item\textsuperscript{1414}Ibid., p. 40, para. 165.
\item\textsuperscript{1415}Ibid.
\item\textsuperscript{1416}Ibid.
\item\textsuperscript{1417}2013 Preliminary Examination Report, p. 45, para. 197.
\item\textsuperscript{1418}Afghanistan: 2014 Preliminary Examination Report, pp. 23-24, para. 101.
\item\textsuperscript{1419}2014 Preliminary Examination Report, p. 40, para. 166.
\item\textsuperscript{1420}Ibid., p. 40, para. 167.
\item\textsuperscript{1421}Ibid., p. 40, para. 168.
\item\textsuperscript{1422}Ibid., p. 40, para. 169.
\end{itemize}
\end{footnotesize}
including the Constitutional Court, sharing her views on issues of national investigations for lower-ranking perpetrators and suspended sentences. 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. 

During the Nigerian preliminary examination, the Prosecutor accepted an invitation by the Nigerian Attorney General to speak at a 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. Contact is also maintained with organisations assisting victims, such as in the Guinea preliminary examination.

The Complementarity Provisions

The principle of admissibility encompasses the concepts of complementarity and gravity. 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”. 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.

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. The ICC Prosecutor must then consider:

- Whether there are, or have been, national investigations or prosecutions relevant to the preliminary examination. If not, then this factor alone is sufficient to make the case admissible at the ICC;

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1423 2013 Preliminary Examination Report, p. 36, para. 149.
1424 Ibid., p. 41, para. 175.
1427 Rome Statute, arts. 17(1)(a)-(c) (complementarity) and 17(1)(d) (gravity).
1428 Ibid., Preamble.
1429 Ibid., arts. 18(1) and 19(2)(b).
1430 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.
1432 Ibid.
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: 1433

- 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; 1434

- 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.

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. 1435 To

1433 Preliminary Examinations Policy Paper, para. 49; The ICC has said that the evidence related, \textit{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) (“Al-Senussi Admissibility Decision”) para. 210.


1435 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.
satisfy this criterion, at least one State with jurisdiction over the case must be actively investigating or prosecuting the case.\textsuperscript{1436}

\textbf{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.\textsuperscript{1437} The domestic investigation and prosecution of a case must correspond in specific respects to the case being examined by the ICC.\textsuperscript{1438} Therefore, capturing the nature and gravity of the crime is vital.\textsuperscript{1439}

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.\textsuperscript{1440} 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”.\textsuperscript{1441} This may include interviewing witnesses, collecting documentary evidence or carrying out forensic analysis.\textsuperscript{1442} 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.\textsuperscript{1443}

\textsuperscript{1436}Ibid., para. 30.

\textsuperscript{1437}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 (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. 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 Kimii 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-01/05-01/08-14-1ENG(10 June 2008) para. 16.

\textsuperscript{1438}Lubanga Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006, para. 31.


\textsuperscript{1440}Rome Statute, arts. 17(1) and 20(3). See also Gaddafi Admissibility Decision, para. 85-88; Al-Senussi Admissibility Decision, para. 66.

\textsuperscript{1441}Al-Senussi Admissibility Decision, para. 66, citing Gaddafi Admissibility Decision, paras. 54, 55 and 73; The Prosecutor v. Francis Kimii 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”.

\textsuperscript{1442}Ibid.

\textsuperscript{1443}Gaddafi Admissibility Decision, para. 77; Al-Senussi Admissibility Decision, para. 66.
The “same person, same conduct test” was first elaborated in *Lubanga*.1444 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 Penitentiaire et de Reeducation de Kinshasa*.1445 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.1446 In particular, the Chamber noted that the warrants of arrest issued by the DRC made no reference to 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”.1447

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.1448 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.1449 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.1450 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”,1451 and “a domestic investigation or prosecution for ‘ordinary crimes’, to the extent that the case covers the same conduct, shall be considered sufficient”.1452 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.1453

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.1454 The ICC Appeals Chamber was not persuaded.1455 It approved the finding of the Pre-Trial Chamber that in the circumstances there was no need to

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1444Lubanga Decision concerning Pre Trial Chamber I’s Decision of 10 February 2006, para. 31.
1445Ibid., para. 36.
1446Ibid., para. 37.
1447Ibid., paras. 37-39.
1448Al-Senussi Admissibility Decision, para. 66.
1450Gaddafi Admissibility Decision, para. 88.
1451Ibid., para. 85.
1452Ibid., para. 88.
1453Ibid., para. 88.
1455Ibid., para. 118.
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.\(^{1456}\)

In determining that the conduct underlying the charge of persecution was sufficiently covered by the Libyan proceedings,\(^{1457}\) 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.\(^{1458}\) 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.\(^{1459}\) 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.\(^{1460}\)

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.\(^{1461}\) 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.\(^{1462}\)

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\(^{1458}\) *Ibid.*, para. 120.

\(^{1459}\) *Ibid.*, para. 121.


\(^{1461}\) 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.

\(^{1462}\) 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.
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”. Nevertheless, they ruled that the same case was being investigated. 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 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”.

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. 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”.

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. 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. However, with other offences this convergence may be less obvious: pillage prosecuted as mere theft may attract a vastly different sentence.

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.

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1463 Ibid., para. 108.
1464 Ibid., para. 113.
1465 Ibid., para. 111.
1466 Ibid., para. 113.
1467 Ibid.
1470 Ibid., p. 97
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 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.1471

Third assessment: Whether the National Proceedings Are Vitiated 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.1472

“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.1473

Pre-Trial Chamber I at the ICC addressed the issue of unwillingness in the Al-Senussi decision on admissibility.1474 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.1475

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

1472 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.
1473 Rome Statute, art. 17(2); Preliminary Examinations Policy Paper, para. 50-55.
1474 Al-Senussi Admissibility Decision, para. 169-293.
Additionally, it stated that the State must substantiate the 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.  

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; and (iv) other comparable proceedings being conducted.

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, the Chamber considered that there was no indication that this was the case such as to warrant a finding of “unwillingness” on this basis.

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. 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.

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.

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. 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”. The notions of independence and impartiality must, however, be seen in light of

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1476 Ibid., para. 208.
1477 Ibid.
1478 Ibid., para. 289
1479 Ibid.
1481 Ibid., para. 290.
1482 Ibid., paras. 227-229 and 291.
1483 Ibid., para. 292.
1484 Rome Statute, art. 17(2)(c); Al-Senussi Admissibility Appeal Judgment, para. 220.
1485 Al-Senussi Admissibility Appeal Judgment, para. 220.
1486 Ibid., para. 230.
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.\textsuperscript{1487} 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”.\textsuperscript{1488} 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.\textsuperscript{1489}

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.\textsuperscript{1490}

“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”.\textsuperscript{1491}

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, \textit{inter alia}, the issuance of two warrants of arrest by the competent DRC authorities for Mr. Lubanga and resulted in proceedings against him.\textsuperscript{1492}

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.\textsuperscript{1493} 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. In particular, the Chamber considered the security situation in Libya, specifically the absence of effective 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.

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. 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. 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.

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. 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. 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.

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”. 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. 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. 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

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1494 Al-Senussi Admissibility Decision, para. 296.
1495 Ibid., para. 297.
1496 Ibid., paras. 297-299.
1497 Ibid., para. 298.
1498 Ibid., para. 301.
1499 Gaddafi Admissibility Decision, para. 205.
1500 Ibid., para. 206.
1501 Ibid., para. 209.
1504 Al-Senussi Admissibility Decision, para. 183.
prevented.\textsuperscript{1505} Libya argued that it was making efforts to appoint a lawyer and the delays were not insurmountable but due to the transitional context and security difficulties and did not amount to inability.\textsuperscript{1506}

The Pre-Trial Chamber ruled that the problem of legal representation could become fatal to the progress of proper proceedings.\textsuperscript{1507} However, the decision had to be made at the time of the admissibility proceedings.\textsuperscript{1508} The Chamber noted that, in contrast to the previous Gaddafi decision, Gaddafi was not under the control of the State as Al-Senussi was,\textsuperscript{1509} as well as the fact that several local lawyers indicated their willingness to represent Al-Senussi.\textsuperscript{1510} 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.\textsuperscript{1511} It therefore was not able to conclude that Libya was unable to otherwise carry out its proceedings.\textsuperscript{1512} This is one example of how the ICC may proceed in relation to this residual category.

\textbf{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 \textit{Katanga and Chui}.\textsuperscript{1513} 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.\textsuperscript{1514} 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.\textsuperscript{1515}

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”.\textsuperscript{1516} This principle, it was said, is designed to protect the sovereign right of States to exercise their jurisdiction when they wish to do so.\textsuperscript{1517} As holders of the right to exercise jurisdiction, States may waive it, just as

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1505}Ibid., para. 303.
\item \textsuperscript{1506}Ibid., para. 306.
\item \textsuperscript{1507}Ibid., para. 307.
\item \textsuperscript{1508}Ibid., para. 307.
\item \textsuperscript{1509}Ibid., para. 308.
\item \textsuperscript{1510}Ibid., para. 308.
\item \textsuperscript{1511}Ibid., para. 308.
\item \textsuperscript{1512}Ibid., para. 309.
\item \textsuperscript{1513}The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Reasons) ICC01/04–01/07-1213-tENG (16 June 2009) paras. 77-78.
\item \textsuperscript{1514}Ibid.
\item \textsuperscript{1516}Ibid; William A. Schabas, \textit{An Introduction to the International Criminal Court} (Cambridge University Press, 2011)p. 194.
\item \textsuperscript{1517}Ibid.
\end{enumerate}
\end{footnotesize}
they may choose not to challenge the admissibility of a case, even if there are objective grounds for it to do so.\textsuperscript{1518}

This is supported by an informal expert paper\textsuperscript{1519} 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.\textsuperscript{1520} 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 jurisdiction\textsuperscript{1521} or where a State is incapacitated by mass crimes and agrees that a consensual division of labour is the most logical approach.\textsuperscript{1522}

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.\textsuperscript{1523} 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.

**The Burden of Proof**

In the event the ICC prosecutor declares particular conduct that has occurred in Ukraine as admissible and opens 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—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] authorities are taking concrete and

\textsuperscript{1518} Ibid.


\textsuperscript{1520} Ibid., p. 18, para. 59.

\textsuperscript{1521} Ibid., p. 19.

\textsuperscript{1522} Ibid.

\textsuperscript{1523} Ibid.
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. As held by the Appeals Chamber, these investigative steps may include “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”. 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” and “a domestic investigation or prosecution for ‘ordinary crimes’, to the extent that the case covers the same conduct, shall be considered sufficient.”

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. 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.

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.

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.

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

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1524 Al-Senussi Admissibility Decision, para. 66 (viii).
1525 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.
1527 Ibid., para. 85.
1528 Ibid., para. 88.
1529 Al-Senussi Admissibility Decision, para. 66 (vii).
1530 Ibid.
1531 Prosecutor v. Thomas Lubanga Dyilo (Decision) ICC–01/04–01/06 (24 February 2006) para. 41.
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.\textsuperscript{1532} 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.\textsuperscript{1533}

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.\textsuperscript{1534}

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.\textsuperscript{1535} The Pre-Trial Chamber initially outlined factors,\textsuperscript{1536} which were later identified as being cumulative requirements.\textsuperscript{1537} These were all, however, rejected by the Appeals Chamber (see below).\textsuperscript{1538} The requirements were that: (i) the conduct be large-scale or systematic;\textsuperscript{1539} (ii) there be “social alarm”;\textsuperscript{1540} (iii) that “the person falls within the category of most senior leaders of the situation under investigation”;\textsuperscript{1541} and (iv) the person be in the “category of most senior leaders suspected of being most 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.\textsuperscript{1542}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1532} Kenya Authorisation Decision, paras. 50 and 188; \textit{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.
\item \textsuperscript{1534} Kenya Authorisation Decision, para. 60.
\item \textsuperscript{1535} \textit{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.
\item \textsuperscript{1536} \textit{Ibid.} paras. 54 and 62.
\item \textsuperscript{1538} \textit{Ibid.}
\item \textsuperscript{1539} Ntaganda Arrest Warrant, paras. 47, 64 and 66.
\item \textsuperscript{1540} \textit{Ibid.} paras. 47 and 64.
\item \textsuperscript{1541} \textit{Ibid.} para. 64(ii).
\item \textsuperscript{1542} \textit{Ibid.} para. 64(iii).
\end{itemize}
\end{footnotesize}
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.\footnote{1543}{Ibid., para. 54.} In \textit{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.\footnote{1544}{Ibid., paras. 86-88.} It found that a military commander ranked second or third within a major armed group was not senior enough.\footnote{1545}{Ibid., para. 89.}

The Appeals Chamber quashed the decision in application of the \textit{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.\footnote{1546}{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, \textit{International Criminal Law Practitioner: International Criminal Procedure} (vol 3, Cambridge University Press, 2011)p. 84.} 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.\footnote{1547}{Ibid., para. 72.} 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 responsibility\footnote{1548}{Ibid., paras. 73-77.} and remanded the case to the Pre-Trial Chamber for reconsideration.\footnote{1549}{Ibid., para. 91.}

In \textit{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.\footnote{1550}{The Prosecutor v. Bahar Idriss Abu Garda (Decision on the Confirmation of Charges) ICC–02/05–02/09 (8 February 2010) para. 30.} 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.\footnote{1551}{Ibid., para. 32.} 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.\footnote{1552}{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 \textit{Situation in the Republic of Kenya} also considered the gravity threshold\footnote{1553}{The Prosecutor v. Bahar Idriss Abu Garda (Decision on the Confirmation of Charges) ICC–02/05–02/09 (8 February 2010) para. 482.} and adopted the same quantitative and qualitative approach as taken by Pre-trial Chamber I in \textit{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.  

Phase Four: Interests of Justice

This phase examines considerations with regards to the “interests of justice” test outlined in Article 53. 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.

The Interests of Justice Test

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.  

In 2007, the Prosecutor published the "Policy Paper on the Interests of Justice." 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.  

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.  

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. There are other factors that are of potential relevance. First, the Prosecutor may wish to consider whether other justice mechanisms exist. The ICC does act complementarily to national jurisdictions, but theory continuously develops concerning the pursuit of justice. The Prosecutor fully endorses the role

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1554 Ibid., para. 62.  
1555 Preliminary Examinations Policy Paper, pp. 16-17, paras. 67-71.  
1558 Ibid., p. 1.  
1559 Ibid., para. 69.  
1560 Ibid., pp. 4-7.  
1561 Ibid., pp. 7-8.
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.1562

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.1563 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".1564 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 based on this would be "highly exceptional".1565 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.1566

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".1567 Either way, the ICC Prosecutor will outline her findings in an Article 53(1) Report.1568

The Article 53(1) Report will contain one of three findings:

1562 Ibid., pp. 7-8.
1563 Ibid., p. 8.
1564 Rome Statute, art. 16.
1566 Ibid., para. 67.
1567 Preliminary Examinations Policy Paper, p2, para. 5; Kenya Authorisation Decision, para. 35.
• A refusal to initiate an investigation because the information falls short of the factors outlined above;¹⁵⁶⁹

• 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.¹⁵⁷⁰

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.

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.¹⁵⁷¹

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;¹⁵⁷² (ii) whether the case is currently admissible under the provisions of Article 17;¹⁵⁷³ 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.¹⁵⁷⁴

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.¹⁵⁷⁵ 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.¹⁵⁷⁶

¹⁵⁶⁹ Rome Statute,art. 53 (1) (a)-(c).
¹⁵⁷¹Ibid.,art. 53(1).
¹⁵⁷²Ibid.,art. 53(1)(a).
¹⁵⁷³Ibid.,art. 53(1)(b).
¹⁵⁷⁴Ibid.,art. 53(1)(c).
¹⁵⁷⁵Ibid.,art. 15(4); Rules of Procedure and Evidence,r. 49(2).
¹⁵⁷⁶Ibid.,art. 15(3); Rules of Procedure and Evidence,r. 104(2).
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, 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, she must ask the ICC Pre-Trial Chamber for authorisation to proceed. 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. 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, or a UNSC referral. 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.

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; (ii) that the case is inadmissible under Article 17; 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.

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.

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.

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1577 Ibid., art. 53.
1578 Ibid., art. 15(3).
1579 Ibid., art. 15(4).
1580 Ibid., arts. 14(1) and 15(1).
1581 Ibid., art. 12(2).
1582 Rules of Procedure and Evidence, r. 49(1).
1583 Rome Statute, art. 53(2)(a).
1584 Ibid., art. 53(2)(b).
1585 Ibid., art. 53(2)(c); Rules of Procedure and Evidence, r. 105(1).
1586 Ibid., art. 53(3)(a).
1587 Ibid., art. 53(3)(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.\(^{1588}\) Before this can take place, the State places 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.\(^{1589}\)

Informing the victims of her intention to seek authorisation from the Pre-Trial Chamber allows victims to make written representations to the Pre-Trial Chamber\(^{1590}\), which, in turn, could be used by the Chamber to decide which procedures should be followed.\(^{1591}\) 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.\(^{1592}\)

**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]”.\(^{1593}\) 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.\(^{1594}\) Further, the Statute makes it clear that the purpose of the Prosecutor’s investigation is to establish truth, rather than to prove guilt.\(^{1595}\) 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

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1588 Rules of Procedure and Evidence, r. 50(2).
1589 Ibid., r. 50(1).
1590 Ibid., r. 50(3).
1591 Rules of Procedure and Evidence, r. 50(4).
1592 Ibid., r. 50(4).
1593 Rome Statute, art. 12(3).
1594 Ibid., art. 54(1)(a).
1595 Ibid., art. 54(1)(a).
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.  

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, as well as questioning potential suspects, including victims and witnesses. 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.

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 investigation that should be signed by all persons present 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.

One of the most useful powers the Prosecutor has during the investigatory process is the ability to conduct on-the-ground investigations. 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. 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.

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, including:

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1596 Ibid., art. 54(1)(b).
1597 Ibid., art. 54(3)(a).
1598 Ibid., art. 54(3)(b).
1599 Ibid., art. 54(3)(d).
1600 Rules of Procedure and Evidence, r. 111(1).
1601 Ibid., r. 111(1).
1602 Ibid., r. 112(1).
1603 Rome Statute, art. 54(2).
1604 Ibid., art. 86.
1605 Ibid., art. 87(7).
1606 Ibid., art. 93.
surrendering a person to the Court;\textsuperscript{1607} (ii) identifying and providing the whereabouts of persons or the location of items;\textsuperscript{1608} (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;\textsuperscript{1609} (iv) providing the questioning of any person being investigated or prosecuted;\textsuperscript{1610} (v) facilitating the voluntary appearance of persons as witnesses or experts before the Court;\textsuperscript{1611} (vi) providing the examination of places or sites, including the exhumation and examination of grave sites;\textsuperscript{1612} (vii) executing searches and seizures;\textsuperscript{1613} (viii) providing the protection of victims and witnesses and the preservation of evidence;\textsuperscript{1614} (ix) identifying, tracing and freezing or seizing the proceeds, property and assets and instrumentalities of crimes;\textsuperscript{1615} as well as (x) any other type of assistance requested by the Prosecutor which is not prohibited by the law of the requested State.\textsuperscript{1616}

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 \textit{ad hoc}, one-off arrangement,\textsuperscript{1617} 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.\textsuperscript{1618}

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.\textsuperscript{1619} 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.\textsuperscript{1620}

**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.\textsuperscript{1621} The powers to arrest an individual or to summons him or her are outlined below.

\textsuperscript{1607}Ibid., art. 89.
\textsuperscript{1608}Ibid., art. 93(1)(a).
\textsuperscript{1609}Ibid., art. 93(1)(b).
\textsuperscript{1610}Ibid., art. 93(1)(c).
\textsuperscript{1611}Ibid., art. 93(1)(e).
\textsuperscript{1612}Ibid., art. 93(1)(g).
\textsuperscript{1613}Ibid., art. 93(1)(h).
\textsuperscript{1614}Ibid., art. 93(1)(i).
\textsuperscript{1615}Ibid., art. 93(1)(k).
\textsuperscript{1616}Ibid., art. 93(1)(l).
\textsuperscript{1617}Ibid., art. 87(5)(a).
\textsuperscript{1618}Ibid., art. 87(5)(b).
\textsuperscript{1619}Rules of Procedure and Evidence, r. 115(1).
\textsuperscript{1620}Ibid., r. 115(2).
\textsuperscript{1621}Rome Statute, art. 58(1)(b)(i).
**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;\(^\text{1622}\) (ii) ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) prevent the person from continuing with 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.\(^\text{1623}\)

The application the Prosecutor makes to the Chamber to request an arrest warrant must be detailed, containing identifying information of the person sought,\(^\text{1624}\) which crimes (within the jurisdiction of the court) the person is alleged to have committed,\(^\text{1625}\) a statement of facts which are alleged to have constituted those crimes,\(^\text{1626}\) a summary of the evidence against the accused\(^\text{1627}\) and the reasons why the Prosecutor believes arrest is necessary.\(^\text{1628}\)

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.\(^\text{1629}\) 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’.\(^\text{1630}\) If it is not drafted with enough specificity, it will be rejected.\(^\text{1631}\)

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.\(^\text{1632}\)

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.\(^\text{1633}\) At any time after the arrest warrant is issued, the

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\(^{1622}\) Ibid., art. 58(1)(b)(ii).
\(^{1623}\) Ibid., art. 58(1)(b)(iii).
\(^{1624}\) Ibid., art. 58(2)(a).
\(^{1625}\) Ibid., art. 58(2)(b).
\(^{1626}\) Ibid., art. 58(2)(c).
\(^{1627}\) Ibid., art. 58(2)(d).
\(^{1628}\) Ibid., art. 58(2)(e).
\(^{1629}\) ICC Statute, art. 58, paras. 3 (for arrest warrant) and 7 (for summon to appear).
\(^{1631}\) 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).
\(^{1632}\) Rome Statute, art. 58(3).
\(^{1633}\) Ibid., art. 58(5).
Prosecutor may request that the Pre-Trial Chamber amend the arrest warrant by modifying or adding to the crimes listed in the original application.\textsuperscript{1634}

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 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—President of Sudan since 1993. 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.

\textit{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, where applicable to prevent the person from continuing 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,\textsuperscript{1635} and (ii) that a summons is sufficient to ensure the person’s appearance.\textsuperscript{1636} 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.\textsuperscript{1637}

\textit{The Start of an ICC case}

\textit{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.\textsuperscript{1638} 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.\textsuperscript{1639}

\textsuperscript{1634}Ibid., art. 58(6).
\textsuperscript{1635}Ibid., art. 58(7).
\textsuperscript{1636}Ibid., art. 87(7).
\textsuperscript{1637}Ibid., art. 58(7)(b).
\textsuperscript{1638}Rules of Procedure and Evidence, r. 121.
\textsuperscript{1639}Rome Statute, art. 60(1).
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”). The Chamber will also make decisions regarding the disclosure of evidence between the Prosecutor and the defence team(s).

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. 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.

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. 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.

**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. 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.

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 or is unable to attend for any other reason. 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. Once the charges have been read and the Presiding Judge has ruled on how the hearing shall

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1640 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).
1641 Rules of Procedure and Evidence, r. 121(2).
1642 Ibid., r. 121(3).
1643 Ibid., r. 121(5).
1644 Ibid., r. 121(6).
1645 Rome Statute, art. 61(1).
1646 Ibid., art. 61(1).
1647 Rules of Procedure and Evidence, r. 124.
1648 Rome Statute, art. 61(2).
1649 Rules of Procedure and Evidence, r. 122(1).
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. \(^{1650}\)

The accused may then: (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; or (iii) present their own contradictory evidence. \(^{1651}\) Once the Chamber has listened to the arguments presented by the Prosecutor and the accused, the Chamber will ask for final statements to be made \(^{1652}\) 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; \(^{1653}\) (ii) decline to confirm the charges as a result of determining there is a lack of evidence to support them; \(^{1654}\) or (iii) adjourn the hearing. \(^{1655}\) 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. \(^{1656}\)

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. \(^{1657}\) 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. \(^{1658}\)

Once the charges have been confirmed, the Court must then notify the accused of the confirmation of the charges against him or her \(^{1659}\) 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”. \(^{1660}\) Consequently, it provides a real opportunity for the parties and the Trial Chamber to arrive at a shared understanding of the case being advanced.

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\(^{1650}\) Rome Statute, art. 61(5).

\(^{1651}\) Ibid., art. 61(6).

\(^{1652}\) Rules of Procedure and Evidence, r. 122(8).

\(^{1653}\) Rome Statute, art. 61(7)(a).

\(^{1654}\) Ibid., art. 61(7)(b).

\(^{1655}\) Ibid., art. 61(7)(c).

\(^{1656}\) Ibid., art. 61(8).

\(^{1657}\) Rome Statute, art. 61(9).

\(^{1658}\) Rules of Procedure and Evidence, r. 129.

\(^{1659}\) 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.\(^{1661}\) At the SCSL, the process rests upon a case summary drafted by the Prosecution\(^{1662}\) 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.\(^{1663}\) 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.\(^{1664}\) 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.\(^{1665}\) 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.\(^{1666}\) 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”\(^{1667}\) and the Prosecution must offer “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”,\(^{1668}\) that must go beyond a mere theory or suspicion.\(^{1669}\) 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.\(^{1670}\)

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 defence. Finally, if the Prosecution wishes to

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\(^{1661}\) ICTY Rules of Procedure and Evidence, r. 47(E); ICTR Rules of Procedure and Evidence, r. 47(E).

\(^{1662}\) 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.

\(^{1663}\) SCSL Rules of Procedure and Evidence, r. 47(E).

\(^{1664}\) 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.

\(^{1665}\) Rome Statute, art. 61(3).

\(^{1666}\) Regulations of the Court, ICC–BD/01–03–11, 29 June 2012, reg 52.

\(^{1667}\) Rome Statute, art. 61(7).

\(^{1668}\) Prosecutor v. Thomas Lubanga Dyilo (Decision on the Confirmation of Charges) ICC–01/04–01/06–803–tEN (29 January 2007) para. 39.

\(^{1669}\) Ibid., para. 37.

add charges to the Document Containing the Charges after their confirmation, a new confirmation hearing will need to take place.\textsuperscript{1671}

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.

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.\textsuperscript{1672} 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 for 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.

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.

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 admissibility of any evidence, taking into account, \textit{inter alia}, the probative value of the evidence and any prejudice that such evidence may cause to a

\textsuperscript{1672}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.
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. The Prosecutor should “assess freely all evidence submitted in order to determine its relevance or admissibility”. 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.

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. 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.

**Oral Testimony**

The ICC, as with all international tribunals, has a stated preference for oral evidence. 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”. 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 participate in the trial.

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1673Rome Statute, art. 69(4).
1674Rules of Procedure and Evidence, r. 63(2).
1676The Prosecutor v. Thomas Lubanga Dyilo (Redacted Decision) ICC-01/04-01/06-2595-Red (8 March 2011) para. 47.
1681Rome Statute, art. 67(1)(e).
challenge the evidence of an opposing party and for the Trial Chambers to evaluate the credibility of the presented evidence.

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. Rule 68 of the Rules of Procedure and Evidence provided for the sole exception to oral testimony. However, in December 2013, Rule 68 was amended, as discussed below.

**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. 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. 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. Rule 68 did not contain an express limitation preventing the admission of evidence concerning the acts and conduct of the Accused. However, neither did it contain the opposite. 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. 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”.

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

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1682 Ibid., art. 69(2).
1684 Rules of Procedure and Evidence, r. 68.
1686 *The Prosecutor v. Thomas Lubanga Dyilo (Redacted Decision)* ICC-01/04-01/06-2595-Red (8 March 2011) para. 45.
admission. When it does not concern 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.

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.

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). 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.

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 [the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)], particularly those of the ICTY”. Further, the IBA expressed concern regarding the broad category of material that is potentially admissible under Rule 68. 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

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1690 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (Decision) ICC-01/09-01/11 (19 August 2015) para. 65
1691 Ibid., para. 65; The Prosecutor v. Milan Lukić and Sredoje Lukić (Judgement) IT-98-32/1-A (4 December 2012) para. 566.
1692 Rules of Procedure and Evidence, r. 68.
1693 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, (Decision) ICC-01/09-01/11 (19 August 2015) para. 32.
1694 Ibid.
1696 Ibid.
transcripts of proceedings from national jurisdiction and/or other fora.\footnote{1697} Regarding the admission of evidence relating to the acts and conduct of the accused, it emphasised the 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.\footnote{1698}

**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,\footnote{1699} 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.\footnote{1700} 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.\footnote{1701}

First, each item of evidence must be individually assessed for relevance and probative value (including authenticity), before being admitted into evidence.\footnote{1702} Relevance is defined as whether the evidence tendered makes the existence of a fact at issue more or less probable.\footnote{1703}

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.\footnote{1704} 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.\footnote{1705}

Second, with regards to the requirement of reliability, this concept is most easily defined as authenticity,\footnote{1706} as well as other qualities that show that, when considered alone, the evidence could reasonably be believed.\footnote{1707} Key factors to assess reliability include the source, the nature and the characteristics of the item.\footnote{1708} The ICC has stated clearly that unauthenticated evidence, by definition, has no probative value.\footnote{1709} Unless the proposed evidence is self-
authenticating or the parties agree on its authenticity, the tendering party needs to provide authenticating evidence, otherwise it will be found inadmissible.\textsuperscript{1710}

The ICC has further held that a document, although authentic, may be unreliable.\textsuperscript{1711} 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.\textsuperscript{1712} 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.\textsuperscript{1713}

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.

\textsuperscript{1710}Ibid., para. 23.
\textsuperscript{1711}Lubanga Trial Judgment, para. 109.
\textsuperscript{1712}Ibid., para. 1087.
When the author of a public document is an 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.\footnote{Katanga Bar Table Decision, para. 24.}

Second, the ICC will also consider whether it can, alone, be reasonably believed.\footnote{Ibid., para. 26.} 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;

- Contemporaneity: 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 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.\textsuperscript{1716}

There are different types of documents that may seem more reliable than others. These are considered below.

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.\textsuperscript{1717}

Reliability of Reports from NGOs, IGOs and Third-Party States
Reports from independent private organisations, governmental bodies or third-party States can be considered \textit{prima facie} reliable if they provide “sufficient guarantees of non-partisanship and impartiality”.\textsuperscript{1718} 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.\textsuperscript{1719}

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.\textsuperscript{1720}

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.\textsuperscript{1721} More likely than not, they will contain assertions which severely reduce their probative value.\textsuperscript{1722}

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 relevance or admissibility of any evidence, taking into

\textsuperscript{1716} \textit{Ibid.}, para. 27.  
\textsuperscript{1717} \textit{Ibid.}, para. 29.  
\textsuperscript{1718} \textit{Ibid.}, para. 30.  
\textsuperscript{1719} \textit{Ibid.}.  
\textsuperscript{1720} \textit{Ibid.}, para. 31.  
\textsuperscript{1721} \textit{Ibid.}, para. 32.  
\textsuperscript{1722} \textit{Ibid.}, para. 33.
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.\(^{1723}\)

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.\(^{1724}\) The Prosecutor is responsible for the chain of custody in the course of investigations by her Office.\(^{1725}\) 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.\(^{1726}\) To this effect, the Prosecutor will maintain a database. This will ensure the proper registration and storage of all information collected during the investigation.\(^{1727}\) 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.\(^{1728}\) 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.\(^{1729}\) 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.

**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.\(^{1730}\) 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.\(^{1731}\) 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.\(^{1732}\) The Chamber, when appointing an expert, will determine the subject of their report.\(^{1733}\)

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

\(^{1723}\) Rome Statute, art. 69(4).


\(^{1725}\) Rules of Procedure and Evidence, r. 10.

\(^{1726}\) ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (23 April 2009) reg 22.

\(^{1727}\) Ibid., reg 23(2).

\(^{1728}\) Ibid., reg 23(2).


\(^{1731}\) ICC, Regulations of the Court, ICC-BD/01-01-04 (adopted 26 May 2004) (“Regulations of the Court”) reg 44.


\(^{1733}\) Regulations of the Court, reg 44(5).
he was medically fit to be able to take part in the Court proceedings. 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. 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.

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.

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:

- 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.
- 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.

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.

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

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1735 Ibid., para. 101-102.
1736 Rules of Procedure and Evidence, r. 76.
1737 Ibid., r. 76(1).
1738 Ibid., r. 76(2).
1739 Rules of Procedure and Evidence, r. 77.
intended for use by the Defence as evidence for the purposes of the confirmation hearing or at trial.\textsuperscript{1740}

In line with this,\textsuperscript{1741} 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;\textsuperscript{1742} 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.\textsuperscript{1743}

Failure to provide notice does not limit the right to raise matters.\textsuperscript{1744} If grounds for excluding criminal responsibility under Article 31(3) are raised,\textsuperscript{1745} notice should be given to the Prosecutor and the Trial Chamber.\textsuperscript{1746}

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:\textsuperscript{1747}

\textsuperscript{1740}\textit{Ibid.}, r. 78.
\textsuperscript{1741}\textit{Ibid.}, r. 79.
\textsuperscript{1742}\textit{Ibid.}, r. 79(1)(a).
\textsuperscript{1743}\textit{Ibid.}, r. 79(1)(b).
\textsuperscript{1744}\textit{Ibid.}, r. 79(3).
\textsuperscript{1745}Rome Statute, art. 31(3):
\begin{itemize}
  \item[(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;
  \item[(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;
  \item[(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;
  \item[(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.
\end{itemize}
\textsuperscript{1746}Rules of Procedure and Evidence, r. 80.
\textsuperscript{1747}\textit{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; 1748

• 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. 1749

• 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. 1750 The Chamber can authorise the non-disclosure of their identity prior to the commencement of the trial. 1751

• 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. 1752

There are other restrictions on disclosure of protected material or information such as: 1753 (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; 1754 and (ii) where material or information is in the possession or control of the Prosecutor that is protected under Article 54(3)(e), 1755 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. 1756 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. 1757

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 ICC. Additionally, members of NGOs can

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1748 Ibid., r. 81(1).
1749 Ibid., r. 81(2).
1750 Ibid., r. 81(3).
1751 Ibid., r. 81(4).
1752 Ibid., r. 81(6).
1753 Rules of Procedure and Evidence, r. 82.
1754 Ibid., r. 82(3).
1755 Rome Statute, art. 53(3)(e).
1756 Rules of Procedure and Evidence, r. 82(1).
1757 Ibid., r. 82(2).
assist the Office of the Prosecutor as intermediaries to identify and contact witnesses. This section will consider each of these modes of cooperation.

**Acting as Amicus Curiae**

Civil society representatives can be invited (or given permission) 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. The Prosecutor and Defence would have the opportunity to respond to any such observations. If granted permission, the civil society representative should file their written observations with the Registrar.

**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. 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. If a civil society witness is called, the accused is entitled to have the witness examined.

**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.

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

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1758 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.

1759 Rules of Procedure and Evidence, r. 103(1)

1760 *ibid.*, r. 103(2).

1761 Rules of Procedure and Evidence, r. 103(3).


1763 Rome Statute, art. 15(2).

1764 *ibid.*, art. 15(2).

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".\textsuperscript{1766}

Consequently, the ICC released guidelines to govern relations between the Court and intermediaries in March 2014.\textsuperscript{1767} The guidelines aim to contribute to the proper oversight of all intermediaries. There is also a Code of Conduct\textsuperscript{1768} and a Model Contract for intermediaries.\textsuperscript{1769} 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.\textsuperscript{1770} 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.\textsuperscript{1771}

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

\textsuperscript{1766} The Prosecutor v. Thomas Lubanga Dyilo (Decision) ICC-01/04-01/06 (31 May 2010) para. 146.
\textsuperscript{1767} Ibid.
\textsuperscript{1771} Ibid., s. 1.
intermediaries; (iii) support intermediaries; and (iv) provide an intermediary with security and protection.

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.1772 The Code of Conduct identifies certain principles intermediaries should adhere to and bear in mind when carrying out their work:

1. 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;

2. 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;

3. 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;

4. 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;

5. 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

6. 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.

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.

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”\(^{1773}\) 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”.\(^{1774}\)

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.\(^{1775}\) This is directly analogous to the ICRC\(^{1776}\) being entitled to an absolute privilege due to the expectation that it will remain true to its objectives (addressed below).\(^{1777}\)

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.\(^{1778}\)

In the Brima case at the SCSL,\(^{1779}\) 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.\(^{1780}\) The Appeals Chamber granted an order permitting the witness to testify without being compelled to answer questions in cross-examination on the grounds of confidentiality.\(^{1781}\) In coming to this conclusion, the Appeals

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\(^{1773}\) Rome Statute, art. 64(6)(b).
\(^{1774}\) Ibid., art. 64(6)(d).
\(^{1775}\) Rules of Procedure and Evidence, r. 73(2).
\(^{1776}\) Ibid., r. 73(4).
\(^{1777}\) The Prosecutor v. Blagoje Simić and others (Decision) IT-95-9-PT (27 July 1999).
\(^{1778}\) Rules of Procedure and Evidence, r. 82(3); Rome Statute, art. 54(3)(E).
\(^{1779}\) Prosecutor v. Brima and others (Decision) SCSL-2004-16-AR 73 (26 May 2006).
\(^{1780}\) Ibid., para. 36.
\(^{1781}\) Ibid., IV. Disposition.
Chamber acknowledged the “privileged relationship” and the public interest arising out of the work of human rights officers.\textsuperscript{1782}

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.\textsuperscript{1783} As noted above, a similar provision applies in the ICC.\textsuperscript{1784}

In \textit{Simić}, the ICTY recognised an absolute privilege for information obtained by the ICRC.\textsuperscript{1785} 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 \textit{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.\textsuperscript{1786} The trial chamber held that the ICRC had a “right under customary international law to non-disclosure of the [i]nformation”.\textsuperscript{1787}

The separate opinion of Judge David Hunt is important. It approaches the ICRC as a NGO, not as a special international entity\textsuperscript{1788} 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”.\textsuperscript{1789} The test was neutral because “powerful public interest[s]” were present on both sides of the issue.\textsuperscript{1790} 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.\textsuperscript{1791} 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.\textsuperscript{1792}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1782}Ibid., para. 33.
\item \textsuperscript{1783}Ibid., para. 34; \textit{The Prosecutor v. Milošević} (Decision) IT-02-54-AR108bis&AR73.3 (23 October 2002) para. 26.
\item \textsuperscript{1784} Rules of Procedure and Evidence, r. 82(3); Rome Statute, art. 54(3).
\item \textsuperscript{1785} \textit{The Prosecutor v. Blagoje Simić and others} (Decision) IT-95-9-PT (27 July 1999).
\item \textsuperscript{1786} Kate Mackintosh, ‘Note for Humanitarian Organizations on Cooperation with International Tribunals’ (2004) 86 Int’l Rev. Red Cross 131, p. 133.
\item \textsuperscript{1787} \textit{The Prosecutor v. Blagoje Simić and others} (Decision) IT-95-9-PT (27 July 1999) para. 74.
\item \textsuperscript{1788} \textit{The Prosecutor v. Blagoje Simić and others} (Separate Opinion of Judge David Hunt) IT-95-9-PT (27 July 1999).
\item \textsuperscript{1789}Ibid., para. 35.
\item \textsuperscript{1790}Ibid., para. 17.
\item \textsuperscript{1791}Ibid., para. 14.
\item \textsuperscript{1792}Ibid., para. 17.
\end{enumerate}
\end{footnotesize}
Ultimately, Judge Hunt concluded that the risks associated with disclosure outweighed the obstacles posed by the exclusion of the evidence.\textsuperscript{1793} 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.\textsuperscript{1794} This will be a strong and persuasive authority for when the ICC decides upon the issue.\textsuperscript{1795} 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.\textsuperscript{1796} In \textit{Radoslav Brđanin},\textsuperscript{1797} the ICTY recognised a qualified privilege for information obtained by war correspondents.\textsuperscript{1798} Some suggest war correspondents’ qualified privilege in the \textit{Brđanin} case at the ICTY will apply by analogy to NGOs.\textsuperscript{1799} 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.

\textbf{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.

\textit{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 organisation”\textsuperscript{1800}. If a State Party is so

\textsuperscript{1793}Ibid., para. 41.
\textsuperscript{1796} 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.’
\textsuperscript{1797} The Prosecutor v. Brđanin and Tadić (Interlocutory Appeal) IT-99-36 AR73.9 (11 December 2002).
\textsuperscript{1798} Ibid.
\textsuperscript{1800} Rome Statute, art. 73.
requested, it must seek the consent of the originator, such as an NGO, to disclose that document or information.\textsuperscript{1801}

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.\textsuperscript{1802}

Therefore, a document or piece of information a State Party has that an NGO has provided specifically in confidence is likely to remain confidential.

\textit{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 \textit{Lubanga}, a considerable portion of the evidence gathered was by way of confidentiality agreements, and some of it was “exculpatory”.\textsuperscript{1803} 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.\textsuperscript{1804} 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.

\textit{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

\textsuperscript{1801}Ibid.

\textsuperscript{1802}Ibid.


\textsuperscript{1804}The Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 OA 13 (21 October 2008) paras. 59 and 101.
they intended to keep confidential”.1805 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.1806 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”.1807 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.1808

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.1809

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 are made only when witnesses are questioned about their knowledge of the case in the course of its investigation.1810 This likely does not apply, for instance, to material from an interview concerning a witness’ security.1811 Therefore, notes written by civil society representatives may

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1806 Rules of Procedure and Evidence,r. 81.
1807 Ibid., para. 18.
1808 The Prosecutor v. Thomas Lubanga Dyilo (Redacted Decision) ICC-01/04-01/06 (20 January 2011) para. 18.
1809 Ibid., para. 18.
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.

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.

Preparation for Trial

From the very first moment the Trial Chamber is constituted, the Chamber will usually designate 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. 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 proceedings 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, to bringing motions relating to the conduct of the trial. 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.

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 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.

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; and (ii) the admission has been voluntarily made by the

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1812 Rules of Procedure and Evidence, r. 132bis (1).
1813 Ibid., r. 132bis (2).
1814 Ibid., r. 132.
1815 Ibid., r. 133.
1816 Ibid., r. 134.
1817 Ibid., r. 134(1).
1818 Rome Statute, art. 64(8)(a).
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.\textsuperscript{1819}

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.\textsuperscript{1820} 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.\textsuperscript{1821}

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.\textsuperscript{1822} 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.\textsuperscript{1823}

**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.\textsuperscript{1824}

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.\textsuperscript{1825} The provisions of Article 67 entitle the accused to: (i) be promptly informed of the charges in the language he/she fully understands;\textsuperscript{1826} (ii) be given adequate time and facilities to prepare his defence and communicate with his counsel in confidence;\textsuperscript{1827} (iii) to be tried without undue delay;\textsuperscript{1828} (iv) to be provided with legal aid should he/she be unable to afford their own defence;\textsuperscript{1829} (v) to examine witnesses or have witnesses examined

\textsuperscript{1819}Ibid.,art. 65(1).
\textsuperscript{1820}Ibid.,art. 65(2).
\textsuperscript{1821}Ibid.,art. 65(3).
\textsuperscript{1822}Rules of Procedure and Evidence,r. 139.
\textsuperscript{1823}Rome Statute,art. 65(4).
\textsuperscript{1824}Ibid.,art. 66.
\textsuperscript{1825}Ibid.,art. 67.
\textsuperscript{1826}Ibid., art. 67(1)(a).
\textsuperscript{1827}Ibid., art. 67(1)(b).
\textsuperscript{1828}Ibid., art. 67(1)(c).
\textsuperscript{1829}Ibid.,art. 67(1)(d).
by their counsel, (vi) to have access to an interpreter, when and if necessary, in order to fully understand the proceeding; and (vii) not to be compelled to testify, confess guilt and remain silent without determination of guilt or innocence.

**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. 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. 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. First, 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”. 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. Unless otherwise directed by the Trial Chamber, no witness should be present when the testimony of another witness is given.

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. Article 69 provides that the Prosecutor and Defence may choose to submit any evidence relevant to the case. However, as discussed above, the Chamber reserves the right to rule any evidence submitted as being inadmissible for the purposes of the trial. 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.

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

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1832 *Ibid.*, art. 67(1)(g).
1833 *Ibid.*, art. 64(8).
1834 Rules of Procedure and Evidence, r. 140.
1837 *Ibid.*, r. 140(3).
1838 *Rome Statute*, art. 61(1).
1839 *Rome Statute*, art. 69(3).
1841 *Ibid.*, art. 69(2).
victims and witnesses.  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. 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.

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. 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.

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. 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.

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. 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 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.

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. 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.\textsuperscript{1850}

The Statute stipulates that the verdict the Chamber reaches must be a decision based on its “evaluation of the evidence and the entire proceedings”,\textsuperscript{1851} 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.\textsuperscript{1852} 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.\textsuperscript{1853} 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.\textsuperscript{1854}

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.

**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.

**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.\textsuperscript{1855} 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”.\textsuperscript{1856} 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.\textsuperscript{1857}

\begin{flushleft}
\textsuperscript{1850}Ibid.
\textsuperscript{1851}Ibid., art. 74(2).
\textsuperscript{1852}Ibid., art. 74(3).
\textsuperscript{1853}Ibid., art. 74(4).
\textsuperscript{1854}Ibid., art. 74(5).
\textsuperscript{1855}The Prosecutor v. Germain Katanga (Sentence) ICC-01/04-01/07 (23 May 2014) para. 38.
\textsuperscript{1856}Ibid.
\textsuperscript{1857}Ibid., para. 37.
\end{flushleft}
When determining a sentence, the Trial Chamber has substantial discretionary power, 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.

**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. 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.

**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, or exceptionally a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In addition to imprisonment, a convicted person may be ordered to:

- Pay a fine under the criteria provided for in Rule 146 of the Rules;
- Forfeit proceeds, property and assets derived directly or indirectly from the crime committed, without prejudice to the rights of bona fide third parties.

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. The period of

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1858 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”) para1.
1859 Pursuant to art. 76(2) of the Rome Statute.
1860 Rome Statute,art. 77(1)(a).
1861 Ibid.,art. 77(2)(b).
1862 Ibid.,art. 77(2)(a).
1863 Ibid.,art. 77(2)(b).
1864 Rules of Procedure and Evidence, rs 217 to 222.
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.

**Prison and Factors to Be Taken into Consideration**

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.\textsuperscript{1865}

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.\textsuperscript{1866}

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.\textsuperscript{1867}

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.\textsuperscript{1868}

**Financial Penalties**

In addition to imprisonment, a convicted person may be ordered to pay a fine under certain criteria,\textsuperscript{1869} and forfeit proceeds, property and assets derived directly or indirectly from the crime committed, without prejudice to the rights of bona fide third parties.\textsuperscript{1870}

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 a sentence; and (vi) whether and to what degree the crime was motivated by personal financial gain.\textsuperscript{1871} 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.\textsuperscript{1872} Failure to pay the fine may result in an extension of the period of imprisonment.\textsuperscript{1873}

\textsuperscript{1865} Rome Statute,art. 76(1).
\textsuperscript{1866} Ibid.,art. 78(3).
\textsuperscript{1867} 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.
\textsuperscript{1868} Rome Statute,art. 78(2).
\textsuperscript{1869} Ibid.,art. 77(2)(a).
\textsuperscript{1870} Ibid.,art. 77(2)(b).
\textsuperscript{1871} Rules of Procedure and Evidence,r. 146(1).
\textsuperscript{1872} Ibid.,r. 146(2).
\textsuperscript{1873} Ibid.,r. 146(5).
When decide 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. 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. A bona fide third party must be given notice by the Chamber and will then be able to submit relevant to the issue.

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.

**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. 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. In addition, the Chamber must take into account any mitigating and aggravating circumstances. Finally, the sentence must reflect the culpability of the convicted person, 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. 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. 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

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1874 Rome Statute, art. 77(2)(b).
1875 Pursuant to rule 147(1) and (4) of the Rules.
1876 Rules of Procedure and Evidence, r. 147(2) and (3).
1877 Rome Statute, art. 79(2); Rules of Procedure and Evidence, r. 148.
1878 *Ibid.*, art. 76(1).
1879 Rome Statute, art. 78.
1880 Rules of Procedure and Evidence, r. 145(2).
1883 Rome Statute, art. 81(2)(a).
one of the mandatory factors listed in Rule 145(1)(b) of the Rules of Procedure and Evidence can amount to a legal error.\textsuperscript{1884}

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 \textit{ad hoc} Tribunals “are in a comparable position to the Court in the context of sentencing”.\textsuperscript{1885} 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”.\textsuperscript{1886}

These factors are addressed below in relation to the two sentencing decisions of the ICC—\textit{Katanga} and \textit{Lubanga}.

\textbf{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.\textsuperscript{1887} 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 \textit{Katanga}\textsuperscript{1888} and \textit{Lubanga}\textsuperscript{1889} 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.\textsuperscript{1890} However, in the \textit{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”.\textsuperscript{1891}

\textbf{Gravity of the Crime}\

Second, the gravity of the crime is one of the key determining factors of the sentence.\textsuperscript{1892} 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.

\textsuperscript{1884}Lubanga Sentence Appeal Judgment, para. 1.\textsuperscript{1885} TheProsecutor v. Thomas Lubanga Dyilo (Sentence) ICC-01/04-01/06 (10 July 2012) (“Lubanga Sentence”) para. 12.\textsuperscript{1886} Lubanga Sentence Appeal Judgment, paras. 76-77.\textsuperscript{1887} Rome Statute,art. 76(1).\textsuperscript{1888} The Prosecutor v. Germain Katanga (Sentence) ICC-01/04-01/07 (23 May 2014) (“Katanga Sentence”) para. 27.\textsuperscript{1889} Ibid.\textsuperscript{1890} Ibid.,para. 27.\textsuperscript{1891} Ibid.,para. 29.\textsuperscript{1892} Ibid.,para. 36.
In *Lubanga*, the Chamber, referring to ICTY jurisprudence,\(^{1893}\) opined that the gravity of the crime is one of the principal factors to be considered in the determination of the sentence.\(^{1894}\) Similarly, in *Katanga* the Chamber considered gravity to be the first step in the determination of a proportionate sentence.\(^{1895}\)

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.\(^{1896}\) Further, according to the Chamber “the gravity criterion must be assessed from both a quantitative and a qualitative standpoint”.\(^{1897}\)

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.\(^{1898}\)

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.\(^{1899}\) 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,\(^{1900}\) 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 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*\(^{1901}\) and *Lubanga*,\(^{1902}\) 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

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\(^{1894}\) *Lubanga* Sentence, para. 36.

\(^{1895}\) *Katanga* Sentence, para. 42.

\(^{1896}\) *Ibid.*, para. 43.

\(^{1897}\) *Ibid.*, para. 43.

\(^{1898}\) *Lubanga* Sentence, paras. 37-42.

\(^{1899}\) 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.

\(^{1900}\) *Katanga* Sentence, para. 43.

\(^{1901}\) *Ibid.*, para. 35.

\(^{1902}\) *Lubanga* Sentence, para. 35.
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.\footnote{\textit{Rules of Procedure and Evidence}, r. 145(2)(b).}

**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 \textit{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”.\footnote{\textit{Lubanga Sentence}, para. 55.}

**Aggravating Circumstances**

Fourth, the aggravating circumstances the Court must take into account are:\footnote{\textit{Rules of Procedure and Evidence}, r. 145(2)(b).}

- 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;\footnote{Namely gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.}
- Other circumstances, which although not enumerated above, by virtue of their nature, are similar to those mentioned.\footnote{\textit{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.\footnote{\textit{Ibid.}}

In the \textit{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.\textsuperscript{1909} Similarly, in the \textit{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.\textsuperscript{1910}

When considering abuse of power or official capacity as an aggravating circumstance, the Chamber has referred to ICTY jurisprudence\textsuperscript{1911} 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.\textsuperscript{1912} The Appeals Chamber in \textit{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.\textsuperscript{1913} In \textit{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.\textsuperscript{1914}

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.\textsuperscript{1915} In his dissenting opinion, Judge Bentio 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.\textsuperscript{1916}

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.\textsuperscript{1917} 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.\textsuperscript{1918} Similarly, with 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”.\textsuperscript{1919} Accordingly, the Chamber examined whether the sexual violence occurred “in the ordinary course” of the crimes, whether he

\begin{footnotesize}
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\item \textsuperscript{1909}Katanga Sentence, paras. 70-71.
\item \textsuperscript{1910}Lubanga Sentence, para. 78.
\item \textsuperscript{1912}Lubanga Sentence, para. 75.
\item \textsuperscript{1913}Ibid., para. 84.
\item \textsuperscript{1914}Katanga Sentence, para. 74.
\item \textsuperscript{1915}Lubanga Sentence, para. 81.
\item \textsuperscript{1916}Dissenting opinion of Judge Odio Benito in Lubanga Sentence, para. 21.
\item \textsuperscript{1917}Lubanga Sentence, para. 69.
\item \textsuperscript{1918}Ibid., para. 59.
\item \textsuperscript{1919}Ibid., para. 69.
\end{itemize}
\end{footnotesize}
“ordered or encouraged” it, “was aware of it” or whether “it could otherwise be attributed to him in a way that reflects his culpability.”  

**Mitigating Circumstances**

Fifth, the mitigating circumstances expressly identified by the Rules are:  

- 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.  

Mitigating circumstances must be established with respect to a balance of probabilities, namely, that something is more likely than not.  

Mitigating circumstances are relevant only for diminishing the sentence and do not lessen the gravity of the crime. 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; (iii) cooperation with the Court; (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); (v) the convicted persons’ subsequent conduct (i.e. contribution to the peace and reconciliation process and statement of remorse and sympathy for the victims); and (vi) violation of the rights of the Defence.  

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 require a “substantial cooperation”. 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. 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”.\footnote{Ibid., para. 128.}

In the \textit{Lubanga} Sentencing Decision, the Chamber noted that despite “onerous circumstances”,\footnote{According to the Chamber, the convicted person was “put under considerable unwarranted pressure by the conduct of the prosecution during the trial”, \textit{Lubanga} Sentence, para. 97.} the convicted person was “respectful and cooperative throughout the proceedings” and proved “notable cooperation with the Court”.\footnote{Ibid., para. 91.} 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,\footnote{\textit{Katanga} Sentence, para. 144.} 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.\footnote{\textit{Katanga} Sentence, para. 38.}

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,\footnote{\textit{Katanga} Sentence, para. 38.} 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.\footnote{\textit{Ibid.}, para. 91.} 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.\footnote{\textit{Katanga} Sentence, para. 117; ICTY, \textit{Prosecutor v. Momir Nikolić} (Sentencing) IT-02-60/1-A (8 March 2006) para. 117; ICTY, \textit{Prosecutor v. Dragan Nikolić} (Sentencing) IT-94-2-S (18 December 2003) para. 242; ICTY, \textit{Prosecutor v. Plavšić} (Sentencing) IT-00-398/4/1-S (27 February 2003) para. 81.} Expressions of sympathy or genuine compassion may also be taken into account, although they will be given less weight than a statement of remorse,\footnote{\textit{Ibid.}, para. 91.} provided that they are also sincere, genuine and not mere convention.\footnote{\textit{Katanga} Sentence, para. 118.}

The Trial Chamber has also affirmed that\footnote{\textit{Recalling ICTR jurisprudence: ICTR, \textit{The Prosecutor v. Laurent Semanza} (Decision) ICTR-97-20-A (31 May 2000) para. 6-b; ICTR, \textit{The Prosecutor v. Jean Bosco Barayagwiza} (Judgment)ICTR-97-19-AR72 (31 March 2000) para. 75; ICTR, \textit{The Prosecutor v. Kajelijeli} (Judgement) ICTR-98-44-A (23 May 2005) para. 325.} if a convicted person’s fundamental rights were violated, it would be appropriate to take that into account during sentencing.\footnote{\textit{Katanga} Sentence, para. 138.} However, only violations to which he was subjected to whilst in detention on behalf of the Court can be ruled

\footnote{\textit{Katanga} Sentence, para. 136.}
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.\textsuperscript{1944} Only the violations concerning a procedure undertaken before the Court during the detention on behalf of the Court may be taken into account.\textsuperscript{1945}

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.\textsuperscript{1946} 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.\textsuperscript{1947}

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.\textsuperscript{1948} Similarly, his “good” reputation as a combatant was irrelevant as this related to his military character,\textsuperscript{1949} 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.\textsuperscript{1950}\* 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.\textsuperscript{1951}

**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 concreto, on the basis of the Chamber’s factual and legal findings in its Judgment”.\textsuperscript{1952}

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”.\textsuperscript{1953} 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

\textsuperscript{1944}Ibid., para. 136, p. 54.  
\textsuperscript{1945}Ibid., para. 137.  
\textsuperscript{1946}Lubanga Sentence, para. 87.  
\textsuperscript{1947}Ibid., para. 87.  
\textsuperscript{1948}Katanga Sentence, paras. 81-83.  
\textsuperscript{1949}Ibid., para. 86.  
\textsuperscript{1950}Ibid., paras. 87-88.  
\textsuperscript{1951}Ibid., para. 88.  
\textsuperscript{1952}Ibid., para. 61.  
\textsuperscript{1953}Lubanga Sentence, paras. 52-53.
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 15.1954 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.1955

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 doubt1956 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.1957

**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
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;1958 (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;1959 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).1960

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

1954 Ibid., para. 52.
1955 Ibid., paras. 52, 97.
1956 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.
1957 Lubanga Sentence, paras. 49-50.
1959 Ibid., para. 63.
1960 Ibid., para. 64.
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. 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. The Appeals Chamber will examine whether the Trial Chamber gave adequate weight to the requisite factors.

**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”. Having both considered that there were no relevant aggravating circumstances, the Lubanga and Katanga Trial Chambers abandoned consideration of a life sentence.

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. 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. 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.

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1963 Ibid., paras. 70-71.
1964 Ibid., para. 72.
1965 Rules of Procedure and Evidence, r. 145(3).
1966 Lubanga Sentence, para. 96; Katanga Sentence, para. 144.
1967 Ibid., para. 92.
1968 Ibid., para. 93.
years pursuant to Article 78(3) of the Statute.\textsuperscript{1699} 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.\textsuperscript{1970}

**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.\textsuperscript{1971}

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”.\textsuperscript{1972} 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.\textsuperscript{1973}

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 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.\textsuperscript{1974}

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”.\textsuperscript{1975} 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.\textsuperscript{1976} 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 Katanga\textsuperscript{1977} and that it is sufficient that the “conduct underlying the crime” is “in principle” covered by the national investigation that justified the detention.\textsuperscript{1978}

\textsuperscript{1699}Ibid., para. 99.
\textsuperscript{1970} Dissenting opinion of Judge Odio Benito on the Decision on sentence in Lubanga Sentence, para. 25.
\textsuperscript{1971} Rome Statute, art. 78(2).
\textsuperscript{1972} The Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 OA 7 (13 February 2007) para. 121.
\textsuperscript{1973} Katanga Sentence, paras. 158 and 168.
\textsuperscript{1974} Lubanga Sentence, para. 102.
\textsuperscript{1975} Ibid., para. 159.
\textsuperscript{1976} Ibid., para. 166.
\textsuperscript{1977} Ibid., para. 3.
\textsuperscript{1978} Ibid., para. 4.
 Appeal of the Sentence

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.\textsuperscript{1979} 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.\textsuperscript{1980}

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.\textsuperscript{1981} 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,\textsuperscript{1982} 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.

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.\textsuperscript{1983} The Registrar notifies all parties who participated in the proceedings before the Trial Chamber that an appeal

\textsuperscript{1979} Rome Statute, art. 81(2).
\textsuperscript{1980} Lubanga Sentence Appeal Judgment, para. 2.
\textsuperscript{1981} Rome Statute, art. 83(3).
\textsuperscript{1982} Ibid., art. 83(1).
\textsuperscript{1983} Rules of Procedure and Evidence, r. 150.
has been filed. 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.

**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. 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.

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. 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.

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.

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. 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”.

**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

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1985 *Lubanga Sentence Appeal Judgment*, paras. 41-42.
1986 *Rome Statute*, art. 83(2).
1987 *Lubanga Sentence Appeal Judgment*, para. 42.
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. 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.

**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.

A person sentenced to imprisonment shall be designated a State from the list of States that
have indicated acceptance of such persons. The State will then either accept or reject the
person. 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.

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1992 Rome Statute, art. 84(2); Rules of Evidence and Procedure, r. 161(1)
1993 Rules of Procedure and Evidence, r. 200, permits the Court to enter into agreements with states concerning persons sentenced by the Court.
1994 Rome Statute, art. 103 (1)(a).
1995 Ibid., art. 103(1)(c).
1996 Ibid., art. 103(3).
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.\textsuperscript{1997} 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.\textsuperscript{1998} The property or proceeds from sale of assets must be transferred to the Court.\textsuperscript{1999}

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.\textsuperscript{2000} 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 \textit{ad hoc} agreements with the Court concerning these matters.\textsuperscript{2001}

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.\textsuperscript{2002} 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,\textsuperscript{2003} 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”.\textsuperscript{2004} 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.

\begin{itemize}
  \item \textsuperscript{1997}\textit{Ibid.}, art. 109(1).
  \item \textsuperscript{1998}\textit{Ibid.}, art. 109(2).
  \item \textsuperscript{1999}\textit{Ibid.}, art. 109(3).
  \item \textsuperscript{2000}\textit{Ibid.}, art. 93(1)(k) and (l).
  \item \textsuperscript{2001}\textit{Ibid.}, art. 87(5); Rules of Procedure and Evidence, r. 200.
  \item \textsuperscript{2002}Rome Statute, art. 75(5).
  \item \textsuperscript{2003}\textit{Ibid.}, art. 93(1)(k).
  \item \textsuperscript{2004}\textit{Ibid.}, art. 93(1)(l).
\end{itemize}
Part Five: Victims and Witnesses

Victim Participation and Their Views at the ICC

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.

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.\(^{2005}\)

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.\(^{2006}\) First, the Rome Statute permits the representations of victims on the authorisation of investigations initiated by the Prosecutor.\(^{2007}\) 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.

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


\(^{2007}\) Rome Statute,art. 15(3).
jurisdiction (see Parts One and Two). Moreover, victims must be able to show that a causal link exists between the crime and the harm suffered.

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. 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. 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.

**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;
- Whether such participation is appropriate at the procedural stage in question; and
- Whether it would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

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

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2009 Ibid.


2012 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.

2013 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.’

2014 Rome Statute, art. 68(3).
of participation can only take place when specific criteria have been met. In every instance, participation is solely at the discretion of the Chamber.\textsuperscript{2015}

**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.

**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.\textsuperscript{2016} Specifically, legal representatives can participate,\textsuperscript{2017} question witnesses, experts or the accused\textsuperscript{2018} 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.\textsuperscript{2019} The Court can also allow appropriate questions to be put forward by victims whenever the evidence under consideration engages their personal interests.\textsuperscript{2020}

**Leading Evidence**

The right to lead evidence of guilt or innocence lies primarily with the parties.\textsuperscript{2021} 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.\textsuperscript{2022} 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.\textsuperscript{2023}

**Victims Making an Opening or Closing Statement at Trial**

Victims are expressly authorised to make statements during proceedings if permission has been sought from the Chamber for this purpose.\textsuperscript{2024} In *Katanga*, the Chamber permitted the legal representatives of the victims to make opening and closing statements at the trial.\textsuperscript{2025}

\begin{footnotes}
\footnote{2015} 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.
\footnote{2016} Rules of Procedure and Evidence,r. 91(2); Katanga Modalities, para. 45.
\footnote{2017} Rules of Procedure and Evidence,r. 91(1); Katanga Modalities, para. 45.
\footnote{2018} Rules of Procedure and Evidence,r. 91(3)(a); Katanga Modalities, para. 45.
\footnote{2019} Rome Statute,art. 69(3); Rules of Procedure and Evidence,r. 91(3); Katanga Modalities, para. 46.
\footnote{2020} Katanga Modalities, para. 46.
\footnote{2021} *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06 OA 9 OA 10 (11 July 2008) para. 93.
\footnote{2022} *Ibid.*, para. 94.
\footnote{2024} Rules of Procedure and Evidence,r. 89(1).
\footnote{2025} 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.
\end{footnotes}
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. 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”. 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.

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. 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”), anticipated questions or unanticipated questions. 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.

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.

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.

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.

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2026 Rules of Procedure and Evidence, r. 91(3)(a).
2027 Katanga Modalities, para. 73.
2028 Ibid., para. 74.
2029 The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Corrigendum Directions) ICC-01/04-01/07-1665-Corr (20 November 2009) (“Decision on rule 140“) paras. 18, 37 and 42.
2030 Decision on rule 140, paras. 84-86.
2031 Ibid., paras. 87-88.
2032 Ibid., para. 89; Katanga Modalities, para. 77.
2033 Ibid., paras. 87-89.
2034 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.
2035 The Prosecutor v. Thomas Lubanga Dyilo (Decision on Victims’ Participation) ICC-01/04/01/06-1119 (18 January 2008) para. 108.
**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.\(^{2036}\) There seems to be no distinction drawn between victims and witnesses who the legal representative wishes to call.\(^{2037}\) In *Lubanga*, the Chamber permitted three victims to give evidence under oath at the conclusion of the Prosecution’s case.\(^{2038}\) On the other hand, the Court will not authorise testimony from victims who wish to remain anonymous to the Defence.\(^{2039}\)

**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.\(^{2040}\) 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.\(^{2041}\)

**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.\(^{2042}\) 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.\(^{2043}\)

**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.\(^{2044}\) Challenges must permit a victim, who has information that evidence cannot be admitted or is irrelevant, to be transmitted to the Chamber.

**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.\(^{2045}\) The Court noted in *Katanga* that neither the Statute nor the Rules impose such an obligation.\(^{2046}\) 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.\textsuperscript{2047} Notably, however, the Appeals Chamber said that:

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\text{[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.}\textsuperscript{2048}
\]

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.\textsuperscript{2049} 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.

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.\textsuperscript{2050} 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 \textit{ex parte}.\textsuperscript{2051}

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:\textsuperscript{2052}

- Attending and participating in the hearings before the Court;\textsuperscript{2053}
- Presenting their views and concerns;\textsuperscript{2054}
- Making representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation;\textsuperscript{2055}

\textsuperscript{2047}Ibid.
\textsuperscript{2048}Ibid., para. 106.
\textsuperscript{2049}Ibid., para. 102.
\textsuperscript{2050}Rules of Procedure and Evidence,r. 131(2); Katanga Modalities, para. 119.
\textsuperscript{2051}Katanga Modalities, paras. 121-22.
\textsuperscript{2052}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.

\textsuperscript{2053}Rules of Procedure and Evidence,r. 91(2).
\textsuperscript{2054}Rome Statute,art. 68(3); Rules of Procedure and Evidence,r. 89.
\textsuperscript{2055}Rome Statute,art. 15(3); Rules of Procedure and Evidence,r. 50(3).


- Requesting a Chamber to order measures to protect their safety, psychological well-being, dignity and privacy,\(^{2056}\) and
- Requesting a Chamber to order special measures.\(^{2057}\)

**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.

**ICC Entities**

There are a number of ICC bodies established to assist victims at the Court. The OPCV\(^{2058}\) is responsible for helping victims exercise their rights and for representing them before the Chambers.\(^{2059}\) In addition, before the Chamber has 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.\(^{2060}\)

The VPRS\(^{2061}\) 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

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\(^{2056}\) Rome Statute, art. 68(1); Rules of Procedure and Evidence, r. 87(1).

\(^{2057}\) Rome Statute, art. 68(1); Rules of Procedure and Evidence, r. 88(1).

\(^{2058}\) The OPCV was established on 19 September 2005.

\(^{2059}\) 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

(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.


\(^{2061}\) The VPRS is established on the basis of the Regulation 86(9) of the Regulations of the Court.
organs and sections of the Court on appropriate protective measures, security arrangements, counselling and assistance. 2062

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.

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. 2063 In Bemba, 722 applications to participate in the proceedings were grouped into four according to the location of the harm. 2064 Remarkably, in Katanga, there were around 4,121 participating victims. 2065 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. 2066 After obtaining victim status, they were jointly represented

2062 Rome Statute, art. 43(6).
2063 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-ENG (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.
2064 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.
(as a collective) by a legal representative. As of November 2011, the ICC had received a total 9,910 applications for victim participation.

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. In Gbagbo, the Court implemented a partly collective application approach, whereby victims would be encouraged to group together. 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.

The Kenya Cases further refined the victim application process. The new approach implemented a dual approach that is dependent on the level of the victims’ desired participation. 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. 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). 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. This representative can also present the views of unregistered victims provided the representative considers that they qualify as victims.

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2069 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.
2070 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 fulfill their obligation pursuant to Art. 68(3) of the Statute and rules 90 and 91 of the rules.

2071 E.g. The Prosecutor v. Thomas Lubanga Dyilo (Second Review) ICC-01/04-01/06-924 (11 June 2007).
2074 Ibid., para. 25.
2075 Ibid., para. 26.
2076 Ibid., paras. 49-50.
2077 Ibid., para. 52.
Protection of Victims and Witnesses

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; (ii) special measures; and (iii) other measures for the protection of victims and witnesses. 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.

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
- Its own motion, and after having consulted with the VWU.

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. 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”. 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. It can be discerned from this that there is a

2078 Rules of Procedure and Evidence, r. 87.
2079 Ibid., r. 88.
2080 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.
2081 Rules of Procedure and Evidence, r. 87.
2082 Rome Statute, Arts. 54(3)(f) and 68(1).
2083 The Prosecutor v. Thomas Lubanga Dyilo (Decision) ICC-01/04-01/06 (16 December 2008) paras. 27-29.
2084 The Prosecutor v. Bosco Ntaganda (Decision) ICC-01/04-02/06 (15 September 2015) para. 6.
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.2085 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.2086

**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;
- 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.2087

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2086 The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Decision) ICC-01/04-01/07 OA 7 (26 November 2008) paras. 93 and 97.
2087 Rules of Procedure and Evidence, r. 87.
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.\(^{2088}\) Similarly, the Court may order special measures to be put in place on its own motion, having consulted with the VWU.\(^{2089}\) 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.\(^{2090}\)

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.\(^{2091}\) 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.\(^{2092}\) 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.\(^{2093}\) 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,\(^{2094}\) 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.\(^{2095}\) The witness will be given a chance to consent to the special measures.\(^{2096}\) An assessment report will then be made to the Trial Chamber.\(^{2097}\) 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.\(^{2098}\)

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

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\(^{2088}\) Ibid., r. 88(1).

\(^{2089}\) Ibid.

\(^{2090}\) Rules of Procedure and Evidence, r. 88(1).

\(^{2091}\) Rome Statute, art. 54(3)(e).

\(^{2092}\) The Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 OA 13 (21 October 2008) paras. 59 and 101.

\(^{2093}\) Rules of Procedure and Evidence, r. 82(2).

\(^{2094}\) The Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06 OA 13 (21 October 2008) para. 10.

\(^{2095}\) Ibid., para. 10; Rules of Procedure and Evidence, r. 88.

\(^{2096}\) Ibid., para. 12.

\(^{2097}\) Ibid., para. 12.

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.\textsuperscript{2099} Legal representatives may be present during the familiarisation process.\textsuperscript{2100} 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.\textsuperscript{2101}

### 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.\textsuperscript{2102} 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).\textsuperscript{2103} 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.\textsuperscript{2104} 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.\textsuperscript{2105}

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”.\textsuperscript{2106} Unfortunately, the precise criteria

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\textsuperscript{2099} The Prosecutor v. Thomas Lubanga Dyilo (Decision) ICC-01/04-01/06-1049 (30 November 2007); Katanga Modalities, para. 79.

\textsuperscript{2100} The Prosecutor v. Thomas Lubanga Dyilo (Decision) ICC-01/04-01/06-1351 (23 May 2008) para. 39; Katanga Modalities, para. 79.


\textsuperscript{2102} Rules of Procedure and Evidence, r. 16(4).

\textsuperscript{2103} Regulations of the Registry, r. 96.


\textsuperscript{2106} The Prosecutor v. Jean-Pierre BembaGombo (Victims and Witnesses Unit’s Observations) ICC-01/05-01/08-72-Red (18 August 2008) para. 8.
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. The ICC is the first international criminal court to be able to make a convicted perpetrator pay reparations to victims of his crimes.

Purpose of Reparations

Reparations fulfill 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. Reparations – i.e., compensation - are meant to address harm suffered by victims, and may include restitution, compensation, rehabilitation, and also other measures. Compensation and restitution includes fines or forfeitures against the convicted person, and the Court can order reparations be paid through the Trust Fund. Rehabilitation and other measures include medical services and healthcare, psychological, psychiatric and social assistance to

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2112 At the Extraordinary Chambers in the Courts of Cambodia (hybrid Court), Civil Parties can seek moral and collective reparation.
2113 ibid., para. 2.
2114 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, UN Doc A/RES/60/147 (16 December 2005) UN Doc A/RES/60/147 ("UN Basic Principles")
2115 Rome Statute, art. 75(2).
support victims suffering from grief and trauma and also relevant legal or social services.\textsuperscript{2116} It may include measures to facilitate reintegration into society or address shame.\textsuperscript{2117}

**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.\textsuperscript{2118} Reparations can also be granted to legal entities, including non-governmental organisations, non-profits, government departments, schools, hospitals and so on.\textsuperscript{2119}

**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.\textsuperscript{2120}

A decision on reparations must be requested by the victims in writing, in a substantial application that differs from other participation applications,\textsuperscript{2121} as the Court will only act on its own motion in exceptional circumstances.\textsuperscript{2122} The Statute and Rules seem to foresee that the reparation decision would normally be taken within the regular trial 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.\textsuperscript{2123}

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

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\textsuperscript{2116} UN Basic Principles, principle 21.
\textsuperscript{2117} *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)
\textsuperscript{2118} Rules of Procedure and Evidence, r. 85.
\textsuperscript{2119} *Ibid.*, r. 85(b).
\textsuperscript{2120} *Ibid.*, r. 96.
\textsuperscript{2121} *Ibid.*, r. 95.
\textsuperscript{2123} The Trust Fund is established pursuant to Article 79 of the Rome Statute.
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. 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. 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.

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. 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.

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. 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.

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. In other words, if the ICC is unable to seize sufficient assets from the convicted individual, the reparations reserve will be relied upon.

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

\[2124\]Uganda Participation Decision, para. 14.
\[2126\]Ibid.
\[2127\]Rules of Procedure and Evidence, r. 97(2).
\[2129\]Ibid., para. 42. Referring to the UN Basic Principles, principle 21.
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.

Reparations Example: Lubanga

Lubanga was the first, and so far only, reparations decision and order issued by the ICC, and as such has implications for future decisions, especially since the Appeals Chamber had occasion to amend the order earlier this year.

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”.2131

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”.2132 Second, they “ensure that offenders account for their acts”.2133 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.2134

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

2131 Amended Reparations Order, para. 1.
2132 Ibid., para. 2.
2133 Ibid., para. 2.
2134 The Prosecutor v. Thomas Lubanga Dyilo (Judgment) ICC-01/04-01/06-3129 (3 March 2015) para. 1.
must be personal to the victim. \(^{2135}\) It may be material, physical, or psychological. \(^{2136}\) There also must be a causal link between the harm and the commission of the crime within the jurisdiction of the ICC. \(^{2137}\) 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. \(^{2138}\) 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. \(^{2139}\) The Court also uses a gender-inclusive approach and has a goal of gender parity in reparations. \(^{2140}\) 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.” \(^{2141}\) The Court should also consult with victims on the identities of beneficiaries and their priorities. \(^{2142}\)

As ordered, the ICC Trust Fund made submissions to the Chamber in the Lubanga reparations matter. \(^{2143}\) 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. \(^{2144}\)

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. \(^{2145}\)
It outlined potential rehabilitation measures and other measures, such as medical care, psychological help, and reintegration measures like education or sustainable work opportunities. 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.

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.

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)].

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. 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 simply the application process.

2146 Ibid., paras. 181, 258-263.
2148 Ibid., pp. 124 et seq.