



Ukraine and the ICC: seven years later

This publication is designed to inform Ukrainian and international stakeholders about the activities of the International Criminal Court in the context of the investigation of war crimes committed on the territory of Ukraine.

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INTRODUCTION

In the first days after the Revolution of Dignity in Ukraine, a new era began in the application of international criminal law, when on 25 February 2014, the Verkhovna Rada recognised the jurisdiction of the International Criminal Court (hereinafter - the ICC or the Court) “over crimes against humanity, committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian nationals” at Euromaidan from 21 November 2013 to 22 February 2014. Declaration with the Court, extending the Court’s jurisdiction to crimes against humanity and war crimes committed by “the highest officials of the Russian Federation and the leaders of the terrorist organisations of the DPR and LPR”.¹

Thus, **as a result of the two declarations by the Ukrainian authorities, the jurisdiction of the ICC in relation to Ukraine extends to crimes against humanity allegedly committed during the Euromaidan events from 21 November 2013 to 22 February 2014, as well as to crimes against humanity and war crimes allegedly (being) committed in Crimea and Donbass.** The court began to examine the Ukrainian situation on 25 April 2014.² Since then, the Office of the Prosecutor (OTP) of the ICC has analysed information from the governmental and non-governmental sources to determine whether there is a reasonable basis to initiate a full investigation. To this end, the OTP must assess the following: (i) whether genocide, crimes against humanity or war crimes have been committed or continue to be committed on

the territory of Ukraine and / or by its citizens; (ii) whether the case is admissible due to unwillingness or inability of the national authorities to bring the perpetrators of these crimes to justice at the national level; (iii) whether there is reason to believe that the investigation will not serve the interests of justice.³

As a result, on 11 December 2020, the then ICC Prosecutor announced the completion of the preliminary examination of the situation in Ukraine, having established reasonable grounds to believe that a broad range of crimes against humanity and war crimes have been committed in Ukraine.⁴ However, at the time of writing of this entry, almost a year has passed since the Prosecutor’s statement, and the investigation has not yet begun.

Accordingly, the publication considers in some detail the categories of crimes which may be considered at the ICC, when and under what conditions such an investigation can begin, and how Ukrainian governmental and non-governmental actors interact with the ICC. The publication is based on many years of experience in Ukraine and numerous projects of the international human rights group Global Rights Compliance, where the author is a legal consultant.

1 Declaration of the Verkhovna Rada of Ukraine, 4 February 2015, [in Ukrainian](#).

2 ICC Press Release, [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine](#), 25 April 2014.

3 Rome Statute, Article 53(1).

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

CRIMES IN FOCUS OF THE ICC

In December 2020, the ICC Prosecutor identified three categories of crimes that, in her opinion, are subject to investigation: (i) crimes committed in Crimea and (ii) crimes committed in Donbass in the context of hostilities and (iii) in the context of unlawful detention.⁵

More specifically, the Office of the ICC Prosecutor noted that **there was a reasonable basis to believe that during the occupation of Crimea from 26 February 2014 war crimes have been committed:** wilful killing, torture, outrages upon human dignity, unlawful confinement, conscription into the army of an adversary, deprivation of the right to a fair and regular trial, transfer of persons deprived of their liberty and detainees outside the occupied territory, seizing the enemy's private and cultural property that is not imperatively demanded by the necessities of war.⁶ In addition, the OTP has a reasonable basis to believe that crimes against humanity were committed in Crimea in the period leading up to and during the occupation.⁷ In particular, these are crimes against humanity of murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, per-

secution, and enforced disappearance.⁸

According to the Office of the Prosecutor of the ICC, war crimes have been and continue to be committed in Donbass.⁹ It should be noted that war crimes may be committed in the context of armed conflicts of international or non-international character. In Donbass, according to the OTP, a non-international armed conflict between the Ukrainian government forces and "anti-government armed elements" began on 30 April 2014.¹⁰ In parallel, from 14 July 2014 at the latest, Ukraine and Russia entered into direct armed confrontation, which marked the beginning of an international armed conflict.¹¹ The OTP continues to examine the information to establish whether Russia exercised overall control over the armed groups, namely, supplied equipment, funding and personnel, and directed or assisted in planning the operations of such groups, which would turn the otherwise non-international armed conflict into the international one.¹²

Accordingly, if the two conflicts continued in parallel, the crimes allegedly committed in Donbass include war crimes, namely, intentionally direct-

5 Ibid.

6 ICC OTP, [Report on Preliminary Examination Activities](#), 14 December 2020, para. 278.

7 Ibid., para. 279.

8 Ibid.

9 Ibid., para. 280.

10 ICC OTP, [Report on Preliminary Examination Activities](#), 14 November 2016, para. 168.

11 Ibid., para. 169.

12 Ibid., para. 170.

ing attacks against civilians and civilian and protected objects, wilful killing/ murder, torture and inhuman/ cruel treatment, outrages upon personal dignity, rape and other forms of sexual violence.¹³ If the conflict was of international character, two other types of war crimes might have been committed, as identified by the OTP, namely intentionally launching attacks that resulted in harm to civilians and civilian objects that was clearly excessive in relation to the military advantage anticipated and unlawful confinement.¹⁴

It is noteworthy that at the national level, in the context of Donbass, Ukraine pursues completely different crimes. Although Article 438 of the Criminal Code of Ukraine (CCU), which criminalises violations of laws and customs of war, generally allows the prosecution of acts constituting crimes in focus of the ICC, according to information provided by the Office of the Prosecutor General, the

total number of such proceedings at the beginning of 2021 was less than 300, and there are only two judgements.¹⁵ Instead of employing Article 438, most conflict-related crimes are investigated at the national level as the creation or participation in a terrorist group under Article 258³ of the CCU or the creation or participation in unlawful paramilitary or armed formations under Article 260 of the CCU. This approach, although not directly prohibited by international law, is at least illogical, because it seems that the same acts are presented as terrorism when it is convenient (in proceedings at the national level and at the International Court of Justice), and as war crimes for the purposes of the ICC. Moreover, this approach does not reflect the gravity of the acts committed.

This national practice is not an obstacle to justice at the ICC. At the same time, there is another factor that hinders the investigation.

BEGINNING OF AN INVESTIGATION AT THE ICC

Given that Ukraine has not ratified the Rome Statute of the ICC, the ICC Prosecutor cannot initiate a full investigation until the Pre-Trial Chamber grants its permission.¹⁶ To this end, the ICC Prosecutor prepares a preliminary examination report under Article 53 of the Rome Statute and applies

to the Pre-Trial Chamber for permission to investigate the situation.

With regard to the situation in Ukraine, these steps have not been taken. The obvious reasons are the change of the ICC Prose-

13 ICC OTP, [Report on Preliminary Examination Activities](#), 14 December 2020, para. 280.

14 *Ibid.*, para. 281.

15 Slovyansk city district court of the Donetsk region, [Judgement](#), Case No. 243/4702/17, 1 June 2017 and Lysychansk city court of the Luhansk region, [Judgement](#), Case No. 415/2182/20, 18 May 2020.

16 Rome Statute, Article 54(2).

curator and insufficient resources of the OTP. The term of office of the former Prosecutor, Fatou Bensouda, under whose leadership the preliminary examination in Ukraine was conducted and completed, expired in June 2021.¹⁷ Between December 2020, when Bensouda announced the completion of the preliminary examination, and June 2021, when she left the Office of the ICC Prosecutor, Fatou Bensouda did not apply to the Pre-Trial Chamber. The new Prosecutor elected in June 2021,¹⁸ Karim Khan, also has not yet submitted the required application.

In an interview, Karim Khan noted that the resources of the Court were limited and it was necessary to prioritise and use these resources to build better court cases, because justice is delivered in the courtroom, and not at the stage of preliminary examination or investigation.¹⁹ Several days earlier, a representative of the OTP, during his speech at the conference “Legal (un)certainly of the occupation: Crimea and Donbass”, commenting on Ukraine’s prospects at the ICC, noted that “We have more cases at the trial and pre-trial stage than ever before. We have many investigations, including new ones recently opened in Bangladesh / Myanmar, Afghanistan and now, most recently, Palestine, and therefore we simply called on the States Parties to provide the Court with the means to move forward.”²⁰

From these statements, it can be concluded that the **investigation of the situation in Ukraine may be postponed until the necessary re-**

sources become available at the ICC. Even when such an opportunity arises, it should be kept in mind that at least several months will pass between the application to open a full investigation of the situation and the granting of such permission, if at all. The Bangladesh / Myanmar situation took four months to be considered by the Pre-Trial Chamber, while the Afghanistan situation took 16 months and the request to investigate was not granted by the Pre-Trial Chamber, and it was only a year later that the Appeals Chamber reviewed the decision and granted its permission.²¹

Thus, **justice at the ICC is not a simple or quick solution to the problem of accountability for the crimes committed in Crimea and Donbass, which does not mean that Ukraine should not move along this path. On the contrary, all possible mechanisms should be used, including cooperation with the ICC.**

17 ICC, [Office of the Prosecutor](#).

18 ICC, [Office of the Prosecutor](#).

19 Aljazeera, [‘New ICC Prosecutor Karim Khan promises to build ‘strong cases’](#), 16 June 2021.

20 Quotes from the international conference “Legal (un)certainly of the occupation: Crimea and Donbass”, 9-11 June 2021, p. 12.

21 ICC Press Release, [‘ICC judges authorise opening of an investigation into the situation in Bangladesh/ Myanmar’](#), 14 November 2019; ICC, [Afghanistan](#).

COMMUNICATION BETWEEN UKRAINE AND THE ICC

At the stage of preliminary examination of the situation, the Office of the Prosecutor of the ICC receives information from various sources: states, UN bodies, intergovernmental and non-governmental organisations, as well as other reliable sources.²² Information most often comes in the form of communications under Article 15 of the Rome Statute. The last time the OTP reported on the number of communications received on the situation in Ukraine was in December 2018 - there were 86 such communications.²³ Communications are received continuously, even when the Prosecutor prepares the final preliminary examination report.

Ukraine is actively using this mechanism. **Non-governmental human rights organisations and prosecutors provide information to the ICC separately or in cooperation. The Prosecutor's Office of the Autonomous Republic of Crimea (hereinafter - ARC), for example, together with human rights defenders from Crimean Human Rights Group, Regional Center for Human Rights, Ukrainian Helsinki Human Rights Union and others, sent 12 communications concerning several crimes to the ICC.** In particular, there was a communication on the war crime of forced conscription to the forces of the

adversary state - a crime that has not been prosecuted by any court since the Nuremberg Tribunal.

Donetsk and Luhansk regional prosecutor's offices also sent several communications to the ICC, including in cooperation with the Luhansk regional human rights center "Alternative". These communications concerned war crimes of intentionally directing attacks against civilians and /or civilian objects.

In addition, human rights defenders independently submit information to the ICC, including on issues to which investigators and prosecutors do not pay the necessary attention, such as crimes against humanity and war crimes of sexual violence.²⁴

Global Rights Compliance prepared several communications to the ICC on the situation in Ukraine at the request of the prosecution authorities or provided expert support in the preparation of such communications. This experience allows to identify several problems that arise during the preparation of communications.

22 Rome Statute, Article 15(2).

23 ICC OTP, [Report on Preliminary Examination Activities](#), 5 December 2018, para. 59.

24 This information was submitted, in particular, by the East Ukrainian Center for Public Initiatives and the International Federation of Human Rights. ZMINA, "Human Rights Defenders Sent a Submission to The Hague on Sexual Violence in Donbas," 27 September 2018.

PROBLEMS ARISING DURING THE PREPARATION OF COMMUNICATIONS TO THE ICC

Difficulties in the preparation of communications to the ICC under Article 15 of the Rome Statute in the Ukrainian context mainly relate to access to information and evidence, as well as the quality of such information and evidence.

The first problem is due, in large part, to the ongoing armed conflict and / or the state of occupation, meaning that investigators do not have physical access to evidence and witnesses located in the territories not controlled by Ukraine, and the access of human rights organisations is often limited. Some of this problem can be overcome by interviewing witnesses online, but there is concern about the safety of witnesses who remain in non-controlled territory. Another potential solution could be to improve working relationships with social media offices, where information is often published that may serve as evidence of crimes against humanity and / or war crimes. However, a comprehensive solution to the problem of access to evidence seems possible only after the end of the conflict.

In addition to the inaccessibility of evidence and information, the lack of an organised electronic storage system for evidence poses a problem. Case files exist in one

printed copy, which significantly slows down the drafting of communications in the ICC, because time is spent on making copies, and on reading not always clear handwriting, and flipping through hundreds of pages to find specific information instead of a search by keywords. To solve this problem, the electronic system I-DOC, launched in the Crimean prosecutor's office, should be used by other prosecutor's offices. This system enables effective documentation and investigation of crimes against humanity, war crimes and human rights violations in the current working conditions of the prosecutor's office and considering the territorial remoteness of the investigative bodies.

Unfortunately, the quality of the evidence remains low. **Investigators have little understanding of what evidence and how to collect in order to build conflict-related cases. Prosecutors, although they understand these issues better and have received some training, do not have the time and the necessary scope of procedural rights to carry out all investigative actions.** Thus, in many cases, interviews of witnesses and victims are conducted on the basis of a standardised list of questions that does not take into account the specifics of certain crimes and therefore does not take into account

important information regarding the contextual elements of crimes, the intent of the criminals, the relationship between the direct perpetrators of crimes and high-ranking military commanders or political leaders, which are important elements of war crimes and crimes against humanity.

Investigators and prosecutors still do not frequently cite open source evidence, such as reports from international and nongovernmental organisations, publications on the media and social networks. This is partially remedied by the efforts of human rights organisations, which usually collect more complete

and accurate information from open sources as part of the preparation of communications to the ICC. However, investigators and prosecutors should look for the sources of information that are less traditional than interviewing witnesses and searching for evidence.

In general, the problems arising during the preparation of communications to the ICC are not unique and also relate to proceedings at the national level, which only reinforces the need to apply the maximum possible efforts to overcome them.

UKRAINE AND THE ICC: A LOOK INTO THE FUTURE

When the Office of the Prosecutor of the ICC has the resources to investigate the situation in Ukraine, it is likely to submit the relevant request to the Pre-Trial Chamber of the ICC as mentioned above. After considering such a request, the Chamber may grant or reject it. **At the moment, the situation in Ukraine appears to meet the criteria for a full investigation, namely, there is a reasonable basis to believe that crimes against humanity and war crimes which fall within the jurisdiction of the ICC and the investigation of which is in the interests of justice, have been committed or are being committed on the territory of Ukraine and/or by its citizens.**

In both the preliminary examination phase and the full investigation phase, the ICC examines the situation comprehensively and impartially. The investigation is carried out with the aim of establishing the truth, and therefore concerns all facts and evidence relevant to assessing criminal responsibility under the Rome Statute and which may be evidence of guilt or innocence.²⁵

It follows, and former ICC Prosecutor Fatou Bensouda noted that the investigation of the situation in Ukraine, if it starts, will concern both sides of the armed conflict.²⁶ Consequently, if reports of crimes against humanity and / or war crimes by the Ukrainian side are not considered at the na-

25 Rome Statute, Article 54(1).

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

tional level, it is likely that the accused will end up in the dock at the ICC.

However, it should be understood that even with the opening of a full investigation, it will take years before such an investigation is completed, and the trial will take several more years. In this sense, Georgia is a great example. The factual circumstances of the situation in Georgia are similar to those of Ukraine, and the ICC investigation began in 2015 and has not yet been completed, as well as no suspects have been identified. Other examples also indicate lengthy consideration. For instance, three years passed between the be-

ginning of the investigation of the situation in the Central African Republic and the beginning of the trial against the key suspect.²⁷ Further, the trial lasted six years, and two years later the ICC Appeals Chamber acquitted the accused.²⁸ In another example, the trial against those accused of crimes against humanity in Cote d'Ivoire began five years after the start of the investigation into the situation in the state, lasted three years and ended with an acquittal.²⁹

Thus, if an investigation of the situation in Ukraine is launched, it is likely to last at least three to five years, and trials will take several more years.

27 ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, [Case Information Sheet](#).

28 ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"](#) ICC-01/05-01/08-3636-Red, 08 June 2018

29 ICC, The Prosecutor v. Laurent Gbagbo, [Case Information Sheet](#).

CONCLUSIONS AND RECOMMENDATIONS

The Office of the ICC Prosecutor completed its preliminary examination of the situation in Ukraine in December 2020, concluding that the events in Crimea and Donbass require a full investigation. This conclusion was made, inter alia, on the basis of information that Ukrainian investigators and prosecutors, together with human rights defenders, sent to the ICC in communications under Article 15 of the Rome Statute.

The process of preparing communications is rather complicated and exposes a number of problematic issues in the work of investigators and prosecutors, including lack of access to information and evidence and low quality of evidence. Solving these issues will facilitate not only cooperation with the ICC, but also the investigation and prosecution for crimes committed in Crimea and Donbass at the national level.

The latter is especially important given that the Office of the Prosecutor has not yet filed a request to open a full investigation of the situation

in Ukraine due to limited resources, and it is unclear when such a request will be made. Even if the investigation begins, it will take several years, and it will take several more years for the trial and sentencing.

Under such circumstances, **improving the quality of national investigations and cases of crimes committed in Crimea and Donbass, on the one hand, will save the resources of the ICC, because the better information the OTP receives from Ukraine, the less of its own resources it needs to spend and the more likely it will be to request a full investigation. On the other hand, good quality national investigations will make it possible to bring perpetrators to justice at the national level, which means that justice will be achieved at least partially without the intervention of the ICC.**

This publication is developed in the framework of the activity of CivilM+ platform.

CivilM+ is an independent international civil society platform, which mission is to active integration of civil initiatives to restore the Donetsk and Luhansk oblasts as peaceful, integrated and developed regions as part of a democratic Ukraine and a united European space, with the active participation of the region's population and those who have left the region due to the conflict.

The CivilM+ platform offers its participants the opportunity to collaborate as part of joint initiatives and projects, to develop and express joint positions, provide mutual support and solidarity, systematise knowledge, raise levels of qualification and improve coordination.

Platform CivilM+ was launched in December 2017 thanks to the joint effort of the civil society representatives from Ukraine, Russia, Germany and France. More about the platform and it's members on the web-site civilmplus.org.

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Federal Foreign Office