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Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond

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ABSTRACT

The Article examines an array of important legal issues that arise out of the acceptance of the jurisdiction of the International Criminal Court by Ukraine, a non-State Party to the Rome Statute, within the framework of Article 12(3) with respect to the alleged crimes against humanity committed during the 2014 Maydan protests (Declaration I) and the alleged war crimes committed in eastern Ukraine and Crimea (Declaration II). It provides an in-depth analysis of constitutional law issues linked to the acceptance of the jurisdiction by Ukraine and discusses its possible implications on the proceedings before the ICC. The Article criticizes the ICC Prosecutor's overly stringent approach with regard to the interpretation of crimes against humanity in the context of the Maydan protests and her decision not to proceed with the first declaration. The Article further argues that ignoring the situation in Ukraine is detrimental to the interests of justice.

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I. INTRODUCTION

This Article is a timely contribution to the debate on the relationship between the International Criminal Court (ICC) and Ukraine, a non-State Party to the Rome Statute. The debate has gained considerable momentum in light of Ukraine's acceptance of the ad hoc jurisdiction of the ICC under Article 12(3) of the Rome Statute for the alleged crimes against humanity committed during the 2014 Maydan protests and subsequent acceptance of jurisdiction for the alleged crimes associated with the escalation of the conflict in eastern Ukraine and the annexation of Crimea by the Russian Federation. The Article situates the debate on the ad hoc jurisdiction acceptance in the broader context by addressing the clash between Ukrainian constitutional law and international law. This tension is

exemplified by the failed ratification attempts of the Rome Statute[1] following the ruling of the Constitutional Court of Ukraine that found the Rome Statute contrary to the Constitution of Ukraine.[2] It raises a number of important legal questions on the interplay between constitutional law and international law, in particular whether the acceptance of the jurisdiction of the ICC by the Ukrainian government was in conformity with constitutional procedure and whether such acceptance overrules the earlier decision of the Constitutional Court of Ukraine, which required the amendment of the Constitution of Ukraine in order to accommodate the jurisdiction of the ICC.

The Article also discusses a number of legal challenges associated with the first declaration lodged by the Ukrainian interim government and critically reflects on the recent decision of the ICC Prosecutor not to seek the Pre-Trial Chamber's authorization to proceed with the investigation. The Article argues that by taking an overly narrow approach to the interpretation of the contextual elements of crimes against humanity, the Prosecutor made an unfortunate decision that stripped the judges of the opportunity to decide whether the crimes, which were committed during the demonstrations in Ukraine, meet the threshold of crimes against humanity. The Article argues that the Prosecutor of the ICC has missed a golden opportunity by deciding not to act on the first declaration, as this could have been a landmark case capable of enhancing the fragile legitimacy of the ICC that is largely plagued by African bias claims with respect to its choice of situations.

The Article also addresses a number of legal intricacies linked to the second declaration that, in an unexpected twist, was recently lodged by the Ukrainian government and extended the jurisdiction of the ICC for an indefinite period of time with respect to the crimes associated with the conflict in eastern Ukraine and the annexation of Crimea. Although the prospects of the ICC Prosecutor acting on the second declaration are bleak at the moment, the Article argues that missing this opportunity to act would be detrimental to the interests of justice and damaging to the public image of the Court, which would be perceived by the victims and international community as incapable of dealing with ongoing conflicts.

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1. The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 1 [hereinafter Rome Statute].

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

II. ROME STATUTE CONTRARY TO THE CONSTITUTION OF UKRAINE?

Ukraine is a signatory to the Rome Statute, although it has yet to ratify the Statute.[3] The ratification procedure was stalled by the ruling of the Constitutional Court of Ukraine, which declared the Rome Statute's principle of complementarity to be contrary to the Constitution of Ukraine.[4] Despite the fact that fifteen years have elapsed since the Constitutional Court's ruling on its nonconformity with the Ukrainian constitution, Ukraine has made miniscule progress in ratifying the Rome Statute. However, hopes remain high in light of the latest legislative initiative taken by members of Verkhovna Rada of Ukraine (Ukrainian parliament) in January 2015 to amend the Constitution of Ukraine.[5] Back in 2001, the proceedings before the Constitutional Court of Ukraine, which is tasked with deciding on conformity of international treaties with the Constitution of Ukraine,[6] were initiated by the then President of Ukraine, Leonid Kuchma, who lodged an application on nonconformity of the Rome Statute with a number of constitutional provisions.[7] Interestingly, the President's submission was at odds with the official position of Ukraine's Ministry of Foreign Affairs, which took an opposing stance and publicly declared that it had not identified any impediments to ratification of the Rome Statute.[8] The President's submission to the Court focused on a number of key constitutional provisions that he argued were contrary to the Rome Statute's provisions on immunities (Art. 27), the principle of complementarity (Art. 1, 17, and 20), surrender of nationals (Art. 89), and enforcement of prison sentences (Art. 103 and 124).[9] In addition, he contended that the Rome Statute was contrary to the constitutional provisions:

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3. Press Release, International Criminal Court, President of the Assembly of States Parties visit to Ukraine, ICC-ASP-20141009-PR1048 (Sept 10, 2014) ("Ukraine signed the Rome Statute on 20 January 2000.").

4. *See Конституційний Суд України*, *supra* note 2, at § 2.8.

5. *Проект Закону про внесення змін до статті 124 Конституції України (щодо визнання положень Римського статуту)* (Draft Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with Regard to the Recognition of the Rome Statute)), No 1788, 16 January 2015 [hereinafter Draft Law].

6. The Constitutional Court of Ukraine also rules on conformity of national legislation with the Constitution of Ukraine, interprets the Constitution and laws in Ukraine, and gives opinion on conformity of the impeachment procedure with the Constitution of Ukraine. *See Закон України 'Про Конституційний Суд України'* (Law of Ukraine on the Constitutional Court of Ukraine), art. 13. (1996) [hereinafter Law on the Constitutional Court of Ukraine].

7. *See Конституція України* (Constitution of Ukraine) art. 151 (Ukr.) (stating that the President of Ukraine has the constitutional right to submit an application to the Constitutional Court of Ukraine, requesting the Court to make a determination on the conformity of international treaties with the Constitution of Ukraine).

8. *See Конституційний Суд України*, *supra* note 2, § 1.

9. *See id.*

1. on the role of Ukraine's prosecution office,

2. on the exercise of power by Ukrainian people directly or through elected agents, and

3. on the legislative competence vested in the Ukrainian Parliament.[10]

One of the central issues in the President's submission was the incompatibility of a constitutional provision on immunities with the Rome Statute's provision on irrelevance of official immunities.[11] The Constitution of Ukraine grants immunities to certain categories of officials, namely the President of Ukraine, members of parliament, and judges during their time in office.[12] However, in exceptional circumstances, such as serious criminal allegations, immunities may be waived through a parliamentary procedure of impeachment.[13] The judges of the Constitutional Court held that Ukraine respected its obligations under international law that it was not afforded immunities for international crimes.[14] Although not referring to any developed jurisprudence on the subject, the Court took a progressive stance on the matter of immunities for international crimes.[15] The ruling affirmed that the constitutional provision on immunities was applicable *only* in the national context and, therefore, could not bar the ICC from exercising its jurisdiction.[16] A less progressive take on immunities was advanced by a French counterpart, the *Conseil constitutionnel,* in its judgment on January 22, 1999, which came to a different conclusion by claiming that the president of France effectively enjoyed immunities during his or her term in office, except for the crime of high treason.[17] This divergence of opinions advanced by constitutional courts in two different countries shows that the clash between constitutional law and international law cannot always be easily resolved. By undertaking a very narrow interpretation of constitutional provisions on immunities in a national context, states

10. *See id.*

11. *See id.* § 2.2.

12. *Конституція України* (Constitution of Ukraine) art. 80, 105, 126 (Ukr.).

13. *See id.* art. 111 (outlining the procedure for impeachment of the President of Ukraine).

14. *See Конституційний Суд України, supra* note 2, § 2.2.

15. In its reasoning, the Court, regrettably, did not resort to the analysis of a landmark Pinochet case on immunities before the House of Lords, which was the very first attempt, in a national context, to address the matters of immunities for international crimes. *See* Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, [1999] 2 W.L.R. (H.L.) 272 (Eng.); Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, [1998] 3 W.L.R. (H.L.) 1456 (Eng.).

16. *See Конституційний Суд України, supra* note 2, § 2.2.1.

17. *See* C. ELLIOTT ET AL., FRENCH LEGAL SYSTEM 33 (2nd ed., 2006); Conseil constitutionnel [CC] [Constitutional Court] decision No. 98-408DC, Jan. 22, 1999, Rec (Fr.).

may act in breach of their already existing international obligations enumerated in the international treaties that they have ratified (e.g., UN Genocide Convention), which explicitly prohibit immunities for international crimes.[18] It has been noted in the academic literature that "a strict interpretation of constitutional provisions . . . could bring a state into conflict with international obligations which it has already undertaken beyond the context of the ICC."[19]

The President's submission questioned the conformity of the constitutional ban on extradition of Ukrainian nationals to another state with the Rome Statute's provision on surrender of suspects into the custody of the ICC.[20] The court distinguished between "extradition" of nationals to another state and "surrender" of nationals to an international court.[21] Whereas extradition of a state's own national to another state is generally resisted due to the fear of the state's concern with losing its grip on the handling of its own domestic affairs, the surrender of a national to an international court, which was established with participation of the state concerned and does not have primacy over the national judicial system, is definitely more acceptable to the ICC state parties and does not come across as undermining national sovereignty.[22] In that regard, the Constitutional Court of Ukraine held that the transfer of a Ukrainian national to stand trial before an international court was in conformity with Ukraine's international obligations.[23] When ratifying the Rome Statute, some states took a different path and amended their respective constitutional provisions on the ban of extradition. As an example, Germany amended its constitutional provision on extradition by explicitly allowing for the surrender of its nationals to an international court.[24] On the other hand, Brazil chose not to amend a specific constitutional provision on the ban of extradition and resolved the situation by simply declaring its acceptance of the jurisdiction of the ICC.[25]

The judges also examined whether serving a prison term by Ukrainian nationals in another member state would be in breach of

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18. Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

19. H. Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J COMP. & INT'L. L. 5, 18 (2001).

20. *See Конституційний Суд України*, *supra* note 2, § 2.3.

21. *See id.* § 2.3.1.

22. *See, e.g.*, H. Duffy & J. Huston, *Other Common Constitutional Issues and Interpretative Approaches: Extradition*, *in* 1 THE ROME STATUTE AND DOMESTIC LEGAL ORDERS, VOLUME I: GENERAL ASPECTS AND CONSTITUTIONAL ISSUES 42, 43–46 (C. Kress & F. Lattanzi eds., 2000).

23. *See Конституційний Суд України*, *supra* note 2, § 2.3.2.

24. GRUNDGESETZES FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], May 23, 1949, BGBI. 1, art. 16(2) (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

25. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(4) (Braz.).

the Constitution of Ukraine, as convicted persons could possibly be deprived of enjoying full human rights protection as guaranteed by the Constitution.[26] The Court held that if Ukraine did not wish its convicted nationals to serve their sentence in another State Party to the ICC, it could request to have the sentence enforced on its own territory.[27] In designating the state where the sentence will be enforced, the ICC is guided by generally recognized international standards on the treatment of prisoners, as well as the views and nationality of the convicted person.[28] In the judges' opinion, these safeguards would generally preclude a situation in which the convicted person ends up in a more disadvantageous position by serving his or her sentence in a prison facility of another State Party to the ICC that is in breach of the constitutional human rights safeguards offered by the Ukrainian constitution to its nationals.[29]

Additional constitutional provisions, which the former President claimed were in conflict with the Rome Statute, included:

> 1. the role of Ukraine's prosecution office,
>
> 2. the exercise of power by Ukrainian people directly or through elected agents, and
>
> 3. the legislative competence vested in the Ukrainian parliament (Verkhovna Rada of Ukraine).[30]

The judges considered none of these to be an impediment to the ratification of the Rome Statute, having cited in support Article 9 of the Constitution of Ukraine that recognizes "international agreements that are in force and have been agreed to be binding by Verkhovna Rada of Ukraine, as part of the national legislation of Ukraine."[31]

The most contentious issue in the President's submission was the compatibility of a constitutional provision on exclusive jurisdiction of Ukrainian courts with the ICC's principle of complementarity.[32] Unlike other international courts, the ICC operates on the basis of the principle of complementarity, which means that it complements, rather than substitutes, national criminal proceedings. The ICC would only exercise jurisdiction over the crimes within its jurisdiction if a State Party was unable or

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26. *See Конституційний Суд України*, *supra* note 2, § 2.7.
27. *See id.* § 2.7.2.
28. Rome Statute, *supra* note 1, art. 103(3).
29. *See Конституційний Суд України*, *supra* note 2, § 2.7.2.
30. *See id.* §§ 2.4, 2.5, 2.8.
31. *See id.* (citing in support, Art. 9 Constitution of Ukraine).
32. *See Конституційний Суд України*, *supra* note 2, § 2.1.

unwilling to genuinely carry out the investigation or prosecution.[33] As noted in the Rome Statute's commentary, the provision on complementarity was carefully drafted to ensure that a State Party's "sovereign right to try crimes committed on their territory would not be encroached."[34] The judges of the Constitutional Court misread the Rome Statute's provision on complementarity, and they concluded that the complementary aspect of jurisdiction exercised by the ICC could not be reconciled with the Constitution of Ukraine, which regards the administration of justice as the exclusive prerogative of national courts.[35]

In this regard, it is worth mentioning that Ukraine is a signatory to the European Convention of Human Rights and recognizes the jurisdiction of the European Court of Human Rights (ECHR), which routinely deals with cases submitted by Ukrainian nationals on human rights violations enshrined in the Convention.[36] The obvious question that comes to mind as to how bringing a case before the ICC is different from adjudicating a case in the ECHR, given that both institutions represent international judicial institutions that—following the Constitutional Court's narrow reading of the Constitution of Ukraine—should not be entitled to rule on matters within the exclusive competence of Ukrainian courts. In this regard, the judges of the Constitutional Court of Ukraine held that the individual's right to seek remedies for human rights violations in the ECHR was guaranteed by Article 55 of the Constitution of Ukraine, which could be invoked by a person who has exhausted all available national remedies of human rights protection.[37] When comparing the procedural framework of the ECHR and the ICC, the judges held that the former was an *auxiliary* means to protect the individual's human rights, whereas the latter was *complementary* to national proceedings.[38] It is the *complementary* nature of the ICC jurisdiction that the judges held as not being compatible with Article 124 of the Constitution of Ukraine and, therefore, as hindering the ratification of the Rome Statute.

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33. Rome Statute, *supra* note 1, art. 17.

34. WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 336 (2010).

35. *See Конституційний Суд України*, *supra* note 2, § 2.1; *see also Конституція України* (Constitution of Ukraine) art. 124 (Ukr.).

36. *See* COUNCIL OF EUROPE, CHART OF SIGNATURES AND RATIFICATIONS OF TREATY 005, http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/signatures?p_auth=fATFp2yA [https://perma.cc/9M7Q-CUS6] (archived Feb. 13, 2016) (showing that Ukraine signed the European Convention for the Protection of Human Rights and Fundamental Freedoms on 9 November 1995 and subsequently ratified it on 11 September 1997).

37. *See Конституційний Суд України*, *supra* note 2, § 2.1; *see also Конституція України* (Constitution of Ukraine) art. 55 (Ukr.).

38. *See id.*

The distinction made by the judges between the ECHR and ICC is not entirely clear, as both courts may only assume jurisdiction when national courts are no longer a viable option, and, therefore, it is necessary for an individual to resort to the jurisdiction of the ECHR or for a state to refer the case to the ICC. The wording of Article 55 of the Constitution of Ukraine suggests that it only applies to individuals whose human rights were violated. However, a broader teleological reading of the Constitution does not impede the state from seeking remedies for international crimes—the most serious violations of human rights—that occurred on its territory. It should also be noted that the ICC's victim participation framework is capable of protecting the individual human rights of those who suffered harm as a result of international crimes within the meaning of Article 55 of the Constitution of Ukraine.[39] Victim participation in the ICC is clearly in line with Article 55, which upholds the individual's right to seek remedies for human rights violations, including the most serious violations of human rights that constitute international crimes.

The interpretation of the principle of complementarity by the judges of the Constitutional Court stems from the lack of understanding of what complementarity entails. It is also worth mentioning that the ruling was delivered in 2001, which was long before the ICC construed the principle of complementarity in its jurisprudence for the very first time in the context of the admissibility proceedings involving Libya and Kenya. In the Gaddafi admissibility decision, the Trial Chamber averred that "the principle of complementarity expresses a preference for national investigations."[40] Similarly, the Appeals Chamber in the *Kenyatta et al.* case underlined that "[s]tates have the primary responsibility to exercise criminal jurisdiction and the Court does not replace, but complements them in that respect."[41] Article 17 of the Rome Statute outlines a number of conditions that render a case inadmissible before the ICC in favor of national jurisdictions.[42] The ICC cannot assume jurisdiction over a case that is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is

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39. *See generally* Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber I (Jan. 18, 2008) (decision on victims' participation); H. Chung, *Victim's Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise*, 6 NW. J. INT'L HUM. RTS. L. 459 (2008); I. Marchuk, *Commentary*, *in* ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL COURT 2006–2008, at 278 (A. Klip and S. Freeland eds., 2014).

40. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-344-Red, Pre-Trial Chamber I ¶ 52 (May 31, 2013) (decision on the admissibility of the case against Saif Al-Islam Gaddafi).

41. Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-274 OA, Appeals Chamber ¶ 36 (Aug. 30, 2011).

42. Rome Statute, *supra* note 1, art. 17(1).

genuinely unwilling or unable to carry out the investigation or prosecution.[43] The ICC jurisprudence provides guidance as to what is meant by "the case being investigated or prosecuted" as well as the state's "unwillingness" or "inability" criteria.[44] The jurisprudence in the context of admissibility proceedings shows that the ICC does not usurp its power and in fact strives to promote the principle of positive complementarity.

In the most recent commentary on conformity of the Constitution of Ukraine with the Rome Statute, Professor M. Hnatovsky stresses the erroneous reading of the principle of complementarity by the Constitutional Court, which did not take into consideration that the ICC jurisdiction would only be triggered if Ukraine did not fulfill its international obligations to prosecute international crimes.[45] Further, he argues that "the principle of complementarity is not a problem but, to the contrary, a guarantee against unlawful interference of the ICC in the competence of national courts, and is aimed at protecting the sovereignty of the State, rather than limiting it."[46] Hence, by ratifying the Rome Statute, Ukraine will not deprive its domestic courts of jurisdiction over international crimes. To the contrary, it will provide them with necessary tools to prosecute these crimes nationally, while at the same time offering the possibility to turn to the ICC for assistance if the prosecution of such crimes is impossible due to Ukraine's unwillingness or inability to do so.

Despite the criticism voiced by many academic commentators and civil society organizations against the ruling of the Constitutional Court of Ukraine, it still remains in force.[47] The question of the

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43. *See id.*

44. *See id.*; *see also* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11 OA 4, Appeals Chamber (May 21, 2014); Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11 OA 6, Appeals Chamber (July 24, 2014).

45. M. Hnatovsky, 'Opinion on Conformity of the Constitution of Ukraine with the Rome Statute of the ICC' (in Ukrainian), April 2014 (on file with author).

46. *See id.*

47. *See* A. ZYUKINA, *Проблеми імплементації Римського статуту в Україні* (Problems of Implementation of the Rome Statute in Ukraine), *in* 60 АКТУАЛЬНІ ПРОБЛЕМИ ДЕРЖАВИ І ПРАВА (ACTUAL PROBLEMS OF STATE AND LAW) 419, 424 (2011); S. Kivalov, *Міжнародне кримінальне правосуддя: від Нюрнберзького військового трибуналу до міжнародного кримінального суду* (International Criminal Justice: The Nuremberg Military Tribunal by the International Criminal Court), *in* 1 АЛЬМАНАХ МІЖНАРОДНОГО ПРАВА (ALMANAC INTERNATIONAL LAW) 5, 18 (2009); Press Release, Coalition for the International Criminal Court, Global Coalition Urges Ukraine to Join the ICC (Jul. 9, 2012) [hereinafter CICC 2012], http://www.coalitionfortheicc.org/documents/Ukraine_URC_July2012_Press_release_Final.pdf [https://perma.cc/U478-HNVM] (archived Feb. 13, 2016); Press Release, Coalition for the International Criminal Court, Global Coalition Urges Ukraine to Join the ICC (Jul. 1, 2008), http://www.iccnow.org/documents/UkraineURCPRJuly2008en.pdf [https://perma.cc/W2J2-BZVU] (archived Feb. 13, 2016); Press Release, Amnesty International, Ukraine: Letter to New President Calls for Urgent Human Rights Reform (Jan. 24, 2005) [hereinafter Amnesty International],

validity of the ruling has gained prominence in the context of the two Ukrainian declarations under Article 12 (3) of the Rome Statute on the ad hoc acceptance of the jurisdiction of the ICC. A number of important questions surface. Does the ad hoc acceptance of ICC jurisdiction by Ukraine overrule the decision of the Constitutional Court? If the ICC chooses to authorize an investigation into the alleged crimes committed in Ukraine, will it need to look into the ruling of the Constitutional Court of Ukraine? Should the current government focus on completing the initiated amendment procedure that will pave the way towards the ratification of the Rome Statute? Alternatively, can the validity of the Constitutional Court be challenged in light of the dubious reading of the ICC's principle of complementarity?

III. TOWARDS RATIFICATION OF THE ROME STATUTE THROUGH AMENDING THE CONSTITUTION OF UKRAINE

First of all, it is necessary to consider the hierarchical relationship between Ukrainian national law and international law. Should there be a discrepancy between Ukrainian national legislation and a particular international treaty, international law will only apply if Ukraine chooses to implement necessary changes that would eliminate such discrepancies.[48] Pursuant to Article 9 of the Constitution of Ukraine, international agreements that are in force and have been agreed to be binding by Verkhovna Rada of Ukraine become part of the national legislation of Ukraine.[49] However, the question of the relationship between national and international law is yet unclear, as the constitutional provision remains silent as to whether national legislation or international treaties should prevail. This uncertainty seems to be resolved in *lex specialis*—the Law of Ukraine On International Treaties, which states that duly ratified international treaties have primacy over national legislation.[50] On the subject of ratification, the law provides that international agreements with respect to Ukraine's participation in international organizations should be ratified.[51] The process of ratification entails the adoption of a specific law on ratification that includes a full text of the international treaty in question.[52] If the ratification of a particular international treaty necessitates the adoption of new laws

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http://www.amnesty.org.uk/press-releases/ukraine-letter-new-president-calls-urgent-human-rights-reform [https://perma.cc/KM89-9WSF] (archived Feb. 13, 2016).

48. *See Конституція України* (Constitution of Ukraine) art. 9 (Ukr.).

49. *See id.*

50. Закон України 'Про міжнародні договори України' (Law of Ukraine on International Treaties of Ukraine) adopted by Verkhovna Rada of Ukraine on 29 June 2004, art. 19 (2).

51. *See id.*, art. 9(2)(d).

52. *See id.*, art. 9(1).

or amendments to existing laws, it is required that the draft law accounting for such changes be submitted to the parliament along with the law on ratification of that international treaty.[53]

A reading of the constitutional law provision together with *lex specialis* on international treaties presupposes amending the Constitution of Ukraine's section on the exclusive competence of Ukrainian national courts in order to remove the obstacle to ratifying the Rome Statute as identified by the Constitutional Court of Ukraine. However, one may also adopt a broader view and question the validity of the Constitutional Court's ruling with respect to the interpretation of the ICC's principle of complementarity and its relationship to Ukrainian national courts. Having said that, the law on the Constitutional Court of Ukraine does not provide a procedure that would allow for reopening the case on the grounds of an alleged wrongful interpretation of an international treaty, as such reopening is only possible in light of the discovery of new facts that, although had existed at the time the case was heard by the court, were not subject to the proceedings.[54] Given that the Constitutional Court undertook a detailed treatment of the principle of complementarity, this would preclude the situation of reopening the case. Hence, the only way forward towards ratification of the Rome Statute appears to be amending the Constitution of Ukraine, which is a fairly complex and burdensome procedure.

The constitutional amendment procedure may be initiated by the President of Ukraine or by at least one third of all members of Verkhovna Rada of Ukraine.[55] Amendments to constitutional provisions, apart from the provisions laid down in Chapter I (General Foundations), Chapter III (Elections. Referendum), and Chapter XIII (Amendments to the Constitutions of Ukraine), must be preliminarily approved by a parliamentary majority and garner support of at least two-thirds of all members of the parliament during the final hearing.[56]

Following the 2001 ruling of the Constitutional Court of Ukraine, all attempts to amend Article 124 of the Constitution in order to accommodate the ICC within Ukraine's framework of the administration of justice have been futile,[57] with very little information available on the outcome of legislative initiatives made in 2008 and 2014. Amnesty International's appeal to the top Ukrainian

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53. *See id.*, art. 9(7).

54. *See* Law on the Constitutional Court of Ukraine, *supra* note 6, art. 68.

55. *See Конституція України* (Constitution of Ukraine) art. 154 (Ukr.).

56. *See id.*, art. 155.

57. *E.g.*, VERKHOVNA RADA OF UKRAINE, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=49833 [https://perma.cc/8E3P-C3ZC] (archived Feb. 29, 2016) (stating that Law Draft No. 0072 on Ratification of the Rome Statute was recalled on Feb. 24, 2014).

officials urging them to undertake the necessary constitutional amendment in order to "allow prompt ratification of the Rome Statute," as well as the 2008 Coalition for the ICC (CICC) campaign, were left largely unattended.[58] It does not come as a surprise that some countries are reluctant to allow international courts to exercise jurisdiction over the crimes committed on their territory and/or by their nationals, fearing that this would lead to a loosening of their grip on their independent handling of domestic affairs. As mentioned elsewhere, amendment processes may be "resisted for fear of opening a political Pandora's box."[59] However, contrary to popular belief, the ICC is not interested in expanding its already heavy workload. Rather it strives to promote the effective implementation of the Rome Statute by States Parties that will enable them to adjudicate international crimes in their national jurisdictions.[60] The ICC, as a court of last resort, will only step in when national jurisdictions cannot cope with the prosecution of international crimes and require assistance of the Court.

The discussion on the necessity of ratifying the Rome Statute was revived yet again in January 2015, on the fifteenth anniversary since the Rome Statute was signed by Ukraine. The draft law on amending Article 124 of the Constitution of Ukraine was submitted by 155 parliamentarians on January 16, 2015, for further consideration by Verkhovna Rada of Ukraine.[61] The draft law suggests introducing the following provision into the text of Article 124: "Ukraine may recognize the jurisdiction of the ICC on the conditions stipulated by the Rome Statute of the ICC."[62] In the explanatory note to the draft, the importance of ratification is brought to the fore in light of the current unstable situation in Ukraine:

> [T]he Rome Statute of the ICC should be immediately ratified given a large number of victims as a result of criminal acts committed by the highest governmental officials, as well as given the investigation of crimes that are of concern to the international community and, therefore, fall within the jurisdiction of the ICC.[63]

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58. *See* CICC 2012, *supra* note 47; Amnesty International, *supra* note 47.

59. Duffy, *supra* note 19, at 7.

60. SCHABAS, *supra* note 34, at 336.

61. Draft Law, *supra* note 5.

62. The wording is similar to the amendment introduced into the French Constitution following the ruling of the *Conseil Constitutionnel*. *See id.*

63. *Пояснювальна записка до проекту закону про внесення змін до статті 124 Конституції України (щодо визнання положень Римського статуту)* (Explanatory Note to the Draft Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with regard to the recognition of the Rome Statute), 16 January 2015.

At the time of writing this Article, little information was available on the status of the draft law on the website of the parliament, apart from a brief note stating that the draft is suggested to be included on the agenda of the parliamentary hearing on December 9, 2015, following consultations on the law draft in parliamentary committees.[64]

However, it is important to keep in mind that the Rome Statute does not have retroactive effect, which means that the ICC could only potentially exercise jurisdiction with respect to crimes committed on the territory of Ukraine after the entry into force of the Rome Statute, unless Ukraine makes a declaration under Article 12 (3) and accepts the ad hoc jurisdiction of the Court before the Rome Statute's entry into force.[65] As stated above, Ukraine has already accepted the ad hoc jurisdiction of the ICC with respect to the alleged crimes against humanity committed during the Maydan protests in the period between November 21, 2013, and February 22, 2014,[66] as well as with respect to the alleged crimes against humanity and war crimes committed in eastern Ukraine and Crimea from February 20, 2014, onwards.[67]

The National Security and Defence Council of Ukraine expressed skepticism with respect to the ratification of the Rome Statute by turning to the example of Georgia, a signatory to the Rome Statute that unsuccessfully sought to have the alleged war crimes committed during the 2008 Georgia-Russia conflict be prosecuted by the ICC.[68] Since the beginning of the preliminary investigation in Georgia, there

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64. For status updates on this particular law draft, see VERKHOVNA RADA OF UKRAINE, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53621 [https://perma.cc/MB5J-G7PX] (archived Feb. 13, 2016); VERKHOVNA RADA OF UKRAINE, http://iportal.rada.gov.ua/meeting/awt/show/6060.html [https://perma.cc/Q2WX-RNTK] (archived Feb. 13, 2016) (noting that according to the official schedule of parliamentary hearings, the law draft has not been included on the agenda yet).

65. Rome Statute, *supra* note 1, art. 11(2).

66. Declaration of Verkhovna Rada of Ukraine to the ICC on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity, committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013–22 February 2014 signed by the Chairperson of the Verkhovna Rada of Ukraine Oleksandr Turchynov, Case No 790-VII, 25 February 2014 [hereinafter Declaration I].

67. Declaration of Verkhovna Rada of Ukraine to the ICC on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the Russian Federation and leaders of terrorist organizations "DNR" and "LNR," which led to extremely grave consequences and mass murder of Ukrainian nationals signed by the Chairperson of the Verkhovna Rada of Ukraine V. Groysman, No 145-VIII, 4 February 2015 [hereinafter Declaration II].

68. *The Council of the National Security and Defence Does Not Advise to Hurry Up with Ratification of the Rome Statute*, INTERFAX NEWS (Feb. 2, 2015), http://ua.interfax.com.ua/news/political/248115.html [https://perma.cc/VMA7-D523] (archived Feb. 13, 2016).

had been very scarce public information on the progress of the investigation by the ICC.[69] Unexpectedly, on October 13, 2015, which is seven years since the conflict took place, the ICC Prosecutor finally decided to seek the Pre-Trial's Chamber authorization to proceed with an investigation.[70] On the one hand, the Prosecutor's decision is hailed as the new chapter in the history of the Court;[71] however, on the other hand, the decision is also a testament to the ICC Prosecutor's inefficiency and short-sighted strategy, as the momentum to move forward with the case seems to have been lost a long time ago. As one commentator suggests, by going forward with the situation in Georgia, the Prosecutor signals that other sensitive cases under the preliminary examination, such as Ukraine, Palestine and Afghanistan, are "not likely to be opened anytime soon."[72]

Four weeks later, on November 12, 2015, the ICC Prosecutor issued its preliminary examination report, in which it informs of its decision not to act on the first declaration lodged by Ukraine with respect to the alleged crimes against humanity during the 2014 Maydan protests.[73] The Article will further address substantive law issues linked to the two declarations on the ad hoc jurisdiction acceptance and will argue that the ICC Prosecutor got it wrong when she decided not to move forward with the first declaration, as the preconditions for seeking the authorization of the Pre-Trial Chamber appear to be in place.

IV. DECLARATION ACCEPTING THE JURISDICTION OF THE ICC FOR ALLEGED CRIMES AGAINST HUMANITY DURING THE MAYDAN PROTESTS (DECLARATION I)

The refusal of the former President of Ukraine Viktor Yanukovych to sign the EU association agreement sparked nationwide protests in Ukraine in favor of closer ties with the

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69. For more information on the preliminary examination of the situation in Georgia, see generally INTERNATIONAL CRIMINAL COURT, *Georgia*, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/ICC-01_15/Pages/default.aspx [https://perma.cc/9NLP-Z79H] (archived Feb. 13, 2016) (containing more information on the preliminary examination of the situation in Georgia).

70. Corrected version of Request for authorization of an investigation pursuant to article 15, INTERNATIONAL CRIMINAL COURT, ICC-01/15-4-Corr, Oct. 16, 2015.

71. News Release, Coalition for the International Criminal Court, ICC Considers Georgia Investigation—Key Facts and Reaction (Oct. 14 2015), https://ciccglobaljustice.wordpress.com/2015/10/14/icc-considers-georgia-investigation-key-facts/ [https://perma.cc/Q34C-2TJT] (archived Feb. 13, 2016).

72. Alex Whiting, *The Significant Firsts of an ICC Investigation in Georgia*, JUST SECURITY (Oct. 14, 2015, 9:38 AM), https://www.justsecurity.org/26817/icc-investigation-georgia/ [https://perma.cc/HJJ2-LJED] (archived Feb. 15, 2016).

73. Office of the Prosecutor, Report on Preliminary Examination Activities (Nov. 12, 2015) [hereinafter OTP report].

European Union.[74] Two months into the pro-EU demonstrations, the government unleashed violence against peaceful protesters that resulted in mass killings of and injuries to protesters who took to the streets to oppose government policies.[75] Despite Yanukovych's attempts to broker a compromise deal with the opposition leaders and agree on the early presidential elections in December 2014, the protestors rejected the deal and demanded his resignation with immediate effect.[76]

Claiming that he feared for his life, Yanukovych fled Ukraine to neighboring Russia, leaving the country without a president.[77] On February 22, 2014, Verkhovna Rada of Ukraine adopted the Resolution "On Self-Withdrawal of the President of Ukraine From Performing His Constitutional Duties," which confirmed that Yanukovych withdrew from performing his constitutional duties and found his actions to have threatened the territorial integrity and sovereignty of Ukraine as well as the protection of human rights and freedoms.[78] The Parliament bestowed presidential duties upon the Chairperson of the Parliament of Ukraine, Oleksandr Turchynov, who acted as interim President until the election of Petro Poroshenko as the new President of Ukraine.[79]

On February 25, 2014, while the interim President still held office, Verkhovna Rada of Ukraine declared that it accepted the jurisdiction of the ICC with respect to crimes against humanity allegedly committed by the Ukrainian law enforcement agencies, on orders of senior government officials that authorized the unleashing of violence against peaceful protesters.[80] In his capacity as *ex officio* Head of State, Oleksandr Turchynov signed the declaration.[81] The

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74. *See* EUROPEAN PARLIAMENT, UKRAINE: TIMELINE OF EVENTS, http://www.europarl.europa.eu/news/en/news-room/20140203STO34645/Ukraine-timeline-of-events [https://perma.cc/UBV5-VA6K] (archived Feb. 15, 2016).

75. *See id.*

76. *See id.*

77. *See id.*

78. *Про самоусунення Президента України від виконання конституційних повноважень та призначення позачергових виборів Президента України* [Resolution of Verkhovna Rada of Ukraine 'On Self-Withdrawal of the President of Ukraine from Performing His Constitutional Duties and Scheduling Early Elections of the President of Ukraine'] (Feb. 22, 2014).

79. *See Конституція України* (Constitution of Ukraine) art. 112 (Ukr.) (explaining what procedure follows in the event of early termination of the presidential duties). Petro Poroshenko was elected as a new President of Ukraine in a landmark presidential election on 25 May 2014. Many world leaders, including the U.S. President Barack Obama, German Chancellor Angela Merkel, and French President Francois Hollande, recognized the importance of elections as a way out of the political crisis and congratulated Petro Poroshenko on winning the election.

80. *See* Declaration I, *supra* note 66 (recognizing jurisdiction for the purpose of having senior officials of Ukraine face criminal liability).

81. *See id.* (containing Oleksandr Turchynov's electronic signature at the end of the document).

declaration submits that Ukrainian law enforcement agencies unlawfully used physical force and weapons against the participants of peaceful demonstrations in Kyiv and other Ukrainian cities, having acted on orders of Ukrainian senior officials, which resulted in the killing of over one hundred nationals of Ukraine and other states; serious injuries inflicted upon more than 2,000 persons (500 persons in serious condition), torture, abductions, enforced disappearances, unlawful deprivation of liberty, and inflicting damage on the protesters' property.[82]

Article 12 (3) of the Rome Statute allows for a state that is not a party to the Statute to accept jurisdiction of the Court by lodging a declaration with the registrar of the Court.[83] The statutory provision on the acceptance of jurisdiction is a window of opportunity for a non-State Party to the Rome Statute to opt for the jurisdiction of the Court. The jurisdiction triggered by the acceptance of a non-State Party may be exercised retroactively—that is, in relation to crimes that have already been committed.[84] However, if a state becomes a party to the Rome Statute, the Court may only exercise jurisdiction with respect to the crimes committed after the entry into force of the Statute. This means that even if Verkhovna Rada of Ukraine adopted the required constitutional amendment to allow for the jurisdiction of the Court and ratified the Rome Statute, the jurisdiction of the Court would only apply from the date of the Statute's entry into force. Hence, lodging a declaration under Article 12 (3) of the Rome Statute was the only available venue to recognize the jurisdiction of the Court with respect to the crimes that have already been committed during the Maydan protests (or commonly known in Ukraine as the "Revolution of Dignity").

Although Verkhovna Rada of Ukraine adopted the declaration accepting the ICC jurisdiction in February 2014, it was not until mid-April that the declaration was officially lodged with the Registrar of the ICC.[85] In its succinct press release, the ICC acknowledged that the declaration was relayed to its Office of the Prosecutor for further consideration.[86] The statement also made clear that the acceptance of

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82. *Id.*

83. Rome Statute, *supra* note 1, art. 12(3).

84. *See id.* art. 11(2) (stating that it may apply retroactively if a declaration is made under article 12(3)); *see also* Kevin Jon Heller, *Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively*, OPINIO JURIS (Nov. 29, 2014), http://opiniojuris.org/2012/11/29/yes-palestine-could-accept-the-iccs-jurisdiction-retroactively/ [http://perma.cc/JM7W-V3V4] (archived Jan. 24, 2016).

85. *See* Press Release, ICC, Ukraine Accepts the ICC Jurisdiction over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014, ICC-CPI-201440417-PR997 (Apr. 17, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr997.aspx [http://perma.cc/ETH3-7ZVU] (archived Jan. 24, 2016).

86. *Id.*

the ICC's jurisdiction did not automatically trigger an investigation, as it was within the discretion of the ICC prosecutor to decide whether or not to request the Pre-Trial Chamber's authorization of an investigation.[87]

Ukraine's acceptance of ICC jurisdiction by way of submitting an Article 12 (3) declaration is not a unique occurrence in the history of the ICC. Similar declarations were previously lodged by Ivory Coast and Palestine. The Republic of Ivory Coast, which is not a State Party to the Rome Statute, initially lodged a declaration accepting the jurisdiction of the Court for the crimes committed on its territory since September 19, 2002.[88] Ironically, the declaration was signed by the Minister of Foreign Affairs Mamadou Bamba acting on behalf of the government of the former President Laurent Gbagbo. The latter was later charged himself with crimes against humanity committed in the midst of the post-election chaos and currently stands trial before the ICC.[89] In December 2010, a newly elected President and former rival of Laurent Gbagbo, Alassane Ouattara, confirmed "the continuing validity of the 2003 Declaration" and, in a letter to the ICC, declared that it was "reasonable to believe that crimes falling under the jurisdiction of the ICC have been committed" during the serious post-election crisis in October–November 2010.[90]

The Palestinian National Authority (PNA) lodged its declaration on the acceptance of the ICC's jurisdiction on January 21, 2009, "for the purpose of identifying, prosecuting, and judging the authors and accomplices of crimes committed in the territory of Palestine since 1 July 2002."[91] However, the then ICC Prosecutor Luis Moreno Ocampo decided not to proceed with the investigation in light of Palestine's

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87. *Id.*

88. Mamadou Bamba, Déclaration de Reconnaissance de la Compétence de la Cour Pénale Internationale [Declaration Accepting the Jurisdiction of the ICC] (Apr. 18, 2003), *available at* https://www.icc-cpi.int/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf (last visited Jan. 24, 2016) [perma.cc/VC66-ESSS] (archived Jan. 24, 2016) (signed by the Minister of Foreign Affairs of the Government of former President Gbagbo).

89. *See generally* The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/ICC-02_11-01_15/Pages/default.aspx [perma.cc/8X22-7LPX] (archived Jan. 24, 2016).

90. Letter from President Alassane Ouattara, Confirmation de la Déclaration de Reconnaissance (Dec. 14, 2010), https://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf [perma.cc/X4DL-2AXC] (archived Jan. 24, 2016) (confirming the acceptance of the jurisdiction of the ICC).

91. *See* Ali Khashan, Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009), https://www.icc-cpi.int/NR/rdonlyres/7CFB4B01-0B7E-4590-A8A8-7863E516F0A3/279777/20090122PalestinianDeclaration7.pdf [http://perma.cc/B47G-TN2A] (archived Jan. 24, 2016) (recognizing the jurisdiction of the ICC by the Minister of Justice for the Government of Palestine).

contentious statehood status under international law.[92] Most recently, Palestine acceded to the Rome Statute and at the same time lodged a new declaration accepting the ad hoc jurisdiction of the ICC over the crimes committed between June 13, 2014, and the Rome Statute's entry into force.[93] Following in Palestine's footsteps, it would be ideal if Ukraine not only submitted declarations accepting the ad hoc jurisdiction of the ICC but also committed itself to the ratification of the Rome Statute.

Below the Article provides an overview of legal challenges connected to Ukraine's declaration, in particular the contested validity of the declaration, identification of key suspects of the alleged crimes against humanity, and the narrow scope of the temporal jurisdiction, which was subsequently revisited by the new declaration lodged by Ukraine.

A. *Problems Linked to Ukraine's Declaration I*

1. Is the Declaration Duly Signed?

A number of legal problems are associated with Ukraine's declaration on the acceptance of the ICC's jurisdiction. First of all, the declaration that garnered support of a parliamentary majority was signed by Oleksandr Turchynov, both in his capacity as the Chairperson of the Parliament and *ex officio* Head of State—a role that the Chairperson of Verkhovna Rada of Ukraine assumes if the President is unable to perform his constitutional duties.[94] When the President of Ukraine, Viktor Yanukovych, fled the country and abandoned his presidential post, the Chairperson of Verkhovna Rada of Ukraine, Oleksandr Turchynov, assumed presidential duties. In his capacity as *ex officio* Head of State, he signed the declaration

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92. *See* Luis Moreno-Ocampo, *Statement by ICC General Prosecutor Abnegating Competence for Crimes Committed in Palestine*, VOLTAIRE NETWORK (Apr. 3, 2012) (refraining from assessing whether Palestine qualifies as a state for the purpose of acceding to the Rome Statute, and left the question of legal determination to the UN relevant authorities or the ASP).

93. *See* Mahmoud Abbas, Declaration Accepting the Jurisdiction of the International Criminal Court (Dec. 31, 2014), https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf [perma.cc/2A6D-QJHW] (archived Jan. 24, 2016); *see also* Press Release, ICC, The Prosecutor of the ICC, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 16, 2015), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx [perma.cc/G29R-6N5Z] (archived Jan. 24, 2016) (announcing the opening of a preliminary examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation are met under article 53(1) of the Rome Statute).

94. *See Конституція України* (Constitution of Ukraine) art. 112 (Ukr.) (stating that in the event of an early termination of the president, the powers of the president are vested in the Chairman of the Verkhovna Rada of Ukraine).

accepting the ad hoc jurisdiction of the ICC by Ukraine.[95] What has been questioned in the media and numerous international law blogs is whether the Chairperson of the Parliament had the constitutional right to sign the declaration in the capacity of *ex officio* Head of State, given the glaring absence of self-withdrawal as a ground for termination of presidential duties as per the Constitution of Ukraine. Pursuant to Article 108 of the Constitution, the duties of the President may be terminated before the expiry of his/her term in office on the grounds of: (1) resignation, (2) inability to perform his/her duties for health reasons, (3) removal from office by means of the impeachment procedure, and (4) death.[96] In the case of resignation, the president must personally tender his resignation at a parliamentary hearing.[97] As former President Yanukovych neither tendered his resignation nor was removed from office through the impeachment procedure, the validity of the declaration signed by the Chairperson of the Parliament has been subject to discussion.[98]

At first sight, a narrow textual reading of the constitutional provisions renders questionable the legality of the parliamentary decision on bestowing presidential duties on the Chairperson of Verkhovna Rada of Ukraine in the face of Yanukovych's self-withdrawal. However, a broader teleological reading of the Constitution, in light of its democratic principles and foundations, would render the presidential mandate illegitimate if the President breached the oath he had undertaken when assuming his office and is suspected of directing crimes against humanity against his country's own nationals. The failure to serve for the good of his country and the dereliction of duty in protecting the rights and freedoms of its citizen must effectively be viewed as being incompatible with the presidential mandate.

Although the international community opposes the unconstitutional and forceful change of a democratically elected government, it appears that in recent years the distinction has been made between "legitimate popular uprisings against authoritarian rulers" and "unconstitutional changes of government."[99] In the

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95. *See* Declaration I, *supra note* 66 (containing Oleksandr Turchynov's electronic signature at the end of the document).

96. *Конституція України* (Constitution of Ukraine) art. 108 (Ukr.).

97. *Id* art. 109.

98. *See* News of Ukraine, *Viktor Yanukovych Press Conference in Rostov 11-03-14*, YOUTUBE (Mar. 11, 2014), https://www.youtube.com/watch?v=uR8IPqVYd84 [https://perma.cc/8GJ6-99CS] (archived Feb. 15, 2016) (depicting the press conference on March 11, 2014 in Rostov-on-Don, Russia where Yanukovych gave an official press conference during which he ascertained that he was a legitimate president of Ukraine after he fled Ukraine).

99. *See* EUR. PARL., *Actions of the African Union Against Coups D'état*, 2 (Mar. 2015), http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/551307/EPRS_ATA(2015)551307_EN.pdf [perma.cc/8HXU-6UXC] (archived Jan. 24, 2016) (detailing the

context of the Egyptian uprising against former President Hosni Mubarak's regime and other uprisings in North Africa, the African Union panel proposed a number of criteria that would render the unconstitutional change of a government (UCG) legitimate, such as (a) the descent of the government into total authoritarianism to the point of forfeiting its legitimacy, (b) the absence or total ineffectiveness of constitutional processes for effecting change of government, (c) the popularity of the uprisings in the sense of attracting a significant portion of the population and involving people from all walks of life and ideological persuasions, (d) the absence of involvement of the military in removing the government, and (e) the peacefulness of the popular protests.[100] The proposed criteria reflect the latest developments in the international arena when authoritarian governments that show gross disregard for the human rights of its citizens are destined to crumble under pressure. The legitimacy of UCG is also tested through governmental recognition by another state(s), which entails that "the recognizing state(s) will deal with the government as the governing authority of the state and accept the usual legal consequences of such status."[101] As Thomas Franck points out, while not yet encapsulated in law, but rapidly becoming a norm within the international system, the right to govern is contingent on a government having met both the democratic entitlement of the governed as well as the standards of the community of states.[102] The legitimacy of a government is closely linked to the rite of recognition. This act of recognition by a foreign government endows a new regime with a range of entitlements and duties that are concomitant with sovereignty and will in turn bestow upon a de facto regime the status of "official government."[103] When a new regime is recognized as validly representing the state in its foreign relations, it can avail itself of rights accorded to sovereigns under international law, of which the lawful negotiation and conclusion of international agreements form an indispensable part.[104]

In the present case, President Yanukovych left Ukraine in the absence of a coup d'état or other similar undemocratic attempt at

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African Union's approach that distinguishes between these two different efforts to change the government).

100. *Final Report of the African Union High-Level Panel for Egypt*, AFRICAN UNION PEACE & SECURITY, June 17, 2014, § 83, http://www.peaceau.org/en/article/final-report-of-the-african-union-high-level-panel-for-egypt#sthash.odJRzlx8.dpuf [perma.cc/LUT9-H7SX] (archived Jan. 24, 2016).

101. MALCOLM N. SHAW, INTERNATIONAL LAW 455 (6th ed. 2008); Jonte van Essen, *De Facto Regimes in International Law*, 28 UTRECHT J. INT'L & EUR. L. 31, 40 (2012).

102. T. M. Franck, *Legitimacy and the Democratic Entitlement*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25, 26 (G.H Fox and B. R. Roth eds., 2000).

103. *See* T. M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 726 (1988); van Essen, *supra* note 101, at 32–39.

104. *See* S. D. Murphy, *Democratic Legitimacy and the Recognition of States and Government*, 48 INT'L & COMP. L.Q. 545, 545-46 (1999).

ousting him from his post. Instead, his departure was triggered by public protests calling for his resignation in the face of the waning legitimacy of his presidential mandate.[105] The change of the Ukrainian government was widely accepted internationally as an expression of the Ukrainian people's right to demand democratic change.[106] In light of this, the position of the author of this Article is that the new government was legitimately instituted, and therefore the chairperson of Verkhovna Rada of Ukraine in his capacity as *ex officio* Head of State was entitled to submit a binding declaration to the ICC, which subjects Ukraine to the jurisdiction of the Court.

On a separate note, it still remains unclear why Verkhovna Rada of Ukraine did not choose a more definite path towards the removal of Viktor Yanukovych from his office by means of the impeachment procedure. Although the procedure itself is fairly complicated and time-consuming, it was undoubtedly worth pursuing and would have dispelled any doubts regarding the legal capacity of the *ex officio* Head of the State to act on behalf of the state. Pursuant to Article 111 of the Constitution of Ukraine, the impeachment procedure is initiated by a parliamentary majority if the President of Ukraine is suspected of committing treason or another crime.[107] As a result, the parliament of Ukraine should establish an ad hoc temporary investigative commission to conduct an investigation into the crimes allegedly committed by the President.[108] The decision on indicting the President of Ukraine should be adopted by two-thirds of a parliamentary majority, following a special plenary session, in which the findings of the investigative commission are heard.[109] The very decision on the removal of the President of Ukraine from office through the impeachment procedure should be adopted by at least three-fourths of the members of Verkhovna Rada of Ukraine and should be accompanied by both a ruling by the Constitutional Court of Ukraine that states that the impeachment procedure has been conducted in accordance with the Constitution of Ukraine and the ruling of the Supreme Court of Ukraine that the crimes on the basis of which the President is indicted contain the legal elements of state treason or another crime.[110]

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105. *See* UKRAINE: TIMELINE OF EVENTS, *supra* note 74 (providing an overview of major events from the Orange Revolution until present).

106. *See* Press Release, Ukraine Accepts ICC Jurisdiction, *supra* note 85.

107. *See Конституція України* (Constitution of Ukraine) art. 111 (Ukr.) (providing for impeachment procedure of the President of Ukraine).

108. *See id.* (stating that the commission should be composed of a special prosecutor and special investigators).

109. *See id.*

110. *See id.*

2. Naming of Suspects

The first declaration implicates a number of senior Ukrainian officials—including, among others, the former President of Ukraine Viktor Yanykovych, the former General Prosecutor of Ukraine Viktor Pshonka, and the former Minister of Internal Affairs of Ukraine Vitaliy Zakharchenko—in the commission of the alleged crimes.[111] There is no official information available about the whereabouts of the suspects who were named in the declaration, although it is widely reported in the media that they have all fled to and currently reside in Russia.[112] However, in naming a list of suspects, Verkhovna Rada of Ukraine exceeded its competence, as it is within discretion of the ICC Prosecutor to initiate an investigation upon the authorization from the Pre-Trial Chamber and identify suspect(s) on the basis of the available evidence.[113]

3. Temporal Jurisdiction

The *ratione temporis* jurisdiction, as outlined in the first declaration, covers the period from November 30, 2013, to February 22, 2014.[114] This entails that the ICC Prosecutor, acting on the declaration, is entitled to investigate the crimes within given time framework. Although the declaration was lodged shortly after the annexation of the autonomous republic of Crimea by the Russian Federation in March 2015 and at the backdrop of the emerging conflict in eastern Ukraine, its temporal scope is only limited to the crimes committed during the Maydan protests.[115] With the escalation of the conflict in eastern Ukraine and widely reported incidents of

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111. *See* Declaration I, *supra* note 66 (appealing to the ICC to bring senior Ukrainian officials to justice).

112. It is reported that all suspects were granted Russian citizenship and currently reside on the territory of Russia. There have been speculations that Viktor Pshonka attempted to leave Russia for Kazakhstan. *See* E. Borovskaya, *Где они теперь: как обустроились в России бежавшие украинские чиновники* [Where are they? How deposed Ukrainian officials settled in Russia], OPENRUSSIA BLOG (Feb. 24, 2015), https://openrussia.org/post/view/2920/ [perma.cc/T9TG-XCZL] (archived Jan. 24, 2016). Russian and Ukrainian media report that the Russian President Vladimir Putin appointed Vitaliy Zakharchenko as an expert member of the parliamentary committee that deals with property rights, in particular the protection of Russian investors' property rights abroad. *See Экс-глава МВД Украины Захарченко стал экспертом по инвестициям* [Former Minister of Interior Affairs Became an Expert on Investment], IZVESTIA NEWS (Mar. 25 2015), http://izvestia.ru/news/584507 [perma.cc/N47G-DX69] (archived Jan. 24, 2016).

113. *See* Rome Statute, *supra* note 1, art. 53.

114. *See* Declaration I, *supra* note 66 (stating that during the period of peaceful protests mass murder of Ukrainian nationals took place).

115. *See id.*

war crimes, the importance of expanding the scope of the existing declaration or lodging a new one was broadly debated.[116]

B. *The ICC Prosecutor's Decision Not to Act on Declaration I as a Missed Opportunity*

At the time of writing this Article, which was before the decision of the ICC Prosecutor not to act on the declaration became public,[117] the author argued that, in deciding whether to initiate an investigation into the alleged crimes against humanity, the Prosecutor would have to grapple with a number of important legal issues, such as the validity of the acceptance of the ICC's ad hoc jurisdiction by the Ukrainian interim government and the important jurisdictional issue as to whether the OTP may proceed with an investigation of the alleged crimes, notwithstanding the earlier ruling of the Constitutional Court of Ukraine on nonconformity of the ICC's principle of complementarity with the Constitution of Ukraine. As to the question of the validity of the declaration, it is not clear whether such an assessment is supposed to be carried out by the ICC Prosecutor or the Pre-Trial Chamber. It appears that until now the ICC Pre-Trial Chamber has paid attention to whether the person who signed the declaration on behalf of the state had the authority to do so.[118] Since the ICC Prosecutor decided not to seek the authorization of an investigation from the Pre-Trial Chamber on the basis that the alleged crimes did not meet the threshold of crimes against humanity,[119] the judges did not have the possibility to address such important issues as the validity of the declaration and the existence of the jurisdictional impediment imposed by the Constitutional Court of Ukraine. However, it is not even certain that if the case had been brought before the Pre-Trial Chamber, the ICC judges would have chosen to do so. Given the ICC's lack of competence to demand the amendment of national constitutions or, more broadly, interfere with national constitutional matters, the Pre-Trial Chamber might have chosen to disregard constitutional law issues altogether and narrowly

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116. *See Rights in Retreat: Abuses in Crimea*, HUMAN RIGHTS WATCH, November 2014, at 6, https://www.hrw.org/sites/default/files/reports/crimea1114_ForUpload.pdf [perma.cc/JKK6-UFAJ] (archived Jan. 24, 2016) (providing recommendations to the United Nations how to address the human rights abuses in Crimea).

117. *See* OTP report, *supra* note 73, ¶¶ 89–101 (providing the legal analysis of Maydan events).

118. *See* Pre-Trial Chamber III, Situation in the Republic of Cote D'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire, ICC-02/11-14, § 14 (Oct. 3, 2011) (stating that the Minister of Foreign Affairs of the former President had the authority to sign a declaration on behalf of Cote d'Ivoire).

119. *See* OTP Report, *supra* note 73, ¶ 101.

focus on whether a basis exists for initiating an investigation. It is not ruled out that the situation will eventually be brought before the Pre-Trial Chamber, as the assessment of widespread or systematic nature of the attack associated with the Maydan crimes may be reconsidered in the future in light of the new facts.[120]

In deciding whether a "reasonable basis" exists for initiating an investigation, the ICC Prosecutor acted within the ICC's statutory framework, considering whether (a) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be inadmissible under Article 17 of the Statute; and (c) taking into account the gravity of the crime and the interests of justice, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[121] It is worth mentioning that the reasonable basis standard is the lowest evidentiary threshold that has to be proved by the Prosecutor in order for the judges to be convinced of making a decision on the initiation of an investigation into the specific situation. This means that the information available to the Prosecutor, which is being served to the Pre-Trial Chamber, does not have be "comprehensive" or "conclusive" of the alleged crimes at the preliminary stage.[122] In other words, at the preliminary stage, it is only necessary for the Pre-Trial Chamber to arrive at the conclusion that "a sensible or reasonable justification for a belief" that the crimes within the jurisdiction of the Court have been committed exists.[123]

In the subsequent sections of the Article, the author will deal with the three elements of the required test for the initiation of an investigation into the situation in Ukraine, arguing that there exists the basis for the initiation of the investigation within the meaning of Article 53(1)(a) of the Rome Statute. The author further claims that by taking an overly narrow approach to the interpretation of crimes against humanity and deciding not to proceed with the situation, the ICC Prosecutor missed the bigger picture and disregarded the interests of justice.

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120. *See id.* (noting that serious human rights did occur and the evaluation of those events may be reconsidered in light of new facts or information).

121. Rome Statute, *supra* note 1, art. 53(1)(a)–(c).

122. *See* Pre-Trial Chamber III, Ivory Coast, *supra* note 118, § 24..

123. *See* Pre-Trial Chamber II, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, § 27–35 (Mar. 31, 2010).

1. Have the Crimes within the Jurisdiction of the ICC Been Committed?

The first declaration submitted by Verkhovna Rada of Ukraine alleges that crimes against humanity were committed during the crackdown on peaceful protesters by the Ukrainian law enforcement agencies that acted on orders from senior governmental officials.[124] Among the crimes listed in the declaration are killings, infliction of serious bodily harm, beatings, torture, abductions and enforced disappearances, unlawful deprivation of liberty, forcible transfer for the purposes of torture and murder, persecution on political grounds, and unlawful damage of demonstrators' property.[125]

The violence against peaceful protesters, mainly young university students, was unleashed by a special riot police unit, commonly known as "Berkut," in late November 2013, with the intention to disperse protesters.[126] There are abundant video materials, which were also posted on YouTube, as well as recorded witness testimonies that confirm numerous instances of police officers and pro-government group of civilians commonly known as "titushky" (anti-Maydan activists) using excessive force against demonstrators.[127] The violence continued to escalate in December 2013 with reported casualties on both sides, and it spiralled out of control with the adoption of a controversial law on January 16, 2014, that substantially limited the right to gatherings and peaceful demonstrations.[128] During the violent clashes between February 18 and 20, the death toll of protesters almost reached one hundred, most of them being killed by snipers from rooftops in central Kyiv.[129]

The subject-matter jurisdiction of the ICC encompasses crimes against humanity that involve the commission of any acts listed in

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124. *See* Declaration I, *supra* note 66.

125. *See id.*

126. *See Report on the Human Rights Situation in Ukraine*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Apr. 15, 2014, ¶56.

127. *See id.*; *see also* TSN, *Heaven's Hundred: The Winter That Changed Us*, YOUTUBE (Apr. 3, 2014), https://www.youtube.com/watch?v=h6XQYnTcg28 [https://perma.cc/N5LB-FE56] (archived Feb. 15, 2016).

128. *See Report on the Human Rights Situation in Ukraine*, *supra* note 126, ¶56; *see also* Про внесення змін до Закону України "Про судоустрій і статус суддів" та процесуальних законів щодо додаткових заходів захисту безпеки громадян [Law of Ukraine on Introducing Changes into the Law 'On Judiciary and the Status of Judges' and Other Procedural Laws Concerning Additional Protective Measures for Citizens' Safety], Law No. 721-VII, http://zakon4.rada.gov.ua/laws/show/721-18 (Ukr.) [https://perma.cc/W8VT-L6JE] (archived Jan. 24, 2016), *translated in* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802efb7f [https://perma.cc/8LDR-T6K3] (archived Jan. 24, 2016) [hereinafter Law on Introducing Changes].

129. *See Report on the Human Rights Situation in Ukraine*, *supra* note 126, ¶57.

Article 7(1) of the Rome Statute as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[130] It follows from the definition that crimes against humanity, unlike crimes under domestic law, have to be committed in a specific context, which translates into the following contextual elements: (1) an attack directed against any civilian population, (2) a state or organizational policy, (3) an attack of a widespread or a systematic nature, (4) the existence of a nexus between the individual act and the attack, and (5) knowledge of the attack.[131] At the stage of the authorization of an investigation, the Pre-Trial Chamber has neither to address the knowledge requirement linked to the contextual elements nor the mental element for underlying acts of crimes against humanity, as these constitutive elements should be determined at a later stage of proceedings, once individual suspects have been identified.[132]

The "attack" refers to a course of conduct carried out against the civilian population that involves multiple commission of underlying acts of crimes against humanity enumerated in the Rome Statute.[133] In this regard, the civilian population must have been the primary rather than an incidental target of the attack. The materials with respect to the Maydan protests, which were made public by the Prosecutor General's Office in Ukraine, show that a number of violent attacks were launched by Ukrainian riot police units, acting on orders from senior Ukrainian officials, against demonstrators who took to the streets to express their dissatisfaction with government policies.[134] In its preliminary report, the ICC Prosecutor acknowledged that during the three months of demonstrations, protesters and other individuals were killed as well as subjected to ill-treatment, including torture and other inhumane acts, by members of Ukrainian law enforcement agencies and pro-government group of civilians commonly known "titushky."[135] The report further continues that individuals were targeted on the basis of their opposition to the former government of beleaguered President Viktor Yanukovych.[136]

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130. Rome Statute, *supra* note 1, art. 7(1).

131. *See id.*; *see also Elements of Crimes*, INTERNATIONAL CRIMINAL COURT, 2011, art. 7.

132. *See* Pre-Trial Chamber III, Ivory Coast, *supra* note 118, § 29.

133. *See* Rome Statute, *supra* note 1, art. 7(2)(a).

134. The information is available on the official website of the Prosecutor General's Office of Ukraine (in Ukrainian) at http://rrg.gp.gov.ua/ [hereinafter PGO] (providing an overview of the registration of criminal proceedings that involve the commission of crimes committed during the Revolution of Dignity and the results of investigation).

135. *See* OTP Report, *supra* note 73, ¶ 90 (defining 'titushky' as "pro-government group of civilians . . . who coordinated with, and provided support to, law enforcement during public order operations.").

136. *See id.*

This led the ICC Prosecutor to conclude that the violent acts against protesters unleashed by Ukrainian security forces and "titushky" satisfy the requirement of Article 7 of the Rome Statute, which requires the attack to be directed against a civilian population.[137]

As stated above, it is also necessary to prove that the attack was committed "pursuant to or in furtherance of a state or organizational policy," which means "the state or organization actively promotes or encourages attack against a civilian population."[138] The adoption of Law No. 712-VII came into force on January 22, 2014, commonly known as "dictatorship" or "draconian" laws, and is reflective of a "state policy" on the part of the former Ukrainian government, which imposed restrictions upon the right to peaceful demonstrations by introducing harsh penalties and fines for crimes and acts associated with the organization and participation in demonstrations.[139] Likewise, the absence of any information on sanctioning the unlawful use of excessive force by the Ukrainian riot police also indicates that the former government authorized the use of force against demonstrators, condoned the behavior of police units, and attempted to shield those responsible for using excessive force against demonstrators. With respect to the policy requirement required for crimes against humanity, the ICC Prosecutor was able to infer the existence of a state policy to attack the civilian population during the protests from a number of factual circumstances, among others, "coordination of, and cooperation with, anti-Maydan citizen volunteers," the "consistent failure of state authorities to take any meaningful of effective action to prevent the repetition of incidents of violence," "the apparent efforts to conceal or cover the alleged crimes."[140] In light of these events and at the backdrop of the overall political situation, the Prosecutor concluded that the violent acts of security forces and titushky, which were aimed at quelling the protests, were carried out pursuant to or in furtherance of a state policy.[141]

One of the contextual elements of crimes against humanity, which proved to be decisive in the Prosecutor's decision not to proceed further with the situation, is the widespread or systematic nature of the attack. The ICC jurisprudence is consistent with the developed practice of the ad hoc tribunals that defines "widespread" through "the large scale nature of the attack and the number of targeted persons" and "systematic" through "the organized nature of the acts

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137. *See id.*, ¶ 91.
138, Pre-Trial Chamber III, Ivory Coast, *supra* note 118, § 42.
139. *See* Law on Introducing Changes, *supra* note 128.
140. OTP Report, *supra* note 73, ¶ 93.
141. *See id.*

of violence and the improbability of their random occurrence."[142] However, one does not have to prove both characteristics of the attack, as they are disjunctive and not cumulative terms.

At the outset, the Prosecutor dismissed the widespread nature of the attack, noting that "the alleged attack was limited in its intensity and geographic scope".[143] The Prosecutor referred to a number of factual circumstances in support of her conclusion, stating that "the alleged crimes were committed almost exclusively in the context of a limited number of clashes and confrontations between security forces and protesters" during the three-month period, and "the majority of the alleged crimes occurred in a limited geographic area within the city of Kyiv . . . particularly in and around Maydan."[144] The Prosecutor also looked at the number of persons who were killed and injured during the protests and concluded that the cumulative effect of the killing of at least seventy-five civilians and the injury of 700 protesters rendered it questionable the existence of the widespread nature of the alleged crimes against humanity.[145] The Prosecutor's decision to rule out the widespread requirement is not surprising, given that the attacks took place in a geographically limited area and given the number of victims, which is much narrower in comparison to similar situations of violence that took place in peacetime in Kenya and Ivory Coast that have already been authorized for an investigation by the ICC Chambers.[146]

Following the evaluation of the widespread characteristic of the attack, the Prosecutor examined whether the evidence supported the conclusion of the systematic nature of the attack. She concluded that

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142. Pre-Trial Chamber II, Kenya, *supra* note 123, §§ 95–96; Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, § 83 (June 15, 2009); Prosecutor v. Dragoljub Kunarac, IT-96-23& IT-96-23/1-A, § 94 (June 12, 2002); Prosecutor v. Tihomir Blaškić ,IT-95-14-A, § 101 (July 29, 2004).

143. OTP Report, *supra* note 73, ¶96.

144. *Id.*

145. *See id.*, ¶ 97 (concluding that some injuries were far less serious in nature and, therefore, did not constitute underlying acts of crimes against humanity).

146. *See* Pre-Trial Chamber II, Kenya, *supra* note 123, § 131 (when authorizing the investigation in the situation in Kenya, the judges confirmed the widespread nature of the attack against civilians in light of the reports that 1,133 to 1,220 were killed, about 3,561 people were injured and up to 350,000 persons were displaced in the period between 27 December 2007 and 28 February 2008); Pre-Trial Chamber III, Ivory Coast, *supra* note 118, §§ 102–05 (discussing the situation in Ivory Coast, the ICC referred to the HRW's and AI's reports that accounted for many hundreds of civilians who were killed, confirming the widespread and systematic nature of the attack); *see also Death Toll in Ivorian Post-Election Violence Surpassed 1,000*, UN NEWS CENTRE, May 26, 2011, http://www.un.org/apps/news/story.asp?NewsID=38522#.VcDGJvOqpBc [perma.cc/LVH4-E9HS] (archived Jan. 24, 2016) (showing that more than 1,000 people were killed in the 2011 post-election crisis).

the systematic dimension of crimes against humanity was missing, given that the alleged crimes did "not necessarily appear to have been carried out in a consistent, organized manner or on a regular or continual basis."[147] The report lists a few examples in support of the conclusion, emphasizing that "the alleged crimes occurred in an infrequent and often more reactive manner, determined by the different circumstances as events developed during the demonstrations."[148] Despite acknowledging the unjustified and disproportionate nature of the attack against protesters, the Prosecutor nevertheless concluded that the alleged acts fall short of meeting the systematic requirement of crimes against humanity, since they were "aimed to limit the protests rather than being part of a deliberate, coordinated plan of violence methodically carried out against the protest movement"[149] and appear to have "occurred only sporadically, in limited instances."[150]

The author disagrees with the Prosecutor's evaluation of the systematic nature of the attack and argues that, despite the disjunctive test of "widespread" *or* "systematic" attack in international criminal law, there seems to be an underlying presumption that both elements have to be present. It has never occurred in the practice of international criminal courts that the case stood alone on the basis of crimes against humanity committed as part of a systematic attack against the civilian population. In the situation of Ivory Coast, the Pre-Trial Chamber confirmed that it believed that the attack carried out by pro-Gbagbo forces against the civilian population was widespread *and* systematic.[151] Interestingly, in reaching its conclusion that both requirements of the attack were met, the judges were only guided by the characteristics of a widespread attack (i.e., extended period time period in which the crimes were carried out, the geographic range of the alleged crimes, and the high number of victims).[152] It seems that once the widespread requirement has been proven, the judges assumed that the systematic nature of the attack is also present.

In another situation of post-election violence, the Pre-Trial Chamber only addressed the existence of the widespread nature of the attack. This demonstrates that the jurisprudence as to what constitutes a "systematic" attack alone is underdeveloped and yet to be crystallized in the practice of the ICC. Hence, it is even more unfortunate that the ICC Prosecutor dismissed the situation at the early stage, without providing the judges with an opportunity to

147. OTP Report, *supra* note 73, ¶ 98.
148. *Id.*, ¶ 99.
149. *Id.*
150. *Id.*, ¶ 100.
151. Pre-Trial Chamber III, Ivory Coast, *supra* note 118, § 62.
152. *Id.*

construe whether the evidence of the Maydan crimes supports the systematic attack threshold required for crimes against humanity. The conclusion of the ICC Prosecutor on the absence of the systematic nature of the attack is also at odds with its earlier findings on the existence of the organized state policy to quell the protests and the selective targeting of individuals for their dissent with the government policies.[153] These findings are clearly indicative of a systematic nature of the attack.

To sum up, the crimes committed during the Maydan protests appear to meet the threshold of crimes against humanity in the Rome Statute, and an overly stringent approach with respect to the interpretation of the systematic nature of the attack advanced by the ICC Prosecutor seems to be totally unjustified and defeating the interests of justice. The ICC Prosecutor also failed to consider that the Maydan crimes have left a lasting impact upon victims, surviving family members, and the public, which renders it even more important to prosecute those who bear the greatest responsibility for unleashing violence against the civilians who took part in the protests.

2. Jurisdiction and Admissibility under Article 17 of the Statute?

In order to meet the requirements of Article 53(1), it is necessary to prove that the case is admissible before the ICC.[154] Although the ICC Prosecutor did not go as far as to address the remaining requirements for the initiation of an investigation, the author of this Article will attempt to demonstrate that such prerequisites have been met. First and foremost, the crime must occur on the territory of a state that lodged a declaration under Article 12(3) of the Rome Statute, or a national of that state must have committed the offense.[155] In the situation of Ukraine, it appears that both *ratione loci* and *ratione personae* are fulfilled, as the crimes were committed on the territory of Ukraine, and Ukrainian senior officials were allegedly implicated in directing the crimes against the civilians who took part in the protests. Despite the fact that many former senior Ukrainian officials, suspected of the crimes, fled the country and reportedly obtained Russian citizenship, the nationality issue would not be a jurisdictional barrier to the investigation of the alleged crimes given that the proof of *ratione loci* is sufficient per se.

Article 17(1)(a) and (b) of the Rome Statute provide conditions for the admissibility of a case before the ICC.[156] Despite the

153. OTP Report, *supra* note 73, ¶¶ 90, 93.

154. *See* Rome Statute, *supra* note 1, art. 53(1)(b) ("[T]he case is or would be admissible under Article 17.").

155. *Id.*, art. 12(2).

156. *Id.*, art. 17(1)(a)–(b).

references to the admissibility of "case," it has been earlier expounded in the ICC jurisprudence that at the early stage of proceedings, when suspects have not been identified, a determination of admissibility involves consideration of one or more potential cases within the broader context of the "situation."[157] Article 17(1)(a) and (b) specify that the case is inadmissible where (a) it is being investigated or prosecuted by a state that has jurisdiction over it or (b) it has been investigated by a state that has jurisdiction over it, and the state has decided not to prosecute the person concerned.[158] However, despite the existence of ongoing national proceedings, the case is admissible if the state concerned is unwilling or unable to genuinely carry out the investigation or prosecution.[159] The twofold test, which includes the examination of the progress of national proceedings before turning to questions of unwillingness or inability, has been decisively confirmed by the ICC Appeals Chamber.[160]

In the context of the situation of Ukraine, the Pre-Trial Chamber would be required to review whether national proceedings are or have been conducted "in relation to the individuals and crimes that are likely to constitute the Court's future case(s)."[161] In a recent statement, the President of Ukraine Petro Poroshenko expressed his dissatisfaction with the progress of investigations of the Maydan crimes and noted that the first cases have already reached Ukrainian courts, while expressing concern about the organizers of the crimes managing to flee the country and obtain safe haven in neighboring Russia.[162]

The Prosecutor General's Office (PGO) made public the information on the investigation and prosecution of crimes committed during the Maydan protests.[163] With respect to the use of force against demonstrating students on November 30, 2013, the PGO issued indictments under Article 340 (unlawful interference with the organization of public gatherings and demonstrations)[164] and Article

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157. Pre-Trial Chamber III, Ivory Coast *supra* note 118, §§ 190–91; Pre-Trial Chamber II, Kenya, *supra* note 123, § 48.

158. Rome Statute, *supra* note 1, art. 17(1)(a)–(b).

159. *Id.*

160. Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-1497 OA8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case § 78 (Sept. 25, 2009).

161. Pre-Trial Chamber III, Ivory Coast, *supra* note 118, § 194.

162. Порошенко незадоволений темпами розслідування злочинів проти Майдану ('Poroshenko is Not Satisfied with the Progress of the Investigation of the Maidan Crimes'), BBC (July 9, 2015), http://www.bbc.com/ukrainian/news_in_brief/2015/07/150709_rl_porashenko_maydan [perma.cc/K2P4-YCT2] (archived Jan. 20, 2016).

163. PGO, *supra* note 134.

164. According to the Criminal Code of Ukraine, an act must have been authorized by a public official or was accompanied by the use of physical force. The penalty includes the deprivation of liberty up to five years. Criminal Code of Ukraine,

365 (3) of the Criminal Code (abuse of power by a representative of a law enforcement agency that entailed serious consequences)[165] against fifteen senior government officials, including the former President of Ukraine Viktor Yanykovych and the former Minister of Interior Affairs Vitaliy Zakharchenko.[166] Another incident of the unlawful use of force against demonstrators by the special riot police unit on December 1, 2013, is still under investigation, with the four low-ranking police officers identified as suspects in that regard.[167] With respect to the incident of the excessive use of force on December 10–11, 2013, the two Berkut officers have been identified as suspects.[168] As to the willful killings and intentional infliction of serious bodily harm against protesters that were commonplace in January and February 2014, the PGO issued indictments on the charges of aggravated murder under Article 115(2) of the Criminal Code of Ukraine against senior public officials, including the former President of Ukraine, Viktor Yanukovych, and the former Minister of Interior Affairs, Vitaliy Zakharchenko.[169] The former General Prosecutor of Ukraine, Viktor Pshonka, was charged with abuse of power that entails serious consequences under Article 364 (2) of the Criminal Code of Ukraine.[170]

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art. 340, http://www.legislationonline.org/documents/action/popup/id/16257/preview [perma. cc/M638-N44M] (archived Feb. 9, 2016).

165. The penalty includes the deprivation of liberty up to ten years and ban on exercising certain functions for the period up to three years. Criminal Code of Ukraine, art. 365(3), http://www.legislationline.org/documents/action/popup/id/16257/preview [perma. cc/M638-N44M] (archived, Feb. 9, 2016).

166. The information is available on the official website of the Prosecutor General's Office of Ukraine (in Ukrainian) at http://rrg.gp.gov.ua/reestr-kriminalnih-provadzhen/golovne-slidche-upravlinnja-generalnoi-prokuraturi-ukraini/rozgin-studentskogo-majdanu-30-11-2013/ [perma.cc/HH66-TN77] (archived Jan. 24, 2016) (providing an account of criminal proceedings with respect to dispersing the Maydan student protests on 30 November 2013).

167. The information is available on the official website of the Prosecutor General's Office of Ukraine (in Ukrainian) at http://rrg.gp.gov.ua/reestr-kriminalnih-provadzhen/golovne-slidche-upravlinnja-generalnoi-prokuraturi-ukraini/protystoyanny a-1-grudnya-2013-roku-na-vulytsi-b/ [perma.cc/2ET2-EZ23] (archived Jan. 24, 2016) (providing an account of criminal proceedings with respect to the clashes on Bankova street in Kyiv on 1 December 2013)

168. The information is available on the official website of the Prosecutor General's Office of Ukraine (in Ukrainian) at http://rrg.gp.gov.ua/reestr-kriminalnih-provadzhen/golovne-slidche-upravlinnja-generalnoi-prokuraturi-ukraini/rozgin-aktsiyi-protestu-10-11-grudnya-2013-roku-v/ [perma.cc/7TL5-A6TA] (archived Jan. 24, 2016) (providing an account of criminal proceedings with respect to dispersing the protests in Kyiv on 10-11 December 2013).

169. The information is available on the official website of the Prosecutor General's Office of Ukraine (in Ukrainian) at http://rrg.gp.gov.ua/reestr-kriminalnih-provadzhen/golovne-slidche-upravlinnja-generalnoi-prokuraturi-ukraini/storinka-1/ [hereinafter PGO Maydan 2014] [perma.cc/9JVA-AP3B] (archived Jan. 24, 2016) (providing an account of criminal proceedings with respect to the killings and inflicting serious injuries during the Maydan protests in January-February 2014).

170. *Id.*

The cases that reached Ukrainian courts mostly concern individuals who are low-ranking perpetrators. The Kyiv city district court (Svyatoshyn district) is currently hearing the joint case against the special police unit officers who were charged with aggravated murder (Article 115(2) of the Criminal Code), abuse of authority that entailed serious consequences (Article 365(3) of the Criminal Code), and unlawful obtaining of weapons, explosive devices, and ammunition through the abuse of authority (Article 262(2) of the Criminal Code).[171] However, at the time of writing this Article, no verdicts have been delivered.[172] However, the proceedings against the Ukrainian senior officials have been halted for procedural reasons, as their whereabouts are officially unknown. In January 2015, Interpol issued a red notice for the former President of Ukraine Viktor Yanukovych, albeit only in relation to the charges of embezzlement and misappropriation, which is of no significance with respect to the prospective ICC proceedings.[173]

At first glance, it does appear that the cases with respect to the Maydan crimes are being investigated by Ukrainian authorities. However, it may be questioned whether the first limb of the two-pronged admissibility test is satisfied—that is, whether the case is being investigated by Ukrainian national authorities, given that the national proceedings mostly concern the crimes related to the abuse of authority, and progress has only been made with respect to the charges levied against low-ranked perpetrators.[174] Further, the ICC Appeals Chamber held that "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."[175] Whereas at the preliminary stage of the authorization of an investigation, "the same person" test, in the absence of the accused, does not require further consideration, it is necessary to remark on the interpretation of "substantially the same conduct." The matter was brought to the fore during the Gaddafi admissibility proceedings, in which the Pre-Trial Chamber concluded that Libya did not have to investigate the same international crimes, as it sufficed that the domestic proceedings

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171. The information is available on the official website of the Prosecutor General's Office of Ukraine (in Ukrainian) at http://rrg.gp.gov.ua/stan-sudovogo-rozgljadu/vbyvstva-pid-chas-masovyh-aktsij-protes/ [hereinafter PGO Kyiv] [perma.cc/UR9N-WMUQ] (archived Jan. 24, 2016) (providing status updates on the progress of judicial proceeding with respect to the killings of protesters in Kyiv).

172. *See id.*

173. *INTERPOL Issues Red Notices for Former Ukrainian leaders*, INTERPOL (Jan. 12, 2015), http://www.interpol.int/News-and-media/News/2015/N2015-002 [https://perma.cc/DF22-WP3M] (archived Jan. 24, 2016).

174. PGO Maydan 2014, *supra* note 169.

175. Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-274 OA, Appeals Chamber ¶ 36 (Aug. 30, 2011).

focused on the alleged conduct and not its legal characterization.[176] However, it was not the difference in labelling the crimes and the dichotomy between domestic and international crimes that led the Pre-Trial Chamber to conclude that Libya was not investigating the same case, but the fact that it was only investigating some "discrete aspects" of the case before the Court that the Appeals Chamber did not oppose.[177] If one assumes, albeit hypothetically, that murder charges levied against Ukrainian senior officials and national efforts with respect to the investigation of such crimes suffice in demonstrating that the case is being investigated at the national level, the next step would be to turn to the question of the genuine willingness or ability of Ukraine to investigate the crimes in question.

At first sight, it does appear that Ukraine is willing to prosecute the crimes, but this has been questioned by the Council of Europe (CoE) international advisory panel, tasked with overseeing domestic investigations of the violent incidents during the Maydan protests and its conformity with the European Convention on Human Rights, which issued a damning statement, concluding that "in many respects, the investigations have failed to satisfy the requirements of the European Convention of Human Rights."[178] The conclusions of the report scrutinize the investigations undertaken prior to and after February 22, 2014. The panel noted that "there was no genuine attempt, prior to 22 February 2014, to pursue investigations into the acts of violence during the Maydan demonstrations," which entailed substantial challenges for the investigations that commenced at a later stage.[179] With respect to the investigations after February 22, 2014, the panel concluded that "substantial progress has not been made," which was explained by serious investigative deficiencies in the work of the prosecutor's office both at the level of the PGO and local prosecutorial divisions, as well as the lack of cooperation

176. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-344-Red, Pre-Trial Chamber I ¶ 85 (May 31, 2013) (decision on the admissibility of the case against Saif Al-Islam Gaddafi).

177. *Id.* ¶ 134; *see also* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-547-Red OA 4, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi (May 21, 2014), § 77; Separate Opinion by Song, J. (concluding that Libya was investigating the same case), and Dissenting Opinion by Usacka, J. (disagreeing with Pre-Trial Chamber's test for determining whether Libya was investigating the same case).

178. Council of Europe, *International Advisory Panel's Report Says Maidan Investigations Failed to Satisfy Requirements of European Convention on Human Rights* (Mar. 31, 2015), http://www.coe.int/en/web/kyiv/-/international-advisory-panel-s-report-says-maidan-investigations-failed-to-satisfy-requirements-of-european-convention-on-human-rights [perma.cc/H2Y2-DY8K] (archived Jan. 24, 2016).

179. *Id.*

between law enforcement authorities in the investigation of crimes.[180]

The CoE report on the progress of national proceedings with respect to the Maydan protests casts doubt on Ukraine's willingness to prosecute the crimes in question.[181] One of the three indicators of the state's unwillingness, as outlined by the Rome Statute, is that "(a) the proceedings were not or are not being conducted independently or impartially, 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."[182] In this regard, "serious investigative deficiencies," as identified by the CoE panel, indicate the violation of the principle of due process and therefore seem to fall under the unwillingness criterion in the Rome Statute.

Although the ICC is not bound to investigate the acts of suspects who were named in the declaration, it would seem natural for the ICC Prosecutor to initiate proceedings against those who bear the greatest responsibility for the alleged crimes and go after the so-called "big fish." As mentioned in this Article, the most senior Ukrainian officials accused of directing and ordering the Maydan crimes are currently on the run and are speculated to have abandoned the territory of Ukraine and fled to neighboring Russia.[183] In the absence of cooperation between Ukrainian and Russian authorities with respect to the investigation of the Maydan crimes, Ukraine is unable to obtain the accused in order to proceed with the national prosecution of the crimes. This situation is indicative of Ukraine's inability to investigate the crimes within the meaning of Article 17 (3) of the Rome Statute.[184] In the context of admissibility proceedings in the Gaddafi case, the Pre-Trial Chamber held that it was necessary to assess the ability of a state to genuinely carry out an investigation or prosecution "in the context of the relevant national system and procedures."[185] It concluded that Libya was

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180. *Id.*

181. *Id.*

182. Rome Statute, *supra* note 1, art. 17 (2) (explaining that another two indicators of unwillingness are "(a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.").

183. PGO Maydan 2014, *supra* note 169.

184. Rome Statute, *supra* note 1, art. 17 (3) ("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.").

185. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-344-Red, Pre-Trial Chamber I ¶ 200 (May 31, 2013) (decision on the admissibility of the case against Saif Al-Islam Gaddafi).

unable to investigate the case in light of the challenges it encountered with respect to "exercising its judicial powers fully across the entire territory," and in particular it was unable to obtain the accused.[186]

3. Gravity and Interests of Justice

At the preliminary stage of the authorization of an investigation, the "gravity" requirement is evaluated in a general sense against the backdrop of the entire situation as well as against the backdrop of potential case(s) within the context of that situation.[187] As mentioned in the ICC jurisprudence, the parameters of a potential case could be defined with respect to:

> (i) whether the individuals or groups of persons that are likely to be the object of the investigation include those who may bear the greatest responsibility for the alleged crimes committed and (ii) the gravity of the crimes committed within the incidents which are likely to be the object of an investigation (including, inter alia, their scale and nature, the manner in which they were carried out, their impact on the victims, and any aggravating circumstances).[188]

In the context of the situation in Ukraine, available information on the individuals who were associated with the Maydan crimes indicates that a number of former senior government officials played a crucial role in authorizing and directing violent attacks against the civilians who took part in the protests.[189] Whereas the national proceedings against direct perpetrators implicated in murder and other violent crimes are progressing at a slow pace, all cases against senior officials are at the moment halted in light of their unknown whereabouts.[190] The crimes committed by law enforcement agencies, on orders from senior officials, may fall within a broad range of underlying acts of crimes against humanity. As earlier argued by the author, they seem to have been committed in the context of a systematic targeting of demonstrators as part of an official plan to quell any form of dissent in the country.[191] The crimes left an indelible mark on victims, surviving relatives, and the Ukrainian population, all of whom still struggle to come to terms with what happened and demand justice for the wrongdoings of the former

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186. *Id.* ¶ 205.
187. Pre-Trial Chamber III, Ivory Coast, *supra* note 118, § 202.
188. Pre-Trial Chamber III, Ivory Coast, *supra* note 118, § 204; Pre-Trial Chamber II, Kenya, *supra* note 123, § 59.
189. PGO, *supra* note 134.
190. PGO Maydan 2014, *supra* note 169; PGO Kyiv, *supra* note 171.
191. *See infra* Section IV(B)(1).

regime.[192] There are no reasons to believe that the authorization into the situation would not be in the interest of justice.

Due to the procedural halt of the national proceedings against the Ukrainian senior officials who allegedly bear the greatest responsibility for the crimes during the Maydan protests but fled the country to evade the prosecution, as well as the gravity of the crimes committed during the protests, and their impact on the victims and population in Ukraine, it appears reasonable that the Pre-Trial Chamber, if had been requested by the ICC Prosecutor, would been have been satisfied that the requirement has been met.

V. DECLARATION ACCEPTING THE JURISDICTION OF THE ICC FOR THE ALLEGED CRIMES IN EASTERN UKRAINE AND CRIMEA (DECLARATION II)

As mentioned above, one of the problematic aspects of the first declaration is that it narrowly focused on the alleged crimes orchestrated by senior Ukrainian officials against fellow Ukrainians during the Maydan protests. The temporal jurisdiction of the declaration did not cover any crimes beyond February 2014 and left out the alleged crimes associated with the chain of dramatic events that unfolded following former President Yanukovych's removal from office, such as the annexation of Crimea and the self-proclamation of independence by pro-Russian rebel groups in Lugansk and Donetsk Republics.[193] Since April 2014, there has been ongoing fighting between Ukrainian government troops and pro-Russian separatist groups, with the former claiming to be conducting an antiterrorist offensive against pro-Russian rebels in its attempt to regain control over the rebel occupied parts of eastern Ukraine.

The fighting in eastern Ukraine gained international prominence following the shooting down of Malaysian Airlines flight MH17 on July 17, 2014.[194] The flight was brought down over the rebel-occupied territory and claimed the lives of the 298 passengers on board.[195] Following the tragic incident, the International Committee of the Red Cross (ICRC) issued an official statement calling all sides to respect international humanitarian law, in which it reiterated the absolute

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192. *Thousands Take Part in Commemoration of EuroMaidan Revolution's Anniversary*, KYIVPOST NEWS (Feb. 21, 2015), http://www.kyivpost.com/multimedia/photo/thousands-of-people-take-part-in-memorial-ceremony-marking-the-first-euromaidan-anniversary-381439.html [perma.cc/V92U-ZJK3] (archived Jan. 24, 2016); *Ukraine Marks Anniversary of Maidan Revolution of Dignity*, UNIAN NEWS (Nov. 21, 2014), http://www.unian.info/politics/1012208-ukraine-marks-anniversary-of-maidan-revolution-of-dignity.html [perma.cc/2TPH-RWB6] (archived Jan. 24, 2016).

193. UKRAINE: TIMELINE OF EVENTS, *supra* note 74.

194. Dutch Safety Board Report, 'Crash of Malaysia Airlines MH17: Hrabove, Ukraine, 17 July 2014', The Hague, October 2015.

195. *Id. at* 7.

prohibition of directing attacks against civilians and civilian objects during an armed conflict.[196] In its statement, the ICRC for the first time explicitly qualified the conflict in Ukraine as a non-international armed conflict.[197] Similar, in the context of reporting on the attacks in eastern Ukraine, the nongovernmental organization (NGO) Human Rights Watch (HRW) concluded that "the fighting in eastern Ukraine is governed by the laws of war applicable to all parties of the conflict and individuals who commit serious violations of the law of war . . . are responsible for war crimes."[198] The nature of the conflict in eastern Ukraine is widely debated due to the alleged Russian involvement in supporting the pro-Russian separatist groups, in particular whether the extent of such involvement transforms the conflict into an international armed conflict.[199]

Whereas the legal qualification of the conflict is of no significance with respect to the first declaration lodged by Ukraine to the ICC, given its narrow temporal jurisdiction, the situation was drastically changed when the Ukrainian government submitted a new declaration that recognized the jurisdiction of the Court over the alleged crimes committed in eastern Ukraine and Crimea.[200] As stated in this second declaration, it was submitted "for the purpose of bringing senior officials of the Russian Federation and leaders of terrorist organizations 'DNR' and 'LNR' . . . in respect of crimes against humanity and war crimes . . . committed on the territory of Ukraine from 20 February 2014 and to the present time."[201] As in the case with the first declaration, the ICC Prosecutor will have to decide whether to request the judges' authorization to open an investigation into the situation on the basis of the available evidence. At first sight, the declaration seems to have remedied the deficiency of the first declaration by accepting the jurisdiction of the ICC from February

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196. Press Release, ICRC, Ukraine: ICRS Calls on All Sides to Respect International Humanitarian Saw (July 23, 2014), www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm [perma.cc/8K3J-V6DZ] (archived Jan. 24, 2016).

197. *Id.*

198. *Ukraine: Unguided Rockets Killing Civilians*, HRW NEWS RELEASE (July 24, 2014), www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians [perma.cc/BU7H-2KEP] (archived Jan 24, 2016).

199. *Eastern Ukraine: Questions and Answers About the Laws of War*, HRW NEWS RELEASE (Sept. 11, 2014), https://www.hrw.org/news/2014/09/11/eastern-ukraine-questions-and-answers-about-laws-war [perma.cc/K9MN-PGKK] (archived Jan. 24, 2016); Noelle Quenivet, *Trying to Classify the Conflict in Eastern Ukraine*, INTLAWGRRLS (Aug. 28, 2014), http://ilg2.org/2014/08/28/trying-to-classify-the-conflict-in-eastern-ukraine/ [perma.cc/FXW7-VZER] (archived Jan. 24, 2016); Ilya Nuzov & Anne Quintin, *The Case of Russia's Detention of Ukrainian Military Pilot Savchenko under IHL*, EJIL: TALK (Mar. 3, 2015), http://www.ejiltalk.org/the-case-of-russias-detention-of-ukrainian-military-pilot-savchenko-under-ihl/ [perma.cc/5NHG-BDUM] (archived Jan. 24, 2016).

200. Declaration II, *supra note* 67.

201. *See id.*

2014 onwards for an indefinite period of time. However, the declaration raises a number of interesting legal issues, which are addressed below. For instance, as discussed previously with regard to the first declaration, the second declaration too brings up the question of who is entitled to sign the declaration accepting the jurisdiction of the ICC on behalf of the state.[202] Despite Article 106 of the Constitution of Ukraine conferring upon the Ukrainian President the power to represent the state in international relations, administer foreign policy, conduct negotiations, and conclude international treaties, the second declaration is atypically signed by the chairperson of the Ukrainian parliament.[203] Unlike with the first declaration, the Ministry of Foreign Affairs of Ukraine expressly laid out the grounds that, in their view, permitted the chairperson of Verkhovna Rada of Ukraine, acting in his capacity as *ex officio* Head of State, to sign the declaration; it is not clearly set out as to why the second declaration was not signed by the incumbent President Petro Poroshenko.[204]

A. *International or Non-International Armed Conflict in Eastern Ukraine?*

As mentioned above, the conflict in eastern Ukraine is widely considered by the international community as being a non-international armed conflict, which is understood as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[205] In order to distinguish a non-international armed conflict from other less serious forms of violence or internal disturbances, two criteria are evaluated in order to determine whether an armed conflict exists, in particular (a) the intensity of fighting and (b) the organization of the parties involved.[206] The fighting between Ukrainian government forces and pro-Russian separatist groups, in its intensity and the organization of parties, has been recognized as meeting the threshold of a non-

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202. *See* infra Section 4.1(A).

203. Declaration II, *supra note* 67 (signed by the Chairperson of the Verkhovna Rada of Ukraine V. Groysman).

204. Note verbale of the Acting Minister for Foreign Affairs of Ukraine Mr. Andrii Deshchytsia, (Apr. 16, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/UkraineMFAdocument16-04-2014.pdf [perma.cc/X8DZ-DAN7] (archived Jan. 24, 2016).

205. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction § 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

206. *See* Judgment, *Boškoski* (IT-04-82-T), Trial Chamber, 10 July 208, § 175; Judgment, *Delalić* (IT-96-21-T), Trial Chamber, 16 November 1998, § 184; Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, §§ 619–620.

international armed conflict by international organizations and NGOs.[207]

However, the legal qualification of the conflict in eastern Ukraine has been challenged in light of the alleged continuous supply of weapons and soldiers by the Russian government.[208] What remains unclear is whether the Russian involvement amounts to being "in control of" the rebel fighting in Ukraine and, therefore, transforms the nature of the conflict to an international armed conflict. Under international humanitarian law, intervention by another state that supports an armed opposition group(s) to the conflict may internationalize the armed conflict, provided that the state providing such support to the armed group(s) is in control of military operations conducted by the group(s).[209] Although it is widely reported that the Russian Federation has been supplying weapons to the rebel groups in eastern Ukraine, the extent of its involvement, in particular whether it goes beyond financing and equipping rebel groups, remains uncertain. The Russian government officials have on many occasions denied the supply of weapons and manpower to the rebel groups in eastern Ukraine.[210]

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207. Press Release, ICRC, *supra* note 196; *Eastern Ukraine: Questions and Answers About the Laws of War*, *supra* note 199; *Ukraine: Mounting Evidence of War Crimes and Russian Involvement*, AMNESTY INT'L (Sept. 7, 2014) https://www.amnesty.org/en/latest/news/2014/09/ukraine-mounting-evidence-war-crimes-and-russian-involvement/ [perma.cc/2GTL-MU5L] (archived Jan. 24, 2016) (explaining that Amnesty International considers that the fighting in eastern Ukraine already constitutes an international armed conflict in light of the evidence of satellite imagery and testimony collected by the organization).

208. Opening Remarks by NATO Secretary General Jens Stoltenberg at the Meeting of the NATO-Ukraine Commission at the Level of Defence Ministers, NATO (June 25, 2015), www.nato.int/cps/en/natohq/opinions_120969.htm?selectedLocale=en [perma.cc/Y8SY-U97R] (archived Jan. 24, 2016); *Russian Soldiers 'Dying in Large Numbers' in Ukraine—NATO*, BBC NEWS (Mar. 5, 2015), http://www.bbc.com/news/world-europe-31747754 [perma.cc/SG49-UNZ4] (archived Jan. 24, 2016).

209. The ICTY Appeals Chamber in *Tadić*, in the context of discussing the ICJ's *Nicaragua* judgment, elaborated on the 'overall control' test that implies a situation when a state goes beyond mere financing and equipping of opposition groups and participates in the planning and supervision of military operations, thus qualifying an armed conflict for the status of an international armed conflict. *See* Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, §§ 131, 137, 145. A similar veil of uncertainty has been linked to the qualification of the ongoing conflict in Syria. Despite the evidence of supplies of weapons, military equipment and training to both sides of the conflict by other states, it was concluded that there is not enough evidence to suggest that those states exercised overall control over the fighting parties to the conflict. For more, see L. Arimatsu & M. Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya*, CHATHAM HOUSE (Mar. 2014), http://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf [https://perma.cc/3XW6-ZAX9] (archived Feb. 15, 2016).

210. *See* Statement of the Russian President's Press Secretary Dmitriy Peskov, (Aug. 17, 2014), www.ntv.ru/novosti/1198063/ (in Russian) [perma.cc/9YDY-JTBS]

By alleging the responsibility of senior officials of the Russian Federation, the declaration suggests that the conflict in Ukraine is of international character.[211] Under international humanitarian law, an international armed conflict "exists whenever there is a resort to armed force between States."[212] In light of the absence of an officially declared state of war between Russia and Ukraine, the lack of clarity as to the extent of the Russian involvement in eastern Ukraine, and the question of whether it satisfies the "overall control" test, the legal qualification of the conflict is far from settled. Should the ICC Prosecutor decide to proceed with the case, she would have some difficult decisions to make with respect to the qualification of the conflict, as such a determination directly affects the possible choice of war crimes charges. The qualification of the conflict has far greater implications, as its recognition as an international armed conflict could entail bringing charges against nationals of the state that has a seat as a permanent member in the United Nations Security Council (UNSC). Such a qualification is fraught with serious consequences, as it may potentially shudder the entire foundation upon which international law and diplomacy are erected.

B. *War Crimes in Eastern Ukraine*

Since the beginning of hostilities in eastern Ukraine, the number of casualties has soared to a staggering 25,439.[213] According to the latest UN figures, this includes at least 7,833 deaths and at least 17,610 injured in eastern Ukraine.[214] In general terms, the declaration lodged by Ukraine describes the situation of thousands of Ukrainian nationals being killed, injured, as well as hundreds of thousands being forced out of their homes as a result of the conflict.[215] It further provides one example of an incident of war crimes—that is, the shelling of civilians in residential areas of Mariupol on January 24, 2015, that claimed the lives of thirty civilians.[216] Although the chosen incident, as a way to illustrate the commission of war crimes in Ukraine, is no doubt important, it stands

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(archived Jan. 24, 2016). See also the statement of the Russian Vice Prime Minister Dmitriy Rogozin, who publicly declared that the Russian Federation was not supplying any weapons to Ukraine to avoid it being used against the citizens of Ukraine in July of 2015, http://www.ntv.ru/novosti/1434411/ (in Russian) [perma.cc/9LGZ-FSHF] (archived Jan. 24, 2016).

211. Declaration II, *supra* note 67.

212. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction § 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

213. OHCHR, *Report on the Human Rights Situation in Ukraine* 12 (July 15, 2015), §34, http://www.ohchr.org/Documents/Countries/UA/11thOHCHRreportUkraine.pdf (last visited Sept. 2015) [perma.cc/8AH4-J6Q8] (archived Jan. 24, 2016).

214. *Id.*

215. Declaration II, *supra* note 67.

216. *See id.*

out oddly on a one-page declaration, given the widely documented instances of serious violations of international humanitarian law by international organizations and NGOs.[217] Despite its mention in the second declaration, the ICC Prosecutor is not obliged to investigate just one instance of war crimes as identified by the declaration but is obliged to investigate *all* instances of war crimes that fall within the scope of the declaration.[218]

The drafters of the second declaration avoided some mistakes associated with the first declaration by refraining from naming suspects of the alleged crimes. However, they do allege responsibility

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217. *See* AMNESTY INT'L, UKRAINE REPORT (2014), http://www.amnesty.org/en/countries/europe-and-central-asia/ukraine/report-ukraine/ [https://perma.cc/2UJV-9QWW] (archived Jan. 24, 2016) (recounting the abduction and ill-treatment of captives in parts of eastern Ukraine controlled by separatists, summary killings by each side to the conflict; use of residential areas and buildings as firing positions by separatist forces and pro-Kyiv forces returning fire to these positions, downing of a Ukrainian military plane by separatist forces on July 17, 2014); *Ukraine: Overwhelming New Evidence of Prisoners Being Tortured and Killed Amid Conflict,* AMNESTY INT'L (May 22, 2015), www.amnesty.org/en/latest/news/2015/05/ukraine-new-evidence-prisoneRS-tortured-and-killed-amid-conflict/ [perma.cc/L5R4-UAE5] (archived Jan. 24, 2016) (reporting on ongoing war crimes committed by both sides to the conflict, including torture and summary killings of prisoners); *New Evidence of Summary Killings of Ukrainian Soldiers Must Spark Urgent Investigation,* AMNESTY INT'L (April 9, 2015), www.amnesty.org/en/latest/news/2015/04/ukraine-new-evidence-of-summary-killings-of-captured-soldieRS-must-spark-urgent-investigations/ [perma.cc/GYL3-AAEJ] (archived Jan. 24, 2016); Press Release, Human Rights Watch, Ukraine: Insurgents Disrupt Medical Services (Aug. 5, 2015), www.hrw.org/news/2014/08/05/ukraine-insurgents-disrupt-medical-services) [perma.cc/K8PG-2WF3] (archived on Jan. 24, 2016) (detailing disruption to medical services and facilities); Rachel Denber, *Dispatches: White phosphorus, White Lies, or What?,* HUMAN RIGHTS WATCH (Aug. 20, 2014), www.hrw.org/news/2014/06/20/dispatches-white-phosphorus-white-lies-or-what [perma.cc/858Q-QBSZ] (archived Jan. 24, 2016) (reporting on the alleged use of white phosphorus as an incendiary weapon by Ukrainian forces); *Intense Fighting in Eastern Ukraine 'Extremely Alarming' Says Pillay, as UN Releases News Report,* U.N. OFFICE OF THE HIGH COMMISSIONER (July 28, 2014), www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14908&LangID=E [perma.cc/UE83-3RD3] (archived Jan. 24, 2016) (reporting on unlawful abductions and detention, including ill-treatment, torture, killing of detainees, loss of civilian lives and serious damage to civilian infrastructure); Ole Solvang, *Dispatches: Marking Ukrainian Independence Day with a Laws-of-War Violation,* HUMAN RIGHTS WATCH (Aug. 24, 2014), www.hrw.org/news/2014/08/24/dispatches-marking-ukrainian-independence-day-laws-war-violation [perma.cc/M3BJ-UXVF] (archived Jan. 24, 2016) (reporting on violations of Geneva Convention's common article 3 by pro-Russian armed forces in Donetsk); *Ukraine: More Civilians Killed in Cluster Munition Attacks,* HUMAN RIGHTS WATCH (Mar. 19, 2015), www.hrw.org/news/2015/03/19/ukraine-more-civilians-killed-cluster-munition-attacks [perma.cc/B7ER-9T4P] (archived Jan. 24, 2016) (reporting on the use of cluster munitions in eastern Ukraine); *Dispatches: More Cluster Munition Use in Ukraine,* HUMAN RIGHTS WATCH (Feb. 4, 2015), www.hrw.org/news/2015/02/04/dispatches-more-cluster-munition-use-ukraine [perma.cc/CQS9-85J6] (archived Jan. 24, 2016); Iryna Gudyma, *Spot Report by the OSCE Special Monitoring Mission to Ukraine (SMM), 3 February 2015: Civilians Killed and Wounded in Strike with Cluster Munitions in Izvestkova Street in Luhansk City,* OSCE (Feb. 3, 2015), www.osce.org/ukraine-smm/138906 [perma.cc/5NSX-CBFT] (archived Jan. 24, 2015).

218. Rome Statute, *supra* note 1, art. 54(1)(a).

of "senior officials of the Russian Federation" and "leaders of terrorist organizations DNR and LNR."[219] Although the Ukrainian government has declared DNR and LNR to be terrorist organizations, this is of no significance with respect to an investigation conducted by the ICC, as it does not exercise jurisdiction over the crime of terrorism, which is normally prosecuted by national jurisdictions.[220]

Additionally, the ICC Prosecutor is not obligated to limit its preliminary examination to the responsibility of parties that have been identified in the declaration. By nature of its mandate, the Prosecutor will have to examine the responsibility of *all* parties to the conflict, including the responsibility of Ukrainian armed forces. In this regard, it is important to recall that, on many occasions, nongovernmental organizations have attributed responsibility to both Ukrainian government and separatist forces for indiscriminate attacks against the civilian population for their use of weapons that are incapable of distinguishing between civilian and military objects with sufficient accuracy.[221]

C. *Annexation of Crimea and Its Significance for Declaration II*

The second declaration speaks of the "Russian Federation's . . . armed aggression against Ukraine," evidenced by the annexation of the Autonomous Republic of Crimea.[222] This Article does not discuss whether the annexation of Crimea constitutes an act of aggression, which is a matter of public international law,[223] but looks into whether the alleged crimes associated with the annexation may be prosecuted by the ICC. At the outset, it should be noted that the ICC cannot exercise jurisdiction over the crime of aggression before January 2017. Therefore, it is not in a position to make a

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219. Declaration II, *supra note* 67.

220. The attempts to introduce the crime of terrorism as a separate crime within the jurisdiction of the ICC failed during the Kampala Review Conference in the absence of a unified approach as to what constitutes the crime of terrorism under international law. The only tribunal of international character that exercises the jurisdiction over the crime of terrorism is the Special Tribunal for Lebanon. The interlocutory decision of the STL Appeals Chamber of 16 February 2011, which introduced the definition of the crime of terrorism under customary international law, was met with a great degree of scepticism in academic circles.

221. Press Release, Amnesty Int'l, Eastern Ukraine: Both Sides Responsible for Indiscriminate Attacks (Nov. 6, 2014) https://www.amnesty.org/en/press-releases/2014/11/eastern-ukraine-both-sides-responsible-indiscriminate-attacks/ [perma.cc/G5CU-Y4HY] (archived Jan. 24, 2016); *Ukraine: Rising Civilian Death Toll. Unlawful Unguided Rocket Attacks on Populated Areas*, HRW NEWS REPORT (Feb. 3, 2015), https://www.hrw.org/news/2015/02/03/ukraine-rising-civilian-death-toll [perma.cc/33EY-ZVB6] (archived Jan. 24, 2016).

222. Declaration II, *supra* note 67.

223. *See* THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE (2015) (examining whether Russia's annexation of Crimea constitutes an act of aggression); *see also The Crisis in Ukraine*, 16 GERMAN L. J. (July 01, 2015).

determination as to whether the Russian officials could be held individually responsible for the crime of aggression.[224] The only available international judicial institution that can rule on whether the annexation of Crimea constitutes an act of aggression under international law is the International Court of Justice, which adjudicates the disputes between states.[225] Such discussion, however, is beyond the scope of this Article as it warrants separate, in depth analysis.

With respect to the situation in Crimea, it could be questioned whether the annexation of its territory by the Russian Federation transforms the situation into an international armed conflict. In the absence of open armed hostilities between Ukraine and Russia on the territory of Crimea, it seems illogical to conclude that such an international armed conflict exists. However, the presence of Russian troops who exercise effective control in Crimea qualifies the Russian Federation as an occupying power under the law of international occupation.[226] Under international humanitarian law, the territory is considered occupied when it comes under effective control of foreign armed forces, even in the absence of an armed resistance.[227]

Despite the statutory constraints with respect to the crime of aggression, the Office of the Prosecutor may evaluate whether the widely reported violations of human rights on the Crimean Peninsula could constitute crimes that fall within the jurisdiction of the Court. Various human rights groups have voiced concerns about human rights violations that manifest themselves in discriminatory policies directed against ethnic, religious, or national groups opposed to the annexation—in particular indigenous Crimean tatars—as well as journalists and representatives of nongovernmental organizations who report on the situation on the Peninsula.[228] There have been documented instances of enforced disappearances, harassment, detention, and prosecution of Crimean tatars and pro-Ukrainian

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224. *See* ICC-RC/Res 6 (June 11, 2010). As agreed during the ICC Review Conference in Kampala, the ICC will be able to exercise the jurisdiction over the crime of aggression subject to a decision to taken after 1 January 2017.

225. Rules of Court, 1978 I.C.J Acts. & Docs. art. 34(1).

226. Questions and Answers: Russia, Ukraine, and International Humanitarian and Human Rights Law, HUMAN RIGHTS WATCH (Mar. 21, 2014), https://www.hrw.org/news/2014/03/21/questions-and-answers-russia-ukraine-and-international-humanitarian-and-human-rights# [perma.cc/GXL9-Y5BX] (archived Jan. 24, 2016).

227. Occupation and International Humanitarian Law: Questions and Answers, ICRC (Aug. 4, 2004), https://www.icrc.org/eng/resources/documents/misc/634kfc.htm [perma.cc/77VY-522A] (archived Jan. 24, 2016).

228. Andrii Klymenko, Freedom House, *Human Rights Abuses in Russian-Occupied Crimea* (Mar. 2015), https://freedomhouse.org/sites/default/files/Crimea Report_FINAL.pdf [perma.cc/VJ8R-M838] (archived Jan. 24, 2016).

activists.[229] Persecution against any identifiable group, enforced disappearances, and other inhumane acts—if committed in the context of a widespread or systematic attack against the civilian population—may amount to crimes against humanity within the meaning of the Rome Statute and, therefore, are subject to the Prosecutor's preliminary investigation.

D. *Missed Opportunities in Declaration II*

The downing of the Malaysian airlines plane over the rebel-controlled area in eastern Ukraine proved to be a turning point in the conflict and prompted the international community to openly recognize the conflict to be governed by the rules of international humanitarian law. In the aftermath of the tragic incident, the states whose nationals lost lives (The Netherlands, Malaysia, Australia, and Belgium) and Ukraine, on whose territory it occurred, submitted a request to the UN Security Council seeking the establishment of an international criminal tribunal under Chapter VII of the UN Charter to "try those responsible for crimes connected to the downing that occurred over Ukraine on 17 July 2014."[230] Russia vetoed the resolution on the establishment of the tribunal, having proposed an alternative draft resolution that backed the UN investigation of the incident but fell short of calling for the establishment of an international tribunal.[231] Following the failed attempt in the UNSC, the states that requested an international tribunal declared that they would probe into alternative prosecution mechanisms to try those responsible for shooting down the civilian aircraft.[232]

The act of downing the aircraft committed in the context of an armed conflict, which resulted in the loss of civilian lives, may

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229. HRW Report, Rights in Retreat: Abuses in Crimea (Nov. 2014), https://www.hrw.org/sites/default/files/reports/crimea1114_ForUpload.pdf [perma.cc/KPQ9-F8Q4] (archived Jan. 24, 2016).

230. *Partner countries ask Security Council to establish an MH17 tribunal*, PERMANENT MISSION OF UKRAINE TO THE UN (July 13, 2015), http://un.mfa.gov.ua/en/press-center/news/38128-krajini-partneri-zvernulisya-do-radi-bezpeki-oon-z-prohannyam-stvoriti-tribunal-dlya-pokarannya-vinnih-u-zbitti-mh17 [perma.cc/VKA5-N52H] (archived Jan. 24, 2016); *see* Draft Statute for the International Criminal Tribunal for Malaysia Airlines Plane MH17, Art. 1 (June 19, 2015) (explaining the potential importance of the international criminal tribunal in establishing accountability and effective prosecution).

231. *Security Council Fails to Adopt Resolution on Tribunal for Malaysian Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims*, UN MEETINGS COVERAGE AND PRESS RELEASES (July 29, 2015), www.un.org/press/en/2015/sc11990.doc.htm [perma.cc/P36V-ZR9S] (archived Jan. 24, 2016); *see also* S.C. Res. 2166 (July 21, 2014).

232. Amari Roos, *Dutch Government Pursuing Lockerbie-Style Tribunal to Prosecute Russia for MH17*, SOTT (Oct. 3, 2015), http://www.sott.net/article/303247-Sott-Exclusive-Dutch-government-pursuing-Lockerbie-style-tribunal-to-prosecute-Russia-for-MH17 [perma.cc/44UT-SXR2] (archived Jan. 24, 2016).

amount to a war crime within the jurisdiction of the ICC. When Ukraine lodged its second declaration accepting the jurisdiction of the ICC from February 2014 onwards, this would have provided an ideal alternative prosecution mechanism to the proposed international tribunal project that was stalled in the UNSC. However, a careful reading of the declaration leads to the conclusion that the prosecution of the downing of the plane is not possible, since the declaration restricts *rationae personae* only to Ukrainian nationals who were subject to the crimes within the jurisdiction of the ICC, thus excluding those nationals from other states who perished in the incident. What remains unclear is whether the OTP is bound by the limitation with respect to *rationae personae* as stipulated in the declaration, as they have to investigate *all* instances of the crimes during the period of time outlined in the declaration.

VI. CONCLUDING WORDS

The relationship between Ukraine and the ICC seems to have improved with the Ukrainian government lodging the declaration on the acceptance of the ad hoc jurisdiction of the ICC initially, with respect to the Maydan crimes, and subsequently, with respect to crimes associated with the conflict in eastern Ukraine and the annexation of Crimea by the Russian Federation. However, the implications of the ad hoc jurisdiction acceptance are far from clear, as it is at odds with the earlier ruling of the Constitutional Court of Ukraine that found the Rome Statute to be contrary to the Constitution of Ukraine. All attempts to amend the Constitution of Ukraine in order to accommodate the jurisdiction of the ICC have so far been unsuccessful. If Ukraine is to avoid a situation where the investigation into the situation is stalled by the Constitutional Court's ruling on the Rome Statute's noncompliance with the Ukrainian constitution, it must accelerate its efforts to make the necessary amendments to its constitution that would allow for the ratification of the Rome Statute. By committing to the ratification of the Rome Statute, Ukraine will demonstrate its unwavering commitment to international law, which cannot be more timely and relevant when viewed against the backdrop of the ongoing bloodshed in eastern Ukraine.

Most recently, the ICC Prosecutor decided not to act on the first declaration, concluding that the Maydan crimes had not satisfied the "widespread or systematic" requirement of the attack within the meaning of crimes against humanity. This gives the impression that the interests of justice have been overtaken by a very narrow interpretation as to what constitutes a systematic attack in the context of crimes against humanity. However, this may not be the

last word in the story, as Ukraine expressed its willingness to provide additional evidence with respect to the Maydan crimes.

While the first declaration has been shelved by the ICC Prosecutor, it remains to be seen what steps will be taken by the OTP with respect to the second declaration that touches upon some sensitive political issues, in particular the extent of the Russian involvement in the fighting in eastern Ukraine. Most hopefully, the heavy weight of the two declarations lodged by Ukraine would exert pressure on the ICC Prosecutor to act at least on the second declaration. A decision by the Prosecutor to not act on either of the declarations would be surprising, especially against the backdrop of the ongoing conflict in eastern Ukraine, which takes place at the heart of Europe and is marred by widespread war crimes allegations documented by international organizations and NGOs. The implications of requesting the authorization of an investigation into the situation of Ukraine should not be underestimated, as it is a window of opportunity for the ICC prosecutor to move away from the widely perceived "African bias" in the selection of cases and demonstrate to the victims and the international community that the Court is not sitting idle watching how the conflict unfolds and more civilians lose their lives. While it took long seven years to request the authorization of an investigation in the situation in Georgia, it is hoped that the Prosecutor would be able to decide much sooner on how to proceed with the second Ukraine's declaration, as it holds true that "justice delayed is justice denied."