

The ICC and the Russia-Ukraine War

Introduction

In the wake of the Russia-Ukraine war, the Prosecutor of the International Criminal Court (ICC) announced the opening of an investigation into the situation in Ukraine. Following the earlier situation in Georgia, this marks the second investigation initiated by the ICC in a post-Soviet country that has found itself at war with the Russian Federation (Russia). An unprecedented joint referral of the situation to the ICC by 43 state parties to the Rome Statute removed the significant procedural hurdle of the investigation being conditional upon the approval of a pre-trial chamber.¹ This *Insight* summarizes the key developments of the ICC's intervention in Ukraine to date and outlines potential future challenges.

Background: Ukraine and Russia's Legal Standing at the ICC

Neither Ukraine nor Russia are state parties to the Rome Statute. However, Ukraine has accepted the *ad hoc* jurisdiction of the Court by lodging two Article 12(3) declarations: the first in 2014 in relation to alleged crimes committed during the Maidan protests and the second, in the aftermath of the occupation of Crimea and the outbreak of Russia's proxy war in eastern Ukraine. Unlike the first declaration, which was temporally limited in scope, the second declaration extended to alleged crimes committed from February 20, 2014, onwards.² The open-ended temporal clause of this second declaration means that it also covers alleged crimes stemming from the ongoing war with Russia. Although Russia symbolically withdrew its signature from the Rome Statute following the release of a damning preliminary examination report by the office of the prosecutor (OTP) in 2016,³ the ICC has jurisdiction to prosecute any individuals, including Russian nationals, who allegedly commit crimes falling within its jurisdiction on Ukrainian territory. Due to the [jurisdictional limitations](#) applicable to the crime of aggression,⁴ however, the reach of the

ICC remains limited to war crimes, crimes against humanity, and genocide; it does not extend to the crime of aggression.

The ICC's preliminary examination into the situation in Ukraine concluded in December 2020 when the former Prosecutor, Fatou Bensouda, announced that a reasonable basis exists to believe that a broad range of war crimes and crimes against humanity falling within the Court's jurisdiction had been committed in the occupied Crimea and eastern Ukraine, all meeting the required gravity threshold.⁵ However, she left the decision on requesting the authorization of an investigation into the situation, to her successor, Karim Khan. Her decision was informed by the lack of sufficient resources at the OTP's disposal to undertake additional investigations.⁶

Russia's recent aggression against Ukraine in 2022 has radically changed the landscape of the conflict in Ukraine, elevating it to the level of a territory-wide international armed conflict (IAC). With the beginning of the full-scale Russian invasion of Ukraine, accompanied by the commission of alleged international crimes by Russian forces, and acting upon a collective referral from state parties, the ICC Prosecutor swiftly launched an investigation into the situation. In terms of potential future prosecutions, speculations abound as to how far up the ladder of responsibility the Prosecutor is willing to reach.

Many credible reports indicate the widespread commission of alleged war crimes and crimes against humanity on the territory of Ukraine by Russian forces that potentially fall within the Court's jurisdiction.⁷ Such incidents include intentional and indiscriminate attacks against civilians and civilian infrastructure (residential buildings, kindergartens, schools, hospitals, maternity wards, water stations, and electricity networks), as well as the use of prohibited weapons, such as cluster munitions and phosphorous bombs.⁸ Shocking footage and witness accounts emerged from the de-occupied areas in the Kyiv oblast, in particular Bucha, where the streets were found littered with the corpses of civilians, and over 400 bodies of men, women, and children (many of them severely mutilated and badly burnt) were discovered with signs of torture and sexual violence.⁹

President Zelensky [publicly stated](#) that the crimes against civilians in Bucha were committed with the express intent to destroy Ukrainians as a national group and therefore qualify as genocide. Indeed, the disturbing rhetoric from the Kremlin and Russia media, which would deny Ukrainians the right to exist as a nation,¹⁰ combined with the unrestrained excesses of Russian forces in the occupied territories, may point toward the existence of genocidal intent.¹¹ It has also been [reported](#) that rape and sexual violence against women, children, and the elderly have been used by Russian forces as a weapon of war in order to sow terror among civilians in the occupied territories. More evidence of

war crimes is likely to emerge from Mariupol and other areas that remain under the control of Russian forces.¹²

Despite some misconceptions in Ukraine that the ICC investigation is only targeting Russians or pro-Russian separatist groups, the ICC Prosecutor is mandated to investigate crimes committed by all parties to the conflict. Prior to 2022, the OTP's annual preliminary examination reports have consistently outlined the gravity of the alleged crimes, and gone on to state that members of the pro-Russian separatist forces (Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR)) had allegedly committed crimes "of a more severe nature and on a significantly larger scale than members of Ukrainian government forces" in eastern Ukraine.¹³ Amidst the ongoing hostilities, the alleged crimes appear to have been predominantly committed by Russian forces, with some isolated reports emerging of Ukrainian armed forces mistreating Russian prisoners of war.¹⁴

Given the ICC's focus on prosecuting those who bear the most responsibility for the commission of atrocity crimes, the Court will likely only ever prosecute a handful of individuals linked to the situation of Ukraine. As for alleged crimes committed in occupied Crimea since 2014 within the context of the IAC between Russia and Ukraine,¹⁵ the ICC Prosecutor may choose to seek warrants of arrest against some high-ranking members of the Occupying Power's administration in Crimea. As for the mixed armed conflict in eastern Ukraine (2014-2022),¹⁶ the Prosecutor's recent request for arrest warrants with regard to the situation in Georgia concerning three senior members of the *de facto* South Ossetian administration, may offer some valuable insights.¹⁷ Similarly, should the prosecutor seek arrest warrants for the commission of international crimes in eastern Ukraine between 2014-2022, it is likely that such warrants would target members of the pro-Russian separatist groups (DPR and LPR).

Challenges Ahead

The ICC investigation into the situation in Ukraine faces multiple challenges. Russia's vocal hostility towards the Court poses the greatest obstacle in terms of evidence collection, especially in the occupied territories under Russian control.¹⁸ It would also complicate any efforts to issue arrest warrants against Russian nationals, given that the ICC relies heavily on national authorities to apprehend suspects and transfer them to The Hague for trial. Thus far, the Prosecutor has received "no response" from Russian authorities to his formal request to discuss the ongoing situation in Ukraine; it is doubtful whether he ever will.¹⁹

The current international sanctions against senior members of the Russian government may further complicate the apprehension of potential suspects.²⁰ More specifically, the travel bans that apply to Russians who are included in the sanctions lists make it unlikely that they will embark on much international travel in the foreseeable future. Should the ICC issue arrest warrants against them, this limits the chances of them being arrested overseas and transferred for trial. Hence, the most likely prospect for the ICC to try such individuals would require a regime change in Russia and the election of a government that would be more willing to cooperate with the ICC. At present, there is little evidence to suggest that this will come to pass anywhere in the near future. However, some important developments are taking place in Ukraine with respect to the accountability of low-ranking Russian soldiers who were captured as prisoners of war, with the first guilty verdicts having recently been handed down by Ukrainian courts.²¹ The prosecution of such “small fish” is likely of limited interest to the ICC, which means that the Ukrainian judiciary will shoulder much of the responsibility for such trials.

Over the last years, the OTP has faced substantial financial and resource constraints amidst its ever-increasing workload,²² which led the Prosecutor to call for additional budgetary support upon announcing the investigation in the situation of Ukraine.²³ In an unprecedented show of support, 21 state parties to the ICC confirmed their willingness to second national experts, while 20 state parties agreed to commit financial resources. This has raised concerns about selective justice, although the ICC Prosecutor later sought to dispel such fears by assuring that the resources and funds will be distributed among all situations.²⁴

In addition to these challenges, there is also opportunity: namely, the unprecedented deployment of ICC resources and a renewed focus on collaboration between the Court and domestic jurisdictions. In May 2022, the ICC Prosecutor dispatched the largest-ever team of 42 investigators, including seconded national experts, to collect evidence in Ukraine. This heralds a new chapter in the history of the ICC that more openly and transparently engages with investigations on the ground alongside other actors, including a joint investigative team established by Ukraine and other states under the auspices of Eurojust and later joined by the ICC).²⁵ Notwithstanding the multitude of obstacles, the ICC investigation in Ukraine holds the promise that nationals of powerful states such as Russia cannot escape justice and that victims will be vindicated in the future, however distant that may be.

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¹ ICC OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine>; *id.*, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact portal launched for provision of information (Mar. 11, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and> (hereinafter Statement of ICC Prosecutor re. Ukraine Mar. 11, 2022).

² ICC Press Release, Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014 (Sep. 8, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1146&ln=en>; *id.*, ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration (Sep. 29, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1156>.

³ Ministry of Foreign Affairs of the Russian Federation, Statement by the Russian Foreign Ministry (Nov. 16, 2016), https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566.

⁴ ICC-ASP/16/Res.5, Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression (Dec. 14, 2017).

⁵ ICC OTP, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES §§ 277-281 (Dec. 14, 2020); ICC OTP, Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine (Dec. 11, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine>.

⁶ *Id.*

⁷ OHCHR, SITUATION OF HUMAN RIGHTS IN UKRAINE IN THE CONTEXT OF THE ARMED ATTACK BY THE RUSSIAN FEDERATION: 24 FEBRUARY – 15 MAY 2022 (June 29, 2022); Amnesty International, “HE’S NOT COMING BACK”: WAR CRIMES IN NORTHWEST AREAS OF KYIV OBLAST (May 2022); Human Rights Watch, UKRAINE: EXECUTIONS, TORTURE DURING RUSSIAN OCCUPATION: APPARENT WAR CRIMES IN KYIV, CHERNIHIV REGIONS (May 12, 2022), <https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation>.

⁸ See, e.g., *Hospitals Bombed and Apartments Destroyed: Mapping Incidents of Civilian Harm in Ukraine*, BELLINGCAT (Mar. 17, 2022) <https://www.bellingcat.com/news/2022/03/17/hospitals-bombed-and-apartments-destroyed-mapping-incidents-of-civilian-harm-in-ukraine/>.

⁹ *Bucha killings raise ‘serious’ questions about possible war crimes: Bachelet*, U.N. NEWS (Apr. 4, 2022) <https://news.un.org/en/story/2022/04/1115482>; Markiyan Klymkovetskyi, *З районів звільненої Київщини вивезли вже 410 тіл загиблих — Венедиктова* (410 dead bodies were removed from the liberated areas of Kyiv region – per Venedyktova), HROMADSKIE (Apr. 3, 2022), <https://hromadske.ua/posts/shestirichnogo-sashka-yakogo-dekilka-tizhniv-shukali-pid-vishgorodom-znajshli-mertvim>.

¹⁰ Timofei Sergeitsev, *Что Россия должна сделать с Украиной*, RIA NOVOSTI (Apr 3, 2022), <https://ria.ru/20220403/ukraina-1781469605.html>.

¹¹ Douglas Irvin-Erickson, *Is Russia Committing Genocide in Ukraine?*, OPINIO JURIS (Apr. 21, 2022), <https://opiniojuris.org/2022/04/21/is-russia-committing-genocide-in-ukraine/>; A. Dirk Moses, *The Ukraine Genocide Debate Reveals the Limits of International Law*, LAWFARE (May 16, 2022), <https://www.lawfareblog.com/ukraine-genocide-debate-reveals-limits-international-law>; George Wright, *Ukraine war: Is Russia committing genocide?*, BBC (Apr. 13, 2022) <https://www.bbc.com/news/world-europe-61017352>.

¹² *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUMAN RIGHTS WATCH (Apr. 3, 2022), <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>.

¹³ ICC OTP, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES § 278 (Dec. 5, 2019).

¹⁴ Daniel Boffey, *UN official concerned over videos showing apparent abuse of PoWs in Ukraine*, THE GUARDIAN (Mar. 29, 2022), <https://www.theguardian.com/world/2022/mar/29/un-official-concerned-over-videos-showing-apparent-abuse-of-pows-in-ukraine>.

¹⁵ ICC OTP, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES § 158 (Nov. 14, 2016).

¹⁶ *Id.* §§ 169-170.

¹⁷ Situation in Georgia, Case No. ICC-01/15, Public redacted version of ‘Prosecutor’s application pursuant to article 58 for warrants of arrest against Mikhail Mindzaev, Gamlet Guchmazov and David Sanakoev’, 10 March 2022, ICC-01/15-34-Conf-Exp, (Mar. 10, 2022).

¹⁸ *Id.*; ICC OTP, *supra* note 15, §§ 158, 169-170.

¹⁹ ICC OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland: “Engagement with all actors critical for effective, independent investigations.” (Mar. 16, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=20220316-prosecutor-statement-visit-ukraine-poland>; *Russia not responding to International Criminal Court amid war crimes investigation, prosecutor says*, ITV (Mar. 25, 2022), <https://www.itv.com/news/2022-03-25/russia-not-responding-to-icc-amid-war-crimes-investigation-prosecutor-says>.

²⁰ See, e.g., *EU adopts package of sanctions in response to Russian recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and sending of troops into the region*, COUNCIL OF THE EUROPEAN UNION (Feb. 23, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/>; *Press statement by President von der Leyen on the fifth round of sanctions against Russia*, European Commission (Apr. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2281.

²¹ Solomyansky District Court of Kyiv City, *Case of Vadim Shishimarin, public announcement of the verdict*, 5 KANAL (May 23, 2022) <https://www.youtube.com/watch?v=AVCunNEZGQc>; Kotelevsky District Court in Poltava Region, *Case of Oleksandr Ivanov and Oleksandr Bobykin* (May 31, 2022).

²² *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, ICC OTP (Dec. 11, 2020) <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine>; Fatou Bensouda, “Without Fear or Favour”: Reflections on my term as Prosecutor of the International

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²³ ICC OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.” (Feb. 18, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=20220228-prosecutor-statement-ukraine>; ICC OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland: “Engagement with all actors critical for effective, independent investigations.” (Mar. 16, 2022) <https://www.icc-cpi.int/Pages/item.aspx?name=20220316-prosecutor-statement-visit-ukraine-poland>.

²⁴ ICC OTP, Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and support from States Parties will accelerate action across our investigations (Mar. 28, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=20220328-prosecutor-statement-investigations>; *id.*, ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands (May 17, 2022), <http://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine>.

²⁵ Office of the Prosecutor General of Ukraine, *The Office of the Prosecutor of the ICC joined a joint investigative team of Ukraine, Lithuania and Poland regarding the prosecution of Russian crimes* (Apr. 25, 2022), <https://www.gp.gov.ua/ua/posts/ofis-prokurora-mks-prijednavsya-do-spilnoyi-slidcoyi-grupi-ukrayini-litvi-ta-polshhi-shhodo-rozsliduvannya-zlociniv-rf> (in Ukrainian); *id.*, *The joint investigative team regarding the prosecution of serious international crimes was further joined by Estonia, Latvia and Slovakia* (May 31, 2022), <https://gp.gov.ua/ua/posts/do-spilnoyi-slidcoyi-grupi-z-rozsliduvannya-tyazkix-miznarodnix-zlociniv-v-ukrayini-prijednalisya-shhe-estoniya-latviya-i-slovaccina> (in Ukrainian).