International Criminal Court – the central figure of transitional justice? Tailoring the post-violence strategies with special reference to Ukraine

To be published in: “The Polish Quarterly of International Affairs” 2015, No. 3

Abstract

This paper is devoted to analyze the factual and potential interference of the International Criminal Court (ICC) in a conflict and post-conflict environment. It is argued that capacity of the ICC has to be measured by the possibility to tackle ‘the hard-cases’, both: geopolitically and legally speaking, serving as a real mean of the transitional justice strategies, applied by the post-violence societies.

The initial evaluation of the ICC capacity in the field of international and transitional justice is confronted with the current situation in Ukraine, since Kyiv has lodged two ad hoc declarations under Article 12 (3) of the Rome Statute. First one accepted the jurisdiction of the Court with reference to ‘Maidan crimes’ that occurred during Winter 2013-2014, while the second covers the possibility of crimes against humanity and war crimes committed in a course of warfare in Donbas region. Undoubtedly, it demands the careful analyses over the ICC presence in the Ukrainian crises.

Introduction

International Criminal Court (ICC) is the first, permanent international criminal body, established in order to pursue international (criminal) justice. The main idea of the delegates to the 1998 Rome Conference was to create an universal court, covering all international core

* Mag. iur., PhD Candidate at The Chair of Public International Law and International Relations, Faculty of Law and Administration, University of Łódź, Poland. Currently, Lachowski is preparing the PhD dissertation on Transitional Justice in International Law: With Special Reference to the Victims Rights: Right to Justice, Right to Truth and Right to Reparation. E-mail address: tomasz.lachowski86@gmail.com.
crimes and possibly all states and potential perpetrators. Up to date, there are 122 parties to the Rome Statute,¹ however with no ‘big players’ (mainly USA, the Russian Federation, China, India, Israel) of the international scene, what clearly undermines the expected universality of the Court. At the same time, the ICC operates in the post-conflict environment(s), dealing with ‘war-torn’ societies (rarely with the societies under still ongoing conflict), which confront themselves with legacy of past evils, trying to form the appropriate transitional justice strategies. The Hague’s Court, bearing in mind its unique legal construction, may serve not only as a mechanism of international (criminal) justice, but also as a transitional justice tool, especially for countries with low capacity, or not sufficient system of protection of fundamental rights and freedoms, either on domestic, or even regional level.

This paper is devoted to understand the ICC role in the contemporary international politics, in other words, to interpret the Rome Statute in the light of seeing the Court as a ‘stream of international justice’ in the transitional justice paradigm. Moreover, it is stated that to achieve one of its primary goals on a path of fighting against impunity of the most responsible wrongdoers, the Court shall intervene – as long as it may exercise its jurisdiction – in states, where the core crimes may occurred, but they are perceived as a space of interest of crucial actors of international relations (e.g. cases of Iraq, Georgia or Israel). The latest example of Ukraine, both the Maidan’s events and the armed conflict in Donbas (Ukraine issued two ad hoc declarations accepting the Court jurisdiction in a matter), clearly shows that the ICC interference is expected in order to achieve the deterrence effect and to contribute to the post-violence efforts in Ukraine.

Thus, the paper is divided into two main parts. The first deals with the ICC legal and political construction as one of the most significant transitional justice measures for post-conflict societies, as the second tries to shed more light on the ongoing Ukrainian crisis, when the Hague’s Tribunal is perceived as one of the significant elements of the post-conflict architecture by the Ukrainian authorities. The Declaration accepting the ICC jurisdiction was issued just 3 days after the rapid transition of power in Kyiv and the escape of the former President Viktor Yanukovych into Russia. Nevertheless, the question remains, why the second declaration under the Article 12 (3) of the Statute, concerning crimes committed during the conflict in two separatists oblasts, was registered in the Court’s Registrar after 7 long months since its adoption by the Verkhovna Rada in February 2015.

Transitional justice and the ICC

The notion of transitional justice was framed in the early-1990s (to mention the N. Kritz’s 3 volume monograph, in particular2) to describe the Central and Eastern European processes of democratization and transition from the authoritarian rule to democracy.3 However, transitional dilemmas of reckoning with past evils, holding accountable the officials of the ancien régime structures, disclosing truth over the long-lasting human rights violations were directly applicable to the context of Latin American states, moving through their transitions after the rule of military juntas the decade before (1980s).4 Doubtlessly, the transitional challenges are perfectly known from the ancient times, when in the aftermath of a conflict a burning need usually appeared: what to do, for instance, with former combatants.5 To

---

5 The first confirmed amnesty policy (transitional justice mechanism) was noticed with regard to the ancient Greek, Athenian general Thrasybulus’ decision. He led to the re-democratization of this Greek polis and
emphasize, for centuries, with the exception of international criminal tribunals (the Nuremberg’s International Military Tribunal, IMT and the Tokyo’s International Military Tribunal for the Far East, IMTFE) operating after the II World War, the transitional justice strategies were solely the internal matter of a particular state. The establishment of the two ad hoc tribunals (International Criminal Tribunal for the former Yugoslavia, ICTY; International Criminal Tribunal for Rwanda, ICTR) in the mid-1990s significantly increased the value of ‘the binding’ international (criminal) justice for the post-conflict societies, what was followed by numerous hybrid courts (Special Court for Sierra Leone, SCSL; Special Tribunal for Lebanon, STL; Extraordinary Chambers in the Courts of Cambodia, ECCC; etc.) and the creation of the ICC itself.

Transitional justice is not all just about delivering criminal justice. Conversely, it contains the huge non-judicial sort of instruments, such as truth-seeking or truth-telling bodies (probably the most well known was the post-apartheid South-African Truth and Reconciliation Commission); reparations programs (material, non-material, individual, collective, symbolic), institutional reforms, vetting procedures and many other ‘beyond-law’ initiatives, concerning preserving collective memory, rehabilitation or, for instance, psychological aid for the victims of abuses. This holistic approach was taken by the UN Secretary-General in his (first) 2004 report on transitional justice, where he indicated that different transitional justice mechanisms shall be seen as complementary methods of pursuing justice, disclosing truth and providing reparations. In addition, it is worth mentioning the slight shift transitional justice overthrowing of the Thirty Tyrants rule (imposed on Athens by Sparta) in 404 BC. Compare N. Weisman, “A History and Discussion of Amnesty,” Columbia Human Rights Law Review, vol. 4, 1972, pp. 529-540.  


7 In the last few years we can observe the emerging tendency of installing the special, domestic criminal tribunals dealing with international crimes by the affected society, with no international presence. For instance, we can point at the International Crimes Tribunal of Bangladesh or slightly internationalized the Extraordinary African Chambers Within the Courts of Senegal.

did experience in the last decade - from solely *backward-looking justice* to *forward-looking justice* paradigm, including also the peacebuilding processes (e.g. the establishment of the UN Peacebuilding Commission in 2005 can be invoked).  

Today we can point that transitional justice, even if cannot be named as a ‘self-contained regime’ in terms of international law, definitely became an autonomous, interdisciplinary field of research, which is symbolized by a quite recent appointment of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (in 2011)\(^9\) and the 3-volume comprehensive publication of *the Encyclopedia of Transitional Justice* in 2012.\(^{11}\)

With regard to the ‘legal section’ of transitional justice, states should be flexible in terms of forming their own transitional strategies (the value of the *local-ownership*\(^{12}\)), as long as they comply with their international law obligations to prosecute and punish wrongdoers of certain heinous crimes and violations and respect the rights of the victims.\(^{13}\) Needless to say, states are mainly obliged to protect and promote the most fundamental rights of victims in the post-violence period (transitional justice seen from the view of *victims’ justice*) – *right to justice, right to truth, right to reparation and guarantee of non-repetition*, which became the basis of transitional justice in the eyes of numerous experts,\(^{14}\) as well as UN officials.\(^{15}\) Moreover, it

---


\(^{10}\) Human Rights Council, A/HRC/RES/18/7, 13 October 2011.


\(^{13}\) States are obliged under different examples of treaty law (e.g. the 1948 Genocide Convention; the 1984 Torture Convention) or customary law. The huge step in determining the state obligations towards victims of abuses was taken by human rights courts and other bodies. One of the crucial judgments in that field was issued by the Inter-American Court of Human Rights in the case of “Velásquez-Rodríguez v. Honduras,” Ser. C, No. 4, 29 July 1988.

corresponds to the commonly agreed normative basis of transitional justice – as invoked by the UN Secretary-General: the UN Charter, alongside the four modern pillars of international law: international human rights law, international humanitarian law (IHL), international criminal law and international refugee law.¹⁶

Does the ICC fit the framework of transitional justice efforts undertaken by different post-conflict societies?

Transitional justice is being delivered by many different actors of a post-conflict environment – the affected state itself (what mirrors its primary legal obligations in that field), the international community (e.g. via UN transitional administration, like in Timor-Leste or Kosovo¹⁷) or by the combination of thereof, ergo the ICC might be seen as one of the streams of post-conflict justice. The factual interference of the Court in many post-crimes situations (African, in particular) is the very first confirmation of such thesis.

Concerning the ICC as a transitional justice figure, the two-fold perspective of such must be underlined. Firstly, as an international response to crimes committed in a (post-)conflict scenario, which is the primary function of the Hague’s Court - to adjudicate and deliver judgment concerning crimes covered by the ICC jurisdiction. Secondly, as a mechanism of a comprehensive system of pursuing justice, disclosing truth and fostering reparations – the strong pillar of transitional justice, at least to some extent, ‘victims’-oriented’.

With regard to the first question, it must be stated that the main objective of the Court, i.e. the accountability is subjected to the complementarity principle – under Article 17 the ICC interferes only when the state, upon which the primary duty to prosecute and punish rests,
unwilling or unable to undertake its obligations. Thus, the ICC is ‘a court of last resort’. Nonetheless, the complementarity may be used by the Court a tool to put a pressure on a particular state, e.g., the Rome Statute provisions as a basis of accountability were adopted by Democratic Republic of Congo (DRC).18 Such interrelation between the ICC and a state we call as a ‘positive’ or ‘proactive complementarity’, aimed at fostering and strengthening the local capacity to fight against impunity.19 ‘Positive complementarity’ may also mean the way of dividing the work between the ICC and a state. For instance, with regard to Uganda, the Court concentrates on prosecuting only the four leaders of the Lord’s Resistance Army (LRA), leaving the Ugandan authorities place for the implementation of different judicial and non-judicial mechanisms covering other participants of the internal conflict.20

With reference to the second abovementioned issue - the question arises whether the criminal court (regardless of its international or domestic character) is capable of becoming ‘the victim-oriented’ body and if it is really necessary to achieve such a goal. Nonetheless, contrary to its ‘predecessors’ the Rome Statute has noticed the presence of victims, (I) as participants to the Court’s proceedings under Article 68;21 (II) and as beneficiaries of a reparation system under Article 75, if certain requirements are met.22 Research conducted by several scholars on the victims’ perception of a criminal trial, which definitely cannot be restricted just to the expectation of a conviction of alleged criminal,23 clearly shows other

21 Individuals or organizations that suffered harm as a result of one of the ICC crimes may file an application in order to participate. Judges of the Court examine whether victims are entitled to appear before the court as participants to the proceedings. The number of 5229 victims took part in Bemba proceedings. See also F. McKay, “Victim Participation in Proceedings before the International Criminal Court,” Human Rights Brief, vol. 15, no. 3, pp. 2-5.
22 Only in case of conviction, limited to the crimes confirmed by the judgment (ergo, previously dependant on charges raised by the Prosecutor).
aims of victims presence in a trial. Mainly - a desire to know the truth of the circumstances of a crime, a will to a commemorate all murdered relatives or, even, the direct confrontation with a perpetrator.\textsuperscript{24} Besides the ICC, the only international criminal tribunals that recognized victims as subject of the trial\textsuperscript{25} were STL and ECCC.\textsuperscript{26}

Therefore, it is necessary to underline the factual ability of the ICC to play significant role in post-conflict scenario, as a transitional justice tool, however not as replacement of other mechanisms.\textsuperscript{27} Although at the same time, the ICC is being criticized (rightly, as it seems) for being not capable of making the decisive response to the crimes committed and making use of postulated ‘deterrence effect’. Why?

Firstly, the ICC being a court of law is permanently located between international law framework and geopolitics. Up to date, the Court deals with 21 cases in 9 situations – all of them are African states (e.g. DRC, Kenya, Mali or (two times) the Central African Republic). The preliminary examinations conducted at present – especially related to countries ‘under the microscope’ of the biggest actors of international scene, like Iraq (USA, UK) or Georgia and Ukraine (Russia) - do not lead to (any) conclusions.\textsuperscript{28} As it argued in the next part of the paper, the Ukrainian situation may rearrange the international position of the ICC as an effective body, comparable to, e.g., economic, robust sanctions imposed on a particular state.

\textsuperscript{24} P.N. Pham, P. Vinck, M. Balthazard, J. Strasser, Ch. Om, ”Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia,” \textit{Journal of Human Rights Practice}, vol. 3, no. 3, 2011, p. 273.


Secondly, the mechanisms of triggering the ICC jurisdiction are highly politicized and put under pressure of the most significant players. The UN Security Council referral needs to have approval of all P5 members. State referrals are the examples of their commitment to the value of pursuing justice, nevertheless they are based on a political decisions of leaders to subordinate themselves to the Hague.\textsuperscript{29} Eventually, the Office of the Prosecutor (OTP) acting on \textit{proprio motu} legal grounds chooses her (Fatou Bensouda) own prosecution policy – was Thomas Lubanga the most responsible wrongdoer to be tried at first?\textsuperscript{30} Probably not, but the decision\textsuperscript{31} of the (former, Luis Moreno-Ocampo) Prosecutor to successfully indict a war criminal and convince the Court to convict him shall be analyzed as willing to succeed, fulfilling his mandate and gaining respect in the eyes of international community.\textsuperscript{32}

Thirdly, still several doubts exist concerning the interrelation between the ICC and other, mainly non-judicial transitional justice mechanisms working on the field. Undoubtedly, states use different mechanisms in their transitional strategies, the combination of judicial and non-judicial measures, thus ‘the criminal justice paradigm’ must be open for another approaches, such as restorative or reparative justice.\textsuperscript{33} Truth commissions or – mainly – controversial amnesties\textsuperscript{34} adopted by states in the aftermath of a conflict shall be very carefully examined

\textsuperscript{29}To date, four states decided to refer their situation to ICC under Article 14 of the Rome Statute: Uganda, DRC, the Central African Republic and Mali.
\textsuperscript{32}ICTY commenced its work with the trial of Duško Tadić, a member of the paramilitary forces, definitely not the main figure of the armed conflict in the former Yugoslavia.
by the OTP.\textsuperscript{35} The Prosecutor’s various policy papers, like on the interest of justice,\textsuperscript{36} seemed to recognize the value of non-judicial tools, nevertheless, in spite of the Kenyan situation, where the ICC and the Truth, Justice and Reconciliation Commission operated during the same period (2008-2013), the Court still lack the direct experience on a cooperation of this two post-conflict instruments.\textsuperscript{37} To underline, the experience of the interrelation between the Special Panels for Serious Crimes of the Dili District Court in Timor-Leste and the Timorese Commission for Reception, Truth and Reconciliation, both established by the UN transitional administration UNTAET, may serve as a one possible solution to the ICC dilemma in the post-conflict state.\textsuperscript{38} The Commission was entitled to disclose the gathered information, which might have been used during the court’s trial solely on a basis of a consent of the Special Panels Attorney-General, while the Prosecutor’s or Court’s archives might have been transferred to the Commission only, if they did not violate the rights of the accused in the court.\textsuperscript{39}

To conclude this part of the paper, it is necessary to emphasize the unique character of the Rome Statute, which takes into account also victims (either by its statutory regulations or by the simple \textit{necessity} of the Court to cooperate with different, non-judicial transitional justice

\textsuperscript{35} A. Cassese proposed that the cooperation of an international criminal tribunal and a truth commission shall be based on a division between \textit{the high-ranked perpetrators}, examined solely by the court, and \textit{the middle- and low-ranked perpetrators}, who may appear before the truth commission. A. Cassese, \textit{International Criminal Law}, Oxford University Press, Oxford, 2003, pp. 451-452.


\textsuperscript{37} A path, which might be followed by the ICC, was previously taken by the SCSL, deciding on the mutual relations between the Special Court and the Truth and Reconciliation Commission for Sierra Leone. In the eyes of the SCSL, as long as the proceedings before the Commission would infringe the due process principle, guarantees of the criminal trial and would not confuse the affected society with ‘the double responsibility’, the Commission may be free in choosing persons, who would appear and methods of operation. See SCSL, "Decision on the appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Samuel Hinga Norman," Case No. SCSL-2003-08-PT, 28 November 2003, para. 30. \textit{Check also} D. Robinson, "Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court," \textit{European Journal of International Law}, vol. 14, no. 3, 2003, pp. 481-505.


mechanisms in post-conflict scenarios). This may lead to a statement of the potential strong contribution of the ICC to the transitional justice endeavors, however still limited by a political dimension of its proceedings.

Ukraine in a period of transition – ‘the new target’ for the ICC?

The Ukrainian crisis, starting from the peaceful demonstration held on Maidan Nezalezhnosti in Kyiv in November 2013, through the secession and the subsequent annexation of Crimea into Russia, until the Fall of 2014, when the (non-international) armed conflict in Donbas region between the pro-Russian separatists and Ukrainian army forces most probably irreversibly broke the ties between Kyiv and Donetsk, serve as a real example of possible interference of the ICC. The Court may play a significant role in determining the future of a country. Ukraine is still not the party to the Rome Statute, although it is necessary to underline that due to the ad hoc declaration issued by the Ukrainian Verkhovna Rada (National Assembly) of 25 February 2014 and lodged under the Article 12 (3) of the Statute on 9 April 2014, Office of the Prosecutor opened preliminary examinations of the situation.

---

40 Fighting for the independence of Donetsk and Luhansk oblasts (to mention the quasi-entities: Donetsk People’s Republic (DNR) and Luhansk People’s Republic (LNR) established by the pro-Russian groups in April and May 2014), with the aim to create the so-called Novorossiya. Most probably, in a case of success, the next step would contain the annexation to the Russian Federation (just as in the Crimean case happened) or – depending on the Kremlin’s will and policy – efforts to freeze the conflict in order to constantly destabilize the internal situation in Ukraine, not to let this country to integrate with EU and NATO. On the “right to self-determination” (?) of those two ‘people’s republics’ read T. Grzywaczewski, "Transitional Justice Beyond the Court: the Quasi-State Security Dilemmas and Post-Conflict Environment,” in: M. Malskyy, I. Byk, M. Mykayevych, N. Antoniuk (eds.), Актуальні проблеми міжнародних відносин: політичні, економічні, правові аспекти, Львів, 2014, pp. 41-42. The Author does not see any legal grounds for the two entities to exercise the so-called remedial secession.

41 Ukraine has signed the Statute on 20 January 2000 (by the President Leonid Kuchma), but has never ratified it. In 2001 the Ukrainian Constitutional Court has stated that the Rome Statute was incompatible with the state Constitution, effectively blocking the process of the ratification. See Opinion of the Constitutional Court of the Conformity of the Rome Statute with the Constitution of Ukraine, 11 July 2011, Case N 1-35/2001. In a late Spring 2014 the Ukrainian Constitutional Court received a motion from Oleksandr Turchynov, the acting President and the Chairman of Verkhovna Rada to rule over the constitutionality of the Rome Statute. Case is still pending during the time of writing.


in Kyiv (Maidan) – within the period of 21 November 2013 – 22 February 2014. Concerning the bloodshed in the eastern part of Ukraine, the Verkhovna Rada submitted another *ad hoc* declaration on 8 September 2015.\(^{44}\) Resolution, adopted by the Ukrainian Parliament, covers crimes against humanity and war crimes that occurred since 20 February 2014 in the territory of Ukraine (without indicating the closing date). The process of the democratization and Europeanization of the country, which was commenced in November 2013 by ‘Maidan protests’ as a response to the refusal of the former Ukrainian President Viktor Yanukovych to sign the EU-Ukraine Association Agreement, demands the careful tailoring the transitional strategies, including the transitional justice efforts itself. It is worth mentioning that Ukraine as a post-USSR country has failed to undertake a full transitional justice process after the collapse of Soviet Union and the independence of the state in 1991,\(^{45}\) as well as after the so-called ‘Orange Revolution’ of 2004 (which completely failed internally, losing the opportunity for the state to craft the strong relations with EU at one side, and to decrease the political influence of Russia at the other).\(^{46}\) Most probably the only ‘past evil’ challenged by the authorities was the ‘the Great Famine’ (*Holodomor*) of 1930s. The Verkhovna Rada passed a special law in November 2006, recognizing the Great Famine as a genocide committed by the Bolsheviks against the Ukrainian nation.\(^{47}\) To be emphasized, the new law raised awareness over the facts of the 1930s genocide (mainly who was responsible for the tragedy) among Ukrainian nationals.\(^{48}\)

\(^{44}\) Declaration of the Verkhovna Rada of Ukraine, 4 February 2015, lodged under Article 12 (3) of the Rome Statute, 8 September 2015.


Thus, the challenges of transition still remain as one of the primary goals of Kyiv policy\(^{49}\) – to mention ‘the old’ as, for instance, the need of deep institutional (security) reforms or vetting procedures and ‘the new’, e.g., to hold accountable those responsible for serious human rights violations that did happen on Maidan, alongside the grave breaches of IHL, which occurred in the course of warfare in the east of Ukraine.

Concerning ‘the old’ challenges, we can point out vetting procedures – known better in this part of Europe as lustration\(^{50}\) – implemented by Kyiv as a transitional justice mechanism: the law cleansing of government of previous regime officials. Lustration was one of the main purposes of the Maidan protests in Winter 2013-2014, therefore just after the political transition of February 2014, the special committee on lustration was established within the structure of a new government. On 16 September 2014 the Rada passed a new lustration statute that came into force one month later.\(^{51}\) The basic aim of the law is to verify the officials of the former regime of President Yanukovych and to ban from a public life those, who by their actions aimed at the abuse of power by Viktor Yanukovych (and his fellows) or the violations of the most fundamental rights and freedoms of the Ukrainian society.\(^{52}\) Even though one of the solutions was to cover the whole period of the Ukrainian independence since 1991, only the short time of 4 years (2010-2014) falls within the ambit of the statute. The first ‘wave’ of lustration moved 39 persons from their public offices, nonetheless the total number of people under screening procedures is estimated to be around 1 million officials.


\(^{52}\) State officials covered by the statute are, *inter alia*: The Prime Minister, members of government and other central offices (like the National Bank of Ukraine and the Central Electoral Commission), prosecutors, judges, councilors or employees of the National Bank of Ukraine.
As it seems, the new law is supported by the majority of a society, however ‘the revolutionary legislation’ is not out of controversies. The biggest question remains why the President, deputies and others directly elected by the nation are excluded from the vetting scrutiny, as well as, whether the act complies with international law and the domestic Constitution. The Venice Commission of the Council of Europe in its Opinion of December 2014 stated that the Ukrainian lustration law “does not constitute a violation of human rights per se”, however in order to comply fully with the human rights law it needs some significant improvements – mainly the guarantees of the proceedings, such as the right of defence, the presumption of innocence and the right to appeal to a court.

Concerning the criminal justice response to the crimes committed in Kyiv, the ICC appears as a crucial element. Soon after the rapid change of a government and the escape of Yanukovych to Russia, the new authorities (Arseniy Yatsenyuk as a Prime Minister and Oleksandr Turchynov, the acting President at that time) decided to ask the ICC for help in investigating the crimes committed and prosecuting the people responsible. Ukraine in the Declaration of 25 February 2014 stipulated the necessity of bringing to justice for crimes against humanity the senior officials of the former authorities, including, directly invoked in the text, Viktor Yanukovych, Viktor Pshonka (the ex-Prosecutor-General) and Vitalii Zakharchenko (the ex-Minister of Internal Affairs). As it seems, the request for the ICC interference should be understood as a will to include the international, credible, independent body in forming the post-transition landscape, even though (and it should have been known by the authors of the Declaration) the ICC is not (cannot be) bound by the state indication to prosecute x, y or z.

---

55 The answer was given by the former ICC Chief Prosecutor, Luis Moreno-Ocampo, concerning the situation in Uganda. In the first – historical – self-referral of a state, the Ugandan authorities requested the Court to investigate crimes committed solely by LRA. Moreno-Ocampo reiterated the value of impartiality and stated that the OTP would inquire all possible crimes committed by all parties to the conflict, including the Ugandan forces.
Similarly, the second _ad hoc_ declaration, registered on 8 September 2015, invoked the need of holding accountable “the senior officials of the Russian Federation and leaders of terrorist organization ‘DNR’ and ‘LNR’”, which as such has no binding effect for the Court.

The OTP has already decided to open preliminary examination into a (limited by time and space) situation in Ukraine, namely on Maidan in Kyiv. Undoubtedly, since Ukraine itself referred a situation under Article 12 (3) to the Court, the full cooperation of the domestic authorities with the Prosecutor can be anticipated, nevertheless the problem of the evidence gathering still exists. None authoritative, especially UN-backed fact-finding mission was created, what may inevitably shatter the endeavors of the ICC prosecutor to open a case against (any) particular individual. The OTP, having no police or other forces, strongly relies on the state cooperation. As we can presume (and what is the direct result of the _ad hoc_ Verkhovna Rada’s declaration accepting the ICC jurisdiction regarding crimes against humanity), the amount of violence targeted at the protesters on Maidan may constitute crimes against humanity in the eyes of the OTP (“a widespread or systematic attack directed against any civilian population, with knowledge of the attack” using the wording of the Article 7 of the Rome Statute). According to the report recently issued by one of the NGOs, at least 114 persons were killed and the fate of another 27 people is still unknown. The inquiry of the Prosecutor must take into consideration the possibility of crimes committed also by the protesters on the main square of Kyiv (falling within the ambit of the abovementioned Article

_Compare_ “Statement of the Chief Prosecutor on the Uganda Arrest Warrants,” 14 October 2005, The Hague, p. 2. Eventually, under the legal scrutiny, the OTP decided to start investigations of the LRA, due to the gravity of the crimes, nevertheless the Prosecutor himself was not bound by the Ugandan referral to prosecute only the LRA members. _Read more_ M. Happold, “The International Criminal Court and The Lord’s Resistance Army,” _Melbourne Journal of International Law_, vol. 8, no. 1, 2007, pp. 159-184.

7), however, as it seems, the protesters did not have enough capacity to undertake such activities within the scope of the definition of crimes against humanity.

With reference to the armed conflict in the eastern part of a country, at the time of writing it was still too early to assess the possible interference of the ICC as a result of the second *ad hoc* declaration. Nonetheless, many commentators raise the possibility of the war crimes committed under the ICC jurisdiction. According to mass-media relations, such actions as, e.g., the Ukrainian Prisoners of War (POW) march through the streets of Donetsk on 24 August 2014 conducted by pro-Russian rebels “designed to overshadow official Independence Day celebrations” may constitute a war crime under Article 8 of the Rome Statute and the violation of the III Geneva Convention Relative to the Treatment of Prisoners of War of 1949.\(^{57}\) Another issue concerns the possible shooting down the Malaysian Airlines MH17 civil aircraft by the pro-Russian separatists on 17 July 2014, which, in the eyes of several experts and some of the UN officials, “may amount to a war crime” (according to words of Navi Pillay, the UN High Commissioner for Human Rights).\(^{58}\) Although, it is necessary to emphasize that international human rights NGOs, such as Amnesty International, indicate that war crimes are being committed on both sides of the conflict (merely invoking conduct of the Ukrainian ‘Battalion Aidar’).\(^{59}\) That is why the Ukrainian authorities, most probably being afraid of opening investigations by the ICC against the Ukrainian army leaders too, submitted their second *ad hoc* declaration under the Article 12 (3) of the Statute on 8 September 2015 (even though the resolution itself was adopted by the Verkhovna Rada in

\(^{57}\) POW were followed by street cleaning machines – just to ‘clean’ the Donetsk streets from the ‘fascist’ troops of Kyiv, what was the symbolic link to the German POW march in Moscow in the mid-1944. *See* R. Oliphant, “Prisoners of war marched through the streets of Donetsk,” *The Telegraph*, 24 August 2014, [http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11053807/Prisoners-of-war-marched-through-streets-of-Donetsk.html](http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11053807/Prisoners-of-war-marched-through-streets-of-Donetsk.html).


February 2015). As it was stated, the possibility of committing crimes against humanity on Maidan by the peaceful protesters was little, while at least some of the actions conducted by the Ukrainian forces (either regular or voluntary military units) may be taken under consideration by the ICC Prosecutor. Nonetheless, as it seems, the OTP will tackle mostly the potential perpetrators belonging to the ‘DNR’ and ‘LNR’ troops, as well as the Russian Federation forces.

Considering the possible individual criminal responsibility for violations of IHL and other flagrant breaches of (international) law, it is crucial to underline the Ukrainian President Petro Poroshenko proposal to grant amnesty to most of the fighters in the east of Ukraine. As it was abovementioned, amnesties are always perceived as controversial, especially in a manner of shielding the human rights and IHL offenders. Poroshenko’s idea needs to be analyzed from the perspective of transitional justice strategies, in other words, the post-conflict efforts to build the relations of the previous adversaries after the war.60

On 16 September 2014 the Ukrainian Verkhovna Rada enacted the special amnesty statute - as a result of the so-called 'Minsk-1' peace talks of September 201461 - covering crimes committed during the time of conflict in Donetsk oblast, in order to secure peace and stability.62 However, some crimes are excluded from the amnesty provisions. According to Article 5 of the amnesty statute these are several crimes listed in the Ukrainian Criminal Code63 falling within the ambit of international core crimes, as well as the perpetrators of downing the MH17 airplane in July 2014. Regardless of the case of MH17, which most

---

61 In Minsk (Belarus) peace negotiations were conducted between Ukraine, Russia, pro-Russian separatists (“represented” by the Russian authorities) and the OSCE.
probably cannot be classified as a war crime (lack of intent of crime; nearly impossible to prove it by a prosecutor in any criminal trial), all other excluded crimes are within the scope of the ICC or can be prosecuted on a basis of universal jurisdiction principle.

As such, the amnesty provisions seem to comply with international law and the jurisprudence of international courts on the matter, contrary to, e.g., many African peace-accords inclusive amnesties incompatible with the international legal system (as in Sierra Leone). As it seems, Poroshenko wanted to show to the international community his commitment and respect of international standards and the possible interference of the ICC (which, in case of jumping into action, is not going to take into consideration any regulations hiding the international perpetrators from the international justice). Transitional justice approach proposed by the Ukrainian President – to find mechanisms of post-conflict rehabilitation and reintegration of the former combatants into society – was in conformity with international criminal justice paradigm. Moreover, it fulfilled the recommendation contained in the Article 6 (5) of the 1977 Additional Protocol II to the Geneva Conventions, encouraging the application of the widest amnesty to move smoothly from war to peace (it is simply impossible to prosecute and punish everyone, taking part in hostilities).

Nevertheless, it must be stated that the lack of political will of the pro-Russian forces to abide by the ceasefire conditions and the subsequent elections, held in two separatists’ people’s republics on 2 November 2014, led to the withdrawal of the special statutes for Donbas of 16 September 2014, including the amnesty laws. Due to the general elections in Ukraine itself on 26 October 2014, the duty to take (any) binding decision concerning the amnesty law

---


rested on the new Verkhovna Rada, commencing its term with the beginning of December 2014. Fighting between Ukrainian and pro-Russian forces (according to numerous reports, direct involvement of the Russian army is already proven) were continued after the September 2014 ceasefire accords - mainly due to the initiative undertaken by the latter. In February 2015, based on the so-called 'Minsk-2' peace talks, another agreement on a ceasefire has been reached - one of the possible solutions to the Donbas conflict are amnesties covering the participants of the hostilities. However, at the time of writing, neither Verkhovna Rada nor President Poroshenko prepared any draft statute on the matter.

Thus, how to assess a place for the ICC in the Ukrainian conflict and post-conflict landscape?

Obviously, like in the latest situation in Comoros ("the flotilla case"), when the Prosecutor decided that alleged crimes committed by Israeli commandos are not of sufficient gravity to open investigation(s) against the offenders, the OTP may drop the Maidan events for similar reasons. Firstly, concerning admissibility, the Prosecutor may decide that Ukrainian domestic courts are capable enough to handle ‘Maidan cases’ (‘the complementarity test’). Then, the OTP examines gravity of crimes (evaluation of a scale, manner and nature of crimes, as well as, the impact of potential investigation), what may also not lead to the pre-trial stage, if gravity is not sufficient enough. Finally, while analyzing the interest of justice under Article 53 of the Statute, the OTP may conclude that potential cases are against the fundamental interest of victims and there is “no sufficient basis for a prosecution”. Moreover, as it seems with regard to current facts, it would be very difficult to bring Viktor Yanuovych

---

66 Peace negotiations were conducted by Ukraine, Russia, France and Germany. Pro-Russian separatists relied on the Russian authorities.


to justice, effectively sheltered by Russia, especially after granting him the Russian citizenship by President Vladimir Putin.\footnote{M. Kersten, "ICC Justice in Ukraine May Have to Wait," \textit{Justice in Conflict}, 17 June 2014, http://justiceinconflict.org/2014/06/17/icc-justice-in-ukraine-may-have-to-wait/}

Conversely, we can assume the huge possibility of opening not only preliminary examinations by the OTP into the situation of Donbas, but also – depending on a cooperation of Kyiv – issuing the arrest warrants against the potential perpetrators. The intensification of the armed conflict since February 2014 was rather high, even bearing in mind the few attempts of a ceasefire between the Ukrainian forces and pro-Russian separatists, supported by the regular Russian troops.

At the same time, it is highly visible that Ukrainian authorities seek for the international assistance and the ICC appears one of the first choices in forming their transitional policy. The Declaration accepting the ICC jurisdiction issued just 3 days after the Verkhovna Rada voted to oust Yanukovych may serve as a clear evidence, although the second declaration was submitted at least a year after the commence of the fighting in the east of the country. It is worth noticing that the inclusion of the Hague’s Court into the post-Maidan scenario and - finally - concerning crimes committed during the conflict in Donbas, should eventually accelerate the process of the ratification of the Rome Statute. It would definitely ‘transfer’ Ukraine to the group of like-minded states, fighting against impunity of the most responsible perpetrators.

The ICC involvement may contribute to the improvement of the domestic courts’ system in Ukraine (as well as the prosecution), especially having in mind the necessity of the cooperation between the Hague and Kyiv – also on the grounds of ‘the positive complementarity’ postulate. What is more, the interference of the ICC in Ukraine shall be viewed also from the perspective of victims of abuses – it must be stated that victims may
participate within the Rome Statute system also during the *situation* phase, the preliminary examination stage, we witness at present.\textsuperscript{70}

Undoubtedly, besides the abovementioned lustration law, it is hard to imagine the implementation of any other transitional justice mechanisms, such as truth commission (lack of internal and regional tradition of non-judicial truth-seeking and truth-telling ‘tool-kit’\textsuperscript{71}) or reparations programs (lack of state capacity to provide reparations for numerous victims). Thus, the ICC involvement shall be perceived as a strong post-violence measure.\textsuperscript{72} Domestic courts did not experience similar cases in the last decades, especially concerning the international core crimes, therefore the credible international assistance is of priceless value. The factual ability of the ICC Prosecutor to cooperate with domestic organs and – potentially – to open investigations against the alleged criminals just ‘in front of’ the Russian neighbor would definitely increase the international position of the Court, disposing of the derogatory label of the tribunal for the ‘weak (African) countries’. Last, but not least, we may presume the more efficient peace talks leading to the end of the conflict in Donbas, when decision-makers or army leaders (on both sides) are now aware of the possibility of holding them accountable before the Hague’s Court for international crimes committed.

**Conclusive remarks**

International Criminal Court is of an unique character. The first truly international criminal tribunal (established on a basis of open-access treaty). The first criminal body to include victims of crimes into proceedings and to provide for the reparation system (even though

\textsuperscript{70} Doubtlessly, the number of legal actions during the *situation* phase is very limited. If the Pre-Trial Chamber decides to issue warrant of arrest and the pre-trial phase begins, the possibility of participation before the ICC significantly increases.


\textsuperscript{72} The possible inclusion of the victims into the ICC proceedings under the Rome Statute, potentially covered also by the ICC reparation system may visibly support the value of the local-ownership of the Ukrainian post-conflict endeavors.
restricted to certain prerequisites). Finally, the institution with a huge potential of becoming significant figure of the UN peace and security system (as a method of prevention, for instance under the label of the Responsibility to Protect concept), which is constantly limited by the political context of its involvement. Nonetheless, as it seems, the ICC is one of the important figures for transitional societies, in framing their post-violence strategies. Coincidentally, it is necessary to strengthen the ICC efforts by the affected society itself, to undertake actions accepted and (culturally) understood by particular people. ICC as a replacement of the ‘local-ownership’ of a transition would never succeed.

International Criminal Court as an useful tool was noticed by the Ukrainian authorities, which accepted its jurisdiction by two ad hoc declarations issued under Article 12 (3) of the Statute. First one of April 2014 to inquire the situation on Maidan in Kyiv from November 2013 till February 2014. Second, of September 2015, to investigate the crimes committed mainly during the ongoing armed conflict in Donbas. Although the second declaration was submitted rather lately, after more than one year of bloodshed in Donbas, it is visible that the Ukrainian government understands the role of the Court with regard to the crimes committed on its territory. Especially having in mind the fragile moment of seeking for the national identity in a course of warfare and fighting for its security and independence. It is clear that Ukraine should look for the comprehensive transitional justice strategies, concerning not only the armed conflict in eastern part of a country (Poroshenko’s idea of September 2014 to grant amnesty for ‘regular’ fighters, appears as one of the examples), but also touching the issue of its post-USSR and post-authoritarian legacy.

ICC cannot become a remedy for each and every problem, but definitely may contribute to the pursuit of justice in Ukraine. What is more, the interference in Ukraine would most probably contribute to its own international position and capability of becoming strong, widely
respected international organ of the fight against impunity of the most responsible perpetrators.