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The ICC's investigation into the situation in Ukraine on the basis of referrals by third states parties to the Rome Statute: A commentary

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Summary: This commentary discusses the decision taken by the Prosecutor of the International Criminal Court (ICC) to open an investigation into the situation in Ukraine on the basis of referrals by a number of state parties to the Rome Statute. In particular, it is interested in the prior decision that the Prosecutor had to make and actually made for that move to be procedurally possible. Indeed, the Prosecutor had to renounce to his steps towards an investigation *proprio motu,* i.e. on his own initiative. The most important of these steps was the request of judicial authorisation by the ICC Pre-trial Chamber. This commentary argues that for that reason, the Prosecutor's decision was ill-advised, despite being in conformity with the Rome Statute. It argues that in that specific situation where neither Ukraine nor the Russian Federation are parties to the Rome Statute and where the Security Council has not and could not play its Rome Statute role, judicial oversight was an important – arguably the most important – legitimising factor for the investigation. The Office of the Prosecutor (OTP) could therefore not have neglected it. Going into the details of the starting investigation, the commentary also weighs the *pros* and *cons* of the Prosecutor's decision. In other words, it balances what was actually lost and what was supposed to be gained by way of that change of procedural paths to investigation.

Keywords: International Criminal Court (ICC), Prosecutor, Ukraine, Rome Statute.

1 Introduction

On 2 March 2022, the Office of The Prosecutor (OTP) of the International Criminal Court (ICC) opened an investigation into the situation in Ukraine. It did so after receiving referrals from thirty-nine states parties to the Rome Statute

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of the International Criminal Court (the ICC constitutive treaty).[2] Four more states later joined the initiative.[3] In so doing, the OTP was renouncing to another procedural path it had previously taken and which could have led to an investigation *proprio motu*, i.e. on the Prosecutor's own initiative or in other words, without being requested to investigate, neither by a state party (or a group of state parties) nor by the United Nations Security Council.[4] The Prosecutor had indeed announced his intention to request judicial authorisation by the ICC Pre-Trial Chamber for that purpose.[5]

Without questioning the strict legality of the OTP's decision to rely on third-state parties' referrals, this commentary reflects on the appropriateness of the change of procedural paths to investigation. In other words, it asks whether it was well advised from the OTP to decide to renounce to the request of judicial authorisation by the Pre-Trial Chamber in order to conduct the investigation as previously planned just because another opportunity had appeared: the referrals by third-states parties. There is no assumption from the commentator that a *proprio motu* investigation is, in principle, more legitimate than an investigation initiated by state referral, whether the referral comes from the concerned state or from a third-state party. The commentary departs rather from two related starting points. The first is that, in matters of criminal investigation, procedural paths with more checks and balances increase the legitimacy of proceedings and of the investigating body itself. This is even more so for international proceedings, especially when they affect states which have not consented to the instrument on which they are based (i.e., the Rome Statute in our case, a treaty to which neither

2 International Criminal Court. *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, 2 March, 2022*. Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> Accessed: 4 December 2022. The first referral was made by the Republic of Lithuania on March, 1st, 2022. In one day, thirty-eight other state parties had joined the initiative. These were the Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland.

3 These were Japan, North Macedonia, Montenegro and Chile. See above Statement of the ICC Prosecutor.

4 Art. 15(3), Rome Statute of the International Criminal Court (adopted 17 July 1998).

5 Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation." Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> Accessed: 17 January 2023.

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Ukraine nor Russia are parties). The second is that, for international judicial institutions as well as for prosecution bodies and their work, checks and balances provide a more solid ground of legitimacy than political endorsement. This is even more so when the investigations and/or judicial processes are about a highly charged political context – as this is often the case for international criminal investigations and trials.

In terms of structure, after this introduction, the commentary will briefly present the ICC's jurisdictional basis in the situation in Ukraine (II). It will then briefly present the regime of referrals by third-party states in the Rome Statute as applied to the situation in Ukraine (III) and conclude (IV).

2 Jurisdictional basis of the ICC's investigation in Ukraine

The jurisdiction of the International Criminal Court has four aspects: *material, spatial, temporal* as well as *personal.* The material viewpoint is concerned with the nature of the conducts over which the Court exercises its power (jurisdiction *ratione materiae:* genocide, war crimes, crimes against humanity and aggression).[6] It is worth mentioning here that with neither Ukraine nor the Federation of Russia being a party to the Rome Statute, the ICC has no jurisdiction whatsoever in relation to the crime of aggression.[7]On the other hand, the spatial viewpoint is interested in *where* the crimes must have been committed for the Court to enjoy jurisdiction over them (jurisdiction *ratione loci*)[8] while *the temporal* viewpoint asks the question of *when* the crimes must have been committed to fall under the ICC's jurisdiction (jurisdiction *ratione temporis*).[9] For a Criminal Court based on an instrument rejecting official capacity as completely irrelevant[10], considerations of personal jurisdiction ('*compétence personnelle*', in French) are limited to the determination of the kind of 'persons' (natural and/or legal) who can be tried before the Court[11] as well as to age.[12]

For the purpose of this commentary, we are only concerned with the spatial aspect of the ICC's jurisdiction. In this regard, the main principle is *territoriality*. The principle gives jurisdiction to the ICC when the State on the territory of which the conduct in question occurred is a party to the Rome Statute or

6 Art. 5, Rome Statute

7 Art. 15*bis*(5), para 5, Rome Statute: '*In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory*.

8 Art. 12(2), Rome Statute

9 Art. 11, Rome Statute.

10 Art. 27, Rome Statute

11 Art. 25(1), Rome Statute: '*The Court shall have jurisdiction over natural persons pursuant to this Statute*.' (emphasis mine).

12 Art. 26, Rome Statute: '*The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime*.' (Emphasis mine).

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has accepted the Court's jurisdiction.[13] On the basis of the same principle, the Court also enjoys jurisdiction when the conduct in question has allegedly been committed on board a vessel or aircraft of a State Party or when the vessel or aircraft has been registered in a State party.[14] Territoriality is among the least disputed jurisdictional principles of international law. Applied to criminal matters, the principle means that a state enjoys indisputable jurisdiction over all criminal offences that are committed in its territory. The State can choose to exercise itself that jurisdiction through its domestic judicial system or delegate it to other States or international judicial organisations and authorities (like the ICC)[15]. The organisation or foreign state receiving the delegation will exercise jurisdiction regardless of whether the alleged perpetrator is a national of the territorial state or not, exactly as would have done the delegating state.[16]

In addition to territoriality, an equally important jurisdictional principle in the Rome Statute is *active personality*. This principle determines the Court's jurisdiction on the basis of the offender's nationality. By virtue of active personality, conducts allegedly committed on a territory (or on boards aircrafts or vessels for that matter) of a non-state party can still fall into the ICC's jurisdiction if the suspects are nationals of a state party.[17] It is worth mentioning here that the Rome Statute does not recognise delegated *passive personality*, i.e. jurisdiction based on the nationality of the victim.[18] As it appears, the two main grounds of jurisdiction in the Rome Statute – territoriality and active personality – are based on the existence of a legal link between a State party to that treaty and the conduct or the offender. It is generally admitted that the principles of territoriality and nationality in the sense of active personality constitute undisputedly legitimate bases for criminal jurisdiction at the international plane. [19] The third and last jurisdictional basis does not require the existence of such linkages. It is the referral to the Prosecutor made by the Security Council acting under Chapter VII of the United Nations Charter. [20]

Neither Ukraine nor the Russian Federation are parties to the Rome Statute.[21] It follows from that neither territoriality nor active personality are of any direct utility. For an obvious reason-Russia's permanent membership of the Security

13 Art. 12(2)(a), Rome Statute.

14 Art. 12(2)(a), Rome Statute.

15 TSILONIS, Victor. *The Jurisdiction of the International Criminal Court*. Springer, 2019, pp. 33.

16 Ibid.

17 Art. 12(2)(b), Rome Statute.

18 TSILONIS, *op.cit*, pp.34.

19 KAUL, Hans-Peter. Preconditions to the Exercise of Jurisdiction. In: CASSESE, Antonio, GAETA, Paola, JONES, John R.W.D. (eds). *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1. Oxford: Oxford University Press, 2002, pp. 607

20 Art. 13(b), Rome Statute.

21 There are 123 states parties to the Rome Statute today. The list can be found here: https://asp.icc-cpi.int/states-parties.

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Council with the veto power attached to it – , no referral has been nor could possibly be made by the Security Council to the Prosecutor, either. ICC's jurisdiction is therefore based on Ukraine's acceptance. *Ad hoc* acceptance of jurisdiction is indeed provided for by the Rome Statute.[22] The Republic of Ukraine used that possibility by a declaration made on April, 9th, 2014 and reiterated on September, 8th, 2015.[23] *Ad hoc* acceptance of the ICC's jurisdiction has been described by some scholars as a rather unusual capacity given to states.[24] Ukraine is however not the first state to use it. The states of Palestine and Ivory Coast did it before.[25]

In the Rome statute system, enjoying jurisdiction and exercising it are two different things. The *exercise* of jurisdiction starts with the Prosecutor setting proceedings in motion. In principle, the Prosecutor will act on the request, either from a state party (or a group of state parties) or from the United Nations Security Council. That request is expressed in the form of a *referral.* The Prosecutor can however also initiate an investigation *proprio motu*, i.e. on his/her own initiative in relation to a state party or a state that has accepted the court's jurisdiction.[26] As a non-state party to the Rome Statute, the Republic of Ukraine was not in a position to procedurally *refer* its situation to the ICC Prosecutor. In this situation, for the investigation to technically start, the expected course of events was a preliminary examination (PE) of the situation by the Prosecutor followed by a full and formal investigation, provided that the Pre-Trial ICC Chamber authorises it.[27] As already alluded to above, the Prosecutor followed that procedural path before reversing course afterwards. He requested and received technically valid 'referrals' from third-party states to the Rome Statute.

22 Art. 12(3), Rome Statute.

23 For these declarations, see the respective websites here: for the first declaration: https://www.icccpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf and for the second declaration: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf

24 KAUL, id., p.70.

25 The state of Palestine made its declaration on 1 January 2015. It acceded to the Rome Statute on 2 January 2015 and the Statute entered into force regarding Palestine on 1 April 2015. See International Criminal Court, State of Palestine. Available at: <https://www.icc-cpi.int/palestine>. Ivory Coast, on her part, accepted the ICC's jurisdiction on 16 April 2003. The acceptance was reiterated on 14 December 2010.

See International Criminal Court, *Confirmation de la Declaration de reconnaissance (14 December 2010)*. Available at: <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/F0EFEE52-C7AA-41EA-B58E-BD054C091F4F/283211/OuattaraICCConfirmationLetter141210.pdf>.

26 Art. 14, Rome Statute.

27 Art. 15, Rome Statute.

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3 Referrals by third-party states in the Rome Statute and in the situation in Ukraine

Referrals by third-party states are clearly provided for in the Rome Statute (1). Nevertheless, in the specific context of the investigation in Ukraine, they raise issues that this commentary will highlight (2).

3.1 Referrals by third-party states: A clearly established legal basis in the Rome Statute

Referrals by third state parties are a category of state-referrals. In other words and as it will be demonstrated in this section, the Rome Statute simply provides for a '*referral of a situation by a state party.*'[28] There is no further indication as to whether the situation must have occurred on the territory of the referring state or connected to it in any other way such as the nationality of the suspect or of the victims, or whether any of its fundamental interests must be at stake at all.[29] Quite to the contrary, the drafting history of the Rome Statute suggests rather that what was envisioned by article 14 was clearly referrals by third-party states, rather than self-referrals. The draft Statute, prepared by the ILC in 1994 encompassed the concept of '*state party referral*' under the title 'complaint'[30]. Under Article 25 of the 1994 draft statute, a state was allowed to refer a crime to the ICC by 'lodging a complaint'[31]. This state was called the 'complainant state' as opposed to the '*referring state*' under the current Statute.[32].The argument could be made – and it has been made – that the state's complaint would expectedly be directed against another state, since it is not foreseeable that a state would file a complaint against itself, especially if it is directly involved in the commission of the alleged crime. Later, at Rome, the term 'complaint' was changed to 'referral'. This term covers both triggering mechanisms whether by means of a State or a Security Council referral.[33]

Scholarly commentary of the Rome Statute indicates that the change in terminology from '*complaint*' to '*referral*' was not meant to suggest any change in

28 Art. 14(1): '*A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.*'

29 Article 14(1) of the Rome Statute provides as follows: '*A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.*'

30 Report of the International Law Commission on the Work of its Forty-Sixth session, UN Doc. A/49/10, 1994, 89.

31 Ibid, Art. 25, paras. 1–2.

32 Arts 13(a) and 14, Rome Statute.

33 Discussion Paper, Bureau, Part 2. *Jurisdiction, Admissibility and Applicable Law*, UN Doc. A/conf.183/C.1/L.53, pp. 16

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the rules of the relevant article in a way which would allow for states' self-referral.[34] Some scholars have put forward another explanation of that change. For instance, according to Schabbas, the main reason for the change in terminology was to prevent states from referring specific cases or crimes, rather than whole situations to the Court and thus prevent the Court from being used to '*settle scores*'. [35] Self-referrals also seemed counter-intuitive. According to Arsanjani and Reisman, '*no one assumed that governments would want to invite the future court to investigate and prosecute crimes that had occurred in their territory.*' [36] This lack of anticipation was shared across the spectrum, i.e. both among states that states supported the future court and those that were sceptical about it.[37]

It is the OTP's desire to boost complementarity in practice that brought self-referrals to light. In April 2003, a group of experts was invited to reflect on the '*potential legal, policy and management challenges which are likely to confront the OTP as a consequence of the complementarity regime of the Statute.*'[38] In their report, the experts articulated what they envisaged as a relationship that would reflect '*partnership and dialogue*' between the OTP and national criminal jurisdictions.[39] The experts envisaged what they called an '*inaction scenario*' in which a state party would be prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.[40] This way, admissibility questions would be limited. It is this voluntary acceptance of admissibility that commentators came to later call '*self-referral*'. The experts encouraged such acknowledgments by a narrative suggesting that self-referrals do not necessarily presuppose or entail *'a loss of national credibility or a lack of commitment to the fight against impunity*.'[41]

Some scholars have questioned the orthodoxy of self-referrals in relation to complementarity. For instance, in Kleffner's view, there is a tension between self-referrals and complementarity as formally understood in the Rome Stat-

34 See, for instance, KIRSCH, Philippe, and ROBINSON, Darryl. Initiation of Proceedings by the Prosecutor. In: CASSESE, Antonio, GAETA, Paola and JONES, John R.W.D. (eds). *The Rome Statute of the International Criminal Court: A Commentary,* Oxford: Oxford University Press, 2002, pp. 623.

35 SCHABAS, William A. First Prosecutions at the International Criminal Court. *Human Rights Law Journal,* 2006, vol. 27, no. 25, pp.2.

36 ARSANJANI, Mahnoush H. and REISMAN, Michael W. The Law-in-Action of the International Criminal Court. *American Journal of International Law,* 2005, vol. 99, no. 385, pp. 386.

37 Ibid.

38 ICC-OTP Informal Expert Paper. *The Principle of Complementarity in Practice, 30 August 2003.* Available at: <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> Accessed: 16 January 2023, pp. 2 (hereafter Informal Expert Paper).

39 HASSANEIN, Ahmed Samir. Self-referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in CriSIS. *International Criminal Law Review*, 2017, vol. 17, pp. 113.

40 Ibid.

41 Informal Expert Paper (n 38 above) pp. 2.

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ute.[42] According to that Scholar, the primary objective of complementarity is to regulate competing claims for the exercise of jurisdiction over ICC crimes. The assumption is that both states and the Prosecutor will be eager to exercise jurisdiction. The threat of the Prosecutor's opening of investigation into a situation will therefore serve as an incentive for States to exercise their jurisdiction, i.e. to investigate and prosecute. Auto-referrals, on the other hand, seem to be based on the opposite assumption. With them, the state is claiming his unwillingness or inability to investigate and prosecute, at least implicitly.[43] Complementarity as a principle allows States to pre-empt the ICC from acting, centrally by requesting a deferral under Article 18 or challenging admissibility in accordance with Article 19.[44] The purpose of that mechanism is to regulate competing claims (between a state party and the ICC) for the exercise of jurisdiction over ICC crimes. By 'self-referring', the State party will be renouncing to that claim. Self-referral being, by definition, voluntary, the issue with Kleffner's view is that it does not demonstrate how such a renunciation would be problematic.

In conclusion to this point, while the referral by a third-party state derives more clearly from the text of the Statute, a good faith interpretation of article 14 of the Rome Statute – with its neutral text as indicated above – suggests that it provides both for self-referral and referral by a third state party.[45] If limited to a purely legal perspective, the OTP's decision to base the opening of its investigation on a referral by a group of states parties is therefore sound and not problematic, at all. However, this does not mean that the decision necessarily reflects the best policy in that specific situation.

3.2 The referrals by third-party states in the situation in Ukraine: The best option available?

The investigation in Ukraine is the second time referrals by third-state parties is used. The place of *consent* in the procedure makes the second use unique, though (A). Moreover, while the change of procedural path looks in conformity with the Rome Statute's letter, it could be argued that, in that specific context, actively avoiding judicial control was not the wisest possible policy for the OTP as it deprives that office of a chance to have the scope of the investigation clarified, especially in its material aspects (B). In addition, the change of procedural path results in an imbalanced situation in which the referring states and the Prosecutor are completely relieved of the obligations normally attached to their

42 KLEFFNER, Jann, K., Auto-referrals and the complementary nature of the ICC. In: STAHN, Carsten & SLUITER, Goran (eds). *The emerging practice of the International Criminal Court*, Martinus Nijhoof Publishers, 2009, pp. 41.

43 Ibid, pp.41–42.

44 Ibid, p.41.

45 Art. 31(1), Vienna Convention of the Law of Treaties (adopted 23 May 1969) provides as follows: '*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*'

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prerogatives(C). It could also be argued that the timing of the decision raises questions (D).

a. Consent and third-party referrals: A uniqueness of the investigation in Ukraine?

As alluded to above, referrals by third-state parties are rare in the ICC's practice. Self-referrals have come to be more common.[46] Before the situation in Ukraine, the only other time referrals by third-state parties have been used in the court's short history is when, on September, 24th, 2018, a group of six Latin-American states referred the situation in Venezuela to the ICC Prosecutor.[47] The referrals in the situation in Ukraine remain nevertheless unique. It differs from the referral in the situation in Venezuela on two main grounds. Firstly, contrary to the Republic of Ukraine, the Bolivarian Republic of Venezuela is a party to the Rome Statute. It ratified the treaty on 07 June 2007.[48] This is significant because the fact that Venezuela is a party to the Rome Statute provides a consensual basis to the mechanism. The acceptance of jurisdiction by Ukraine does not put it in the same situation. Acceptance of jurisdiction does not transform a non-state party into a state party. It only results in the obligation for the accepting non-state party '*to cooperate with the Court without any delay or exception*.'[49] There is therefore no basis to argue that, by accepting ICC's jurisdiction, Ukraine has also consented to the provisions of the Rome Statute creating state referrals, let alone referrals from third-party states. As far as the referral procedure in the Rome Statute is concerned, *consent* is even more important as it is a pre-requisite for potential actions based on *reciprocity*. The similar logic applied in relation to human rights protection mechanisms. State referral only exists among states which have consented to the procedure.[50] In other words, it could be argued that, unlike for Ukraine, the referral of the situation in Venezuela to the OTP by a group of State parties to the Rome Statute is legitimised by the right recognized to the Bolivarian Republic (Venezuela), as a state party to the Rome Statute, to do exactly the same in relation to any other state party to the Rome Statute, includ-

46 Five investigations regarding situations in four countries have been opened so far on a self-referral basis: The Democratic Republic of Congo, Uganda, the Central African Republic (I and II) and Mali. See International Criminal Court. *Situations Under Investigation*. Available at: <https://www.icc-cpi.int/situations-under-investigations> Accessed: 19 December 2022.

47 For information on the situation in Venezuela, see International Criminal Court. *Situation in Bolivarian Republic of Venezuela I*. Available at: <https://www.icc-cpi.int/venezuela> Accessed: 19 August 2022.

48 International Criminal Court. *ICC Prosecutor, Mr Karim A.A. Khan QC, opens an Investigation into the Situation in Venezuela and concludes Memorandum of Understanding with Government. 5 November 2021*. Available at: <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-opens-investigation-situation-venezuela-and-concludes>.

49 Art. 12(3), Rome Statute.

50 Just as an example, see Art. 41(1) of the International Covenant on Civil and Political Rights in relation to state complaints to the Human Rights Committee.

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ing the six Latin-American states. Ukraine has no such power towards any of the referring states of its situation. The fact that it is not complaining about it now does not change the facts, from a legal perspective. Moreover, there is no guarantee that political sentiments towards the investigation – positive for the moment – will remain the same throughout the process. One possible ground for a shift in those sentiments would be the issuing of arrest warrants against Ukrainian officials. This is indeed a possibility, as the Prosecutor investigates both sides to the conflict.

Secondly, contrary to the situation in Venezuela, the investigation into the situation in Ukraine covers also – mainly, it could be said – the actions of another state, which is not a party to the Rome Statute either and which, contrary to Ukraine, has not even made the *ad hoc* declaration accepting the Court's jurisdiction: the Russian Federation. It is also reasonable to assume that, while the investigation covers the actions of both sides to the conflict, in later stages of the proceedings, most indictments are likely to be issued against Russian agents or nationals – for clear and understandable reasons.

If one adds to the picture the fact that there has been no referral from the Security Council – for the obvious reason that Russia is a permanent member of that UN organ, the result is an image of a group of states enforcing a law it has created (the Rome Statute) to a state that was not involved in the law creation process (the Russian Federation). The analogy with the Nuremberg and Tokyo trials quickly comes to mind. While the positive role played by the two Tribunals in the history of international criminal justice is undeniable, it is partly for the purpose of increasing the legitimacy of international criminal justice processes that the creation of later Tribunals strived for states' consent expressed either directly by treaty (ICC) or indirectly via organs of the United Nations on the basis of the UN Charter (ICTY-ICTR and mixed tribunals).

b. The change of procedural routes: A clarification opportunity lost?

As the situation stands today, there is no clarity as to which crimes the investigation is supposed to cover. In particular, it is doubtful whether the OTP can investigate allegations of genocide if the facts in question have been committed after 8.9.2015. As indicated above, the ICC's jurisdiction is based on Ukraine *ad hoc* acceptance of jurisdiction made in two declarations, the first on 9.4.2014 and the second on 8.9.2015.[51] While the two declarations are largely similar, two main features distinguish them. The first and most obvious difference is the timeframe for which jurisdiction is recognized (jurisdiction *ratione tempore).* While the 2014 declaration gave jurisdiction to the ICC for crimes allegedly committed from 21 November 2013 to 22 February 2014, the 2015 declaration covers crimes

51 See the declarations in n 2 above and, International Criminal Court. *Minister for Foreign Affairs of Ukraine. 8 September 2015.* Available at: <https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine>.

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committed from 20 February 2014 onwards.[52] The second and largely unnoticed difference is on the material or subject-matter jurisdiction given to the Court (jurisdiction *ratione materiae*). By the 2014 declaration, Ukraine accepts the Court's jurisdiction without any specification regarding the crimes covered.[53] In those circumstances, the declaration must be interpreted as covering the entirety of the Court's material jurisdiction, except for the crime of aggression. On the other hand, by the second declaration, Ukraine recognizes the Court's jurisdiction for war crimes and crimes against humanity.[54] In other words, the crime of genocide is not included. To be accurate, the declaration is based on an act of parliament which is specific on this limitation and is quoted in the declaration as its basis.[55]

Reading the two declarations as cumulative rather than alternative sources of authority – as nothing seems to suggest that the second abrogates the first, the conclusion is that Ukraine has recognized the jurisdiction of the ICC for possible war crimes, crimes against humanity and crimes of genocide committed between 21 November 2013 to 22 February 2014 and (only) for possible war crimes and crimes against humanity from 20 February 2014 onwards. In other words, the ICC does not enjoy jurisdiction for the crime of genocide in relation to the period starting from 20.02.2014 onwards. It is therefore not accurate to suggest, as does the Prosecutor, that the second declaration simply extends the time frame of the first[56] or, even further, that Ukraine has given the Court jurisdiction for '*Rome Statute crimes*'.[57] To be even more precise on his position, the OTP has stated – arguably wrongly – that '*the scope of the situation encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards*.'[58] This seems to go beyond the jurisdictional parameters set by Ukraine in its two declarations.

Had the Prosecutor kept the first procedural route and therefore requested the authorization from the Pre-Trial Chamber, the issue above would be/have been clarified in advance and once for all. As this has not been the case, it is not impossible that adjustments will be needed in later stages of the proceedings. The time the OTP wanted to save will therefore be lost, probably in more significant proportions.

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52 Ibid

53 See declaration in n 2 above.

54 See 51 above.

55 Ibid.

56 See, among other sources, ICC, OTP, Report on Preliminary Examination Activities 2020, paras 270–271.

57 ICC, OTP. Report on Preliminary Examination Activities 2020, para 271.

58 ICC OTP. *Information to the victims, Jurisdiction in the general situation*. Available at: <https://www.icc-cpi.int/ukraine8> Accessed: 19 December 2022.

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c. The call for state referrals by the Prosecutor: A mixture of two procedural paths leading to imbalance?

The purpose of this section is to demonstrate that the new path looks as a procedural detour to keep the cake while eating it at the same time, both for the Prosecution and the referring states. As already highlighted, the referrals by state-parties were not spontaneous. They were implicitly requested by the Prosecutor. More importantly, the call was made long after the end of the preliminary examination started *proprio motu*. Indeed, it is on February, 28th, 2022, while announcing his intention to proceed with opening an investigation by requesting the required judicial authorisation for that matter, that the Prosecutor made clear that his preferable route was that an ICC State Party would refer the situation to his Office.[59] He stated, in unambiguous terms: "…*The next step is to proceed with the process of seeking and obtaining authorisation from the Pre-Trial Chamber of the Court to open an investigation*. ***An alternative route set out in the Statute that could further expedite matters would be for an ICC State Party to refer the situation to my Office****, which would allow us to actively and immediately proceed with the Office's independent and objective investigation*s.' In the next two days, the Office of the Prosecutor announced that it had received 39 third-states' referrals.[60] It is therefore fair to say that the referrals were made *on demand*.[61]

In the normal unfolding of an investigation launched after a state referral, whether it is a self-referral or a third-party's initiative, it is that very procedural act (the referral) which sets the Prosecutor's action in motion.[62] Contrary to a *proprio motu* investigation, there is no room for a '*preliminary examination*' to be conducted by the Prosecutor in the context of article 14 of the Rome Statute. It is rather up to the referring state to specify, in its reference, all the relevant circumstances and to accompany them with necessary supporting documentation. [63] This was not the case in relation to the investigation in Ukraine. The referring states felt no need to provide information on the facts, at all. Their letters do

59 *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation.*' Available at_ <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> Accessed: 4 December 2022, para 5.

60 *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*. Accessed: 4 December 2022.

61 Id, para 2.

62 Art. 14, Rome Statute.

63 Art. 14, Rome Statute provides as follows: '*A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes*.' 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

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nothing more than give the OTP the legal power to investigate.[64] In this commentary, we do not intend to conduct a detailed analysis of the referrals' legality on the basis that they provide no information at all on the situation to be investigated. However, the language used in article 14, 2 suggests that the referrals would *a priori* survive legal scrutiny. Indeed, the referring state is only required to specify the circumstances '*as far as possible*[65]' and support its description of events with the documentation '*as is available*.'[66] As a matter of fact though, it is undeniable that the referring states felt 'relieved' of the obligation to provide information and documentation because they knew that the OTP had been conducting-and had even concluded-his preliminary examination. For the Prosecutor, one advantage of the change of procedural path is the possibility to use the findings of his preliminary examination without having them checked by the Pre-Trial Chamber. Indeed, had the Prosecutor remained on the path of a *proprio motu* investigation, the actual investigation would have only started upon a Pre-Trial Chamber's affirmative response to two questions. One is whether '*there is a reasonable basis to proceed with an investigation*', and the other is whether '*the case appears to fall within the jurisdiction of the Court*.'[67] Indeed, some states were quite explicit that they wanted to provide to the OTP more discretion in his assessments, in addition to speeding up the process.[68] Simply put, the benefits of a *proprio motu* investigation, i.e. the findings of the preliminary examination concluded in 2020 are used in a procedure in which the Prosecutor does not need to face the Pre-Trial Chamber.

As for the referring states, the change of procedural paths in that context creates a possibility to have their wish acted upon without having to bear the burden of providing detailed information and documentation. In other words, the benefits of the power to refer are harvested without its cost.

d. The timing of the change in procedural routes: A decision made '*tempore suspecto*'?

The OTP's work on the situation in Ukraine did not start with the 2022 full invasion of the Ukrainian territory by the Russian Federation. As highlighted above, Ukraine had already recognised the Court's jurisdiction in 2014 for potential ICC crimes committed in relation to the conflict in the East of Ukraine

64 The collective referral made by 38 states can be found here: https://www.icc-cpi.int/sites/default/files/2022-04/Article-14-letter.pdf and here: https://www.icc-cpi.int/sites/default/files/2022-04/State-Party-Referral.pdf. The separate referral by the Republic of Lithuania can be found here: https://www.icc-cpi.int/sites/default/files/2022-04/1041.pdf.

65 Art. 14(2), Rome Statute provides as follows: 'As *far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation*.'

66 Ibid.

67 Art. 15, para 4 of the Rome Statute.

68 See, for instance, the Letter from the Minister of Justice of the Republic of Lithuania. Available here: <https://www.icc-cpi.int/sites/default/files/2022-04/1041.pdf>.

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– already involving Russia to a large extent – A preliminary examination had been conducted and concluded. In its 2020 report on preliminary examinations, the OTP had concluded as to the legality and need to proceed with a full investigation. For the two years, though, the OTP did not request the required authorisation from the Pre-trial Chamber. There are no clear reasons as to why. Critics could argue that the OTP is acting now to please the western countries today more actively engaged (compared to 2014) against the invasion of Ukraine by the Russian Federation. Quite obviously, the criticism would be of limited merit, as there is indeed nothing wrong for the OPT to finally come out of its two year dormancy. Nevertheless, it is important that the OTP avoids any sign that would be interpreted as a willingness to avoid judicial checks-and-balances and follow instead the political will of a group of states.

e. What about the expediency argument?

From a legal perspective, the OTP was/is not required to justify its decision to change its procedural route.[69] However, the Prosecutor did indicate in the statement made on February, 28th, 2022 that third-state parties' referral was preferred as a procedural route to investigation because it allowed to proceed expediently.[70] The real question is therefore how much time the change of procedural route actually allowed to gain. In other words, the question is how long the judicial authorisation process would have taken.

To authorise the opening of an investigation, the Pre-Trial Chamber does not conduct its own enquiry on the facts. It merely examines the file as presented by the Prosecutor and determines whether there exists a "*reasonable basis to proceed*" with the investigation.[71] In other words, the pre-trial chamber's oversight is not a duplication of the Prosecutor's preliminary examination. In essence, the Pre-Trial Chamber conducts an assessment on three grounds. Firstly, it quickly examines whether a crime within the court's jurisdiction has probably been committed or is being committed. Secondly, it makes a provisional assessment of admissibility. Thirdly and lastly, it considers whether the investigation would (not) serve the interests of justice.[72] There seems to be no reason to assume that

69 In the situation under analysis, the first legal decision to make was to abandon the request of authorisation of an investigation from the Pre-trial Chamber. The wording of article 15, §1 – using the phrase 'may' – ' seems to give the OTP discretion in matters related to the opening of a preliminary examination which can potentially lead to an investigation *proprio motu*. Whether he/she does it to pursue investigation on the basis of article 14 – state referral – or abandon the proceedings altogether seems irrelevant.

70 ICC Prosecutor. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation, "February, 28th, 2022.* Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> Accessed 4 December 2022, para 5.

71 Art. 15(4), Rome Statute.

72 Art. 53(1), Rome Statute provides as follows: '*The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she deter-*

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the granting of judicial authorisation would have taken unreasonably long, given the very widespread nature of the abuses as already documented by a number of independent human rights organisations especially in relation to criminalised violations of international humanitarian law.[73]

The expediency argument is made even weaker by the clearly positive attitude of the ICC Presidency. At this administrative level, the Court's willingness to act expediently could not be doubted. As mentioned above, the case was assigned to a bench even before the Court was formally seized with a request to authorise the investigation.[74] From a judicial body, there can be no clearer sign of openness and collaborative spirit.

4 Conclusion

The purpose of this commentary was to reflect on the merits of the decision taken by the ICC Prosecutor to base the investigation into the situation in Ukraine on the referrals by States parties to the Rome Statute, rather pursuing his mission on a *proprio motu* basis.

The commentary has first clarified that while third state parties' referrals are notably rare in the practice of the Court, they have a strong and clear basis in the Rome Statute. It is the OTP's policies in relation to complementarity which, quite surprisingly, have made self-referrals more common.

However, it has been indicated that in the specific situation of Ukraine, an investigation by the Prosecutor acting *proprio motu* would have been more appropriate and legitimate. The main reason is that that procedural route would have preserved the judicial oversight of the Pre-trial Chamber. It has been argued that judicial oversight would have increased the legitimacy of that investigation. For instance, judicial oversight would have created room for the clarification of some issues such as the parameters of the investigation with regard to subject-matter jurisdiction. The commentary also highlighted that the change of procedural paths created a situation in which the referring states and the Prosecutor

mines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider 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 admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.'

73 There are many reports on crimes committed in Ukraine. Some organisations update the reports on a continuous basis. An example of a reliable source is 'War crimes Watch in Ukraine' of Frontline and the Associated Press. On Sunday, 28.08.2022, it had documented 403 incidents involving potential war crimes. See <https://www.pbs.org/wgbh/frontline/interactive/ap-russia-war-crimes-ukraine>Accessed: 19 December 2022.

74 ICC Presidency, ICC Presidency assigns the Situation in Ukraine to Pre-Trial Chamber II, 2 March 2022.

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exercise unchecked prerogatives. It has also argued that the decision was made *tempore suspecto* as it was reached at two years after the conclusion of a *proprio motu* preliminary examination by the Prosecutor. Lastly, the commentary questioned the merits of the expediency argument put forward to justify the change of procedural routes. All in all, it is arguable that, in the specific investigation of the situation in Ukraine, while state referrals increased the political legitimacy of the investigation, procedural paths with checks and balances would have been a stronger legitimizing factor.

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