

# Unfinished Business: Acceptance of International Criminal Justice in Ukraine

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## Content

- 1 Introduction
- 2 Hostilities in Ukraine since 2013
- 3 Domestic investigation and prosecution of international crimes
- 4 The ICC's involvement in the situation in Ukraine
- 5 Ratification of the Rome Statute
- 6 Acceptance of international criminal justice in Ukraine: the perspectives of the actors
- 7 Conclusion



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# Unfinished Business: Acceptance of International Criminal Justice in Ukraine

Valentyna Polunina<sup>1</sup>

## 1. Introduction

Since Russia's seizure of Crimea and the beginning of the armed conflict in eastern Ukraine, many in Kyiv have taken to the idea of enlisting the help of the International Criminal Court (ICC) in The Hague to punish those responsible and discourage further belligerence. Political leaders in Ukraine, including President Poroshenko, like to publicly invoke 'The Hague' as a judicial instance of last resort when describing the future of President Putin, senior Russian officials, the militants in parts of the Donbas region, and those responsible for the killings during the Euromaidan protests (TSN 2014, CNN 2015). At the same time, the widespread use of such a vague term as 'The Hague' or 'The Hague tribunal' to mean the International Criminal Court indicates that many Ukrainians – including senior officials – do not understand what the ICC stands for and how it works. At the same time, due to the lack of experience of Ukrainian national courts in prosecuting international crimes, the unprecedented scale of crimes committed, and the general lack of confidence in the judiciary, the ICC may be an important transitional justice mechanism for Ukraine.<sup>2</sup>

In light of the complicated political and institutional landscape in Ukraine with regard to international justice, it is important to understand how different actors relate to the current situation in Ukraine and see international criminal justice (ICJ), and to look at the reasons why they do or do not accept international courts and tribunals. The situation in Ukraine is different from many orthodox transitional justice cases of post-conflict justice where human rights violations are no longer being committed, because there is an ongoing conflict, which is additionally accompanied by an economic recession, devaluation of the national currency, and high levels of unemployment.<sup>3</sup> Ukraine is also going through one of the most extensive phases of institutional reforms in its history. Diverse attitudes towards the war in eastern Ukraine, political change, and foreign policy differences provoke divisions within society and among political leaders, and create different groups with their own interests.

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<sup>2</sup> For more on the ICC's role in the Ukrainian transitional justice process, see Lachowski 2015.

<sup>3</sup> Ukraine is not the first situation country that is going through some sort of transitional justice before the end of the conflict: Several other countries have experienced the pursuit of justice in a context of ongoing human rights violations including Afghanistan, Colombia, the DRC, Sierra Leone, Liberia, Sudan, Uganda, and the former Yugoslavia. For more on transitional justice during an ongoing conflict see Thomas Unger, Marieke Wierda 'Pursuing Justice in an Ongoing Conflict: A Discussion of Current Practice' in: Kai Ambos, Judith Lange, Marieke Wierda (eds.) *Building Future of Peace and Justice* (Berlin, Heidelberg: Springer, 2011), pp. 263-302.

The broad spectrum of opinions challenges the Government's task to find common ground, and the aspect of prosecution of war criminals is not an exception. Even if there is strong support for accountability among the population,<sup>4</sup> it does not necessarily follow that there is a consensus on who the victims and perpetrators are, and how punishment of the perpetrators should be effected. Despite this, the attitude towards war criminals is quite negative in all regions of Ukraine; only in Donbass is this negative attitude balanced to some degree by an understanding of perpetrators' motivation or uncertain attitudes towards them (Tsentr Razumkova 2016).

Accountability for war crimes committed in Ukraine and ICJ are supported by a majority of the Ukrainian population. According to the recent poll conducted by the Democratic Initiatives Foundation, most Ukrainians (72 per cent) do not trust the judiciary and prosecutor's office (Fond demokratychni initsiatyvy 2016). Two years after Petro Poroshenko became the President of Ukraine, experts indicate the reluctance to carry out meaningful reforms of the judicial system and the Prosecutor's Office as one of his biggest failures (ibid).

Ukrainian legal and political experts interviewed for this study were unanimous that low trust in national judicial institutions may explain why large sections of the population turn their hopes to international justice mechanisms such as the ICC. According to a 2015 survey conducted by Amnesty International, 73 per cent of Ukrainian citizens support the involvement of the ICC in investigations of the war crimes committed in Donbas, while 45 per cent believe that the ICC alone should deal with international crimes committed in Ukraine and 21 per cent support the complementarity approach (Amnesty International Ukraine 2015). Only 17 per cent of respondents support the idea of national courts dealing with international crimes (ibid). This is an important indicator of the ICC's legitimacy in Ukraine, and could have an effect on the Government's decision making process regarding the ICC. At the same time, the process of ICJ acceptance in Ukraine is a dynamic one that changes depending on how the conflict evolves. Two years after the beginning of the war in Ukraine, support for the ICJ may not be as widespread anymore.

This study provides an overview of the challenges connected to the prosecution of international crimes in Ukraine, as well as an analysis of the most important actors' attitudes towards the ICJ. It also highlights areas that require further research, something that is particularly important given the paucity of academic literature or empirical studies on this topic. Acceptance is defined for this study as an agreement either expressly or by conduct to the principles of ICJ in one or more of its forms (laws, intuitions or processes).

The study begins with a conflict profile and a short overview of the handling of international crimes allegedly committed in Ukraine since November 2013. Next, the description of the actors relevant to the international criminal justice processes in Ukraine will be followed by an analysis of different patterns, dynamics and drivers of acceptance of ICJ in Ukraine.

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<sup>4</sup> Just 2.7 per cent of Ukrainian citizens support amnesties for those who participated in the fighting in Donbas, according to a study conducted by Fond demokratychni initsiatyvy in October 2015. Fond demokratychni initsiatyvy. 2015. 'Drugiy rik Prezidenta Petra Poroshenka - opituvannya yekspertiv.' Accessed February 2016. <http://dif.org.ua/ua/publications/press-relisy/drugii-rik-prezikspertiv.htm>.

The process of acceptance of ICJ in Ukraine is shaped by different actors: civil society, human rights activists, lawyers, experts on international humanitarian and criminal law, volunteers, journalists, as well as state officials, law-enforcement bodies, victims and victim groups, and nationalistic and right-wing movements.

The current study draws on sources such as Ukrainian legislation, media outlets, political debates, accessible surveys, and NGO reports, as well as 70 oral and written semi-structured interviews conducted in Kyiv in March-April 2016 with victims, local politicians, chief and special prosecutors, state security officers, legal experts, practicing lawyers, human rights activists and others. Interviewees were divided into five separate categories of actors: experts (practicing lawyers, legal advisors, academics); government (ministerial officials, law enforcement officers, prosecutors, members of the intelligence service, in some instances MPs who are vocal about prosecution of international crimes in Ukraine); civil society (members of human rights NGOs, think tanks); communities (victims, internally displaced persons); and parties (opposition parties and movements, mostly not represented in the Parliament, nationalistic groups, and members of former volunteer battalions).

Interview partners were chosen on the basis of their degree of influence on the ICJ acceptance process in Ukraine: decision-makers, actors who are clear and vocal regarding their position about ICJ in Ukraine, and those who are directly affected by international crimes committed on Ukrainian territory.

This study has some limitations. Due to security concerns it was difficult to get access to victims or internally displaced persons (IDPs) who live in the conflict zone or near the frontline. That is why the author put emphasis on questioning actors who were directly in contact with victims and IDPs. The chapter also does not answer questions about the acceptance of ICJ by the Ukrainian public, as it would go beyond the scope of this paper and the methodology used. Understanding public attitudes towards international justice is an important topic for future research that would potentially help the Ukrainian Government, international justice institutions, and international organisations to develop a more effective and sustainable policy regarding transitional judicial measures in Ukraine that would take into account the interests of different societal groups and at the same time minimise the risks of undermining the peace process.

## **2. Hostilities in Ukraine since 2013**

This section gives an overview of the political controversies and violent interactions in Ukraine since November 2013 and thus lays the groundwork for understanding which crimes are being discussed as suitable for ICJ and what they mean to various actors. The refusal of Ukrainian authorities to sign the Association Agreement with the European Union in late November 2013 became the root cause of the largest protests in Ukraine's modern history, and lasted until late February 2014 and came to be known as 'Euromaidan' or the 'Revolution of Dignity'. The agenda of the protests changed to anti-corruption and adherence to human rights after riot police beat dozens of students in Kyiv's Independence Square on the night of 30 November 2013. Widespread demonstrations that took place throughout the country reached their peak in January and February 2014.

On 16 January 2014, the Ukrainian Parliament, the Verkhovna Rada, in violation of established voting procedures, passed ten laws narrowing constitutional rights and freedoms. On the night of 21 January, President Yanukovich fled the capital; a month later, on 22 February the Verkhovna Rada passed a resolution impeaching Yanukovich and scheduling early presidential elections.

The final phase of the protests were the events in Kyiv from 18-20 February during which at least 90 people were killed, amongst them 17 police officers (Heidelberg Institute for International Conflict Research 2015, 44). Ukrainian security forces used excessive and indiscriminate force against unarmed protesters and bystanders, including journalists covering the events (International Criminal Court 2015, 20). In addition, protesters and other individuals participating in, or associated with the Maidan movement were violently targeted by pro-government thugs – known as *titushki* – who coordinated their actions with the police (International Criminal Court 2015, 20). In total, between November 2013 and February 2014 at least 114 people were killed, including 94 Euromaidan activists, several hundred were detained, and over a thousand injured. The fate of 27 missing people is still unknown (Human Rights House Kiev 2015).

In the aftermath of the protests, the Russian Federation refused to recognise the new interim government and initiated a covert invasion of the Crimean Peninsula in Ukraine on 20 February 2014. After the annexation of Crimea, freedoms of expression, assembly and association were greatly restricted on the formerly autonomous peninsula. These restrictions specifically affected the Crimean Tatar community whose leaders were subjected to regular house searches and faced criminal prosecution and detention on politically motivated charges. There are several cases of suspected enforced disappearances of Crimean Tatar activists in 2014, and one confirmed case of abduction, torture and killing (Amnesty International Ukraine 2016).

After the rapid annexation of Crimea, pro-Russian activists began to occupy regional state administration buildings in several eastern Ukrainian cities. As a result, the Ukrainian Government launched a military offensive, the so-called ‘Anti-Terrorist Operation’ in April 2014, to regain control over the breakaway regions.

On 2 May 2014, clashes in the mainland Black Sea port city of Odesa left 42 people dead, most of them pro-Russian anti-Maidan protesters trapped in the burning Trade Unions building (OSCE 2014). A week later pro-Russian separatists in the eastern Donetsk and Luhansk regions held a referendum and declared independence as the Donetsk and Lugansk People’s Republics (further referred to as DPR and LPR).

On 17 July 2014 a civilian Malaysia Airlines flight en route from Amsterdam to Kuala Lumpur was shot down over rebel-held territory, killing all 298 on board (Malaysia Airlines 2014). According to the Dutch Safety Board’s final report on their investigation into the incident, the airliner was downed by a Buk surface-to-air missile (Dutch Safety Board 2015).

On 5 September 2014 the first ceasefire agreement (Minsk I) was reached between the Ukrainian Government and the separatists in Minsk, Belarus, under the aegis of the Organisation for Security and Co-operation in Europe (OSCE). The terms of the agreement included: an

immediate bilateral ceasefire monitored by the OSCE; decentralisation of power in Ukraine; permanent monitoring of the Ukrainian-Russian border by the OSCE; release of all hostages and illegally detained persons; a law preventing the prosecution of persons in connection with the events in Donetsk and Luhansk regions; improvement of the humanitarian and economic situation in Donbas, early local elections in the Donetsk and Luhansk regions in accordance with Ukrainian law; and withdrawal of illegal armed groups and military equipment, as well as the national dialogue (OSCE 2014). The agreement helped to reduce the fighting but failed to stop it entirely. Additional protocols aimed at ensuring the implementation of the ceasefire were signed later but have also failed to put an end to the hostilities.

On 11 February 2015, the so-called Minsk II protocol was signed by Ukraine, the Russian Federation, separatist forces, and the OSCE (OSCE 2015). Minsk II was similar to Minsk I but included more detailed explanations of how to deal with ex-combatants. The document provides 'pardon and amnesty [...] in relation to events that took place in particular districts of Donetsk and Luhansk oblasts of Ukraine' by enacting a 'law that forbids persecution and punishment' of persons involved (OSCE 2015). At the same time, there is no clear definition of what is understood by amnesty or which groups can claim it. Although Minsk II's provisions have not been fully implemented, the document helped to significantly reduce the intensity of the fighting. Nonetheless, in some areas armed clashes continue and many fear that more intense fighting could recommence at any time and the situation in Eastern Ukraine may develop into a 'frozen conflict' (Amnesty International 2015; Deutschlandfunk 2016). There is a possibility that the conflict could escalate into an open war between Ukraine and the Russian Federation. According to new evidence collected by the International Partnership for Human Rights and the Norwegian Helsinki Committee and the Ukrainian Helsinki Human Rights Union, the conflict can be qualified as an international armed conflict due to continuing cross border shelling and interventions by Russian forces (International Partnership for Human Rights 2016).

According to Tayé-Brook Zerihoun, the Assistant UN Secretary-General for Political Affairs, the total number of conflict-related casualties continues to climb. As of April 2016, the total number of victims stood at 30,729, including 9,333 killed and 21,396 injured since the beginning of the conflict in mid-April 2014 (United Nations 2016). Over a million have been displaced externally and 1.7 million internally (UN OCHA 2015; IDMC 2016). An estimated three million people continue to live in the territories controlled by the pro-Russian separatists (UN OCHA 2015). The humanitarian situation in the conflict region remains grave, especially due to the suspension by the *de facto* authorities in the DPR and LPR of almost all United Nations (UN) and international non-governmental operations since July 2015 and excessive bureaucratic obstacles. The conflict has put 1.5 million people at risk of malnutrition (World Food Programme 2016).

Based on information provided by numerous human rights organisations, including the UN, International Partnership for Human Rights and Amnesty International Ukraine, there is a reasonable basis to believe that international crimes have been perpetrated during the fighting in eastern Ukraine (International Partnership for Human Rights 2015, 6-7, OHCHR 2016, 11-52). These accounts show that all parties are responsible for violations of international humanitarian law.

Civilians continue to pay the highest price in the conflict. Since mid-April 2014, up to 2,000 civilians have been killed, mostly by indiscriminate shelling of populated areas (OHCHR 2016, 9), and dozens have become victims of summary executions or ill-treatment while being in custody. 'Arbitrary deprivation of liberty has reached an unprecedented scale in the territories controlled by the armed groups,' while there is evidence that secret prisons also exist on territories under control of the Ukrainian Government (OHCHR 2016, 9).

Another very disturbing development is that children continue to take part in the hostilities. There are reports that separatists have created militarised youth groups including children as young as 12. They have also recruited children as informants and human shields (US Department of State 2016). President Poroshenko admitted that 21 under-aged soldiers also died fighting on the Ukrainian side (Golos 2016). Because of flaws in the Ukrainian legislation, child soldiers are not considered to be victims but rather perpetrators, which has led to eight convictions of juveniles for participation in the conflict on the separatist side as of March 2016 (Informator 2016).

Human rights organisations have also documented numerous cases of conflict-related sexual and gender-based violence. Some instances are linked to the military presence in civilian areas and general lawlessness, but the majority of cases of sexual violence are used as a 'method of ill-treatment and torture in the context of arbitrary or illegal detention, both towards men and women' (OHCHR 2016, 17).

There is thus a reasonable basis to believe that the following war crimes have been perpetrated which constitute international crimes and potentially fall under the jurisdiction of the ICC: intentionally directing attacks against the civilian population; intentionally directing attacks against civilian objects; inhuman and/or cruel treatment; denying fair trial rights to prisoners; unlawful confinement of civilians; torture; murder and wilful killing; and appropriation and destruction of property (International Partnership for Human Rights 2015, 6).

The following crimes against humanity have been perpetrated against civilians: illegal detention; torture; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health; murder; and persecution on political and religious grounds (International Partnership for Human Rights 2015, 7).

### **3. Domestic investigation and prosecution of international crimes**

The ICC only prosecutes international crimes if a country is unwilling or unable to do so itself. This section gives a brief overview of the investigation and punishment of international crimes committed on the territory of Ukraine by national bodies. The Prosecutor General's Office (PGO), the Ministry of the Interior (MoI), and the Security Service of Ukraine (SSU) are the main state bodies in charge of the investigation of international crimes committed on Ukrainian territory. Maidan-related investigations fall within the competence of the MoI and the PGO. On December 8, 2014, the Special Investigations Division (SID) was authorised to carry out investigations into Maidan cases. In August 2015, the PGO established a military prosecutor's office of the anti-terror operation (ATO) forces to investigate crimes committed by the Ukrainian military. In

September 2015, the Prosecutor's Office established a 'Department for the Investigation of Crimes against Peace, Security of the Mankind and the International Legal Order' which exclusively deals with 'the Russian aggression against Ukraine and assistance to terrorist organisations' (Radio Svoboda 2015). The SSU has investigative jurisdiction over crimes against national security and peace, crimes against humanity and international order, cases concerning trafficking and terrorist acts, as well as crimes of treason, espionage, and crimes relating to weapons of mass destruction. On November 12, 2015, the State Bureau of Investigations was created which is in charge of, amongst other things, investigating war crimes and crimes committed by high state officials. The Bureau will begin its work no earlier than 2017.

Although the investigations into Maidan have been criticised for being inefficient and too slow (Council of Europe 2015) there has been some progress. According to the Department of Special Investigations (DSI) of the Prosecutor General's Office, investigations into more than 2,000 Euromaidan-related incidents are ongoing, with criminal proceedings initiated against 282 individuals, 43 of whom are high-ranking officials. 126 indictments and requests with regard to 162 people have been submitted to courts, and 18 guilty verdicts have been delivered with respect to 26 individuals. The DSI alone has interviewed 6,000 witnesses and victims and scheduled 1,800 forensic examinations (Department of Special Investigations 2016).

Following the destruction of flight MH17, Malaysia proposed establishing an international tribunal by a United Nations Resolution to prosecute those responsible for shooting down the aircraft. While the proposal gained a majority on the UN Security Council (11 countries voting for it, 3 abstaining), it was vetoed by the Russian Federation.

There is also no effective investigation into the six cases of suspected enforced disappearances of Crimean Tatar activists in 2014 and one confirmed case of abduction, torture and killing, despite significant evidence, including video footage, strongly suggesting that pro-Russian paramilitaries from the so-called 'Crimean Self-Defence Force' were responsible for at least some of these crimes (Amnesty International 2016). Contrary to international humanitarian law, Crimean anti-occupation activists Oleg Sentsov and Alexander Kolchenko were put on trial outside Crimea. They were tried under Russian law in a military court in the city of Rostov-on-Don in southern Russia, and sentenced to 20 and 10 years imprisonment respectively, on manufactured terrorism-related charges (Kharkiv Human Rights Protection Group 2015).

Regarding the human rights violations in south eastern Ukraine, the MoI, since the launch of the security operation by the Government on April 14, 2014, has opened more than 6,000 criminal investigations into the killing and injuring of civilians and Ukrainian military personnel in the affected areas of Donetsk and Luhansk (UN OHCHR 2015, 27). The MoI and SSU have initiated investigations into cases of the indiscriminate shelling of residential areas by armed groups under Article 258 of the Criminal Code (acts of terrorism). They have also continued to investigate crimes related to the unlawful deprivation of liberty and the ill-treatment of civilian and military detainees by the armed groups. The main impediments to investigations are the lack of access to crime scenes due to the ongoing hostilities, and the difficulty of identifying and locating suspects and evidence.



The military prosecutor's office has brought to court 20 indictments for 22 people (8 citizens of the Russian Federation and 14 of Ukraine) who are charged with committing grave and especially grave crimes with regard to waging, preparing and initiating aggressive war and violating the laws and customs of war (Art. 437-438 of the Criminal Code of Ukraine). At the time of writing, there had been 15 guilty verdicts.<sup>5</sup> The military prosecutor's office is also investigating facts of 'killings, mistreatment of captives and civil population, the use of civilians in forced labour and looting state property on the occupied territory of eastern Ukraine' (Prosecutor General's Office 2016).

The Prosecutor General's Office reported that at least three criminal cases were opened into alleged abuses by members of Pravyi Sektor, including abduction, beatings and extortion between August 2014 and May 2015, as well as the ill-treatment and disappearance of one man in November 2014, allegedly involving volunteer paramilitaries and members of the Security Service of Ukraine. Victims of human rights violations alleged to have been committed by members of the Ukrainian military or law enforcement agents have been reluctant to file complaints, fearing persecution if they remain in government-controlled territory. Others have been simply unable to file a complaint from the territories controlled by the armed groups in the absence of a postal service (UN OHCHR 2015, 28).

#### **4. The ICC's involvement in the situation in Ukraine<sup>6</sup>**

Ukraine's relations with the ICC and the reluctance of the Ukrainian Government to ratify the Rome Statute will be discussed in this chapter to provide the reader with information about possible mechanisms of an ICC involvement in Ukraine and the paradoxical attitude of the Government to the Court. First of all, Ukraine is not a party to the Rome Statute. However, on April 17, 2014, the Government of Ukraine lodged a Declaration under Article 12(3) of the Rome Statute accepting the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. On 8 September 2015 it lodged a second Declaration under Article 12(3) of the Statute, accepting the exercise of jurisdiction by the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date. The Ukrainian Government's declaration names the actors it considers responsible for crimes against humanity and war crimes, namely 'senior officials of the Russian Federation' and the leaders of the so-called DPR and LPR (International Criminal Court 2015), omitting any potential perpetrators amongst the Ukrainian military and political leadership. The Court may therefore exercise its jurisdiction over Rome Statute crimes committed in the territory or by nationals of Ukraine since 21 November 2013 (International Criminal Court 2016). Pavlo Klimkin, Ukrainian Minister of Foreign Affairs, described Kyiv's recognition of the Court's jurisdiction as a 'historic moment', adding that granting such jurisdiction was Ukraine's 'moral responsibility' and highlighting that 'Ukraine will cooperate with the Court without delay or exception' (International Criminal Court 2015).

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<sup>5</sup> March-April 2016.

<sup>6</sup> For more on the acceptance of the ICC by the Ukrainian Government see: Valentyna Polunina, *Between Interests and Values: Ukraine's Contingent Acceptance of International Criminal Justice* (International Academy of Nuremberg Principles, 2016). Accessed January 1, 2017. <http://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Ukraine.pdf>.

The preliminary examination of the situation in Ukraine by the ICC was announced on 25 April 2014. On September 29, the ICC Prosecutor announced, based on Ukraine's second Declaration under Article 12(3), the extension of the preliminary examination of the situation in Ukraine to include alleged crimes occurring after February 20, 2014. The Office of the Prosecutor (OTP) has received several communications under Article 15 of the Rome Statute in relation to the Maidan protests, as well as to events in Crimea and eastern Ukraine (International Criminal Court 2015).

The preliminary examination initially focused on alleged crimes against humanity committed in the context of the Maidan protests which took place in Kyiv and other regions of Ukraine, including murder, torture, and other inhumane acts. Following the lodging of a new declaration by Ukraine, the OTP decided to extend the temporal scope of the existing preliminary examination to include any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards.

The preliminary analysis of the OTP issued on November 12, 2015, states that the criteria established by the Rome Statute for the opening of an investigation have not been met in regard to the acts of violence committed during the Euromaidan protests (International Criminal Court 2015, 21-25). Despite the fact that the 'acts of violence allegedly committed by the Ukrainian authorities between November 30, 2013 and February 20, 2014 [could constitute an] attack directed against a civilian population' under Article 7(2)(a) of the Rome Statute (International Criminal Court 2015, 22). The OTP considers that 'there is limited information at this stage to support the conclusion that the alleged attack carried out in the context of the Maidan protests was either widespread or systematic' (International Criminal Court 2015, 23). This means that, for the time being, and until more evidence is received, there will be no formal investigations of the Maidan events.

## **5. Ratification of the Rome Statute**

Ukraine is reluctant to ratify the ICC's Rome Statute, despite the fact that affiliation was one of the provisions of the association agreement between Ukraine and the European Union. Although Ukraine signed the Rome Statute in 2000, the Ukrainian Constitutional Court ruled a year later that the Statute was incompatible with the Ukrainian Constitution, effectively preventing ratification. Most recently the Ukrainian Parliament has voted to postpone the ratification by another three years (Atlantic Council 2016). The Ukrainian Government has, however, granted the ICC *ad hoc* jurisdiction over all international crimes that have taken place on Ukrainian territory since November 21, 2013 – the beginning of the Euromaidan – on the basis of these declarations.

Despite numerous appeals from civil society and the international community to the Ukrainian Government to ratify the Rome Statute, it remains reluctant to do so and instead prefers to call on the ICC when it suits its ends. At the same time, statements by members of President Poroshenko's party, the Council on Security and Defence, or by the Prosecutor General demonstrate their lack of political will and understanding of ICJ mechanisms (Human Rights Information Centre 2015).

There is little understanding that the ICC is not a substitute for Ukrainian authorities, yet the majority of interviewed experts believe there is a widespread misperception in Ukraine that the ICC will do all the work of the Ukrainian national authorities for them. The Court does not usurp the role of national courts in prosecuting international crimes, such as the crime of aggression, genocide, crimes against humanity, and war crimes. Only if a state is unable or unwilling to take legal action can the ICC step in and prosecute wrongdoings punishable by international law.

Secondly, the ICC cannot fully address the public demand for justice in Ukraine as it usually focuses only on high-ranking perpetrators of crimes against international law. It does not have the resources to deal with the much larger number of rank-and-file offenders in Ukraine. Also, contrary to the desire of the Ukrainian public for swift justice, trials conducted by the ICC are costly and time-consuming. Finally, the Court does not yet address the crime of aggression, so even if the wish of many Ukrainian citizens came true and President Putin stood trial, he could not be prosecuted for the Russian aggression against Ukraine.

Most importantly, Ukraine is not a party to the ICC's Rome Statute and so it does not enjoy all the rights of a member state such as sending its judges and other representatives to the Court, participating in the Assembly of States Parties, or asking help of the Court at any time. Kyiv instead prefers to call on the ICC selectively when it sees an opportunity in the ongoing propaganda war between Ukraine and the Russian Federation. Some human rights activists interviewed for this study suggested that Ukrainian authorities involved in the decision-making process, for instance the President and his administration, might want to preserve an escape route and withdraw the ICC's jurisdiction if things do not turn out as planned, even though it is impossible to withdraw jurisdiction after the ICC opens a case.<sup>7</sup>

A member of Ukraine's parliament's Supreme Council recently complained that a draft law on the ratification of the Rome Statute was being blocked by the Parliamentary Committee on Legal Policy and Justice, headed by a deputy from President Poroshenko's bloc. He alleged that President Poroshenko was not interested in ratifying the Statute of the ICC out of fear of being held responsible for Ukrainian military casualties incurred under his leadership.

A more plausible (and official) reason for the reluctance to ratify the Rome Statute is that Ukraine risks too much by becoming a full party to the ICC while at war and being unable to protect the Ukrainian military from prosecution. Ukraine's newly-appointed Chief Prosecutor, Yuri Lutsenko, previously announced that full ratification must wait until the end of hostilities. In his words, 'now we have to fight and not go to court and collect evidence' (Human Rights Information Centre 2015). Kyiv fears that it would expose itself to Russian legal harassment in the ICC, especially when there is credible evidence that Ukrainian forces are responsible for violations of international humanitarian law. This assumption is not without merit: in the aftermath of the Russian-Georgian War of 2008, Tbilisi became the target of a wave of Russian motions filed in the Court. Human rights activists interviewed by the author suspect that Poroshenko's Georgian advisors are responsible for his reserved attitude towards ratification of

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<sup>7</sup> For example, interview with Borys Zakharov, the Ukrainian Helsinki Human Rights Union, April 13, 2016.

the Rome Statute, but the negative consequences of Georgia's ratifications of the Rome Statute may be overestimated. Although Russian organisations have submitted copious documentation to the ICC, the Court has not sided with Russia.

Another possible reason for the Government's reluctance to ratify the Rome Statute is the fear of upsetting nationalist groups. Proposed changes to the Constitution and the prosecution of marginal radical rightists already provoked violent protests in Kyiv in 2015. In July 2016, for example, supporters of the former chief of staff of the 'Aidar' battalion blocked the courtroom, where his trial was being held, demanding his release. The potential prosecution by an international institution of Ukrainian military personnel could seriously radicalise an already dangerous faction. The Deputy Head of the Presidential Administration has voiced his concern that the recognition of the jurisdiction of the ICC would have some risks for Ukraine, particularly for the Ukrainian military service personnel.

By recognising the jurisdiction of the ICC *ad hoc*, Ukraine has put itself in an uncomfortable position: the ICC has full jurisdiction over any international crime committed in Ukraine after November 21, 2013. Yet, not having ratified the Rome Statute, Ukraine does not enjoy all the privileges of a member state, nor will the current delay in ratifying the Statute protect Ukrainian army personnel as the ICC already has the ability to bring charges against Ukrainian service personnel under the terms of Ukraine's partial recognition of its authority. Kyiv's delay of the ratification of the Rome Statute therefore does little more than generate an international perception that Ukraine has something to hide and that war crimes and crimes against humanity were perpetrated by Ukrainian forces with knowledge and approval of the Government.

## **6. Acceptance of international criminal justice in Ukraine: the perspectives of the actors**

Before patterns, dynamics and drivers of acceptance of specific actors are addressed, it is important to draw a broader picture. On the basis of this study it can be observed that the various Ukrainian actors generally accept ICJ. When asked about attitudes towards ICJ in society, interviewees pointed to the wide acceptance by the public and 'a request for intervention of an international judicial body due to low trust in the national authorities.'<sup>8</sup> What is unusual about this public acceptance is that it is dynamic and exists in the situation of an ongoing conflict. It means that people look for justice before peace is reached. The question of justice remains important alongside other vital issues such as security concerns due to the violent conflict in Eastern Ukraine, unemployment, or the devaluation of the Ukrainian currency (UNIAN 2016).

At the same time, respondents in all actors categories noticed that acceptance in the Ukrainian society might be shrinking due to the overall disappointment in the Western response to the war in Ukraine and unrealistic expectations of international institutions, for instance the OSCE,

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<sup>8</sup> Interview with Serhiy Petukhov, Deputy Minister of Justice of Ukraine for European Integration, March 16, 2016.

among Ukrainians.<sup>9</sup> Some respondents think that the level of acceptance within the society might be positively changed by education and information campaigns about ICJ.<sup>10</sup> Taras Miroshnychenko, a lawyer at the Ukrainian office of the International Partnership for Human Rights, is of the opinion that those living near the front line or on territory under control of the separatists would especially benefit from these campaigns:

'If people had access to information, it would lead to a more positive attitude [to ICJ]. Information they receive is distorted; Russian propaganda discredits international justice, especially after losing some cases in international courts, for example, the case against Khodorkovsky.'<sup>11</sup>

The level of acceptance is changing depending on the development of the conflict. Maksym Filipenko from Amnesty International Ukraine said in an interview that:

'In the beginning [of the conflict] there was great hope with regard to the ICC, but the tide of the war is changing this positive opinion. [...] There is no understanding of the ICC. There were high expectations that the court would consider criminal cases quickly and will bring swift justice but there is no information about how the court works. People are concerned that the involvement of the ICC can harm our military. There is an opinion that if the court hasn't done anything during the first 1-2 years of the conflict, it won't ever deliver justice.'<sup>12</sup>

Borys Zakharov from the Ukrainian Helsinki Human Rights Union adds that:

'After 2 years there is a feeling of disappointment [in Ukrainian society] but still no knowledge about international law. Society is slowly changing and becoming more tolerant to violence and increasingly aggressive towards the terrorists.'<sup>13</sup>

Many other interviewed experts agreed that even if Ukrainians on the whole were welcoming towards international institutions and trust international judicial bodies more than national ones, the disappointment due to their inaction is growing. Experts are afraid that if the ICC waits for too long to open a case like it was in the Georgian situation (it was done only seven years after the war in Georgia was over) there will be little public support.

Another interesting aspect of the acceptance process in Ukraine is that the conflict parties communicate using highly emotionally charged allegations of international crimes. Depictions of unimaginable atrocities, sometimes of those that are not corroborated by any evidence and calls

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<sup>9</sup> Interview with Taras Miroshnychenko, lawyer at the Ukrainian office of the International Partnership for Human Rights, April 6, 2016; Oleksiy Bida, Project Coordinator at the Ukrainian Helsinki Human Rights Union, 30 March 2016; Borys Zakharov, the Ukrainian Helsinki Human Rights Union, April 13, 2016.

<sup>10</sup> Interview with Taras Miroshnychenko, lawyer at the Ukrainian office of the International Partnership for Human Rights, April 6, 2016.

<sup>11</sup> Interview with Taras Miroshnychenko, lawyer at the Ukrainian office of the International Partnership for Human Rights, April 6, 2016.

<sup>12</sup> Interview with Maksym Filipenko, Amnesty International Ukraine, April 18, 2016.

<sup>13</sup> Interview with Borys Zakharov, the Ukrainian Helsinki Human Rights Union, April 13, 2016.

for revenge became part of public discourse both in the Russian Federation and in Ukraine. Russian propaganda that portrays Ukrainians as fascists who want to eliminate all the Russian-speaking population and attracts Russian citizens who go to the war zone to fight on the side of the separatists. Even though mercenaries are forbidden by the Criminal Code of the Russian Federation, little has been done to prevent or punish those guilty of joining illegal armed groups. On the other hand, there is a tendency in Ukrainian media to portray the population of Donetsk and Luhansk regions and IDPs as separatists and criminals that contribute to tensions in Ukrainian society. Human rights activists and experts in Ukraine hope that the ICC will be able to punish those responsible for spreading hate speech as it was in the case of the International Criminal Tribunal for Rwanda.<sup>14</sup>

During the conduct of the study it was obvious that emotionally loaded categories such as justice for and moral responsibility to the victims played an important role in the acceptance of ICJ in Ukraine, especially with civil society actors. In this case, we can talk about emotional rather than rational strategic acceptance.

## **6.1 Government**

The Government at the highest level is using the topic of prosecutions for international crimes strategically, and sees the ICC as a political and not purely judicial body. Two different approaches can be observed with regard to ICJ acceptance: in communication with the international community it insists that (Russian) war criminals should be punished and that the ratification of the Rome Statute is the highest priority for the state (Human Rights Information Centre 2016); while messages directed at the Ukrainian public contain totally different information. The Government claims that no other state has ratified the Rome Statute during a military conflict, and that by postponing membership of the ICC it protects Ukrainian military service personnel who should defend the country and not waste time going to The Hague and giving testimony.

Differences between institutional and individual acceptance within the Government can be seen. It was surprising to find that co-operation with international legal bodies and the ratification of the Rome Statute was supported by the majority of the interviewees from the category 'government'. It is correct to speak about different institutional and individual acceptance within the Government. When the ICJ is not supported or just partially supported on the highest level – for example, by the President, the Prosecutor General, or the Military Prosecutor of Ukraine<sup>15</sup> – we can still speak about broader acceptance among the mid- and low-ranking officials. To give an example, even though the General Prosecutor Yuriy Lutsenko is of the opinion that Ukraine should postpone the ratification of the Rome Statute, the Head of the Special Investigation Division in the General Prosecutor's Office, Serhiy Horbatiuk, mentioned in conversation that:

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<sup>14</sup> Interview with Oleksiy Bida, Project Coordinator at the Ukrainian Helsinki Human Rights Union, March 30, 2016.

<sup>15</sup> Anatoliy Matios, the Military Prosecutor of Ukraine, for example, stated in an interview on April 15, 2016 that the 'ICC is a political court, the court of selective law'.

‘The ICC is important for its objectivity [...] and could give a clear picture to the world [about what happened in Ukraine]. Verdicts of Ukrainian courts will not necessarily lead to punishment [of those who are hiding in the Russian Federation] but a verdict of the ICC will mean more pressure, a greater chance to successful implementation of the verdict.’<sup>16</sup>

At the same time a certain correlation was observed: the higher the status of a state official, the lower the level of acceptance. This could be explained by the fact that there is no real separation of powers in Ukraine, and that the executive and the majority in the Parliament follow the line of the President who is the central decision-making figure. Serhiy Petukhov, Deputy Minister of Justice of Ukraine for European Integration, complained during the interview that ‘a part of the problem is that decisions are taken behind closed doors.’<sup>17</sup>

## 6.2 Civil society and experts

Civil society and experts generally have a high level of ICJ acceptance. They criticise the lack of understanding of ICJ mechanisms and insufficient political will to investigate and prosecute international crimes committed in Ukraine, and corruption, and unprofessionalism within national law enforcement agencies. For example, human rights activist Volodymyr Yavorsky stresses that:

‘Old separatist [law enforcement] personnel remains in eastern Ukraine which is reluctant to register [international] crimes [and] needs training on how to react to information about war crimes.’<sup>18</sup>

He added that decision-makers often offer populist ideas ‘which, in their opinion, will solve all the problems in a week’;<sup>19</sup> even though Ukraine has fundamental structural problems like dysfunctional law enforcement agencies and courts.<sup>20</sup> Many interviewed experts and human rights activists were extremely pessimistic about prospects of any real changes in the Ukrainian law enforcement system, especially of the Prosecutor’s office.<sup>21</sup> They claim that the political system was not changed after Maidan, and that old elites prevent any changes: for example, initially employed military prosecutors were forced to leave the office after their contracts were over due to resistance from their supervisors.<sup>22</sup>

At the same time experts point to the fact that ‘it is almost impossible to conduct investigations and bring to justice perpetrators on the territory that is not under Ukrainian control’<sup>23</sup> which

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<sup>16</sup> Interview with Serhiy Horbatiuk, Head of Special Investigation Division in the General Prosecutor’s Office, April 13, 2016.

<sup>17</sup> Interview with Serhiy Petukhov, Deputy Minister of Justice of Ukraine for European Integration, March 16, 2016.

<sup>18</sup> Interview with Volodymyr Yavorsky, member of the Ukrainian Helsinki Human Rights Union, co-organiser of the festival Docudays UA, March 9, 2016.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Interview with a coordinator of international crimes documentation in eastern Ukraine at an international NGO who wished to remain anonymous, March 16, 2016; Interview with Vitaliy Tytych, lawyer of the relatives of the Maidan victims, April 6, 2016.

<sup>22</sup> Interview with Oleksiy Bida, Project Coordinator at the Ukrainian Helsinki Human Rights Union, March 30, 2016.

<sup>23</sup> Interview with a coordinator of international crimes documentation in eastern Ukraine in an international NGO who wished to remain anonymous, March 16, 2016.

means that over time many crimes might remain unsolved and the perpetrators unpunished.<sup>24</sup> It is even more difficult in a situation when, according to activists, there is no clear division of responsibilities between national agencies and no precisely defined mechanism of recording international crimes.<sup>25</sup>

For instance, experts and human rights activists emphasized the importance of acceptance as a sign of Ukraine's democratic development and means to reform the corrupt judicial and law enforcement system in Ukraine. They agreed that the ratification of the Rome Statute could be an impetus to change Ukrainian criminal law norms that do not correspond with the norms of international criminal law and to investigate international crimes independently.<sup>26</sup> Most of them understood that ICC procedures are usually very time-consuming and may disappoint those who wish for swift justice in Ukraine.

There was a consensus among civil society groups that a hybrid ad hoc tribunal with mixed national and international staff would be an acceptable solution. According to Oleksandra Matviychuk, head of the NGO Centre for Civil Liberties, a hybrid tribunal is:

'Flexible and takes into account the national legal system, is visible to the public and especially to the victims, has additional enforcement opportunities due to cooperation with other countries, and has trust within the society.'<sup>27</sup>

Additionally, the experts hoped that a hybrid court would be able to prosecute the crime of aggression and corruption crimes that currently cannot be dealt with by the ICC. In this case, international experts would be working with their Ukrainian colleagues on a daily basis, transferring knowledge and experience and not acting as mere consultants.<sup>28</sup>

This vision was not shared by all the interviewed experts: some of them believed that the ICC was the only chance to punish those who committed international crimes in Ukraine. The ICC's involvement has a symbolic meaning for them as an international stage where the truth about the conflict in Ukraine will be revealed and the Russian intervention proven. Even though the Court is unable to bring to justice those who are in Russia, 'already an arrest warrant would be a legal and a political victory.'<sup>29</sup>

### **6.3 Victims**

Two different positions could be observed with regard to the acceptance among victims: for those who became direct victims of violence, mainly those who survived captivity by the separatist forces, it was immensely important that justice would be restored. For IDPs, it was important that peace was restored and that they could go back to their homes. It remains an open question what the level of acceptance of the victims of crimes committed by Ukrainian

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<sup>24</sup> Interview with Valeriy Novikov, human rights lawyer, April 1, 2016.

<sup>25</sup> Interview with Taras Miroshnychenko, lawyer at the Ukrainian office of the International Partnership for Human Rights, April 6, 2016.

<sup>26</sup> Interview with Mykhaylo Zhernakov, lawyer, member of the board at the reanimation package of reforms, March 23, 2016.

<sup>27</sup> Interview with Oleksandra Matviychuk, Head of the NGO 'Center for Civil Liberties,' March 18, 2016.

<sup>28</sup> Interview with Mykhaylo Zhernakov, lawyer, member of the board at the reanimation package of reforms, March 23, 2016.

<sup>29</sup> Interview with Markiy Halabala, lawyer, expert on the judicial reform in Ukraine at the reanimation package of reforms, April 6, 2016.



forces is and of those who stayed in the conflict zone, as the author did not have access to those groups.

It is believed that victims were afraid to speak to the authorities out of fear for their own security because there is no witness protection programme in Ukraine and a general mistrust towards national bodies.<sup>30</sup> These people would prefer to transfer their cases to the ICC. At the same time, particularly those who live in the territories controlled by the separatist forces or near the contact line and deal with the OSCE monitors or members of other international organisations, often believed that these organisations were useless, and they would transfer this negative attitude on the ICC, especially those who did not know much about the Court or did not distinguish between different agencies and organisations. In this situation of absolute mistrust the lack of knowledge about the ICC and about the mechanisms of international humanitarian and criminal law may affect victims' acceptance and prevent them from testifying at the ICC.<sup>31</sup> Sometimes people did not know that they had been victims of international crimes, and it had not occurred to them to testify.<sup>32</sup>

For those directly affected by violence, one of the most emotive issues was the question of amnesties. The Minsk Agreements contain a provision about broad amnesties for those who participated in the conflict in Eastern Ukraine. According to the law 'On the special procedure of local self-governance in some districts of Donetsk and Luhansk regions,' adopted by the Ukrainian Parliament in 2014, exemption from prosecution was provided for participation in the events in Donetsk and Luhansk regions. The only restrictions for amnesty envisaged were terrorist acts, murder, rape, and plunder. In general, the Ukrainian position is that amnesty cannot be all encompassing, as some of the cases should be considered as crimes against humanity due to their extreme violence and intent. The position of Ukraine is in line with international practice and the provisions of international humanitarian law. At the same time, the separatist combatants demand total amnesty for all involved in the events in the Donetsk and Luhansk regions as a precondition for holding elections. This would allow participation in elections to all participants to the conflict from the DPR and LPR, regardless of the type and scale of crimes committed during the conflict.

The majority of victims, experts, human rights activists, and government officials were against the blanket amnesties featured in the Minsk Agreement. They claimed that it was judicially wrong to grant amnesty without any preliminary investigation,<sup>33</sup> and that peace in Ukraine is impossible without some degree of justice as otherwise there is a risk of vigilantism.<sup>34</sup> 'Peace in Ukraine should be just. We cannot allow that the principle of inevitability of punishment for crimes against humanity is ignored by the international community,' stressed a human rights lawyer from Alchevsk, Luhansk region.<sup>35</sup> Those who have experience of interacting with civilian

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<sup>30</sup> Aleksandra Novichkova, senior lecturer at the political science department, Kyiv Mohyla Academy, April 22, 2016.

<sup>31</sup> Interview with Victoria Salikhova, former member of the International Committee of the Red Cross in Ukraine and current member of the OSCE Special Monitoring Mission to Ukraine originally from Donetsk, April 14, 2016.

<sup>32</sup> Ibid.; interview with Lora Artyugina, documentary filmmaker, member of the 'Free people's house' NGO, April 18, 2016.

<sup>33</sup> Interview with Markiy Halabala, lawyer, expert on the judicial reform in Ukraine at the Reanimation package of reforms, April 6, 2016.

<sup>34</sup> Interview with Oleksiy Bida, Project Coordinator at the Ukrainian Helsinki Human Rights Union, March 30, 2016.

<sup>35</sup> Interview with Valeriy Novikov, human rights lawyer, April 1, 2016.

and military victims of international crimes are convinced that victims need justice; even ‘those who only saw or heard about committed crimes in their surroundings.’<sup>36</sup> ‘It is a socially meaningful moment’ which can potentially have a positive effect on acceptance as ‘it restores faith in state institutions.’<sup>37</sup> Their opinion is supported by interviews with victims of international crimes. One of them, Oleksandr Gryshchenko who was kept imprisoned and tortured in the LPR for about 6 months ‘cannot imagine that people who tortured’ him and other prisoners, some of them to death, ‘would stay unpunished.’<sup>38</sup> At the same time, some experts thought that apart from people who participated in the ATO and those living in western Ukraine, the rest of the population would not pay special attention to the amnesties.<sup>39</sup>

Some of the interviewees said that not only the amnesty provisions but also the whole Minsk peace process is increasingly perceived as:

‘An ultimatum where all the pressure to maintain peace is put only on one side of the conflict. Victims [of international crimes] and their relatives are especially dissatisfied with the whole situation. Due to this attitude that perceived to be unfair and the opinion among Ukrainian military that ‘honest’ defence is impossible anyway [any military activities will be criticised by the European mediators even those of defensive nature – author’s remark], the number of war crimes [committed by the Ukrainian forces] is growing. It is possible though that the increasing number of crimes means that they are better documented and investigated.’<sup>40</sup>

The prospect of blanket amnesties also demoralises national investigation agencies as potential perpetrators under investigation.<sup>41</sup> In the long term, the intention to ‘freeze’ the conflict and legitimise separatist leaders was perceived by the majority of interviewees as harmful to national reconciliation.

#### **6.4 Political parties, right wing and nationalist groups**

Perhaps surprisingly, so far there have not been any major protests by nationalist groups whose members have been prosecuted by the Military Prosecutor’s Office. Only the Right Sector (Pravyi Sektor) has branded the prosecution of its members as political trials. Some human rights lawyers agree that some cases against Pravyi Sector members may be politically motivated (its volunteer unit is the only one that remains reluctant to be included in the National Guard). The movement supports the idea of the prosecution of war crimes because ‘there is no peace without justice [...] and the inevitability of punishment is the key to future stability.’<sup>42</sup> At the same time, they assume that only separatists can be war criminals and do not accept ICJ ‘based on negative

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<sup>36</sup> Interview with Lora Artyugina, documentary filmmaker, member of the ‘Free people’s house’ NGO, April 18, 2016.

<sup>37</sup> Ibid.

<sup>38</sup> Interview with Oleksandr Gryshchenko, April 12, 2016.

<sup>39</sup> Interview with Oleg Martynenko, Director of the Centre of Law Enforcement Studies, April 5, 2016.

<sup>40</sup> Interview with a coordinator of international crimes documentation in eastern Ukraine in an international NGO who wished to remain anonymous, March 16, 2016.

<sup>41</sup> Ibid.

<sup>42</sup> Interview with Artem Skoropadskyi, the Right Sector, April 13, 2016.

experiences with the work of the OSCE in Ukraine' and due to the conviction that 'Ukrainians can deal with these issues themselves.'<sup>43</sup>

Left parties support prosecutions of war criminals to some extent, but want to see not only former political leaders (for example, the former President Yanukovich) but also current ones in the courtroom. Most of them support the idea of an investigation and a trial but think that 'Ukraine is not capable of conducting such investigations at the present'.<sup>44</sup> The acceptance of left-wing and oppositional movements and parties is strategic; by their criticism of the current Government and pressure to conduct elections in the LPR and DPR, they try to win more votes by participating in the elections.

In general, there are different opinions about the reaction in the society on possible prosecutions of Ukrainian military service personnel by the ICC. Nevertheless, the majority of interviewees agreed that if the prosecutions will be one-sided and only the Ukrainian side is tried in The Hague (for example, because it will not be possible to extradite potential perpetrators from the Russian territory), those prosecutions will be negatively perceived in Ukraine because members of the Ukrainian military forces are seen as heroes.<sup>45</sup> Yet, many experts do not expect widespread protests as a substantial number of volunteer members are currently under investigation and there is no reaction to it in society.

## **7. Conclusion**

The acceptance of the ICC should be seen in the broader context of an ongoing conflict, propaganda wars, and the population's mistrust of the authorities. There is overall support for the ICC and big expectations about its involvement in Ukraine as in some other cases that are under preliminary examination by the Court, for example, Palestine. Nevertheless, the respondents stressed that acceptance in Ukrainian society has started to diminish due to: overall disappointment in the Western response to the war in Ukraine; concerns that the ICC could harm the Ukrainian military; poor knowledge of ICJ mechanisms; and too high expectations of international institutions such as the OSCE. There is a concern that if the ICC waits too long to open a case, as it did in the Georgian situation, there will be little public support left.

Another interesting aspect of the acceptance process in Ukraine is that emotionally loaded categories such as justice and moral responsibility to the victims have played an important role in acceptance, especially in civil society. A strong sense of justice has led to resistance to possible blanket amnesties among almost all the observed actors.

Despite some steps towards acceptance that can be seen as a signal of the Government's commitment to accountability for grave crimes, the lack of political will and understanding of the ICC's work and attempts to balance the interests of different actors has created a situation in which the ICC's mechanisms are being used selectively as a political tool. This strategic selective

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<sup>43</sup> Ibid.

<sup>44</sup> Interview with Vasyliy Volga, Head of the 'Union of the Left Forces', April 18, 2016.

<sup>45</sup> Aleksandra Novichkova, senior lecturer at the political science department, Kyiv Mohyla Academy, April 22, 2016.

approach permeates not only the Government but also opposition parties and movements, both left- and right-wing. The Ukrainian Government has been forced to cooperate with a reputable institution such as the ICC in order to strengthen its version of events in Ukraine in the propaganda war with Russia. Considering the EU-Ukraine agreement, the acceptance of the ICC could also contribute to good relations with the EU and secure financial and political support, and such international support for the post-Maidan government would contribute to its legitimisation. At the same time, the Ukrainian Government is concerned that it will be vulnerable to Russian diplomatic attacks after the ratification of the Rome Statute. One of the most plausible explanations for the contingent acceptance of the ICC by the Ukrainian Government is its fear that the ICC will open investigations against the Ukrainian military. This would cause a serious damage to Ukraine's image, decrease the country's international support, and may even damage the peace process. The resistance to full acceptance of the ICC by the Government could be the result of a poor understanding of the Court's mechanisms and an inability to distinguish between conventional and international crimes.

Differences between institutional and individual acceptance within the Government can be observed. Co-operation with international legal bodies and the ratification of the Rome Statute was supported by the majority of the interviewees from the category 'government' but mostly among the mid-ranking and low-ranking officials. At the same time a certain correlation was observed: The higher the status of a state official, the lower the level of acceptance.

Civil society and experts generally have a high level of ICJ acceptance. It is a common belief among civil society that a hybrid *ad hoc* tribunal with mixed national and international staff would be an acceptable alternative for time-consuming ICC procedures.

Two different positions can be observed with regard to the acceptance among victims, which echoes the Kenyan situation where the ICC's involvement was seen by victims as a last resort in the face of domestic inaction and by communities as political action. For those who have been direct victims of violence, mainly those who survived captivity by the separatist forces, it is immensely important that justice will be restored. For IDPs it is important that peace is restored and that they can go back to their homes. Communities under control of separatist forces may be even distrustful and resentful towards an international trial due to the lack of information.

For those directly affected by violence, one of the most emotional issues is the question of amnesties. The majority not only of victims but also of experts, human rights activists, and governmental officials are against the blanket amnesties featured in the Minsk Agreement and argue that peace in Ukraine is impossible without at least some degree of justice.

Most opposition parties and even right-wing movements support the idea of an investigation into what has happened in Ukraine during the last 2 years, and trial of the perpetrators. However, their acceptance is rather strategic as they see justice generally directed at only the rival camp. The majority of interview partners agreed that if the prosecutions will be one-sided and only the Ukrainian side will be tried, perhaps because it would not be possible to extradite alleged perpetrators from Russian territory, those prosecutions will be perceived negatively in Ukraine because members of the Ukrainian military forces are seen as heroes and defenders of

the homeland. Yet, some experts do not expect widespread protests as a substantial number of volunteer members are currently under investigation and there is no reaction to it in society.

Different factors influence acceptance of the ICC by specific actors in Ukraine, such as the popular demand for accountability and the involvement of the ICC in the Ukrainian situation, as well as the pressure of human rights activists, legal experts, and international partners such as the EU.

On a more general level, the situation of a so-called 'hybrid war' in Ukraine when one of the conflict sides denies its involvement and acts through proxies, poses new challenges to the international community. Transitional justice mechanisms and the current international security system may not be suitable to deal with modern kinds of aggression.

To conclude, one could raise broader questions for further debate on whether efforts to prosecute perpetrators of mass atrocities can coexist with a peace process, or how to balance the need for peace with the importance of accountability, given that a certain degree of impunity might be required in order to conclude a peace deal. The different needs and interests not only of different actors but those that can exist even within one actor also need to be balanced, and there are questions over whether information campaigns about ICJ do indeed lead to higher levels of acceptance.

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