

ARTICLE

VENTURING EAST: THE INVOLVEMENT OF THE  
INTERNATIONAL CRIMINAL COURT IN POST-  
SOVIET COUNTRIES AND ITS IMPACT ON  
DOMESTIC PROCESSES

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ABSTRACT

*This Article examines the involvement of the International Criminal Court (“ICC”) in Georgia and Ukraine, and the impact the ICC has had on mobilizing national authorities and civil society in the two countries, in order to address impunity for international crimes. Both Georgia and Ukraine, with Russia as their adversary, share many commonalities in dealing with the conflict-related crimes. However, it appears that the ICC’s involvement has produced different effects in each country in terms of the ability of domestic authorities to deal with the conflict-related crimes. This Article describes how the ICC’s involvement in Georgia and Ukraine has affected domestic processes in terms of legal reform, mobilization of civil society, and domestic prosecution of the conflict-related crimes. It compares and contrasts both situations by highlighting the challenges encountered by both countries, and the ways in which the ICC has impacted domestic processes.*

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### *I. INTRODUCTION*

This Article examines the involvement of the International Criminal Court (“ICC”) in Georgia and Ukraine, and the impact the ICC has had on mobilizing national authorities and civil society in the two countries in order to address impunity for international crimes. Both Georgia and Ukraine—faced with Russia as their adversary—share many commonalities in dealing with the conflict-related crimes. These include non-cooperation by the Russian authorities, lack of effective control over parts of their territory, and associated challenges in the evidence collection process. However, it appears that the ICC’s involvement has produced different effects in each country in terms of the ability of domestic authorities to deal with the conflict-related crimes.

Georgia is in a state of limbo, exhibiting complete inaction at the domestic level despite the existence of the appropriate national legal framework on the criminalization of international crimes. Ukraine is pushing forward for necessary domestic legal reforms on harmonizing its legislation with international law and exhibits more enthusiasm for prosecuting the conflict-related crimes. However, Ukraine has struggled to achieve its ambitious goals to date. In both Georgia and Ukraine, the ICC has been a topic that has been high on the political agenda. However, in both countries this has been marred by divided opinions ranging

from open hostility towards the ICC to overwhelming approval of the ICC as an institution capable of addressing the impunity gap.

Part II of this Article provides the background of the conflict in both countries and explains how the situations came before the ICC. Part III describes how the ICC's involvement has affected domestic processes in terms of legal reform, mobilization of civil society, and domestic prosecution of the conflict-related crimes. The last Part of the Article compares and contrasts both situations by highlighting the challenges encountered by both countries, and the ways in which the ICC has impacted domestic processes.

## II. BACKGROUND OF THE CONFLICT AND ICC'S INVOLVEMENT

### A. Georgia

The conflict in Georgia stems from historical factors and events that germinated following the collapse of the Soviet Union ("USSR") and the civil wars that ensued.<sup>1</sup> When the USSR crumbled in the 1990s, pro-Russian South Ossetia and Abkhazia were reluctant to accept Georgian rule, as they enjoyed autonomous status within the USSR.<sup>2</sup> Georgia went on to completely abolish South Ossetian autonomy on December 11, 1990.<sup>3</sup> On May 29, 1992, the South Ossetian parliament declared its independence from Georgia, which led to the exacerbation of the conflict across South Ossetia and Abkhazia.<sup>4</sup> The conflict raged on until ceasefires put an end to the worst of the fighting<sup>5</sup>

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1. See Nina Markovic, *Behind the Scenes of the Russia-Georgia Conflict*, PARLIAMENT AUSTL. (Sept. 17, 2008), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/0809/RussiaGeorgiaConflict](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0809/RussiaGeorgiaConflict) [<https://perma.cc/ZSH2-URJN>].

2. See Thomas D. Grant, *Frozen Conflicts and International Law*, 50 CORNELL INT'L L.J. 361, 383-90 (2017).

3. Закон Республики Грузия от 11.12.1990 No. 63-I «Об упразднении Юго-Осетинской автономной области [Law of the Republic of Georgia No. 63-I on the Abolition of the Autonomous Oblast of South Ossetia] (Dec. 11, 1990).

4. ВЕРХОВНЫЙ СОВЕТ РЕСПУБЛИКИ ЮЖНАЯ ОСЕТИЯ [SUPREME COUNCIL OF THE SOUTH OSSETIAN REPUBLIC], О Принятии Акта о независимости Республики Южная Осетия [ON ADOPTION OF INDEPENDENCE OF THE REPUBLIC OF SOUTH OSSETIA] (May 29, 1992).

5. On June 24, 1992, Georgia and Russia signed the Agreement on Principles of Settlement of the Georgian-Ossetian Conflict. Two years later, on October 31, 1994, Georgia, South Ossetia, Russia, and North Ossetia, signed another Agreement on

and remained “frozen” until 2003 when the former Georgian president, Mikheil Saakashvili, came to power promising North Atlantic Treaty Organization (“NATO”) membership for Georgia and the restoration of Georgian control over South Ossetia and Abkhazia.<sup>6</sup>

In 2008, South Ossetian and Abkhazian aspirations for independence were strengthened by Kosovo’s declaration of independence from Serbia. Around the same time, Russia indicated its support for the South Ossetian separatists and established closer ties with both South Ossetia and Abkhazia, which further aggravated existing tensions with Georgia.<sup>7</sup> The relationship between Georgia and Russia reached an all-time low resulting in a five-day armed conflict between the two countries in August 2008 in the pro-Russian breakaway region of South Ossetia. Hostilities came to a halt as a result of the EU-mediated Six Point Agreement between Georgia and Russia.<sup>8</sup> According to the EU fact-finding report, an estimated 850 lives were lost, and more than 100,000 civilians fled their homes during the conflict.<sup>9</sup> Additionally, by early September 2008, Georgia’s Ministry of Justice registered 125,819 internally displaced persons (“IDPs”).<sup>10</sup>

The ICC’s Office of the Prosecutor (“OTP”) immediately responded to the Georgia-Russia conflict, with the Prosecutor announcing the commencement of a *proprio motu* preliminary examination into the situation in Georgia as early as August 14, 2008. Following a seven-year preliminary examination, on October 13, 2015, the Prosecutor submitted her request for

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Further Development of Georgian-Ossetian Peaceful Settlement Process and on Joint Control Commission. Grant, *supra* note 2, at 384.

6. See M. Саакашвили официально вступил в должность президента Грузии [M. Saakashvili Officially Inaugurated as President of Georgia], КАВКАЗСКИЙ УЗЕЛ [CAUCASIAN KNOT] (Jan. 26, 2004), <https://www.kavkaz-uzel.eu/articles/49724/> [<https://perma.cc/W3XY-5MPS>].

7. See Grant, *supra* note 2, at 385.

8. *Frozen Conflicts in Georgia: Is There a Way Out?*, EUR. PARLIAMENT (June 7, 2018), <https://www.europarl.europa.eu/news/en/agenda/briefing/2018-06-11/9/frozen-conflicts-in-georgia-is-there-a-way-out> [<https://perma.cc/9VWG-Z2GZ>].

9. INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT: VOLUME I 5 (2009) [hereinafter Georgia Fact-Finding Report].

10. GEORGIAN YOUNG LAWYERS’ ASS’N ET AL., AUGUST RUINS: REPORT OF THE GEORGIAN NON-GOVERNMENTAL ORGANIZATIONS ON VIOLATION OF FUNDAMENTAL HUMAN RIGHTS & INTERNATIONAL HUMANITARIAN LAW: AUGUST WAR 2008 xi (2009) [hereinafter August Ruins Report].

authorization of an investigation into the situation in Georgia to the Pre-Trial Chamber (“PTC”).<sup>11</sup> Four months later, PTC I authorized the initiation of an investigation into alleged crimes against humanity<sup>12</sup> and war crimes<sup>13</sup> committed in and around South Ossetia between July 1 and October 10, 2008.<sup>14</sup> The situation is one of many firsts: the first instance where the ICC Prosecutor initiated an investigation into a situation arising outside of the African continent; the first instance an investigation has been initiated into a situation in a post-Soviet country; and the first situation involving alleged crimes committed in the context of an international armed conflict.

### *B. Ukraine*

The situation in Ukraine was sparked by anti-government protests in 2013-2014 linked to the former government’s decision to walk away from the EU association agreement under pressure from the Kremlin. Dissatisfied with the government’s foreign policy direction, many Ukrainians took to the streets to participate in peaceful protests demanding closer ties with the EU (commonly referred to as the Maidan protests). The protests quickly turned violent when the former government authorized the Ukrainian law enforcement agencies to unleash violence against the protesters. The clashes between the riot police and protesters resulted in around 100 deaths and over 1,000 injuries among the protesters.<sup>15</sup> In response to the Maidan crimes, the

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11. See Situation in Georgia, Case No. ICC-01/15, Request for Authorisation of an Investigation Pursuant to Article 15, ICC-01/15-4 (Oct. 13, 2015); Situation in Georgia, Case No. ICC-01/15, Corrected Version of “Request for Authorisation of an Investigation Pursuant to Article 15”, 16 Oct. 2015, ICC-01/15-4-Corr2 (Nov. 17, 2017) [hereinafter ICC Prosecutor’s Request /Georgia].

12. Situation in Georgia, Case No. ICC-01/15, Decision on the Prosecutor’s Request for Authorization of an Investigation, ICC-01/15-12, ¶ 7 (Jan. 27, 2016) [hereinafter PTC Investigation Decision/Georgia].

13. *Id.*

14. *Id.* ¶ 26.

15. See Реєстр проваджень про злочини, пов’язані із перешкоджанням проведенню мирних акцій протесту, які відбувалися у Києві та інших містах України в період листопада 2013 року – лютого 2014 року [*Register of Proceedings of Crimes Committed During Peaceful Protests in Kyiv and other Ukrainian Cities*], Офіс Генерального прокурора України [GEN. PROSECUTOR’S OFF. UKR.], <https://rrg.gp.gov.ua/> [<https://perma.cc/74BD-6MB7>] (stating that during the protests 78 civilians were killed, around 200 civilians sustained gunshot wounds, and more than 1,000 civilians were injured).

Ukrainian parliament adopted a declaration accepting the *ad hoc* jurisdiction of the ICC that, in its temporal scope, covered the alleged crimes committed during the protests.<sup>16</sup> Having reviewed evidence on the alleged crimes, the ICC Prosecutor decided not to pursue a preliminary examination, concluding that the alleged crimes did not constitute crimes against humanity due to the lack of evidence that such crimes were committed as part of a widespread or systematic attack against the civilian population.<sup>17</sup>

The Maidan protests in Kyiv exacerbated secessionist sentiments in Crimea, which led to the referendum on the future status of Crimea within Ukraine in the presence of the Russian military disguised as “little green men,” and the subsequent “incorporation” of Crimea into the territory of the Russian Federation by Russian federal law.<sup>18</sup> This move by Russia outraged the international community that condemned the occupation of Crimea as a flagrant violation of international law.<sup>19</sup> However, Russia asserts its sovereign rights over Crimea by virtue of the right of the “Crimean people” to self-determination and unilateral secession.<sup>20</sup> From the moment of Russia’s assumption

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16. See Declaration of the Verkhovna Rada of Ukraine to the ICC on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity, committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013–22 February 2014, Case No. 790-VII (Feb. 25, 2014) [hereinafter Declaration I]. For more see Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond*, 49 VAND. J. TRANSNAT’L L. 323, 337-46 (2016).

17. OFFICE OF THE PROSECUTOR OF THE ICC, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES § 95 (Nov. 12, 2015).

18. Федеральный конституционный закон от 21 марта 2014 г. N 6-ФКЗ “О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов - Республики Крым и города федерального значения Севастополя” [Federal Constitutional Law of Mar. 21, 2014 N 6-ФКЗ “On admitting to the Russian Federation the Republic of Crimea and establishing within the Russian Federation new constituent entities the Republic of Crimea and the city of federal significance Sevastopol”] Собрание законодательства Российской Федерации [SZRF] [Russian Federation Collection of Legislation] 2014, No. 12, p. 1201.

19. See, e.g., G.A. Res. 68/262 (Apr. 1, 2014); Reconsideration on Substantive Grounds of the Previously Ratified Credentials of the Russian Delegation, EUR. PARL. ASS., 16th Sess., Resolution 1990 (2014).

20. *Address by President of the Russian Federation*, PRESIDENT RUSS. (Mar. 18, 2014), <http://en.kremlin.ru/events/president/news/20603> [https://perma.cc/3D5U-LK3W]; Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All

of effective control over Crimea in late February 2014, international organizations and the Ukrainian government maintain that the Russian government has orchestrated a deliberate campaign of targeting actual and perceived opponents of the newly instituted regime, through a wide range of persecutory and discriminatory measures.<sup>21</sup> Russia has consistently denied such allegations, arguing that Ukraine's assertions are nothing more than "political propaganda" aimed at discrediting Russia.<sup>22</sup>

In parallel to the events in Crimea, secessionist movements were gaining ground in eastern Ukraine, which led to a full-scale armed conflict between the Ukrainian armed forces and pro-Russian separatist groups. Russia has allegedly backed the separatist groups by continuously supplying arms, weaponry, funds, and manpower, which it categorically denies.<sup>23</sup> The turning point in the conflict was the shooting down of the MH17 civilian passenger jet passing over the territory of eastern Ukraine.<sup>24</sup> Following this, the International Committee of the Red Cross ("ICRC") recognized the conflict in eastern Ukraine as a non-international armed conflict ("NIAC").<sup>25</sup> However, Russia's degree of involvement in eastern Ukraine and its supply of the Buk missile, which was used to shoot down the aircraft,<sup>26</sup> cast doubt on the accuracy of the legal qualification of the conflict

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Forms of Racial Discrimination (Ukraine v. Russian Federation), Verbatim Record, 2017 I.C.J. 2, ¶ 3 (Mar. 7, 2017).

21. See, e.g., politically motivated trials on bogus charges, deportation and forcible transfer, unlawful detention and unlawful house searches, torture and ill-treatment, enforced disappearances, etc. *Ukraine v. Russia (re Crimea) Grand Chamber Hearing*, EUR. CT. HUM. RTS. WEBCAST (Sept. 11, 2019); see *Ukraine v. Russia (re Crimea)*, 2021 Eur. Ct. H.R. § 510-5 (2021).

22. *Ukraine v. Russia (re Crimea) Grand Chamber Hearing*, supra note 21.

23. Iryna Marchuk, *Ukraine v Russia at the ICJ Hearings on Indication of Provisional Measures: Who Leads?*, EJIL:TALK! (Mar. 16, 2017), <https://www.ejiltalk.org/ukraine-v-russia-at-the-icj-hearings-on-indication-of-provisional-measures-who-leads/> [<https://perma.cc/KV3Y-5ST8>].

24. DUTCH SAFETY BD., MH17 CRASH (2015).

25. Press Release, Int'l Comm. of the Red Cross, Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law (Jul. 23, 2014), <https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kirov-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm> [<https://perma.cc/Y5MQ-YYE3>].

26. *MH17 - The Open Source Investigation, Three Years Later*, BELLINGCAT (Jul. 17, 2017), <https://www.bellingcat.com/news/uk-and-europe/2017/07/17/mh17-open-source-investigation-three-years-later/> [<https://perma.cc/5JQV-26B7>].

in eastern Ukraine. The question arises as to whether the conflict in eastern Ukraine has already transformed into a single international armed conflict (“IAC”) by virtue of Russia’s exercise of overall control over the pro-Russian separatist groups.<sup>27</sup> The two ceasefire agreements, Minsk Protocol I of September 5, 2014 and Minsk Protocol II of February 11, 2015, failed to achieve conflict resolution in eastern Ukraine. The newly elected government of Ukraine resumed peace talks with the Kremlin, which led to some early signs of progress (i.e. the release and exchange of conflict-related detainees, including prisoners of war and political prisoners).<sup>28</sup> However, although the conflict has reduced in intensity, it continues to simmer at the backdrop of low-scale violence.

The events in Crimea and eastern Ukraine led the Ukrainian government to lodge a separate declaration accepting the *ad hoc* jurisdiction of the ICC, which covered alleged crimes associated with the occupation of Crimea and the fighting in eastern Ukraine.<sup>29</sup> Unlike its first declaration, which was limited in its temporal scope to the Maidan events, this second declaration applies from February 20, 2014 onwards. The declaration attributes blame to “senior officials of the Russian Federation and leaders of the terrorist organizations “DNR” and “LNR.”<sup>30</sup> However, the ICC Prosecutor’s mandate requires her to examine the responsibility of *all* parties involved; therefore, she is not obligated to limit the scope of her inquiry to the responsibility of the parties as specified in Ukraine’s declaration.<sup>31</sup>

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27. OFFICE OF THE PROSECUTOR OF THE ICC, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES § 170 (Nov. 14, 2016).

28. Press Release, United Nations Secretary-General, Secretary-General Welcomes Eastern Ukraine Prisoner Exchange Ahead of Orthodox Easter, U.N. Press Release SG/SM/20048 (Apr. 16, 2020).

29. Declaration of the Verkhovna Rada of Ukraine on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the Russian Federation and leaders of terrorist organizations “DNR” and “LNR”, which led to extremely grave consequences and mass murder of Ukrainian nationals, case no. 145-VIII (Feb. 4, 2015) [hereinafter Declaration II].

30. *Id.*

31. Iryna Marchuk, *Dealing with The Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor’s Difficult Choices in the Preliminary Examination into the Situation of Ukraine*, in 1 *QUALITY CONTROL IN PRELIMINARY EXAMINATIONS* 371, 371-97, 388 (2018).



The OTP recently concluded the ICC's preliminary examination into the situation in Ukraine.<sup>32</sup> The OTP confirmed that all criteria for opening an investigation have been met, including the jurisdiction, admissibility and the interests of justice.<sup>33</sup> The next step is to seek authorization from the Pre-Trial Chamber to open investigations.<sup>34</sup> However, the conclusion of the preliminary examination coincided with the operational challenges generated by the COVID-19 pandemic, as well as lingering uncertainty surrounding the election of the new ICC Prosecutor.<sup>35</sup> The outgoing ICC Prosecutor, Fatou Bensouda, intends to consult with the incoming Prosecutor, Karim Khan, on the strategic and operational challenges faced by the OTP with respect to the prioritization of its workload and the pending submissions to the PTC requesting the opening of investigations.<sup>36</sup> Should the PTC authorize the opening of an investigation, Ukraine will become the second post-Soviet country on the ICC's watch list at loggerheads with Russia. The prospects of the situation in Ukraine proceeding to the investigation stage are high and there is nothing indicating that the PTC will have any solid reasons for disagreeing with the OTP's assessment.<sup>37</sup>

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32. Press Release, Office of the Prosecutor, Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation of Ukraine (Dec. 11, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine> [<https://perma.cc/4X2R-QZDW>] [hereinafter OTP Ukraine Statement].

33. *Id.*; see also Office of the Prosecutor of the ICC, Report on Preliminary Examination Activities § 289 (Dec. 14, 2020) [hereinafter 2020 OTP Report].

34. See OTP Ukraine Statement, *supra* note 32.

35. The election of the new ICC Prosecutor took place at the second resumed 19th session of the Assembly of States Parties, which was held on February 12, 2021. See *Election of the Prosecutor*, INT'L CRIM. CT. (2020), [https://asp.icc-cpi.int/en\\_menus/asp/elections/prosecutor/Pages/Prosecutor2020.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/prosecutor/Pages/Prosecutor2020.aspx) [<https://perma.cc/PF3A-YQY8>].

36. See OTP Ukraine Statement, *supra* note 32.

37. Iryna Marchuk & Aloka Wanigasuriya, *The ICC concludes its preliminary examination in Crimea and Donbas: What's next for the situation in Ukraine?*, EJIL:TALK! (Dec. 16, 2020), <https://www.ejiltalk.org/the-icc-concludes-its-preliminary-examination-in-crimea-and-donbas-whats-next-for-the-situation-in-ukraine/> [<https://perma.cc/DTE9-ENLL>].

*III. IMPACT OF THE ICC ON DOMESTIC PROCESSES**A. Legal reform*

## 1. Georgia

Georgia signed the Rome Statute on July 18, 1998 and deposited its instrument of ratification with the ICC on September 5, 2003,<sup>38</sup> which provides for ICC jurisdiction from December 1, 2003 onwards. Subsequently, Georgia brought its domestic laws in line with the Rome Statute in order to allow for possible national prosecution of international crimes. The Criminal Code of Georgia (“CCG”) was amended to provide for the “surrender and extradition of offenders” suspected of committing international crimes to the ICC for criminal prosecution.<sup>39</sup> Section 14 of the CCG criminalizes a separate category of crimes titled “Crime against Humanity, Peace and Security and against International Humanitarian Law” (Articles 404-413), which includes the crime of aggression (Articles 404-405), genocide (Article 407), crimes against humanity (Article 408) and war crimes (Articles 411-413). Hence, ratifying the Rome Statute had the effect of prompting Georgia to implement domestic legislation that could facilitate the domestic prosecution of international crimes.

These legislative reforms came into effect well before the Georgia-Russia conflict and the subsequent ICC preliminary examination and investigation, thus placing the country’s criminal justice system in an advantageous position legislatively to prosecute international crimes at the national level. However, from the outset of the ICC investigation, civil society called for domestic capacity building, making it doubtful whether Georgia’s judicial system and the actors involved had the necessary capacity and skills to undertake such domestic investigative and prosecutorial action, despite being armed with the necessary

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38. Int’l Criminal Court, *Georgia*, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/eastern%20european%20states/Pages/georgia.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/eastern%20european%20states/Pages/georgia.aspx) [https://perma.cc/8EG8-D982] (last visited Aug. 5, 2020); Criminal Code of Georgia, arts. 6(1)-(2) (1999).

39. Criminal Code of Georgia, art. 6 (1999).

legislative framework.<sup>40</sup> Regardless, as discussed below in Section III.B.1 of this Article, the available legislative framework in Georgia was not sufficient in itself to translate into effective investigations or domestic trials on the charges of international crimes.

## 2. Ukraine

Ukraine signed the Rome Statute as early as January 20, 2000, but despite the ongoing lobbying campaign urging the parliament to speed up the ratification process, Ukraine has failed to ratify it.<sup>41</sup> The initial obstacle to ratification of the Rome Statute was the decision of the Constitutional Court of Ukraine in 2001 that found the ICC's principle of complementarity to be in conflict with the Constitution of Ukraine.<sup>42</sup> In particular, the Constitutional Court of Ukraine found that any potential ICC involvement would be contrary to the constitutional provision which conferred exclusive competence in matters of the judiciary to the Ukrainian national courts.<sup>43</sup> The only way forward out of such a stalemate was to amend this provision in order to accommodate the jurisdiction of the ICC.

Fifteen years passed before the Verkhovna Rada of Ukraine adopted the necessary constitutional amendments aimed at overhauling the judicial system, which allowed for the jurisdiction of the ICC only three years after the adoption of such

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40. *Georgia: A Test Case for the ICC's Future*, CICC GLOBAL JUST. (Feb. 23, 2016), <https://ciccglobaljustice.wordpress.com/2016/02/23/georgia-a-test-case-for-the-iccs-future/> [<https://perma.cc/C8T9-C56Q>].

41. Letter from the Coalition for the ICC to Volodymyr Zelenskyy, President of Ukraine (Sept. 23, 2019), [https://coalitionfortheicc.org/sites/default/files/cicc\\_documents/Letter%20to%20the%20President%20of%20Ukraine\\_ICC%20Rome%20Statute\\_CICC%20&%20members\\_FINALupdated.pdf](https://coalitionfortheicc.org/sites/default/files/cicc_documents/Letter%20to%20the%20President%20of%20Ukraine_ICC%20Rome%20Statute_CICC%20&%20members_FINALupdated.pdf) [<https://perma.cc/SPY9-EDFP>]. The Coalition for the ICC and its members sent a letter to the President of Ukraine, Volodymyr Zelenskyy, calling for prompt ratification of the ICC Rome Statute and commitment to fight impunity domestically.

42. Висновок Конституційного Суду України у справі за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду [Decision on the Submission of the President of Ukraine Regarding Conformity of the Constitution of Ukraine with the Rome Statute of the International Criminal Court, Case No. 1-35/2001], Конституційний Суд України [Constitutional Court of Ukraine], (July 11, 2001). For more, see Marchuk, *supra* note 16, at 326-33.

43. *Id.* § 2.8.

amendments, i.e. as of June 30, 2019.<sup>44</sup> As mentioned elsewhere,<sup>45</sup> a plausible explanation behind the three-year delay period was the parliamentarians' strategic move to postpone ratification of the Rome Statute until after the parliamentary elections in 2019. However, notwithstanding the removal of the constitutional obstacle to ratification, the newly elected Ukrainian parliament in 2019 is yet to ratify the Rome Statute by means of adopting a specific law on ratification.<sup>46</sup> The reluctance of Ukrainian parliamentarians to move forward with ratification is largely due to the fear of a potential ICC investigation targeting members of the Ukrainian armed forces, as well as a superficial understanding as to how the ICC's principle of complementarity operates in practice.<sup>47</sup>

Ratifying the Rome Statute should be of utmost priority to Ukraine in light of the ongoing occupation of Crimea and the conflict in eastern Ukraine. The glaring absence of international crimes in the Criminal Code of Ukraine, with the exception of a few imperfect provisions, is a hindrance to the work of the Ukrainian national authorities in correctly qualifying the conflict-related crimes. Moreover, it is peculiar that Ukraine subjects itself to the jurisdiction of the ICC by accepting the *ad hoc* jurisdiction of the ICC, but does not wish to commit to the ICC's jurisdiction by becoming a fully-fledged state party to the Rome Statute.

Putting the question of ratification aside, the draft law on the implementation of international criminal law and international humanitarian law into Ukrainian legislation has passed the first parliamentary hearing.<sup>48</sup> The draft law introduces an extensive list

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44. Закон України про внесення змін до Конституції України (щодо правосуддя) [Law of Ukraine on Amending the Constitution of Ukraine (with regard to the administration of justice)], Відомості Верховної Ради [Verkhovna Rada Gazette], 2016, No. 28, p. 532 (June 2, 2016).

45. Marchuk, *supra* note 31, at 379.

46. Закон України про міжнародні договори України [Law of Ukraine on International Treaties of Ukraine], Відомості Верховної Ради [Verkhovna Rada Gazette], 2004, No. 50, p. 540, art. 9 (June 29, 2004).

47. Marchuk, *supra* note 31, at 379.

48. Проект Закону про внесення змін до деяких законодавчих актів України щодо імплементації норм міжнародного кримінального та гуманітарного права [Draft Law on Amending Some Legislative Acts of Ukraine Regarding Implementation of International Criminal Law and International Humanitarian Law], No. 2689, (Dec. 27, 2019) [hereinafter Draft Law]. The draft law was passed in the first hearing on September 17, 2020.

of criminal law provisions criminalizing all core international crimes within the jurisdiction of the ICC. Notwithstanding that genocide (Article 442), the crime of aggression (Article 437), and violations of the laws and customs of war (Article 438) had already been criminalized by the Criminal Code (“CC”), the Ukrainian legislation seriously lags behind and fails to comply with international law. In particular, a clear lacuna in the law is visible with respect to war crimes. Article 438 (violations of the laws and customs of war) is a blanket norm, as it only directly lists a few specific violations of international humanitarian law,<sup>49</sup> whereas for the remaining crimes it simply refers to the violations of the laws and customs of war prescribed in the treaties that have been ratified by Ukraine. In other words, only the violations of the laws and customs of war enumerated in international instruments, which had been duly ratified by Ukraine, can be prosecuted in accordance with Ukrainian criminal law. Hence, as it stands now, some war crimes, which form part of customary international law, fall outside the ambit of Ukrainian national law.

The draft law encompasses a number of provisions on war crimes, which are divided into separate categories: (1) war crimes against a person (Article 438); (2) war crimes against property (Article 438-1); (3) war crimes involving prohibited methods of warfare (Article 438-2); (4) war crimes involving prohibited means of warfare (weapons) (Article 438-3); (5) war crimes against humanitarian operations and the use of protected symbols (Article 438-4); and (6) war crimes against movable and immovable valuable objects protected under international humanitarian law (Article 438-5).<sup>50</sup> While a certain logic underlies the proposed classification of war crimes, it is rather confusing that grave breaches of the Geneva Conventions and violations of Common Article 3 to the Geneva Conventions are dispersed throughout the text of the draft law provisions. Hence, for a non-expert in international humanitarian law or Ukrainian legal professionals lacking practical experience in this field, piecing together a coherent framework on war crimes may prove to be a daunting task. It might have been easier had the drafters chosen

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49. These include such war crimes as cruel treatment of prisoners of war or civilians; deportation of civilian population for forced labour; pillage of national heritage on occupied territories; and prohibited methods of warfare.

50. *Id.*

to follow a more simplified classification of war crimes as outlined in the Rome Statute in light of the anticipated ratification of the Statute.

Additionally, the current definition of the crime of aggression enumerated in Article 437 of the CC omits the leadership requirement, and references to the elements of scale and gravity. The draft law replicates the definition of the crime of aggression endorsed by States Parties to the Rome Statute of the ICC at the Review Conference in Kampala (2010).<sup>51</sup> The most serious omission in Ukrainian criminal legislation is a glaring absence of the criminalization of crimes against humanity. The draft law addresses this serious lacuna in national criminal law by replicating the provision on crimes against humanity in the Rome Statute.<sup>52</sup> The draft law appears to accommodate major developments of international law, however, it is somewhat confusing that different underlying acts of war crimes and crimes against humanity were moved around in the text, depending upon the sanction (sentence) assigned to each underlying act.<sup>53</sup>

Undoubtedly, Ukraine's acceptance of the *ad hoc* jurisdiction of the ICC has had a catalyzing impact on Ukrainian national law reforms, not only with respect to the prospective criminalization of core international crimes in conformity with the Rome Statute, but also with respect to clarification of a number of important practical issues (e.g. the transfer of persons into the custody of the ICC, the recognition of the decisions rendered by the ICC, etc.).<sup>54</sup> However, these legislative initiatives have thus far failed to come to fruition. Political will is necessary to advance much-needed reform of Ukrainian national law in order to align it with international law.

As a non-ratifying state of the Rome Statute, the Ukrainian Parliament should read the latest ICC Prosecutor's statement on the strategic and operational challenges it faces in relation to the prioritization of its workload as an active call to speed up the

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51. Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90 (inserted by resolution RC/Res.6 (June 11, 2010)).

52. Draft Law, *supra* note 48, art. 442-1.

53. *Id.* art. 438-442-1.

54. Проект Закону про внесення змін до деяких законодавчих актів України щодо співробітництва з Міжнародним кримінальним судом [Draft Law on Amending Some Legislative Acts Regarding Cooperation with the International Criminal Court, No. 7179] (Oct. 5, 2017) (recalled from the parliamentary agenda on August 29, 2019).

ratification of the Rome Statute.<sup>55</sup> This would place Ukraine in a position of a financially contributing State Party to the overall budget of the Court and dispel any doubts as to why the situation of Ukraine should be prioritized over other situations concerning ICC States Parties. Absent the ratification of the Rome Statute, Ukraine's attempts in the pursuit of justice appear at best half-hearted.<sup>56</sup>

### *B. Domestic Proceedings*

#### 1. Georgia (and Russia)

Following the Georgia-Russia war, both Georgia and Russia initiated investigations into the alleged crimes committed during the conflict.<sup>57</sup> Such action was also encouraged by the Council of Europe's Parliamentary Assembly ("PACE"), which "demanded that Russia and Georgia . . . investigate all allegations of human rights violations committed during the war and its aftermath and hold the perpetrators to account before domestic courts."<sup>58</sup>

On August 9, 2008, the General Prosecutor's Office of Georgia announced the launch of an investigation into alleged violations of international humanitarian law, including the destruction and unlawful appropriation of civilian property during hostilities, pursuant to Articles 411 and 413 of the Georgian Criminal Code.<sup>59</sup> The general public was assured that

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55. See Marchuk & Wanigasuriya, *supra* note 37.

56. *Id.*

57. *Civilians in the Line of Fire: The Georgia-Russia Conflict*, AMNESTY INT'L 56 (2008), <https://www.amnesty.org/download/Documents/52000/eur040052008eng.pdf> [<https://perma.cc/MU3Z-B2MT>] [hereinafter AI Georgia-Russia Conflict Report]; Georgia Fact-Finding Report, *supra* note 9, at 417-19; Human Rights Watch, *Up In Flames: Humanitarian Law Violations and Civilian Victims in the Conflict Over South Ossetia* (Jan. 23, 2009), <https://www.hrw.org/report/2009/01/23/flames/humanitarian-law-violations-and-civilian-victims-conflict-over-south> [<https://perma.cc/325A-Q6LV>].

58. *Resolution 1633 (2008): The Consequences of the War between Georgia and Russia*, COUNCIL OF EUR. PARLIAMENTARY ASSEMBLY ¶¶ 22.8, 23 (Oct. 2, 2008), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17681> [<https://perma.cc/L2Z2-3NUU>]; *The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia*, COUNCIL OF EUR. PARLIAMENTARY ASSEMBLY ¶¶ B.47 (Jan. 26, 2009), <https://pace.coe.int/en/files/12131/html> [<https://perma.cc/4SCT-WQUU>] [hereinafter PACE Implementation of Resolution 1633].

59. AI Georgia-Russia Conflict Report, *supra* note 57, at 56; PACE Implementation of Resolution 1633, *supra* note 58, ¶ B.49.

all parties to the conflict would be investigated in an unbiased manner regardless of the perpetrators' allegiances.<sup>60</sup> Additionally, on October 7, 2008, the Georgian Parliament established a special *ad hoc* commission chaired by a member of the parliamentary opposition, to probe the circumstances behind the war, how events unfolded, and the decisions made by the Georgian authorities.<sup>61</sup> It commenced its work on October 10, 2008 and heard testimonies from key decision makers who held positions of power during the war.<sup>62</sup> The commission was to report back to the parliament and was also invested with the power to refer any incidents linked to criminal responsibility to the General Prosecutor's Office of Georgia for investigation.<sup>63</sup> However, according to the Chairman of the commission, the commission's focus was the political causes underlying the conflict, and no examination of possible war crimes was ever undertaken.<sup>64</sup> The commission concluded its work and published its final report on December 18, 2008.<sup>65</sup> Additionally, in 2013, Georgia's Chief Prosecutor set up a separate working group to examine the legal basis for the conflict with Russia.<sup>66</sup>

Similarly, in Russia, the Russian Public Chamber (a consultative institution comprised of civil society representatives) established a "Public Investigation Commission on War Crimes in South Ossetia and Civilian Victims Aid."<sup>67</sup> Additionally, the same year, the Investigative Committee of the General Prosecutor's Office of Russia announced the initiation of a genocide probe to scrutinize the alleged actions of Georgian troops that led to the deaths of Russian citizens (i.e. ethnic Ossetians) living in South

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60. *Id.*

61. PACE Implementation of Resolution 1633, *supra* note 58, ¶ B.40.

62. *Id.* ¶ B.42.

63. *Id.* ¶ B.40.

64. Shoren Latatia, *Five Years on, Georgia to Probe Facts of 2008 War*, INST. FOR WAR & PEACE REPORTING (Aug. 7, 2013), <https://www.refworld.org/docid/5204caf74.html> [<https://perma.cc/TD46-P8YA>].

65. PACE Implementation of Resolution 1633, *supra* note 58, ¶ B.44.

66. Latatia, *supra* note 64.

67. Общественная палата Российской Федерации [Pub. Chamber of the Russian Fed'n], *О работе Общественной палаты Российской Федерации в 2008 году* [*On Work of the Public Chamber of the Russian Federation in 2008*], PUBLIC CHAMBER RUSS. FED'N 28-43, [https://www.oprf.ru/files/analitc\\_rew08.pdf](https://www.oprf.ru/files/analitc_rew08.pdf) [<https://perma.cc/8K2D-WKXP>].



Ossetia.<sup>68</sup> Later the same month, the General Prosecutor's Office initiated two cases: (i) concerning violations against the civilian population, and (ii) concerning crimes against the Russian military.<sup>69</sup> Additionally, it is reported that the Russian authorities have been actively assisting and encouraging ethnic Ossetians to file applications to the European Court for Human Rights ("ECtHR") against Georgia in relation to alleged violations of human rights arising out of the armed conflict.<sup>70</sup>

As for domestic prosecutions in Russia, civil society organizations report that there was no indication that investigations would be carried out into any alleged violations of international law committed by Russian military forces or forces that were controlled by the *de facto* South Ossetian authorities during the conflict.<sup>71</sup> However, Russia claims that it has been conducting national investigations.<sup>72</sup> The Russian Ministry of Defence has repeatedly denied any wrongdoing by its military personnel with regard to violations of international humanitarian or human rights law.<sup>73</sup> In mid-September 2008, the Investigative Committee is reported to have closed its investigations on the ground in South Ossetia despite credible reports of violations emerging from areas under Russian control.<sup>74</sup>

While initially, it appeared as though both Georgian and Russian authorities were taking active steps to investigate and prosecute the alleged crimes emanating from the conflict, by October 2015 this only held true for Russia, which claimed to be investigating the alleged attacks against its peacekeepers.<sup>75</sup> The Georgian authorities undertook some investigative activities from August 2008 until November 2014.<sup>76</sup> However, a lull in national

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68. Прокуратура РФ возбудила по факту убийств в Южной Осетии дело по статье "геноцид" [The Prosecutor's Office of the Russian Federation initiated criminal proceedings in relation to murder in South Ossetia on the charges of genocide], VESTI (Aug. 14, 2008), <https://www.vesti.ru/article/2243135> [<https://perma.cc/JJH7-M5CM>].

69. AI Georgia-Russia Conflict Report, *supra* note 57, at 56.

70. PACE Implementation of Resolution 1633, *supra* note 58, ¶ B.53.

71. AI Georgia-Russia Conflict Report, *supra* note 57, at 56; PACE Implementation of Resolution 1633, *supra* note 58, ¶ B.50.

72. See PTC Investigation Decision/Georgia, *supra* note 12, ¶¶ 42-50.

73. Georgia Fact-Finding Report, *supra* note 9, ¶ 418.

74. PACE Implementation of Resolution 1633, *supra* note 58, ¶ B.50.

75. PTC Investigation Decision/Georgia, *supra* note 12, ¶¶ 47-50.

76. *Id.* ¶¶ 41, 278-302.

proceedings was observed from the end of 2012 until mid-2014.<sup>77</sup> Eventually, on March 17, 2015, the Georgian government sent a letter to the OTP informing of the indefinite suspension of national proceedings into cases related to the displacement of ethnic Georgians from South Ossetia.<sup>78</sup> This letter had a significant impact on the complementarity assessment that was being carried out by the OTP. With no resumption of Georgian investigative activities in sight, the OTP assessed that the admissibility threshold for the initiation of an ICC investigation would be met “due to State inaction.”<sup>79</sup> The information outlined in the letter stating that the progress of relevant national proceedings had been hampered by the fragile security situation in the occupied territories in Georgia and adjacent areas, was pivotal to the decision reached by the PTC regarding admissibility in its authorization decision.<sup>80</sup>

## 2. Ukraine (and Russia)

The sheer volume of crimes committed in Ukraine since the beginning of the conflict renders the investigation and prosecution of these crimes a top priority at the national level. It is well understood in Ukraine that even if the situation proceeds to the investigation stage (subject to the PTC’s approval) when individual suspects are identified, the number of cases to be tried by the ICC would be limited to a handful of high-level perpetrators. Notwithstanding this sober realization of how much the ICC can actually achieve in the situation of Ukraine, the acceptance of the *ad hoc* jurisdiction of the ICC has nevertheless had a catalyzing impact on pushing for a comprehensive legal reform in order to bring Ukrainian national legislation in conformity with international law.<sup>81</sup> Such reform is a necessary prerequisite for conducting meaningful national investigations and prosecutions. Most conflict-related crimes are incorrectly qualified under the umbrella of terrorism offences, due to the previous government’s insistence on qualifying the conflict in

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77. See ICC Prosecutor’s Request /Georgia, *supra* note 11, ¶¶ 42, 279-302.

78. See PTC Investigation Decision/Georgia, *supra* note 12, ¶ 41.

79. ICC Prosecutor’s Request /Georgia, *supra* note 11, ¶ 42.

80. PTC Investigation Decision/Georgia, *supra* note 12, ¶ 41.

81. See *supra* Section III.A.2.

eastern Ukraine as an “anti-terrorism operation.”<sup>82</sup> Notwithstanding the confusion surrounding the qualification of crimes in eastern Ukraine, there appears to be a more coherent strategy on the qualification of alleged crimes in Crimea, which could be credited to coordinated efforts of the Crimean Prosecutor’s Office (“CPO”) working in exile from Kyiv. The OTP annual report (2016), which concluded that rules of IHL applied to the occupied Crimea, galvanized domestic prosecution efforts to correctly qualify alleged crimes in Crimea within the legal framework of IHL.<sup>83</sup>

As a result, the CPO initiated a number of criminal proceedings under Article 438 of the Criminal Code. These criminal proceedings encompass underlying grave breaches of the Geneva Conventions (i.e. violations of the right to a fair and regular trial, willful killings, torture and ill-treatment, forcible conscription, deportations, and extensive appropriation of property not justified by military necessity).<sup>84</sup> Other serious violations of the laws and customs of war, which are currently examined by the CPO, include Russia’s transfer of its own population into the territory of Crimea (colonization) and the use of human shields by the Russian military during the takeover of Ukrainian military facilities during the first phase of the conflict.<sup>85</sup> Hence, national proceedings mirror the information provided to the ICC in Ukraine’s communications.<sup>86</sup>

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82. Указ Президента України № 405/2014 «Про рішення Ради національної безпеки і оборони України від 13 квітня 2014 року "Про невідкладні заходи щодо подолання терористичної загрози і збереження територіальної цілісності України» [Presidential Decree of Ukraine of April 14, 2014 No. 405/2014 “On extraordinary measures to withstand the terrorism threat and preservation of the territorial integrity of Ukraine”], <https://www.president.gov.ua/documents/4052014-16886> [<https://perma.cc/8UN3-5BHC>].

83. See 2016 OTP Report, *supra* note 27, §158.

84. See Єдиний реєстр досудових розслідувань [Unified Register of Pre-Trial Investigations], <https://erdr.gp.gov.ua> [<https://perma.cc/46YL-SNZ2>]; see Ukrainian Legal Advisory Grp., *Principle of Complementarity: International Justice in Ukraine*, JUST. FOR FUTURE 18 (2020) [hereinafter 2020 ULAG report].

85. See Єдиний реєстр досудових розслідувань [Unified Register of Pre-Trial Investigations], <https://erdr.gp.gov.ua> [<https://perma.cc/46YL-SNZ2>] (last visited Feb. 4, 2021).

86. See, e.g., Press Release, Прокуратура АРК та міста Севастополя [The Prosecutor’s Office of the Autonomous Republic of Crimea and Sevastopol], До Міжнародного кримінального суду передали нові свідчення про злочини Росії в Криму [New Evidence of Russia’s crimes in Crimea has been submitted to the

However, despite some visible signs of progress with respect to the investigation of the conflict-related crimes, one might still doubt the genuine willingness and ability of the Ukrainian national authorities to prosecute such crimes. Ukraine exhibits more willingness towards prosecuting the alleged crimes in Crimea; however, its efforts have been thwarted by the inaccessibility of the territory due to Ukraine's absence of effective control over Crimea. As a result, the Ukrainian national authorities cannot carry out the necessary investigative steps on the occupied territories. The only avenue through which to acquire evidence is to work with witnesses and victims physically present in mainland Ukraine who fled Crimea. Many of them are reluctant to provide testimony due to fear of retaliation from the Occupying Power's authorities against them or their family members residing in Crimea.

The situation with respect to the prosecution of the conflict-related crimes is more complicated in eastern Ukraine. The Ukrainian authorities are not always able to investigate and prosecute the alleged crimes on the non-government controlled territories. Although such investigation options are more readily available on the government controlled territories, there appears to be greater reluctance on the part of the Ukrainian law enforcement agencies to investigate due to the shortage of resources and politically sensitive nature of the ongoing armed conflict.<sup>87</sup> First, as mentioned above, the alleged crimes are incorrectly qualified under the umbrella of terrorist offences.<sup>88</sup> Second, as a general rule, investigations and prosecutions are one-sided, since the charges have almost predominantly been levied against members of the pro-Russian separatist groups, whereas the actions of the Ukrainian armed forces, Ukrainian Security Service, and Ukrainian Police remain largely

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International Criminal Court] (Mar. 29, 2018) (concerning the ICC communication on IDPs and Russia's impact on the change of the demographic situation in Crimea), [https://ark.gp.gov.ua/ua/videonew.html?\\_m=publications&\\_c=view&\\_t=rec&id=226726](https://ark.gp.gov.ua/ua/videonew.html?_m=publications&_c=view&_t=rec&id=226726) [https://perma.cc/ZF7S-WWY3].

87. Marchuk, *supra* note 31, at 392.

88. 2020 ULAG Report, *supra* note 84, at 18-19 (referring to *Статистична інформація*, Офіс Генерального прокурора, <https://www.gp.gov.ua/ua/Istat> [https://perma.cc/XK63-5XQF] (last visited Feb. 4, 2020)).

unscrutinized,<sup>89</sup> despite a number of credible reports on crimes having been committed by all sides to the conflict.<sup>90</sup> Prosecutions are also complicated by the back and forth peace processes, as speculations are rife about granting amnesties to members of the pro-Russian separatist armed groups.<sup>91</sup> On September 16, 2014, the Ukrainian parliament adopted the so-called “Amnesty Law Package” (No. 5081 and No. 5082) which meant to grant amnesties to pro-Russian rebels (although the law did not include amnesties for the rebels who committed “grave” crimes or were involved in the shooting down of the MH17 passenger aircraft). However, the law is largely “forgotten,” as the new negotiations are ongoing regarding the scope of amnesties. On October 20, 2020, President Zelensky in his speech in the Ukrainian parliament clarified that blanket amnesties will not be applicable to those who have “blood on their hands.”<sup>92</sup>

Most recently, a new specialized war crimes department was established within the General Prosecutor’s Office (“GPO”), which is expected to have a positive effect on the ability to prosecute war crimes and consolidate national prosecution efforts in Ukraine.<sup>93</sup> Deputy Chief Prosecutor Gyunduz

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89. The most controversial criminal proceedings involve combatants of “Tornado” and “Aydar” volunteer battalions (previously integrated within the Ministry of Interior Affairs of Ukraine before being disbanded), who were charged with a long list of conflict-related crimes, such as unlawful deprivation of liberty, torture, extortion, and gender-based crimes. Some received long prison sentences, others suspended sentences or were acquitted. The proceedings stirred public controversy as to whether combatants of such battalions should be considered as “criminals” or “national heroes”.

90. See Press Release, Truth Hounds, *Воєнні злочини на сході України: зібране за 2019-2020 рр.* [War Crimes in Eastern Ukraine: Collected Materials in 2019-2020] (Mar. 24, 2020), <https://truth-hounds.org/voenni-zlochyny-na-shodi-ukrainy-2019-2020> [https://perma.cc/DVA3-RXM2]; Ctr. for Civil Liberties, *Eastern Ukraine: Civilians Caught in the Crossfire*, INT’L FED’N FOR HUM. RTS. 4, 22-24 (2015); U.N. Off. of the High Comm’r for Hum. Rts, Rep. on Accountability for Killings in Ukraine From January 2014 to May 2016, ¶ 62 (July 14, 2016).

91. 2020 ULAG Report, *supra* note 84, at 20.

92. *Послання Президента України Володимира Зеленського до Верховної Ради про внутрішнє та зовнішнє становище України* [President Volodymyr Zelenskyy’s Address to the Verkhovna Rada of Ukraine Regarding the External and Internal Situation in Ukraine], OFF. PRESIDENT UKR. (Oct. 20, 2020), <https://www.president.gov.ua/news/poslannya-prezidenta-ukrayini-volodimira-zelenskogo-do-verho-64717> [https://perma.cc/6V9L-YGP8].

93. On October 21, 2019, former Prosecutor General Ruslan Ryaboshapko signed a decree on the establishment of the specialized GPO’s Department on Oversight of Criminal Proceedings in Relation to Crimes Committed During Armed Conflict. See Генеральна прокуратура України [Gen. Prosecutor’s Office of Ukraine], В

Mamedov, who is heading the department, reported that 214 criminal proceedings have been registered under Article 438 of CC since 2014, 10 cases have been directed to national courts, and 2 verdicts have been rendered.<sup>94</sup> Notwithstanding these signs of progress, neither the Ukrainian law enforcement agencies nor the Ukrainian judiciary have had any experience in dealing with international crimes. This is one of the areas where the ICC contribution may prove to be invaluable. The ICC is capable of playing a more active role in capacity building of the Ukrainian legal sector, which could translate into successful domestic trials on the charges of international crimes.

Having conducted an overview of national proceedings both in Ukraine and Russia, the OTP completed its admissibility assessment, concluding that the potential cases—likely to arise out of its investigation—would be admissible before the ICC.<sup>95</sup> The finding stems from “domestic inaction” demonstrated both by Ukraine and Russia in relation to persons and conduct of potential interest to the ICC, as well as the “inability” of the Ukrainian authorities to obtain the accused and the necessary evidence given the absence of control over parts of its territory.<sup>96</sup> However, the PTC has yet to endorse the admissibility assessment, which has to give its “blessing” to proceed with an investigation. Should the PTC authorize the investigation, it is unclear how far down the chain of military command or political leadership the newly elected ICC Prosecutor will be willing to travel when pursuing potential cases.<sup>97</sup> The furthest the Ukrainian national authorities got when initiating domestic proceedings in terms of

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Генеральній прокуратурі створено Департамент нагляду у кримінальних провадженнях щодо злочинів, вчинених в умовах збройного конфлікту [The Department of Oversight in Criminal Proceedings Concerning Crimes Committed During Armed Conflict Was Established in the General Prosecutor’s Office] (Oct. 22, 2019),

[https://old.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=259951&fp=290](https://old.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=259951&fp=290)  
[<https://perma.cc/DGV5-BXVX>].

94. Gyunduz Mamedov, *Принятие законопроекта №2689 – эффективное юридическое орудие для наказания преступников на Донбассе* [*Adoption of Draft Law No. 2689 As an Effective Legal Tool for Punishing War Criminals in Donbas*], GORDON BLOG (Sept. 17, 2020), <https://gordonua.com/blogs/gyunduz-mamedov/kriminalizaciya-voennyh-prestupleniy-effektivnoe-yuridicheskoe-orudie-dlya-nakazaniya-voennyh-prestupnikov-na-donbasse-1518930.html> [<https://perma.cc/EPS5-LSPU>].

95. OTP 2020 Report, *supra* note 33, § 282.

96. OTP 2020 Report, *supra* note 33, § 283.

97. Marchuk & Wanigasuriya, *supra* note 37.

the chain of military command in Donbas were informal leaders of the DPR, namely Igor Girkin (also one of the accused in the MH17 trial before The Hague District Court) and Igor Bezler (alleged to have been assassinated by Russian special forces).<sup>98</sup> As for the most senior Russian representative of its administration in Crimea, the most high-profile war crimes suspect to date has been a current MP of the Russian State Duma, Natalia Poklonskaya, who acted as the so-called “Crimean Prosecutor” after the occupation of Crimea and, in this role, supported politically motivated charges against members of the Crimean Tatar representative body “Mejlis” (which resulted in the organization being banned under the pretext of it being a “terrorist” organization and the imprisonment of its senior leaders).<sup>99</sup> In 2016, the then General Prosecutor of Ukraine, Yuriy Lutsenko, announced that his Office was bringing charges against the Russian Defence Minister Sergei Shoigu and other senior Russian officials, including its high-ranking military generals;<sup>100</sup> however, the fate of these criminal proceedings is unknown. Russian authorities have not conducted any national proceedings in relation to the conflict-related crimes committed on the territory

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98. *Id.* (referring to the MH17 trial currently being heard before The District Court of the Hague). See also Офіс Генерального прокурора України [General Prosecutor’s Office of Ukr.], *Колишньому «міністру оборони ДНР» повідомлено про підозру в порушенні законів та звичаїв війни*, [“The former Minister of Defence of the DPR” was served a notice of suspicion on the charges of the violations of the laws and customs of war] (June 16, 2016), [https://www.gp.gov.ua/ua/news?\\_m=publications&\\_c=view&\\_t=rec&id=275095](https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=275095) [https://perma.cc/5U8R-6B2M]; *Російські спецслужби ліквідували ватажка бойовиків Безлера – Данилюк* [Russian special forces liquidated the militia’s leader Bezler - Danylyuk], *RADIOSVOBODA* (Nov. 7, 2014), <https://www.radiosvoboda.org/a/26679205.html> [https://perma.cc/9ZWM-3ML6].

99. Marchuk & Wanigasuriya, *supra* note 37 (referring to Press Release, Прокуратура АРК та міста Севастополя [The Prosecutor’s Office of the Autonomous Republic of Crimea and Sevastopol], За заборону діяльності Меджлісу та переслідування учасників мітингу 26.02.2014 року біля будівлі Верховної Ради автономії Прокуратура АР Крим повідомила про підозру Н.В. Поклонській у вчиненні воєнного злочину [The Crimean Prosecutor’s Office served a notice of suspicion on the charges of war crimes to N. V. Poklonska for her role in the banning of the Mejlis and persecuting protesters near the building of the Crimean Supreme Council on February 26, 2014] (Oct. 10, 2018), [https://ark.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=238396](https://ark.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=238396) [https://perma.cc/8HTL-9VCP].

100. *ГПУ повідомила про підозру міністру оборони Росії і раднику Путіна* [GPO served a notice of suspicion to the Russian Minister of Defence and Putin’s Advisor], *HROMADSKIE* (Aug. 22, 2016), <https://hromadske.ua/posts/hpu-povidomyla-pro-pidozru-ministru-oborony-rosii-i-radnyku-putina> [https://perma.cc/2PEE-F2PA].

of Ukraine and have not responded to the ICC requests for such information.<sup>101</sup>

Although the Ukrainian national authorities put a lot of trust into the prospective ICC investigation (especially in relation to targeting senior Russian officials), the ICC cannot solve all of Ukraine's problems with respect to the conflict-related crimes. A tremendous amount of responsibility weighs on the shoulders of the Ukrainian authorities, in particular the Ukrainian judiciary. The prospects of national prosecution and adjudication of the conflict-related crimes may also be strengthened by greater reliance of the Ukrainian national authorities on the procedural mechanism *trials in absentia* provided for in the Criminal Procedural Code.<sup>102</sup> In the absence of effective control over the non-government controlled areas in eastern Ukraine as well as over Crimea, which hinders the apprehension of suspects, this procedural mechanism offers an attractive option. However, as noted by Ukrainian practitioners, it suffers from a number of flaws that may potentially interfere with fair trial safeguards under national and international law.<sup>103</sup> Given the novelty of this mechanism, there is a certain degree of resistance among national judges to utilize it, especially in relation to the adjudication of the conflict-related crimes that normally entail high sentences. It will be a long and thorny road ahead for Ukraine in relation to the domestic prosecution of the conflict-related crimes. The process can be facilitated by the legal reform of the domestic legislation, the ratification of the Rome Statute, and the national capacity building of the Ukrainian prosecutor's office and judiciary.

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101. 2020 OTP Report, *supra* note 33, § 285.

102. See Criminal Procedural Code of Ukraine, Відомості Верховної Ради [Verkhovna Rada Gazette], 2013, No. 9-10, No. 11-12, No. 13, p. 88, art. 297-1.

103. See Press Release, Верховний Суд України [Supreme Court of Ukraine], Під час кримінального провадження за процедурою «in absentia» на одній чаші терезів – інтереси забезпечення ефективності провадження, а на другій – право особи на справедливий суд [During trials “in absentia” there are two issues on scales of justice—the interests of serving effective justice and the right of a person to a fair trial] (May 22, 2020), <https://supreme.court.gov.ua/supreme/pres-centr/news/943591> [https://perma.cc/5WSM-ADJ3].



*C. Mobilizing Civil Society*

## 1. Georgia

In Georgia, amidst a lack of national prosecutions, civil society appears to have shouldered much of the burden of seeking justice on behalf of victims of the conflict. This could be attributed to several factors, including political unwillingness to deal with the conflict-related crimes, inaction of national authorities with respect to the investigation and prosecution of alleged crimes, and the reluctance of national authorities to share vital information with civil society groups.<sup>104</sup> Regardless, civil society groups<sup>105</sup> have worked with victims to document the alleged crimes, provided legal aid and rehabilitation services to victims, and advocated on their behalf.<sup>106</sup> The obtained evidence and information was compiled into a report titled “August Ruins,” which was subsequently submitted to the ICC’s OTP in 2009 pursuant to Article 15 of the Rome Statute (Article 15 communication).<sup>107</sup> Additionally, following the Prosecutor’s request to the PTC for authorization of an investigation, Georgian civil society organizations<sup>108</sup> visited numerous conflict-affected villages and assisted victims of the alleged crimes to submit representations to the PTC regarding their views and expectations.<sup>109</sup> Civil society organizations such as the Georgian

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104. Interview with Representative of Article 42 of the Constitution (now known as Rights Georgia), in Tbilisi, Geor. (Nov. 20, 2018) [hereinafter Article 42 Interview]; Interview with Nino Jomarjidge, Geor. Young Lawyers Ass’n (“GYLA”), in Tbilisi, Geor. (Nov. 21, 2018) [hereinafter Jomarjidge Interview].

105. See, e.g., Human Rights Center, Article 42 of the Constitution (now known as Rights Georgia), Justice International, Georgian Young Lawyers’ Association, and the Georgian Center for Psychosocial and Medical Rehabilitation of Torture Victims.

106. August Ruins Report, *supra* note 10, at viii; *Meet our Members: Civil Society’s role in Georgia: Interview with Ms. Nino Tsagareshvili*, COALITION FOR INT’L CRIM. CT. (Oct. 22, 2019), <http://www.coalitionfortheicc.org/news/20191022/civil-societys-role-georgia-interview-with-nino> [https://perma.cc/WU8B-XQCT] [hereinafter CICC Interview].

107. *Id.*

108. *Georgian Coalition for International Criminal Court (GCICC)*, GEORGIAN YOUNG LAW. ASS’N (Feb. 19, 2019), <http://nodiscrimination.gyla.ge/en/post/saqartveloskoalicia-siskhlis-samartlis-saertashoriso-sasamartlostvis> [https://perma.cc/W5ZG-4HC6].

109. Situation in Georgia, No. ICC-01/15, Report on the Victims’ Representations Received Pursuant to Article 15(3) of the Rome Statute, Pre-Trial Chamber I, 3, 9 (Dec. 4, 2015); Int’l P’ship for Hum. Rights et al., *Representations Submitted on Behalf of Victims of International Crimes in the Situation in Georgia Pursuant to Article 15(3) of the Rome Statute to*

Coalition for International Criminal Court (“GCICC”)<sup>110</sup> have since engaged with various ICC organs sharing further information on challenges on the ground and areas for prioritization.<sup>111</sup> The OTP is said to have been impressed with the quality of the reports submitted by Georgian civil society.<sup>112</sup> Interestingly however, the Prosecutor appears not to have relied on the information contained in these Article 15 communications in her request seeking the PTC’s authorization to initiate an investigation.<sup>113</sup> Instead, the request relied on an evidentiary record comprised of media sources, public source documents, and previous non-judicial investigations. As some commentators suggest, this decision to rely on publicly available information, instead of the Article 15 communications, could be due to the OTP’s policy of maintaining the confidentiality of communications.<sup>114</sup> On the other hand, international NGOs such as Human Rights Watch opine that the lack of transparency by the Georgian government regarding their domestic investigative steps placed Georgian civil society organizations in a weak position as they were unable to ascertain and provide information on domestic investigations to the OTP, thus weakening the leverage they had with the ICC.<sup>115</sup>

Regardless, Georgian civil society has also assisted victims to explore other avenues through which to obtain justice, for instance by assisting victims to submit applications to the

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*the International Criminal Court* 3 (Nov. 12, 2015), <https://www.sjji.org/upload/medialibrary/b51/icc-georgia-submission-without-annexes.pdf> [<https://perma.cc/8AGF-ENHU>].

110. The GCICC is comprised of 7 NGOs: (i) Georgian Young Lawyers’ Association (“GYLA”); (ii) Human Rights Center; (iii) Rights Georgia (previously known as Article 42 of the Constitution); (iv) Justice International; (v) The Georgian Centre for Psychosocial and Medical Rehabilitation of Torture Victims (“GCRT”); (vi) International Center on Conflict and Negotiation (“ICCN”); and (vii) Human Rights Priority. *Georgian Coalition for International Criminal Court (GCICC)*, *supra* note 108.

111. *See* CICC Interview, *supra* note 106.

112. HUMAN RIGHTS WATCH, *PRESSURE POINT: THE ICC’S IMPACT ON NATIONAL JUSTICE: LESSONS FROM COLOMBIA, GEORGIA, GUINEA, AND THE UNITED KINGDOM* 74 (2018) [hereinafter HRW ICC National Impact Report].

113. Sarah Williams, *Civil Society Participation in Preliminary Examinations*, in 2 *QUALITY CONTROL IN PRELIMINARY EXAMINATIONS* 553, 559 (Morten Bergsmo & Carsten Stahn eds., 2018).

114. *Id.* at 560.

115. HRW ICC National Impact Report, *supra* note 112, at 77.

European Court of Human Rights (“ECtHR”).<sup>116</sup> However, despite a plethora of individual applications lodged to the ECtHR, no visible progress has materialized. Due to one of the three inter-state applications lodged by Georgia against Russia at the ECtHR relating to the armed conflict and its aftermath, *Georgia v. Russia (II)*, App. No. 38263/08, Eur. Ct. H.R. (2021), hundreds of individual applications were put on the backburner awaiting the outcome of the inter-state claim.<sup>117</sup> On January 21, 2021, the ECtHR’s Grand Chamber delivered its judgment on the merits in the case. However, the impact of this judgment on individual applications is yet to be seen. Therefore, given this slow pace of progress, the ICC investigation is viewed as a beacon of hope for those seeking justice, as some civil society actors see the conflict as being “too big and serious to be confronted at the local or even regional level.”<sup>118</sup>

However, the first year after the initiation of the ICC investigation was marred by limited engagement by the ICC with victims or civil society on the ground. Being the first situation investigated outside of the African continent, the sentiment was that the ICC was unfamiliar with the region in which it was operating. Similarly, having previously had limited reasons for interacting with the ICC, Georgians were unfamiliar with the ICC as a judicial institution. Confusion reigned regarding parallel proceedings at the ICJ and ECtHR, with many members of the public and even Georgian government officials being unable to

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116. In 2011, Georgia’s Human Rights Center (“HRC”), Georgian Young Lawyers’ Association, Article 42 (now known as Rights Georgia), and the Norwegian Helsinki Committee were representing victims in over 100 individual cases linked to the 2008 war at the ECtHR. NORWEGIAN HELSINKI COMM., UNABLE OR UNWILLING? GEORGIA’S FAULTY INVESTIGATION OF CRIMES COMMITTED DURING AND AFTER THE RUSSO-GEORGIAN WAR OF AUGUST 2008 6 (Aage Borchgrevink & Gunnar M. Ekeløve-Slydal eds., 2011).

117. Press Release, European Court of Human Rights, New Inter-State Application Brought by Georgia Against Russia (Aug. 31, 2018); Geir Ulfstein & Isabella Risini, *Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges*, EJIL:TALK! (Jan. 24, 2020), <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> [<https://perma.cc/6P5T-PB6R>].

118. ICC opens investigation in Georgia, COALITION FOR INT’L CRIM. CT. (Jan. 28, 2016), [http://www.iccnw.org/documents/CICCMA\\_GeorgiaInv\\_Jan2016.pdf](http://www.iccnw.org/documents/CICCMA_GeorgiaInv_Jan2016.pdf) [<https://perma.cc/RM97-5FH9>]; Nika Jeiranashvili, *The Georgian Experience: A Story of How the ICC is Failing Victims in its First Case Outside Africa*, INT’L JUST. MONITOR (May 10, 2018), <https://www.ijmonitor.org/2018/05/the-georgian-experience-a-story-of-how-the-icc-is-failing-victims-in-its-first-case-outside-africa> [<https://perma.cc/WPF2-5UX4>].

differentiate between the various institutions, the ICC and ICJ] in particular.<sup>119</sup> Civil society actors link victims' unawareness about the role and mandate of the ICC to the ICC's lack of outreach activities.<sup>120</sup> Against this background, civil society has played a key role in building bridges with the affected communities given the ICC's limited engagement in this regard. For instance, civil society organizations have visited IDP settlements educating individuals regarding the ongoing ICC investigation and the mandate of the ICC, stepped in to stop the spread of misinformation regarding the ICC's activities, educated the general public regarding the functioning of the ICC, etc.<sup>121</sup>

The ICC's engagement efforts witnessed an improvement in subsequent years, especially with the setting up of a team of investigators. Moreover, different organs of the ICC, including the OTP, Public Information and Outreach Section, the Victims Participation and Reparations Section, and the Trust Fund for Victims, have since stepped up their activities in Georgia by meeting with local civil society, arranging information sessions for affected communities, and conducting training sessions for local lawyers on victims' participation.<sup>122</sup> However, the confidential nature of the OTP's investigative activities means that the public has gained limited insight regarding the OTP's investigation efforts. According to the civil society representatives, the lack of knowledge of the OTP's investigative activities has led to

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119. *10 Years after the August War: Victims of the Situation in Georgia*, COALITION FOR INT'L CRIM. CT. (July 23, 2019), <http://www.coalitionfortheicc.org/situation-in-georgia> [https://perma.cc/C2H8-DCAF]; Mariam Antadze et al., *10 Years After the War: Victims of the Situation in Georgia*, COALITION FOR ICC (2019), [https://www.coalitionfortheicc.org/sites/default/files/cicc\\_documents/Report%2010YearsAfterTheAugustWar\\_Victims%20of%20the%20Situation%20in%20Georgia\\_July2019.pdf](https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/Report%2010YearsAfterTheAugustWar_Victims%20of%20the%20Situation%20in%20Georgia_July2019.pdf) [https://perma.cc/G8LD-LCK6].

120. Article 42 Interview, *supra* note 104; Jomarjidge Interview, *supra* note 104.

121. Article 42 of Constitution et al., *Civil Society Statement on International Justice Day*, GEOR. CTR. FOR PSYCHOSOCIAL & MED. REHAB. TORTURE VICTIMS (2018), <http://gcrt.ge/en/news/54> [https://perma.cc/SY5R-AG5Q]; *Waiting on the ICC in Georgia*, JUSTICE HUB (Apr. 23, 2018), <https://justicehub.org/article/waiting-on-the-icc-in-georgia> [https://perma.cc/Y2H9-S2Y8].

122. *ICC Marks 17 July, Day of International Criminal Justice*, INT'L CRIM. CT. (July 17, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1471> [https://perma.cc/43H9-BUPX]; Nika Jeiranashvili, *How the ICC Can Still Be Meaningful in Georgia*, JUSTICEINFO (May 28, 2019), <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/41542-how-the-icc-can-still-be-meaningful-in-georgia.html> [https://perma.cc/3FQC-YJMX].

ambiguity, providing space for misinterpretation and false information about the ICC, thus damaging the ICC's credibility.<sup>123</sup> With the opening of the ICC's first country office outside of the African continent in Tbilisi in December 2017,<sup>124</sup> civil society was optimistic that the Office would act as the solution for closing the information gap that had been created. Nevertheless, the insufficient staffing of the office, the language barrier which hindered direct communication with affected communities, and its presence in Tbilisi which limited the possibilities for interactions between affected individuals and ICC staff, gave rise to concerns from the outset.<sup>125</sup> Hence, Georgian civil society has urged the ICC to raise awareness about its work by informing victims and the Georgian public of its activities (disclosing the non-confidential aspects that would not jeopardize the investigation).<sup>126</sup>

## 2. Ukraine

As in Georgia, civil society in Ukraine has also been instrumental in bringing conflict-related crimes into the spotlight. A significant number of communications under Article 15 of the Rome Statute were submitted to the ICC in relation to the alleged crimes committed on the territory of Ukraine since the beginning of the Maidan protests until now.<sup>127</sup> Many NGOs have cooperated in collecting evidence and preparing joint submissions to the ICC (e.g. the Ukrainian Helsinki Human Rights Group, the Regional Centre of Human Rights, Truth Hounds, the Kharkiv Human Rights Group). Unlike the complete breakdown of communication between civil society and national authorities in Georgia, there has been an unprecedented

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123. Jeiranashvili, *supra* note 118.

124. *Int'l Criminal Court Opens Field Office in Georgia, Led by Head of Office Dr. Kaupo Kand*, GEORGIAN J. (Feb. 17, 2018), <https://www.georgianjournal.ge/politics/34214-intl-criminal-court-opens-field-office-in-georgia-led-by-head-of-office-dr-kaupo-kand.html> [<https://perma.cc/LSY4-SDBQ>].

125. Article 42 Interview, *supra* note 104; Jomarjidge Interview, *supra* note 104.

126. See Jared Ferrie, *Georgians Want Answers from the ICC*, JUSTICEINFO (May 2, 2019), <https://www.justiceinfo.net/en/tribunals/icc/41298-georgians-want-answers-from-the-icc.html> [<https://perma.cc/7CVL-BUZX>].

127. Office of the Prosecutor of the ICC, Report on Preliminary Examination Activities § 95-97 (Dec. 5, 2018) [hereinafter 2018 OTP Report]; Office of the Prosecutor of the ICC, Report on Preliminary Examination Activities § 286-287 (Dec 5., 2019); 2020 OTP Report, *supra* note 33, § 285, 287.

level of cooperation between civil society and the Ukrainian national authorities, especially in connection with the preparation of joint communications to the ICC. As a general rule, the communications were thematic as they concerned specific alleged crimes either in Crimea or eastern Ukraine. For instance, one communication concerned the use of civilians as human shields during the takeover of the Ukrainian military facilities in Crimea in 2014.<sup>128</sup> Another joint submission prepared by civil society in cooperation with CPO concerned the forcible conscription of Crimean residents to serve in the armed forces of the Russian Federation.<sup>129</sup> The most recent submission concerns the extensive appropriation of property in Crimea which was unlawfully authorized by the courts of the Occupying Power.<sup>130</sup> The ICC communications regarding Crimea considerably differ from those submitted with respect to the conflict in eastern Ukraine. The latter detail the commission of more violent crimes, such as murder, torture and ill-treatment, sexual violence, and

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128. Press Release, Прокуратура АРК та міста Севастополя [The Prosecutor's Office of the Autonomous Republic of Crimea and Sevastopol], До Міжнародного кримінального суду подані докази використання РФ цивільного населення як «живих щитів» під час окупації Криму [Submission concerning the use of civilians as human shields by the Russian Federation during the occupation of Crimea was communicated to the International Criminal Court] (Feb. 26, 2019), [https://ark.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=246320](https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=246320) [https://perma.cc/L9MQ-7ATM].

129. Press Release, Прокуратура АРК та міста Севастополя [The Prosecutor's Office of the Autonomous Republic of Crimea and Sevastopol], До Міжнародного кримінального суду передано звернення щодо незаконного примусу кримчан до служби у збройних силах РФ [Submission Concerning Forcible Conscription of Crimean Residents to Serve in Armed Forces of the Russian Federation was Communicated to the International Criminal Court] (jointly prepared with the Crimean Human Rights Group, the Regional Centre of Human Rights, and the Ukrainian Helsinki Human Rights Group) (Oct. 25, 2018), [https://ark.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=239243](https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=239243) [https://perma.cc/68AJ-QEWJ].

130. Press Release, Офіс Генерального прокурора України [General Prosecutor's Office of Ukraine], Офіс Генерального прокурора направив восьме інформаційне повідомлення до МКС щодо порушень прав власності в окупованому Криму [GPO Submitted its Eighth Communication to the ICC Concerning Violations of Property Rights in the Occupied Crimea] (jointly prepared with the Regional Centre of Human Rights) (July 30, 2020), [https://www.gp.gov.ua/ua/news?\\_m=publications&\\_t=rec&id=277804](https://www.gp.gov.ua/ua/news?_m=publications&_t=rec&id=277804) [https://perma.cc/ZP89-K2M6].

indiscriminate attacks against civilians in eastern Ukraine,<sup>131</sup> while the former describe alleged crimes that are less violent in nature, albeit reflecting a broader persecutory policy of the Occupying Power targeting actual or perceived opponents of the Russian regime in Crimea. The submissions prepared jointly by civil society and the Ukrainian national authorities, paint a broader picture of persecutory practices in Crimea, in particular deliberate measures adopted by the Occupying Power to compel the disloyal segment of the population to leave the territory of the occupied Crimea, which has already led to the forced displacement of over 40,000 residents of Crimea.<sup>132</sup> Further, the information relayed to the ICC describes various measures adopted by Russia for the transfer of parts of its own population into the occupied territory with the objective of altering the demographic compositions of Crimea (colonization).<sup>133</sup> The crimes of colonization and forcible conscription were last adjudged by the International Military Tribunal at Nuremberg, with no judicial practice developed by contemporary international criminal courts and tribunals. Therefore, the communications on such “rare” international crimes may potentially advance the doctrine of international criminal law, prompting the ICC to deal with a broader range of crimes within its jurisdiction.

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131. Int'l P'ship for Human Rights & Truth Hounds, *Attacks on Civilians and Civilian Infrastructure in Eastern Ukraine: March 2014 – November 2017*, IPHR ONLINE 1, 40 (2017), <https://iphronline.org/wp-content/uploads/2017/12/ICC-UA-15.02.pdf> [<https://perma.cc/C2P9-67LQ>]; Press Release, Kharkiv Human Rights Grp., *Насильницькі злочини, скоєні в ході збройного конфлікту на сході України у 2014–2018 [Violent Crimes Committed During the Armed Conflict in Eastern Ukraine in 2014-2018]* (Mar. 12, 2019), <http://khp.org/index.php?id=1552383658> [<https://perma.cc/JUH5-V89B>].

132. Press Release, Прокуратура АРК та міста Севастополя [The Prosecutor's Office of the Autonomous Republic of Crimea and Sevastopol], *До Міжнародного кримінального суду передали нові свідчення про злочини Росії в Криму [New Evidence Regarding Russian Crimes Was Communicated to the ICC]* (Jan. 31, 2020), [https://ark.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=266001](https://ark.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=266001) [<https://perma.cc/YD22-HBPU>] (concerning forcible transfer of IDPs and the change of the demographic composition of the population in Crimea).

133. *Id.*; S. Zayets, R. Martynovsky, & D. Svyrydova, *Crimea beyond rules: Forcible Expulsion of the Civilian Population from the Occupied Territory by Russia*, *Крымский прецедент* (2018), <https://krymbezpravil.org.ua/en/issues/crimea-beyond-the-rules-special-issue-forcible-expulsion-of-the-civilian-population-from-the-occupied-territory-by-russia/> [<https://perma.cc/ZP89-K2M6>].

The avalanche of information regarding the alleged crimes prompted the OTP to state in its 2018 annual report that it was overwhelmed by the volume of information in its possession in relation to the conflict in Ukraine, and that it sought to “prioritize certain forms of alleged conduct believed to be most representative of the patterns of alleged crimes.”<sup>134</sup> The report also took note of the OTP’s extensive engagement with the Ukrainian national authorities and civil society.<sup>135</sup> Civil society has played a tremendous role in raising awareness about the ICC, collecting evidence and building bridges with the Ukrainian national authorities. This unprecedented level of engagement with the Ukrainian national authorities resulted in the higher quality of communications submitted to the ICC, as the evidence was cross-checked and some of it formed part of ongoing national criminal proceedings.

#### *IV GEORGIA AND UKRAINE: SIMILAR CHALLENGES BUT DIFFERENT RESPONSES*

Both Georgia and Ukraine as post-Soviet countries share a similar legal culture and have similar techniques for investigating and prosecuting crimes. The situations of Ukraine and Georgia at the ICC have arisen out of a military standoff with Russia. The armed conflicts in both countries have produced similar consequences (i.e. absence of control over parts of their territory; denial of access to non-government controlled areas and accompanying challenges linked to the collection of evidence; and non-cooperation of Russian authorities with respect to the surrender and extradition of suspects and exchange of information). Despite sharing many common challenges, the approaches of both countries for tackling international crimes diverge significantly.

Georgia has taken a rather passive stance towards the domestic prosecution of the conflict-related crimes. Unlike Georgia, Ukraine appears to be more eager to investigate and prosecute. However, it has faced a number of obstacles in achieving its ambitious goals, such as unfamiliarity with dealing with international crimes, and unwillingness to scrutinize the

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134. 2018 OTP REPORT, *supra* note 127, § 95.

135. *Id.* § 97.



actions of the Ukrainian armed forces and law enforcement agencies; evidentiary challenges due to the lack of effective control over Crimea and non-government controlled areas in eastern Ukraine; and the incorrect legal qualification of crimes in eastern Ukraine as terrorist offences.<sup>136</sup>

It is also interesting that Georgia as a State Party to the Rome Statute was better positioned to deal with the conflict-related crimes, as it had made all the necessary changes to its national legislation upon ratifying the Rome Statute. However, it missed its opportunity to fully utilize the available legal tools and refused to disclose any information on the progress of national proceedings to the general public, and has left the task of advocating on behalf of victims to civil society. In contrast, Ukraine, as a non-ratifying state, has witnessed a flurry of legislative initiatives to reform Ukrainian legislation to align it with international law, and has subjected itself to the jurisdiction of the ICC by accepting the *ad hoc* jurisdiction of the ICC on two separate occasions.<sup>137</sup> Ukrainian national authorities closely cooperate with civil society in preparing joint submissions to the ICC and are fully transparent about the information they have communicated to the ICC.<sup>138</sup>

Both Georgia and Ukraine are at loggerheads with Russia—a powerful adversary. Unsurprisingly, news of the initiation of an investigation into the situation in Georgia received a cold reception from the Russian Federation. Russia accused the ICC Prosecutor of siding with the aggressor and initiating an investigation aimed at victims.<sup>139</sup> Additionally, in a largely symbolic move, in November 2016, the president of the Russian Federation issued bylaw No 361-rp, which had the effect of withdrawing Russia's signature to the Rome Statute, which it had never ratified.<sup>140</sup> Russia's withdrawal of its signature was prompted

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136. See *supra* Section III.B.2.

137. See *supra* Section III.A.2.

138. See *supra* Section III.A.2.

139. *Briefing by Foreign Ministry Spokesperson Maria Zakharova*, MINISTRY FOREIGN AFF. RUSSIAN FED'N (Jan. 29, 2016), [http://www.mid.ru/en/foreign\\_policy/news//asset\\_publisher/cKNonkJE02Bw/content/id/2039123#7](http://www.mid.ru/en/foreign_policy/news//asset_publisher/cKNonkJE02Bw/content/id/2039123#7) [<https://perma.cc/XT94-VF5E>].

140. *Распоряжение Президента Российской Федерации от 16.11.2016 г. № 361-рп «О намерении Российской Федерации не стать участником Римского статута Международного уголовного суда»* [*Decree of the President of the Russian Federation of Nov.*

by the issuance of the OTP annual report (2016), which found that Russia effectively occupied Crimea and was involved in steering the conflict in eastern Ukraine.<sup>141</sup> Among the reasons for the withdrawal, the Russian MFA official statement named the ICC's failure to live up to the expectations of becoming "a truly independent, authoritative international tribunal," its poor performance record in comparison to the costs, and the distrust of the African states towards the ICC.<sup>142</sup> While the statement did not make a single reference to the situation in Ukraine, it alleged the ICC's biased handling of Georgia's situation.<sup>143</sup> It further stated that the ICC was heaping the blame on South Ossetian and Russian soldiers, while leaving out "actions and orders of Georgian officials . . . to the discretion of the Georgian justice."<sup>144</sup> Russia's symbolic withdrawal of its signature from the Rome Statute can be viewed as a "tactical move signaling that the ICC should not count on any cooperation from Russia during the course of its examination of alleged crimes in Crimea and eastern Ukraine."<sup>145</sup> Russia has already ceased its cooperation with the ICC with respect to the investigation of Georgia's situation, notwithstanding that earlier it chose to cooperate with the ICC.<sup>146</sup>

Georgian and Ukrainian national authorities have been placing all blame on the Russian armed forces and its proxy forces in South Ossetia and eastern Ukraine. Therefore, ICC attempts

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11, 2016 No. 361-pn "On the Russian Federation's Intention Not To Become a State Party to the Rome Statute of the International Criminal Court"] (Nov. 16, 2016), <http://www.kremlin.ru/acts/bank/41387> [<https://perma.cc/4JLS-Z2C9>]; Sergey Sayapin, *Russia's Withdrawal of Signature from the Rome Statute Would not Shield its Nationals from Potential Prosecution at the ICC*, EJIL:TALK! (Nov. 21, 2016), <https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc> [<https://perma.cc/34P7-NUN9>].

141. 2018 OTP Report, *supra* note 134, §§ 158, 169-70.

142. Press Release, Russia's Ministry of Foreign Affairs, In Connection with Russia's Withdrawal of its Signature from the Rome Statute (Nov. 16, 2016).

143. *Id.*

144. *Id.*

145. See generally Iryna Marchuk & Aloka Wanigasuriya, *Making the Wrong Enemies? The ICC Prosecutor's Dilemma When Targeting Powerful States at the Preliminary Examination Stage*, in THE ROME STATUTE OF THE ICC AT ITS TWENTIETH ANNIVERSARY: ACHIEVEMENTS AND PERSPECTIVES 139 (Pavel Šturma ed., 2019).

146. Phakiso Mochochoko, *No Cooperation from Moscow, Tskhinvali in ICC Investigation*, CIV. GEOR. (Oct. 9, 2017), <https://civil.ge/archives/218360> [<https://perma.cc/55D3-U5WN>].

to prosecute Georgian and/or Ukrainian armed forces will most likely be met with open hostility in both countries. Such fears of their “own” armed forces being tried in The Hague are amply exploited by politicians in both countries. Little has been done to dispel these myths about the ICC in Georgia and Ukraine. The ICC Prosecutor prioritizes the prosecution of individuals bearing the most serious responsibility for the crimes falling within the ICC’s jurisdiction. It is doubtful whether members of the Ukrainian and/or Georgian armed forces will make the cut. This, however, does not mean that the conflict-related crimes alleged to have been committed by the Georgian and Ukrainian armed forces should go unpunished. It is a chance for both Georgian and Ukrainian national authorities to demonstrate how complementarity works in practice, and to prove that effective prosecution and adjudication of such crimes is possible at the national level. Although the ICC has positively impacted domestic processes in Georgia and Ukraine to a certain extent, it cannot be seen as a panacea for all the conflict-related problems. Both states have to assume responsibility for achieving justice at home. Georgia is reluctant to assume such responsibility. However, Ukraine appears to have chosen the path of national justice for international crimes in parallel to pursuing international justice at the ICC, which are not necessarily mutually exclusive. Only time will tell if Ukraine’s thirst for justice will translate into real action and how the ICC investigation will pan out in Georgia.

