

**WITHOUT A SPECIFIC DECLARATION OF
JURISDICTION AND RATIFICATION:
PROCEDURAL WEAKNESSES OF THE
INTERNATIONAL CRIMINAL COURT’S
INVESTIGATION INTO THE RUSSO-UKRAINIAN
WAR**

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TABLE OF CONTENTS

I. INTRODUCTION: THE INTERNATIONAL CRIMINAL COURT’S IMMEDIATE RESPONSE TO THE RUSSIAN INVASION OF UKRAINE	172
II. THE PRELIMINARY EXAMINATION INTO THE SITUATION IN UKRAINE: AN UNUSUAL APPLICATION AND OVEREXTENSION OF A PREEXISTENT PRELIMINARY EXAMINATION WITHIN A ROUGHLY DIFFERENT SCENARIO. BUT IN THE END, PRELIMINARY EXAMINATION IS NOT LAW	173
III. ISSUES DERIVED FROM A DE FACTO LACK OF DECLARATION OF ACCEPTANCE OF JURISDICTION AND ROME STATUTE MEMBERSHIP: THE UNSURMOUNTABLE PROCEDURAL REPERCUSSIONS OVER THE INVESTIGATION, THE WARRANT OF ARREST, AND THE FUTURE OF THE ENTIRE PROCEEDINGS	178
IV. CONCLUSION	180

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I. INTRODUCTION: THE INTERNATIONAL CRIMINAL COURT'S IMMEDIATE
RESPONSE TO THE RUSSIAN INVASION OF UKRAINE

The day after the Russian invasion of Ukraine, which occurred in the early morning hours of February 24, 2022, the Prosecutor of the International Criminal Court (ICC), Karim Khan, stated he had been “closely following recent developments in and around Ukraine with increasing concern.”¹ With this immediate response, somehow uncommon for its fastness in the history of the ICC Office of the Prosecutor (OTP), Karim Khan reminded all sides conducting hostilities that pursuant to the article 12 Rome Statute declaration lodged by Ukraine on September 8, 2015, the OTP can “exercise its jurisdiction over and investigate any act of genocide, crime against humanity[,] or war crime committed within the territory of Ukraine since February 20, 2014[,] onwards.”²

Notwithstanding an existing Ukrainian self-referral of jurisdiction to the ICC [with] respect [to] war crimes and crimes against humanity in reference to an earlier Russian incursion, as well as the opening of an investigation, the recent invasion will not allow the ICC to expand its case to include potential charges of aggression.³

In this Article, we will explore and propose our view on the main procedural challenges of the ICC investigation into the situation of Ukraine, namely (1) the procedural issues related to the preliminary examination, which are only apparent since the preliminary examination framework itself is based on extra juridical rules; (2) the insurmountable issues related to a de facto lack of declaration of acceptance of jurisdiction and the lack of Rome Statute membership; and (3) the inherent procedural weaknesses that characterize the ICC statutory law as a whole, specifically its composition, which could negatively impact the efficiency of the entire proceeding.⁴

1. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR (Feb. 25, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following>.

2. *Id.*

3. For a very brief introduction, written a few days after the Russian invasion, see Gregory S. Gordon & Giovanni Chiarini, *The Russian Invasion of Ukraine: Navigating Aggression's Fragmented Justice Landscape*, CAMBRIDGE INT'L L.J. BLOG (Apr. 5, 2022), <https://cilj.co.uk/2022/04/05/the-russian-invasion-of-ukraine-navigating-aggressions-fragmented-justice-landscape/>.

4. *See infra* Parts II–IV (examining the current procedural issues in ICC investigations, the acceptance of the Rome Statute, and the weaknesses of ICC statutory law).

II. THE PRELIMINARY EXAMINATION INTO THE SITUATION IN UKRAINE: AN UNUSUAL APPLICATION AND OVEREXTENSION OF A PREEXISTENT PRELIMINARY EXAMINATION WITHIN A ROUGHLY DIFFERENT SCENARIO. BUT IN THE END, PRELIMINARY EXAMINATION IS NOT LAW

The first observation should be made with regard to the preliminary examination's procedural history and discipline, which is exclusively derived from judicial interpretation.⁵

[A] preliminary examination is not an investigation, although both phases could be considered as “inherently connected.” A preliminary examination is a legalistic process that “serves as a bridge between the documentation of human rights violations and criminal investigation[,]” but which is also wrapped by “magic, mystery[,] and mayhem.” It has been defined as an “amorphous status,” a kind of “pre-investigative process,” or, [as stated by the OTP itself] a “pre-investigative phase,” and a “core activity” of the [OTP].

At the preliminary examination stage, as highlighted in the OTP's Policy Paper on Preliminary Examination, the OTP “does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court[,] and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States.” A preliminary examination may be initiated by the OTP considering any information on crimes within the jurisdiction of the Court.⁶

As indicated in an OTP Policy, the OTP may receive information on crimes from multiple sources: “(a) information sent by individuals or groups, States, intergovernmental or non-governmental organi[z]ations; (b) a referral from a State Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute.”⁷ But such communications do not automatically lead to the start of an investigation.⁸

Hence, a preliminary examination is essentially a phase of evaluation of the information available in order to understand if there is a “reasonable basis” to proceed with an investigation. Although the Prosecutor has a formal “legal duty” to proceed, . . . their role is [inherently] based on discretion.

5. The following reasoning on the preliminary examination in general is based on Giovanni Chiarini, *Ecocide: From the Vietnam War to International Criminal Jurisdiction? Procedural Issues In-Between Environmental Science, Climate Change, and Law*, 21 CORK ONLINE L. REV. 1, 22–24 (2022), https://www.corkonlinelawreview.com/_files/ugd/724adb_050dbd94d3184bf48699488b83b6adaa.pdf.

6. *Id.* at 22–23.

7. *Policy Paper on Preliminary Examinations*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR ¶ 4 (Nov. 2013), www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.

8. *Id.* ¶ 75.

There is no temporal limit for the preliminary examination, and the Prosecutor must continue the examination “until the information provides clarity on whether or not a reasonable basis for an investigation exists.”⁹

The path from initial communication to preliminary examination to formal investigation is divided into four phases:¹⁰

Phase 1: [T]he initial assessment of all information related to potential crimes within the Court’s jurisdiction implicated by any communication is submitted pursuant to article 15 in order to analyze and verify the gravity of the alleged crime and filter out information on crimes that are outside the jurisdiction of the Court or a *ne bis in idem*.

Phase 2: [T]he formal commencement of a preliminary examination. This focuses on the “preconditions to the exercise of jurisdiction” contained in article 12. It is an assessment of the crimes allegedly committed, with a view to identifying potential cases falling within the jurisdiction of the ICC.

Phase 3: Assessing the admissibility of potential cases in terms of “complementarity and gravity” pursuant to article 17.

Phase 4: Consideration of whether the “interests of justice”—a quasi-judicial and malleable concept contained in article 53(1)(c)—necessitate the request to initiate a formal investigation.¹¹

To initiate an investigation, the Prosecutor needs to submit to the Pre-Trial Chamber a request for authori[z]ation together with any supporting material collected. Pursuant to articles 15(3) and 53(1), the standard proof for requesting this authori[z]ation is a “reasonable basis.” If, and only if, the OTP assesses a situation as necessitating the more formal preliminary examination, the OTP follows a so-called “statutory-based approach.”¹²

This requires the OTP to ascertain and affirm the following fundamental requirements for triggering the examination: the four-facets jurisdiction, admissibility (comports with “complementarity and gravity”), and the “interests of justice.”¹³

In practice, this means that the four phases, if the prosecutor proceeds *proprio motu*, have to be completed and evaluated by the Pre-Trial Chamber, who is entitled to authorize the start of an investigation.¹⁴ However, if the prosecutor proceeds after receiving a state referral or a referral from the U.N.

9. Chiarini, *supra* note 5, at 23.

10. *Policy Paper on Preliminary Examinations*, *supra* note 7, ¶¶ 77–92.

11. Chiarini, *supra* note 5, at 24.

12. *Id.*

13. *Policy Paper on Preliminary Examinations*, *supra* note 7, ¶ 80.

14. *Id.* ¶ 98.

Security Council, the discipline is further expedited.¹⁵ In Ukraine, for instance, Khan said there was a “reasonable basis” to believe that crimes had been committed within the court’s jurisdiction, but he needed the Hague-based court’s judges to approve his decision before going ahead.¹⁶ Regardless, due to the ICC Countries’ referral, Khan’s probe continued without the Pre-Trial Chamber judges’ approval, thus speeding up the process as this aforementioned confirmatory stage had been bypassed.¹⁷ This is, in short, the discipline of the preliminary examination, wherein the role of the Prosecutor is considered a very “unique trait of the ICC.”¹⁸

Some problems, though, arise from the preliminary examination in Ukraine. Indeed, the ICC Prosecutor decided not to open a preliminary examination solely dedicated to the Russian aggression (and the subsequent war in Ukraine) but instead decided to work within an already existent preliminary examination.¹⁹ This latter preliminary examination was opened on April 24, 2014, by the former Prosecutor Fatou Bensouda.²⁰ However, the ICC’s pre-2022 Ukrainian case relates to the more limited Russian incursion in February–March 2014,²¹ wherein its military crossed into Ukrainian territory and ultimately annexed the Crimean Peninsula.²²

The foundation of ICC jurisdiction over Ukraine was then based on two ad hoc declarations of acceptance under Rome Statute article 12(3), as Ukraine was not (and is not nowadays) an ICC member state.²³ Precisely, the first declaration was lodged on April 29, 2014, and related to alleged crimes

15. *Id.* ¶ 92.

16. *See Statement of ICC Prosecutor Feb. 25, 2022, supra* note 1.

17. *See id.*

18. As highlighted in the Policy Paper, *Policy Paper on Preliminary Examinations, supra* note 7, ¶ 24: “This role of the Prosecutor is a unique trait of the ICC. The ability of national and international courts to define their own jurisdiction within statutory parameters—*compétence de la compétence*—is well established. The International Military Tribunals in Nuremberg and Tokyo, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”), and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) were provided jurisdiction only over a specific situation. The concerned States or the Security Council of the United Nations defined those situations and decided that the intervention of a judicial mechanism was appropriate. These courts were neither in a position to decide against investigating, nor to expand their focus to other situations. By contrast, the Statute does not predefine specific situations for investigation: it is the ICC that ultimately determines when and where the Court should intervene in accordance with the statutory criteria, which are the essence of the Office’s preliminary examination process.”

19. *Statement of the Prosecutor, Fatou Bensouda, On the Conclusion of Preliminary Examination in the Situation in Ukraine*, INT’L CRIM. CT.: OFF. OF THE PROSECUTOR (Dec. 11, 2020), <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine>.

20. *Id.*

21. *See, e.g.,* Matt Clinch, *How Russia Invaded Ukraine in 2014. And How the Markets Tanked*, CNBC (Jan. 27, 2022, 2:22 AM), <https://www.cnbc.com/2022/01/27/how-russia-invaded-ukraine-in-2014-and-how-the-markets-tanked.html>.

22. *See id.*

23. *See* The Hague (Apr. 9, 2014), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> (declaring recognition of the ICC’s jurisdiction).

committed on the territory of Ukraine from November 21, 2013, to February 22, 2014.²⁴ The second declaration, submitted on September 8, 2015, accepted ICC jurisdiction over alleged crimes committed on Ukrainian territory from February 20, 2014, onwards, with no specified end date.²⁵ As highlighted in the OTP's 2020 Report on Preliminary Examination Activities,²⁶ the inquiry thus far has focused on allegations arising from the armed conflict in Crimea and eastern Ukraine areas, as well as from the violence perpetrated on civilians in Kyiv's Majdan Nezaležnosti (Independence Square).²⁷ Thereby, both the ad hoc declarations of acceptance of jurisdiction lodged under article 12(3) of the Rome Statute were based, and are still based, on a radically different de facto situations, and they are referring to scenarios dated eight years before the Russian invasion that led to the war.²⁸

In other words, instead of opening an autonomous preliminary examination, the Prosecutor has decided to proceed within the previous one, already based on the 2014 and 2015 Ukrainian declarations of acceptance of jurisdiction.²⁹ Even if the existing legal framework does not prohibit the prosecutor to overextend a pre-existing preliminary examination, the decision not to open a new preliminary examination causes perplexity.³⁰ Indeed, the prosecutor decided to open two different preliminary examinations in two different countries under examination by the OTP: Venezuela and the Democratic Republic of the Congo (DRC).³¹ The preliminary examinations consisted of "Venezuela I" and "Venezuela II" as well as "DRC I" and "DRC II," respectively.³² There, the preliminary examination "Venezuela II"³³ was opened because the ICC Prosecutor

24. *Id.*

25. See Paylo Kilimkin, *Minister of Foreign Affairs of Ukraine Declaration Lodged Under Article 12(3) of the Rome Statute*, INT'L CRIM. CT. (Sept. 8, 2015), https://www.icc-cpi.int/sites/default/files/icc_docs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

26. *Report on Preliminary Examination Activities 2020*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR ¶¶ 267–90 (Dec. 14, 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>.

27. *Id.* ¶ 272.

28. See *id.* ¶ 289 (stating that a preliminary examination has been conducted regarding the situation in Ukraine regarding both the crime in Crimea and eastern Ukraine and in Kyivs Nezalezhanosti (Independence Square)).

29. See *id.* ¶ 220 (stating that "the Prosecutor announced the extension of the preliminary examination").

30. See *supra* notes 5–9 and accompanying text (explaining preliminary examinations).

31. *Venezuela I: Situation in the Bolivarian Republic of Venezuela I*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR (Sept. 27, 2018) [hereinafter *Venezuela I*], <https://www.icc-cpi.int/venezuela-i>; *Preliminary Examination: Democratic Republic of the Congo*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR (Apr. 2004) [hereinafter *DCR I*], <https://www.icc-cpi.int/dc>.

32. *Venezuela I*, *supra* note 31; *Preliminary Examination: Venezuela II*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR (Feb. 13, 2020) [hereinafter *Venezuela II*], <https://www.icc-cpi.int/venezuela-ii>; *DCR I*, *supra* note 31; *Preliminary Examination: Democratic Republic of the Congo II*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR (May 23, 2023) [hereinafter *DRC II*], <https://www.icc-cpi.int/drcII>.

33. *Venezuela II*, *supra* note 32.

received a referral from the Government of the Bolivarian Republic of Venezuela under article 14 of the Rome Statute.³⁴ Similarly, the preliminary examination “DRC II”³⁵ opened after another referral was received from the DRC government.³⁶

Nonetheless, the main concern is not found in the issues related to the preliminary examination—which are only apparent because the preliminary examination framework is not based on the law, as we later explain.³⁷ Deep concerns, though, are to be found in the decision to extend the 2015 declaration of acceptance of jurisdiction and apply it to the 2022 scenario.³⁸

Overextending the validity of the 2015 article 12(3) of the Rome Statute declaration is meaningless and mainly a consequence of the omission of the Ukrainian political authorities, as the government did not lodge a specific declaration of acceptance of jurisdiction in the aftermath of the aggression and did not ratify the Rome Statute.³⁹

The decision not to lodge a specific declaration under article 12(3) of the Rome Statute causes more perplexities because the ICC prosecutor received the biggest referral in the history of the ICC itself: forty-three state parties, between March 1st and April 1st, submitted a joint referral⁴⁰ with

34. *Id.*

35. *DRC II*, *supra* note 32.

36. *Id.*

37. *See infra* Part III (noting that the preliminary examination framework was not disciplined by any statutory law and is not law).

38. *See generally infra* Part III (highlighting the perplexities and problems arising from the decision not to open a new preliminary examination and instead choosing to rely on the 2014 and 2015 declarations).

39. *See Ukraine: Situation in Ukraine*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR, <http://www.icc-mpi.int/situations/ukraine> (last visited Sept. 12, 2023). *See generally* Kilimkin, *supra* note 25 (noting that the aggression referenced to in the Declaration was from 2014).

40. Precisely, “[o]n [March 1], 2022, the [OTP] received a State Party referral from the Republic of Lithuania. On [March 2], 2022, the following coordinated group of States Parties submitted a joint referral: Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland. On [March 2], 2022, the prosecutor announced he had proceeded to open an investigation into the Situation in Ukraine on the basis of the referrals received. In accordance with the overall jurisdictional parameters conferred through these referrals, and without prejudice to the focus of the investigation, the scope of the situation encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from [November 21], 2013 onwards. On [March 11], 2022, the prosecutor confirmed that two additional states, Japan and North Macedonia, have referred the Situation in Ukraine to the Office. On [March 21, 2022], Montenegro further informed the Office of [its] decision to join the group State Party referral, and on [April 1, 2022], the Republic of Chile joined the group State Party referral of the situation.” *Ukraine: Situation in Ukraine*, *supra* note 39.

reference to the 2021 Russian aggression and *not* to the previous episodes dated 2014 and 2015.⁴¹

To proceed on the basis of the 2014 and 2015 declarations is, procedurally speaking, a gross mistake that could be foreseeably challenged in future judicial proceedings (if any), leaving the door open to the nullity of the whole proceedings.

III. ISSUES DERIVED FROM A DE FACTO LACK OF DECLARATION OF ACCEPTANCE OF JURISDICTION AND ROME STATUTE MEMBERSHIP: THE UNSURMOUNTABLE PROCEDURAL REPERCUSSIONS OVER THE INVESTIGATION, THE WARRANT OF ARREST, AND THE FUTURE OF THE ENTIRE PROCEEDINGS

If the prosecutor's resolution to announce the decision to proceed with seeking the authorization to start an investigation, dated February 28, 2022,⁴² and based on the previous Ukrainian self-referral, was probably justified for the expedition of the proceedings, the decision *not* to lodge a declaration under article 12(3) of the Rome Statute—especially after having received the first referral from a State Party on March 1, 2022, (from the Republic of Lithuania) and the aforementioned joint referral as of March 2, 2022—causes much perplexity.⁴³ Thus, several doubts emerge from relying on the 2014 and 2015 declarations.

In our opinion, at least three procedural issues may arise:

- (1) The entire prosecution is still based on a different preliminary examination for a different situation (although on the same territories) and is in contrast with the general principles of the preliminary examination set in the OTP policy paper: “[T]he preliminary examination process is conducted on the basis of the facts and information available.”⁴⁴ Both the facts and information available here referred to the specific situations in Ukraine concerning the events that occurred in 2014.⁴⁵ Moreover, the latest declaration of the Ukrainian government lodged under article 12(3) of the Rome Statute did not mention the crime of genocide (nor the crime of aggression), but only the “crimes against humanity and war crimes.”⁴⁶ Furthermore, the investigation was de facto opened before the submission

41. *Id.*

42. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine*, INT’L CRIM. CT.: OFF. OF THE PROSECUTOR (Feb. 28, 2022) [hereinafter *Statement of ICC Prosecutor Feb. 28, 2022*], <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

43. *See* Kilimkin, *supra* note 25 (highlighting the Joint Referral regarding Russia’s 2022 aggressions).

44. *Policy Paper on Preliminary Examinations*, *supra* note 7, ¶ 25.

45. *See* Kilimkin, *supra* note 25 (noting no mention of current aggression).

46. *See* Kilimkin, *supra* note 25 (referring only to these specific crimes).

of the State Parties joint referral, even though it is dated March 2, 2022,⁴⁷ as it is based on the *previous* preliminary examination and not on an *autonomous* preliminary examination that should have been opened on the basis of the Lithuanian referral on March 1st and/or the consequential joint referral dated March 2nd.⁴⁸ In sum, the Prosecutor opened the investigation without a preliminary examination of this situation.⁴⁹

(2) In a purely formalistic view, Ukraine did not precisely accept the ICC jurisdiction regarding the 2022 Russian aggression and the subsequent war. It is not understandable why the Ukrainian government did not lodge a declaration of acceptance of jurisdiction, considering, for instance, that on February 26, 2022, Ukraine requested provisional measures to the International Court of Justice. Similarly, it is not clear why Ukraine did not decide to ratify the Rome Statute and become a State Party.

(3) The latest declaration of the Ukrainian government lodged under [a]rticle 12(3) of the Rome Statute is limited as it clearly refers to the “crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations [‘]DNR[’] and [‘]LNR[’], which led to extremely grave consequences and mass murder of Ukrainian nationals.”⁵⁰ Therefore, “Ukraine accepts the jurisdiction of the Court for the purpose of identifying, prosecuting[,] and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since 20 February 2014.”⁵¹

We should now ask ourselves if these issues could impact the validity of the subsequent warrant of arrest submitted by the Prosecutor on February 22, 2023, to the Pre-Trial Chamber II, against Vladimir Vladimirovich Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children’s Rights in the Office of the President of the Russian Federation. According to the information available to the ICC Prosecutor, Putin is allegedly responsible for the war crime of unlawful deportation of population (children) and the unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.⁵² The crimes were allegedly committed in Ukrainian-occupied territory from at least February 24, 2022.⁵³

47. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INT’L CRIM. CT.: OFF. OF THE PROSECUTOR (Mar. 2, 2022) [hereinafter *Statement of ICC Prosecutor Mar. 2, 2022*], <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

48. See *Ukraine, Situation in Ukraine*, *supra* note 39 (emphasizing the difference in concerns).

49. See *Policy Paper on Preliminary Examinations*, *supra* note 7 (noting the basis given for the investigation).

50. *Kilimkin*, *supra* note 25.

51. *Id.*

52. See Rome Statute of the Int’l Crim. Ct. arts. 8(2)(a)(vii), 8(2)(b)(viii), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

53. *Statement of ICC Prosecutor Feb. 28, 2022*, *supra* note 42.

There are reasonable grounds to believe that Mr. Putin bears individual criminal responsibility for the following crimes: (i) having committed the acts directly, jointly with others, and/or through others;⁵⁴ and (ii) having failed to exercise proper control over civilian and military subordinates who committed the acts or allowed for their commission while under his effective authority and control, pursuant to superior responsibility.⁵⁵ Maria Alekseyevna Lvova-Belova is allegedly responsible for having committed these crimes directly, jointly with others, and/or through others.⁵⁶ The Pre-Trial Chamber II then issued the warrants while keeping them secret in order to protect victims and witnesses and safeguard the investigation.⁵⁷

Although pre-trial judges, based on the Prosecution's applications of February 22, 2023, have found reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation and transfer of population from occupied areas of Ukraine to the Russian Federation—in prejudice of Ukrainian children. The decision is not publicly available; therefore, we do not know if the above-mentioned procedural issues have been discussed, and if they have, how they were solved.⁵⁸

Another possibility (which we are afraid of) is that the Pre-Trial Chamber II simply ignored the procedural issues and focused only on the substantive law or even worse, created a procedural shortcut to allow the overextension of the previous declarations of acceptance of jurisdiction.

IV. CONCLUSION

In our opinion, when recalling the three aforementioned issues and applying a strict and purely formalistic approach, three conclusions can be drawn:

- (1) The lack of a dedicated preliminary examination would not lead to a nullity of the investigation and the subsequent warrant of arrest, as no statutory law has disciplined the preliminary examination legal framework, which is entirely based on extra-judicial rules such as the OTP Policy

54. Rome Statute, *supra* note 53, art. 25(3)(a).

55. *Id.* art 28(b).

56. *Id.* art. 25(3)(a).

57. *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT'L CRIM. CT.: OFF. OF THE PROSECUTOR (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova>. As underlined in that statement, “[t]he Chamber considered that the warrants are secret in order to protect victims and witnesses and also to safeguard the investigation. Nevertheless, mindful that the conduct addressed in the present situation is allegedly ongoing, and that the public awareness of the warrants may contribute to the prevention of the further commission of crimes, the Chamber considered that it is in the interests of justice to authori[z]e the Registry to publicly disclose the existence of the warrants, the name of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the Chamber.” *Id.*

58. *Id.*

Paper.⁵⁹ The preliminary examination legal framework is not law.⁶⁰ It is true that the entire prosecution is still based on a different preliminary examination for a different situation (although on the same territories) and that it is in contrast with the general principles of the preliminary examination set in the OTP policy paper—the preliminary examination “process is conducted on the basis of the facts and information available.”⁶¹ Furthermore, both the facts and the information available referred to the specific situations in Ukraine concerning the events that occurred in 2014.⁶² This could constitute a mere violation of the OTP policies, justified by an extraordinary situation with no procedural consequences in terms of the validity of the subsequent acts.⁶³ Similarly, the investigation was de facto opened before the submission of the state parties’ joint referral, even if it is dated March 2, 2022, as it is based on the previous preliminary examination and not on an *autonomous* preliminary examination that should have been opened on the basis of the Lithuanian referral on March 1st, and/or the consequent joint referral dated March 2nd.⁶⁴ Regardless, as we previously observed, this would not represent a procedural matter but a matter, of OTP policies—a purely extra-judicial problem, not related to the law.⁶⁵

(2) Ukraine never accepted the ICC jurisdiction regarding the 2022 Russian aggression and the subsequent war, and this represents the greatest issue.⁶⁶ The issue could not be resolved by inventing a sort of implicit acceptance of jurisdiction based on the previous 2014 and 2015 declarations, as this would be in contrast with any basic principles of criminal law and procedure. The overextension and ultra-activity of the 2014 and 2015 declarations constitute the main problem and could affect the whole proceeding, since the investigation is based neither on a declaration of acceptance nor on Rome Statute membership.⁶⁷ In other words, while the preliminary examination is not affected (as the preliminary examination framework itself is not based on the law), the investigation is *fully* affected because the investigation itself lacked any jurisdictional basis from the beginning.⁶⁸

(3) The latest declaration of the Ukrainian government lodged under article 12(3) of the Rome Statute is limited as it clearly refers to the crimes

59. *Policy Paper in Preliminary Examinations*, *supra* note 7.

60. *See supra* Part II (concluding that preliminary examination is not law).

61. *Policy Paper on Preliminary Examination*, *supra* note 7, ¶ 25.

62. *Statement of ICC Prosecutor Mar. 2, 2022*, *supra* note 47.

63. *Id.*

64. *Id.*

65. *See supra* Part I (discussing how the framework of preliminary examination is based on extra-judicial rules).

66. *See supra* Part II; *supra* notes 49–52 and accompanying text (detailing Ukraine’s lack of acceptance of ICC jurisdiction).

67. *See supra* Part III (discussing the procedural issues that may arise due to the 2014 and 2015 declarations).

68. *See supra* notes 49–52 and accompanying text (explaining that the investigation was opened without a preliminary examination of the situation).

committed by senior officials of the Russian Federation and leaders of terrorist organizations ‘DNR’ and ‘LNR’, which led to extremely grave consequences and mass murder of Ukrainian nationals,” and not to the crimes committed by the Russian Army as a whole nor, for instance, to the crimes committed by the Wagner Group.⁶⁹ This could be *prima facie* a delicate issue in terms of jurisdiction *ratione personae* (“senior officials of the Russian Federation”) and jurisdiction *ratione loci* (DNR and LNR).⁷⁰ Moreover, the latest declaration of the Ukrainian government lodged under article 12(3) of the Rome Statute did not mention the crime of genocide (nor the crime of aggression), but only the “crimes against humanity and war crimes.”⁷¹ This could constitute a problem in terms of jurisdiction *ratione materiae*. However, we believe this does not represent a problem: when a state accepts the ICC jurisdiction, the acceptance covers all the crimes under the jurisdiction of the Rome Statute.

Finally, we cannot deny that there are several other issues underlying the entire legal structure—as well as concrete composition—of the International Criminal Court. We are just mentioning a few of them:

(A) As is well known, the trial *in absentia* is not permitted, according to article 63 of the Rome Statute.⁷² Therefore, the ICC is not entitled to try individuals unless—as is very unlikely in this case—they are present in the courtroom.⁷³

(B) The ICC needs cooperation to execute a warrant of arrest, and Russian cooperation does not seem to be an actual possibility with the current government.

(C) The lengthiness of the proceedings still represents a great problem that could affect the overall quality of the proceeding itself, and the discretionary power of the prosecutor to keep a preliminary examination or an investigation ongoing for an unlimited period of years confers uncertainty. For example, in the case of Al Bashir, two warrants of arrests were issued (in 2009 and 2010 respectively), but it took ten years for an arrest to be made.

(D) As we highlighted in an *opinio juris*, the lack of practical experience, criminal law, and procedural knowledge of potentially half of the members of the ICC have a large impact on the whole procedural fairness of the legal proceeding.⁷⁴ The selection of legal assistants, legal officers, and trial

69. See The Hague, *supra* note 23.

70. See *id.*

71. Report on Preliminary Examination Activities 2020, *supra* note 26.

72. Rome Statute, *supra* note 53, art. 63.

73. See *id.*

74. Cuno Jakob Tarfusser & Giovanni Chiarini, *Can We Return to the Law, Please? Rethinking the Judicial Interpretation of Procedural Rules in the ICC—A Conversation with Judge Tarfusser after the Gbagbo-Blé Goude Appeal Judgment*, OPINIO JURIS (Apr. 13, 2021), <http://opiniojuris.org/2021/04/13/>

lawyers is not transparent and adequate, as neither written exam nor oral examination are required.⁷⁵ Moreover, the provision of a list A and B for the judges' selections confer to the ICC composition a nature of hybrid court that is inadequate to deal with the complex procedural matters that inherently arise in every criminal proceeding.⁷⁶

(E) Solving purely procedural matters by applying judicial creativity has evolved into something pathological in the ICC.⁷⁷ A very recent case from the Philippines, where the continuation of an investigation against the Philippines was authorized by the ICC Appeals Chamber despite the expiration of the one-year legal period after the withdrawal of a state party, is a clear example of judicial creativity application in lieu of statutory law, bounding procedural norms (as occurred in other ICC cases)⁷⁸ and expanding de facto the Court's jurisdiction indefinitely—in contrast with any basic principles of criminal procedure.⁷⁹

In light of all the above-mentioned issues, doubts, and perplexity that the war in Ukraine shed light on, we affirm that several amendments to both the statutes and the ICC composition must be put forward to confer to the ICC efficiency in prosecuting and trying international crimes.

This is the hope. However, we seriously doubt that important amendments will be proposed. Indeed, whilst amendments to the Rules of Procedure and Evidence are likely, amendments to the Rome Statute are

can-we-return-to-the-law-please-rethinking-the-judicial-interpretation-of-procedural-rules-in-the-icc-a-conversation-with-judge-tarfusser-after-the-gbagbo-ble-goude-appeal-judgment/.

75. See Duane W. Krohnke, *International Criminal Court: Required and Recommended Qualifications for ICC Judges*, DWKCOMMENTARIES (June 24, 2011), <https://dwkcommentaries.com/2011/06/24/the-international-criminal-court-required-and-recommended-qualifications-for-icc-judges/>.

76. See *id.*; Tarfusser & Chiarini, *supra* note 75.

77. See Tarfusser & Chiarini, *supra* note 75. As highlighted by Tarfusser: "On the question if 'judicial creativity' is attributable to the different legal cultures of the judges and/or to the lack of respect to the procedure, I am not in a position to give a final answer, although I think it is a little of both. For sure, it is a fact that the majority of the judges elected to serve the Court (as well as the overwhelming majority of legal officers) have never put foot into a court of law before coming to the ICC. Thus, they are not familiar with the criminal law and even less with the criminal procedure. However, the most dangerous trait that characterizes all judges is their egomania, which becomes particularly apparent in this run to give the imprinting to creative solutions and to go to extraordinary lengths just for the sake of expressing personal opinions, none of which has the slightest impact on the judicial fate of a case and is likely to be forgotten soon." *Id.*

78. See *Judgment on the Appeal of the Republic of the Philippines Against Pre-Trial Chamber I's "Authorisation Pursuant to Article 18(2) of the Statute to Resume the Investigation,"* INT'L CRIM. CT. (July 18, 2023), <https://www.icc-cpi.int/sites/default/files/2023-07/01-21%20%28Philippines%20OA%29%20-%20Judgment%20%28FINAL%29.pdf>; see also Giovanni Chiarini, *Extra-Judicial Killings in The Philippines and the So-Called 'War on Drugs': Where Does it Stand Before the ICC?*, CAMBRIDGE INT'L L.J. BLOG (2021); Manish N. Bhatt et al., *International Criminal Law, International Courts, and Judicial Affairs*, 56 A.B.A. YEAR IN REV. 193, 201 (2002) (emphasizing the situation in the Philippines).

79. *Dissenting Opinion of Judge Perrin De Brichambaut and Judge Lordkipanidze*, INT'L CRIM. CT. (July 18, 2023), <https://www.icc-cpi.int/sites/default/files/2023-07/01-21%20Philippines%20OA%20Dissenting%20Opinion%20%28FINAL%29.pdf>. The dissenting opinion issued by Judge Perrin de Brichambaut and Judge Lordkipanidze is indeed not dissimilar to what we have observed. *Id.*

highly unlikely, and amending the Rome Statute would leave the door open to the enemies of the ICC itself (namely several member states) who would undoubtedly take the opportunity to give the final blow.

It is highly likely that the ICC will solve any aforementioned issues by inventing jurisdiction, despite the juridical basis of both lack of jurisdictional acceptance and Rome Statute membership. In doing so, though, the ICC would affirm its identity as a hybrid international court—a court not bound to the basic principles of criminal law and procedure.