



## **Will the annexation of the Crimea and killing of civilians in the Donbass be considered as crimes in The Hague? An expert explains.**

Why there is still no sufficient evidence of the crime against humanity committed by Yanukovich in the Hague and why Kyiv wants to wear two hats, explains David Donat Cattin, Secretary - General of **Parliamentarians for Global Action**.

**Interviewer:** Maria Guryeva, Press Secretary for Amnesty International Ukraine.

Recently, the Verkhovna Rada has submitted to the Constitutional Court of Ukraine the law on amendments to the Constitution of Ukraine in terms of justice, which puts the ratification of the Rome Statute for another three years off. This amendment was included by the Presidential Administration on November 25 without any explanations on the President's part.

David Donat Cattin, Secretary - General of **Parliamentarians for Global Action**, spoke about new prospects arising for Ukraine in case of immediate ratification of the Statute.

## **Ukraine has accepted the jurisdiction of ICC. What does it mean and how it differs from ratification of the Rome Statute?**

Rome Statute is an international agreement serving the foundation for establishment of the International Criminal Court. The competence of the ICC includes bringing to justice those who commit such crimes as genocide, crimes against humanity, war crimes and the crime of aggression.

The Rome Statute's draftsmen included in the Statute provisions that allow non State-parties to accept the jurisdiction of the court. In such a way, the State-parties allowed the court to be used as an ad-hoc tribunal that could have been created for single situations by the UN Security Council. This had happened in the 1990 ties for the Former Yugoslavia and Rwanda.

When you accept the jurisdiction as a non-state party you have all obligations, but you have no rights. That's what you have now. You cannot have any Ukrainian judge in the Court, you cannot vote in the Assembly of the State Parties, you cannot propose anything, you don't approve the court budget, you don't contribute to the court budget. You are basically a passive subject to the court jurisdiction but not an active subject of the Rome Statute system.

Now, within the jurisdiction, the situation has been defined in a broad way: anything happening in Ukraine from a certain date. But the judges may say 'no' to one situation and "yes" to another, you can never foresee what the judges will say.

As of now, the Court can already exercise its jurisdiction in Ukraine. However, in order to get the rights of the State-Party, Ukraine has to ratify the Statute. Instead of that, we see that the ratification has been postponed for 3 years.

There are arguments that it is necessary to wait for 3 or 4 years because Ukraine would need to issue an amnesty or adapt the national legal orders. These are false arguments, otherwise why has Ukraine accepted the jurisdiction in the first place if you need to give an amnesty to the person committing crime against humanity or the most serious war crimes? That amnesty is not possible nor is it allowed under International Law.

### **What might be the reason for this 3-year delay?**

It's politics. On one hand you are committing yourself to something because let's say you want to accept the ICC and change the Constitution so that you can ratify it, on the other hand you are sending the message to other major powers or other entities that, in any case, it is not going to really work because we are postponing it. You want to say "yes and no" at the same time, it is the old Soviet diplomacy. But Ukraine now is a modern democracy and it must decide where it stands.

When it's about protecting civilians, victims of extermination, torture, armed attack, whichever side it comes from, the innocent have the fundamental rights that must be protected.

### **We have two applications about Maydan. How ICC will treat them regarding the fact that Ukraine still hasn't ratified the Statute?**

The prosecutor presented the report, November 12, in which she said that, at the moment, not forever but as of now, she cannot proceed with a fully-fledged investigation because the evidence that she has managed to gather so far hasn't shown that it was systematic or large scale enough to meet the threshold of criteria of crimes against humanity.

It is important to realise that Ukraine has the sovereign right to bring to justice the authors of killings or other acts of violence that took place in the Euromaydan. The sovereignty of Ukraine has never been in question; there has not been an armed attack against Ukraine during that time. There hasn't been yet an active armed conflict in which to apply the law of "war crimes" which have a lower threshold of gravity vis-à-vis crimes against humanity. That's why we have a presumption that we need more evidence, the threshold is higher: in peacetime the sovereignty of the state is presumed to be "integral: and can exercise itself. So, at the end of the day, Prosecutors in The Hague said "we don't have enough evidence for crimes against humanity at this stage".

But if Ukraine had been a state party, you think the prosecutors would have been so quick in their determination? Maybe not, I would say because psychologically it would have been more difficult for them to justify this situation in respect of a State Party, which can in turn exercise some form of indirect influence on the Court's organs.

### **If Ukraine ratifies it, can we assume that ICC will pay more attention to this?**

Exactly. Once you are a State party you are a member of the club. You've agreed permanently to use the court for this purpose: "ending impunity". So, that's a difference between being a party and a non-party. Like Ukraine, Cote-d'Ivoire was a non-party but the trial started after it became a member of the court. So you have to look what is in the interest of Ukraine, that's why we were here with Parliamentarians of Global Action to advise the policy makers and urge the parliamentarians to push the ratification of the Rome Statute now, not 3 years or more after that the relevant constitutional amendment would be adopted.

Ukraine receives a lot of support from the international community, but there is also a request on the part of international community and the EU in particular, that Ukraine also commits itself in a serious way to fulfil its obligations. One of its obligations under the EU-Ukraine Association Agreement is exactly to ratify for good the Rome Statute, not to accept ad-hoc the ICC jurisdiction.

One of this obligations is to ratify the Statute, not just recognise an «ad-hoc» jurisdiction of ICC.

### **What are the prospects of Ukraine in ICC relating situations in Eastern Ukraine and in the Crimea?**

The ICC is certainly undergoing the preliminary examination on the situation in the East, and possibly also in Crimea, even though I am sure that the Court is certainly looking at what has been going on in the East of the country. What I can tell is that certain crimes are already fully under jurisdiction of the court, war crimes and crimes against humanity in particular. Any evidence can be found and evaluated by the Prosecutor.

Regarding the crime of aggression that is certainly a crime, which applies in the Crimean situation, here the Court cannot apply any jurisdiction because the definition of the crime of aggression was agreed in 2010, but the amendment to the Rome Statute did not enter into force. It will do so only after 2017 when the Assembly of the States Parties will make a specific decision that will need a 2/3 majority, and I am sure there will be this majority, because there was unanimity, consensus on the text.

But it would be very symbolic if Ukraine was there as a State Party to vote and take the decision together with the other Member States to activate the court jurisdiction of the crime of aggression in 2017. As of now, unfortunately, the crime of aggression cannot be applied.

### **Would it be possible to apply the “crime of aggression” to Crimea since the annexation has already happened?**

If the situation continues in the period, let me be cautious and realistic about this because we don't want to tell the public things that are unlikely to happen. This is very difficult, if not impossible, because the jurisdictional regime relating to the crime of aggression is more restrictive than the one on war crimes, crimes against humanity and genocide. In other words, you need to have a universally accepted jurisdiction from all sides, all states involved in the armed conflict. Or you need the Security Council to refer a certain situation to the Court's jurisdiction, but with the Russian Federation being a permanent member of the SC this will not happen.

Yet, the fact that the crime of aggression as such is codified, and the fact that the crime enters into force really brings up the level of pressure on the authorities involved in this operation to fix it, to go back to the Crimean people, to the Ukrainian government and allow them to take the decision about the future of Crimea because an essential norm of international law stipulates that there cannot be legal effects arising from a wrongful act. The status quo is not lawful under international law and will never be recognized as such under international law. This technique or tactic to annex, to create ad hoc, self-proclaimed territories has no standing in the international law.

What is most important is that international law applies to individuals who are the beneficiaries of rights and of the correct exercise of sovereignty by states and are also the persons liable for breach of law because who is committing war crimes and crimes against humanity? Certain individuals, not states and they have to be brought to justice sooner or later. And the fact that responsibility for war crimes or crimes against humanity may be attributed to individuals who are also committing the crime of aggression can, in and of itself, be evaluated as a seriously aggravating circumstance by the Judges of the Court.

### **How Ukraine would benefit the immediate ratification?**

First benefit is that Ukraine is standing in the international community as a law-binding nation in a permanent but not ad-hoc selective manner. So, ratification reflects a decision to permanently and generally promote the Rule of Law. All the EU members ratified the ICC: if Ukraine wants to be part of the EU, it needs to be part of ICC.

Secondly, from the jurisdictional benefit – even if there is the jurisdiction of the court over Ukraine now, the fact that Ukraine is not a state party is a psychological disincentive for the Prosecutor and the Judges to really promote and advance effective investigations. This is something that the Court officials will never admit, but I can say as an NGO activist that this is the reality. Until you are a State Party, you are really seen as a sort of an exceptional actor in the system, once you are a party – you are seen as a member of a club and you are given all the examination and the attention you deserve.

Thirdly, as a State Party it's not only about being obliged to respect the Rome statute, cooperate with the court and punish the criminals. Being a member of the Statute means being a State Party that can elect judges, prosecutors, form the policies, adopt the budget and take the decisions that are needed to be taken in the governance of the institution. And the States are the ones shaping its policies. So, as of now, Ukraine is out. Of course, Russia is also out, so it's up to you to decide whether you are in or out. I would humbly assume that it would be absolutely in the best interest of the Ukrainian people if Ukraine were, without any further delay, a State Party of the Rome Statute of the ICC, hopefully its 125<sup>th</sup> State Party!