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## The Rome Statute of the ICC is a guarantee for the Rule of Law in Ukraine: Time to Decide Where Ukraine Stands

### *A Response to Mr. Oleksandr Chebanenko*

#### Introduction

On 28 September 2019, an opinion article, entitled “*The Rome Statute is a trap for Ukraine*” written by Deputy Minister of the Interior Oleksandr Chebanenko, was published in Ukrainian media. As explained below, I respectfully but firmly disagree with the opinion expressed therein.

Mr. Chebanenko extracted and reproduced out-of-context a number of quotes containing constructive criticism by ardent supporters of the Rome Statute of the International Criminal Court (ICC, Court), including staff of Amnesty International (AI), a prominent member of the Coalition for the ICC (CICC), and a representative of one of the most active States Party to the Statute, the United Kingdom (UK), as well as various statements by media outlets. As a consequence, his attacks against the decision of Ukraine to ratify the Rome Statute of the ICC are confused, misleading and inaccurate. Most significantly, the article contains repeated **mistakes of law** derived from media misquoted or misinterpreted articles and opinions. The end-result of his reasoning would be against the *national interest* of Ukraine to strengthen its domestic and international tools to combat impunity for atrocity-crimes and would weaken the *international standing* of Ukraine as a credible member of the international community, in particular damaging its relations with the European Union.

#### Achievements of the ICC to date

The context of the critical comments cited by Mr. Chebanenko was the 20th anniversary of the Rome Statute (1998-2018) and related reflections on the achievements of the Court to date and prospective discussions of means to improve the Court's performance.

Since its entry into force on 1 July 2002 and its progressive operationalization in 2003, the Rome Statute system had to face a number of *external and internal challenges*. In this respect, Mr. Chebanenko omits to make reference to the most significant external challenge that characterizes **every** international organization, in particular every international jurisdiction: Given that States retain sovereign powers in respect of their territories, the ICC depends on the cooperation that States can offer to execute the arrest of suspects, the protection of witnesses and victims, the gathering of evidence –including testimonies – through compulsory means, and any other step to be realized through law-enforcement coercive action, which remains under the absolute monopoly of sovereign States. This is the reflection of the fact that International Law is the creation of States, and States want to retain their sovereignty. As demonstrated by the 15 outstanding public arrest warrants issued by the Court, as well as numerous failures by States to execute Court's requests for cooperation, this state of affairs creates significant challenges, with the risk of undermining the Court's mandate and, ultimately, its efficacy and efficiency. This will, nevertheless, remain the *status quo* as long as States will not decide to exercise their sovereignty in a joint manner through the establishment of a supranational world-Government. Needless to say, we are still very far away from that stage of development of international relations and International Law, which aspires to be the ultimate guarantee of a world

order where *the force of law* (the Rule of Law) and *not the law of force* would govern the relations amongst peoples and communities.

Taking stock of the reality as it is, supporters of the ICC – including States Parties and non-governmental organizations (NGOs) – are convinced that States must do their best with what they have, in particular the Rome Statute system. Indeed, we have a collective duty to join, contribute to, and strengthen the Rome Statute system for a number of reasons, including:

- The need to send a clear signal to perpetrators of international crimes that if States are unable or unwilling to bring them to justice, there is a court in The Hague that **can** do so.
- The Court **can** have **jurisdiction** *for good* and *without limitation* over crimes committed in the territories or by nationals of States that ratify its Statute, while the Court can have special jurisdiction on specific situations if States Non Parties accept *ad hoc* its jurisdiction or if the UN Security Council refers specific situations to the Court's jurisdiction.
- Albeit imperfect, the ICC is a symbol of justice that **can** deter perpetrators to escalate their crimes into massive scales of inhumanity that characterized the history of the XX century. During these last 17 years in which the Court has been operational (since 2003), Members of Parliament from Parliamentarians for Global Action (PGA) witnessed this deterrent effect firsthand, with parliamentarians reporting that in their countries both Non State actors (e.g. warlords and rebels) and senior Government officials, mindful of potential incrimination by the ICC, gave orders or took decisions to limit or even halt the use of violence against civilians.

**While the ICC has *not yet* performed in accordance with its full potential, its very existence brought about a change that, in and of itself, has been the main achievement of the Rome Statute:** 77 States Parties decided to reform their national legislation and incorporate most of the Rome Statute crimes and principles of international criminal law in their domestic legal orders, hence eliminating many safe havens for alleged “war criminals.” National prosecutors and courts took notice of the adoption of the Rome Statute in pivotal national decisions and judgments. One of such landmark decisions was issued by the Spanish investigative Judge Baltazar Garzón, who launched a prosecution against former Chilean dictator Augusto Pinochet only *after* the Rome Statute had been adopted. In the Judge's consideration, the Rome Statute codified the customary law status of International Criminal Law at least since 17 July 1998.

It is incorrect to assess the impact of the ICC from the limited number of public charges that it has brought against alleged perpetrators of international crimes and the only three (3) convictions that it has achieved in approximately 17 years (not 20) of its functioning: While it is self-evident that the ICC could have done more and better, the Rome Statute positioned itself as a centerpiece of a new system in which individual criminal responsibility should apply to all, and *not only* to those who lose an armed conflict (like the Nazis after World War II or the *genocidaires* following the Rwandan conflict), *but also* those who manage to remain in power, as Serbian President Slobodan [Milošević](#) did during the first eight years of functioning of the International Criminal Tribunal for the former Yugoslavia (ICTY) or as Sudanese President Omar al Bashir for nearly a decade after the issuance of the first arrest warrant by the ICC. It is indeed a great achievement for the International Community to now have a permanent court – following in the steps of the ad hoc tribunals for atrocities in specific conflicts – that is able to indicate to the entire world that impunity for alleged war criminals, including Heads of States, should not be accepted as “business as usual”.

### Terrorism and Aggression

Terrorism is a crime that exists in every Penal Code and can entail diverse types of attacks against human life and dignity, committed with a purpose to spread terror and generate subversion in society. Article 51(2) of Additional Protocol I<sup>1</sup> and Article 13(2) of Additional Protocol II<sup>2</sup> to the 1949 Geneva Conventions specifically prohibit ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’.

The nature of the acts of violence or threats thereof constitutive of terror can vary and a terrorist attack may entail the killing or even the wounding of only one individual. While *terrorism as such* was not included in the “Nuremberg Charter” or in the Statutes of international tribunals or the Rome Statute, the prohibition of spreading terror among the civilian population has been nevertheless adjudicated by the ICTY in *Galić* as a war crime, in reliance on the above-mentioned Articles of Additional Protocols I and II.<sup>3</sup>

It follows that if any combatants, including unlawful ones such as terrorists, intervene in an armed conflict and carry out attacks to terrorize the civilian population, they may be liable for war crimes. Similarly, if terrorists decide to carry out widespread or systematic attacks against civilians, they commit and may be liable for crimes against humanity. And if terrorists are advancing a plan or policy with the specific goal to destroy an ethnic, racial, religious, or national group, they can be incriminated for genocide. Mr. Chebanenko is completely omitting these considerations, and is therefore misleading the Ukrainian public in respect of the applicability of the Rome Statute to rebel and foreign forces who could be accused of perpetrating war crimes and crimes against humanity in Ukraine’s territories, including Crimea and Donbas. It would be disingenuous to describe these groups as terrorists. These individuals formed part of armed groups that are supported by powerful States with the view to use

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<sup>1</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>2</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

<sup>3</sup> Prosecutor v Galić (*Trial judgment*), IT-98-29, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 December 2003. The Trial Chamber relied on Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II to the 1949 Geneva Conventions.

armed force against Ukraine's territorial integrity and sovereignty and political independence, which are the normative features of the act of aggression.

In this respect, Mr. Chabanenko fails to recognize that the amended Rome Statute of 2010 is the *only* International Law instrument that contains a universally accepted definition of the crime of aggression. While there are jurisdictional limitations to the applicability of the definition before the ICC itself for crimes committed by nationals of States Non Parties to the Rome Statute (e.g. President Vladimir Vladimirovic Putin), the very existence of this definition in the Statute may compel leaders and actors to be more prudent and careful in their conduct, as evidenced by the resignation letter of the Deputy Legal Advisor of the UK ahead of the invasion of Iraq by the US and the UK forces in 2003, which the Deputy Legal Advisor associated with the Rome Statute's definition of aggression. The reason why major powers do not ratify the Rome Statute lies also behind their fear that their power will be limited by the use that small and mid-powers can make of the Court's definition of the crime of aggression. In the same vein, 122 States (including two nuclear weapons' powers, some regional powers, and many countries with mid- or small-scale militaries) decided to join and remain within the Rome Statute system with the aim to prevent eventual abuses of power by the so-called "super-powers". **Where does Ukraine want to belong?**

Additionally, notwithstanding the separation between *jus in bello* and *jus ad bellum*, if the ICC or a Ukrainian court were to assess the gravity of the conduct of a leader ordering an attack against civilians in unlawfully occupied territories within Ukraine (e.g. Donetsk or Luhansk), that same court would be able to consider an aggressive war as an "aggravating factor" for war crimes or crimes against humanity, and consequently increase the penalty for the leader in question. Therefore, it is wrong to affirm that the crime of aggression as defined in the amended Rome Statute may not have any positive impact on eventual criminal cases against leaders of aggressive powers in the context of Ukraine. In fact, the Russian Federation opposes the ratification of the amended Rome Statute in part for this very reason, as it would prefer seeing the ICC fully controlled by the UN Security Council in the realm of aggressive wars. Fortunately, this is not the case; the ICC is an independent institution, not a servant of the Security Council. So, the question to be asked is: **Where does Ukraine want to stand? Does Ukraine stand for ratification of the amended Rome Statute or does it take the same position as Russia against ratification?**

#### The definition of war crimes and the downing of MH17

The most misleading and incorrect assessment of Mr. Chebanenko regards the man-made tragedy of MH17, as he infers from statements of the Dutch Justice Minister and other authorities concerning the fact that, under the Rome Statute's definition of war crimes, persons responsible for the killing of more than 200 civilians in a civilian airplane would be acquitted. This is not true.

Firstly, the war crimes' definitions under the Rome Statute of 1998 reflect the definition of grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict, which are binding upon Ukraine. The ICC therefore has no more legal basis or likelihood of acquitting the attackers than Ukrainian, Dutch or other national courts with jurisdiction, as the law on war crimes is, in its substance, identical.

Secondly, and most importantly, it is very clear that the downing of a civilian aircraft flying at 10,000 meters of altitude is a prohibited conduct in armed conflict that is punishable as a war crime of intentionally directing attacks against the civilian population as such or against individual civilians not

taking direct part in hostilities, whether the conflict is international<sup>4</sup> (e.g. the conflict in Donbas, as affirmed by the ICC Prosecutor's initial findings) or non-international<sup>5</sup> (as the Russian Federation tries to unpersuasively assert).

Thirdly, even if the person who makes use of a missile-device makes a mistake believing that a civilian object was a military object, under the principles of distinction, proportionality, military necessity and precautions in attack, it is appropriate to attribute a serious degree of criminal responsibility to that direct perpetrator, who would be held accountable. At the same time, it is absolutely imperative to ascertain the criminal responsibility of the military leaders who failed to prevent or repress the crime, and who are exercising effective control over the direct perpetrator(s), as military leaders of the Russian Federation apparatus may be found to have done in a criminal trial (whether in The Netherlands, Malaysia, Ukraine or the ICC) that would examine evidence about the origin of the missiles and the failures of these leaders to prevent atrocity-crimes when they provided rebels with this sophisticated missile-technology without proper training on its use.

What is the basis of the legal principle that would attribute responsibility to Russian military leaders for the war crime of targeting and destroying MH17, a civilian target? Article 28 of the Rome Statute, which codifies the norm on command responsibility under customary international law, firmly enshrines this principle. Therefore, the opinion of Mr. Chebanenko is erroneous and dangerous, as it subtly purports to mislead the Ukrainian public to believe that Russian Federation's leaders exercising effective control over Donbas be used as a defense against responsibility under the Rome Statute of the ICC for war crimes, such as the downing of MH17.

### Other criticism of the ICC

There are other false affirmations in Mr. Chebanenko's article:

- A) It is not true that **intoxication** is a defense in the ICC under any circumstance. If intoxication has been caused by the perpetrator himself (who deliberately took drugs or alcohol), intoxication in fact is **not a defense** and may be even interpreted as an aggravating factor of individual criminal responsibility, given that the Judges must assess the gravity of the conduct and the personal circumstances of the perpetrator when modulating the penalty. Mr. Chebanenko fails to understand the letter of Article 31, which correctly says that a person who has been intoxicated by others may not be held liable for his involuntary acts, which shall be attributed to the criminal responsibility of others (i.e. the intoxicated person is an *instrumentum criminis* of another person, who is liable).
- B) It is not true that the ICC Prosecutor will not be able to investigate crimes committed by Russian nationals in Russian territory, because Russia is not a State Party to the Rome Statute: If Russians' conduct had criminal *effects* in Ukrainian territory, such conduct would form part of the ICC investigation [*see, e.g.* the recent Pre-Trial Chamber decision on jurisdiction in the Rohingya situation in Myanmar (Non Party State) and Bangladesh (Party State) regarding the crime of deportation allegedly committed by Myanmar officials<sup>6</sup>]. Additionally, any criminal

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<sup>4</sup> UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, Art. 2(b)(1).

<sup>5</sup> Ibid, Art. 2(e)(1).

<sup>6</sup> Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18-37, Pre-Trial Chamber I (Decision), 06 September 2018.

conduct carried out in Crimea or Donbas by anyone, including Russians, will fall part of the ICC jurisdiction as under International Law, the territory of Ukraine encompasses those unlawfully occupied regions. Once again, the misinformation advanced by Mr. Chebanenko appears to indirectly suggest to the Ukrainian public that there is nothing to do against criminal conduct attributed to Russian nationals. This is incorrect and may be used to justify ill-advised policy options.

- C) While it is true that the Russian authorities have inundated the ICC with materials concerning the alleged responsibility of Georgians or Ukrainians in respect of purported crimes, Mr. Chebanenko fails to explain that the seriousness and gravity of these allegations are as such that the ICC Prosecutor may not proceed with any case against Georgian or Ukrainian nationals. On the contrary, the same criteria informing the exercise of the Court's jurisdiction under the Rome Statute are making Russian Federation policy-makers very nervous: Hence, their decision to attempt to "withdraw the signature" of the Rome Statute (despite these efforts, the Russian Federation still remains a signatory State, which had, in fact, voted in favour of the adoption of the Statute on 17 July 1998) and their decision *not* to ratify it. These are the facts. The rest is propaganda.
- D) While it is true that several ICC prosecutions have been interrupted due to unsuccessful investigations by the Prosecutor and the prevailing reconstructions of facts presented by the defense, it is incorrect to characterize this weakness as justification not to join the Rome Statute. The ICC is a court of law, where individuals may be convicted only if judges are convinced that the accused is guilty beyond reasonable doubt of specific crimes. It is, of course, correct to criticize the Office of the Prosecutor for its record of cases, yet the best remedy to this problem is not to advocate against Ukraine's ratification of the Rome Statute, but to push for Ukraine to join the ICC system as soon as possible so that Ukraine can contribute to the Assembly of States Parties' processes to elect the new Prosecutor and Judges in 2020. Only States Parties to the Rome Statute can take measures to reform the Court and make it more effective and efficient.
- E) While it is true that Burundi, South Africa, and The Gambia began the process of withdrawal from the Rome Statute in 2016, it is not true that they all withdrew: South Africa and the Gambia decided to halt these process in 2017 and are now firmly States Parties to the Rome Statute. The decision of Burundi's President to withdraw from the Rome Statute has been triggered by an opening of a preliminary examination by the ICC Prosecutor for systematic crimes against humanity against unarmed political opponents. As reported by the UN, it is alleged that the President of Burundi acted as the mastermind behind these crimes. His decision to withdraw was therefore forcefully criticized by most actors in the International Community. A similar scenario took place when Philippines' President Rodrigo Duterte took the decision to withdraw, in the face of an ICC preliminary examination into mass killings in his so called "war on drugs." Does Ukraine wish to be associated with law-abiding nations that joined the Rome Statute or with controversial regimes responsible for grave human rights violations that are exiting the Rome Statute system?
- F) Mr. Chebanenko writes that "*the ICC did nothing to arrest the Sudanese President*" Omar al-Bashir: This is absolutely false. The ICC issued a number of binding decisions demanding his arrest and surrender to the Court, which certain States Parties to the Rome Statute ignored and violated. In the case of South Africa, this matter was litigated in domestic Courts and led to a

judgment in which the High Court of Pretoria condemned the Zuma Administration for a violation of legal obligations contained in the 2002 ICC Act of South Africa, namely, the obligation to arrest and surrender persons requested by the ICC.

Even if most States Non Parties, such as the USA, are not under a legal obligation to arrest and surrender persons wanted by the ICC in the situations of Darfur/Sudan and Libya due to loopholes in the Resolutions of the UN Security Council referring these situations to the ICC jurisdiction, President al-Bashir never travelled to the UN General Assembly in New York after being indicted before the ICC due to the fear that the US Government would have arrested and surrendered him to a State Party to the Rome Statute (i.e. The Netherlands). All this happened as a consequence of the ICC arrest warrant, which was disseminated by the ICC to all UN Member States, including all States Non Parties to the Rome Statute.

- G) Mr. Chebanenko falsely claims that the call to ratify the Rome Statute comes from “2500 NGOs.” He ignores that the fact that the Verkhovna Rada of Ukraine voted unanimously for the enactment into law of the ratification of the EU-Ukraine Association Agreement<sup>7</sup>, which, in its Article 8, imposes an obligation on Ukraine and all EU Member States “to cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court (ICC) of 1998 and its related instruments”. In fact, all EU States are Parties to the Rome Statute. **Now it’s the time for Ukraine to join them without any further delay.**

[David Donat Cattin, 7 October 2019]

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<sup>7</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part; L/163, 29 May 2014.