

Canada joins in the referral of the situation in Ukraine to the International Criminal Court

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By: Sylvie McCallum Rougerie

On March 2, 2022, the Chief Prosecutor of the International Criminal Court announced that he had received a coordinated referral from 39 States Parties to investigate the recent military invasion of Ukraine by Russian forces. Canadian observers will recall that Minister of Foreign Affairs Mélanie Joly had announced, a few days earlier, that Canada intended to request an investigation from the Court. This is only the second time that States Parties have exercised the State referral power to initiate an investigation under the Rome Statute.

Canada's referral

Interestingly enough, Canada and Colombia are now the only States to have made referrals twice, two countries with very different political considerations at play in their relationship to the Court.

Minister Joly took the opportunity to re-affirm its support of the Court:

“We do not take this decision lightly. We have repeatedly called on Russia to cease its unprovoked and completely unjustifiable attacks on Ukraine and engage in meaningful dialogue. However, as the horrific events in Ukraine unfold before our eyes, it is now clear that more must be done.

The ICC has our full support and confidence. We call on Russia to cooperate with the court.”

The State referral process

For those less well versed in the procedural rules of the ICC, these announcements raise some basic questions: what is the effect of a State referral, and why is it necessary?

Opening an investigation into a “situation” holds a specific meaning at the International Criminal Court. When information first comes into the Office of the Prosecutor (OTP), any work done on the matter is considered part of a “preliminary examination”. The ICC can move to the next phase - the formal opening of an investigation - in one of three ways: the Office of the Prosecutor can seek judicial authorization to begin an investigation of its own accord (articles 13(c) and 15); the situation can be referred to the Court by the UN Security Council (article 13(b)); or the situation can be referred to the Court by a Member State (article 13(a) and 14).

In the case of Ukraine, the UN Security Council is unlikely to intervene given that Russia is one of the permanent members which holds a veto.

The coordinate joint referral followed an announcement by ICC Chief Prosecutor Karim Khan on February 28, 2022, that he intended to open an investigation into the situation in Ukraine.

What is the value of this referral, then, if the OTP was prepared to exercise its *proprio motu* power to launch an investigation? As noted above, while the OTP does have the power to initiate an investigation, article 15(3) of the Rome Statute requires that the OTP first submit a request, along with supporting evidence, to the Pre-Trial Chamber of the Court for authorization to proceed. This application is not a mere formality; in deciding whether to authorize an investigation to be commenced, the Pre-Trial Chamber considers not only whether there is a reasonable factual basis to proceed, but also issues of substantive jurisdiction.

A State referral can accelerate the launch of an investigation as Article 14 of the Rome Statute does not impose the same judicial check. A referral by a State Party therefore can reduce the time required for this step and eliminate the possibility that the Pre-Trial Chamber will decline to authorise a proprio motu investigation, as it did in the case of Afghanistan.

The need for a State referral is also the result of Ukraine's unique situation in the ICC. Ukraine signed the Rome Statute of the International Criminal Court in 2000 but never proceeded to ratification. Because it is not a member of the Court, so it cannot refer the situation to the Court itself. However, because it formally accepted the jurisdiction of the Court on an indefinite basis in 2014 after the Russian invasion of the Crimea, the Court has substantive jurisdiction over crimes committed on Ukrainian territory.

In his February 28 statement, Chief Prosecutor Khan said that he has a reasonable basis for opening an investigation into war crimes and crimes against humanity, two of the four crimes within the jurisdiction of the Court. He also stated, however, that he intends to investigate "any new alleged crimes falling within the jurisdiction of [his] office that are committed by any party to the conflict on any part of the territory of Ukraine." This is consistent with the guidance provided by the Appeals Chamber in its 2020 decision on the launch of an investigation into the Situation in Afghanistan. According to the Appeals Chamber, the OTP is not restricted to investigating the specific incidents identified in the request, as listing and documenting all possible crimes and perpetrators at such an early stage would be unduly onerous on the OTP. Once authorized to investigate, the OTP must investigate the Situation as a whole.

The crime of aggression

The one asterisk on this is the court's ability to prosecute for the crime of aggression. Whether an investigation is requested by a State party or initiated *proprio motu* by the OTP, the Rome Statute imposes additional requirements on the exercise of jurisdiction over crimes of aggression. For one, Article 15bis(5) states that in respect of a State that is not a party to the Rome Statute, as is the case of Russia, "the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory". On its face, this rule appears to foreclose the OTP's ability to investigate or initiate prosecution of crimes of aggression against high-ranking Russian officials, including President Vladimir Putin.

That being said, the jurisdictional provisions on aggression only came into force in 2018, and there is no judicial guidance on them so far. Given the novelty of the provisions, might we see the OTP try to advance less strict interpretations of them? It remains to be seen whether the rules can leave space for creative arguments on the interpretation Article 15bis that might permit the Court to assume jurisdiction in respect of aggression in instances like this one, where neither party to a conflict is a State Party to the Rome Statute.

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