Chapter 9

Effects of war crimes in the Rome Statute on national systems of prosecution
With particular emphasis on universal jurisdiction

Réka Varga

Abstract

This chapter explores the interplay between the International Criminal Court (ICC) and domestic legal systems, focusing on how war crimes provisions influence national prosecution efforts. Emphasizing the ICC's principle of complementarity, the analysis highlights both the legal obligations and the practical challenges faced by national courts in prosecuting core international crimes. It demonstrates the critical importance of adequate domestic legislation and judicial capacity, particularly in systems where the direct application of international law remains limited or ambiguous. The study addresses difficulties in implementing treaty and customary international law, revealing gaps in national legal frameworks and judicial preparedness. A special focus is given to the re-emergence of universal jurisdiction, particularly in light of the Russian-Ukrainian conflict. The chapter discusses Ukraine's partial incorporation in its legislation of the Rome Statute's definitions and the efforts of European and overseas states in initiating war crimes investigations based on universal or extraterritorial jurisdiction. These developments illustrate both the promise and the complexity of international criminal justice when national systems are tasked with upholding global norms. The chapter concludes by reaffirming the

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vital role of national courts in closing the impunity gap and stresses that the ICC's success depends largely on states fulfilling their responsibility to prosecute war crimes effectively, guided by international legal standards and supported through coordinated global efforts.

Keywords: International Criminal Justice, War Crimes Prosecution, Domestic Courts, Russian-Ukrainian Conflict, Universal Jurisdiction

1. Introduction

As the International Criminal Court's (ICC) first president, Philippe Kirsch, said, the Court would be truly successful if no case were brought before it, as this would mean either that international crimes are not committed anymore or that states are able and willing to investigate them.[1] The ICC stands as a significant milestone in the broader international project aimed at establishing global justice and enhancing accountability for international crimes.[2] However, inherent challenges arise from the interplay between the ICC, its complementary principle and the complexities of national lawmaking. The interplay between the Court's jurisdiction and the complementarity principle, which emphasises the primacy of national legal systems in prosecuting international crimes, introduces complexities that reflect the potential tensions between international and domestic legal frameworks. Notwithstanding these challenges, we must underline the pivotal role of national courts in investigating and prosecuting core international crimes, with the ICC serving as a potential jurisdictional authority if states fall short in fulfilling their prosecutorial duties.

This chapter assesses the effects of war crimes in the Rome Statute on the readiness of domestic courts to handle war crimes cases, highlighting the limited number of national procedures and the complexities associated with prosecuting such crimes. This is then followed by a discussion on the re-emergence of universal jurisdiction, a vital tool in the context of the Russian-Ukrainian conflict, which, by complementing the efforts of the ICC, is starting to take centre stage in Europe and overseas.

1 Kardos and Lattmann, 2013, p. 377.
2 Reynolds and Xavier, 2016, p. 960.

2. Effects of international law on national lawmaking and national jurisprudence: the ICC complementarity principle

The Rome Statute of the ICC and its complementarity provision[3] illustrate potential challenges arising from disparities between international and national lawmaking. States are obligated to enact legislation enabling their courts to prosecute war crimes, aligning with the Geneva Conventions and Additional Protocol I. The Rome Statute's complementarity provision emphasises the significance of national courts' actual investigations and prosecutions,[4] with the ICC potentially assuming jurisdiction if a state fails to or does not prosecute.[5] Unlike the Geneva Conventions, which lack a clear standard for implementation and offer no direct consequence for non-compliance,[6] the Rome Statute establishes a tangible effect: the ICC can take over a case if a state neglects its prosecutorial obligations.[7] In fact, the complementarity principle was one of the main reasons why states examined whether their national laws were adequate to apply international criminal law.[8] The interplay between the Geneva Convention's obligation and the Rome Statute's complementarity provision highlights a complementary relationship, with the latter reinforcing the former's weight.[9]

Although the "threat" that the ICC complementary principle encourages jurisdictional states to proceed was seen as one of the great achievements of the Rome Statute,[10] the ICC is not intended as an appellate court freely taking cases from national courts.[11] While the criteria of inability and unwillingness make sense in many cases, they should not be and are not wielded as a freely usable discretionary tool by the ICC. Fundamental differences exist between the ICC's complementarity approach and the jurisdictional primacy of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The ICC aims to refrain from

3 ICC Rome Statute, Article 17: *'1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (…)'.

4 Holmes, 2002, p. 668.

5 Bárd, 2003, p. 320 ff.

6 Varga, R., 2007.

7 Robinson, 2010, p. 25, and Varga, R., 2006, pp. 95-98.

8 Bárd, 2003, p. 320 ff.

9 Varga, R., 2014, pp. 81-82.

10 Robinson, 2010, p. 25, and Varga R., 2006, pp. 95-98.

11 Van der Wilt, 2008, p. 232. and p. 257: *'The International Criminal Court is not expected to repair unfair trials, as it is not meant to be a human rights court, nor is it in a position to mitigate or aggravate sentences, imposed by domestic courts'.* Also see Holmes, 2002, p. 673, and Varga, R., 2014, p. 83.

extensive scrutiny of domestic proceedings, limiting itself to fundamental questions rather than engaging in detailed revision.[12]

3. Can international law really be directly applicable?

3.1. Treaty law

Adequate national implementation of core international crimes is thus a prerequisite of domestic procedures. The primary reason given when states refuse to implement international humanitarian law treaties is the argument that, based on states' constitutions, international law automatically becomes part of domestic law upon promulgation (dualist systems) or publication (monist systems). However, this provision often fails to address challenges faced by states in applying humanitarian law treaties because in numerous instances, there is no clear-cut distinction between monist and dualist approaches, but rather a combination of both.[13] Furthermore, direct application of international law by national judges may cause problems. When a state becomes party to a treaty without adopting implementing legislation, the promulgation alone may not be enough for judges to try someone for war crimes directly based on these treaties.[14] This chapter interprets direct applicability as requiring the application of international law, that is, the promulgated treaty. Consequently, if the treaty rules are not implemented into existing internal norms (e.g., the Criminal Code), judges may have to apply the Geneva Conventions/Additional Protocols directly, creating complexity due to constitutional issues and the differences between international and national law systems.[15]

12 Holmes, 2002, p. 668.

13 The constitutions of Bosnia-Herzegovina, Estonia and Hungary recognise general principles of international law. The constitutions of Macedonia, Poland, Slovakia and Slovenia say that self-executing treaties are directly applicable. The Croatian, Lithuania, Estonian and Slovak systems (although the Slovak Constitution mentions promulgation of international treaties, many Slovak authors argue that the Slovak system is monist) seem to be monist or have monist elements in their constitutions. The Bulgarian, Czech, Hungarian and Polish constitutions are dualist or have dualist elements: the Bulgarian Constitution says that ratified, promulgated and in-force treaties are part of national law, the Czech Constitution refers to promulgated treaties, and the Hungarian and Polish constitutions mention publication of international treaties. See Varga, R., 2014, p. 81.

14 By "direct application of international law by domestic courts", the present study means application by domestic courts of rules of international treaties that were ratified by the given state but whose provisions had not been implemented into national law. For instance, applying a grave breach of the Geneva Conventions in a criminal procedure in a state that had ratified the Geneva Conventions but had not implemented that specific grave breach into its penal code. Similarly, direct application could also mean an application of a customary rule without its having been implemented into national legislation. See Varga, R., 2014, p. 118.

15 Kis and Gellér, 2005, p. 364. Also see Varga, R., 2014, p. 119 and the ministerial explanation to the

International law often lacks the detailed regulations needed for effective judicial application,[16] leading to questions about references for elements of crimes, sanctions and consideration of international case law and customary law. Depending on the state's legal system, judges may either successfully address these issues through direct application or struggle due to unclear domestic legislation, potentially leading to very lengthy procedures or charges being dropped. If a state adopts inadequate implementing legislation, it may face challenges enforcing international treaties, raising questions about breaches of international obligations.[17] Degan notes that a national judge cannot give direct effect to international obligations unless authorised by national law.[18] The level of authorisation depends on both national legislation and judges' willingness to apply international law. In theory, if international law is part of the national legal order, it becomes directly applicable, but challenges arise when elements necessary for adjudication are drawn from non-treaty sources. For instance, the Elements of Crimes in the ICC Rome Statute, though not binding, serve as interpretative aids during ICC proceedings[19] and could guide national courts.[20]

3.2. Customary law

The issue of directly applying international law becomes more intricate with customary law, especially in cases of universal jurisdiction where in many cases the jurisdictional base is founded on customary international law. Degan notes that, without national authorisation, the *nullum crimen sine lege* principle hinders judges from implementing the *aut dedere aut judicare* principle based on customary international law or treaties. A potential solution lies in the transformation of accepted customary law into the national legal framework, as exemplified in the Hungarian Fundamental Law that accepts generally recognised rules of international law as part of the national legal order.[21] While debate exists about whether this includes *ius cogens* or customary international law, such a transformation could facilitate judges' application of unwritten, binding international law.[22] Even in cases where a state transforms customary law into its national legal order, the question of adequate implementation measures is relevant.

Certain states find customary law elusive and vague, or even controversial: the Dutch Supreme Court in the Bouterse case[23] rejected reliance on customary law

German Völkerstrafgesetzbuch.

16 As for collision of direct application of the Rome Statute with the principle of legality, see Cottier, 2005, p. 4.

17 Wiener, 1995, p. 203.

18 Degan, 2005, p. 212.

19 Dörmann, 2003, p. 8.

20 Varga R., 2014, pp. 119–121.

21 The Fundamental Law of Hungary, 25 April 2011, Article Q para 3.

22 Varga R., 2014, pp. 122–123.

23 Supreme Court of the Netherlands, nr. HR 00749/01 CW 2323 LJN: AB1471, NJ 2002, 559.

conflicting with national law. Van der Wilt acknowledges the lack of precision in rules of international customary law but argues that if certain standards, like the prohibition of torture as *ius cogens*, require states to prosecute perpetrators, domestic legal impediments may not excuse neglecting such obligations.[24]

The elusiveness of customary law should not impede its application, given its equal binding status with treaty law. The identification of whether a norm is customary and consequently its enforcement lies – among others – with the state, and while it may be unrealistic for the legislature to systematically implement customary law, judges bear the responsibility to determine its customary nature. The elusiveness of customary law warrants cautious determinations by judges, favouring a restrictive rather than a broad approach.[25]

3.3. Are domestic courts really ready to try war crimes cases?

The limited number of national procedures hampers the effective prosecution of serious war crimes, necessitating collaboration between national authorities, the international community, and the ICC to avoid an "impunity gap".[26] Several factors contribute to the practical challenges in prosecuting war crimes. First, war crimes are typically interconnected, resulting in multiple accused and numerous cases to be tried.[27] Second, the processes for handling war crimes require expert understanding of international law, legal precedents, and the application of domestic law with a view to international law. Accessing primary and secondary sources can often be challenging due to physical unavailability or language barriers, despite the Internet. Third, war crimes procedures are often costly and time intensive. The geographical and temporal distance between the crime scene and the trial location makes evidence retrieval difficult, witnesses may be distant and speak different languages, and cooperation with other states' authorities is crucial, making proceedings dependent on the cooperation of the state where the crimes occurred. These complexities may contribute to judges' hesitancy in handling war crime cases.[28]

Although prosecutors and judges technically apply national law during procedures due to the promulgation of international treaties, they require specialised knowledge of international law. Merely navigating relevant international treaties is insufficient; familiarity with the literature, international jurisprudence, and related international norms is essential for effective handling of war crimes cases.[29]

Furthermore, trying war crime cases is not necessarily a career motivator for judges. The legal intricacies and lengthy procedures may not contribute significantly to judges' career statistics.

24 Comment by Harmen van der Wilt, Bouterse-case, ILDC 80 (NL 2001), C5.
25 Varga R., 2014, p. 123.
26 Kirs, 2012, p. 19. Also see ICC, 2003, p. 3.
27 Kirs, 2012, p. 19. Also see Kirs, 2008, p. 31.
28 Varga R., 2014, pp. 158–159.
29 Mettraux, 2006, p. 371.

Another factor is that political considerations often come into play when dealing with one's own nationals or nationals of powerful nations, leading to potential dropping of charges or attempts to exclude the criminality of the accused.[30] A comparative analysis of national judges' behaviour reveals reluctance to apply international law when perceived as injuring national interests.[31] Recognising the problem of the independence of national courts when dealing with international law, the Institute of International Law in its document emphasised maintaining their independence. Prosecutors and judges play crucial roles, impacting the success of national processes[32] as they hinge on their decisions. Prosecutors may opt to drop charges citing a purported lack of jurisdiction, denying the international law character of the crime or attempting extradition rather than pursuing domestic prosecution. Judges, on the other hand, may adopt a restrictive interpretation of jurisdictional issues or apply ordinary crimes instead of recognising the international nature of the offence.[33]

Some states address these challenges by hiring experts and systematically collecting materials on international law. Unfortunately, Central European countries often lack such measures, leaving prosecutors and judges to navigate these difficulties themselves. While states may attribute the lack of judicial preparedness to judicial independence, it is essential for states to intervene and provide training, funds and a motivating environment for judges. This emphasises the state's responsibility to ensure effective prosecution of grave breaches, as mandated by international law. Judges' reluctance to apply international law directly due to perceived distance and lack of influence underscores the significance of national jurisprudence in the formation of customary law.[34] Courts applying international law contribute to a dialogue on experiences and lessons learned, enhancing mutual efforts. For effective implementation, courts must interpret national law in alignment with international law, following the principle of consistent interpretation.[35] The Hungarian Constitutional Court emphasised this in 1993, stating that the constitution and domestic law should be construed to give effect to generally recognised international rules.[36] Judges need an awareness of international law for this rule to be effective.

30 Ferdinandusse, 2006, pp. 89–98.

31 Benvenisti, 1993, cited in Benvenisti, 1994, p. 424. and see Varga, Cs., 2009, pp. 148–150.

32 Institute of International Law, 1993.

33 This is exactly what happened in Hungary in the Biszku case, where the Prosecution did not bring charges, arguing that the acts in question did not constitute crimes against humanity and that prosecution was therefore time-barred. Remarkably, the prosecution did not explain why it had come to the conclusion that the acts were not crimes against humanity, it simply stated so. See Municipal Prosecutor's Office, NF 27942/2010/1 and Public Prosecutor's Office, NF. 10718/2010/5-I. For an analysis see Varga R., 2011.

34 ICTY, Trial Chamber, Tadic, 7 May 1997, para 642, refers to the judgement of the French Cour de Cassation in the Barbie case, and ICTY, Trial Chamber, Furundzija, 10 December 1998, para 194, refers to British military courts. See Ferdinandusse, 2006, p. 111.

35 Ferdinandusse, 2006, pp. 146–153.

36 Hungarian Constitutional Court, Decision 53/1993 (13 October 1993). For a critical analysis, see Ádány and Varga, R., 2021.

Furthermore, legal correctness is just one facet of international criminal proceedings. Criminal judges must also exhibit cultural openness to assess perpetrators and victims fairly in cases stemming from cultural conflicts.[37] While the insertion of the *aut dedere aut judicare* principle in treaties reflects the international community's belief in states' capability to address international crimes exercising universal jurisdiction,[38] it remains crucial to assess whether those applying the law possess the necessary knowledge, experience and language skills for effective war crimes procedures. The availability of literature and legal commentaries in languages foreign to prosecutors and judges is a vital consideration for effective application.

All states must comply to end impunity, signalling a commitment to the universally accepted belief that war crimes violate fundamental principles. Establishing a capable system to prosecute war criminals is a crucial step in this regard.[39]

4. Case study: the "renaissance" of war crimes procedures and universal jurisdiction in the context of the Russian-Ukrainian conflict

The relevance of establishing mechanisms ensuring the effective prosecution of war crimes was already often questioned in peacetime. However, due to the sudden turn of events in February 2022, the importance of the principle regained its priority. The war in Ukraine has reinvigorated international efforts towards criminal justice.

Not being party to the Rome Statute itself, Ukraine has consented to the ICC's investigating the situation within the country for crimes under the jurisdiction of the ICC allegedly committed on its territory. In 2014 and 2015, Ukraine submitted a declaration recognising the Court's jurisdiction to identify war crimes and crimes against humanity committed within its territory starting from 21 November 2013, to prosecute suspects, and to conduct proceedings. Furthermore, Ukraine committed to collaborating with the ICC throughout the entirety of the proceedings.[40]

Following the referral of 43 states parties, which served as the trigger for the procedure, the ICC opened an investigation in the territory of Ukraine in March 2022 over war crimes, crimes against humanity and genocide. Aggression does not fall under the jurisdiction of the ICC in this case, as the ICC has jurisdiction over this crime only with respect to states parties to the Rome Statute. In March 2023, the ICC issued an arrest warrant against Vladimir Vladimirovich Putin, President

37 Höfe, 1998, p. 216.
38 Ryngaert, 2006, p. 53.
39 Varga, R., 2014, pp. 163–164.
40 Varga, R., 2022.

of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation, in response to the forcible transfer of Ukrainian children to Russian territory.[41] The ICC's specific mandate and limitations – having no enforcement powers of its own – advocates for enhanced cooperation between the Court and states.

However, as stated above, the ICC is not expected to try a large number of cases. It serves as a fallback option, in case other jurisdictions are not exercised, following from the so-called complementarity principle, according to which the ICC will only have jurisdiction if the concerned state is unwilling or unable to carry out a procedure.[42] Hence, states have the primary responsibility to try core international crimes. Jurisdictions exercised by states may be founded on a general jurisdictional basis (national, territorial or passive national bases) or universal jurisdiction. During or after armed conflicts, the state(s) with general jurisdictional basis are often either not in a position to carry out procedures, do not want to carry them out or do so only in respect of the nationals of the "enemy". Universal jurisdiction is thus a crucial tool in the fight against impunity and is complemented by the ICC in addressing crimes against humanity, genocide and war crimes.[43]

In a noteworthy response to the heinous acts committed, several countries throughout Europe and overseas initiated investigations at the national level into international crimes carried out in Ukraine based on universal or extraterritorial jurisdiction.[44] Above all, however, it is Ukraine's and Russia's primary responsibility to ensure that there are domestic prosecutions for war crimes.

4.1. Procedures in Ukraine

More than one year after the outbreak of the war in Ukraine, the Office of the Prosecutor General of Ukraine had documented around 108,904 incidents of potential war crimes as of 29 September 2023.[45] Additionally, Ukrainian Prosecutor General Andriy Kostin stated that up until 16 July 2023, Ukrainian courts had already successfully convicted more than 50 Russian nationals for their involvement in war crimes.[46] Although Ukraine did incorporate universal jurisdiction and the definition of war crimes, crimes against humanity, genocide and torture into its Criminal Code,[47] it does not cover all of them.

Part 1 Article 8 of the Ukrainian Criminal Code states that 'foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal

41 International Criminal Court. (n.d.). Situation in Ukraine, see also: Congressional Research Service, 2023, pp. 1–2.
42 Articles 1 and 17, Rome Statute.
43 Paulet, 2017.
44 TRIAL International, 2023, p. 10.
45 Congressional Research Service, 2023, Summary.
46 RFE/RL's Ukrainian Service, 2023.
47 Amnesty International, 2012, p. 21.

offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code'.[48] The Criminal Code takes into consideration first and foremost the grave breaches defined by the four Geneva Conventions and its Additional Protocols, the corner stone(s) of international humanitarian law. However, not all war crimes are listed in the Geneva Conventions and the Additional Protocols. The war crime definitions of the Criminal Code are narrower than those of the Rome Statute – which is logical, given that Ukraine is not a party to the Rome Statute. Currently, based on its Criminal Code, Ukraine has the authority to pursue legal action against war crimes such as wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation and taking of hostages. Many actions, including using people as human shields, sexual violence committed in armed conflict, crimes against cultural objects, and crimes against humanitarian missions – like shelling evacuation buses – are not criminalised by the Criminal Code.

In addition, the application of universal jurisdiction for war crimes is feasible only when the individuals involved are present on Ukrainian territory. This implies that Ukraine can initiate criminal proceedings against foreigners or stateless individuals only when they are present within its borders.[49] While this approach enhances the efficiency of the principle, there is a drawback. Generally, there is a lapse of time between the commencement of the investigation and the formal declaration of an individual as suspected of committing a crime. During this period, the suspect has the opportunity to leave Ukraine's territory.[50] Should this happen and perpetrators escape and settle elsewhere, according to Amnesty International's 2012 survey on universal jurisdiction, more than 80% of the 193 UN states can 'exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law'.[51] The urge to avoid any "impunity gap" prompted states worldwide to collectively act against grave atrocities, each according to its own capacity.

4.2. Procedures in Europe and overseas

From the onset of Russia's invasion of Ukraine in February 2022, several Central European states have initiated multiple criminal investigations focusing on war crimes, crimes against humanity and aggression. Germany, Sweden, Spain and

48 Official Translation of the Criminal Code of Ukraine, 2021, Part 8. Article 1. See also Institute for War & Peace Reporting, 2022.
49 Institute for War & Peace Reporting, 2022.
50 Ibid.
51 Amnesty International, 2012, p. 2.

Switzerland, as well as Canada, have also initiated investigations within their respective national justice systems.[52]

4.2.1. Europe

In recent years, there has been a resurgence of interest in universal jurisdiction, particularly in Europe. In 2022, a former Iranian prosecutor was put on trial in Sweden and found guilty of war crimes committed in 1988. In the same year, a breakthrough occurred in the Laurent Bucyibaruta case as a former Rwandan prefect was sentenced in France for his involvement in the 1994 genocide. Furthermore, in the Netherlands, a former Kabul prison commander was convicted of war crimes perpetrated in Afghanistan in the 1980s, and a sentence of life imprisonment for a former Ethiopian official implicated in war crimes during the late 1970s was affirmed by the Hague Court of Appeal.[53] Germany, France and Sweden, for instance, have also developed a quite extraordinary expertise in investigating international crimes in connection with the Syrian armed conflict. These countries launched "structural investigations" through specialised war crimes units dedicated to gathering evidence. Therefore, with the ongoing war in Ukraine, all this experience and knowledge are made very good use of since public prosecutors across Europe and Canada have initiated structural investigations. Although these specific procedures do not target individuals or incidents from the outset, but focus on the collection of evidence, it is crucial to proactively build cases for future criminal proceedings.[54]

Moreover, countries lacking experience in investigating international crimes have also initiated legal proceedings in response to the conflict in Ukraine. Poland, Romania, Slovakia and Latvia, due to the enormous and constant waves of Ukrainian refugees fleeing the war zone, started recording testimonies to safeguard essential evidence for potential future cases. However, this multifaceted initiative also has its drawbacks. It could cause duplication or over- documentation of the cases as well as re-traumatising victims.

Therefore, there was a need to harmonise these efforts and establish a unified, properly coordinated investigation team. The Joint Investigation Team (JIT) was established by Lithuania, Poland and Ukraine with the support of the European Union Agency for Criminal Justice Cooperation (Eurojust), and it now includes seven European countries, the European Union Agency for Law Enforcement Cooperation (Europol) and the ICC.[55] This initiative is also fostered by the work of the United Nations Independent International Commission of Inquiry for Ukraine. The Commission's findings are shared with both the JIT and the ICC separately.[56]

52 Congressional Research Service, 2023, p. 15.
53 TRIAL International, 2023, pp. 10–11.
54 Ibid.
55 Ibid. See also Eurojust, 2023.
56 Van den Berg and Deutsch, 2023. See also Varga, R. and Újvári, 2023, pp. 50–51.

4.2.2 Canada and the United States

Canada plays a fundamental role in the investigation into alleged war crimes in Ukraine. Canada was the first nation to integrate the crimes defined in the Rome Statute into its domestic laws through the Crimes Against Humanity and War Crimes Act (CAHWCA) in 2000. The CAHWCA officially criminalises genocide, crimes against humanity and war crimes based on international law, including the Rome Statute. By defining these offences in Canadian law, Canada can utilise the complementarity provisions of the Rome Statute. In addition, the legislation incorporates universal jurisdiction, allowing Canada to prosecute individuals within its borders for crimes outlined in the CAHWCA, irrespective of their nationality or the location of the crimes.[57]

In March 2022, Canada was among those 43 states that referred the situation in Ukraine to the ICC, coinciding with the Royal Canadian Mounted Police (RCMP) launching the first real-time war crimes investigation in Canada's history. Ukrainian Canadians actively contribute by collecting war crimes testimonials to potentially prosecute war crimes in Ukraine. Despite the geopolitical complexities, the RCMP investigation remains crucial for victims.[58]

The United States (not a party to the Rome Statute) is now initiating prosecutions focusing on Russian nationals involved in committing war crimes during the conflict in Ukraine. U.S. law made war crimes punishable under federal criminal law but limited its national courts' jurisdiction to active and passive personality jurisdiction.[59] The indictment details the actions of four defendants, all identified as members of the Russian military or Donetsk People's Republic, who allegedly abducted and mistreated a U.S. civilian, in violation of the Geneva Convention. The charges, under the U.S. War Crimes Act of 1996, include unlawful confinement, torture, inhuman treatment and criminal conspiracy. The conspiracy charge, unusual in international law, is brought under the U.S. statute. The indictment, though a significant move towards accountability, faces challenges due to the defendants' absence and difficulties in gathering evidence from an active war zone. The indictment is intended to expose Russia's conduct and could affect the defendants' future international travels.[60]

Furthermore, a proposal aiming to broaden the jurisdiction of U.S. courts over war crimes by including individuals 'present in the United States, regardless of the nationality of the victim or offender' was approved and enacted into law in January 2023. This modification enables U.S. prosecutors to file charges against foreign nationals, extending to those accused of war crimes in the ongoing conflict occurring after the enactment of the legislation.[61] While the recent legislative changes to the

57 Government of Canada, 2023.
58 Banerjee and Levin, 2023.
59 Congressional Research Service, 2023, p. 24.
60 Anderson and Orpett, 2023.
61 Congressional Research Service, 2023, p. 24.

U.S. war crimes statute fall short of granting full universal jurisdiction, they extend jurisdiction based on presence in U.S. territory. This expansion facilitates the Justice Department's prosecution in cases where it is well-equipped to investigate and bring charges.[62]

5. Conclusion

The complicated interplay between the ICC Rome Statute and national criminal legislation boosts national prosecutions and also has a triggering effect on the application of universal jurisdiction. These also underscore both the challenges and the opportunities in addressing war crimes.

In the face of the ongoing armed conflicts, it is crucial for nations to address gaps in legislation, enhance judicial preparedness, and foster international cooperation. The effective prosecution of war crimes demands a comprehensive approach that aligns national laws with international standards, navigates challenges in applying international law directly and makes use of universal jurisdiction to ensure justice prevails in even the most complex situations.

Coming back to Philippe Kirsch's statement, cited at the beginning of this chapter, the ICC's success is not necessarily measured in the number of procedures the ICC itself carries out, but in the extent to which states are taking on their responsibility to punish perpetrators.

62 Anderson and Orpett, 2023.

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