



Did Karim Khan's Procedural Approach Undermine the ICC's Response to Ukraine?

By Reece Robertshaw

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Abstract

This blog examines whether ICC Prosecutor Karim Khan's decision to rely on Ukraine's existing 2014–2015 preliminary examination, rather than initiating a new examination following Russia's 2022 full-scale invasion, undermined the procedural legitimacy of the Court's response. It argues that although Ukraine's subsequent ratification of the Rome Statute strengthens the Court's jurisdictional framework for future proceedings, it does not resolve concerns about the Prosecutor's reliance on an earlier examination addressing fundamentally different factual circumstances.

Key words: ICC, Preliminary Examination, Ratification, Ukraine-Russia War, Rome Statute

Introduction

The International Criminal Court ('ICC') possessed jurisdiction to investigate crimes committed in Ukraine long before Ukraine became a State Party to the Rome Statute. Accordingly, the principal issue examined in this article is not whether the Court had jurisdiction, but whether Prosecutor Karim Khan adopted the most procedurally coherent method of exercising that jurisdiction following Russia's full-scale invasion in February 2022. Specifically, this article argues that the decision to continue relying upon the preliminary examination opened in 2014, rather than initiating a new examination reflecting the fundamentally altered factual circumstances, created unnecessary procedural uncertainty, raising important questions about the transparency and coherence of the Prosecutor's jurisdictional approach.

The procedural choices made by the Prosecutor

The procedural framework through which the ICC exercised jurisdiction over crimes committed in Ukraine was founded upon two Article 12(3) declarations submitted by Ukraine in 2014 and 2015. While these declarations successfully conferred jurisdiction upon the Court, they were drafted in response to factual circumstances that differed significantly from Russia's full-scale invasion in 2022. Consequently, the Prosecutor's decision to continue relying upon that existing procedural framework, rather than initiating a new preliminary examination, raises important questions regarding procedural coherence.

At the time of writing this blog, the Prosecutor's decision to continue relying on the preliminary examination established following Ukraine's 2014 and 2015 Article 12(3) declarations, rather than opening a new examination after the 2022 invasion, arguably undermines the Court's broader objective of promoting international peace and security. This procedural choice matters because it determined the legal framework



through which the Court exercised an already existing jurisdiction and raises broader questions regarding procedural consistency, transparency and prosecutorial discretion. This concern becomes more apparent when compared with previous prosecutorial practice. In other situations, involving evolving factual circumstances, including Venezuela and the Democratic Republic of Congo, the Office of the Prosecutor opened separate preliminary examinations or investigations reflecting materially different legal and factual contexts. These examples demonstrate that the Prosecutor has previously recognised the importance of procedural clarity when the nature of a situation changes substantially. Against that background, the decision not to adopt a similar approach in Ukraine appears difficult to reconcile with prior practice.

Had Prosecutor Khan initiated a new preliminary examination following Russia's full-scale invasion in 2022, the Court would not necessarily have acquired any additional jurisdiction, but it would have established a procedurally clearer framework reflecting the fundamentally altered factual and legal circumstances. A separate examination would have created a distinct temporal and contextual basis for assessing the 2022 invasion, enhanced transparency regarding the scope of the investigation, and aligned more closely with previous prosecutorial practice in situations involving significant changes in factual circumstances. Such an approach would have strengthened the procedural coherence of the Court's exercise of jurisdiction while reducing uncertainty surrounding the continued reliance on the 2014–2015 preliminary examination.

Why the procedural choices matter

The Prosecutors approach presents several procedural difficulties, particularly by limiting the opportunity to assess the fundamentally altered factual circumstances arising from Russia's 2022 full-scale invasion through a distinct procedural framework.¹ As a result of this questionable procedural choice, it is not only problematic as it emulates the questionable principles pertaining to the jurisdiction of the ICC and the overall limited value to extend an existing preliminary examination, but it also relates to the simple fact that the legal process of a preliminary examination is not substantive law.² Although the preliminary examination process remains at the periphery of the formal jurisdiction of the Court as being less judicial than later steps in the proceedings, it nonetheless is detrimental for the legitimacy and concept of justice.³ The overextension and ultra- activity of the 2014 and 2015 declarations assert a collection of challenges that obtain potential to affect the whole proceedings of the Russo-Ukrainian situation.⁴ For instance, it can be evidenced that the failure of Khan's proprio motu decision is based neither on a ratified Rome Statute membership nor a declaration of acceptance. Essentially, the issues of declaration should not affect the

¹ Iryna Mar, 'The ICC and the Russia- Ukraine War' (2022) 26(4) ASIL 1,4

² Cuno Jakob Tarfusser* and Giovanni Chiarini, 'WITHOUT A SPECIFIC DECLARATION OF JURISDICTION AND RATIFICATION: PROCEDURAL WEAKNESSES OF THE INTERNATIONAL CRIMINAL COURT'S INVESTIGATION INTO THE RUSSO- UKRAINIAN WAR' (2023) 56(1) TTLR 171,174

³ Carsten Stahn, 'Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC' (2017) 15 JOICJ 413, 415

⁴ Cuno Jakob Tarfusser* and Giovanni Chiarini, 'WITHOUT A SPECIFIC DECLARATION OF JURISDICTION AND RATIFICATION: PROCEDURAL WEAKNESSES OF THE INTERNATIONAL CRIMINAL COURT'S INVESTIGATION INTO THE RUSSO- UKRAINIAN WAR' (2023) 56(1) TTLR 171, 181



preliminary examination, however, procedurally, the investigation will be significantly impacted as the investigation is not based on a substantive jurisdictional basis from the outset, rather jurisdiction that was accepted under factually different circumstances for the current situation.⁵ As Judge Kovács observes, Article 53 seeks to strike a balance between the Prosecutor's independent assessment and the supervisory role of the Pre-Trial Chamber when deciding whether to initiate an investigation. His observations reinforce the importance of careful prosecutorial decision-making at the investigative stage and support the broader contention that procedural coherence contributes to the Court's institutional legitimacy.⁶ Judge Kovács' observations therefore reinforce the importance of careful prosecutorial decision-making at the investigative stage and support the broader contention that procedural coherence forms an important component of the Court's institutional legitimacy.

Does Ukraine's ratification resolve the problem?

Although ratification confirms Ukraine's status as a State Party and provides a stronger legal basis for future proceedings, it does not retrospectively alter the procedural choices made before ratification entered into force. The investigation into crimes arising from the 2022 invasion continued under a preliminary examination originally opened in response to materially different events occurring in 2014. Consequently, the procedural coherence of that decision remains an independent question requiring assessment irrespective of Ukraine's subsequent accession to the Rome Statute.

Accordingly, Ukraine's ratification substantially reinforces the Court's jurisdiction *ratione materiae* over crimes falling within Article 5 of the Rome Statute, particularly for future proceedings. However, it does not resolve the procedural legitimacy of relying upon the earlier preliminary examination to investigate the fundamentally altered circumstances arising from Russia's full-scale invasion in 2022. That question remains central to assessing the coherence of the Prosecutor's jurisdictional approach. This distinction is significant because procedural legitimacy contributes directly to the transparency and consistency of international criminal justice. Where the Prosecutor departs from previous practice or extends existing procedural mechanisms to encompass substantially different factual circumstances, a clear explanation of that approach strengthens confidence in the Court's decision-making. Ukraine's ratification therefore reinforces the Court's jurisdiction going forward, but it does not remove the need to evaluate whether reliance on the earlier preliminary examination represented the most procedurally coherent exercise of prosecutorial discretion.

Conclusion

⁵ The international Criminal Court: 'ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration' (ICC-OTP-20150929-PR1156, 2015)

⁶ Priya Urs, 'Judicial Review of Prosecutorial Discretion in the Initiation of Investigations into Situations of 'Sufficient Gravity' (2020) 18 (4) JOICJ 851, 859



This blog has argued that the principal issue is not whether the ICC possessed jurisdiction over crimes committed in Ukraine, but whether Prosecutor Karim Khan exercised that jurisdiction through the most procedurally coherent mechanism available. The Prosecutor's decision to rely upon the 2014–2015 preliminary examination instead of initiating a new examination following the 2022 invasion remains open to legitimate procedural criticism. Although ratification strengthens the Court's jurisdictional basis for future proceedings, it does not retrospectively resolve concerns regarding the legal coherence of the Prosecutor's approach. As the Ukraine situation continues to shape international criminal justice, these procedural questions remain central to the ICC's legitimacy and the consistent application of its jurisdictional framework.

***Reece Robertshaw** (he/him) graduated in Forensic Psychology before converting to law through the Graduate Diploma in Law and subsequently completing an LLM in International Criminal Law. In September 2026, he will commence the Bar Training Course in the UK with the aim of qualifying as a barrister. His academic interests include criminal law, international law and human rights.*



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