

ANALYTICAL NOTE

# DECLARATION UNDER ARTICLE 124 OF THE ROME STATUTE: WHAT COULD IT MEAN FOR UKRAINE?



**Declaration under Article 124 of the Rome Statute: what could it mean for Ukraine?** / Syniuk O.,  
edited by Lunova A. – Kyiv, 2025. – 16 p.

The analytical note is aimed at studying the potential risks of Ukraine's application of Article 124 when ratifying the Rome Statute of the International Criminal Court based on the analysis of the declarations of the Verkhovna Rada of Ukraine on the recognition of the ICC jurisdiction, the text and preparatory materials for the development of the Rome Statute of the ICC, the positions of international and Ukrainian experts on the interpretation of the relevant provisions of the Rome Statute, as well as the Law of Ukraine "On Ratification of the Rome Statute of the International Criminal Court and Amendments thereto".

Author: Onysiia Syniuk, Legal Analyst of the Human Rights Centre ZMINA

Editor: Alena Lunova, Advocacy Director of the Human Rights Centre ZMINA



ZMINA is a Ukrainian human rights organisation that works in the areas of protecting freedom of speech, combating discrimination, preventing torture and ill-treatment, supporting human rights defenders and civil society activists, and protecting the rights of war victims.

More information about the Human Rights Centre ZMINA and its activities: [zmina.ua](http://zmina.ua), [zmina.info](http://zmina.info).



This material has been supported by UK International Development from the UK Government; the views expressed do not necessarily reflect the official position of the UK Government



# CONTENTS

Introduction .....	4
1. How did ICC exercise jurisdiction in Ukraine before the ratification of the Rome Statute? .....	5
2. Article 124 of the Rome Statute: what is it about and why was it included? .....	7
3. Ukraine and Article 124: What are the potential consequences? .....	11
3.1. “Or”: can the non-acceptance of jurisdiction apply only to nationals? .....	12
3.2. When does Ukraine’s non-acceptance of jurisdiction come into force? .....	12
3.3. Acceptance of the ICC’s jurisdiction under Article 12(3) and non-acceptance of the ICC’s jurisdiction under Article 124: how do they relate? .....	13
4. Complementary nature of the ICC and Ukraine’s obligations to prosecute perpetrators of international crimes. ....	14
Conclusions .....	15



# INTRODUCTION

In 2024, Ukraine's long journey towards ratification of the Rome Statute of the International Criminal Court (hereinafter – the ICC) was completed. Although the Statute was signed back in 2000<sup>1</sup>, a number of reasons – ranging from the stated need to amend the Constitution of Ukraine to the dissemination of myths about the Court's functioning – led to a pause of 24 years before its ratification and Ukraine becoming a State Party.

However, ratification was not without reservations. When adopting the relevant law<sup>2</sup>, Ukraine exercised its right to make a declaration under Article 124 of the Rome Statute of the ICC, a transitional provision that provides for the non-acceptance by a State for which the Rome Statute enters into force of the ICC's jurisdiction regarding alleged war crimes committed on its territory or by its nationals for a period of seven years. Ukraine chose one of the “or’s” – non-acceptance of jurisdiction regarding its own nationals. State representatives explain this step as a “compromise with the military”<sup>3</sup> due to “the widespread disinformation about the Rome Statute”.<sup>4</sup>

While the decision to ratify the Rome Statute was welcomed by both international experts and civil society representatives<sup>5</sup>, as well as by Ukrainian ones<sup>6</sup>, the declaration under Article 124 caused misunderstanding and active discussions about the consequences of such a step, as Ukraine had accepted the jurisdiction of the ICC before ratifying the Statute. Reflections on the consequences of Ukraine's application under Article 124 of the Rome Statute of the ICC are mostly theoretical, but may have a practical impact. The discussion on consequences becomes especially relevant in the current context of intensified rhetoric regarding peace negotiations, and the uncertainty of the impact this could have on holding perpetrators of international crimes accountable.

This analytical note is an attempt to examine the potential risks of Ukraine making a declaration under Article 124 based on the analysis of the declarations of the Verkhovna Rada of Ukraine on the acceptance of the ICC's jurisdiction, the text and preparatory materials for the drafting of the Rome Statute of the ICC, the positions of international and Ukrainian experts on the interpretation of the relevant provisions of the Rome Statute, as well as the Law of Ukraine “On Ratification of the Rome Statute of the International Criminal Court and Amendments thereto”.

---

1 Rome Statute of the International Criminal Court / Status of Treaties: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=XVIII-10&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&clang=en)

2 The Law of Ukraine “On Ratification of the Rome Statute of the International Criminal Court and Amendments thereto” of 21.08.2024: <https://zakon.rada.gov.ua/laws/show/3909-IX#Text>

3 Iryna Mudra: “After ratification of the Rome Statute, Ukraine may delegate a judge to the ICC and a candidate for prosecutor” / LB.ua, 10.09.2024: [https://lb.ua/pravo/2024/09/10/633820\\_irina\\_mudra\\_pislya\\_ratifikatsii.html](https://lb.ua/pravo/2024/09/10/633820_irina_mudra_pislya_ratifikatsii.html)

4 Ratification of the Rome Statute: the Presidential Administration explains why Ukraine had to compromise / Ukrinform, 23.08.2024: <https://www.ukrinform.ua/rubric-polytics/3898197-ratifikacia-rimskogo-statutu-v-op-pasnili-comu-ukraini-dovelos-jti-na-kompromis.html>

5 Ukraine moves towards ratification of the ICC Rome Statute / Coalition for the ICC, 24.08.2024: <https://coalitionfortheicc.org/news/ukraine-moves-towards-ratification-icc-rome-statute>

6 Human rights defenders support ratification of the Rome Statute by Ukraine – statement of the Coalition / ZMINA, 20.08.2024: <https://zmina.ua/statements/pravozahysnyky-pidtrymuyut-ratyfikaciyu-ukrayinoyu-rymskogo-statutu-pozycziya/>



## 1. HOW DID ICC EXERCISE JURISDICTION IN UKRAINE BEFORE THE RATIFICATION OF THE ROME STATUTE?

Ukraine has accepted the jurisdiction of the ICC by adopting two declarations by the Verkhovna Rada of Ukraine in accordance with paragraphs 2 and 3 of Article 12 of the Rome Statute:

1. Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court “On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity committed by senior State officials, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests between 21 November 2013 and 22 February 2014”.<sup>7</sup>
2. Statement of the Verkhovna Rada of Ukraine “On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the terrorist organisations “DPR” and “LPR”, which led to extremely grave consequences and mass murder of Ukrainian nationals”.<sup>8</sup>

The first declaration concerned a specific period – from 21 November 2013 to 22 February 2014. The second declaration, however, is essentially open-ended, as it refers to the period covered as “from 22 February 2014 to the present”.

Both declarations attempt to limit the potential perpetrators of the crime, however, nothing in the relevant article of the Rome Statute, which outlines the grounds for the exercise of jurisdiction, allows this. Moreover, paragraph 2 of Article 12, which is also referred to in the Verkhovna Rada Declaration, provides that the Court may exercise its jurisdiction, if a State has accepted the jurisdiction of the Court in accordance with Article 12 paragraph 3, in the following cases:

a) the State on the territory of which the conduct in question occurred, or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

b) the State of which the person accused of committing the crime is a national.

Another interesting issue is the scope of the ICC’s jurisdiction in the context of specific categories of crimes. The wording of paragraph 3 of Article 12 suggests that a State that accepts the jurisdiction may choose over which category of crimes it accepts the jurisdiction – “accept the exercise of jurisdiction by the Court with respect to the crime in question”. The first declaration

<sup>7</sup> Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court on the recognition by Ukraine of the jurisdiction of the International Criminal Court over crimes against humanity committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian citizens during peaceful protests between 21 November 2013 and 22 February 2014 of 25.02.2014: <https://zakon.rada.gov.ua/laws/show/790-18#Text>

<sup>8</sup> Resolution of the Verkhovna Rada of Ukraine on the Statement of the Verkhovna Rada of Ukraine “On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the terrorist organisations “DPR” and “LPR”, which led to extremely grave consequences and mass murder of Ukrainian nationals” of 04.02.2015: <https://zakon.rada.gov.ua/laws/show/145-19#Text>





of Ukraine concerned crimes against humanity, the second – crimes against humanity and war crimes. Why the crime of genocide was not included in the list is an open question.

A broader answer to the scope of the Court's jurisdiction in the event of a state's acceptance of jurisdiction under paragraph 3 of Article 12 is provided by the Pre-Trial Chamber of the ICC. The State's choice is primarily a matter of consent to jurisdiction, while the scope of jurisdiction is determined by the ICC's legal framework. The Chamber referred, in particular, to Rule 44 of the Rules of Procedure and Evidence<sup>9</sup> – in the case of acceptance of jurisdiction by means of a declaration under paragraph 3 of Article 12, the acceptance of jurisdiction is with respect to the crimes referred to in Article 5 of relevance to the situation, i.e. the crime of genocide, crimes against humanity and war crimes.<sup>10</sup> Rule 44 was designed to prevent the use of the acceptance of the Court's jurisdiction under paragraph 3 of Article 12 as a means to use the Court solely for the prosecution of certain crimes or a certain party to a conflict.<sup>11</sup>

On 2 March 2022, the Prosecutor of the ICC announced the opening of an investigation into the situation in Ukraine on the basis of a referral to the Prosecutor by a number of State Parties.<sup>12</sup> It is noteworthy that the Prosecutor's statement referred to the investigation of "the situation in Ukraine since 21 November 2013, covering any previous and ongoing allegations of war crimes, crimes against humanity or genocide committed in any part of the territory of Ukraine by any person". It appears that at the opening stage of the investigation, the Prosecutor exercised the right to interpret jurisdiction on the basis of the Court's legal framework. It is interesting to note that the actual referral of the situation in Ukraine by the States Parties contained wording that included war crimes, crimes against humanity and the crime of genocide, while noting that the request for the Court's jurisdiction covers "jurisdictional scope accepted by Ukraine".<sup>13</sup>

However, the wording regarding the jurisdiction on a territorial and nationality basis is less clear. In its declaration of acceptance of the ICC's jurisdiction, a State is limited in its ability to "choose" which persons are subject to the Court's jurisdiction. Can the ICC limit itself at its own discretion? Referring back to the Prosecutor's statement on the opening of the investigation, he mentions crimes committed in *any part of the territory of Ukraine* by any person. This implies that the ICC's jurisdiction includes nationals of any state, regardless of whether that State accepts the ICC's jurisdiction, who have committed a crime on the territory of Ukraine. This, therefore, includes Ukrainian nationals as well. But what is the situation with jurisdiction based not on the territorial principle, but on the principle of nationality? What if the crime was allegedly committed by a national of Ukraine on the territory of a State that has not accepted the jurisdiction of the ICC in any way?

9 Rules of Procedure and Evidence / International Criminal Court, 2013: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>

10 as well as the crime of aggression, but the Statute directly provides for a different jurisdictional regime for it

11 Prosecutor v. Laurent Koudou Gbagbo, No. ICC-02/11-01/11-212, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)", Pre-Trial Chamber I, 15 August 2012, para. 59: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012\\_08024.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_08024.PDF)

12 Statement by the Prosecutor of the International Criminal Court, Mr Karim Asad Ahmad Khan, QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and Opening of an Investigation / International Criminal Court, 02.03.2022: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states?lang=Ukrainian>

13 State Party Referral under article 14 of the Rome Statute (Situation in Ukraine): <https://www.icc-cpi.int/sites/default/files/2022-04/State-Party-Referral.pdf>



Nothing in Article 12 of the Statute restricts the Court from investigating such a case – as mentioned above, the Court may exercise jurisdiction if the State of which the person accused of the crime is a national has accepted the jurisdiction of the ICC under paragraph 3 of the same Article.

Some Ukrainian experts have also expressed the opinion that the ICC does not have jurisdiction in the case of alleged crimes committed by Ukrainian nationals on the territory of, for example, the Russian Federation.<sup>14</sup> In his statement, the ICC Prosecutor also mentions a limitation – any part of the territory of Ukraine. Whether this limitation was a conscious decision, and whether it is in line with the Court's “legal framework” under Rule 44, or simply a reflection of the reality at the time of the opening of the investigation – given that in March 2022, it was hard to imagine Ukrainian military operations on the territory of the Russian Federation – remains unclear. In practice, during the entire period of the ICC's jurisdiction over the situation in Ukraine and the two years of investigation into the situation in Ukraine before the ratification of the Rome Statute, no charges have been brought against Ukrainian nationals.

On 21 August 2024, the Verkhovna Rada of Ukraine ratified the Rome Statute<sup>15</sup>, and on 1 January 2025, Ukraine became a full-fledged State Party. This should have resolved many of the issues raised in the context of the ICC's jurisdiction under previous declarations of acceptance of the ICC's jurisdiction. However, when ratifying the Rome Statute, Ukraine invoked the aforementioned Article 124.

## 2. ARTICLE 124 OF THE ROME STATUTE: WHAT IS IT ABOUT AND WHY WAS IT INCLUDED?

Article 124 of the Rome Statute is entitled “Transitional Provision” and reads as follows:

“Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1”.

This text was not its initial version. Moreover, the Article itself did not appear in the draft Rome Statute<sup>16</sup>, until the final days before its adoption.

Article 124, or rather the reservation it contained, was a controversial point. A number of states, in particular France and the USA, took a rather conservative view of the limits of the

<sup>14</sup> Why Is Ukraine Ratifying the Rome Statute With an Article 124 Caveat? / Dmytro Koval, Mykhailo Soldatenko, 08.10.2024: <https://www.lawfaremedia.org/article/why-is-ukraine-ratifying-the-rome-statute-with-an-article-124-caveat>

<sup>15</sup> The Law of Ukraine “On Ratification of the Rome Statute of the International Criminal Court and Amendments thereto” of 21.08.2024: <https://zakon.rada.gov.ua/laws/show/3909-IX#Text>

<sup>16</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, June 15–July 17, 1998, Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/51/22 (Apr. 14, 1998): [https://legal.un.org/icc/rome/proceedings/e/rome%20proceedings\\_v3\\_e.pdf](https://legal.un.org/icc/rome/proceedings/e/rome%20proceedings_v3_e.pdf)



future Court's jurisdiction. They insisted that in the case of the Court exercising its jurisdiction over war crimes and crimes against humanity, the consent of the suspect's State of nationality was required, unless the situation was referred to the Court by the UN Security Council.<sup>17</sup> These states based their position on the claim they needed time to properly assess how the ICC operates.<sup>18</sup> The United Kingdom's proposal, which was supported by all permanent members of the UN Security Council, also included an exception for both war crimes and crimes against humanity, as outlined in an optional protocol that could be ratified by states that had doubts about unconditionally joining the Rome Statute. This protocol was to remain in force for ten years, and could be extended by a simple majority vote in the Assembly of States Parties.<sup>19</sup>

Such an approach would have significantly limited the jurisdiction of the ICC and would not have satisfied the other states parties to the negotiations.

In contrast to this, two days before the end of the Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Germany proposed its own version - a State Party could choose not to accept the jurisdiction of the Court only regarding war crimes, moreover, such a restriction could be applied not only to all the war crimes provided for in the Statute, but to the select ones identified by the State - one or more. The declaration for such a non-acceptance should have been valid only for a period of three years, without the possibility of renewal.<sup>20</sup>

The current text of the Rome Statute with Article 124 was drafted based on the German proposal, modified to encourage more states that had doubts, primarily France, to join. At this stage, the transitional provision allows a State to make a declaration, as part of the procedure for becoming a State Party to the Rome Statute, that for a period of seven years after the Statute enters into force for that state, the Court shall not exercise jurisdiction regarding war crimes where the crime is alleged to have been committed by nationals of that State or on its territory. A declaration under this Article may be withdrawn at any time.

Andreas Zimmermann, a professor and expert in international law, offers two possible interpretations of Article 124:

1. "negative": non-acceptance of jurisdiction can be seen as a complete prohibition for the ICC to exercise jurisdiction over alleged war crimes committed by nationals or on the territory of the State that made the relevant declaration;
2. "positive": non-acceptance of jurisdiction means that the declaring State does not accept the jurisdiction of the ICC over its nationals under paragraph 2 of Article 12 of the Statute (which provides that the Court may exercise its jurisdiction if at least one of the States in whose territory the crime was committed has become a party to the Statute or has otherwise accepted the jurisdiction of the Court, or it was committed by a national of such a state), but this does not exclude the Court's jurisdiction if there are other grounds for its

<sup>17</sup> Rome Statute of the International Criminal Court, A Commentary / edited by Otto Triffterer, Kai Ambos, Article 124, Andreas Zimmermann, p.2312: [https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer\\_Ambos\\_Rome\\_Statute\\_Commentary\\_3rd\\_ed\\_2016.pdf](https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer_Ambos_Rome_Statute_Commentary_3rd_ed_2016.pdf)

<sup>18</sup> Article 124, war crimes and the development of the Rome Statute / Shana Tabak, Georgetown Journal of International Law, Vol. 40, 31.01.2009, p.1083: <https://ssrn.com/abstract=1824876>

<sup>19</sup> Rome Statute of the International Criminal Court, A Commentary / edited by Otto Triffterer, Kai Ambos, Article 124, Andreas Zimmermann, p.2353: [https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer\\_Ambos\\_Rome\\_Statute\\_Commentary\\_3rd\\_ed\\_2016.pdf](https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer_Ambos_Rome_Statute_Commentary_3rd_ed_2016.pdf)

<sup>20</sup> Rome Statute of the International Criminal Court, A Commentary / edited by Otto Triffterer, Kai Ambos, Article 124, Andreas Zimmermann, p.2352: [https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer\\_Ambos\\_Rome\\_Statute\\_Commentary\\_3rd\\_ed\\_2016.pdf](https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer_Ambos_Rome_Statute_Commentary_3rd_ed_2016.pdf)





application – the crime was committed by a national of a State that made a declaration under Article 124, but in the territory of another State that has accepted the jurisdiction of the Court and has not made a declaration under Article 124.<sup>21</sup>

The Rome Statute does not contain a provision that would unambiguously answer the question of the relationship between Article 124 and Article 12 regarding the preconditions for the exercise of the ICC's jurisdiction.

When interpreting international treaties, the general rule is to interpret in accordance with the ordinary meaning of the terms, and in light of the object and purpose of the treaty. The entire text of the treaty (annexes, preamble), subsequent practice in the application of the treaty, as well as further agreements and documents concluded by the parties to the treaty are taken into account.<sup>22</sup> The preamble to the Rome Statute states that the most serious crimes of concern to the international community as a whole should not go unpunished and that their effective prosecution should be ensured by both national measures and enhanced international cooperation, and that the ICC has jurisdiction over the most serious crimes of concern to the international community as a whole.

At the same time, certain limitations are embedded in the very nature of the Statute itself. First and foremost, the criminal prosecution of those responsible for international crimes is the responsibility of each State, and the ICC complements national criminal justice systems. The ICC's jurisdiction is also not automatic – it applies in specific, clearly defined cases: if the crime was committed either in the territory or by a national of a State that is a State Party to the Statute or has otherwise accepted the jurisdiction of the ICC.<sup>23</sup>

However, the principles guiding the exercise of the ICC's jurisdiction also provide for cases in which the Court's jurisdiction may apply to nationals of a State that is not a State Party to the Statute and has not otherwise accepted the jurisdiction of the ICC – for example, in the case where such a crime was committed on the territory of a State that has accepted the jurisdiction of the ICC. In addition, the procedure that “bypasses” the need for a State to accept the jurisdiction of the ICC is, in fact, the referral of a case to the ICC by the UN Security Council.<sup>24</sup>

The practice of application also does not provide an answer to the question of interpretation. In addition to Ukraine, only two States have made a declaration under Article 124 – France and Colombia.

In the case of France, the argumentation was very similar to the myths that circulated in Ukraine prior to the ratification of the Rome Statute – fears that France would become the target of unfounded complaints for political reasons due to its active participation in peacekeeping operations.<sup>25</sup> The fears, however, were not justified in any way – no situation involving French nationals or on French territory was considered by the ICC and Article 124 was not applied in

21 Rome Statute of the International Criminal Court, A Commentary / edited by Otto Triffterer, Kai Ambos, Article 124, Andreas Zimmermann, p.2354: [https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer\\_Ambos\\_Rome\\_Statute\\_Commentary\\_3rd\\_ed\\_2016.pdf](https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer_Ambos_Rome_Statute_Commentary_3rd_ed_2016.pdf)

22 Vienna Convention on the Law of Treaties of 23.05.1969, Article 31: [https://zakon.rada.gov.ua/laws/show/995\\_118#Text](https://zakon.rada.gov.ua/laws/show/995_118#Text)

23 Rome Statute of the International Criminal Court of 17.07.1998, Article 12: [https://zakon.rada.gov.ua/laws/show/995\\_588#Text](https://zakon.rada.gov.ua/laws/show/995_588#Text)

24 Rome Statute of the International Criminal Court of 17.07.1998, Article 13(b): [https://zakon.rada.gov.ua/laws/show/995\\_588#Text](https://zakon.rada.gov.ua/laws/show/995_588#Text)

25 The Irresolution of Rome / Ruth Wedgwood, 64 Law and Contemporary Problems (Winter 2001), p.203, note 40: <https://scholarship.law.duke.edu/lcp/vol64/iss1/10/>



practice. After confirming the unfounded nature of its reservations, France withdrew its Article 124 declaration before it expired.

A similar situation occurred in Colombia regarding the outcomes. Colombia likely decided to take a precautionary approach – the ICC had been conducting a preliminary examination regarding Colombia since 2004, but in 2021 it decided not to open an investigation.<sup>26</sup> Colombia's Article 124 declaration expired without any application.

When considering the limits of application of Article 124 of the Rome Statute, it is important to take into account the actions of the States Parties regarding its review. According to the wording of the Article itself, it was envisaged that the Article was to be reviewed at the Review Conference. In 2010, discussions centred around whether to delete, retain or amend Article 124 of the Rome Statute. One of the options proposed was to introduce a “sunset clause” into Article 124, providing that upon the end of the respective term the article would automatically expire. This Conference did not result in a clear-cut decision – some States Parties supported the idea of a “sunset clause” in Article 124, some insisted on its complete removal, while others were of the opinion that Article 124 was necessary.<sup>27</sup> A decision was made to review it again at the fourteenth session of the Assembly of States Parties.

During the fourteenth session, discussions in the Working Group on amendments led to a recommendation to delete Article 124 through the procedure for amending the Rome Statute in accordance with Article 121(4)<sup>28</sup>. This means that the amendment will enter into force for all States Parties one year after the deposit with the Secretary-General of the United Nations of the instruments of ratification or acceptance by 7/8 of the States Parties. The resolution to delete Article 124 as amended was adopted by consensus.<sup>29</sup> However, as noted, the amendment requires ratification or acceptance by the State Parties. Currently, only 24 States have done so.<sup>30</sup>

Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions is also used to interpret the treaty, but there is no clear answer as to what understanding this Resolution provides. As has been the case since the inception of Article 124, some States Parties apparently intend to remove it from the text of the Rome Statute, thereby eliminating this limitation on the ICC's jurisdiction. Moreover, the practice of applying Article 124 rather suggests that it is not needed – only three States have used it since its inception and in both cases the Article has not been activated. However, the amendment to remove it has not yet entered into force, so Article 124 remains in force, and it is impossible to assert a unanimous opinion and intention of the States Parties to completely remove all obstacles to the ICC's jurisdiction.

If the interpretation using the means suggested above needs to be confirmed or does not provide a clear answer, it is possible to rely on the preparatory work and the circumstances surrounding the conclusion of the treaty.<sup>31</sup>

26 Preliminary Examination, Colombia / International Criminal Court: <https://www.icc-cpi.int/colombia>

27 Review Conference of the Rome Statute, RC/6/Rev.1, 31 May – 11 June 2010, Report of the Working Group on other amendments: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/RC2010/RC-6-Rev1-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/RC2010/RC-6-Rev1-ENG.pdf)

28 Report of the Working Group on Amendments ICC-ASP/14/34, Fourteenth session, Assembly of State Parties, 16 November 2015: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP14/ICC-ASP-14-34-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP14/ICC-ASP-14-34-ENG.pdf)

29 Resolution ICC-ASP/14/Res.2, Resolution on Article 124: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/Resolutions/ASP14/ICC-ASP-14-Res2-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP14/ICC-ASP-14-Res2-ENG.pdf)

30 Amendment to Article 124 of the Rome Statute of the International Criminal Court / Status of Treaties: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10-c&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-c&chapter=18&clang=en)

31 Vienna Convention on the Law of Treaties of 23.05.1969, Article 32: [https://zakon.rada.gov.ua/laws/show/995\\_118#Text](https://zakon.rada.gov.ua/laws/show/995_118#Text)



As discussed above, the history of the inclusion of Article 124 in the draft Rome Statute in its current form is also ambiguous. The States that insisted on the inclusion of a provision limiting the ICC's jurisdiction sought the broadest and most serious restriction possible - for a wider list of categories of crimes, for a longer period of time, etc. This could indicate an interpretation of the article through a "negative understanding" - an absolute impossibility for the ICC to exercise its jurisdiction in the case of a declaration under Article 124. However, it is rather strange in this context not to take into account the compromise of the provision itself and in the process of its inclusion. It appeared in the draft at the last minute and was significantly modified - a State's declaration can only apply to war crimes and for a shorter period of time. It is also unfair not to consider the position of States Parties that were against the inclusion of any restrictions on the ICC's jurisdiction. Accordingly, the history of the development of the current version of Article 124 shows only that it was the result of a constant search for a balance between granting the ICC the widest possible jurisdiction and attracting those states to join the Rome Statute for which limiting the ICC's jurisdiction is a crucial issue. It is difficult to give a definitive answer as to the interpretation of the article, the nature of which is a compromise.

The inclusion of Article 124 in the Rome Statute was originally intended to attract as many States Parties as possible. At the time, this probably made sense - in a context where the establishment of the ICC as a permanent international judicial body was a revolutionary idea and it was not certain that it could even exist. Now, however, when there are already 125 States Parties to the Rome Statute, and only three, including Ukraine, have made a declaration under Article 124 upon ratification, the need for its existence is questionable. It is doubtful that the existence of the Article will encourage other States to join the ICC if they have not already done so during the years the transitional provision has existed. Moreover, the motivation expressed by some States at the time of the drafting of the Statute - the need for time to evaluate how the ICC operates - has also lost its relevance. 23 years of the ICC's existence and active work is sufficient time for that.

### 3. UKRAINE AND ARTICLE 124: WHAT ARE THE POTENTIAL CONSEQUENCES?

Both international<sup>32</sup> and Ukrainian<sup>33</sup> experts considered what the ratification of the Rome Statute with a declaration under Article 124 would mean for Ukraine, for active and future investigations, even before the adoption of the Law of Ukraine on ratification.

32 ICC Jurisdiction in Ukraine and Article 124: Does Article 12(3) Leave the Stage Lit on War Crimes? / Mischa Gureghian Hall, 02.11.24: <https://opiniojuris.org/2024/11/02/icc-jurisdiction-in-ukraine-and-article-124-does-article-123-leave-the-stage-lit-on-war-crimes/>; Unforced Error: Article 124 and the Regrettable Caveat to Ukraine's Proposed Ratification of the ICC Statute / Tom Dannenbaum, 20.08.2024: <https://www.justsecurity.org/98733/ukraine-icc-ratification/>; "There's life in the old dog yet ...", or: the news of the death of Art. 124 Rome Statute were premature / Andreas Zimmermann, 20.08.2024: <https://www.ejiltalk.org/theres-life-in-the-old-dog-yet-or-the-news-of-the-death-of-art-124-rome-statute-were-premature/>

33 Why Is Ukraine Ratifying the Rome Statute With an Article 124 Caveat? / Dmytro Koval, Mykhailo Soldatenko, 08.10.2024: <https://www.lawfaremedia.org/article/why-is-ukraine-ratifying-the-rome-statute-with-an-article-124-caveat>



### 3.1. “Or”: can the non-acceptance of jurisdiction apply only to nationals?

One of the first questions that arises is related to the wording of the reference to Article 124 provided for in the ratification law, namely that Ukraine has limited its non-acceptance of the ICC’s jurisdiction to those cases where the crime has allegedly been committed by its nationals.

The wording of Article 124 regarding jurisdiction provides an “or”: the offence was allegedly committed by the nationals of the country or on its territory. Such wording suggests that the Article provides for a choice – the exercise of jurisdiction may be not accepted either in relation to the territory of the state, or to the nationals of the state, or cumulatively.

On the other hand, the aforementioned approach based on the “legal framework” of the Court, within which jurisdiction is interpreted, contradicts this view. Such a restriction in the acceptance of jurisdiction may be perceived as one-sided justice aimed at prosecuting only one Party to an armed conflict. It could, of course, be argued that this interpretation was given in the case of the question of the exercise of jurisdiction in the event of a State’s acceptance of such jurisdiction under paragraph 3 of Article 12, and not as a result of becoming a State Party. However, this would mean that the ICC has broader powers to exercise its jurisdiction over States that are not Parties to the Rome Statute than over those that have fully joined the Court. Such an approach makes no sense and is unlikely to be accepted by States that voluntarily consent to the ICC’s jurisdiction.

As mentioned above, neither the history of the inclusion of Article 124 in the Rome Statute nor the practice of its application provide a clear answer to this question. In the case of France and Colombia, both States in their declarations did not accept the jurisdiction of the ICC over their territory and over their nationals.

Another position worth considering is that Ukraine’s acceptance of the ICC’s jurisdiction over its territory will mean that in the event of alleged war crimes being committed on the territory of Ukraine, the ICC will have jurisdiction over them, regardless of which country’s nationals commit them – including Ukrainian nationals. Thus, the only cases in which a declaration under Article 124 would work are those where the alleged war crimes are committed by Ukrainian nationals outside the territory of Ukraine.<sup>34</sup>

### 3.2. When does Ukraine’s non-acceptance of jurisdiction come into force?

A somewhat less controversial issue is the temporal effect of the non-acceptance of the ICC’s jurisdiction under Article 124. The Article itself gives a straightforward answer – it applies from the moment the Statute enters into force for the State, which means, in Ukraine’s case, from 1 January 2025. And it is valid for seven years, unless it is withdrawn earlier. Also, given that Article 124 refers to paragraphs 1 and 2 of Article 12, but does not refer to paragraph 3 of Article 12, the application of Article 124 will not have a retroactive effect,<sup>35</sup> i.e. will not affect the investigation of

<sup>34</sup> Unforced Error: Article 124 and the Regrettable Caveat to Ukraine’s Proposed Ratification of the ICC Statute / Tom Dannenbaum, 20.08.2024: <https://www.justsecurity.org/98733/ukraine-icc-ratification/>

<sup>35</sup> “There’s life in the old dog yet ...”, or: the news of the death of Art. 124 Rome Statute were premature / Andreas Zimmermann, 20.08.2024: <https://www.ejiltalk.org/theres-life-in-the-old-dog-yet-or-the-news-of-the-death-of-art-124-rome-statute-were-premature/>



war crimes committed before 1 January 2025. Moreover, even after the expiration of the seven-year period or the withdrawal of the Article 124 declaration, the ICC will not have jurisdiction over alleged war crimes committed during the period when the State did not accept the ICC's jurisdiction under Article 124.<sup>36</sup>

### **3.3. Acceptance of the ICC's jurisdiction under Article 12(3) and non-acceptance of the ICC's jurisdiction under Article 124: how do they relate?**

A separate issue also arises from the unique situation of Ukraine, which initially accepted the jurisdiction of the ICC without becoming a party to the Rome Statute, and after ratifying the Statute, did not accept the jurisdiction of the Court over war crimes for a period of seven years. Previous cases of use of Article 124 concerned States that had not previously accepted the jurisdiction of the ICC in any way. How do declarations of acceptance of jurisdiction under Article 12(3) and a declaration under Article 124 relate when the Statute enters into force for a State?

Some experts believe that the declaration under Article 12(3) does not automatically expire upon ratification of the Rome Statute, but continues to apply to the specific situation for which the jurisdiction of the ICC was accepted.<sup>37</sup> Furthermore, neither Article 12(3) nor any other article of the Rome Statute contains a provision that would provide for a procedure for withdrawal of a declaration under Article 12(3). Article 124, as already mentioned, also contains explicit references to paragraphs 1 and 2 of Article 12, without mentioning paragraph 3, which further complicates the relationship between them. Both articles, however, are part of the Rome Statute and have equal force. The conclusion that the declaration under Article 12(3) ceases to have effect at the time a State becomes a Party to the Statute and makes a declaration under Article 124 is not obvious.

However, it is unnatural for international law to take the approach that a declaration under Article 12(3) can be considered as granting ICC unlimited jurisdiction. Given the existence of a procedure for withdrawal of a State Party from the Rome Statute<sup>38</sup>, it is logical that a similar right should be available to States that have accepted the jurisdiction of the ICC without becoming a State Party. Otherwise, the situation mentioned above would arise when States that are not Parties to the Statute would be subject to stricter obligations than States Parties.

Experts also refer to the nature of the declaration under Article 12(3), in particular as a unilateral act of the State, which can be withdrawn or amended in certain specific circumstances.<sup>39</sup>

All these considerations, however, are purely theoretical – there is no procedure for withdrawal of a declaration under Article 12(3) and its status in relation to a later declaration under Article 124 is uncertain.

36 Rome Statute of the International Criminal Court, A Commentary / edited by Otto Triffterer, Kai Ambos, Article 124, Andreas Zimmermann, p.2315: [https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer\\_Ambos\\_Rome\\_Statute\\_Commentary\\_3rd\\_ed\\_2016.pdf](https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/Triffterer_Ambos_Rome_Statute_Commentary_3rd_ed_2016.pdf)

37 Legal Issues Regarding Ukraine's Potential Art. 124 Declaration / Kevin Jon Heller, 17.08.24: <https://opiniojuris.org/2024/08/17/legal-issues-regarding-ukraines-potential-art-124-declaration/>

38 Rome Statute of the International Criminal Court of 17.07.1998, Article 127: [https://zakon.rada.gov.ua/laws/show/995\\_588#Text](https://zakon.rada.gov.ua/laws/show/995_588#Text)

39 ICC Jurisdiction in Ukraine and Article 124: Does Article 12(3) Leave the Stage Lit on War Crimes? / Mischa Gureghian Hall, 02.11.24: <https://opiniojuris.org/2024/11/02/icc-jurisdiction-in-ukraine-and-article-124-does-article-123-leave-the-stage-lit-on-war-crimes/>





Ukraine's position is that Article 124 and the declarations under Article 12(3) refer to two different regimes - for States Parties and for States not party to the Rome Statute, respectively - and do not overlap<sup>40</sup>. This interpretation seems to imply that the Article 12(3) declarations lose their effect for Ukraine from the moment when Ukraine becomes a State Party and cannot be the basis for the ICC's jurisdiction to bypass the Article 124 declaration.

Given this, the issue arises from the wording of paragraph two of the Law of Ukraine "On Ratification of the Rome Statute of the International Criminal Court and Amendments thereto", namely:

*"In accordance with Article 12(3) of the Rome Statute, to confirm Ukraine's acceptance of the jurisdiction of the International Criminal Court over the crimes under Articles 6, 7, 8 of the Rome Statute, starting from 21 November 2013, as well as to accept the jurisdiction of the International Criminal Court over the crime under Article 8bis of the Rome Statute, starting from 17 July 2018".*

Perhaps, given the position on the different regimes for Article 12(3) and Article 124, this provision was intended to serve as a confirmation of acceptance of the jurisdiction of the ICC prior to the entry into force of the Rome Statute for Ukraine, with the presumption that the relevant declaration under Article 12(3) would lose its effect upon the entry into force of the Rome Statute. However, as noted above, the absence of retroactive effect in Article 124 and its application in relation to the entry into force of the Rome Statute for a State, rather than acceptance of jurisdiction under any other procedure, do not raise any issues.

On the contrary, the presumption that a declaration under Article 12(3) automatically lapses upon entry into force of the Statute raises questions. Given the ambiguity of the relationship between Article 12(3) and Article 124 at the time of the entry into force of the Statute for Ukraine, this provision may be interpreted as meaning that Ukraine confirms its acceptance of the ICC's jurisdiction over war crimes from 21 November 2013 and onwards. Paragraph two of the Law does not in itself provide for a point at which acceptance of the jurisdiction of the ICC under Article 12(3) loses its effect.

## 4. COMPLEMENTARY NATURE OF THE ICC AND UKRAINE'S OBLIGATIONS TO PROSECUTE PERPETRATORS OF INTERNATIONAL CRIMES.

In the context of the ICC's jurisdiction over the situation in Ukraine, it is important to remember that there are specific grounds for the Court to hear cases even within situations over which it has jurisdiction.

In particular, Article 17 of the Rome Statute provides: "the Court shall determine that a case is inadmissible where:

40 Why Is Ukraine Ratifying the Rome Statute With an Article 124 Caveat? / Dmytro Koval, Mykhailo Soldatenko, 08.10.2024: <https://www.lawfaremedia.org/article/why-is-ukraine-ratifying-the-rome-statute-with-an-article-124-caveat>



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;

c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

d) the case is not of sufficient gravity to justify further action by the Court”.

Ukraine also has obligations to prosecute perpetrators of international crimes under a number of international treaties that do not relate to its participation in the ICC and the Rome Statute. In particular, the relevant obligations are provided for in Articles 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field<sup>41</sup>, 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea<sup>42</sup>, 129 of the Geneva Convention relative to the Treatment of Prisoners of War<sup>43</sup>, 146 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War<sup>44</sup> and Article 85 of the Protocol Additional to the Geneva Conventions and Relative to the Protection of Victims of International Armed Conflicts.<sup>45</sup>

Ukraine, therefore, even without making a declaration under Article 124, could ensure that the relevant cases against its nationals are declared inadmissible by effectively investigating them on its own. At the moment, this obligation is relevant, and the only potential effect of an Article 124 declaration is to limit the ICC's jurisdiction over such cases.

## CONCLUSIONS

Ukraine's ratification of the Rome Statute of the ICC is an important step towards justice for the most serious international crimes, strengthening the national system, including by harmonising Ukrainian legislation with international criminal law. With this step, Ukraine has also acquired all the rights of a State Party to the Rome Statute and will be able to fully represent its interests in the ICC.

The submission of a declaration under Article 124 during ratification, however, is a controversial step.

First, the scope of the ICC's jurisdiction over the situation in Ukraine, considering the declaration under Article 124, remains an open question. The concern that Article 124 does not

41 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_151#Text](https://zakon.rada.gov.ua/laws/show/995_151#Text)

42 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_152#Text](https://zakon.rada.gov.ua/laws/show/995_152#Text)

43 Geneva Convention relative to the Treatment of Prisoners of War of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_153#Text](https://zakon.rada.gov.ua/laws/show/995_153#Text)

44 Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text)

45 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), of 8 June 1977: [https://zakon.rada.gov.ua/laws/show/995\\_199#Text](https://zakon.rada.gov.ua/laws/show/995_199#Text)



allow for a choice between limiting the jurisdiction based on territory and nationality, but only provides for its complete non-acceptance, seems to be insufficiently substantiated. The text of the Article does not establish such a limitation, and a deliberate complete refusal to investigate alleged war crimes committed on the territory of Ukraine does not comply with the spirit and principles of the ICC.

At the same time, given the ICC's position in previous cases, its preference for the broadest possible jurisdiction and for considering the case "comprehensively", including to prevent one-sided justice, the most likely outcome is that the ICC will recognise that it has full jurisdiction over the situation in Ukraine, either based on territorial jurisdiction over all crimes committed in Ukraine or by recognising the acceptance of jurisdiction under Article 12(3) as still in force. It is unlikely that the ICC will accept only territorial jurisdiction, completely excluding jurisdiction over Ukrainian nationals. Even in the absence of grounds to investigate alleged crimes committed by Ukrainian nationals, the position of excluding citizens of one of the Parties to the conflict from the jurisdiction of the ICC would contradict the Court's purpose and set a precedent that would undermine confidence in fair justice within the institution.

However, given that any assumptions about the consequences of an Article 124 declaration are not clearly answered, the question arises whether the risk of Ukraine filing this declaration as a compromise is justified. Ukraine had the opportunity to check how the ICC works, unlike France and Colombia, which used this provision earlier. Moreover, in Ukraine's case, the ICC's activities were directly related to the situation in Ukraine and covered Ukrainian nationals. Fears of mass prosecution were not justified - and even with ratification, Ukraine remains obliged to investigate international crimes within the national system, which will prevent any interference in this process by the ICC.

At the same time, such a statement by Ukraine may also carry reputational risks and affect the strength of its position. Such a non-acceptance of the ICC's jurisdiction over Ukrainian citizens exclusively may look like double standards and one-sided justice. If Ukraine trusts the ICC to properly and fairly prosecute Russian nationals, what is the reason for the absence of trust in assessing the actions of Ukrainian nationals and the adequacy of the Ukrainian justice system?

It is also important to consider the context in which Ukraine is taking this step. The activities and position of the ICC are in a difficult environment, with some States trying to exert political pressure on the Court, in particular through the imposition of sanctions. Moreover, with the intensification of negotiations and a possible peace process in the armed conflict between Russia and Ukraine, and the unpredictability of developments in terms of prosecuting perpetrators of the most serious international crimes, including for the crime of aggression, the ICC is an additional means of ensuring justice. Ukraine, as a State Party to the Statute, should direct its efforts to strengthen the position of the Court, which can prosecute, among other things, the highest officials.

