

## Russia's Obligation Not to Defeat Object and Purpose of Rome Statute of the International Criminal Court

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### Abstract

Russia signed the Rome Statute on 8 September 2000. After the International Criminal Court commenced an examination of the alleged commission of international crimes during the Russian invasion in Georgia and Ukraine, Russia unsigned the Statute and ceased any co-operation with the Court which endangered international investigation and turns the object and purpose of the Statute, i.e. enforcement of international justice, redundant. The current Article argues that Russia, through unsigned the Rome Statute amid the ongoing investigation, violated Article 18 of the Vienna Convention on the Law of Treaties for three reasons: a) the normative nature of the Rome Statute triggers distinct regime from the general contracts; b) such special regime is recognised by the Russian Constitutional Court; c) Russia's subsequent practice created legitimate expectation for the ratification of the Rome Statute. These aspects make Russian case different from unsigned the Statute by the USA. The current research examines the complex issue on the relationship between Article 18 of the VCLT and normative multilateral treaties and offers the solution for complications raised by Russia's unsigned of the Rome Statute through answering the main question – whether Russia is still obliged to honour Rome Statute for cases originated before 16 November 2017.

### INTRODUCTION

Rome Statute of the International Criminal Court (Rome Statute) is the first multilateral treaty establishing individual criminal responsibility for international crimes with object and purpose “to guarantee lasting respect for and the enforcement of international justice.”<sup>1</sup> Although Rome Statute deals with individual responsibility, the role of States for actual implementation of international justice is paramount. Without State co-operation, the Rome Statute, as well as the International Criminal Court (ICC), will be as professor Cassese described “giant without arms and legs.”<sup>2</sup> Here the law of treaties comes into play. After the USA, Russia is the second State who withdrew its signature from Rome Statute, however, it was done in a different context amid two situations being examined by the Office of the Prosecutor of the International Criminal Court (OTP). Those are Situation in Georgia being under investigation<sup>3</sup> and preliminary examination in Ukraine.<sup>4</sup> Both concern crimes against humanity and war crimes allegedly committed by Russian forces and/or separatists under Russian control.

For a better understanding of the relationship between Rome Statute and Article 18 of the Vienna Convention on the Law of Treaties (VCLT), the notion of normative multilateral treaties should be taken into consideration. *Chapter 1.1* of the essay particularly deals with the idea that normative multilateral treaties have a different regime in international law. This is caused by their specific object and purpose having a humanitarian character. The distinct regime for such treaties has a general character covering situations regarding reservation, interpretation, succession, termination as well as an interim obligation under Article 18 of VCLT. *Chapter 1.2* examines the scope of Article 18. Firstly, determination of the nature of the obligation is crucial. Is it a legal obligation? Or just manifestation of the general principle of good faith? Here two different situations should be considered. One is the extent of obligations for general international treaties and the second is situations regarding normative multilateral treaties. *Chapter 2* focuses on positive measures undertaken by Russia during 17 years with aim implementation Rome Statute. This is important for two reasons. First, it demonstrates the State's readiness to be bound by the treaty and second, it draws a clear distinction with the withdrawal of signature by the USA which from the Rome Conference was a persistent objector to the establishment of ICC. *Chapter 3* deals with the legal effects of withdrawal of signature by Russia. The main questions are: a) whether the withdrawal itself was contrary to the object and purpose of the Statute, considering the two situations under investigation; b) what are the possible consequences for the alleged breach of Article 18 of VCLT by Russia. Noteworthy, *Chapter 3* begins with the Russian Constitutional Court's decision. This is particularly important

<sup>1</sup> Preamble of Rome Statute

<sup>2</sup> Professor Antonio Cassese used those words for describing the International Criminal Tribunal for Former Yugoslavia. See: Antonio Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ 9 EJIL 2(1998) 13

<sup>3</sup> Decision on the Prosecutor's request for authorization of an investigation ICC-01/15-12 27 January 2016 Pre-Trial Chamber I; available at: <<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/15-12>> accessed 9 September 2018

<sup>4</sup> Information available at: <<https://www.icc-cpi.int/ukraine>> accessed 9 September 2018

because it clearly demonstrates the precise perception of Article 18 by the State concerned.

This research *inter alia* covers relevant reports of International Law Commission (ILC), decisions of international tribunals, such as International Court of Justice (ICJ), Human Rights Committee (HRC), European Court of Human Rights (ECHR) etc., as well as, practice of relevant domestic jurisprudence, namely, Constitutional Court of Russia.

The outcome of this essay is expected to be a contribution in a better understanding of the application of Article 18 of VCLT especially when it comes to normative multilateral treaties such as Rome Statute. The fact that this particular topic is not exhaustively studied makes current research even more challenging.

## 1. Rome Statute as a Normative Multilateral Treaty in light of Article 18 of the Vienna Convention on the Law of Treaties

### 1.1. Normative Multilateral Treaties in International Law

While it is true that international relations are based on the notion of reciprocity,<sup>1</sup> long before the codification of VCLT special category of normative multilateral treaties emerged.<sup>2</sup> Special Rapporteur Sir Gerald Fitzmaurice referred them as *law-making* multilateral treaties where “*juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty.*”<sup>3</sup> He described such obligations as “self-existent” and “integral”.<sup>4</sup> Sir Jennings and Sir Watts, characterise formation of such treaties in following way: “*relatively extensive participation in a treaty, coupled with a subject matter of general significance and stipulations which accord with the general sense of the international community, do establish for some treaties an influence far beyond the limits of formal participation in them.*”<sup>5</sup>

Important development with respect to normative multilateral treaties was made through the *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>6</sup> Here ICJ underlined the importance of normative treaties while stating that reservations are acceptable unless it frustrates the object and purpose of the Convention. This was particularly important for highlighting the non-reciprocal nature of normative treaties.<sup>7</sup> The normative character of human rights treaties is strongly demonstrated in HRC’s General Comment No. 24 which dealt with reservations contrary to the object and purpose of the International Covenant on Civil and Political Rights (ICCPR). The HRC held that “*the normal consequence of an unacceptable reservation is [...] that the Covenant will be operative for the reserving party without benefit of the reservation.*”<sup>8</sup> The similar approaches were upheld by other international human rights bodies.<sup>9</sup>

Noteworthy, Special Rapporteur Allain Pellet in his second report on the reservation to treaties<sup>10</sup> contested the existence of a special regime with respect to the normative multilateral treaties, such as human rights treaties.<sup>11</sup> He, however, did not deny that permissibility of the reservations should be determined by the object and purpose criterion.<sup>12</sup> The ILC’s caution was that such controversies ought to be resolved by State party itself (rather than monitoring bodies), either through “*modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.*”<sup>13</sup> According to Pellet, only such an approach could maintain a balance between universality and stability of treaties.<sup>14</sup> This determination could not be deemed sufficient though. For example, in 1997 when North Korea decided denunciation of ICCPR, HRC issued General Comment No. 26 according to which States cannot denunciate or withdraw from the Pact.<sup>15</sup> How should State act when its reservation is against the object and purpose of the normative multilateral treaty and meanwhile it cannot withdraw from the treaty? For such situations, Klabbbers refers to the Nordic approach pursuant to which State remains as a party to the normative multilateral treaty although without receiving the benefits from the reservation.<sup>16</sup>

<sup>1</sup> Keohane R O, ‘Reciprocity in International Relations’ [1986] 40 International Organization 12-13

<sup>2</sup> Catherine Brölmann, ‘Law-Making Treaties: Form and Function in International Law’ [2005] 74(3) Nordic J Int’l L 387

<sup>3</sup> Gerald Fitzmaurice, Second Report on the Law of Treaties, A/CN.4/107 [1957] 2 YBILC 31

<sup>4</sup> *ibid*

<sup>5</sup> Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (9<sup>th</sup> edn, Vol I, OUP 2008) 583 at 1204

<sup>6</sup> Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, 28 May 1951

<sup>7</sup> Malgosia Fitzmaurice, ‘On the Protection of Human Rights, Rome Statute and Reservations to Multilateral Treaties’ [2006] 10 SYBIL 168

<sup>8</sup> HRC General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6 para 18

<sup>9</sup> Fitzmaurice M (n 11) 169

<sup>10</sup> Allain Pellet, Second Report on Reservation to Treaties, A/CN.4/477 [1996] 2(1) YBILC

<sup>11</sup> *ibid* 163-64

<sup>12</sup> *ibid*

<sup>13</sup> Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, A/CN.4/SER.A/1997/Add.1 (Part 2) [1997] 2 YBILC para 10 at 57

<sup>14</sup> Alain Pellet, ‘The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur’ [2013] 24(4) EJIL 1078

<sup>15</sup> Laurence R Helfer, ‘Terminating Treaties’ in Duncan B Hollis (ed) *The Oxford Guide to Treaties* (OUP 2012) 639

<sup>16</sup> Jan Klabbbers, ‘Accepting the Unacceptable - A New Nordic Approach to Reservations to Multilateral Treaties’ [2000] 69 Nordic J Int’l L

The normative character is not linked solely to the reservation issues, rather it has a general application. According to professor Simma, “*this view goes much further than the Vienna Convention regime on reservations to treaties in that it calls for severability where a reservation does not pass the ‘object and purpose’ test.*”<sup>1</sup> For example, the ECHR for the purposes of treaty interpretation frequently refers to the Convention as a “law-making treaty”.<sup>2</sup> The specific regime for normative multilateral treaties applies in case of State succession where State is limited in the application of so-called *clean state* doctrine with respect to humanitarian treaties.<sup>3</sup> Namely, consent to be bound expressed by the predecessor State on normative treaties automatically binds successor State.<sup>4</sup> Noteworthy, Article 60(5) of VCLT denies State the right to terminate or suspend treaty during its material breach if it concerns humanitarian treaties.

Therefore, normative multilateral treaty regime is of *sui generis* nature closely linked to the object and purpose criterion. The reason behind this is that such treaties have inherent nature. Namely, as professor Brölmann mentions, for normative treaties “*an underlying premise is that once the treaty is concluded, the legal order it has established, assumes a life of its own.*”<sup>5</sup> Hence, a special regime with respect to the normative treaties also arises in situations regarding Article 18 of VCLT (see *Chapter 1.2.3.* below).

## 1.2. Scope of Article 18 of the Vienna Convention on the Law of Treaties

### 1.2.1. Triggering Conditions and termination

Article 18 extends over two different situations which are given in paragraphs (a) and (b) respectively. Paragraph “a” refers the simple signature when the consent to be bound is not yet declared by the State or is pending, for example, when State accedes the treaty later or when signs from the beginning of the negotiations but protracts its ratification. Paragraph “b” on the other hand covers such situations where State on its behalf had done everything, including ratification but the treaty itself had not become operative.<sup>6</sup> Although Article 18(b) mentions that such entry into force should not be *unduly delayed*, there are no specific criteria for such cases.<sup>7</sup>

Regarding the termination of interim obligation, Article 18 (a) requires from the State to *make its intention clear not to become a party to the treaty*. There is little State practice in this regard. Frequently cited examples are unsigned Rome Statute by the USA, also an announcement made by Russia refusing to ratify Energy Charter Treaty, although, Russia had previously agreed on the provisional application of that latter treaty which is different regime from Article 18 of VCLT.<sup>8</sup> Russia’s relationship with Rome Statute has distinct connotations and hence it will be assessed separately. Professor Aust suggests that withdrawal of signature or refusal to ratify are State discretions, therefore, those acts could have only political implications.<sup>9</sup> According to Jennings & Watts, “*State cannot sign a treaty and subsequently conduct itself as if it had no concern with it or as if its signature were a mere act of authentication. [...] A State probably ought to submit a treaty which is subject to ratification to the proper constitutional authorities with a view to ratification or rejection.*”<sup>10</sup> Considering the importance of good faith, especially if the normative multilateral treaties are involved, the latter observation could be deemed more appropriate. An interesting parallel can be drawn from the *Congo v Rwanda* case where a statement made by the Minister of Justice of Rwanda with respect to the withdrawal of reservation from Genocide Convention was not deemed sufficient by the ICJ for triggering legal effects.<sup>11</sup> Application of this standard *mutatis mutandis* to Article 18 would require from States to undertake formal procedures in order to *make clear intention not become a party*.

### 1.2.2. Nature and Extent of Obligation under Article 18 in General

Historically it was questionable whether any kind of obligation arises from the simple signature. According to Article 9 of the 1935 Harvard Draft Convention on the Law of Treaties, such signatory States had no obligation to perform the treaty unless the treaty itself provided otherwise.<sup>12</sup> The commentators emphasised that the simple signature could only trigger the legitimate expectation that State will act in accordance with good faith which is

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<sup>1</sup> Simma B, ‘The Work of the International Law Commission at Its Forty-Ninth Session (1997)’ [1997] 66(4) Nordic J Int’l L 537

<sup>2</sup> See, for example: Leyla Şahin v Turkey [GC] App no 44774/98 (ECHR, 10 November 2005) 141; Loizidou v Turkey [GC, Preliminary Objections], App no 15318/89 (ECHR, 23 March 1995) 84

<sup>3</sup> Marko Milanovic, Milanovic, ‘Territorial Application of the Genocide Convention and State Succession’ in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 486

<sup>4</sup> For example the ICJ, despite the Federal Republic of Yugoslavia’s (FRY) preliminary objection denying automatic succession with respect to Genocide Convention, held it accountable for failure to prevent Genocide. See: Case Concerning Application of the Convention on the Prevention And Punishment of the crime of Genocide (Bosnia And Herzegovina v. Serbia And Montenegro) ICJ Judgment Of 26 February 2007 paras 130, 471

<sup>5</sup> Catherine Brölmann (n 6) 388

<sup>6</sup> Oliver Dör and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (Springer, 2012) 226-229

<sup>7</sup> *ibid*

<sup>8</sup> Curtis A Bradley, ‘Treaty Signature’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 217

<sup>9</sup> Anthony Aust, *Modern Treaty Law and Practice* (2<sup>nd</sup> edn CUP 2007) 120

<sup>10</sup> Robert Jennings and Arthur Watts (n 9), 1231

<sup>11</sup> Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), ICJ, Judgment of 3 February 2006 para 52

<sup>12</sup> Harvard Law School, *Article 9. Obligation of a Signatory Prior to the Coming into Force of a Treaty* [1935] 29 AJIL 778

the foundation of international relations.<sup>1</sup> The opinions of the ILC Rapporteurs were also divided. The first Special Rapporteur, J. L. Brierly, identified an obligation between signature and ratification as a “*kind of estoppel against the non-ratifying party*.”<sup>2</sup> The Second Rapporteur, Sir Hersch Lauterpacht, mentioned that the abuse of discretion not to ratify a treaty might harm the authority of international law.<sup>3</sup> He further stated that “*the mere fact of signature confers upon the signatory certain rights [...] and it is proper that there should exist some obligation in consideration of those rights.*”<sup>4</sup> The third Rapporteur, Sir Gerald Fitzmaurice mentioned that albeit signature is not equal to the final acceptance by the State, “*it may nevertheless have certain legal consequences.*”<sup>5</sup> The Fourth Rapporteur, Sir Humphrey Waldock, underlined that signatory State has an obligation to act in a good faith. Namely, in case the treaty so provides, State must submit it to the legislative body for its ratification.<sup>6</sup> In his report, Sir Waldock referred to the *Case Concerning Certain German interests in Polish Upper Silesia*<sup>7</sup> to conclude that abuse of rights by a signatory State might lead to a breach of the treaty.<sup>8</sup> Another decision frequently cited in order to demonstrate the existence of an interim obligation triggered by the signature is *Mageladis v Turkey* where the tribunal held that “*from the time of the signature of the Treaty and before its entry into force the contracting parties were under the duty to do nothing which might impair the operation of its References clauses.*”<sup>9</sup>

Most of the commentators do not contest the customary nature of the Article 18 of VCLT.<sup>10</sup> Moreover, contemporary State practice, such as unsigned Rome Statute by the USA could be deemed as an illustration of the customary nature of the Article 18, otherwise, there would be no necessity of such precautionary measure.<sup>11</sup> Noteworthy, the USA, unlike Russia, never ratified VCLT.<sup>12</sup>

Article 18 is based on the *object and purpose* criterion which is also referred in other provisions of VCLT. It is agreed among scholars that this criterion in all situations should be understood similarly,<sup>13</sup> albeit with different contextual implications.<sup>14</sup> In order to identify the object and purpose, the whole treaty, including its title, preamble and individual provisions, should be assessed. That is because treaties frequently have more than one *telos*.<sup>15</sup>

With respect to the amount of an interim obligation, Article 18 indicates to the obligation to refrain. This 18 obliges States to omit from doing certain acts which might compromise the essence of the treaty. States are not obliged to impose positive measures *per se*,<sup>16</sup> however, in certain situations, States might have a duty to maintain the material object (such as product or other good) envisaged under the treaty.<sup>17</sup> Thus the obligation to refrain could be assessed only case-by-case analysis.<sup>18</sup>

### 1.2.3. Extent of Obligation in Normative Multilateral Treaties

An additional factor for determining the extent of the obligation under Article 18 is the nature of the treaty.<sup>19</sup> This means that the scope of interim obligations with respect to the normative treaties should be wider. The strong illustration is given in *Öcalan* judgment where Turkey, by the material time, had signed but not ratified Additional Protocol No. 6 concerning the abolition of the death penalty. ECHR therefore held that “*non-implementation of the capital sentence is in keeping with Turkey's obligations as a signatory State to this Protocol, in accordance with Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties, to 'refrain from acts which would defeat the object and purpose' of the Protocol.*”<sup>20</sup> Such kind of approach indicates that for normative multilateral treaties the interim obligation under Article 18 extends beyond the good faith criterion and gains a legal character. The same conclusion could be deduced from the decision of the Russian Constitutional Court (see *Chapter 3.1* below). Another interesting example is that States undertook

<sup>1</sup> *ibid* 781

<sup>2</sup> J.L. Brierly, ‘Report Law of Treaties’ A/CN.4/54 [1952] 2 YBILC 54

<sup>3</sup> Hersch Lauterpacht, ‘Report Law of Treaties’ A/CN.4/63 [1953] 2 YBILC 108

<sup>4</sup> *ibid* 110

<sup>5</sup> Gerald Fitzmaurice, ‘Report on the Law of Treaties, A/CN.4/101 [1956] 2 YBILC para 58 at 122

<sup>6</sup> Humphrey Waldock, ‘Report on the Law of Treaties’ A/CN.4/144 and Add.1 [1962] 2 YBILC, 46

<sup>7</sup> *Certain German interests in Polish Upper Silesia (Germany v Poland)* PCIJ Judgment of 25 May 1926.

<sup>8</sup> Waldock (n 39) 47

<sup>9</sup> *Megalidis v Turkey* (Turkish-Greek Mixed Arbitral Tribunal 1928), cited from Curtis A Bradly (n 26) 213-14

<sup>10</sup> Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2016) 45

<sup>11</sup> Paolo Palchetti ‘Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 26

<sup>12</sup> UN Treaty Collection, VCLT, available at: <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en)> accessed 9 September 2018

<sup>13</sup> Dör and Schmalenbach (n 27) 232

<sup>14</sup> Curtis A Bradly (n 29) 213

<sup>15</sup> *supra* (n 45)

<sup>16</sup> Kolb (n 42) 44

<sup>17</sup> Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishing 2009) 249-50

<sup>18</sup> Dör and Schmalenbach (n 26) 234

<sup>19</sup> Palchetti (n 43) 28

<sup>20</sup> *Öcalan v Turkey* App no 46221/99 (ECHR, 12 March 2003) 185

positive measures for the implementation of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, which has normative nature, before its entry into force.<sup>1</sup>

No doubt that Rome Statute constitutes a normative, law-making multilateral treaty, however, it has more specific, constitutional characteristics as well.<sup>2</sup> Rome Statute through Article 120 clearly prohibits any reservation to it. Although there is some room left for States through interpretative declarations (Article 124),<sup>3</sup> the intention of the Statute clearly diverges in favour of stability of treaty. This raises following hypothetical questions: Can the withdrawal of the signature by the State be deemed as a move contrary to the object and purpose of the Statute? If so, what are the possible moves from other States or monitoring bodies? Bearing in mind the particular importance of normative multilateral treaties, the answer to the first question could, in theory, be affirmative,<sup>4</sup> especially when subsequent conduct by the State refers to its readiness to be bound. As to the second question, the issue of legal analogy comes into play. Here the analogy to the Nordic approach to invalid reservations also enshrined in HRC's General Comment No. 24 might be *mutatis mutandis* applied with respect to Article 18 of VCLT. In other words, a hypothetical State which signed Rome Statute (or another normative treaty) and actively engaged in such a way that expressed readiness to be bound by it, but one day decided to withdraw its signature, should not be allowed to benefit from such withdrawal. The using of the legal analogy from the reservations regime could be also justified through the observation given in the Oxford Commentaries, according to which: "*Article 18 could a posteriori facilitate the determination of the scope of compatibility or validity of reservations and of interpretations of a treaty [...] Therefore, the complementarity between Article 18 and the rules of the Vienna Convention with respect to reservations appears to be fundamental.*"<sup>5</sup>

Noteworthy, using legal parallelism between Article 18 and other provisions of VCLT in favour of normative multilateral treaties is indeed worthy to be tested. It is suggested by Professor Paolo Palchetti that if State engages in such activities that are similar to those of "material breach" from Article 60 of VCLT, will trigger a violation of Article 18. That is because one of the examples of material breach is "*the violation of a provision essential to the accomplishment of the object or purpose of the treaty*", i.e. both articles contain similar red-line regarding the violation.<sup>6</sup>

Nevertheless, this area of law of treaties is not exhaustively studied. Thus the theory of using such kind of legal analogy from reservations regime is based upon the author's observations which need further research especially from the perspective of *de lege ferenda*.

## 2. From Signature till 'divorce': 17 Years of Relationship between Russia and Rome Statute

### 2.1. Signature and Subsequent Implementation

On 20 July 1998, during the final Rome Conference, Russia voted in favour of the adoption of Rome Statute.<sup>7</sup> On 8 September 2000, the President of Russia ordered the Minister of Foreign Affairs to sign it.<sup>8</sup> Russia signed the Statute on 13 September 2000, two years before its entry into force.<sup>9</sup> The Statute entered into force on 1 July 2002 after 60<sup>th</sup> ratification.<sup>10</sup> Therefore, the interim obligation under Article 18(a) was triggered with respect to Russia.

During the Rome Conference, Russian representatives emphasised on the normative nature of Rome Statute. For example, during the diplomatic conference held in Rome between 15 June and 17 July 1998, Russian Mr. Gevorgian made following statement: "*after more than three years of intense work and effort, an effective, international criminal court had been established that could act fully in accordance with recognized norms and standards of international law and human rights.*" (Emphasis added).<sup>11</sup>

Year after the entry into force of Rome Statute, the President of Russia issued an executive order which set up an advisory board within the Ministry of Justice of Russia.<sup>12</sup> The aim was drafting a proposal for ratification

<sup>1</sup> Malgosia Fitzmaurice, 'The Kyoto Protocol Compliance Regime and Treaty Law' [2004] 8 SYBIL 36. See also: Malgosia Fitzmaurice, Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005) 305

<sup>2</sup> Fitzmaurice M (n 11) 160

<sup>3</sup> There are arguments that declarations made by several States are similar to reservations. For more details see Fitzmaurice M (supra n 11)

<sup>4</sup> Compare with Palchetti (n 43) 32-33

<sup>5</sup> Laurence Boisson de Chazournes and others, 'Conclusion of Treaties' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 384

<sup>6</sup> Palchetti (n 43) 30

<sup>7</sup> Press Release, L/2889, 20 July 1998; available at: <<https://www.un.org/press/en/1998/19980720.L2889.html>> accessed 9 September 2018

<sup>8</sup> Decree of the President of Russian Federation N394-rp dated on 8 September 2000; available in Russian at: <<http://kremlin.ru/acts/bank/16051>> accessed 9 September 2018

<sup>9</sup> UN Treaty Collection; available at: <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en)> accessed 9 September 2018

<sup>10</sup> *ibid*

<sup>11</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13 (Vol.11), 1998, para 102 at p 128; available at: <[http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf)> accessed 9 September 2018

<sup>12</sup> Sergey Vasiliev and Anna Ogorodova, 'Implementation of Rome Statute in Russia' [2005] 16 Finnish YB Int'l L 197.

as well as preparing amendments for the harmonisation of Russian legislation with Rome Statute.<sup>1</sup> The first draft proposals were returned by the President's Administration for further improvements and they were not submitted before the Parliament.<sup>2</sup> The main disagreement raised around Article 61(1) of the Russian Constitution according to which "*A citizen of the Russian Federation may not be deported from Russia or extradited to another State.*"<sup>3</sup> Nevertheless, some Russian commentators rightly emphasise that there are no theoretical contradictions between the Constitution and the Statute because the latter refers to "surrender" of accused to the international tribunal while the Constitution deals with extradition and/or deportation of Russian citizens to another State.<sup>4</sup> The Ministry of Foreign Affairs of Russia in its official statement of 17 February 2004 once again reiterated that Rome Statute was a manifestation of existing conventional norms, as well as ICC, was set up in accordance with existing UN Security Council norms safeguarding the international peace and security.<sup>5</sup> The Statement further specified that Russia was actively working for harmonisation of its domestic legislation.<sup>6</sup>

Russia's relationship with Rome Statute and ICC is not confined by the protracted domestic implementation. Russia was actively participating in sessions held by the Assembly of the State Parties (ASP) to Rome Statute as an observer State. On 1 June 2010, during Kampala Conference, Russian representative once again reaffirmed that Russia voted in favour of Rome Statute and at the material time Russia was in a fruitful co-operation with ICC.<sup>7</sup> On 21 November 2012, during a 12<sup>th</sup> session of the ASP, Russia as an observer State declared that ICC "*does not exist in a vacuum. It is of utmost importance that it becomes an organic part of the complex system of international institutions and mechanisms aimed at creating the most harmonious conditions for the development of international community.*"<sup>8</sup> The Russian representative further confirmed that his country was "*expecting the ICC, as the only permanent institution of international justice, to become an important factor of stability in international affairs.*"<sup>9</sup> In 2009, upon the request of the Prosecutor, Russia submitted 28 Volumes of materials<sup>10</sup> trying to justify its aggression against Georgia in August 2008. Russia also hosted the Office of Prosecutor's mission in 2014 and updated about proceedings with respect to 2008 war.<sup>11</sup>

The ICJ in the *North Sea Continental Shelf Cases* assessed the applicability of 1958 Geneva Convention on Continental Shelf with respect to Federal Republic of Germany (FRG) who acceded but did not ratify the mentioned convention. The Court nevertheless held that the convention with respect to FRG became binding "*namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional régime; or has recognized it as being generally applicable to the delimitation of continental shelf areas.*"<sup>12</sup> Such "*consistent course of conduct*"<sup>13</sup> was enough for the ICJ to bypass the issue of formal ratification which was a condition under Article 9 of the Convention. However, the Court underlined that the threshold is high and all such situations should be assessed case-by-case.<sup>14</sup> It is obvious that Russia's subsequent practice until 2016 manifested the intention to ratify the Statute while the excuse from its delay was the complicated process of harmonising domestic legislation.

<sup>1</sup> *ibid* 198

<sup>2</sup> *ibid*

<sup>3</sup> Constitution of Russia available at: <<http://www.constitution.ru/en/10003000-03.htm>> accessed 9 September 2018

<sup>4</sup> Елена Трикоз (ред), *Международный Уголовный Суд: Проблемы, Дискуссии, Поиск Решений* (Институт права и публичной политики, Москва 2008) 158; [Elena Trikoz (ed), *International Criminal Court: Problems, Discussion, Search for Solution* (Institute of Law and Public Policy, Moscow, 2008) 158] available in Russian at: <[http://www.ngo-at-work.org/icc2006/docs/Project\\_Reader\\_Russian.pdf](http://www.ngo-at-work.org/icc2006/docs/Project_Reader_Russian.pdf)> accessed 9 September 2018

<sup>5</sup> Statement of the Ministry of Foreign Affairs of Russian Federation dated 17 February 2004, paras. 3-4; available in Russian at: <[http://www.mid.ru/foreign\\_policy/legal\\_problems\\_of-international\\_cooperation/-/asset\\_publisher/HCN0yFLs7lFy/content/id/484880](http://www.mid.ru/foreign_policy/legal_problems_of-international_cooperation/-/asset_publisher/HCN0yFLs7lFy/content/id/484880)> accessed 9 September 2018

<sup>6</sup> *ibid* para 5

<sup>7</sup> Statement by H.E. Kirill G Gevorgyan, Director of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation to the Review Conference of Rome Statute Kampala, 1 June 2010; available at: <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Statements/ICC-RC-gendeba-RussianFederation-ENG.pdf#search=Russia](https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-RussianFederation-ENG.pdf#search=Russia)> accessed 9 September 2018

<sup>8</sup> Statement by the delegation of the Russian Federation (Observer State) at the Twelfth session of the Assembly of States Parties to Rome Statute of the International Criminal Court, 21 November 2012, 1; available at: <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Russia-ENG.pdf#search=russia](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Russia-ENG.pdf#search=russia)> accessed 9 September 2018

<sup>9</sup> *ibid*

<sup>10</sup> Report on programme performance of the International Criminal Court for the year 2009, Assembly of States Parties, ICC-ASP/9/7, Ninth session, New York, 6-10 December 2010, 12; available at: <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP9/ICC-ASP-9-7-ENG.pdf#search=Russia](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-7-ENG.pdf#search=Russia)> accessed 9 September 2018

<sup>11</sup> Report on activities and programme performance of the International Criminal Court for the year 2014, Assembly of States Parties, ICC-ASP/14/8, Fourteenth session The Hague, 18-26 November 2015, para 64 at p 11; available at: <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-8-ENG.pdf#search=Russia](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-8-ENG.pdf#search=Russia)> accessed 9 September 2018

<sup>12</sup> *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark and Netherlands) ICJ Judgment of 20 February 1969, para 27

<sup>13</sup> *ibid* para 28

<sup>14</sup> *ibid*

## 2.2. Distinction from Withdrawal by the USA

Although the USA was the first country unsigning Rome Statute, there are several crucial differences between this and Russia's declaration not to ratify the Statute.

First of all, the USA, unlike Russia, voted against the Statute during the final Rome Conference held in July 1998. The official position of the USA was following: "*The United States does not accept the concept of jurisdiction in the Statute and its application over non-States parties. It voted against the Statute.*"<sup>1</sup>

The second major factor was the intent of a signature. Participating countries had a deadline for signature until December 2000. This means that State signing after the deadline would be unable to participate in further negotiations.<sup>2</sup> Therefore, the intent of the USA was not to ratify Rome Statute but maintaining a venue for debates. This was also clear by the statement of President Clinton who declared that the aim of the signature was to be "*in a position to influence the evolution of the court.*"<sup>3</sup>

The third interesting observation regards the application of Article 18 of VCLT with respect to the USA. Noteworthy, the USA unsigned the Statute on 6 May 2002, 2 months before the Statute officially entered into force.<sup>4</sup> During the mentioned period Rome Statute was pending the entry into force and meanwhile, the USA had not expressed the consent to be bound. Thus the application of Article 18(b) of VCLT is dismissed from the beginning. With respect to Article 18(a), one can conclude that voting against the Statute in 1998 and the statement made by President Clinton were enough indication for deducing the USA's intent not to ratify the Statute.

The fourth difference regards to the subsequent practice of the USA with respect to Rome Statute and ICC. In 2003 the US adopted the American Service-members' Protection Act,<sup>5</sup> according to which "*members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States.*"<sup>6</sup> Meanwhile, since summer 2002, the USA concluded Bilateral Immunity Agreements (also known as Article 98 agreements) with more than 100 member States to Rome Statute.<sup>7</sup> The aim of those agreements is to exempt US citizens from being surrendered before ICC.<sup>8</sup> Furthermore, in 2002 the USA vetoed the extension of the UN peacekeeping mandate in Bosnia until getting assurances that US personnel would under no circumstances be subject to ICC jurisdiction.<sup>9</sup> All the above examples illustrate that the USA, unlike Russia, from the very beginning was the persistent objector to Rome Statute.

## 3. Legal Effect of Russia's Refusal to Ratify Rome Statute

### 3.1. Russian Constitutional Court's Approach to Article 18 of the Vienna Convention on the Law of Treaties

In order to better understand how Russia, as a State, envisages Article 18 of VCLT, the decision of the Constitutional Court of Russia<sup>10</sup> dated 19 November 2009 should be analysed. In 2009, the Supreme Court of Russia submitted the request before the Constitutional Court to interpret its previous decision dated 2 February 1999, according to which imposition of capital punishment was suspended until enacting the Jury Trial Act, namely, until 1 January 2010. The Question of the Supreme Court was whether the death penalty would violate Additional Protocol No.6 to the ECHR which Russia signed on 16 April 1997 but never ratified.<sup>11</sup> While signing the Protocol, Russia took the obligation to ratify it until 28 February 1999.<sup>12</sup> The instrument of ratification was submitted before the Russian Parliament on 6 August 1999, however, after long deliberations, in February 2002

<sup>1</sup> Press Release (n 59)

<sup>2</sup> Anup Shah, 'Signing Up to the International Criminal Court by December 2000' (Global Issues, 17 April 2002) <<http://www.globalissues.org/article/491/signing-up-to-the-icc-by-december-2002>> accessed 9 September 2018

<sup>3</sup> Statement by US President Bill Clinton, authorizing the US signing of Rome Statute of the International Criminal Court, 31 December 2000 <<http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf>> accessed 9 September 2018

<sup>4</sup> Letter to UN Secretary General Kofi Annan, Richard Boucher, Spokesman Washington DC, 6 May 2002; <<https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>> accessed 9 September 2018

<sup>5</sup> American Service-Members' Protection Act Bureau of Political-Military Affairs Washington DC, 30 July 2003; <<https://2001-2009.state.gov/t/pm/rls/othr/misc/23425.htm>> accessed 9 September 2018

<sup>6</sup> *ibid* SEC 2002 para 8

<sup>7</sup> List available at: <<http://guides.ll.georgetown.edu/c.php?g=363527&p=2456099>> accessed 9 September 2018

<sup>8</sup> Markus Benzling, 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties' [2004] 8 Max Planck UNYB 182-236

<sup>9</sup> *ibid* 187

<sup>10</sup> Decision of the Constitutional Court of Russian Federation dated 19 November 2009; available in Russian at: <<http://doc.ksrf.ru/decision/KSRFDecision24593.pdf>> accessed 9 September 2018; see English summaries at: N 1344-O-P, Oxford Reports on International Law, ILDC 1553 (RU 2009) at: <<http://opil.ouplaw.com/view/10.1093/law/ildc/1553ru09.case.1/law-ildc-1553ru09>> accessed 9 September 2018

<sup>11</sup> Council of Europe, ETS No.114 at: <[https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p\\_auth=JLL7ize8](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/114/signatures?p_auth=JLL7ize8)> accessed 9 September 2018

<sup>12</sup> Decision of the Constitutional Court (n 88), para 4.2 at 11

the ratification was rejected by the Parliament.<sup>1</sup>

From the beginning, the Constitutional Court emphasized that although the Additional Protocol was not ratified, Russia still had obligations under Article 18 of VCLT not to defeat object and purpose of the Protocol.<sup>2</sup> The Court further held that the fact that the document is not ratified, does not preclude its application considering the existing human rights norms.<sup>3</sup> According to the Court held that:

*“Implementation of the obligation not to defeat object and purpose of the Additional Protocol No.6 lies on the State as a whole. If the particular branch of the power rejects to fulfil those obligations, another branch, based on the principle of distribution of power, [...] ought to fulfil that duty in accordance with Article 18 of the Vienna Convention on the Law of Treaties.”<sup>4</sup>*

The Court concluded that rendering the death penalties would have violated Article 18 of VCLT if not pardons made by the President’s Office for such cases.<sup>5</sup> The Court finally observed that moratorium to the execution of the capital punishments *“transformed into the existing norm according to which no one could be executed.”<sup>6</sup>*

Today Russia is the only remaining country in the Council of Europe who had not ratified Additional Protocol No.6. Nevertheless, the Constitutional Court of Russia clearly mentioned applicability of Article 18 of VCLT with respect to abovementioned Protocol and urged executive authorities not to enforce death penalties in order to avoid violation of Article 18 of VCLT, i.e. the Constitutional Court imposed positive measures in order to safeguard fulfilment of the duties under Article 18 of VCLT. Indeed, no capital punishment was executed by Russia since signing of Additional Protocol despite the Parliament’s rejection to ratify it. This judgment is a clear evidence that approach of Russia to Article 18 of VCLT, at least with respect to normative multilateral treaties, is more than a general obligation of good faith. This, in principle, is similar to the idea of *mutatis mutandis* application of Nordic approach on invalid reservations mentioned in *Chapter 1.2.3* above. Does this mean that the similar approach should be taken with respect to Rome Statute? *Chapter 3.2* below will focus particularly on this issue.

### **3.2. Russia’s Obligation not to Defeat Object and Purpose of Rome Statute notwithstanding the Refusal to Ratify**

On 16 November 2016, the President of Russia issued Decree N361-rp where he ordered to the Ministry of Foreign Affairs of Russia (MFA) to notify the UN Secretary-General regarding intention not to ratify Rome Statute.<sup>7</sup> The Same day, the MFA issued a statement where it accused OTP of biased investigation in favour of Georgia.<sup>8</sup> The MFA also mentioned VCLT in a vague way stating that *“the decision of the Russian Federation not to become a party to Rome Statute (to withdraw its signature from the Statute) entails legal consequences provided for by the Vienna Convention on the Law of Treaties of 1969.”<sup>9</sup>* This was further clarified through official communication with the UN Secretary-General where the Russian representative asked *“to consider this instrument as an official notification of the Russian Federation in accordance with paragraph (a) of Article 18 of the Vienna Convention on the Law of Treaties of 1969.”<sup>10</sup>*

Such move undertaken by Russia was clearly directed towards defeating object and purpose of Rome Statute, which is, as was mentioned in the beginning, *“to guarantee lasting respect for and the enforcement of international justice”<sup>11</sup>* and to end impunity. This is even more obvious considering the context before withdrawal. On 14 August 2008, during ongoing Russian aggression against Georgia, OTP announced commencing the preliminary examination for allegedly committed international crimes under ICC jurisdiction.<sup>12</sup> On 13 October 2015 OTP requested authorisation from the Pre-Trial Chamber for *proprio motu* investigation.<sup>13</sup>

<sup>1</sup> ibid 12

<sup>2</sup> ibid 4

<sup>3</sup> ibid para 4.3 at 12

<sup>4</sup> ibid para 5 at 13

<sup>5</sup> ibid p 14

<sup>6</sup> ibid, para. 6, p 15

<sup>7</sup> Decree N361-rp of the President of Russian Federation regarding Russia’s Intention not to Become Party to the Rome Statute, 16 November 2016; available in Russian at:

<<http://www.mid.ru/documents/10180/2523446/%D1%80%D0%B0%D1%81%D0%BF%D0%BE%D1%80%D1%8F%D0%B6%D0%B5%D0%BD%D0%B8%D0%B5.pdf/d1674f8d-b331-43ca-9216-2023cec0c050>> accessed 9 September 2018

<sup>8</sup> Statement of the Ministry of Foreign Affairs of Russia N 2111 dated 16 November 2016; available at:

<[http://www.mid.ru/press\\_service/spokesman/official\\_statement/-/asset\\_publisher/t2GCdmD8RNlr/content/id/2523566?p\\_p\\_id=101\\_INSTANCE\\_t2GCdmD8RNlr&\\_101\\_INSTANCE\\_t2GCdmD8RNlr\\_lan guageId=en\\_GB](http://www.mid.ru/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNlr/content/id/2523566?p_p_id=101_INSTANCE_t2GCdmD8RNlr&_101_INSTANCE_t2GCdmD8RNlr_lan guageId=en_GB)> accessed 9 September 2018

<sup>9</sup> ibid

<sup>10</sup> Communication with UN Secretary General dated 30 November 2016; available at:

<[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-10&chapter=18&lang=en#9](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en#9)> accessed 9 September 2018

<sup>11</sup> Preamble of Rome Statute

<sup>12</sup> Full information available at: <<https://www.icc-cpi.int/georgia>> accessed 9 September 2018

<sup>13</sup> Request for authorisation of an investigation pursuant to article 15 ICC-01/15-4 13 October 2015; available at: <<https://www.icc->



The request was satisfied on 27 January 2016 with jurisdiction on crimes against humanity committed against ethnic Georgian population and war crimes.<sup>1</sup> Meanwhile, the Prosecutor initiated preliminary examinations regarding alleged crimes against humanity committed in Ukraine which submitted a declaration in accordance to article 12(3) of Rome Statute and accepted ICC's jurisdiction from 20 February 2014 onwards.<sup>2</sup> In both situations, direct involvement of Russian forces, as well as at least overall control over separatists, were established. This being so, it is clear that the aim of Russia's declaration not to ratify the Statute is the obstruction of investigative proceedings and prevention of punishment of those who committed international crimes. This clearly amounts defeating of *raison d'être* of Rome Statute.

Based on above reasoning it could be concluded that the very Russian act to get rid of any responsibilities *via* refusing to ratify Rome Statute is a violation of Article 18 because the inevitable consequence of such act is the impunity of perpetrators committing international crimes. From this point, two possible scenarios should be analysed.

The first solution to this problem is *mutatis mutandis* application of the Russian Constitutional Court's decision as well as a legal analogy to the reservations with respect to normative multilateral treaties as was discussed in *Chapter 1.2.3*. According to the Constitutional Court's decision, analysed in the previous chapter 3.1, if one branch of power refuses or is unable to commit with the obligations under Article 18 of VCLT, other branches of power are still in duty to honour such obligations. Thus, even though the Parliament of Russia refused to ratify Additional Protocol No.6, the Constitutional Court ruled that the Protocol was still covered under Article 18. The main rationale behind this was the object and purpose of the Protocol which is the protection of human rights, particularly the right to life. Taking this argument in conjunction with the idea of using a legal analogy from HRC's General Comment No. 24 will result in the conclusion that Russia could not benefit from her refusal to ratify Rome Statute. This means that Russia is still obliged not to defeat object and purpose of the Statute.

Even if such analogy is not used, anyway Russia will be responsible for breach of the interim obligation which occurred before 16 November 2016. This reasoning is supported by professor Sayapin's precise observation according to which "*it would be incorrect to suppose (as some commentators do) that the withdrawal of Russia's signature should also retrospectively cancel the State's interim obligation not to defeat the object and purpose of Rome Statute, which existed from the time the Statute was signed on its behalf on 13 September 2000 until the issuance of bylaw № 361-rp on 16 November 2016. This obligation is autonomous, and its existence is not affected by the bylaw.*"<sup>3</sup> Furthermore, according to Sayapin, in future if Russia surrenders alleged perpetrators before ICC, this will be "*a form of satisfaction for the alleged breach of Russia's interim obligation under Article 18(a) of the Vienna Convention on the Law of Treaties, in the sense of Article 37 of the Draft Articles on State Responsibility.*"<sup>4</sup>

Bearing in mind all abovementioned it should be concluded that Russia still has the legal interim obligation not to defeat object and purpose of Rome Statute, at least, with respect to the Georgian and Ukrainian cases since they occurred before 16 November 2016.

## CONCLUSION

When speaking about Russia's relationship with Rome Statute, the first thing that should be taken into consideration is the normative nature of the Statute itself. As it is demonstrated in Chapter 1, such treaties have a distinct regime which is caused by their specific object and purpose having a humanitarian character. Noteworthy, issue of normative multilateral treaties is not confined by reservations, rather they have a general character. This means that the extent of the obligation under Article 18 of VCLT with respect to such treaties is higher. This was upheld by ECHR as well.

Russia voted in favour of Rome Statute during the Rome Conference in 1998. Throughout 1998-2016, it has undertaken positive steps for implementation of Rome Statute as well as made a supporting statement regarding the Statute and ICC itself. Upon the request of OTP, Russian authorities provided documents on 2008 August invasion in Georgia and hosted representatives of the Prosecutor several times. Such kind of subsequent practice indeed constitutes a consistent course of conduct which is enough to conclude that at least for those situations occurred during the period of 1998-2016, should be analysed in light of Article 18 of VCLT. Such subsequent practice is the core difference from the USA's withdrawal of signature. The USA from the very beginning was an objector to Rome Statute as well as ICC jurisdiction and it withdrew signature before the Statute entered into

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[cpi.int/Pages/record.aspx?docNo=ICC-01/15-4](http://cpi.int/Pages/record.aspx?docNo=ICC-01/15-4) accessed 9 September 2018

<sup>1</sup> Decision on the Prosecutor's request for authorization of an investigation (n 3)

<sup>2</sup> Full information available at: <https://www.icc-cpi.int/ukraine> accessed 9 September 2018

<sup>3</sup> Sergey Sayapin, 'Russia's Withdrawal of Signature from Rome Statute Would not Shield its Nationals from Potential Prosecution at the ICC' (Ejil:Talk, 21 November 2016) <<https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/>> accessed 9 September 2018

<sup>4</sup> *ibid*

force.

Before making final remarks regarding validity and subsequent effects of Russia's refusal to ratify Rome Statute, the landmark decision of Russian Constitutional Court with respect to the application of Additional Protocol no.6 of ECHR should be mentioned. The Court here made three significant clarifications. First, it underlined the object and purpose of the Protocol having a humanitarian character. This is important in the context of normative multilateral treaties. Second, the court made clear that notwithstanding refusal from the Russian Parliament to ratify the Protocol, other branches of power were still obliged to ensure a proper implementation of this document. And third, the court highlighted the legal nature of obligations under Article 18 of VCLT through holding that such obligations might entail for State to undertake positive measures in order to protect object and purpose of the treaty. This being so, the decision of the Constitutional Court should be *mutatis mutandis* used with respect to Rome Statute as well since both instruments constitute normative multilateral treaties.

As to the final remarks two possible solutions should be mentioned. First, Russia should not benefit from the withdrawal of its signature and therefore Article 18 is still applicable. The second solution is holding Russia accountable for breach of Article 18 of VCLT that occurred during 1998-2016 and compelling it to co-operate with ICC. The rationale is clear: Russia, through its refusal to ratify, once again undermined the very *raison d'être* of Rome Statute that is prosecution of international crimes and enforcement of international justice. In such circumstances, adequate application of Article 18 of VCLT is of utmost importance, especially when its potential is not exhaustively studied.

Therefore, while the purpose of the present article is to provide arguments in favour of specific application of Article 18 of VCLT with respect to Rome Statute, the future research should be focused more on describing the margins of such application. This is particularly important in light of Ukraine considering that the armed activities in East Ukraine has not ceased after Russia unsigned Rome Statute. On the other hand, establishing State responsibility for violation of good faith principle under Article 18 of VCLT will not make significant impact if Russia is not found obliged to co-operate with ICC. These two issues are the main directions for future research.