
**JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT IN THE HAGUE
AND WAR CRIMES IN UKRAINE IN THE FACE OF SECURITY**

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Abstract. War is theoretically subject to the laws of armed conflict but, in practice, it brings in its wake war crimes, crimes against humanity, genocide, and the crime of aggression. The parties to an armed conflict are unable and/or unwilling to hold the perpetrators of these crimes (oftentimes their own citizens) to account. Part of the rationale for establishment of the International Criminal Court was to offer a way forward in this regard. Yet the suspected war criminal – even the political leader of the aggressor state – must be apprehended and brought to The Hague so that he may face the Court. This is no easy task, thwarted by a variety of formal, factual, and political obstacles; all too often, the idea of a supranational justice system presided over by the International Criminal Court proves illusory, if not fictitious. In this article, these points are discussed in reference to the crimes being committed against the Ukrainian population by the Russian aggressors.

Keywords: International Criminal Court; Statute; war crimes in Ukraine; jurisdiction; Prosecutor of the Court; security

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JEL Classifications:

1. Introduction

Security in literature is interpreted in many dimensions (Jurgilewicz, Kozicki B, Piwowski, Grabowska, 2022, pp. 71-80; Kozicki, Bryczek-Wróbel, Górniewicz, 2020, s. 228-238; Chehabeddine et al., 2022; Hegedűs, 2022; Agbaje, 2022; Ranaweera, 2022; Bamigboye et al., 2023; Vyas-Doorgapersad et al., 2023), and in the 21st century one of its military types becomes particularly important (Mitkow, Tomaszewski, Kozicki, 2021; Mizura, Mitkow, Kozicki, 2023; Wadji et al., 2023; Radchenko et al., 2023; Szabó, 2023).

The war waged by Russia against Ukraine, the second stage of which commenced on 24 February 2022, has already claimed hundreds of thousands of victims. In an important point, many of these victims were civilians. In this era of the 24/7 news cycle powered by digital technologies, the inescapable conclusion – considering just the timeline of events and the essential characteristics of the power structure in Russia – is that direct political and legal responsibility for the ongoing conflict rests with the President of the Russian Federation, Vladimir Putin. The direct order to invade a neighbouring country amounts, in and of itself, to a crime under international law. Liability for war crimes, as defined under international law, is borne by political functionaries at various levels of the state apparatus and of the military structures who deliberately issued and/or followed

orders in breach of the international law of war. While some of the details remain to be established and some of the victim counts are estimates, it is common ground that we are faced with crimes of a magnitude not seen in Europe for decades, with all the grave implications for peace, security, and general well-being in the modern world as a common interest of all nations. Accordingly, the international community must react to the raging crisis and to the crimes committed in its context – not only by offering military and humanitarian aid, but also in the legal sphere.

Within the international legal system as it now is, the only institution which may possibly hold the individuals responsible for the war crimes in Ukraine to account is the International Criminal Court in The Hague (“the ICC”). The first step of consequence taken by the ICC with respect to the war in Ukraine was nothing short of unprecedented – on 17 March 2023, it issued warrants for the arrest of the President of the Russian Federation, Vladimir Putin and of the Ombudswoman for Children’s Rights affiliated with the Office of the President of the Russian Federation, Maria Alekseyevna Lvova-Belova (<https://www.icc-cpi.int/situations/ukraine>, 03.11.2023). The ground-breaking character of this decision lies in the fact that any arrest warrants issued by the ICC to date were for the apprehension of leaders of countries of minor geopolitical significance (usually in Africa), never of a nuclear global power (and a permanent member of the United Nations Security Council to boot). The situation becomes even more unique if one considers that Russia – much like China, India, or the United States – has never ratified the Rome Statute of the International Criminal Court, the instrument on authority of which international war crimes fall under the ICC’s jurisdiction (<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>, 03.11.2023). Come to think of it, Ukraine is likewise not a party to the Rome Statute, albeit in this case the ICC may proceed on the grounds that Ukraine has recognised its jurisdiction with respect to crimes defined in the Statute committed on Ukrainian territory. All in all, then, considering the factual situation and the legal framework, it remains an open question whether the international community might, anytime in the foreseeable future, have an opportunity to laud ICC verdicts which provide some semblance of justice for victims of the war in Ukraine and prevent the perpetrators from basking in impunity.

2. The international criminal court

Before addressing these questions, a brief description of the International Criminal Court is in order. The ICC, with its seat in The Hague, is the world’s first and only international criminal tribunal established on authority of the Treaty of Rome adopted at the United Nations Diplomatic Conference held in Rome between 15 June and 17 July 1998, bringing together representatives of 160 countries. The conference participants adopted the ICC Statute, which came into force on 1 July 2002 upon ratification by 60 states.

Actual operations of the International Criminal Court commenced on 11 March 2003, and from this day onwards it is competent to prosecute perpetrators of the most serious war crimes under international law. As per art. 5 of the Rome Statute, these include genocide, crimes against humanity, war crimes, and the crime of aggression. The latter has been the object of protracted debate as to its exact meaning, and it was only upon adoption (during the Kampala conference held on 10-11 June 2010) of amendments to the Rome Statute that the crime of aggression was defined and procedures for prosecuting it were put in place (Barriga, Kress: 2012, pp. 101-107). Actual jurisdiction of the ICC with respect to the crime of aggression kicked in as of 17 July 2018, once the General Assembly of States Parties to the Rome Statute reached formal agreement on 15 December 2017.

All along, it must be borne in mind that jurisdiction of the International Criminal Court applies only to States Parties of the Treaty which had adopted the relevant amendment and ratified it. To date, only a relatively modest number of states – 43, out of the 120 signatories of the Rome Statute supporting the ICC – have effectuated such ratification. The ICC is composed of 18 judges hailing from various States Parties, appointed via secret ballot by the countries which had submitted to the Court’s jurisdiction. Every country may put forth two candidates; these must be individuals of unimpeachable moral standing, with high legal qualifications, experience presiding over criminal cases, and renown in the field of international law. Art. 40.1 of the Statute stipulates that ICC judges must be independent, and art. 40.2 – that they may not engage in any other professional activity. The

Tribunal is a permanent body. Its jurisdiction extends only to natural persons (art. 25.1 of the Statute), and it is complementary in character with respect to national legal systems as far as criminal cases are concerned (as discussed in more detail below). The International Criminal Court is independent of the United Nations Organisation, it has the status of an international legal entity with discrete legal personality and legal competence within the scope necessary to perform its functions and pursue its objectives (art. 4.1 of the Statute) (Grzeszczyk, 2005, p. 23). Apart from the most serious crimes specified in art. 5 of the Rome Statute, jurisdiction of the ICC also extends to deliberate infractions against the ICC itself and its judicial process; as set out in art. 70.1, these include submission of false testimony in violation of the duty to tell the truth instituted in art. 69.1, deliberate presentation of untrue or falsified evidence, bribery of witnesses, intimidation of witnesses and retaliation against witnesses who had testified, destruction of evidence, impeding the work of the Court and intimidation or bribery of Court officials with a view to influencing their performance of Court duties, and acceptance or solicitation of bribes by Court officials in connection with official Court business. Under art. 86 of the Statute, States Parties are obligated to fully cooperate with the ICC as it prosecutes and adjudicates crimes within its remit. Art. 88, meanwhile, obligates States Parties to ensure that their domestic laws include procedural solutions enabling effective cooperation with the ICC as required under the Statute.

The Statute applies to all natural persons who have potentially committed a crime within the meaning of art. 5.1, with no limitations as to their role or their public office. In other words, the standard concept of state immunity does not translate into any protections for a president, prime minister, cabinet member, or parliamentarian facing criminal liability under the Rome Statute, be it as a “leave jail” card for the proceedings as such or as a mitigating factor in sentencing (art. 27.1 of the Statute). Immunities and privileges associated with a given public office, whether under domestic or international law, cannot stand in the way of the International Criminal Court as it prosecutes crimes (art. 27.2). Criminal liability for crimes within the ICC’s remit is also borne by military commanders and military leaders, at least as long as the soldiers committing the crimes remained under their actual command and control or under their actual power. Liability can also attach to a military leader on whose watch crimes were committed if he failed to exercise due control over his subordinates, if such commander (or other person) knew, or ought to have known under the circumstances, that the soldiers are committing crimes or planning to do so and such commander (or other person) did not take all necessary and reasonable measures possible to prevent the crime or to refer it to a competent tribunal (art. 28.a of the Statute). Jurisdiction of the ICC does not extend to individuals who, at the time of alleged commission of the crime, were less than 18 years old (art. 26 of the Statute).

The single most important point from the perspective of effective prosecution and bringing the guilty to justice is that crimes within the remit of the ICC are not subject to a statute of limitations (art. 29 of the Statute). Proceedings before the ICC may be described as having the specific hallmarks of the adversarial model while embodying a series of compromises between different legal traditions within a hybrid design drawing upon elements of several legal systems (Kuczyńska, 2014, p. 56; Ambos, 2007, p. 475; Triffterer, 2008, p. 1216). The accused are guaranteed a fair trial (art. 67 of the Statute) and the right to defence (they may plead on their own behalf, appoint a counsel of their choice, or have defence counsel appointed to their benefit *ex officio*); they have a right to information, and they may be assisted by a competent interpreter whose fees are covered by the Court.

In accordance with art. 21.1 of the Statute, the ICC follows, in the first order of sequence, the Statute itself, the Elements of Crimes, and the Rules of Procedure and Evidence (www.icc-cpi.int, 03.11.2023). The latter Rules constitute the instrument for practical implementation of the Rome Statute of the International Criminal Court, which has precedence over the Rules in any and all matters; the Rules of Procedure and Evidence must always be read in conjunction with relevant provisions of – and with due heed for – the Statute (Schabas, 2001, pp. 293-382). In the second order of sequence, the ICC applies the relevant treaties and the rules of international law, including the recognised laws of armed conflict. Finally, the ICC may refer to general legal principles extrapolated by it from the national laws of any global jurisdiction or, where called for by the case at hand, the national laws of the country which would have exercised jurisdiction over the given crime, as long as these do not contravene the Statute, international law, and the established standards recognised in the international community.

Being as it is a tribunal of last resort, it behoves the International Criminal Court to ascertain whether the competent national courts have followed due legal process concerning the matter in question and, if not, whether this was for lack of trying, or due to objective difficulties. The general rule is that it is not for the ICC to replace or supplant the national courts; rather, as already mentioned above, the role of the International Criminal Court is a complementary one. Responsibility for prosecuting any and all crimes, up to and including the serious crimes defined in the Rome Statute, rests first and foremost with individual states. Also, the ICC ought to concern itself only with the most serious crimes, so assessment of a crime's gravity is called for. This is weighed in quantitative as well as qualitative terms, with attention devoted to the character, scale, and method of the crime and the impact of its pernicious effects.

If the ICC finds a defendant guilty, it may incarcerate him for a fixed period not exceeding 30 years or, where warranted by the exceptionally egregious nature of the crime and the personal traits of the defendant, for life (art. 77 of the Statute). Once the case moves past sentencing and actual enforcement of the sentence (serving the jail time) becomes an issue, any and all cooperation and assistance for the ICC from individual countries is purely voluntary, basing either on agreement or on unilateral declarations in which a country expresses its willingness to accept convicts sentenced by the ICC into its jail system. The countries with which such agreements have been drawn up or which submitted such declarations are entered on a list from which the ICC, having regard for the circumstances, selects the country in which a convict will serve his jail sentence. On the one hand, the ICC – acting through one of its units, the Office of the Prosecutor – conducts investigations into the gravest crimes which give rise to disquiet in the international community, and into the persons suspected of perpetrating these crimes; on the other hand, the ICC, depending on the outcome of such investigation, passes judgement with respect to such persons. In this sense, the Prosecutor becomes a gatekeeper of sorts, deciding whether initiation of proceedings before the ICC is in the interests of the victims and whether it is conducive to international justice. Yet it is actually bringing a defendant before the International Criminal Court which poses the biggest challenge to international justice (Kuczynska, 2022, p. 21).

3. Putin's arrest warrant makes waves

On 28 February 2022, the Prosecutor of the International Criminal Court, in his capacity as guardian of the legal order, announced that, having reviewed the preliminary findings of his Office, he will be seeking permission to launch an investigation into the unfolding Ukrainian crisis, to include any and all presumed crimes possibly committed there which might fall within the ICC's remit. It should be borne in mind here that a preliminary investigation concerning possible war crimes and crimes against humanity in Ukraine had been ongoing already since 2014 (<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>, 03.11.2023).

The ICC acts in response to complaints received, not of its own accord. A request to investigate an alleged crime falling within the International Criminal Court's jurisdiction can be submitted to the Prosecutor (art. 13.a and art. 14 of the Statute). The State Party duly presents to the Prosecutor the circumstances which, in its belief, substantiate the suspicion that a crime with respect to which the ICC is competent has been committed and requests that the Prosecutor conducts a preliminary investigation so as to establish whether charges against one or more persons are warranted (art. 14 of the Statute). This, in a nutshell, is how the cases concerning the Democratic Republic of Congo, Uganda, Mali and, eventually, Ukraine ran their course. Another possibility, at least as long as the situation in question poses a risk to international peace and security, is comprised in a request for investigation submitted to the Prosecutor by the UN Security Council on authority of Chapter VII of the United Nations Charter (art. 13.b of the Statute). This was the course taken in the case of Libya and of Darfur. The third and final possibility is for the Prosecutor to initiate an investigation on his own initiative, on the basis of information about potential crimes subject to the ICC's jurisdiction (art. 13.c and art. 15 of the Statute). In such a scenario, the Prosecutor's decision to initiate proceedings requires endorsement by the ICC's Pre-Trial Chamber. This was the procedure followed in the cases of Kenya, Georgia, Bangladesh, Myanmar (Burma) – and, of course, Ukraine.

On 1 March 2022, an application requesting investigation of the situation in Ukraine was submitted by Lithu-

ania, promptly followed the next day by 38 more countries. In this way, the Prosecutor had ample grounds to launch an investigation. The Prosecutor's exploration of the matter under case no. ICC-01/22 comprises any and all past as well as present instances of war crimes, crimes against humanity, and genocide allegedly committed by any person anywhere on Ukrainian territory on or after 21 November 2013. In his statement of 17 March 2023, prosecutor Karim A.A. Khan noted that the incidents the occurrence of which he had been able to verify included deportations of at least a few hundred children taken from orphanages and from their families, many of whom have since been offered up for adoption in the Russian Federation. In this particular instance, President Vladimir Putin took a personal interest in facilitation of the whole process, signing decrees which expedited the granting of Russian citizenship to these children and, thus, their adoption by Russian families. These actions can be construed as a deliberate effort to permanently remove children from their country, also, as these deportations were conducted, the affected children had the status of protected persons under the Fourth Geneva Convention. The Prosecutor went on to posit that the individuals responsible for these presumed crimes ought to be brought to justice, and the children should be returned to their homes and communities – treating children as spoils of war flies in the face of any and all standards.

The arrest warrants were issued on the basis of applications filed by the Office of the Prosecutor on 22 February 2023, after a yearlong investigation. No less than 43 countries lent their formal support to the proceedings. The International Criminal Court duly announced that Vladimir Putin and his Ombudswoman for Children's Rights, Maria Lvova-Belova, are being charged with war crimes, specifically unlawful deportation or transfer or unlawful confinement as well as deportation or transfer of all or some of the civilian population living in, or outside, an occupied territory (art. 8.2.a and art. 8.2.b of the Statute). In light of the evidence gathered by the Prosecutor, these crimes were perpetrated primarily against children. The scene of the crime was identified as parts of Ukrainian territory occupied at least since 24 February 2022. In the Prosecutor's view, Putin and Lvova-Belova had committed the war crimes directly and in concert with others (art. 25.3.a of the Statute); in the case of Putin, the Prosecutor also invoked individual criminal liability in his capacity as a leader on the basis of art. 28.b of the Statute, which stipulates that a superior shall bear liability for war crimes committed by his personnel if he can be shown to have failed to exercise due control and command (the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes, the crimes concerned activities that were within the effective responsibility and control of the superior, and the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution).

Having considered the applications submitted by the Prosecutor, the Preparatory Chamber of the International Criminal Court discerned reasonable grounds for presuming that both the individuals named therein are liable for war crimes against Ukrainian children, to wit their unlawful deportation and transfer from occupied Ukrainian territory to Russia. Specifically, the Pre-Trial Chamber found that there are reasonable grounds to believe that Putin bears individual criminal liability for commission of the imputed crimes directly as well together and/or through others, and likewise for failing to exercise due control over his civilian and military subordinates who committed crimes and/or acquiesced to them while remaining under Putin's effective power and control within the Russian state's chain of authority. Pains were taken to emphasise that, while the arrest warrants are generally confidential, in the given case considerations of victim protection, of witness protection, and of the ongoing investigation militate in favour of making the information public, even more so given that the crimes are presumably still in progress and broader awareness of the arrest warrants might, potentially, prevent or reduce more offences. The arrest warrants were based on such evidence as the Prosecutor had assembled to date, which was being supplemented with new material on an ongoing basis.

On authority of art. 99.4 of the Statute, the Prosecutor may take actions within proceedings directly and on his own, e.g. question witnesses and conduct *in situ* inspections of public sites connected with the alleged crimes. The Prosecutor is not merely a party to criminal proceedings before the ICC, but also serves as an impartial entity within a broader justice system, working with the judges to establish the substantive truth (Turone, 2002, p. 1164). The Prosecutor and other ICC officials duly travelled to Ukraine, where they spoke with witnesses, assembled documents, and recorded footage, assembling a body of evidence which amounted to a solid basis

for applying to the Pre-Trial Chamber for issue of arrest warrants.

The Prosecutor's case was bolstered by the report on Russian war crimes in Ukraine published by the United Nations commission on 16 March 2023 (<https://www.ohchr.org/en/hr-bodies/hrc/iic/hr-ukraine/index>, 03.11.2023). This report drew on over 500 witness interviews, satellite images, and visits to makeshift prisons and burial sites. The catalogue of crimes spans deliberate killing, torture, rape, and deportation of children. The very fact of transferring children of the victimised national group (Ukrainians) to the perpetrator national group (Russians) qualifies as genocide under art. 6.e of the Statute as well as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations Convention, 1948). Quite apart from that, deportation and forced relocations conducted as part of a broad, systematic, and deliberate attack on the civilian population constitutes a crime against humanity (art. 7.1.d of the Statute).

Alas, the perfunctory list set out above does not preclude the possibility of other instances of Russian war crimes in Ukraine which might qualify for prosecution by the International Criminal Court (e.g. killing, extermination, torture, rape, grave breaches of the 1949 Geneva Conventions, or transgressions against the laws and customs of international armed conflict). Concerns arise especially with regard to what, by all appearances, are instances of deliberate targeting of civilian infrastructure, attacks against humanitarian assets and individuals seeking to bring humanitarian aid, and targeting of religious sites, schools, and hospitals. The Office of the Prosecutor has created a special online platform enabling any person who holds information about the situation on the ground in Ukraine to contact the International Criminal Court directly, with the 23 March 2023 agreement establishing an International Criminal Court mission on location in Ukraine (signed by Andriy Kostin, head of Ukraine's public prosecution service, and Peter Lewis, Secretary of the International Criminal Court) expected to further facilitate evidence gathering. Many non-governmental organisations and foundations have also stepped up, maintaining their own information banks and platforms for gathering and archiving evidence of war crimes being committed in Ukraine (www.ccl.org.ua, 03.11.2023; <https://projectsunflowers.org/pl/home.html>, 03.11.2023; <https://www.eurojust.europa.eu/news/history-making-international-centre-prosecution-crime-aggression-against-ukraine-starts-operations-at-eurojust>, 03.11.2023).

4. But will the waves subside without effect?

Vladimir Putin now joins a select club – hereuntil composed of Omar Al Bashir of Sudan and the late Muammar Gaddafi of Libya – as only the third sitting president with an International Criminal Court arrest warrant in his name (ICC-01/11-4-Red). As it issued the warrant for Putin's arrest, the ICC surely felt the difficulty of the task weighing heavily on its shoulders. Just for starters, Russia is not a party to the Rome Statute (and, for that matter, neither is Sudan, or Libya). After it occupied Crimea in 2016, Russia made it known, on the basis of another one of Putin's presidential decrees, that it is terminating its cooperation with the International Criminal Court and withdrawing from agreements it had signed in this connection. This will not make practical enforcement of the arrest warrant against Putin any easier. The general idea is that, once the Pre-Trial Chamber of the International Criminal Court has issued an arrest warrant, the ICC formally requests the relevant state to apprehend and hand over the individual concerned (art. 58.1 and art. 58.5 of the Statute). In other words, this is a species of nexus with national law, in that it is now for the country which had been approached by the ICC to take the suspect into custody in accordance with its own legal system (Grzegorzcyk, 2005, p.19). Yet, as art. 86 of the Statute makes clear, only States Parties are bound by an actual duty to cooperate with the ICC. Of course, the ICC may apply for the kind assistance of a country which is not a State Party, but this will always require *ad hoc* agreement or some other basis (art. 87.5(a) of the Statute). The net effect is that neither Russia nor any of the other 69 UN members which do not recognise the ICC's jurisdiction will be under any obligation to take Putin into custody or to deliver him to The Hague.

In fact, practice shows that even States Parties have been less than consistent in this regard, to mention only the case of Omar Al Bashir. The former president of Sudan, despite two outstanding warrants for his arrest issued by the ICC in 2009 and 2010 (on suspicion of genocide, war crimes, and crimes against humanity during the conflict in Darfur), travelled to States Parties on several occasions and was invariably allowed to continue on

his way unmolested (ICC-02/05-01/09 and ICC-02/05-01/09-OA). The most blatant examples were comprised in Al Bashir's attendance at the African Union summit in South Africa 2015 and his trip to Jordan in 2017. In both instances, Al Bashir's hosts evaded their duty to take him into custody on the grounds that he benefits from immunity as head of state of a country which had not recognised the International Criminal Court. To risk stating the obvious, in such situations much will depend on the political will (or lack thereof) of the government in question and on wider geopolitical considerations. There is nothing to prevent a country which is not a State Party to apprehend an individual wanted by the ICC of its own initiative. Intent to this effect has been expressed by the new authorities in Sudan after Al Bashir's overthrow. The Sudanese government went on to sign a relevant agreement with the ICC on 12 August 2021, although it yet has to deliver on this promise.

At the end of the day, enforcing an ICC arrest warrant through the good offices of a country which had no signed and ratified the Statute is all but impossible. These days, Vladimir Putin and senior members of his structures are loath to venture outside Russia and Belarus – countries with which the ICC does not have any formal arrangements. This state of affairs, clearly, will not change in the near future. There is also the point that, the protestations of Russian officialdom aside, the country's state apparatus is subordinated in all matters great and small to none other than Putin himself. A scenario where the Russian police apprehend Putin with the blessing (also for the extradition which would need to follow) of the Russian courts is fanciful, to say the least.

The problems concerning Ukraine are similar in nature, if not in scale. Ukraine likewise isn't a State Party to the Rome. Yet, in a notable point of difference from Russia, Ukraine has already exercised its prerogative to recognise the ICC's jurisdiction over alleged crimes committed on Ukrainian soil falling under the ambit of the Rome Statute (as per art. 12.3 thereof) – on two occasions, no less. The Ukrainian government made a formal declaration accepting jurisdiction of the International Criminal Court with respect to presumed war crimes committed on Ukrainian territory between 21 November 2013 and 22 February 2014 (<https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>, 03.11.2023). Then, in a follow-up, it expanded the temporal scope of this first declaration over an indefinite period of time so as to encompass identification, prosecution, and adjudication of crimes committed anywhere on Ukrainian territory on or after 20 February 2014 (https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine, 03.11.2023).

Thus, the ICC may now prosecute Russians waging war on Ukraine for war crimes, for crimes against humanity, and for genocide – but not for aggression. Jurisdiction of the International Criminal Court with respect to aggression may be exercised only vis a vis countries which have ratified the original Rome Statute along with the Kampala amendments, provided that such country had not made a reservation excluding jurisdiction for this crime (Art. 15 bis of the Statute) (Kuczynska, 2022, p.14). In other words, the aggressor state must be a State Party to the Statute. The one possibility of overcoming this impediment would involve the United Nations Security Council notifying the International Criminal Court of commission of the crime of aggression within the meaning of Chapter VII of the UN Charter; in such an event, art. 13.b of the Statute would kick in, extending jurisdiction of the ICC also to countries not party to the Rome Statute. Seeing as Russia is a permanent member of the Security Council, with veto power and all, such an outcome is unlikely. In practical terms, then, the Security Council might adopt resolutions regarding only three crimes committed in the context of the Ukrainian conflict: war crimes, crimes against humanity, and genocide.

In the hypothetical event that President Putin were to travel to Ukraine and be apprehended there, he could be transferred into custody in The Hague and tried by the ICC, or stand trial before a Ukrainian court. There remains, however, the matter of immunity; as long as Putin continues to hold office as President of the Russian Federation, Ukrainian courts will have no jurisdiction over him. It follows from the recognised principle of immunity of a head of state before the courts of a third country that any court of a State Party moving to find against President Putin would be acting in violation of international law. Immunity would not come into play, however, if Putin were to be tried before the International Criminal Court. In 2009, in the context of the Al Bashir case, the International Criminal Court held itself competent to request a State Party to arrest a serving senior state official, even if he is head of state of a country which is not a State Party – the very fact that the in-

dividual is being indicted by the Prosecutor is sufficient. This interpretation on the ICC's part was rooted less in legal technicalities, more in abstract values – the ICC had draped itself in the mantle of guardian and upholder of justice for the entire international community. Accordingly, it was bound to engender criticism among international law experts, who pointed out, for instance, that the ICC had elided art. 98 of the Rome Statute, which forbids it to seek the cooperation of a state where this compromises its obligations vis a vis another state with regard to immunity. Thankfully, no such doubts would arise in the case of Ukraine. Also, it is not entirely devoid of significance that the crimes in Darfur / Sudan had been referred to the ICC by the UN Security Council, rather than a State Party (as is the case with Ukraine). As some legal commentators see it, this constitutes the most robust basis for jurisdiction of the ICC, particularly with respect to persons from countries which have not signed the Statute.

As matters stand today, there are 123 States Parties of the Rome Statute which have a legal duty to arrest Putin (as well as Lvova-Belova) should they show their faces within their jurisdiction – within their territory, but also, for example, on board an aircraft or ship registered in a State Party. The same duty of cooperation with the ICC encompasses subsequent handing over of a suspect to the International Tribunal Court. Due to the operation of immunity, as mentioned above, Putin could not be brought before the national court of any State Party, and only by making him available to the International Criminal Court would international law be complied with. No national court will be competent in such a case to assess whether the ICC's warrant for Putin's arrest had been duly issued (art. 59.4 of the Statute). An individual who had been arrested on the basis of an ICC warrant may request that, rather than being remanded in custody, they be subjected to milder measures, e.g. some form of house arrest (art. 58.3 of the Statute). A unique characteristic of proceedings before the International Criminal Court is that the suspect may be called to account only for the alleged crimes which had been taken as the grounds for their arrest and their extradition by the state concerned (art. 101.1 of the Statute). If the original charges against such individual are expanded, the state which had answered the ICC's request for cooperation by apprehending the suspect and rendering him to The Hague must generally be asked for its permission for such expanded prosecution (art. 61.4 and art. 58 of the Statute). While the ICC may ask the state concerned to waive this right, it will then be obligated to provide such additional information as the cooperating state may request. Again, matters become considerably more complicated where the arrest warrant is for a citizen – let alone a senior official – of a country which had not signed the Rome Statute. A country which had not recognised jurisdiction of the International Criminal Court on a general basis may make a formal declaration recognising such jurisdiction with respect to the given crimes (as Ukraine has done), and the UN Security Council may task the ICC with addressing a given matter deemed to pose a risk to international peace and security.

5. Complementary character of the international criminal court's actions

In a point to be borne in mind all along, responsibility for the prosecution of any and all crimes – including those defined in the Rome Statute – rests first and foremost with the national courts of countries with the requisite jurisdiction. In a situation where jurisdiction of the national courts and of the International Criminal Court overlaps, the general rule grants priority to the former, with jurisdiction of the ICC recognised on a complementary basis (Karska, 2010, pp. 278). Applied to the matter of concern here, this principle means that ruling on any war crimes committed during the ongoing conflict in Ukraine and pronouncing judgment on the perpetrators is, in the first order of sequence, a matter for the courts of Russia and Ukraine. It is not for the International Court to supplant the national courts (Milik, 2012, pp. 185-189). Accordingly, the first order of business will be to establish whether the competent national courts are in a position to duly adjudge the case, and – perhaps more importantly – whether they are wont to do so (art. 17 of the Statute). The issue of complementarity is assessed by the ICC itself, which examines whether or not it is competent to rule on the matter at hand. Where proceedings in a matter falling within the ICC's remit are already pending in a given country, or would already have been concluded with the ICC procedure, a variant of the “no double jeopardy” rule applies – the Prosecutor cannot, as it were, replicate the work of a national court. If, however, a national court is prosecuting a case based on a different legal classification (ordinary felony, as opposed to a crime under international law), or if proceedings before the national court were somehow tainted (e.g. by partiality to the defendant's behalf), then the International Criminal Court is free to proceed, even though the suspect had already come before a national court (Guariglia, 2002, p. 1111 et seq).

One of the salient points throughout this article is that, whatever the legal theory, practical operations of the International Criminal Court rely largely on the cooperation and good will of the polity of nations in general and of the States Parties in specific. This assumes especial importance when one considers the more mundane aspects. As opposed to any national justice system, the ICC cannot call upon the support of any law enforcement services charged with the day-to-day work of apprehending a suspected criminal, keeping him in custody, and bringing him in for his day in court. In order to be held liable, a suspect must be in attendance before the International Criminal Court for his trial.

The ICC's mission is to act in cases where, for one reason or another, there is no possibility that a perpetrator of crimes under international law will duly face trial before the national courts. Art. 20.2 of the Statute enshrines the *ne bis in idem* principle whereunder an individual who has already been found guilty or acquitted by the ICC with respect to crimes covered by art. 5 of the Statute cannot answer for the same crimes before a national court (and vice versa, as mentioned above).

In the case discussed here, this means that Vladimir Putin and his sundry enablers might be put on trial in Russia only once the country underwent some dramatic shift towards the rule of law, a hypothetical development which would presumably be coupled with an end of the war in Ukraine. This is not just a point of broader political theory. It should be borne in mind that the Russian Duma has enacted a law which, effective as of late 2022, waives criminal liability for offences committed in the course of what the Russian powers that be insist on calling the "special military operation" in Ukraine.

As for the question of immunity accorded to heads of state before the national courts at home and in third countries, this is a daunting obstacle, yet one which is subject to expiration in time (the usual caveat being that, minor questions of nomenclature aside, Vladimir Putin is now in his third decade as Russia's supreme leader).

To recap, in order for Vladimir Putin and members of his civilian and military inner circle to be effectively made to answer for their crimes, they would have to be physically apprehended on the territory of a State Party to the Rome Statute or of a country which has agreed to cooperate with the International Criminal Court and then transferred to the Hague.

6. Summary and conclusions

The violence and destruction unleashed upon the people of Ukraine before our very eyes give rise to the natural question whether the perpetrators can ever be brought to justice. When might this happen, what would be the competent tribunal and, indeed, what would be a fitting punishment? The need for justice at global level is served, at least in theory, by the International Criminal Court, which is charged with investigating war crimes and crimes against humanity and holding the guilty to account. As much is owed not only to the people of Ukraine, but also to the international polity, if peace and security are to be more than empty slogans.

Moving on from the ethical and philosophical level to practical considerations, the problem is a political one, almost to the point of banality. The war in Ukraine was launched by a nuclear power and a permanent member of the UN Security Council; this power's head of state is the main suspect. Neither Russia nor any other country not party to the Rome Statute will move to put Vladimir Putin on trial in The Hague. Russia and various countries with which she has shared interests will not be keen to see their own citizens, politicians, or soldiers tried for crimes covered by the Rome Statute. For legal reasons and, perhaps more importantly, for political and practical ones, the chances that the warrant for Vladimir Putin's arrest might be enforced are close to nil.

This situation could, conceivably, change as a result of future developments in Russian politics and on the battlefields of Ukraine. Yet the International Criminal Court remains powerless as regards independently, without relying on cooperation of a willing state, to apprehend a suspect.

This is not to detract in any way from the importance of the arrest warrant, or to question the International Crimi-

nal Court's decision to issue it. The warrant for Putin's arrest has considerable moral and political import and, in an impalpable yet inescapable way, is bound to bring pressure to bear on the Russian political elite. Regarded in this way, the import of the arrest warrant lies not only in its enforcement, but also in broader prevention.

Possible establishment of a new international court, fully independent and impartial, dedicated exclusively to the war in Ukraine – also competent to rule on the crime of aggression – would certainly be welcome, as long as it is combined with cessation of hostilities sealed by a signed document (https://www.europarl.europa.eu/doceo/document/TA-9-2023-0015_PL.html, 03.11.2023). As with any supranational body, however, a critical mass of countries would have to agree to convene such a tribunal and to submit to its jurisdiction – as would Russia. It is a universal hope that the war in Ukraine might end soon. Whether this will usher in a stage of genuine cooperation in the interests of justice among the world's nations, time will tell.

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