



## UKRAINE SITUATION FROM THE PERSPECTIVE OF INTERNATIONAL CRIMINAL LAW: ICC AND BEYOND

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### ABSTRACT

The ever-evolving landscape of International Criminal Law (ICL), as a field that connects different branches and levels of law, requires meticulous deliberation. Establishing international justice is a crucial step in ensuring that all perpetrators are held accountable. The International Criminal Court (ICC/the Court) has issued two arrest warrants against the President and Commissioner for Children's Rights of the Russian Federation, on March 17, 2023, for their involvement in forced population transfer which is an international crime under the Rome Statute. This research article seeks to explore the Ukraine situation from the perspective of ICL and examine the arrest warrants issued by the ICC against Russian authorities. Additionally, it briefly addresses the Ukraine's lawfare against Russia at the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR). While the issuance of the arrest warrants is in itself a positive step toward the fortification of international criminal justice, the implementation of these warrants specifically regarding the President of the Russian Federation seems to be very problematic. Nevertheless, in spite of the challenges faced by the ICC in this situation, issuance of the arrest warrants reveals a significant reality: international criminal justice does not exempt even the president of a permanent member of the UN Security Council. Furthermore, the legal actions taken by Ukraine against Russia at both the ICJ and ECtHR are legally positive steps towards halting aggression and restoring international peace and security through international law. However, these actions face challenges such as time constraints and compliance.

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## Introduction

In earlier times and in smaller societies, the absence of judicial bodies resulted in the consolidation of power within monarchs, who simultaneously served as both lawmakers and interpreters of the law. However, as populations expanded and human societies evolved, these legislative authorities realized the necessity of delegating the responsibility of legal interpretation in order to sustain societal progress.<sup>1</sup> Over time, alongside the growth and progress of human societies and fundamental human developments, judicial settlement methods have expanded beyond domestic realms to regional and global arenas. This process has also influenced the domestic courts of neighboring states and communities.

Since 2006, over twenty-five international courts have been operational, possessing a statute that recognizes their competences, and having appointed judges ready to receive legal complaints. Some of these courts, in addition to inter-state disputes, have considered complaints between citizens of countries or international organizations to be heard. It is said that international courts have issued over twenty-seven thousand enforceable sentences and judgments, some of which we are familiar with.<sup>2</sup> These prominent examples often shape our understanding of international courts. When an international court assumes jurisdiction over an international dispute, in fact, it is officially authorized to monitor a state's compliance with international law and the actions of state, public bodies and, in some cases, individuals to ascertain their conformity with the requirements of international law. In this way, the court's role is to first determine the legality or illegality of a state's conduct, and in the second place, to establish liability for compensating the victims and the costs related to the illegal actions.

On February 24, 2022, Russia launched an invasion of Ukraine resulting in an ongoing armed conflict. Since then, this conflict has been and is discussed from different branches of

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1. Karen J Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' in Jeffrey L Dunoff, Mark A Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) first edition CUP 362.

2. Raffaella Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2019) Vol 30 No. 4 *European Journal of International Law* 1129-1152.



public international law including international law on use of force,<sup>1</sup> international humanitarian law,<sup>2</sup> international human rights law<sup>3</sup> etc. In this vein, international criminal law has garnered significant attention as a discipline with potential relevance to the Ukrainian situation. International criminal law is a legal system designed to prosecute individuals responsible for committing international crimes. General categories of international crimes include aggression, genocide, war crimes, and crimes against humanity. The main objectives of international criminal law are to maintain international order, peace, and security, to hold international criminals accountable, to provide reparation and alleviate the suffering of victims of international crimes, and to prevent the occurrence of such crimes in the international community.<sup>4</sup>

Given the significance and relevance of international criminal law in the situation of Ukraine, particularly in light of the two arrest warrants made by Pre-Trial Chamber II of the International Criminal Court (ICC, the Court) on March 17, 2023, against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, it becomes imperative to analyze the ICC's jurisdiction and explore alternative avenues for ensuring accountability for international crimes committed in this conflict. Accordingly, this article aims to examine the Ukraine situation through the lens of international criminal law. In doing so, Section 1 will discuss the mechanisms by which the ICC may gain jurisdiction over a situation. Thereafter, Section 2 will examine the arrest warrant issued against Vladimir Putin, evaluating its merits and shortcomings. Finally, Section 3 will provide a brief overview of Ukraine's legal actions at the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR).

## 1. Mechanisms by Which the ICC May Acquire Jurisdiction Over a Situation

The twentieth century can be regarded as one of the bloodiest periods of human history. The occurrence of two world wars and many inter and intrastate conflicts which led to flagrant violations and abuses of human rights across the globe confirms this claim.<sup>5</sup> However, it is one side of the coin. This century witnessed the beginning of a new chapter in the history of international law in terms of the efforts made to legalize international relations.<sup>6</sup> A significant milestone was the establishment of a permanent international court to deal with international crimes committed by individuals. This culminated in the adoption of Rome Statute, the founding treaty of the ICC on July 17, 1998. The Statute entered into force on July 1, 2002, thereby, rendering the Court operational.<sup>7</sup> Although the idea to create a court to prosecute persons responsible for the worst

1. In this regard see James A Green, Christian Henderson, Tom Ruys, 'Russia's Attack on Ukraine and the Jus ad Bellum' (2022) Vol 9 Issue 1 Journal on the Use of Force and International Law 4-30.

2. See Patrycja Grzebyk, 'Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law' (2022) Vol XLI Polish Yearbook of International Law 145-162.

3. See Sattar Azizi, Mousa Karami, 'Applicability of Remedial Secession Theory on the Recognition of Ukraine's Donetsk and Luhansk Oblasts' Independence' (2023) Vol 39 Issue 68 International Law Review 141-172.

4. Abolfath Khaleghi, General International Criminal Law (Majd Publication 2015) 27-35.

5. Daniel D Ntanda Nsereko, 'Triggering the Jurisdiction of the International Criminal Court' (2004) Vol 4 African Human Rights Journal 256-257.

6. Parviz Zol'ain, The Foundations of Public International Law (sixth edition, Ministry of Foreign Affairs 2009) 304. [In Persian]

7. Iraj Rezaie Nezhad, The Jurisdiction of International Criminal Court (Majd Publication 2014) 25. [In Persian]

According to the ICC Homepage, 123 countries are States Parties to the Rome Statute of the Court. See <https://asp.icc-cpi.int/states-parties> (last access on May 6, 2023).



crimes of mankind was not a new one,<sup>1</sup> the establishment of ICC has been characterized as both “a revolution in international law and in the conduct of international relations” and an achievement of the global civil society.<sup>2</sup>

One of the significant issues regarding ICC is its jurisdiction. Generally speaking, jurisdiction refers to the Court's authority to enforce the law<sup>3</sup> and is aimed at identifying the “scope of the Court’s authority”.<sup>4</sup> The constituent treaty of the ICC, the Rome Statute, stipulates the situations in which the Court can exercise its jurisdiction. These are enumerated in Article 13 of the Statute, and the ICC may exercise jurisdiction through the referral of a State Party to the ICC Statute, referral by the UN Security Council and the initiation of an investigation at the behest of the Prosecutor. Moreover, regarding a State which is not a Party to the Statute, Article 12(3) states that the Court may exercise its jurisdiction if that State issues a declaration accepting the jurisdiction of the ICC retroactively. In such a case, the acceptance of jurisdiction extends to all crimes within the purview of the Court. It should be noted that, although the preconditions for the exercise of jurisdiction can be realized through a declaration under Article 12(3) of the Statute, this does not make the accepting State a Party to the ICC Statute nor does it make the referral of the situation as provided for in Article 13.<sup>5</sup> Neither Russia nor Ukraine have ratified the Rome Statute. Article 12(3) as regards the issuance of a declaration accepting the jurisdiction of the ICC by a non-Party is applicable in the Ukraine situation. It was following the submission of two declarations by Ukraine that the ICC finally gained jurisdiction over the situation in the country. Based on the ICC website, Ukraine has exercised its prerogatives twice, accepting the Court's jurisdiction over alleged crimes within the Court’s purview and occurring on Ukrainian territory. The first declaration<sup>6</sup> was lodged by the Government of Ukraine on April 9, 2014, accepting ICC jurisdiction for alleged crimes committed on Ukrainian territory between November 21, 2013, and February 22, 2014. The second declaration, made on September 8, 2015,<sup>7</sup> extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from February 20, 2014, onwards. On February 28, 2022, the ICC Prosecutor announced he would seek authorization to open an investigation into the Situation in Ukraine, on the basis of the Office's earlier conclusions of its preliminary examination,<sup>8</sup> and encompassing any new alleged crimes falling within the Court’s jurisdiction.<sup>9</sup>

1. Sarah Bahaian, *The International Criminal Court – An International Criminal World Court?* (Springer International Publishing AG 2018) 191.

2. See Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge 2007) xiii-xiv.

3. Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (third edition, CUP 2014) 49.

4. William A Schabas, *An Introduction to the International Criminal Court* (fourth edition, CUP 2011) 25.

5. Sajjad Abbasi, 'The Decision of the International Criminal Court in the Palestine Situation: A Beginning in the Prevention of Impunity for Israeli Crimes' (2023) Vol 4 *Iranian Review for UN Studies* 23-25.

6. See <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> (last access on August 18, 2023).

For an in-depth analysis of the legal problems associated with this declaration see Iryna Marchuk, 'Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond' (2016) 49 *Vanderbilt Journal of Transnational Law* 323, 341-360.

7. See [https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf#search=ukraine](https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine) (last access on August 18, 2023).

For a detailed analysis of this second declaration see Marchuk (no 13) 360-368.

8. See <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> (last access on August 18, 2023).

9. <https://www.icc-cpi.int/situations/ukraine> (last access on August 18, 2023).



It was pursuant to the second voluntary declaration made by the Ukrainian government that the Pre-Trial Chamber II of the ICC issued two arrest warrants on March 17, 2023, against *Vladimir Vladimirovich Putin* and *Maria Alekseyevna Lvova-Belova*. The subsequent section discusses the arrest warrant on Putin, including its strengths and weaknesses.

## 2. Arrest Warrant against Vladimir Putin: Strengths and Weaknesses

As King puts it, the effective function of the ICC's regime of arrest and surrender is a crucial factor in its success.<sup>1</sup> Issuance of arrest warrants against those responsible for international crimes is stipulated in the ICC's Statute. In accordance with Article 58(1) of the Statute: "1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances".<sup>2</sup> This legal framework was applicable in the Ukraine situation where the Pre-Trial Chamber issued two arrest warrants against the Russian authorities.

According to ICC website, on March 17, 2023, Pre-Trial Chamber II of the ICC issued arrest warrants for two individuals in relation to the situation in Ukraine: *Vladimir Vladimirovich Putin* and *Maria Alekseyevna Lvova-Belova*. Putin is allegedly responsible for the war crime of unlawful deportation of population (children) and unlawful transfer of population (children) from the occupied areas of Ukraine to the Russian Federation, as stipulated under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute. These crimes have allegedly been committed in Ukrainian occupied territory at least from February 24, 2022. Similarly, *Lvova-Belova*, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute) which were allegedly committed in Ukrainian occupied territory at least from February 24, 2022.<sup>3</sup> Forced population transfer is a crime under the Rome Statute. Following the four visits by *Karim Khan* over the past year, it was decided that there exist "reasonable grounds to believe that Mr. Putin bears individual criminal responsibility" for the children abductions. The number of children taken from Ukraine by Russian forces remains uncertain to date. The Office of the Prosecutor detected the deportation of hundreds of children many of whom are being adopted by Russian individuals. Issuing a decree to speed up the granting of Russian nationality to these children, Putin made it easier to adopt them. According to the Office of the Prosecutor, these

1. Hugh King, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute' (2006) 4 *New Zealand Journal of Public and International Law* 269.

2. Rome Statute of the International Criminal Court (last amended 2010) (adopted July 17, 1998, entered into force July 1, 2002) (Rome Statute) art. 58(1).

3. See <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (last access on May 5, 2023)



acts, *inter alia*, implies the intention to permanently remove these children from Ukraine. The ICC prosecutor emphasized in a statement, “We must ensure that those responsible for alleged crimes are held accountable and that children are returned to their families and communities... We cannot allow children to be treated as if they were the spoils of war” the ICC prosecutor said in a statement.<sup>1</sup> It is worth mentioning that it was on March 4, 2009, when the ICC issued the precedent-setting case of arrest warrant against a sitting head of State- Omar Al Bashir- allegedly on the grounds of war crimes and crimes against humanity.<sup>2</sup> Although the issuance of arrest warrant against Putin holds significant importance in terms of the realization of international criminal justice, particularly against the head of state of a permanent member of the UN Security Council, the enforcement of such warrant faces several obstacles. It should be noted that all States Parties to the Rome Statute are obligated to surrender *Maria Alekseyevna Lvova-Belova* to the ICC if she is found within their territory. Furthermore, non-States Parties to the Statute may cooperate with the Court in this regard. Nevertheless, the case is not this simple for President Putin. In addition to political barriers, the ICC faces several legal challenges in enforcing the arrest warrant against him. These challenges and barriers are dealt with in the following paragraphs. In such a situation, the prosecutor can file new charges against *Putin*, thereby expanding the scope of sentences.

One of the tensions between the interests of humanity and demands of state sovereignty is reflected in the discussion of the immunity enjoyed by state officials.<sup>3</sup> The principle of absolute personal immunity for a sitting head of State from other States’ criminal jurisdiction is widely entrenched in the contemporary international law.<sup>4</sup> However, The State Parties to the ICC’s Statute (as of currently, August 18, 2023, 123 States), have accepted to waive the immunity of their high ranking authorities including the heads of State. This approach signifies a remarkable shift as it stands contrary to treaty and customary international law or domestic laws on immunities resulting from official capacity.<sup>5</sup> However, as mentioned above, the Russian Federation is not a State Party to the Statute and, as a consequence, its high ranking officials, including the head of state enjoy immunity from arrest or surrender to the ICC.

According to the principle of privity of treaties under international law enshrined in Article 34 of the 1969 Vienna Convention on Law of Treaties,<sup>6</sup> “a treaty applies only between the Parties to it...”. Furthermore, no obligation or right is created for a third state without its consent under such a treaty. Therefore, the ICC lacks the authority to compel States not Parties to its Statute to arrest and surrender their own officials or officials of other States. This is expressly specified in Article 98(1) of the Statute, which states “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its

1. See ICC, Statement by Prosecutor Karim A. A. Khan KC on the issue of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova, [www.icc-cpi.int](http://www.icc-cpi.int), 17 March 2023. (last access on August 18, 2023)

2. Seyed Ghasem Zamani, 'International Criminal Court and the Issue of Arrest Warrant against Omar Al Bashir' (2009) Vol 7 Issue 14 Legal Researches 13-14. [In Persian]

3. Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) Vol 98 No. 3 The American Journal of International Law 407.

4. Antonio Cassese, International Law (OUP 2005) 117-118; Jan Klabbbers, International Law (CUP 2013) 102.

5. Mohammadali Chapari, Majid Shayganfard, 'Criminal Responsibility in International Crimes and Its Contrast with the Discourse of Immunity' (2017) Vol 10 International Legal Researches 77-78. [In Persian]

6. Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force January 27, 1980) UNTS, Vol. 1155, 331.



obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”.

Consequently, if the head of State A against whom an arrest warrant has been issued travels to State B which is a Party to the Statute, two different situations as to the implementation of such an arrest warrant arise: 1) if the head of State A is the national of a State Party to the Statute, it appears that State B has the authority to arrest and surrender the individual to the ICC. This is due to the fact that the consent of State A to waive the immunity of the head of State has already been obtained through Article 27 of the Statute. Therefore, surrendering the head of State A does not mean to neglect the immunity of this official before State B; and 2) if the head of State B is not the national of a State Party to the Statute, the State B lacks the authority to surrender the individual to the ICC, unless the consent of State A to waive the immunity of its head of State is obtained in advance.<sup>1</sup> So, even States Parties to the Statute have no authority to surrender Putin to the ICC in case of his presence in their territory.<sup>2</sup>

A comparison can be drawn between the arrest warrant issued against Omar Al Bashir of Sudan on March 4, 2009, with that of Putin of Russia on March 17, 2023, in terms of the immunity of heads of States not Parties to the Statute. However, the two cases are different in this regard. The proceedings against Omar Al Bashir were instigated by the UN Security Council. On March 31, 2005, through Resolution 1593 (para. 1), the Council determined that the Darfur crisis poses a continuous threat to international peace and security and, as a result, decided to “to refer the situation in Darfur since July 1, 2002, to the Prosecutor of the ICC”. The referral of the situation in Darfur to the ICC marked the first exercise of the power of referral by the Council.<sup>3</sup>

The referral empowered the ICC to investigate crimes committed by Al Bashir and prosecute him pursuant to Article 13(b) of Statute in spite of the fact that Sudan was not a State Party to the Statute. Since the Council acted under Chapter VII of the UN Charter, it had the power to disregard the immunity of the head of a non-State Party to the Statute. Although the UNSC Resolution 1593 on the basis of which the ICC issued the arrest warrant against Al Bashir did not explicitly waive his immunities, it implicitly did so by adopting the relevant provisions, particularly Article 27, on immunities when availing itself of the option offered by Article 13(b) of the Statute.<sup>4</sup> Undoubtedly, the successful prosecution or trial of Putin by the ICC will be a highly challenging process, and in the absence of cooperation from Russia in this regard, he may never stand trial before the Court due to his personal immunity on the one side and non-cooperation of Russia and other non-States Parties on the other side.<sup>5</sup> Put simply, there are two viable avenues for enforcing this arrest warrant: 1) consent of the Russian Federation to waive Putin’s immunity, or 2) termination of Putin’s presidential term.

1 . UNSC Resolution 1593 (2005) S/RES/1593 (2005), para. 1.

2. Julie M Martin, 'The International Criminal Court: Defining Complementarity and Diving Implications for the United States' (2006) Vol 4 Loyola University Chicago International Law Review 109.

3. Ibid.

4. Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir’s Immunities' (2009) Vol 7 Journal of International Criminal Justice 340-341.

5. Aghen Hanson Ekori, Paul S Masumbe, 'Putin on Trial: Reality of Heads of State Immunity before International Criminal Courts' (2022) Vol 2 Polit Journal: Scientific Journal of Politics 34.



### 3. Ukraine Lawfare against Russia at Other Fora: ICJ and ECtHR

The invasion of Ukraine by the Russian Federation on February 24, 2022, provided the factual background for two disputes between the two States which the Ukrainian government brought before the ICJ and ECtHR. Taking into account the conflicts caused by the collapse of the former Yugoslavia and the resulting crimes, Russia's aggressive war and war crimes in Ukraine have led to one of the most severe human rights crisis in Europe since World War II.<sup>1</sup> In particular, the unprecedented number of declarations of intervention under Article 63 of the ICJ's Statute [33 declarations as of May 5, 2023; the last one is the Liechtenstein's on December 15, 2022]<sup>2</sup> has made this case an extraordinary one in the history of the ICJ and Permanent Court of International Justice (PCIJ).<sup>3</sup> In fact, lawfare, the purposeful use of law as a weapon of war, has undeniably been a part of the Russia-Ukraine situation since 2014 by both sides. Russia has justified its military attack on Ukrainian territory under the guise of domestic and international law, whereas Ukraine has launched a lawfare project including lawsuits under both public and private international law.<sup>4</sup> In the subsequent paragraphs, we briefly look at Ukraine's legal actions against Russia before the ICJ and the ECtHR.

Following the military attack launched by Russia on Ukraine on February 24, 2022, Ukraine brought a case before the ICJ the day after invasion, filing an Application with the Court, requesting to institute proceedings against the Russian Federation in a dispute concerning the interpretation, application or fulfilment of the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>5</sup> In the Request, Ukraine sought "provisional measures to protect its rights not to be subject to a false claim of genocide, and not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention".<sup>6</sup> Russia, on the other hand, accused Ukraine of committing genocide against millions of ethnically Russian people in the Donbas region and justified its military intervention as an act of collective self-defense to save these individuals based on two separate treaties of friendship and mutual assistance with self-proclaimed states of Donetsk, and Luhansk and their request for military assistance.<sup>7</sup>

It is noteworthy that the ICJ issued an Order on March 16, 2022, concerning the Request submitted by Ukraine. This Order clearly showed that the accusation and claim made by Russia against Ukraine on committing genocide against ethnically Russian people in Donetsk and Luhansk had been unfounded. The Judges of the ICJ stated that,

*"at the present stage of the proceedings, it suffices to observe that the Court is not in*

1. Amnesty International UK, 'Foreign Secretary: Help Deliver Justice for Ukraine' available online at: [www.amnesty.org.uk/actions/deliver-justice-ukraine](http://www.amnesty.org.uk/actions/deliver-justice-ukraine) (last access on August 18, 2023).

2. See <https://www.icj-cij.org/case/182/intervention>.

3. Beatrice I Bonafe, 'The Collective Dimension of Bilateral Litigation: The Ukraine v Russia Case before the ICJ' (2022) *Questions of International Law* 27.

4. Jill I Goldenziel, 'An Alternative to Zombieing: Lawfare between Russia and Ukraine and the Future of International Law' (2023) Vol 108 *Cornell Law Review Online* 1.

5. Request for the Indication of Provisional Measures (Ukraine v Russia) (February 25, 2022), para. 1. Available at: <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-WRI-01-00-EN.pdf> (last access August 18, 2023)

6. *Ibid*, para. 12.

7. Terry D Gill, 'The Jus ad Bellum and Russia's "Special Military Operation" in Ukraine' (2022) Vol 25 *Journal of International Peacekeeping* 122.





*possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention [on the Prevention and Punishment of the Crime of Genocide], in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide... Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine".<sup>1</sup>*

According to this Order, it is established that neither Ukraine has committed genocide in the Donbas region nor Russia had the authority to use force to stop such a genocide, even if one were to consider it to be committed by the Ukrainian armed forces. However, the complexity of the procedural process in view of Russia's initial objections makes the Court to address the controversial question of whether the intervention of a third party at the jurisdictional stage is legal. It should be noted that the collective intervention by third States may also prolong the case, because if Russia objects to these declarations of third-party intervention, the Court will have to hear it before deciding on the admissibility of the third-party intervention.<sup>2</sup>

The other forum at which Ukraine has proceeded its lawfare project is ECtHR- also known as the Strasbourg Court. Since 2014, Ukraine has brought about ten inter-state cases, accusing Russia of severe human rights violations. In a somewhat unexpected step, on July 22, 2021, the Russian Federation, under Article 33 of the European Convention on Human Rights (ECHR), filed a case against Ukraine as its first interstate case submitted by Moscow before ECtHR.<sup>3</sup> Filing this application by the Russian Federation can be interpreted as the continuance of a chain of events against Ukraine which finally led to the full-scale invasion of February 24, 2022. Four days after the invasion, Kiev filed another case against Russia in Strasbourg on grounds of "massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine".<sup>4</sup>

Ukraine requested the ECtHR to take interim measures under Rule 39 of the Rules of Court.<sup>5</sup> ECtHR has clarified that substantive interim measures of protection may only be granted when there is an "imminent risk" of "irreparable damage" to the rights and freedoms allegedly violated. The Court has also embraced a narrow approach to the concept of "irreparability" that mainly revolves around the potential harm to the life and physical integrity of the individuals concerned. Substantive interim relief is therefore granted by the Court only in cases of alleged violations of the right to life under Article 2 of the ECHR, the prohibition of torture and inhuman or degrading treatment under Article 3 of the ECHR, and exceptionally of the right to respect for private and family life under Article 8 of the ECHR.<sup>6</sup> In this regard, according to the press

1. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Order) [2022] General List No. 182, paras. 59-60.

2. See paragraph 2 of article 84 of the Rules of Court.

3. Milena Ingelevič-Citak, 'Russia Against Ukraine Before the European Court of Human Rights. The Empire Strikes Back?' (2022) Vol 51 Polish Political Science Yearbook 8, 7.

4. See <http://tinyurl.com/26ojmoe3> (last access on February 2, 2024)

5. For full text of these Rules see [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)

6. Quoted from Andrea Saccucci, 'Interim Measures at the European Court of Human Rights: Current Practice and Future



release issued by the Registrar of the Court on March 1, 2022, the ECtHR decided to indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals. The ECtHR also... and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.<sup>1</sup> Subsequently, Russia was expelled from Council of Europe by the decision of Committee of Ministers on March 16, 2022.<sup>2</sup>

The lawsuits against Russia by Ukraine at both the ICJ and the ECtHR are legally positive steps to stop a war of aggression and restore the international peace and security through international law. However, they are faced with challenges such as time constraints and compliance.<sup>3</sup> To conclude, the Ukraine's lawfare project, launched specifically after the invasion by the Russian Federation, through the ICC, ICJ and ECtHR seems to be an effective and appropriate means for employing international law to fight against the violations committed by Russia and its officials. However, it should be accepted and considered that international law and its mechanisms are not yet effective in solving the problems that are essentially political.

We maintain that among the avenues that the international community has not taken is the formation of a special international tribunal to deal with alleged crimes committed during a certain period of armed conflicts in the territory of Ukraine by the authority of the UN Security Council. But the bitter truth of the veto power consistently shows itself in this field. On August 24, 2022, Russian Ambassador *Vassily Nebenzia* cast the only negative vote on a procedural matter that would have allowed Ukrainian President *Volodymyr Zelensky* to speak with the Security Council via telephone conference. So, the general pattern of voting in the Council in 2022 has reflected the geopolitical differences caused by Russia's war against Ukraine, which will certainly not be without influence in this case as well.<sup>4</sup> Therefore, in a situation where one of the permanent members of the Security Council is accused, it is obvious that the resolution will be vetoed by the accused party. As a result, the ICC is incapable of dealing with the crimes of these members in the issues referred to it. This is a fundamental problem that challenges the executive process of the Court.

Perhaps one solution is for the UN General Assembly to make tough and serious decisions in such cases. However, in terms of the framework and provisions of the Charter, the General Assembly lacks sufficient powers to take action (for example, removing the membership of a permanent member of the Security Council). Despite this, since the United Nations and the Charter derive their legitimacy from the collective will of the member States, it seems that if an overwhelming majority of the member States made such a decision, it could somehow be

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Challenges' in Fulvio M Palombino, Reoberto Virzo and Giovanni Zarra (eds) *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 218.

1. See <https://hudoc.echr.coe.int/eng-press?i=003-7272764-9905947> (last access August 18, 2023)

2. See <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe> (last access on August 18, 2023)

3. Julia Crawford, 'Ukraine vs Russia: What the European Court of Human Rights Can (and Can't) Do' (April, 7 2022), available at: <https://www.justiceinfo.net/en/90187-ukraine-russia-european-court-of-human-rights-can-do.html> (last access on May 5, 2023)

4. Adrian Steube, 'Voting Wrap-Up of the UN Security Council in 2022: Bitterness Mixed with Agreements', January 9, 2023, available at: <https://www.passblue.com/2023/01/09/voting-wrap-up-of-the-un-security-council-in-2022-bitterness-mixed-with-agreements/> (last access on May 5, 2023).



considered a revision of the Charter and considered to have legal validity. In such a situation, the goal is neither to draw moral equations nor to justify Russia's actions against Ukraine. The international community must condemn Russia's actions as a violation of international law in no vague terms and take practical and effective steps to prevent the recurrence of such acts that gravely endanger international peace and security.

## Conclusion

The invasion of Ukraine by the Russian Federation on February 24, 2022, which led to an ongoing conflict, opened a new chapter in international relations and international law. This conflict can be analyzed from different perspectives and branches of public international law. This paper addressed the most important aspects of the Ukraine situation from the perspective of international criminal law. In doing so, first and foremost, it dealt with the mechanisms through which the ICC may gain jurisdiction over a situation. Next, it explored the arrest warrant against *Vladimir Putin* and the strengths and weaknesses of such warrants were explored. Lastly, it briefly examined the other cases pursued by Ukraine at the ICJ and the ECtHR and other viable alternatives. The findings of this essay demonstrate that, relying on the possibilities and facilities provided by international law, Ukraine has started a lawfare against the Russian Federation which has ended in a legal battlefield along with the armed conflict between two belligerents.

To elaborate, neither Russia nor Ukraine are Parties to the Rome Statute.<sup>1</sup> However, Ukraine lodged two ad hoc declarations according to Article 12(3) of the Statute, thereby providing the Court with the jurisdiction over the situation in Ukraine. It was pursuant to the second voluntary declaration made by the government of Ukraine on September 8, 2015, as well as the referral of the situation by 43 State Parties, which the Prosecutor of the Court started its investigations on March 2, 2022, focusing on alleged crimes committed in Ukraine since November 21, 2013. Ultimately, these investigations resulted in the issuance of two arrest warrants against Putin and Lvova-Belova.

Although the issuance of these two arrest warrants in the context of the Ukraine situation is in itself a positive step toward the consolidation of international criminal justice and can be considered a warning for the big fish as the mandate of international criminal law, the implementation of such arrest warrants specifically regarding the President of the Russian Federation seems to be seriously problematic. Given that Russia is not a State Party to the Rome Statute and considering the personal immunity enjoyed by Vladimir Putin as the head of a State, the State Parties to the ICC's Statute cannot arrest and surrender Putin to the Court. There are two possibilities to enforce this arrest warrant: 1) consent of the Russian Federation to waive the immunity of Putin; 2) termination of Putin's presidential term. However, in spite of challenges faced by the ICC in this situation, issuance of the arrest warrant unveils a significant reality that international criminal justice does not exempt even the president of a permanent member of the UN Security Council. Furthermore, although lawsuits against Russia by Ukraine at both the ICJ and the ECtHR are legally positive steps to stop a war of aggression and restore the

<sup>1</sup> After the acceptance of the article, Ukraine deposited its instrument of ratification of the Rome Statute on 25 October 2024.



international peace and security through international law, they face several challenges such as time constraints and compliance issues. However, the ICC cannot succeed alone. It needs more support, including, but not limited to, additional financial support. The ICC has 40 inspectors in Ukraine, but its budget has not increased proportionately.

How should one contemplate the future of the world order and international organizations after the Russian war in Ukraine? Since Moscow has blocked or ignored all calls from the United Nations and other international organizations to stop hostilities, the war revealed the limitations of multilateral security institutions both at the global level and at the level of the European continent. Looking at the current crisis created by Russia, it is not possible to find an opportunity for the trust-building process with Moscow that was carried out in the 1970s. However, it may be feasible to create the desired structural changes that are needed at the time of opening the window of understanding with Russia at the global level. It is possible that this window will not appear soon. Therefore, experts in both European and global security architecture should spend time during the current crisis to outline measures that can be implemented through the current international and organizational order under different political scenarios.



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