

## LATE-BREAKING PANEL: ICC ARREST WARRANTS: IMPUNITY IN CHECK?

This panel was convened at 10:30 a.m. on Friday, March 31, 2023, by its moderator, Katherine Gallagher, a Senior Staff Attorney at the Center for Constitutional Rights and an Adjunct Professor of Clinical Law at New York University School of Law, who introduced the panelists: Diane Marie Amann of the University of Georgia School of Law; Saira Mohamed of the University of California at Berkeley School of Law; Javier S. Eskauriatza of the University of Nottingham; and Marko Milanović of the University of Reading School of Law.

### INTRODUCTORY REMARKS BY KATHERINE GALLAGHER\*

On March 17, the International Criminal Court (ICC) issued an arrest warrant against Vladimir Putin, president of the Russian Federation, and Maria Lvova-Belova, Russia's Commissioner for Children's Rights, following applications submitted by ICC Prosecutor Karim Khan on February 22, 2023.<sup>1</sup> The warrant focuses on war crimes relating to children: the unlawful deportation of population and unlawful transfer of population from occupied areas of Ukraine to the Russian Federation.

The ICC opened a preliminary examination into the Situation in Ukraine nearly nine years ago, following attacks on the Maidan protests,<sup>2</sup> extended it the following year after the annexation of Crimea,<sup>3</sup> and the former prosecutor, Fatou Bensouda, announced that there was a sufficient basis to open an investigation into Ukraine in December 2020—but due to a lack of resources, did not do so.<sup>4</sup> In February 2022, after the large-scale Russian invasion of Ukraine, Prosecutor Khan announced the opening of an investigation.<sup>5</sup>

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<sup>1</sup> See ICC Press Release, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova>.

<sup>2</sup> ICC Office of the Prosecutor Press Release, *The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens A Preliminary Examination in Ukraine* (Apr. 25, 2014), at <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-opens-preliminary-examination-ukraine>.

<sup>3</sup> ICC Office of the Prosecutor Press Release, *ICC Prosecutor Extends Preliminary Examination of the Situation in Ukraine Following Second Article 12(3) Declaration* (Sept. 29, 2015), at <https://www.icc-cpi.int/news/icc-prosecutor-extends-preliminary-examination-situation-ukraine-following-second-article-123>.

<sup>4</sup> ICC Office of the Prosecutor Press Release, *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation of Ukraine* (Dec. 11, 2020), at <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> (concluding “that there is a reasonable basis at this time to believe that a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine”).

<sup>5</sup> ICC Office of the Prosecutor Press Release, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I Have Decided to Proceed with Opening an Investigation,”* (Feb. 28, 2022), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

So the issuance of arrest warrants in the Ukraine situation has been a long time coming—and here, I want to particularly commend Ukrainian human rights organizations and civil society, which pressed for years for the opening of an investigation and accountability, in The Hague and New York at the Court and the sidelines of the Assembly of States Parties, speaking about the challenges of holding the powerful to account at conferences from Kyiv and London to Johannesburg and Ramallah—and yet, the announcement both of the target and the focus of the crimes still marked a pivotal moment in international criminal justice and the ICC.

And it raises many questions.

What are the implications of such a warrant, against a sitting head of state, of a non-state party to the Rome Statute? What are the obligations on Rome Statute states parties in relation to this warrant? Given the specific nature and type of crimes that are the focus of the arrest warrant, what does this signal? Is this a new and bold step forward in the fight against state impunity, or is this arrest warrant bound to be consigned to the history books with nary an impact?

We have a stellar set of panelists who will unpack and address some of these questions.<sup>6</sup>

### CHILDREN AND THE ICC ARREST WARRANT AGAINST THE PRESIDENT AND THE CHILDREN'S RIGHTS COMMISSIONER OF RUSSIA

*By Diane Marie Amann\**

*These remarks address the following questions posed by the moderator: (1) Placing the arrest warrants in the historical context of crimes against or involving children as a concern of international law, provide an overview of the charges underlying the arrest warrants and also speak to their importance; and (2) Elaborate on the specific charges, including why war crimes but not crimes against humanity; why choose these targets, that is why name President Vladimir Putin in particular for this crime base; and whether there is anything of note in the fact that his co-accused is a woman.*

To experts in international child law, the March 2023 announcement that the International Criminal Court (ICC) was seeking to arrest Russia's president, as well as a woman official on his major staff,<sup>1</sup> conjured images of a proceeding long ago. In the same month seventy-five years earlier, in a courtroom 400 miles southeast of The Hague, a predecessor tribunal had passed judgment over fourteen Nazi SS members, as well as a woman official.

<sup>6</sup> The remarks of three of our four panelists follow. In addition, Professor Marko Milanović addressed two sets of questions: (1) Can you address some of the jurisdictional issues implicated through these arrest warrants—whether Russia's status as a non-state party or Crimea's status as an occupied territory? What are some of the particular legal aspects—and potential precedents for other situations—we might see develop here?; (2) On the legal issues that we will see play out, can you speak to what we might see, by ways of argument about head of state immunity? What do the *Milošević*, *Taylor*, or *Bashir* cases tell us about the prospects for Vladimir Putin raising this as a defense? And what we might expect from states vis-à-vis cooperation to enforce the warrants? A recording of the full panel is available at: <https://www.youtube.com/watch?v=UekYOGpPpFs>.

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<sup>1</sup> ICC Press Release, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> [hereinafter *ICC Judges*]; President of Russia, *Major Staff and Key Officials*, at <http://www.en.kremlin.ru/structure/administration/members> (listing Lvova-Belova as one of only three women, with title of "Presidential Commissioner for Children's Rights") (visited June 13, 2023).



That 1948 verdict was one of a dozen rendered in U.S.-led proceedings subsequent to Nuremberg's International Military Tribunal trial. It occurred in the *RuSHA* case, so named after the German acronym for the Race and Settlement Main Office, which main defendants had directed. A *RuSHA* photograph depicts somber men, and one woman, in the dock; many wear headphones so they can follow the judges' English-language delivery of the tribunal's decision.<sup>2</sup>

At the center of the maelstrom of crimes against humanity and war crimes alleged in *RuSHA* were “[k]idnapping the children of foreign nationals in order to select for Germanization those who were considered of ‘racial value,’” and also of “[t]aking away, for the purpose of . . . Germanization, infants born to Eastern workers . . .” Both acts appeared in a list of misconduct “aimed,” according to the indictment, “at the destruction of foreign nations and ethnic groups . . . in part by elimination and suppression of national characteristics.”<sup>3</sup>

Both the indictment and the photograph drew a direct link between the founding era of modern international criminal law and the just-issued ICC arrest warrants against Russian President Vladimir Putin and his Presidential Commissioner for Children's Rights, Maria Lvova-Belova. The warrants themselves reinforced that link; to quote an ICC press release, the sealed warrants

<sup>2</sup> *Max Sollmann Receives Sentence*, NAID 169157186, in Record Group 238: National Archives Collection of World War II War Crimes Records, Series: Photographs Relating to the Minor Nuremberg Trials, File Unit: Tribunal VIII [8] – Rusha Trial – Defendants, at <https://catalog.archives.gov/id/169157186>. According to official records, judgment and sentencing in *RuSHA* occurred on March 10, 1948. TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. IV (1946–1949) [hereinafter TRIALS], judgment and sentencing in *RuSHA* occurred on March 10, 1948. *Id.*, VOL. V, at 88–170.

<sup>3</sup> TRIALS, *supra* note 2, VOL. IV, at 609–10; *see id.* at 617–18 (incorporating allegations quoted from first count, crimes against humanity, into second count, war crimes).

contained just two charges, “the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine into the Russian Federation . . . .”<sup>4</sup> What is more, the places from which children were taken in the 2020s lie very near the places from which children were taken in the 1940s.

The interim decades witnessed still more trials on similar charges. France’s conviction of Klaus Barbie in 1987 rested in part on his role in raiding a home for Jewish children near Grenoble, from which forty-one children, some as young as three, were arrested and transported to camps.<sup>5</sup> In 2012, an Argentine tribunal imposed heavy sentences on two military officers convicted of involvement in the kidnapping of children and infants when the country was ruled by a junta.<sup>6</sup> Child-soldiering convictions that were issued in both the Special Court for Sierra Leone, as long ago as 2007, and in the International Criminal Court, as recently as 2021, included allegations that children had been abducted into armed groups.<sup>7</sup> In its 2016 appeal judgment against two Khmer Rouge leaders, the Extraordinary Chambers in the Courts of Cambodia placed emphasis on evidence that forced evacuations had been particularly harmful to children.<sup>8</sup>

In short, the ICC charges lodged against Putin and Lvova-Belova in 2023 advance an international criminal law tradition of addressing grievous harms to children. And it is appropriate that they do so.

On occasion one hears commentary that belittles this tradition—that talks about crimes against and affecting children as if they were minor, as if they were placeholders for some truly important crime to be added later. I would submit that they are much more than that. Crimes against and affecting children have a unique pull, as a matter both of morals and of fact.

Speaking from a moral standpoint, we contend as a global society to care more about children—more than we do about other living beings. It pains me to admit that I do not believe this is so. If it were, we as a society would not treat children as we do. Nevertheless, we certainly persist in the pretense that we care about children, and thus we demand that they receive full protection and redress.

Speaking factually, we must acknowledge that settings which give rise to international crimes have, to quote the 2016 *Policy on Children* of the ICC Office of the Prosecutor, a “multi-faceted impact on children.”<sup>9</sup> Among all who endure criminality in such settings, children likely will carry the consequences of such criminality longer, for the simple reason that they are younger than other persons. To the extent that children embody their society’s future, moreover, the traumas, the burdens, and the resentments they carry are that much more likely to be passed down to future generations.

Consider, finally, the precise crime at issue. “The object of this program,” the *RuSHA* indictment stated, “was to strengthen the German nation and the so-called ‘Aryan’ race,” and to weaken

<sup>4</sup> *ICC Judges*, *supra* note 1.

<sup>5</sup> See DE NUREMBERG À IZIEU, JUGER LE CRIME CONTRE L’HUMANITÉ: MÉMOIRE DU PROCÈS BARBIE, 30 ANS APRÈS (Dominique Vidaud dir., 2018).

<sup>6</sup> See *STOLEN BABIES: Argentina Convicts Two Military Dictators*, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 383 (July 5, 2012), at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB383>.

<sup>7</sup> Human Rights Watch, *Sierra Leone: Landmark Convictions for Use of Child Soldiers* (June 20, 2007), at <https://www.hrw.org/news/2007/06/20/sierra-leone-landmark-convictions-use-child-soldiers>; ICC Press Release, *Ntaganda Case: ICC Appeals Chamber Confirms Conviction and Sentencing Decisions* (Mar. 30, 2021), at <https://www.icc-cpi.int/news/ntaganda-case-icc-appeals-chamber-confirms-conviction-and-sentencing-decisions>.

<sup>8</sup> Nuon Chea and Khieu Samphan (Case 002/01), F36, Judgment, at 207–09, paras. 455–57 (Supreme Court Chamber (SCC) Nov. 23, 2016), at [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36\\_EN\\_0.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/F36_EN_0.pdf).

<sup>9</sup> See ICC Office of Prosecutor, *Policy on Children*, at 12, para. 17 (Nov. 2016), at [https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF).

“‘undesirable’ racial elements.”<sup>10</sup> (At this juncture, it is to be noted that the photograph described earlier revealed the *RuSHA* defendants’ guards to have been African-American MPs. In her oral history a half-century years later, *New Yorker* reporter Andy Logan recalled a similar Nuremberg scene as a visible condemnation of Nazi ideology—even as she acknowledged that the U.S. Army did not stop its racial segregation of troops until months after these trials.<sup>11</sup>)

As for the crimes charged in the ICC, civil society reports in the run-up to the announcement asserted that thousands of Ukrainian children had been transferred to Russia and there made Russian citizens and adopted into Russian families.<sup>12</sup> To take a child out of his or her or their own society, to take the child to a different place and turn the child into a member of a different society, is among the most heinous of crimes in either domestic or international law. And it deserves to be treated as such.

The decision of ICC Prosecutor Karim Khan KC to seek arrest warrants solely for war crimes left room to put pressure on persons now taking part in the impugned program. That is because acts of child-taking may support additional charges. Unlawful deportation, for example, may constitute a crime against humanity as well as a war crime. Depending on how the Ukraine-Russia conflict unfolds, moreover, the grim possibility remains that the alleged conduct may give rise to the first international criminal charges of the forcible transfer of children from a protected group to another group, as genocide. That surely would not be a minor occurrence.

There is another sense in which crimes against and affecting children are by no means minor. Securing a conviction for these crimes, no less than for others punishable before the ICC, presents a herculean challenge. The task of gathering persuasive physical and testimonial evidence amid armed conflict cannot be underestimated. Essential components such as *mens rea* and mode of liability are devils to prove, especially given the skill and vigor of the typical ICC defense counsel. In the instant case, the prosecution will confront top officials of one of the world’s most powerful states, whose lawyers doubtless will contest every legal theory advanced and every item of evidence proffered. As for adjudication, ICC chambers often demand forensic precision equal to that in the most well-resourced national criminal justice systems. Indeed, ICC judges typically examine facts and law to a much greater extent than many a decision by their predecessors in the Nuremberg era.

That last factor points to even greater difficulty, for not everyone at Nuremberg was convicted of the crimes for which they stood trial. The *RuSHA* child-taking case was no exception. Prosecutors did secure war crimes and crimes against humanity convictions against eight defendants, with sentences ranging from ten years to life in prison. But five SS members, including two affiliated with Lebensborn—an organization vilified as kidnappers by the prosecution—were judged not responsible for those crimes. The woman official at Lebensborn, Inge Vermietz, was acquitted in full.<sup>13</sup>

Vermietz is one of two women charged in the twelve subsequent proceedings at Nuremberg, and many more women faced charges before military tribunals in the British, French, Soviet, and American occupation zones. Concentration camp guards were convicted of severe brutality, and some of them were hanged for their crimes. Scholars like Natalie Hodgson, Mark Drumbl, and

<sup>10</sup> See TRIALS, *supra* note 2, VOL. IV, at 610.

<sup>11</sup> Andy Logan, Interview 35605, Tape 2, USC Shoah Foundation Visual History Archive, USC Shoah Foundation (Nov. 17, 1997) (recalling the event reported in Andy Logan, *Letter from Germany*, NEW YORKER, at 94, 98 (May 8, 1948)) (accessed Jan. 30, 2018); see Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

<sup>12</sup> EBU Investigative Journalism Network, *The Missing Children of Ukraine*, EUROVISION NEWS (Feb. 14, 2023), at <https://missingchildreukraine.news-exchange.ebu.ch/the-missing-children-of-ukraine/index.htm>; Yale School of Public Health Humanitarian Research Lab, *Russia’s Systematic Program for the Re-education and Adoption of Ukraine’s Children: A Conflict Observatory Report* (Feb. 14, 2023), at <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/97f919ccfe524d31a241b53ca44076b8/data>.

<sup>13</sup> See TRIALS, *supra* note 2, VOL. V, at 88–170.



Solange Mouthaan have shown that a common aspect in such trials is the essentialization of the defendant's identity as a woman.<sup>14</sup> Traits considered unfeminine may be attributed to her as a way to explain her criminality. Proceedings against Ilse Koch, a Nazi camp commandant's wife, thus surfaced her reputed sexual appetite, and popular culture responded: she went by "Beast of Buchenwald" in the polite pages of *The New York Times*, and by a less polite B-word in less polite company.<sup>15</sup>

As for the *RuSHA* case, Inge Vermietz embraced the feminine side, and the record suggests that she would have walked free even if her male colleagues had been convicted. Her lawyer played on then-prevailing assumptions that no woman could hold genuine responsibility. She told the judges, "I cannot believe that my work was ever a crime"; indeed, she referred to that work as "my helping activities."<sup>16</sup> Given prior comments by Russia's Children's Rights Commissioner,<sup>17</sup> it is not hard to imagine her echoing those sentiments were she ever to take the witness stand at the ICC.

Thus, the ICC prosecutor has his work cut out for him if he is to deliver on the worthy promise made in his statement on the arrest warrant. He said: "We cannot allow children to be treated as if they are the spoils of war."<sup>18</sup>

## THE GOALS AND IMPACT OF THE ARREST WARRANTS AGAINST PRESIDENT PUTIN AND CHILDREN'S RIGHTS COMMISSIONER LVOVA-BELOVA

By Saira Mohamed\*

*These remarks address questions posed by the moderator concerning (1) the goals of the prosecutor and the International Criminal Court (ICC) in issuing the arrest warrants and the warrants' impact on perceptions of the war; and (2) the significance of the notion that this time marks a new "Nuremberg moment."*

### I. GOALS AND IMPACT OF THE WARRANTS

I begin with the goal the Court announced: prevention. The International Criminal Court (ICC) press release—which explained that although the warrants' existence was being publicized, the warrants themselves would remain secret to protect victims and witnesses and the continued investigation—noted that the crimes are ongoing and expressed a hope that "public awareness of the warrants may contribute to the prevention of the further commission of crimes."<sup>1</sup>

<sup>14</sup> Mark A. Drumbl, *She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko*, 34 MICH. J. INT'L L. 559 (2011); Natalie Hodgson, *Arresting "Mother Russia": Female Defendants and Gender(ed) Justice in International Criminal Tribunals*, EJIL:TALK! (Mar. 27, 2023).

<sup>15</sup> Mark Drumbl & Solange Mouthaan, "A Hussy Who Rode on Horseback in Sexy Underwear in Front of the Prisoners": *The Trials of Buchenwald's Ilse Koch*, 21 INT'L CRIM. L. REV. 280 (2021); *Ilse Koch Hangs Herself in Cell*, N.Y. TIMES, at 3 (Sept. 6, 1967).

<sup>16</sup> TRIALS, *supra* note 2, VOL. V, at 87.

<sup>17</sup> See Mick Krever, *The Russian Official at Center of Alleged Scheme to Forcibly Deport Thousands of Ukrainian Children to Russia*, CNN (Feb. 16, 2023), at <https://www.cnn.com/2023/02/15/europe/russia-ukraine-children-maria-lvova-belova-intl/index.html>.

<sup>18</sup> ICC Press Release, *Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms Maria Lvova-Belova* (Mar. 17, 2023), at <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

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<sup>1</sup> ICC Press Release, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

Does this mean the Court expects the charges will stop Russian President Vladimir Putin himself from further commission of these crimes? Probably not. But the warrants could potentially influence mid-level actors. The literature on the direct deterrent effects of international criminal prosecutions is, of course, not heartening.<sup>2</sup> Still, we might wonder whether for actors below Putin and Russia's Commissioner for Children's Rights Maria Lvova-Belova, this development changes the calculus of the costs and benefits of the child deportation program. It will not end the war. But perhaps it will result in fewer children abducted from their homes and taken across the border and subjected to military training and forced to appear in propaganda campaigns. Russian authorities have committed these acts right out in the open, and in the days since the warrants have been issued, they have insisted the programs will continue. But perhaps the Court's involvement will change the behavior of others.

What about the goals the Court has not explicitly identified? A number of commentators have framed reactions to the warrants around the question of whether these are merely symbolic,<sup>3</sup> because surely Putin will not be arrested or tried anytime soon. Some of the goals and functions are indeed symbolic—but the symbolic functions, which I put under the broader category of expressive functions of law, are powerful and crucial—they are not *mere*.

First, we can see these warrants as an opportunity the Court is embracing to show solidarity with Ukrainian victims of atrocity crimes. And for some of those individuals, the ICC's acknowledgement of the crimes they have suffered—and of the responsibility of the Russian president for those crimes—matters. It is not everything; it will not end the war, and it will not rebuild the families and communities and towns that have been ravaged. But it is something.

Scholars like Sara Kendall and Sarah Nouwen<sup>4</sup> and Laurel Fletcher<sup>5</sup> have offered important insights on judicial understandings of victims, and we must be careful not to imagine a monolithic victim population that shares one reaction to this indictment. But at least for some Ukrainians, especially in a state that itself values criminal prosecution as a form of accountability for wrongs committed during the war, the ICC's attention and willingness to issue an arrest warrant against Putin himself may be meaningful.

And it may be especially important to victims given the fractured global reaction to the war. There is obviously a very different sense of the stakes and the appropriate resolution in the Global South,<sup>6</sup> and we are now at a moment when support even in western states may be waning too: public opinion polling shows softening support for U.S. assistance to Ukraine, and some prominent Republican party voices have opposed American support for Ukraine.<sup>7</sup>

Second, given those dynamics, we should also see the warrants as an effort to establish the ICC as an institution that is central in responding to the war. (Again, the public announcement is relevant here.) For the Court, this is a way to proudly say, "The world does not need an aggression

<sup>2</sup> See Natalie Hodgson, *Exploring the International Criminal Court's Deterrent Potential: A Case Study of Australian Politics*, 19 J. INT'L CRIM. JUST. 913, 920–24 (2021).

<sup>3</sup> See, e.g., Danielle Johnson, *ICC Arrest Warrant for Putin Is a Step Toward Ending Russian Impunity*, ATLANTIC COUNCIL (Mar. 19, 2023), at <https://www.atlanticcouncil.org/blogs/ukrainalert/icc-arrest-warrant-for-putin-is-a-step-toward-ending-russian-impunity>.

<sup>4</sup> See Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 L. & CONTEMP. PROBS. 235 (2013).

<sup>5</sup> See Laurel E. Fletcher, *Refracted Justice: The Imagined Victim and the International Criminal Court*, in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS (Christian De Vos, Sara Kendall & Carsten Stahn eds., 2015).

<sup>6</sup> See, e.g., Liz Sly, *A Global Divide on the Ukraine War Is Deepening*, WASH. POST (Feb. 23, 2023), at <https://www.washingtonpost.com/world/2023/02/22/global-south-russia-war-divided>.

<sup>7</sup> See, e.g., Robert Draper, *A Loud G.O.P. Minority Pledges to Make Trouble on Ukraine Military Aid*, N.Y. TIMES (May 19, 2023), at <https://www.nytimes.com/2023/05/19/us/politics/ukraine-republican-skeptics.html>.

tribunal! We can handle Putin ourselves.” (Put aside the fact that ten days after the warrants were announced, the United States announced its support for an “internationalized national court” within Ukraine to try individuals for aggression.<sup>8</sup>)

This is a gamble. *Can* the ICC handle Putin? We will see whether he will travel to the BRICS summit in South Africa and whether authorities seek his apprehension if he does. Beyond that, geopolitical dynamics suggest that this gamble will not succeed in establishing the ICC as the primary international institution contributing to resolution of the war and its harms. The characterization of this war as a battle between authoritarianism and democracy is not embraced throughout the world. The insertion of the ICC into the conflict might only add to these divisions. Russia says this is a war with NATO. Now Putin can portray it also as a battle with the ICC—which, given other states’ conflicts with the Court, could be a productive strategy.

A last note on goals concerns two points about narrative. First, consider the ways criminal law reckons with abuses of power. Any accountability effort aimed at individuals at the top of a hierarchy offers an opportunity to better understand and condemn the ways individuals use positions of power and authority to influence others to commit crime. Putin is conceived as a perpetrator under Article 25(3)(a), but, as I have argued, we should examine how leaders use control of others and institutions not only to plan and organize wrongdoing directly, but also to create the psychological and moral conditions that convince others to commit crimes.<sup>9</sup> Prosecutions ideally trigger investigation of how leaders use purported justifications, characterizations of threat or necessity, to exploit and influence. And prosecutions ideally impel those who are being influenced—the lower-level perpetrators, the Russian families taking in these children in this case—to rethink and question those justifications and to reconsider their complicity. (To be sure, that might be unlikely given what we know about public opinion and news consumption in Russia.)

Second, I urge readers to consider what is left out when we let criminal law do the storytelling. As we consider the narrative functions of international criminal prosecutions—the story about the importance of these crimes against children and families; the story that says even this most powerful man is not above the law—we must be aware that the prosecutions and these arrest warrants will shape the conversation about wrongdoing. For better or worse, in this country and across the world, we treat criminal prosecution as if it is a marker of what matters. If it matters, it is taken seriously by criminal law.

These warrants signal choices about prioritization about resources; and it is unavoidable that a prioritization about resources means a prioritization about power, about what matters, about what constitutes a wrong worthy of global attention and what does not. Accordingly, the warrants represent not only a hearty endorsement of accountability for Putin. They are a yes to accountability for Putin and no to accountability for U.S. personnel in Afghanistan.<sup>10</sup> They are a yes to Ukraine and no to Nigeria, a situation that is now years past the conclusion of preliminary examination and still the investigation has not commenced.<sup>11</sup> A yes to deportation and transfer of population as war crimes, and no, at least as of yet, at least publicly, to the masses of other crimes taking place.

<sup>8</sup> Beth Van Schaack, Ambassador for Global Crim. Just., U.S. Dep’t of State, Ambassador Van Schaack’s Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression (Mar. 27, 2023), at <https://www.state.gov/ambassador-van-schaacks-remarks>.

<sup>9</sup> See Saira Mohamed, *Leadership Crimes*, 105 CAL. L. REV. 777 (2017).

<sup>10</sup> See ICC Press Release, *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan* (Sept. 27, 2021), at <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>.

<sup>11</sup> See ICC, Preliminary Examination: Nigeria, at <https://www.icc-cpi.int/nigeria> (last visited June 15, 2023).



And acts that are not identified as relevant crimes under the Rome Statute are set aside. The crimes both reflect and shape public understanding of what constitutes significant wrongdoing, of what merits attention. My current research focuses on the absence in international law of any adequate legal language or frameworks for addressing how a state treats its own service members.<sup>12</sup> There is no way under the Rome Statute to address the fact that Putin is sacrificing the lives of soldiers forced to fight this war, that under international law we continue to tolerate the treatment of service members as cannon fodder.

## II. THE “NUREMBERG MOMENT”

Many have embraced the idea that this is a new Nuremberg moment, as Ambassador Beth Van Schaack described it last year.<sup>13</sup> This phrase has been used in at least two different ways. First, some have used it to describe the prospects of accountability going all the way to the top. And indeed, we can see the warrant for Putin as an indication—at least within the ICC itself—of comfort with, or even enthusiasm for, accountability for heads of state. Still, although the ICC considers the matter of head-of-state immunity indisputably settled as of the *Bashir* decision, for other states and other actors, the answer is not so clear. The coming months, especially if Putin travels to ICC member states, will be crucial in assessing whether we are indeed at a moment of real willingness to subject the highest levels of power to the rule of law.

Second, as Ambassador Van Schaack used the term, the phrase has been used to refer to a global consensus on accountability. But this is more of an aspirational label than one reflecting reality. As discussed, there is neither global consensus on the appropriate outcome of this war, nor on accountability mechanisms.

To close, I want to consider a third meaning. We can also think about the “Nuremberg moment” as one that forces us to reckon with the uncomfortable relationship between accountability and power. Or, to put it more starkly, why are we seeing this embrace of an aggression tribunal for Ukraine and no accountability for the war in Iraq?

We all know the arguments about Nuremberg as victor’s justice. And we might see a parallel with American support for accountability for crimes in Ukraine sitting alongside the continued insistence by the U.S. government that there should be no ICC jurisdiction over non-states parties to the Rome Statute and the Administration’s statement that it “disagree[d] strongly” with the ICC’s Afghanistan investigation.<sup>14</sup>

Is this a double standard? Yes.

Some argue the major difference between accountability for the war in Ukraine and the Afghanistan investigation is admissibility, and that the United States has done enough to satisfy the complementarity requirements to displace prosecution and that the gravity threshold is not met with respect to U.S. defendants. I disagree with those assessments. I think there is a double standard.

Does that mean we should reject embrace of the ICC by any state that has adhered to this principle of accountability for thee but not for me? I do not think so.

<sup>12</sup> See, e.g., Saira Mohamed, *Cannon Fodder, or a Soldier’s Right to Life*, 95 S. CAL. L. REV. 1037 (2022).

<sup>13</sup> U.S. Dep’t of State, Briefing With Ambassador-at-Large for Global Criminal Justice Beth Van Schaack on Justice and Accountability for Russia’s Atrocities in Ukraine (Nov. 21, 2022), at <https://www.state.gov/briefing-with-ambassador-at-large-for-global-criminal-justice-beth-van-schaack-on-justice-and-accountability-for-russias-atrocities-in-ukraine>.

<sup>14</sup> Office of Secretary of State Anthony J. Blinken Press Release, U.S. Dep’t of State, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court (Apr. 2, 2021), at <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court>.

The U.S. relationship with international criminal justice has always been complex. And it is important to recognize that the state is not a monolith; there is a multiplicity of actors within the U.S. government with different interests and different approaches both to the larger question of international accountability and to the particular question of, say, the ICC's jurisdiction.

At this point, the war has become a driver of change in the U.S. relationship with the ICC. We have new legislation that enables cooperation with the Court and bipartisan congressional support for the Court, at least for activities in the Ukraine situation. Is there a double standard? Yes. But still, this is a moment of opportunity. Perhaps this is the moment when the United States can move toward dropping the non-party nationals argument. We have already seen the United States revise the war crimes statute to allow for "present in" jurisdiction, a broad-based change that may be inspired by the events in Ukraine but is not limited to prosecutions related to Ukraine.

For those who want to see the United States support the ICC, or support the broader movement of international criminal accountability for mass atrocity crimes, or even for those who want to see the United States engage productively with multilateral institutions more generally, we should both be cognizant of the double standard and consider this a moment of opportunity.

## THE ARREST WARRANTS IN CONTEXT: FOR UKRAINE AND FOR THE INTERNATIONAL COMMUNITY

*By Dr. Javier S. Eskauriatza\**

*These remarks address questions posed by the moderator concerning (1) the arrest warrants in the larger trajectory of justice for Ukraine, eight years after the annexation of Crimea and a year into the full-scale invasion, and how, if at all, they may feature into the resolution of the conflict or post-conflict justice; and (2) the role, if any, that the United Nations Security Council might play in response to the issuance of an arrest warrant against the president of a P5 non-ICC member state, including a possible deferral under Article 16 of the Rome Statute.*

### I. THE ARREST WARRANTS IN A LARGER PEACE AND JUSTICE CONTEXT

In terms of justice for Ukraine, the story of Muscovite imperial ambitions in the region goes back centuries. Yet however far we want to go back, these arrest warrants absolutely mark an inflection point. The warrants imply that Moscow's imperial ambitions have manifested in conduct that is contrary to international criminal law. They will require that the relevant individuals present themselves before an international criminal tribunal with jurisdiction to account for their conduct. This is what Ukraine has wanted since, at least April 9, 2014, when it made the first of two declarations recognizing the jurisdiction of the International Criminal Court (ICC) pursuant to Rome Statute Article 12(3).<sup>1</sup> Ukraine has had to wait, perhaps, without justification, but the so-called "full-scale invasion" on February 24, 2022, alongside the installation of a new prosecutor at the ICC, and other significant developments, have changed the political dynamics.

Yet, if we start from the premise that this conflict is going to end, like many conflicts, in a negotiated settlement (although peace negotiations do not appear imminent), then we should be prepared for things to get messy. The post-conflict space can be a world of uncomfortable agreements and compromises. An illuminating account has been provided by Larry May who

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<sup>1</sup> ICC Press Release, *Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014* (Apr. 17, 2014), at <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-between-21-november-2013-and-22>.

describes the normative heart of the “*jus post bellum*” as *meionexia*—justice as accepting less than that to which you are entitled.<sup>2</sup> In this respect, the arrest warrants, all things being equal, may stand in the way of the conclusion of any comprehensive peace agreement. But a mechanism to set aside the prosecutions is provided for in the Rome Statute and I will come to that later. The point is that the ICC requires states to assist its efforts and there may come a time when the politics of peace and the politics of accountability are not aligned.

To many, not least Ukrainians, it might seem distasteful, or at worse, betrayal to talk about peace settlement issues, when the conflict is still ongoing, and the justice of the matter appears to be so firmly on one side. But I think it is useful and necessary for some thinking in this direction to take place (even if most of us will hope that the war in Ukraine is won, and that Putin and his facilitators are arraigned and tried). Not least, thinking about post-conflict issues (and criminal accountability) reminds us that the *jus in bello* applies to the parties equally regardless of who is “in the right.” It is therefore in the interests of Ukraine to continue to conduct itself strictly within the confines of international humanitarian law.

From the perspective of peace settlement practice, we are in a pre-negotiation phase; the parties are jockeying for position, in terms of territory, but also legally and morally. How should we interpret this ICC intervention? Are the warrants an attempt to marginalize Putin? Or an attempt to bolster opposition to Putin in Moscow? Alternatively, are they an attempt to cajole him into peace talks? It is not clear the extent to which the ICC prosecutor has considered how the warrants would be interpreted in Moscow. It is worth noting that Putin’s immediate response to the warrants was to threaten a nuclear weapons attack from the territory of Belarus.

Should the conflict end in a stalemate, where there is not an outright “winner,” we have seen that international law can guide parties toward innovative compromises which attempt to balance the law’s demand for criminal accountability with the need for, at least, a negative peace, and attention to a whole host of other human rights issues. Colombia, perhaps, is the most interesting recent example, where the agreement between the government and the FARC-EP established a set of innovative institutions that were mandated to deal with thousands of war crimes spanning decades. But there are other examples and the situation in Ukraine is, of course, different. In Ukraine, we have a multi-level conflict which includes: a geopolitical conflict; a regional (European) conflict; a specific international armed conflict; and other localized conflicts. It is, therefore, a conflict that involves serious risks of escalation. All this means that the practical effect of these arrest warrants is not yet known; much depends on what happens on the battlefield, the (eventual) peace terms, and the politics in Moscow, Kiev, and other places.

## II. A UN SECURITY COUNCIL RESPONSE TO THE ARREST WARRANTS?

At the Rome negotiations (and despite what ICC prosecutors have said since then) it was clear that the ICC would have something to do with peace and security issues, and, therefore, that the relationship with the United Nations Security Council (UNSC) would be a bone of contention. You are creating a permanent criminal court; it is going to be intervening during armed conflict as well as in the post-conflict space. Fundamentally, international criminal law and the maintenance of peace and security have been intertwined throughout history, and they continue to share a legal space. Therefore, there was considerable debate about the nature of the relationship between this new and permanent international court and the UNSC.

<sup>2</sup> LARRY MAY, *AFTER WAR ENDS: A PHILOSOPHICAL PERSPECTIVE* (2012).

In the beginning, it was thought that the ICC prosecutor would be subservient to the UNSC, or that they would need to watch the UNSC and make sure the ICC avoided the space occupied by the UNSC. In the end, that relationship was flipped, and the judicial independence of the court was secured. The price, however, is Rome Statute Article 16, which provides a legal mechanism that guarantees an ICC prosecution or investigation can be blocked for a renewable period of twelve months pursuant to a UNSC Chapter VII resolution to that effect. Renewals of an Article 16 deferral require a new request and there is no limit to the number of deferral requests that may be put forward. Thus, in theory, an investigation or prosecution can be postponed (or blocked) indefinitely. However, the UNSC has never deferred an ICC investigation. So, this is another way that the arrest warrants take international criminal justice into unprecedented territory.

In Ukraine, should peace negotiations be “in the offing,” there will be arguments made for the deferral of the investigation or prosecution, founded on the view that no Putin-led administration will vote for peace when it includes the prospect of a criminal trial. It is worth noting the significance of requiring a Chapter VII resolution to defer the prosecutions in this regard. As is well known, this requires nine affirmative votes from among the fifteen Council members and, as ever, the abstention or concurring votes from all five permanent members (i.e., no vetoes). This means that the permanent members, which includes the Russian Federation, must agree (or agree not to disagree) that the situation in Ukraine is “a threat to the peace, breach of the peace or act of aggression.”<sup>3</sup> That may not be so easily achievable.

It should be noted that when African states have sought to make similar arguments to defer ICC prosecutions that complicated peace negotiations, their arguments have fallen on deaf ears, with Western states failing to provide enough support for the deferral requests. In respect of the Kenya situation, for example, the United Kingdom argued that the situation did not meet the threshold for a Chapter VII resolution. The Russian Federation and China, on the other hand, have tended to support such deferral requests.

Thus, the politics of deferral raises several very important questions.

Firstly, in relation to Ukraine, one preliminary issue is where such a proposal for deferral would come from? Surely not from the Russian Federation; it has already said it does not recognize the ICC and that it wants nothing to do with it. At this stage, it is hard to imagine the request for deferral coming from the European states on the Council either, given that they have provided so much energy and enthusiasm for the prosecution and the defense of Ukraine. For the same reasons, it does not appear likely that the current U.S. administration would request a deferral. So, that leaves China. Might one of the legacies of these ICC arrest warrants be that China takes an even more active role in peace and security issues, with all that that entails? Other current members on the Council include Brazil, Japan, and Switzerland.

Secondly, it should be remembered that the Office of the Prosecutor is already investigating the situation in Ukraine. Thus, even if a deferral is obtained, what conduct does Article 16 bar the prosecutor from undertaking in relation to that investigation? Is the prosecutor permitted to conduct the same kind of activities that they would during a preliminary examination? It is not clear how the prosecutor can prevent information from reaching them, say, from civil society, or from states, even during an Article 16 situation. So, there is a presumption, I think, that arises, which is that the prosecutor can receive information during an Article 16 situation, even if they can do no more than categorize that information and file it away. Hopefully, this means that calls for the United States to share evidence with the ICC prosecutor will continue to be made.

Thirdly, there are other evidentiary and practical problems of stopping an investigation that is already underway. Specifically, what about the preservation of evidence? In this case, the evidence

<sup>3</sup> United Nations Charter, Art. 39.

appears to be clear (owing to the existence of the Putin-Lvova-Belova video on the transfer of children). Thus, in that respect, the charges were very well chosen, as the preservation of evidence is not such a headache. Yet, what if there are witnesses that are cooperating with the Office of the Prosecutor—does a deferral mean that they lose that protection? What if their lives are placed in danger?

There has not been very much discussion of Article 16 so far because the conflict is ongoing, and peace seems quite far away. However, to the extent that the end of fighting becomes a reality, and the current players remain relatively unchanged, we may expect calls for a deferral of the prosecution to ensure peace talks succeed.

### III. FINAL COMMENTS

My last reflection is that in a situation where there is no outright winner the shape of post-conflict criminal justice can depend on very messy politics. In terms of comprehensive peace agreements, the experience of other post-conflict situations will provide negotiating parties with a *lex pacificatoria* that provides a legal framework in relation to criminal justice, but also, minority rights, self-governance, and other human rights issues, with which criminal justice must be balanced.<sup>4</sup> It is worth reiterating that although this is a multi-level conflict including various actors, some of them will need to live very closely together in the future.

Although I share the enthusiasm about these ICC arrest warrants (and all the solidarity with Ukraine) we must wait and see whether the ICC ends up playing the most significant role in this situation. It could be that a new institution is set up, located in Ukraine, or elsewhere in Eastern Europe, to which the parties agree, which tends toward usurping the ICC's role as the principal dispenser of post-conflict criminal accountability. It is an open question whether that would be a good or a bad thing. Related to this is the ongoing discussion about how the crime of aggression should be dealt with and the individuals against whom those charges could be laid. Unlike other war crimes, the crime of aggression cannot implicate any Ukrainians. The ICC, however (thanks, largely, to the same Western states pursuing justice for Ukraine today) is unable to act in relation to the crime of aggression. So, does that mean that some other (third) venue will need to be created? We may find ourselves in a situation where the ICC, the Ukrainian courts, and, perhaps, another "special" court are tasked with delivering criminal justice in the context of a very delicate peace compromise.

Finally, it is worth reiterating that the arrest warrants mark an unprecedented moment in the history of international criminal justice. Hope, they say, is about commitment. It is, therefore, to be hoped that the same enthusiasm for accountability is mustered in relation to all international and internal conflicts, especially those where the international community has remained mute in the face of what is now condemned vociferously, and rightly, as criminal.

<sup>4</sup> On the *lex pacificatoria*, see CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS (2000); ON THE LAW OF PEACE – PEACE AGREEMENTS AND THE *LEX PACIFICATORIA* (2008).