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Introduction

1.1 The Radical Project of International Criminal Justice

On 17 March 2023, just over a year since Russia began waging an aggressive war against its neighbouring country Ukraine, the Pre-Trial Chamber II of the International Criminal Court (ICC) in The Hague issued two warrants of arrest. The ICC's Prosecutor, Karim Khan, had opened an investigation into the situation in Ukraine and the commission of potential war crimes less than a week after Russia invaded Ukraine in 2022. He immediately sent staff to collect evidence on the ground. Based on that evidence, the judges argue that they have reasonable grounds to believe that at least hundreds, if not thousands, of Ukrainian children were illegally transported to Russia and given up for adoption. One of the warrants is for the arrest of Maria Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. The other arrest warrant is for the President of the Russian Federation himself – Vladimir Putin. The ICC alleges that Lvova-Belova and Putin are criminally responsible for the war crime of unlawful deportation of population[1] and of unlawful transfer of population from occupied areas[2] of Ukraine to the Russian Federation.

The ICC's decision to seek an arrest for Putin is radical: it is a highly controversial step of the ICC to indict a sitting head of state, let alone a president of a state with a permanent seat on the United Nations Security Council. Putin is now a suspect at large, and under article 59 of the Rome Statute, any one of the 124 ICC member states is now obligated to arrest Putin if he enters their territory and deliver him into the custody of the

[1] Prohibited under article 8(2)(a)(vii) of the Rome Statute. UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: www.icc-cpi.int/sites/default/files/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf

[2] Prohibited under article 8(2)(b)(viii) of the Rome Statute.

ICC in The Hague for trial. The Kremlin swiftly dismissed the arrest warrants as 'outrageous' and 'unacceptable', denying that the ICC has jurisdiction over Russian officials.[3] Indeed, neither Russia nor Ukraine is a member of the ICC. So why did the Prosecutor decide to open an investigation? According to the Rome Statute – the treaty establishing the court – the ICC can initiate investigations under a number of principles. First, a member state can refer itself to the ICC and give it permission to open an investigation.[4] The other principle under which an investigation into a situation in a member state (or involving a citizen of a member state) can be initiated is by decision of the Chief Prosecutor. This principle finds application when member states fail to investigate a situation on their own territory because they are either unwilling or unable to do so.[5] The third principle under which an investigation can be initiated is by United Nations Security Council resolution. A referral to the ICC by the Security Council in principle allows the ICC to investigate situations in non-member states, although any permanent member of the Security Council may veto the referral.[6]

The Ukraine situation is special: although Ukraine is *not* a member of the ICC, it has permitted the ICC to exercise jurisdiction over international crimes committed on its territory.[7] Despite this, it is unlikely that Putin will appear before the ICC – certainly not in the near future, and probably not at all.[8] The court has no enforcement tools of its own

[3] www.reuters.com/world/europe/icc-judges-issue-arrest-warrant-against-putin-over-alleged-war-crimes-2023-03-17/.

[4] Examples of such a self-referral include Uganda, Mali, Gabon, and the Democratic Republic of the Congo.

[5] Kenya, Côte d'Ivoire, and Afghanistan, for example, have been the focus of such a *proprio motu* investigation.

[6] In 2005, the Security Council referred the situation in Darfur, Sudan, and in 2011, it referred the situation in Libya. A planned referral of the situation in Syria failed in 2014 because Russia and China vetoed it.

[7] Under article 12 (3) of the Rome Statute.

[8] The *formal* influence that powerful states have on the court is very limited; the only exception is the Security Council's power to defer an investigation for reasons of maintaining peace and security. Under article 16 of the Rome Statute, the Security Council can defer an investigation or prosecution for one year. The formally limited role of powerful states is unusual for international institutions. Bosco argues that it probably resulted from the participation of civil society groups in the process that led up to the drafting of the statute. Civil society groups were able to 'shape and amplify' the message of smaller, less powerful states, while the larger powers did not manage to dominate the proceedings as a coherent group negotiator (Bosco 2015, 7). The limited formal influence is mirrored in several institutional features: for example, the 'one-state-one-vote' majority voting

and relies on the state parties for financial, diplomatic, intelligence, military,[9] and police support. Cooperation from the state parties is vital for accessing witnesses and evidence, the delivery of arrest warrants, and the search and arrest of suspects. Without the help and provision of the resources of states, the ICC cannot perform any of its essential functions. In that sense, the ICC relies fundamentally on the political goodwill and support of states – and while legal considerations matter, states will always also consider the political implications of their actions, especially during an active war.

One might therefore be puzzled why – in light of the slim chance of actually seeing Putin in the defendants' dock – the ICC decided to go ahead and publicly issue the warrants for arrest. Piotr Hofmański, the ICC's president judge, explains the intention of making the warrants of arrest public: 'the judges of the chamber . . . decided to make the existence of the warrants public in the interest of justice and to prevent the commission of future crimes'.[10] In their press release, the ICC reiterates the claim that the arrest warrants, having been made public, may 'contribute to the prevention of the further commission of crimes'.[11] To my mind, this reasoning – that the ICC's actions prevent further crimes – gives us a first, rough answer to the following questions: Is the ICC morally justified to prosecute and punish alleged perpetrators of international crimes, even if their states have not consented to the ICC's jurisdiction? And if it is, on what grounds?

procedure for the election of judges and prosecutors, or the rule that no two judges may be citizens from the same state (Bosco 2015, 8).

[9] Seventy-three per cent of global armed forces are non-members of the ICC while only 27 per cent are members (Bosco 2015, 7).

[10] www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

[11] This is in line with article 58 (1) (b) (iii) of the Rome Statute. On the decision to make the arrest warrants public, the press release states:

> The Chamber considered that the warrants are secret in order to protect victims and witnesses and also to safeguard the investigation. Nevertheless, mindful that the conduct addressed in the present situation is allegedly ongoing, and that the public awareness of the warrants may contribute to the prevention of the further commission of crimes, the Chamber considered that it is in the interests of justice to authorise the Registry to publicly disclose the existence of the warrants, the name of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the Chamber. (www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and)

This book is the result of approaching these questions from a political philosophy perspective. The history of and the contemporary rhetoric surrounding international criminal justice (ICJ) and its institutions suggest that beyond their nature as international contracts between states, or even military impositions of victorious states, there is a further *moral* claim that supersedes such conceptualizations. Statements like as the ones we find in the Preamble of the Rome Statute about 'atrocities that deeply shock the conscience of humanity' which are 'the most serious crimes of concern to the international community as a whole' reveal that behind the mere technical legality of ICJ lies a normative promise of universal scope. My aim is to understand under what circumstances this universal normative promise can be rightfully redeemed. Assuming that the content of the moral rules that frame international criminal law – the prohibition of genocide, the prohibition of slavery, crimes against humanity, war crimes, and aggressive war – is not in dispute, the real challenge for political philosophers lies with justifying the scope and nature of *institutions* that prosecute and punish such crimes in the absence of unanimous state consent. Do international institutions such as the ICC have justified political authority to prosecute and punish alleged perpetrators of mass human rights violations, even if their states have not consented to their prosecution? Judge Hofmański's argument – that arresting and putting Putin on trial might help prevent further crimes – illustrates the core of the argument I advance in this book, which is that ICJ institutions are justified by virtue of their function to deter mass violations of human rights, which everyone has a natural duty to secure and protect. But that authority comes with conditions: ICJ institutions must operate with the highest level of fairness, and they must treat those who are subject to them as equals. This last condition, treating subjects as equals, yields the – perhaps surprising – result that the source of the ICJ institutions' authority must be democratic decision-making procedures. In a sense, then, I undertake an attempt to address a concern that was voiced by Madeline Morris in 2002: namely, that an undemocratic ICC with global jurisdiction presents normative problems for its legitimacy (Morris 2002).

1.2 From Nuremberg to The Hague

The Rome Statute that established the ICC came into force in 2002. But the historical precedent for prosecuting state agents under criminal charges was set in the German city of Nuremberg over fifty years earlier, right after the Allied forces' victory over Nazi Germany. The

choice of a criminal trial as a means to deal with the atrocities committed by Germany was not obvious at all during the war. In his memoirs about the Second World War, Winston Churchill recounts a telling incident at a vodka-infused banquet that was hosted by Joseph Stalin during the Tehran Conference on 29 November 1943. The evening's atmosphere involved 'a good deal of gaiety', many toasts, and some teasing by Marshal Stalin, which Churchill said he did not resent, until

> the Marshal entered in a genial manner upon a serious and even deadly aspect of the punishment to be inflicted upon the Germans. The German General Staff, he said, must be liquidated. The whole force of Hitler's mighty armies depended upon about fifty-thousand officers and technicians. If these were rounded up and shot at the end of the war, German military strength would be extirpated. (Churchill 2005, 330)

Churchill writes that he categorically rejected Stalin's proposal, saying that the Soviets must be under no delusion that he would ever allow it. But Stalin was insistent:

> 'Fifty thousand,' he said, 'must be shot.' I was deeply angered. 'I would rather,' I said, 'be taken out into the garden here and now and be shot myself than sully my own and my country's honour by such infamy.' At this point the President [Franklin D. Roosevelt, L.M.] intervened. He had a compromise to propose. Not fifty thousand should be shot, but only forty-nine thousand. By this he hoped, no doubt, to reduce the whole matter to ridicule. Eden also made signs and gestures intended to reassure me that it was all a joke. (Churchill 2005, 330)

Churchill left the banquet full of indignation after Roosevelt's son, Elliott, stood up and said how cordially he agreed with the Marshal's proposal. Stalin and Molotov followed Churchill, eager to reassure him that they were only joking. But Churchill was actually not so sure:

> Stalin has a very captivating manner when he chooses to use it, and I never saw him do so to such an extent as at this moment. Although I was not then, and am not now, fully convinced that all was chaff and there was no serious intent lurking behind, I consented to return, and the rest of the evening passed pleasantly. (Churchill 2005, V:330)

Was Stalin's proposal – to shoot fifty thousand Nazis as a means of bringing justice after the Second World War – really a joke? It would certainly not have been out of character for a man responsible for the 1950s purges in the Soviet Union, or the massacre of twenty-two thousand Polish officers and Polish prisoners in the Katyn forest and other

sites.[12] Perhaps, if Churchill had reacted differently, Stalin's proposal would have gained momentum towards the end of the war. What else to do with the scores of German officials who had planned and carried out crimes so massive that they were beyond comprehension? Leaving the prosecution and punishment to the Germans themselves was not an option. The German judiciary was deeply involved in the crimes. Even from a purely practical perspective, it would not have been possible: in 1945, there was effectively no German state – its institutions were dissolved. In fact, the German criminal justice system did not start prosecuting Nazi crimes until more than ten years later.[13]

The Allied powers chose a different path: in August 1945, they established the International Military Tribunal (IMT). Twenty-two Nazi leaders[14] were tried before it. The trial took place between November 1945 and October 1946 in the German city of Nuremberg. The judges presiding over the trial were citizens of the four victorius powers: the United States, France, Great Britain, and the Soviet Union. The US Supreme Court Justice Robert Jackson was elected prosecutor and opened the trial on 21 November 1945, a mere ten months after the liberation of Auschwitz and seven months after Hitler's suicide. Jackson opened the court proceedings by acknowledging that the decision to prosecute the defendants under criminal charges expressed the 'victory of reason over vengeance': 'That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason.'[15]

[12] These massacres were themselves war crimes and crimes against humanity but were left unprosecuted – thus begins the long story of selective prosecution in international criminal law.

[13] Since 1958, about 18,500 prosecutions were investigated by German authorities for their involvement in international crimes, according to the Central Office of the Land Judicial Authorities for the Investigation of National Socialist Crimes in Germany.

[14] Number 23, Robert Ley, committed suicide three days after receiving the indictment. Dr Gilbert, the psychologist on duty at the prison where the prospective defendants were held, reports that Ley, when he received his indictment, was furious:

> He said he could not prepare a defence, that he knew nothing about any of the crimes alleged. He stood against the wall, arms raised as if in crucifixion, and asked why the victors did not shoot their prisoners if they had wanted more sacrifices. 'But why should I be brought before a Tribunal like a c . . . c . . . c. . .', Gilbert supplied the word 'criminal'. (Tusa and Tusa 2010, 133)

[15] Justice Robert Jackson's Opening Address to the International Military Tribunal at Nuremberg, Germany, 10 November 1945, quoted in Tusa and Tusa (2010, 8).

The idea to prosecute major Nazi leaders in the form of an international tribunal was not the first attempt at punishing officials under international criminal law.[16] It had a historical precedent: the Treaty of Versailles included an article that provided for the criminal prosecution of Kaiser William II of Hohenzollern 'for a supreme offence against international morality and the sanctity of treaties' before a special tribunal.[17] However, neither the crime of 'offence against international morality' nor the crime of 'offence against the sanctity of treaties' legally existed in international law, and in the end, the Allied powers decided that the article could not be enforced (Bassiouni 2014, 1052). Furthermore, the Kaiser was in Dutch exile, and the Dutch refused to hand him over, regarding pressure as an illegitimate infringement on their sovereign right to choose their own 'guests' (Tusa and Tusa 2010, 18). An Allied Powers Commission also urged for the prosecution and punishment of the perpetrators of the 1915 genocide of the Armenians in Turkey. Talaat Pasha, the architect of the genocide, had fled to Germany after the surrender of the Ottoman Empire in 1918. Besides the protection Talaat Pasha was afforded by the German authorities, the Allied powers were unwilling to put any serious political effort into punishing those responsible for the genocide of the Armenians.[18]

[16] For two accounts of very early international criminal law punishment and the first international criminal tribunal, in 1474, see Bassiouni (2014, 1047ff).

[17] Peace Treaty of Versailles, article 227. The Peace Treaty of Versailles was drafted during the Paris Peace Conference in 1919, after the end of the First World War.

[18] It appears that Adolf Hitler referred to the Armenian genocide and the subsequent impunity in the context of the invasion of Poland in 1939. According to the document L-3, which was introduced as Exhibit Nr. USA 28 in the trial of Hermann Goering during the Nuremberg Trials, Hitler pointed out that nobody cared about the Armenian genocide:

> Ich habe den Befehl gegeben, und ich lasse jeden füsilieren, der auch nur ein Wort der Kritik äussert, dass das Kriegsziel nicht im Erreichen von bestimmten Linien, sondern in der physischen Vernichtung des Gegners besteht. So habe ich, einstweilen nur im Osten, meine Totenkopfverbände bereitgestellt, mit dem Befehl, unbarmherzig und mitleidslos Mann, Weib und Kind polnischer Abstammung und Sprache in den Tod zu schicken. Nur so gewinnen wir den Lebensraum, den wir brauchen. Wer redet heute noch von der Vernichtung der Armenier?
>
> I have given the order, and I will have anyone who utters just a single word of criticism shot, that the final goal of the war does not consist in reaching specific lines, but in the physical extermination of the enemy. And so I have allocated my skull and crossbones formations (*Totenkopfverbände*) to the East, with the order to send men, women, and children of Polish descent

The Nuremberg Trials marked a sea change in a long history of impunity. When Nazi General Alfred Jodl signed the document of unconditional surrender in May 1945, passing Germany's sovereignty to the Allied forces, he said that he hoped that the Allied forces would treat the German people with generosity (Tusa and Tusa 2010, 13). After having freed the concentration camps, having seen the piles of dead bodies, and having heard the chilling testimonies of the half-dead survivors, it seems almost lunatic to hope for generosity towards those responsible for these crimes. Indeed, US Treasury Secretary Henry Morgenthau advocated a post-war plan that included summary punishment for a few dozen Nazi leaders. Against this, the US Secretary of War Henry Stimson brought up the idea of legally prosecuting and punishing Nazi criminals. For a brief while, it looked as if Morgenthau's plan would prevail, but Roosevelt was ultimately swayed onto the Stimson plan (Tusa and Tusa 2010, 60f). Stalin wanted to put the Nazi leaders to death, but not without a previous trial. Only the British were adamant that 'political justice by joint executive action' of the Allied forces was the only way to deal with the major war criminals: 'for the principal Nazi leaders a full trial under judicial procedure was out of the question'.[19] However, Roosevelt's successor, Harry Truman, was a wholehearted supporter of a criminal trial and wanted to implement his plan as soon as possible. The United States had given the impulse for a legal prosecution of those responsible for the war and the massive atrocities committed. With the support of the Soviets and the French, the British were finally persuaded.

Since the end of the trials in Nuremberg, there have been a few more instances of international criminal trials. The International Military Tribunal for the Far East (IMTFE) was established in January 1946. With its seat in Tokyo, it prosecuted twenty-eight Japanese military officials, excluding, among others, the Japanese Emperor Hirohito. Both the IMT and the IMTFE only prosecuted the crimes committed by the losers of the war, not the ones committed by those who had won. Another problem was that there was no explicit international law on the basis of which the IMT and the IMTFE could operate. Technically, both tribunals prosecuted and punished retroactively and therefore in

and language to their death without mercy or pity. This is the only way to get the living space we need. Who still talks about the extermination of the Armenians these days?

[19] From the minutes of War Cabinet Meeting, 12 April, quoted in Tusa and Tusa (2010, 65).

breach of one of the most fundamental principles of criminal law: *nullum crimen, nulla poena sine lege*.[20]

During the Cold War period, the idea of ICJ lay dormant, and the momentum that was gained after the end of Second World War dissipated. Neither the crimes committed by the United States in Latin America or Vietnam, nor the crimes committed by France in Algeria, nor the crimes committed by the Soviet Union in Afghanistan and on their own territory were ever prosecuted.[21] After this long hiatus, in 1992 the Security Council established a Commission of Experts to investigate violations of international humanitarian law in the former Yugoslavia between 1991 and 1994 (Bassiouni 2014, 1057f). In May 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the United Nations. It was the first international criminal tribunal since the Nuremberg Trials and the IMTFE in Tokyo. A year after the establishment of the ICTY, in November 1994, the Security Council established the International Criminal Tribunal for Rwanda (ICTR), which was operative for almost twenty years until it formally closed its doors in December 2015. In Rwanda, the international effort to prosecute those responsible for the mass atrocities was supplemented by national courts as well as about 12,000 *gacaca* courts, traditional community courts that heard over 1.2 million cases during their operative time between 2005 and 2012.

The first permanent, treaty-based international criminal court, located in The Hague, was established in 2002.[22] The Rome Statute had been adopted four years earlier, long after Trinidad and Tobago had asked the United Nations (UN) General Assembly to reopen the negotiations for a permanent international criminal court in 1989. After the momentum

[20] For a discussion on the ex post facto and *nullum crimen sine lege* problem, see Altman and Wellman (2009, 82ff). It can be argued that the IMT and IMTFE prosecutions of at least some war crimes/some serious violations of the laws and customs of war that had been regarded as crimes under customary international law were not in breach of these two principles. Case law from the International Criminal Tribunal for the former Yugoslavia [JCE Decision – 21 May 2003] asserts that criminal liability must be 'sufficiently foreseeable' and that the law providing such liability must be 'sufficiently accessible' to warrant a criminal conviction and sentencing; and it can be argued that this had applied to at least some crimes. I am grateful to an anonymous reader for Cambridge University Press for pressing me to consider this.

[21] The only exception was the investigation and prosecution of two US soldiers, William Calley and Ernest Medina, for their involvement in the My Lai massacre.

[22] A few months earlier, in January 2002, the UN and Sierra Leone agreed to establish the Special Court for Sierra Leone, another international criminal tribunal. I thank an anonymous reader for Cambridge University Press for spotting and pointing out an earlier imprecision regarding the timeline.

gained with the two ad hoc tribunals in The Hague (ICTY) and Arusha (ICTR), and a lucky combination of government changes in some of the global powers – the election and then re-election of the Democrat Bill Clinton to the White House, the shift from a Tory to the Blair-led Labour government in the UK, and a socialist majority in France, leading to Lionel Jospin being the socialist prime minister cohabiting with President Jacques Chirac – the path was cleared to enter real negotiations for a permanent court (Bosco 2015, 44).

The conference to establish and adopt a statute for such a court was held in Rome in June and July 1998. According to a German delegate, the outcome of the final vote was completely unpredictable. The long nights, the parallel working groups, and the subsequent lack of communication between the delegates and the home governments – the delegates were often simply too tired to report back to their governments and receive instructions for further negotiation – were probably conducive to the politically ambitious draft that eventually emerged from the Rome sessions. Due to the looser communication channels to their national capitals, the delegates took many decisions on their own, without checking their governments' position first (Bosco 2015, 48). Another factor that likely contributed to the eventual high number of yes votes was the fact that the organizing committee of the Rome Conference (known as 'the Bureau') strategically held off on any voting as long as possible with the result that delegates were mostly in the dark about the other delegations' positions.

With the deadline approaching, the Bureau decided against suspending and postponing the conference and prepared a draft statute. India and the United States, actively trying to bully the supporting states to draft in exceptions and special competences for the major global powers, proposed last-minute amendments in an attempt to suspend the final vote, but they were blocked by a number of small states, among them Norway, Malawi, and Chile (Bosco 2015, 50). Immediately, an open vote on the draft statute was held. According to the German delegate, at that moment, the outcome of the voting procedure was completely up in the air: the delegates had no time to properly check back with their governments and basically had to make a decision on the spot. Smaller undecided states looked nervously to the regional powers who nervously looked to the other regional powers. Somehow a cascade of yes votes had started, and the dynamic gripped the whole room.[23] Once it was clear

[23] According to the personal recollection of a delegate, told in personal communication.