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Diretta da Claudio Zanghì, Lina Panella, Carlo Curti Gialdino
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1. *ALEA IACTA EST*: THE ICC ISSUES ARREST WARRANTS AGAINST VLADIMIR PUTIN AND MARIA LVOVA-BELOVA

1. *Prologue: The Arrest Warrants Against Putin and Lvova-Belova*

On 17 March 2023, Pre-Trial Chamber II (PTC II or the Pre-Trial Chamber) of the International Criminal Court (ICC or the Court) issued warrants of arrest for two individuals in the context of the situation in Ukraine: the President of the Russian Federation, Mr Vladimir Vladimirovich Putin (hereinafter: Vladimir Putin or Putin), and the Commissioner for Children's Rights in the Office of the President of the Russian Federation, Ms Maria Alekseyevna Lvova-Belova (hereinafter: Lvova-Belova). As the Pre-Trial Chamber decided to keep the warrants secret in order to protect victims and witnesses and safeguard (ongoing and future) investigations, in this commentary we will rely on the press statements issued by the Pre-Trial Chamber and the ICC Prosecutor, Mr Karim A. A. Khan KC (hereinafter: Karim Khan, the Prosecutor).

According to the said press statement, PTC II found that there are reasonable grounds to believe that Putin and Lvova-Belova hold criminal responsibility, pursuant to Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute of the International Criminal Court (ICC Statute, the Statute), in respect to the war crimes of unlawful deportation and unlawful transfer of children from occupied areas of Ukraine to the Russian Federation, allegedly committed at least from 24 February 2022. According to Karim Khan, the Office of the Prosecutor (OTP or the Prosecution) identified incidents where «at least hundreds of children» have been taken «from orphanages and children's care homes» in Ukraine, many of whom have been later «given for adoption in the Russian Federation». This result was achieved, amongst others, through the issuance of Presidential decrees on the part of Vladimir Putin, amending the law for the purpose of expediting the conferral of Russian citizenship on those children. Thus the Pre-Trial Chamber concluded that there are reasonable grounds to believe that either Putin «committed the acts directly, jointly with others and/or through others» (in accordance with Article 25(3)(a) of the Statute), and/or «through his failure to exercise control properly over civilian and military subordinates», and/or by allowing people «who were under his effective authority and control, pursuant to superior responsibility» to commit them (in accordance with Article 28(b) of the Statute). Lvova-Belova, on the other hand, would bear criminal responsibility for the above-mentioned crimes «for having committed the acts directly, jointly with others and/or through others» (in accordance with Article 25(3)(a) of the Statute).

Analogous allegations have been analysed by the Independent International Commission of Inquiry on Ukraine (an organ established by the Human Rights Council on 4 March 2022). In the report the Commission issued on 15 March 2023, the Commission

concluded that «the situations it has examined concerning the transfer and deportation of children, within Ukraine and to the Russian Federation respectively, violate international humanitarian law, and amount to a war crime» (para. 102).

Interestingly, PTC II's press statement stressed that the warrants have been issued «pursuant to the applications submitted by the Prosecution on 22 February 2023». Scholars have pointed out that this was barely a week after Putin and Lvova-Belova discussed the "evacuations" of Ukrainian children to the Russian Federation in public, including the adoption by Lvova-Belova of a 15-year-old boy from Donbas (S. VASILIEV, *The International Criminal Court goes all-in: What now?*, in *EJIL: Talk!*, 20 March 2023).

However, in this commentary we will not so much focus on the allegations brought against the two suspects, as on (some of) the contentious legal issues raised by the issuance of the arrest warrants. Therefore, in Section 2 we will focus on the legal basis for the opening of an investigation into crimes allegedly perpetrated, in the Prosecutor's words, «in the context of the acts of aggression committed by Russian military forces against the sovereignty and territorial integrity of Ukraine which began in 2014». In this section we will seek to address the issue why the OTP has not sought warrants in relation to *other* allegations, including the crime of aggression. In Section 3, we will turn to the issue whether Vladimir Putin may successfully invoke his personal immunity from arrest. We will try to shed a light on the tension between Articles 27 and 98 ICC Statute, including through a critical analysis of the relevant practice of the Court. Finally, in Section 4 we will share some thoughts concerning the accusations of double standards moved to the Court and how the Prosecutor could contribute to address this criticism following the swift approach adopted in the situation in Ukraine.

2. *Setting the stage: the scope of the OTP's investigation into crimes committed in Ukraine*

What does the "situation in Ukraine" mentioned in the Pre-Trial Chamber's statement encompass?

As detailed in a commentary published in this Journal by *Pierpaolo Petrelli* one year ago, neither the Russian Federation nor Ukraine are states parties to the ICC Statute. However, Ukraine accepted the ICC's jurisdiction through the deposit of two *ad hoc* declarations pursuant to Article 12, paragraph 3 of the Statute. In particular, Ukrainian authorities filed a first declaration in April 2014, covering acts committed on the territory of Ukraine between 21 November 2013 and 22 February 2014 (mostly associated with the crackdown on the so-called Euromaidan protest). As armed clashes escalated throughout Ukraine after February 2014, leading to the annexation of Crimea by the Russian Federation and the issuance of declarations of independence on the part of the Donetsk and Luhansk Republics, in September 2015 Ukrainian authorities lodged a second declaration with the ICC, accepting the Court's jurisdiction over «acts committed in the territory of Ukraine since 20 February 2014».

This latter declaration has been considered "open-ended". In fact, the Prosecution interpreted it as encompassing «any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards». Although the warrants have not yet being made public, the fact that they have been issued in respect to conducts allegedly committed *at least from 24 February 2022* suggests that PTC II took the same view. Therefore, it is on the basis of the September 2015 declaration that the ICC may *also* exercise its jurisdiction over crimes

allegedly committed in the context of, and following the invasion of Ukraine by military forces of the Russian Federation on 24 February 2022.

While the 2015 declaration provided the Court with the "preconditions" to the exercise of its jurisdiction, it was not sufficient to "trigger" its exercise. Pursuant to Article 15, paragraph 3 of the Statute, the Prosecutor has to seek the Pre-Trial Chamber's authorization to open an investigation. In fact, on 11 December 2020, the then Prosecutor, Fatou Bensouda, announced that her Office had concluded that there was a reasonable basis to believe that «war crimes and crimes against humanity … have been committed in the context of the situation in Ukraine». In a somewhat surprising and unprecedented move, the then Prosecutor nevertheless decided not to seek the authorization to open an investigation into the situation in Ukraine in light of, among other things, the limitations of the OTP's operational capacity «due to thin and overextended resources» (on this decision, *see* A. PIZZUTI, *ICC Situations Concerning Ukraine and Nigeria: No Room in the ICC Statute for Prioritisation at the Preliminary Examination Stage*, in *Opinio Juris*, 19 January 2021).

On 28 February 2022, following the invasion of Ukraine by military forces of the Russian Federation, Prosecutor Khan reversed his predecessor's decision and announced his Office's intention to seek the authorization from the Pre-Trial Chamber to open an investigation. In such circumstances, Khan stressed that matters would be further expedited in case an ICC state party referred the situation to the OTP. Indeed, pursuant to Articles 13, letter a) and 14 of the Statute, the Pre-Trial Chamber's authorization is not required where one or more States parties refer a situation to the Prosecutor. This is precisely what happened in the following days. On 2 March 2022, Karim Khan announced that the OTP had received referrals of the situation in Ukraine from 39 states parties (Japan and the Republic of North Macedonia joined those 39 states on 11 March 2022, while Montenegro and Chile joined in April, bringing the total to 43), and notified the ICC Presidency of his decision to immediately proceed with investigations.

As a result, an investigation into crimes allegedly committed on Ukraine's territory has been initiated in early March 2022. In light of the conclusions reached in the Report on Preliminary Examination Activities 2020 (*see* paras. 278-281) and in the 28 February 2022 announcement, this investigation should encompass: 1) war crimes and crimes against humanity allegedly committed in the context of the occupation of Crimea since 26 February 2014; 2) war crimes allegedly committed in the context of the armed conflict in eastern Ukraine; 3) *any crimes* falling within the jurisdiction of the Court allegedly committed in the context of the conflict which broke out on 24 February 2022, on *any part* of the territory of Ukraine.

The statement, issued by the Pre-Trial Chamber on 17 March 2023, seems to indicate that the allegations against Putin and Lvova-Belova fall within the scope of the third prong. This follows from the fact that the relevant (war) crimes would have been committed *at least from 24 February 2022*. However, it is important to stress that this may not be it for the two suspects. As a matter of fact, no provision in the Rome Statute prohibits the Prosecution from seeking a second (and eventually a third…) warrant of arrest against the same suspect, should it later conclude that there are reasonable grounds to believe that he/she committed additional crimes. As highlighted by scholars, this was in fact what happened in the *Al-Bashir* case, when the then President of Sudan was the recipient of a first arrest warrant on 4 March 2009 and a second one on 12 July 2010 (*see* M. KERSTEN, *Straight to the top: The International Criminal Court issues an arrest warrant for Russia's Vladimir Putin*, in *Justice in Conflict*, 17 March 2023).

What we know for sure is that the investigation *will not* cover allegations concerning the crime of aggression. It was Prosecutor Khan himself to point out, in a statement issued on 25 February 2022, that «[g]iven that neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, the Court cannot exercise jurisdiction over this alleged crime in this situation». Such interpretation is in line with Article 15*bis*, paragraph 5 of the Statute, establishing that the Court cannot exercise its jurisdiction over the crime of aggression when committed by nationals or on the territory of a state that is *not a party* to the Statute (on the issue of the impact of this rule and the "international tribunal for aggression" option, *see* C. MELONI, *La Corte penale internazionale spicca uno storico mandato di arresto per Vladimir Putin mentre si continua a discutere di un tribunale speciale per l'aggressione in Ucraina*, in *Questione giustizia*, 23 March 2023). As a side note, this statement seemed to settle a lively academic debate on this matter (*see* L. PROSPERI, *Legal Effects of the Ratification by Italy of the Amendments to the ICC Statute on Aggression*, in *The Italian Review of International and Comparative Law*, Volume 2, Issue 1, 2022, p. 212 for an overview). This outcome is the effect of the political compromise reached in Kampala on the amendments on the crime of aggression, resulting in the restriction of the scope of the definition of the crime as well as in the introduction of stricter conditions for the exercise of the ICC's jurisdiction over such crime (on the negotiations *see*, among others, C. KREß, *The Kampala Compromise on the Crime of Aggression*, in *Journal of International Criminal Justice*, Volume 8, Issue 5, 2010, pp. 1179-1217). In Kampala, the permanent members of the UN Security Council had «insisted upon» the compromise, which was «reluctantly accepted by other States as the price paid for the adoption of the aggression amendments» (C. MCDOUGALL, *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, in *Journal of Conflict and Security Law*, 20 March 2023, p. 10). That is to say: the text of the amendments seemed to please powerful (western) states, including France (that has not ratified them), the United Kingdom, and the US (to this day a non-state party to the ICC). The same states that according to reports, today support the establishment of an international(ized) tribunal for aggression. The irony is not lost on us.

3. *Does Vladimir Putin enjoy immunity from arrest?*

In the past few weeks, one of the most debated aspects concerning the two warrants of arrest has been whether states parties should, pursuant to the ICC Statute, arrest and transfer Vladimir Putin – that is, the acting Head of state of a non-state party – to the Court.

The point of contention is the interpretation of Article 27, paragraph 2 of the Statute in light of Article 98, paragraph 1 of the Statute. While the former provision seems to "displace" functional and personal immunities alike, establishing that immunities «shall not bar the Court from exercising its jurisdiction», the latter prescribes that the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international law with respect to personal immunities of a national of a third State, unless such third State has waived said immunities. In order to address the question whether states parties are under an obligation to arrest Vladimir Putin, one needs to resolve the tension between these provisions. This issue has kept ICC Chambers busy for more than a decade.

In March 2009 and July 2010, two arrest warrants were issued against the sitting President of Sudan, Omar Al Bashir. In the specific circumstances of the case, as Sudan was not a party to the Statute, the legal basis for the exercise of the Court's jurisdiction was a referral of the situation in Darfur by the UN Security Council (through paragraph 1 of

Resolution 1593/2005) pursuant to Article 13, letter b) of the Statute. In the following decade, until Al Bashir's overthrow in April 2019, he travelled to at least 32 countries, including 14 ICC states parties such as Malawi (in 2011), Chad (ironically, the only country that had entered a reservation in respect to the decision adopted by the African Union in 2009 not to cooperate with the ICC for the arrest of Al Bashir, would later fail to arrest him twice: in 2011 and 2014), Nigeria (in 2013), the Democratic Republic of the Congo (2014), South Africa (in 2015), Djibouti (in 2016), Uganda (in 2016), and Jordan (in 2017). Such visits prompted non-compliance decisions of the Pre-Trial Chamber, the latest of which, against Jordan, was later confirmed by the Appeals Chamber in 2019 (in an unexpected turn of events, this decision would be issued *after* Al Bashir's demise). For the purpose of this analysis, we will only focus on the Appeals Chamber's judgment as it will likely have an impact in the case against Putin.

In the judgment, the Appeals Chamber found that Article 27, paragraph 2 of the ICC Statute reflected customary international law (*see* paragraphs 103-117). In fact, Head of state immunity «has never been recognized in international law as a bar to the jurisdiction of an international court» (paragraph 113). According to the Appeals Chamber, this has been «specifically recognized» by the International Court of Justice (ICJ) in the Congo v. Belgium (*Arrest Warrant*) case (paragraph 102). As a result, states parties are not allowed to invoke the said immunity in their horizontal relationship with non-states parties when they are requested by an international court to arrest and surrender the Head of state of a third country (paragraphs 114, 120, 127). Nor does this follow from Article 98, paragraph 1 of the Statute, as this is a «*procedural* rule» determining how the Court should proceed in case any such immunities existed in accordance with the Statute – which is not the case in respect to Head of state immunity (paragraphs 130-131).

The Appeals Chamber's finding that there is no Head of state immunity under customary international law has drawn much criticism – as well as sporadic praise – from scholars. Two arguments seem to stand out. First, as stressed by *Akande*, one of the implications of the Appeals Chamber's conclusion would be that «parties to the Rome Statute, have, by creating the Court, taken away the rights of non-party states under international law» (D. AKANDE, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, in *EJIL: Talk!*, 6 May 2019). Second, as convincingly argued by *Batros*, «if there is no immunity for heads of State … then there seems to be little substance left for Article 98(1) of the Rome Statute, which prevents the Court from requesting surrender (or other assistance) if it would require a state to violate the state immunity of another» (B. BATROS, *A Confusing ICC Appeals Judgment on Head-of-State Immunity*, in *Just Security*, 7 May 2019). Others suggested a different reading of the Appeals Chamber decision. For instance, *Skander Galand* pointed out that it «must be understood as having held that States are not barred from surrendering the Head of a non-party State to the ICC, only when the arrest warrant emerges from a situation referred by the UN Security Council» (A. SKANDER GALAND, *A Hidden Reading of the ICC Appeals Chamber's Judgment in the Jordan Referral Re Al-Bashir*, in *EJIL: Talk!*, 6 June 2019).

In addition to that, it is worth recalling that in respect to the reference to the *Arrest Warrant* case, the ICC Appeals Chamber seemed to follow in the footsteps of the Appeals Chamber of the Special Court for Sierra Leone (*see* Prosecutor v. Charles Ghankay Taylor, SCSL-2003-01-1, "Decision on Immunity from Jurisdiction", Appeals Chamber, 31 May 2004, paras. 50-52). Both Appeals Chambers invoked an *obiter dictum* of the ICJ according to which personal immunities of incumbent state officials do not represent a bar to criminal

prosecutions «before certain international criminal courts, where they have jurisdiction» (*see* ICJ, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, para. 61). Regrettably, the ICJ did not elaborate on why (*in accordance with customary international law*) the ICC would be one of such international criminal courts.

More generally, the problem is that assuming a customary norm on personal immunities of Heads of state exists, its precise content is uncertain because on the one hand, «international criminal courts are quite new and arrest warrants for sitting Heads of State are extremely rare», and on the other, the practice arising from such rare cases may be «*not representative*» due to the fact that targeted Heads of state tend to choose their travel destinations carefully, *gerrymandering* the practice in their favour (A. A. HAQUE, *Head of State Immunity is Too Important for the International Court of Justice*, in *Just Security*, 24 February 2020).

In light of the above, one is likely to conclude that under the ICC practice, Vladimir Putin does not enjoy immunity from arrest and transfer to the Court. However, it remains to be seen whether in case the opportunity arose, the ICC would follow the reasoning of the Appeals Chamber. According to Article 21, paragraph 2 of the Statute, while judges «may apply principles and rules of law as interpreted in its previous decisions», they are not bound by the precedent. In consequence, a request to find that a state party did not comply with a request to arrest and transfer the sitting Head of state of the Russian Federation might provide the ICC with an opportunity to clarify (or *rectify*, if you agree with the critics) the 2019 judgment.

In case judges confirmed that personal immunity cannot be invoked before the ICC, it is unlikely that states parties would incur any sanction, should they decide not to comply with the request to arrest Putin. In fact, for all the decisions issued against states parties in the *Al Bashir* case between 2011 and 2019, none of them has been the recipient of a decision issued for that purpose by the Assembly of states parties (ASP) or by the UN Security Council. Throughout the years, the ASP has set up procedures relating to non-cooperation (including a Tool kit on non-cooperation and a reporting procedure – *see* here), but did not adopt any "punitive measure" against non-complying states. In addition to that, it is highly likely – unless a regime change occurred in the country – that the Russian Federation will exercise its veto power in the context of the Security Council, should it be called to address the matter.

Nevertheless, the warrant will have an impact on international relations (*see* A. GURMENDI, *Tracking State Reactions to the ICC's Arrest Warrant against Vladimir Putin*, in *Opinio Juris*, 29 March 2023). At least, the warrant issued against Putin will have the effect of restricting his freedom of movement and causing headaches to the leaders of those countries that under "normal" circumstances would warmly welcome him. For instance, it will be interesting to see whether South Africa is going to actually allow Putin to join the BRICS Summit in August 2023. The drama is still unfolding.

4. *Is all that glitters gold? Critical remarks on the Arrest Warrants against Putin and Lvova-Belova*

The decision of the Pre-Trial Chamber II of the ICC to issue arrest warrants for Putin and Lvova-Belova has been welcomed with enormous enthusiasm by scholars and most Western states who have greeted this decision as a ground-breaking event with global repercussions. The pronouncement shows indeed how promptly international institutions can act when they feel compelled to bring alleged perpetrators of the most serious crimes to

justice. What has been praised is not only the timeliness of the decision of the Pre-Trial Chamber to issue an arrest warrant against a sitting Head of state (the first from a non-African country, which is also a permanent member of the UN Security Council), but also the choice to start the case with the abduction and unlawful transfer of children (R. HAMILTON, *The ICC Goes Straight to the Top*, in *Just Security*, 17 March 2023).

The ICC Prosecutor had already indicated in early March that the public reported abductions of children, unlawfully transferred from the Ukrainian occupied territories to Russia, were an investigative priority for his Office as such an atrocious crime is being perpetrated against one of the most vulnerable groups of civilians during an armed conflict. But more than anything, centring the charges around the unlawful deportation of children, along with the wide resonance one of the most reprehensible acts of violence will inevitably have, could contribute to delegitimize the very reasons for Russia's war (see, M. KERSTEN, *Why did the International Criminal Court focus on the transfer and deportation of children from Ukraine to Russia?*, in *Justice in Conflict*, 21 March 2023). These alleged crimes against children question indeed Putin's claim that the invasion was an act of self-defence to protect Russia against NATO, countering at once the narrative built by Putin and Lvova-Belova that the transfer programme of children to Russia was a humanitarian operation to deliver «Ukrainian children from evil into the care of Russian families desperate to share their love» (see, R. HAMILTON, *The ICC Goes Straight to the Top*, in *Just Security*, 17 March 2023).

However, while most commentators have enthusiastically supported the issuance of the two arrest warrants, less attention has been paid to the impact this daring move might have on the legitimacy and credibility of the ICC if other situations will not be treated with the same vigour, alacrity and resource dedication. Exploiting the potential of this unprecedented decision of PTC II in the context of the situation in Ukraine to proceed with investigations in other situations, could be an exceptional opportunity for the Court to dispel the risks of criticism linked to its practice of selectivity and double standards. After such a bold step in Ukraine, the Court's reputation is at a crossroads. As pressure is likely to increase on the OTP, the Court can either continue to indulge in those less-disturbing situations that do not involve powerful Western states and their allies, or rather decide to enhance its credibility by prioritizing investigations in other equally urgent (and still neglected) situations, such as Afghanistan, Iraq, or Palestine where the alleged commission of core crimes is over-documented (for similar arguments, *see* O. OWISO and A. MUDUKUTI, as cited by J. ANDERSON in *ICC vs Putin: what do the experts say?*, in *Justiceinfo.net*, 21 March 2023).

The decisions of the Court not to open an investigation into the situations in Iraq (2006 and 2020) and in Palestine (2012), as well as the decision to "de-prioritise" alleged war crimes in Afghanistan is indeed based on the rhetoric of "convenient pragmatism" grounded on the unproven presumption that the Court might survive in the long term only avoiding investigations against the most powerful actors (*see* T. MARINIELLO, *Justice of the Powerful: Abusing Prosecutorial Discretion in the Punishment of International Crimes?*, in F. JEßBERGER, C. MELONI, M. CRIPPA, *Domesticating International Criminal Law*, Routledge, 2023; A WHITING, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?, in Just Security*, 12 April 2019).

The 2020 ICC Report on preliminary examination activities reveals how the criteria for proceeding with an investigation into the situation in Ukraine were fulfilled with respect to the jurisdiction, admissibility and the interests of justice. However, no authorization to open an investigation was sought at the time (*see* Section 2 above). But straight after Russia's invasion of Ukraine in 2022, «the notable delay factors highlighted in 2020 did not feature

likely because the conflict was one of interest for key powers» (*see* C. A. ODINKALU, S. NAKANDA, *Putin Arrest Warrant: International Law and Perceptions of Double Standards*, in *Opinio Juris*, 27 March 2023).

Not only forty-three states parties to the Rome Statute have referred the situation in Ukraine to the ICC for investigation, but several States have also stepped up to support investigative efforts through human resources and intelligence sharing. One could also ask to what extent the exceptional financial assistance by some Western States to reinforce the ICC probe into potential war crimes in Ukraine has contributed to such an acceleration in the selection of cases (for some examples, see here, here and here). But while Western funding support has been impressive showing the shock and emotion caused by the images of the war in Ukraine and the readiness of many countries to support international justice, it remains to be seen whether such generosity will also be proffered to victims of mass atrocities committed outside Europe (C. A. ODINKALU, S. NAKANDA, *Putin Arrest Warrant: International Law and Perceptions of Double Standards*, in *Opinio Juris*, 27 March 2023).

Although the ICC investigation into the situation in Ukraine covers acts allegedly committed since 25 April 2014, the crimes for which the arrest warrants for Putin and Lvova-Belova have been issued concern conducts carried out by Russian forces in the context of the recent invasion of Ukraine. Such a rapidity in proceeding with an investigation and selection of cases was only experienced by the Court with respect to Libyan leader Muammar Gaddafi in 2011, when the Prosecutor decided to initiate the investigation into the situation in Libya only seven days after the Security Council's referral to the ICC. And two months after the opening of that investigation, the Prosecutor submitted a request for three arrest warrants to the Pre-Trial Chamber. Therefore, the expeditiousness with which some cases are tackled shows that justice can be swiftly pursued if it aligns with the interest of key powers. However, while «international criminal justice is always and can only be selective», there is an evident and disturbing lack of clarity on the criteria used by the OTP to prioritize situations and select the cases for prosecution.

Should the Prosecutor keep emphasizing the criminality of some individuals while ignoring that of others, also refraining from selecting cases in some of the most documented international violations falling under the ICC's jurisdiction, he will risk making the criticism of bias even more pronounced feeding the perception of a Court as a paradigm of a «justice of the powerful» (See F. MEGRET, N. JURDI, *The International Criminal Court, the Arab Spring and its Aftermath*, in *Diritti umani e diritto internazionale*, Vol. 16, Issue 2, 2016, p. 375). This is the reason why the decision to issue arrest warrants against Putin and Lvova-Belova should be taken by the Court as a crucial occasion to expand its range of action and strengthen its credibility as an impartial and independent institution. To do so, the Prosecutor should undertake to make some bold moves. Investigating the international crimes allegedly committed in the Israeli-Palestinian setting since Gaza war 2008/2009; selecting cases in the Palestine situation; and stopping the impunity of UK and US nationals allegedly responsible for war crimes (including torture), committed in the context of the Iraq and Afghanistan armed conflicts would all be steps in the right direction.

5. *Conclusion*

In this brief commentary, we sought to provide an overview of the decision of PTC II of the ICC to issue warrants of arrest, on 17 March 2023, against the President of the Russian Federation, Putin, and the Commissioner for Children's Rights in the Office of the President

of the Russian Federation, Lvova-Belova, in the context of the situation in Ukraine. According to the Court, reasonable grounds exist to believe that the two suspects committed war crimes of unlawful deportation and unlawful transfer of children from the Ukrainian occupied territories to Russia under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Statute.

Despite the fact that neither the Russian Federation nor Ukraine are states parties to the ICC Statute, Ukraine accepted the ICC's jurisdiction through the deposit of two *ad hoc* declarations (the first in April 2014 and the second one in September 2015) pursuant to Article 12, paragraph 3 of the Statute. And it is on the basis of the September 2015 declaration – which according to the Prosecution, encompasses "any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards" – that the ICC may *also* exercise its jurisdiction over crimes allegedly committed in the context of, and following the invasion of Ukraine in 2022. Following an unprecedented referral by 43 states parties, the Prosecutor opened an investigation into crimes allegedly committed on the territory of Ukraine, including *any crimes* falling within the jurisdiction of the Court allegedly committed in the context of the conflict which broke out on 24 February 2022, on *any part* of the territory of Ukraine. While the current arrest warrants only concern the unlawful deportation of children, it is highly likely that further charges will be (or have been) brought against Putin before the ICC, with the obvious exception of the crime of aggression, as neither Ukraine nor the Russian Federation are state parties to the Rome Statute.

However, the issue of Vladimir Putin's personal immunity and the relationship between Article 98, paragraph 1 and Article 27, paragraph 2 of the Statute remains unsettled. While it seems that under the ICC practice, a sitting Head of state suspected of an international crime does not enjoy immunity from arrest and transfer to the Court, it is not clear whether the ICC would follow – should the opportunity arise – the same reasoning of the Appeals Chamber in *Al-Bashir* whereby there is no such immunity under customary international law. According to the 2019 decision, in line with the ICJ *Arrest Warrant* case, states parties are not allowed to invoke the said immunity when they are requested by an international court to arrest and surrender the Head of State of a third country. In particular, it remains to be seen whether South Africa – the country Putin has reportedly been invited to visit for the BRICS Summit in August 2023 – is under an obligation to arrest him pursuant to the arrest warrant issued by the ICC.

To conclude, we argued that the laudable and uncommon expeditiousness in the selection of cases and the issuance of arrest warrants after the outbreak of the war in Ukraine in February 2022 could raise accusations of double standards by the ICC. To avoid a credibility fall, the Court should therefore seize this occasion to set the standard for other situations in which well-documented atrocities have allegedly been committed outside Europe (e.g. Afghanistan, Iraq and Palestine), even if the suspects are nationals of powerful Western states (e.g. UK and US) and their allies. It is indeed only calling the most powerful to account for the perpetration of core crimes that the legitimacy and reputation of the Court can be preserved.

MARIAGIULIA GIUFFRÈ
LUIGI PROSPERI