

Putin and The Hague: The Precedent, and the Significance for Israel

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On March 17, 2023, the International Criminal Court (ICC) issued arrest warrants against Russian President Vladimir Putin and a senior member of his government on suspected charges of committing war crimes by unlawfully deporting and transferring children from Ukraine to Russian territory. This marks the first time that the ICC has issued arrest warrants as part of its investigation into the conflict between Russia and Ukraine, and it is expected that further proceedings will be initiated over additional war crimes. This is a dramatic move that could have a profound impact on the future of the ICC. Moreover, the proceedings could have a wide range of ramifications, including deepening Putin's isolation and limiting his ability to travel, bolstering global support for Ukraine, and influencing any future ceasefire talks between the two sides. From an Israeli perspective, this development raises concerns, as it determines that even if a state is not a member of the ICC, its leaders are not immune from prosecution. It also indicates possible future legal rulings regarding the crime of population transfer, as well as the likely difficulty Israel will face in mustering support for its position at the ICC.

On March 17, 2023, the Pre-Trial Chamber of the International Criminal Court (ICC) [issued arrest warrants](#) against Russian President Vladimir Putin and Maria Lvova-Belova, the Russian Commissioner for Children's Rights, on suspicion of war crimes. The two are suspected of the war crimes of unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation. Russia [condemned](#) the decision, arguing that the warrants had no legal meaning, since Russia is not a member of the ICC and is not obligated to it in any way. Meanwhile,

many states and organizations, including the United States, Germany, the United Kingdom, and the European Union have all expressed their support for the move.

This development represents the first time that the ICC has issued arrest warrants in connection with its investigation into the conflict between Russia and Ukraine. Initially, the proceedings dealt with alleged crimes that were committed as part of the annexation of the Crimean Peninsula and the fighting in East Ukraine in 2014. Ukraine and Russia are not members of the ICC, but Ukraine has given its ad hoc agreement to the Court's jurisdiction to investigate crimes committed on its territory from November 21, 2013. On March 2, 2022, shortly after the Russian invasion, ICC Prosecutor Karim Khan [announced](#) the launch of an official investigation, saying that the probe would also look into allegations of war crimes committed during the current fighting.

The fact that the ICC made these arrest warrants public is unusual, since they are usually issued under seal, to protect victims and potential witnesses, and to ensure that the effectiveness of the investigation is not undermined. In its [statement](#), however, the Court explained that in light of the fact that crimes are still being committed on the ground, public awareness of these warrants could help bring them to an end. While the warrants themselves remain confidential, [reports](#) indicate that some 6,000 Ukrainian children were held in dozens of "political reeducation camps" in Russia, subjected to pro-Russian teaching and indoctrination, and hundreds of children were subsequently adopted by Russian families. Russia itself has made no secret of this activity, but argued that it was a humanitarian policy aimed at helping children who were forced to flee from the war zone. This is not the first time that the ICC has issued arrest warrants against a serving head of state: in 2009, a warrant was issued against Sudanese leader Omar al-Bashir, and in 2010, against President Muammar Ghadaffi of Libya. However, the current arrest warrants are a precedent for the ICC in that for the first time, concrete measures were taken against nationals of one of the permanent members of the United Nations Security Council.

In an [interview](#) with CNN, Khan stated that the decision to focus first on Putin and these allegations stemmed from evidence collected in the field, and was not predetermined. He added that additional directions for investigation were also under examination. Indeed, on March 13, the *New York Times* [revealed](#) that the Office of the Prosecutor is planning on opening additional proceedings over the deliberate targeting of civilian infrastructure. It can be assumed that the ICC is also examining allegations made in reports by various organizations, including the United Nations Human Rights Commission of Inquiry on Ukraine, which [found](#) evidence of a wide range of war crimes, including willful killings, unlawful confinement, torture, rape, and indiscriminate and disproportionate attacks. In addition, on March 20, the ICC [held](#) a training session on witness protection and support for victims of conflict-related sexual violence in Ukraine, and it is likely that these issues are also being examined. These proceedings are in line with Khan's [policy](#) of prioritizing crimes of sexual and gender-based violence and crimes against children.

The forced transfer of children is included in the list of elements that can constitute genocide under the ICC statute. When [asked](#) about the decision to issue warrants for war crimes, rather than crimes against humanity or genocide, Khan replied that the investigation is at an early stage and that if more evidence comes to light suggesting additional crimes, his Office would add charges accordingly.

The ICC does not conduct trials against suspects in absentia, so as long as Putin and Lvova-Belova are not in the Court's custody, proceedings against them are frozen. The ICC does not have its own policing force and it relies on its member states, who are obliged to aid it in executing the arrest warrants. Currently, 123 countries are members of the ICC, including most Western nations. However, the ICC itself does not have effective tools to enforce this obligation, and in the past, several countries, including Jordan and South Africa, have refused to arrest suspects who were on their soil (most of these cases revolved around countries' refusal to arrest former Sudanese leader Omar al-Bashir). Putin is scheduled to travel to South

Africa in August, to attend the BRICS summit of five emerging economies (Brazil, Russia, India, China, and South Africa) and, in anticipation of the visit, there have been [calls](#) in South Africa for the government to prevent him from traveling to the country. In an [official statement](#), South Africa stated that it is aware of its legal obligations regarding Putin's visit.

The current situation raises a question that has come up before the ICC several times in the past, regarding the immunity from criminal proceedings that heads of state – and other senior officials – enjoy in international law, as well as immunity from arrest by authorities in another state. The ICC statute stipulates that even currently serving heads of state do not enjoy immunity from prosecution. However, it also states that no request for surrender or assistance will be advanced if it forces a state to violate its obligations under international law when it comes to the diplomatic immunity granted to a national of a third state – as long as that third state has not given its agreement to waive immunity. In 2019, the ICC's Appeals Chamber, discussing Jordan's refusal to arrest al-Bashir, ruled that heads of state do not enjoy immunity from prosecution in the court. However, that ruling did not make it clear whether it applies to a state that is not a member of the ICC, only when the investigation was launched based on a referral from the UN Security Council, as was the case with Sudan. It now appears that the ICC has adopted the position whereby even if an investigation was not launched following a referral from the Security Council, the heads of a state that is not a member of the ICC do not enjoy immunity from prosecution, and a member state must arrest a suspect from that state if and when he arrives in its territory.

This is one of the most dramatic decisions taken by the ICC since its establishment some 20 years ago, and it is likely to have far-reaching implications for the future of the organization. On the one hand, it is highly unlikely that Putin will be extradited and put on trial in The Hague in the near future, which could undermine the Court's status and prestige – especially if Putin visits member states and is not arrested. On the other hand, the decision demonstrates that Khan is not afraid to confront the superpowers, and it is entirely in keeping with his [policy](#) since he assumed

his role as the ICC Prosecutor: turning the ICC into a significant player in contemporary conflicts and making it a hub for international justice through increased cooperation with states parties. Khan states that broad cooperation with a number of countries, under the auspices of the European Union, allowed for quick access to information and evidence, and accelerated the current proceedings.

In addition, the proceedings could have much broader ramifications, including deepening Putin's isolation and limiting his ability to travel; it could classify him as a war criminal; it could undermine the motivation of Russian soldiers in the field; and it could increase global support for Ukraine. Moreover, the move could have an impact on any future ceasefire negotiations between the two countries, even in terms of where such talks would take place. They could not be held on the soil of any country that is a member of the ICC, and there is also the possibility that Russia would demand the freeze of any ICC proceedings as a precondition for negotiations. It could do so using a resolution passed by the UN Security Council, which has the authority to order a one-year halt to the proceedings, that can be extended for additional periods of one year each time.

There is an ongoing investigation regarding Israel before the ICC, which was officially launched in March 2021, and focuses on allegations of crimes committed in the West Bank, East Jerusalem, and the Gaza Strip from June 13, 2014, by all parties involved in the conflict. The current proceedings vis-à-vis Ukraine raise a number of concerns in the Israeli context. First, the ruling that heads of state that are not members of the ICC do not enjoy immunity could have implications for potential proceedings against senior Israeli officials. Second, arrest warrants have been issued for the crime of population transfer. This is the same clause that also prohibits the transfer of an occupying power's population to the occupied territory ("the settlements crime") and prohibits the transfer of the occupied population within the territory itself. Future rulings of the court in the proceedings against Putin could have an impact in the future on the investigation regarding Israel, both in terms of the "crime of settlements," and the

evacuation of Palestinian villages. Beyond this, the increase of support for the ICC, which stems in part from the global groundswell of support for an investigation against Russia, could make it hard for Israel to recruit countries and other influential actors to exert pressure on the ICC Prosecutor to freeze the investigation regarding Israel, based on arguments against the Court's legitimacy and authority when it comes to non-member states such as Israel.

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