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The International Criminal Court at the Crossroads: selectivity, politics and the prosecution of international crimes in a post-Western world*

O Tribunal Penal Internacional na encruzilhada: seletividade, políticas e o processo penal de crimes internacionais num mundo pós-ocidental

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Abstract

By delving into the past and present, this article's objective is to critically assess the selectivity of International Criminal Law (ICL) in light of the International Criminal Court (ICC)'s response to the conflict in Ukraine. This research seeks to provide insight into selectivity, politics and international criminal lawmaking and enforcement, attempting to pave a future where the ICC may engage in international affairs in a meaningful and adequate way. This is a case study of the ICC's response to the Ukraine situation that, by adopting bibliographic, documental, jurisprudential and legislative research methods as its working methodology, provides an overarching vision of the selectivity critique in the international criminal realm and dives into the inherently political element of ICL. As a result, this research appraises the political dimension of the ICC, stating the need for the Court to embrace it as a way of achieving its ending impunity goal while advocating for transparent criteria for case prosecution and trial. The suggestion that the ICC fully engages with its political element as a way to promote transitional, conflict-settling justice and to find its renewed inner voice in a post-Western world is brought forth as a concluding remark.

Keywords: International Criminal Court; international criminal law; selectivity; politics; Ukraine; Post-Western world.

Resumo

Aprofundando-se no passado e no presente, o objetivo deste artigo é avaliar criticamente a seletividade do Direito Penal Internacional (DPI) à luz da resposta do Tribunal Penal Internacional (TPI) ao conflito na Ucrânia. Esta pesquisa busca fornecer perspectivas sobre a seletividade, a dimensão política e a criação e aplicação de normas penais internacionais, buscando abrir caminho para que o TPI se envolva em assuntos internacionais de forma significativa e adequada. Trata-se de um estudo de caso da resposta à

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situação da Ucrânia que, ao adotar métodos de pesquisa bibliográfica, documental, jurisprudencial e legislativa como sua metodologia de trabalho, oferece uma visão abrangente da crítica à seletividade no âmbito penal internacional e mergulha no elemento inerentemente político do DPI. Como resultado, esta pesquisa avalia a dimensão política do TPI e defende que o Tribunal abrace essa dimensão como meio de alcançar seu objetivo de acabar com a impunidade, ao mesmo tempo em que defende a adoção de critérios transparentes para a investigação e julgamento dos casos. A sugestão de que o TPI se envolva plenamente com seu elemento político como forma de promover uma justiça transicional e voltada à resolução de conflitos e encontrar sua voz interna renovada em um mundo pós-ocidental é apresentada como argumento conclusivo.

Palavras-chave: Tribunal Penal Internacional; direito penal internacional; seletividade; política; Ucrânia; mundo Pós-Ocidental.

1 Introduction

Criticisms regarding the selectivity and unequal enforcement of International Criminal Law (ICL) are far from new. Courts such as the International Military Tribunals for Nuremberg and the Far East[1], the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)[2] and the International Criminal Court (ICC)[3] have all faced the selectivity critique at some point. While selectivity is, at least to some extent, inherent to ICL[4], it nevertheless harms the globally shared perception of legitimacy of international criminal trials[5], especially among victims[6].

As the Rome Statute, the international treaty that established the ICC, completed 25 years in 2023, reassessing the strengths and weaknesses of the Court is key to ensuring the success of its ending impunity goal in the future. The ICC is today "a staple not only of legal commentary but also of political discourse"[7], which makes it a prominent stakeholder in ongoing international conflicts, such as the one between Russia and Ukraine. The Russo-Ukrainian conflict has spurred the interest of the international community and, likewise, called upon international organisations and adjudicative bodies such as the ICC to take action and respond accordingly.

Given the close historical relation between international politics and International (Criminal) Law and how international criminal justice has been repeatedly on the spot due to its so-called political bias[8], one should worry about the influence of the interests of the Global North over ICL. This is particularly true due to accusations of double standards[9] and to a freshened

[1] ZOLO, Danilo. *La Giustizia dei Vincitori:* Da Norimberga a Baghdad. Roma-Bari: Laterza, 2006; SCHABAS, William. Victors' Justice? Selecting Targets for Prosecution. *In*: SCHABAS, William. *Unimaginable Atrocities*: Justice, Politics, and Rights at the War Crimes Tribunals. Oxford: Oxford University Press, 2012. p. 73-98; KOPELMAN, Elizabeth S. Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial. *New York University Journal of International Law and Politics*, v. 23, p. 373-444, 1991.

[2] CASSESE, Antonio. The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice. *Leiden Journal of International Law*, v. 25, n. 2, p. 491-501, june 2012; CRYER, Robert. *Prosecuting International Crimes*: Selectivity and the International Criminal Law Regimes. Cambridge: Cambridge University Press, 2005.

[3] GEGOUT, Catherine. The International Criminal Court: limits, potential and conditions for the promotion of justice and peace. *Third World Quarterly*, v. 34, n. 5, p. 800-818, 2013; DEGUZMAN, Margaret M. Choosing to Prosecute: Expressive Selection at the International Criminal Court. *Michigan Journal of International Law*, v. 33, n. 2, p. 265-320, 2012.

[4] KIYANI, Asad G. Re-narrating selectivity. *In*: DEGUZMAN, Margaret; OOSTERVELD (ed.). *The Elgar Companion to the International Criminal Court*. Cheltenham: Edward Elgar Publishing, 2020. p. 307-333; VAN DER WILT, Harmen. Selectivity in International Criminal Law: Assymetrical Enforcement as a Problem for Theories of Punishment. *In*: JESSBERGER, Florian; GENEUSS, Julia (ed.). *Why Punish Perpetrators of Mass Atrocities?* Purposes of Punishment in International Criminal Law. Cambridge: Cambridge University Press, 2021. p. 305-322.

[5] ARMENIAN, Andre V. Selectivity in International Criminal Law: An Assessment of the 'Progress Narrative'. *International Criminal Law Review*, v. 16, n. 4, p. 642-672, 2016; REYNOLDS, John; XAVIER, Sujith. 'The Dark Corners of the World': TWAIL and International Criminal Justice. *Journal of International Criminal Justice*, v. 14, n. 4, p. 959-983, sep. 2016; CHRISTIANO, Thomas. The problem of selective prosecution and the legitimacy of the International Criminal Court. *Journal of Social Philosophy*, Early View, p. 1-21, 2021.

[6] KERR, Christa-Gerr. Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined. *Michigan Journal of International Law*, v. 41, n. 1, p. 195-225, 2020; NIANG, Mandiaye. Africa and the Legitimacy of the ICC in Question. *International Criminal Law Review*, v. 17, n. 4, p. 615-624, 2017.

[7] KREVER, Tor. International Criminal Law: An Ideology Critique. *Leiden Journal of International Law*, v. 26, n. 3, p. 701-723, sep. 2013. p. 701.

[8] See, *e.g.*, SCHABAS, William A. Victor's Justice: Selecting Situations at the International Criminal Court. *The John Marshall Law Review*, v. 43, p. 535-552, 2010.

[9] AMBOS, Kai. Ukraine and the Double Standards of the West. *Journal of International Criminal Justice*, v. 20, n. 4, p. 875-892, sep. 2022.

selectivity critique[10] that has permeated ICL scholars' response to the Ukraine situation. Crucially, this high-profile conflict places the ICC at a crossroads, once more testing its ability to withstand challenges to its legitimacy and legality.

By seeking to comprehend how criminal selectivity and the influence of international politics can become obstacles to the ICC's mission in a multipolar world, this article seeks to reflect upon the past, assess the present and propose a future where (international criminal) law and politics work together, and not against each other in ensuring justice for all. This research's objective is to critically assess the selectivity of international criminal justice in light of the ICC's response to the Russo-Ukrainian conflict. By looking at the history of international criminal justice as one infused with selectivity and legitimacy critiques, this article reflects upon how the ICC became one of the main stakeholders in the quest for accountability against Russia, while embroiling itself in the interests of the West – as it had already done in the past. By doing so, it seeks to contribute to a growing body of literature that critically reflects on the ICC's role in the crisis of the international (liberal) legal order.

This is a case study[11] that adopts bibliographic, documental, jurisprudential and legislative research methods[12] as its working methodology. It is divided in four stages. Section 1 broadly presents and contextualizes the conflict between Russia and Ukraine. Section 2 introduces ICL's normative framework and assesses the warrants of arrest against Vladimir Putin and Maria Lvova-Belova. Section 3 analyses the orders of arrest under the light of the selectivity critique against the ICC. Section 4 turns to selectivity as a historical and unavoidable issue of international criminal justice. Finally, section 5 points to the reconfiguration of the post-Western world and what place the ICC has in it, weighing the role of politics in ICL against the need for an international criminal justice that serves all, and not just the Global North.

2 The Ukrainian-Russian Conflict and the International Community's Reaction(s)

February 2022 was marked by the outbreak of an international armed conflict between Russia and Ukraine – a conflict unprecedented in scope and gravity in the troubled relationship between these States[13]. The beginning of the armed conflict marked an escalation of Russo-Ukrainian tensions due to the dispute over Crimea between the two countries that was present throughout the post-Soviet era[14], although 2014 is considered the official starting point of this taut relation[15]. There

[10] HELLER, Kevin Jon. *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*. 2022. Available at: http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/. Access in: 31 july 2023; CHANDRAN, Aakash; McCANN-KEENE, Jennifer; PALMER, Emma. What of the Rohingya? The ICC, Ukraine, and limits of "international" justice. 2023. Available at: https://www.lowyinstitute.org/the-interpreter/what-rohingya-icc-ukraine-limits-international-justice. Access in: 31 july 2023.

[11] MACHADO, Maíra Rocha. Estudo de caso na pesquisa em Direito. *In*: QUEIROZ, Rafael Mafei R.; FEFERBAUM, Marina (coord.). *Metodologia da Pesquisa em Direito*: técnicas e abordagens para elaboração de monografias, dissertações e teses. 3. ed. São Paulo: SaraivaJur, 2023. p. 307-329.

[12] GUSTIN, Miracy B. S.; DIAS, Maria Tereza F.; NICÁCIO, Camila S. *(Re)pensando a Pesquisa Jurídica*. 5. ed. São Paulo: Almedina, 2020. p. 199-215; PAULA, Felipe de; PAIVA, Luiz Guilherme M. A pesquisa legislativa: fontes, cautela e alternativas à abordagem tradicional. *In*: QUEIROZ, Rafael Mafei R.; FEFERBAUM, Marina (coord.). *Metodologia da Pesquisa em Direito*: técnicas e abordagens para elaboração de monografias, dissertações e teses. 3. ed. São Paulo: SaraivaJur, 2023. p. 123-145; LIMA, Telma Cristiane S.; MIOTO, Regina Célia T. Procedimentos metodológicos na construção do conhecimento científico: a pesquisa bibliográfica. *Revista Katálysis*, v. 10, n. esp., p. 37-45, 2007.

[13] Understanding the causes of this conflict is not within the scope of this work. However, it is important to note that tensions between Russia and Ukraine primarily date back to 2014. For a detailed study on the beginning and trajectory of this tension, see: GRANT, T. *Aggression Against Ukraine*: Territory, Responsibility, and International Law. Nova Iorque: Palgrave Macmillan, 2015; BEBLER, Anton. Crimea and the Russian-Ukrainian Conflict. *Romanian Journal of European Affairs*, v. 15, n. 1, p. 35-54, mar. 2015.

[14] KUZIO, Taras. Russia-Ukraine Crisis: The Blame Game, Geopolitics and National Identity. *Europe-Asia Studies*, v. 70, n. 3, p. 462-473, 2018. p. 468. As Marples e Duke observe, the issue of Crimea has multiple dimensions: the historical background between Russia and Ukraine; the case of the Crimean Tatars as an *ipso facto* indigenous population deported *en masse* at the end of World War II; the military-strategic issue, in which Crimea served as the base for the Black Sea Fleet; and the legality of the transfer of the peninsula from the Soviet Socialist Federative Republic of Russia to Ukraine in 1954. MARPLES, David R.; DUKE, David F. Ukraine, Russia, and the Question of Crimea. *Nationalities Papers*, v. 23, n. 2, p. 261-289, 1995.

[15] On the conflict between Russia and Ukraine over Crimea and the role of International Law as (inter)mediator, including in critical perspective, see: SAYAPAN, Sergey; TSYBULENKO, Evhen (ed.). *The Use of Force Against Ukraine and International Law*. The Hague: T.M.C.

are complex factors involved in the matters between Ukraine and Russia, all of which started years, if not decades ago. Since March 2021, the Russian State had occupied the border region with Ukraine with a large military operation; however, any plans for invasion or attack on the other State were denied until the launch of the first attack, in 2022[16].

On 21 February 2022, Russia officially recognized the Donetsk and Luhansk Peoples' Republics, two self-proclaimed *quasi*-States[17] in the Donbass region with a crucial role in the pre-existing tension between Ukraine and Russia[18]. The following day, the Russian Federation Council authorized the use of military force and the entry of Russian troops into these territories[19], and on 24 February 2022, Vladimir Putin, the President of Russia, announced a special military operation aimed at demilitarizing and de-nazifying Ukraine[20], as well as ensuring Ukrainian neutrality[21].

The armed conflict quickly escalated to a large scale. On both sides, casualties reached thousands, if not hundreds of thousands[22]. In addition, Europe is now facing the largest crisis of displaced European persons since World War II[23]. The entire situation has been well documented, especially regarding human rights violations that occurred during and because of the conflict[24] and alleged international crimes[25].

The international community carried out a quick and comprehensive response. On the very next day after the beginning of the conflict, 25 February 2022, the UN Secretary-General appointed Amin Awad to serve as the UN Crisis Coordinator for Ukraine[26], and on 04

Asser Press, 2018; MARXSEN, Christian. The Crimea Crisis – An International Law Perspective. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, v. 74, n. 2, p. 367-391, 2014; FELDBRUGGE, Ferdinand. Ukraine, Russia and International Law. *Review of Central and East European Law*, v. 39, p. 95-97, 2014.

16 TAYLOR, Adam. *Russia's attack on Ukraine came after months of denials it would attack*. 2022. Available at: https://www.washingtonpost.com/world/2022/02/24/ukraine-russia-denials/. Access in: 03 july 2023; KIELY, Eugene; FARLEY, Robert. *Russian Rhetoric Ahead of Attack Against Ukraine*: Deny, Deflect, Mislead. 2022. Available at: https://www.factcheck.org/2022/02/russian-rhetoric-ahead-of-attack-against-ukraine-deny-deflect-mislead/. Access in: 03 july 2023.

17 *Quasi*-States are entities who fulfil some, but not all, criteria for statehood and thus do not represent a fully autonomous or institutionalised State, in accordance with International Law. Usually, «a quasi-state does not enjoy full international recognition, but functions nonetheless as a genuine state entity with its administration, army and financial system". RYWKIN, Michael. The Phenomenon of Quasi-states. *Diogenes*, v. 53, n. 2, p. 23-28, Mayo, 2006.

18 KIRBY, Jen; GUYER, Jonathan. Russia's war in Ukraine, explained. *Vox*, 6 mar. 2022. Available at: https://www.vox.com/2022/2/23/22948534/russia-ukraine-war-putin-explosions-invasion-explained. Access in: 03 july 2023.

19 RUSSIA. Federation Council. *Federation Council gives consent to use the Russian Armed Forces outside of the Russia Federation*. Moscow, 22 February 2022. Available at: http://council.gov.ru/en/events/news/133443/. Access in: 03 july 2023.

20 RUSSIA. President of Russia. *Address by the President of the Russian Federation*. Moscow, 24 February 2022. Available at: http://en.kremlin.ru/events/president/news/67843. Access in: 03 july 2023.

21 RUSSIA. President of Russia. *Telephone conversation with President of France Emmanuel Macron*. Moscow, 28 February 2022. Available at: http://en.kremlin.ru/events/president/news/67880. Access in: 03 july 2023.

22 Until 5 June 2023, the United Nations High Commissioner for Human Rights (OHCHR) had officially accounted for 6,979 dead civilians and 12.703 hurt civilians. UN. *Ukraine*: civilian casualty update 5 June 2023. 2023. Available at: https://www.ohchr.org/en/news/2023/06/ukraine-civilian-casualty-update-5-june-2023. Access in: 01 aug. 2023. In relation to military personnel, estimates indicate there were at least over 200,000 dead or hurt military staff in both sides; COOPER, Helene. Russia and Ukraine each have suffered over 100,000 casualties, the top U.S. general says. *NY Times*, 10 nov. 2022. Available at: https://www.nytimes.com/2022/11/10/world/europe/ukraine-russia-war-casualties-deaths.html. Access in: 01 aug. 2023.

23 More precisely, as of 6 December 2022, there were 5,861,300 refugees from Ukraine registered in Europe alone. UNHCR. *Operational Data Portal - Ukraine Refugee Situation*. New York: UNHCR, [2023] [last updated: 25 July 2023]. Available at: https://data2.unhcr.org/en/situations/ukraine. Access in: 01 aug. 2023). However, estimates indicate more than 14 million displaced Ukrainians (AP. Russia's war in Ukraine has displaced more than 14 million Ukrainians, says Filippo Grandi. *Euro News*, 03 nov. 2022. Available at: https://www.euronews.com/2022/11/03/russias-war-in-ukraine-has-displaced-more-than-14-million-ukrainians-says-filippo-grandi. Access in: 01 aug. 2023).

24 For example, see OHCHR. *Report on the Human Rights Situation in Ukraine 1 February to 31 July 2022*. New York: OHCHR, 2022; OHCHR. *Update on the Human Rights Situation in Ukraine 1 August - 31 October 2022*. New York: OHCHR, 2022; OHCHR. *Killings of civilians*: summary executions and attacks on individual civilians in Kyiv, Chernihiv, and Sumy regions in the context of the Russian Federation's armed attack against Ukraine. New York: OHCHR, 2022.

25 For example, UN. *Report of the Independent International Commission of Inquiry on Ukraine*. A/77/533. New York: UN, 2022. Civil society also has a key role in documenting the Russo-Ukrainian conflict. See, for example, Ukraine: Ukrainian fighting tactics endanger civilians. *In*: *Amnesty International*, 04 aug. 2022; Ukraine: Apparent War Crimes in Russia-Controlled Areas. *In*: *Human Rights Watch*, 03 April 2022. However, it is important to note that these reports, particularly those produced by Amnesty International, have been involved in controversy due to the narrative adopted. ABRAMS, Elliott. *Amnesty International's Attack on Ukraine*. 2022. Available at: https://www.cfr.org/blog/amnesty-internationals-attack-ukraine. Access in: 03 july 2023; POSNER, Lilian. Flawed Amnesty report risks enabling more Russian war crimes in Ukraine. 2022. Available at: https://www.atlanticcouncil.org/blogs/ukrainealert/flawed-amnesty-report-risks-enabling-more-russian-war-crimes-in-ukraine/. Access in: 03 july 2023.

26 UN. *Secretary-General Appoints Amin Awad of Sudan United Na-*

March, the UN Human Rights Council (HRC) decided to implement the Independent International Commission of Inquiry on Ukraine[27].

In addition, numerous resolutions and decisions have been adopted by UN bodies, among which are: (i) a resolution of the General Assembly condemning Russian aggression against Ukraine, with 141 votes in favour[28]; (ii) a resolution of the General Assembly reinforcing the humanitarian consequences of these acts and demanding the protection of civilians and humanitarian access in Ukraine, with 140 votes in favour[29]; (iii) a resolution of the General Assembly calling for the suspension of Russia from the Human Rights Council, with 93 votes in favour[30]; (iv) a statement by the President of the Security Council in support of the efforts of the UN Secretary-General to achieve a peaceful solution in Ukraine[31]; (v) a resolution of the Human Rights Council for an investigation of alleged atrocities committed by Russian occupying troops[32]; (vi) a resolution of the General Assembly calling on States not to recognize the «illegal attempt at annexation» of four regions of Ukraine by Russia, with 143 votes in favour[33]; and (vii) a resolution of the General Assembly calling on Russia to pay reparations to Ukraine as a result of the armed conflict[34].

European States, acting through the European Union and its European Council, have adopted a series of sanctioning measures against Russia. These measures have been more severe, economic sanctions included. From 23 February 2022 (one day before the start of the international armed conflict) until 01 August 2023, the EU has adopted eleven comprehensive sanction packages against Russia, high-level government officials (such as the Russian President and ministers), Russian nationals, and companies based in Russian territory[35] – mostly economic measures, but also other measures in the field of foreign relations, such as those aimed at visa issuance and mobility restrictions in the Schengen area. The Parliamentary Assembly of the Council of Europe also advocated for the establishment of an *ad hoc* international criminal court to investigate and prosecute alleged crimes of aggression by Russian leaders[36].

International adjudication, as in international courts and tribunals, was also another important realm used in response to the Russo-Ukrainian conflict. Similarly, yet in a sharper manner, the international responses that occurred before certain international litigious bodies happened in an unprecedented manner and speed. For example, on 26 February 2022, Ukraine filed a petition before the International Court of Justice, initiating proceedings against Russia regarding the application of the Convention on the Prevention and Punishment of the

tions Crisis Coordinator for Ukraine. SG/A/2102. New York: UN, 2022. Available at: https://press.un.org/en/2022/sga2102.doc.htm. Access in: 04 july 2023.

27 UN. HRC. *Situation of human rights in Ukraine stemming from the Russian aggression*. Resolution adopted by the Human Rights Council on 4 March 2022. A/HRC/RES/49/1. New York: UN, 2022. Available at: https://digitallibrary.un.org/record/3959073?ln=en. Access in: 04 july 2023.

28 UN. *Aggression against Ukraine*. Resolution adopted by the General Assembly on 2 March 2022. A/RES/ES-11/1. New York: UN, 2022. Available at: https://digitallibrary.un.org/record/3965290?ln=en. Access in: 04 july 2023.

29 UN. *Humanitarian consequences of the aggression against Ukraine*. Resolution adopted by the General Assembly on 24 March 2022. A/RES/ES-11/2. New York: UN, 2022. Available at: https://digitallibrary.un.org/record/3965954?ln=en. Access in: 04 july 2023.

30 UN. *Suspension of the rights of membership of the Russian Federation in the Human Rights Council*. Resolution adopted by the General Assembly on 7 April 2022. A/RES/ES-11/3. New York: UN, 2022. Available at: https://digitallibrary.un.org/record/3967950?ln=en. Access in: 04 july 2023.

31 UN. Security Council. *Statement by the President of the Security Council*. S/PRST/2022/. New York: UN, 2022. Available at: http://undocs.org/S/PRST/2022/3. Access in: 04 july 2023.

32 UN. *Human Rights Council Adopts Resolution on the Deteriorating Human Rights Situation in Ukraine and Closes Special Session*. 2022. Available at: https://www.ohchr.org/en/press-releases/2022/05/human-rights-council-adopts-resolution-deteriorating-human-rights-situation. Access in: 04 july 2023.

33 UN. *Territorial integrity of Ukraine*: defending the principles of the Charter of the United Nations. Resolution adopted by the General Assembly on 12 October 2022. A/RES/ES-11/4. New York: UN, 2022. Available at: https://digitallibrary.un.org/record/3990673?ln=en. Access in: 04 july 2023.

34 UN. *General Assembly adopts resolution on Russian reparations for Ukraine*. 2022. Available at: https://news.un.org/en/story/2022/11/1130587. Access in: 04 july 2023.

35 For a detailed timeline of all sanction packages in response to Russia's attack, see: EU. *Timeline - EU response to Russia's invasion of Ukraine*. Brussels: EU, 2023. Available at: https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/timeline-eu-response-ukraine-invasion/. Access in: 01 aug. 2023. It is possible, within this timeline, to infer that the sanctions originated, within the European context, from the Council of the European Union, the European Council, the International Summit, and the International Interministerial Meetings, which demonstrates the broad scope of actions taken by European States in the face of the conflict between Russia and Ukraine.

36 COUNCIL OF EUROPE. Parliamentary Assembly. *Resolution 2436 (2022)*. The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes. Strasbourg: Council of Europe, 2022. Available at: https://pace.coe.int/en/files/30024/html. Access in: 04 july 2023. para. 11.6.

Crime of Genocide[37]. On that occasion, Ukraine requested the indication of provisional measures[38], which judgment, according to the ICJ Rules, has priority over other cases[39]. Public hearings took place on 07 and 08 March, 2022[40], and on 16 March, less than a month after the proceedings were initiated, the Court indicated a series of provisional measures to be taken by Russia (and Ukraine)[41]. On top of that, more than 30 States presented declarations of intervention[42] – all of them from the Global North[43] – in an unprecedented fashion.

ICL, mainly manifested nowadays through the operation of the ICC[44], is also a crucial actor to this equation. Four days after the start of the Russo-Ukrainian armed conflict, the ICC Prosecutor, Karim A. A. Khan QC, announced his decision to initiate an investigation into the situation in Ukraine[45]. Based on the preliminary findings issued by the Office of the Prosecutor (OtP)[46], the Prosecutor decided favourably on the existence of a reasonable basis to proceed with the opening of an investigation, particularly regarding the commission of war crimes and crimes against humanity[47].

3 International Criminal Law's Normative Framework and the Warrants of Arrest Against Putin and Lvova-Belova

To proceed with the investigation, Khan stated either authorization from the Pre-Trial Chamber or a referral by a State Party to the Rome Statute would be required[48]. In just two days, by 02 March 2022, 39 States Parties had referred the situation to the Prosecutor's Office[49], enabling investigation to advance immediately.

[37] ICJ. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022. The Hague, 26 February 2022. Available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220227-APP-01-00-EN.pdf. Access in: 05 july 2023.

[38] ICJ. *Request for the Indication of Provisional Measures Submitted by Ukraine*. The Hague: ICJ, 2022.

[39] ICJ. *Rules of Court*. New York: UN, 1978. para. 74.

[40] ICJ. *Conclusion of the public hearing on the Request for the indication of provisional measures submitted by Ukraine*. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). No. 2022/8. The Hague: ICJ, 2022. Available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220307-PRE-01-00-EN.pdf. Access in: 05 july 2023.

[41] The measures were: (i) immediately suspend military operations in Ukrainian territory, with 13 votes in favour and 2 against; (ii) ensure that no military or irregular armed unit, as well as any organization or person subject to such a unit, take any action to prolong military operations, with 13 votes in favour and 2 against; and (iii) that both States-Parties avoid taking any action that would aggravate or extend the dispute or make it more difficult to resolve, unanimously. ICJ. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) - Order. The Hague, 16 March 2022.

[42] The ICJ Statute allows interventions by third States interested in the interpretation of an international treaty, ensuring the right to intervene, with the counterpart of being bound by the interpretation given by the Court.

[43] The list is comprised, until July 2023, of Latvia, Lithuania, New Zealand, United Kingdom, Germany, United States, Sweden, France, Romania, Poland, Italy, Denmark, Ireland, Finland, Estonia, Spain, Australia, Portugal, Austria, Greece, Luxembourg, Croatia, Czechia, Bulgaria, Norway, Malta, Belgium, Slovenia, Slovakia, Canada and The Netherlands, Cyprus and Liechtenstein, as well as the European Union.

[44] The ICC is a permanent court with jurisdiction over individuals accused of committing the most serious crimes of international concern: genocide, crimes against humanity, war crimes and aggression. See Rome Statute of the International Criminal Court. Rome, 1998.

[45] ICC. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine*: "I have decided to proceed with opening an investigation». The Hague: ICC, 2022. Available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening. Access in: 05 july 2023.

[46] ICC. *Information for victims*. Ukraine. The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/victims/ukraine. Access in: on 05 july 2023.

[47] ICC. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine*: "I have decided to proceed with opening an investigation». The Hague: ICC, 2022. Available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening. Access in: 05 july 2023.

[48] "A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes." ROME Statute of the International Criminal Court. Rome, 1998. article 14(1)).

[49] These countries are Germany, Albania, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Cyprus, Czechia, Denmark, Latvia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Liechtenstein, Luxembourg, Malta, New Zealand, Norway, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland and United Kingdom. ICC. *Statement of ICC Prosecutor, Karim A. A. Khan QC, on the Situation in Ukraine*: Receipt of Referrals from 39 States Parties and the Opening of an Investigation. The Hague: ICC, 2022. Available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states. Access in: 05 july 2023. Other States that later joined the list are Japan, Montenegro, North Macedonia and Chile. ICC. *Situation in Ukraine*. ICC-01/22. The Hague: ICC, 2022. Available at: https://www.icc-cpi.int/situations/ukraine. Access in: 05 july 2023, amounting to 43 States Parties that referred the situation to the ICC Prosecutor's Office.

It is notable how quickly the investigation was launched. Despite prosecutorial discretion on investigative matters, which will be discussed later in this article, the ICC Prosecutor's Office did not act as swiftly on other cases, such as in the Afghanistan case, where it sought authorization to investigate only in 2017, about 14 years after the country's accession to the Rome Statute[50].

Neither Russia nor Ukraine are Parties to the Rome Statute, meaning they are not, in theory, subject to the ICC's jurisdiction. However, article 12.3 of the Rome Statute allows a State to lodge an *ad hoc* declaration accepting the Court's jurisdiction over "the crime in question"[51] (or, more accurately, the situation in question in which one or more crimes appear to have been committed[52]). Ukraine has twice accepted the ICC's jurisdiction over alleged crimes under the Rome Statute on its territory: the first, covering alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014[53]; and second, extending the time limit indefinitely from 20 February 2014 onwards[54]. Furthermore, the Ukraine President submitted a bill on the ratification of the Rome Statute in August 2024[55].

The ICC may prosecute alleged international crimes in a complementary manner[56], based on two jurisdictional principles: territoriality, where the Court can exercise jurisdiction over events that occurr within a State Party's territory (or even outside the territory if the effects are felt within it[57]); and the active nationality principle, which asserts jurisdiction over international crimes committed by nationals of a State Party. The Ukraine investigation encompassed "any new alleged crimes falling within the jurisdiction of my Office that are committed by any party to the conflict on any part of the territory of Ukraine"[58].

On 17 March 2023, the Pre-Trial Chamber II of the ICC issued two warrants of arrest against Vladimir Vladimirovich Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. They were both charged for the unlawful deportation and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, in violation of articles 8(2)(a)(vii) and 8(2)(b)(viii) from the Rome Statute, at least from 24 February 2022[59].

[50] HAZIM, Abdul Mahir. A Critical Analysis of the Rome Statute Implementation in Afghanistan. *Florida Journal of International Law*, v. 31, n. 1, p. 1-32, 2019. p. 14-16.

[51] ROME Statute of the International Criminal Court. Rome, 1998. article 12(3).

[52] KAUL, Hans-Peter. Preconditions to the Exercise of Jurisdiction. *In*: CASSESE, Antonio *et al.* (ed.). *The Rome Statute of the International Criminal Court*: A Commentary. Oxford: Oxford University Press, 2002. p. 584-616. p. 611.

[53] ICC. *Ukraine accepts ICC jurisdiction over alleged crimes committed between 21 November 2013 and 22 February 2014*. The Hague: ICC, 2014. Available at: https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-between-21-november-2013-and-22. Access in: 07 july 2023.

[54] UKRAINE. *Resolution of the Verkhovna Rada of Ukraine*. On the Declaration of the Verkhovna Rada of Ukraine «On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations «DNR» and «LNR», which led to extremely grave consequences and mass murder of Ukrainian nationals». Kyev: Verkhovna Rada, 2015. Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf. Access in: 07 july 2023.

[55] CHAHAL, Ishrat. Ukraine President Zelenskyy submits bill to ratify ICC Rome Statute. *JuristNEWS*, 17 aug. 2024. Available at: https://www.jurist.org/news/2024/08/ukraine-president-zelenskyy-submits-bill-to-ratify-icc-rome-statute. Access in: 08 aug. 2024. It is interesting to observe that this bill seeks to take advantage of the transitional provision (article 124) of the Rome Statute, which would preclude the ICC from exercising its jurisdiction over war crimes committed by Ukrainian nationals or in Ukrainian territory for a period of seven years after ratification.

[56] The principle of complementarity dictates the ICC «is barred from exercising its jurisdiction over a case, and must declare it inadmissible whenever a national court asserts its jurisdiction over the same person(s) for the same crime and i) under its national law the state has jurisdiction; and ii) the case is being duly investigated or prosecuted by its authorities or these authorities have decided, in a proper manner, not to prosecute the person concerned [...]. In addition, the Court iii) may not prosecute and try a person who has already been convicted of or acquitted by another court with respect to the same conduct, if the trail was fair and proper". The Court may exercise its jurisdiction over a case, even if it is pending before national authorities, whenever the State is unable or unwilling to carry out the investigation or the prosecution or has refused not to prosecute the person(s) due to said inability or unwillingness. CASSESE, Antonio; GAETA, Paola (ed.). *Cassese's International Criminal Law*. 3. ed. Oxford: Oxford University Press, 2013. p. 297. See also articles 15, 17, 18, 19 and 20 of the Rome Statute.

[57] CASSESE, Antonio; GAETA, Paola (ed.). *Cassese's International Criminal Law*. 3. ed. Oxford: Oxford University Press, 2013. p. 274.

[58] ICC. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine*: "I have decided to proceed with opening an investigation». The Hague: ICC, 2022. Available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening. Access in: 05 july 2023.

[59] ICC. *Situation in Ukraine*: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova. Press Release: 17 March 2023. The Hague: ICC, 2023. Available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and. Access in: 08 july 2023.

Both Putin and Lvova-Belova have been charged with committing a crime individually, jointly or through another person (article 25(3)(a)). Additionally, Putin has been charged under article 28(b) for failing to properly control civilian and military subordinates who committed or allowed the commission of these acts[60], corresponding to command responsibility[61]. In addition, Khan has stated that «most acts in this pattern of deportations were carried out in the context of the acts of aggression committed by Russian military forces»[62], although there were no charges related to aggression put forth.

The warrant against Putin raises the issue of immunity for Heads of State, a familiar topic to ICL[63]. While state and diplomatic immunities are well-established in International Law[64], the push to end impunity by the hands of international criminal justice[65] has led to the "uneasy revolution"[66] where such immunities do not apply in cases of core crimes. This process has culminated in the ICC issuing warrants of arrest against the former President of Sudan, Omar Hassan Ahmad Al Bashir, in 2009[67] and 2010[68].

While this article does not revisit the legal implications of such decisions[69], the warrant against Al Bashir cannot be seen as a strictt precedent for the warrant against Putin regarding State cooperation obligations. That is because the Sudan situation was referred to the ICC by the UN Security Council, and hence it created an international obligation for all States Parties to the UN, regardless of whether they were also Parties to the Rome Statute[70]. The Ukraine situation was referred by States, which arguably entails a different category of legal obligation[71].

On his statement on the decision of opening an investigation into the situation of Ukraine, the Prosecutor affirmed there was "a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine in relation to the events already assessed during the preliminary examina-

[60] ICC. *Situation in Ukraine*: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova. Press Release: 17 March 2023. The Hague: ICC, 2023. Available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and. Access in: 08 july 2023.

[61] See Robinson's work on a culpability-based justification for command responsibility, in response to the heavy criticism the "should have known" fault standard has received. ROBINSON, Darryl. A Justification of Command Responsibility. *Criminal Law Forum*, v. 28, p. 633-668, 2017.

[62] ICC. *Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova*. Statement: 17 March 2023. The Hague: ICC, 2023. Available at: https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin. Access in: 08 july 2023.

[63] See, for instance, AKANDE, Dapo. The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits. *Journal of International Criminal Justice*, v. 1, n. 3, p. 618-650, dec. 2003; PEDRETTI, Ramona. *Immunity of Heads of State and State Officials for International Crimes*. Leiden: Brill Nijhoff, 2014; PERRONE-MOISÉS, Cláudia. *Direito Internacional Penal*: Imunidades e Anistias. Barueri: Manole, 2012.

[64] AKANDE, Dapo. International Law Immunities and the International Criminal Court. *American Journal of International Law*, v. 98, n. 3, p. 407-433, july 2004.

[65] ROBERTSON, Geoffrey. Ending Impunity: How International Criminal Law Can Put Tyrants on Trial. *Cornell International Law Journal*, v. 38, n. 3, p. 649-671, 2005.

[66] SADAT, Leila Nadya. Heads of state and other government officials before the International Criminal Court: the uneasy revolution continues. *In*: DEGUZMAN, Margaret; OOSTERVELD, Valerie (ed.). *The Elgar Companion to the International Criminal Court*. Cheltenham: Edward Elgar Publishing, 2020. p. 96-127. According to Sadat, the 'uneasy revolution' represents the internationally adopted goal of ending impunity for core crimes, including the establishment of international criminal courts and, more specifically, certain legal innovations towards these goals, such as the non-applicability of jurisdictional immunities for Heads of State in cases of core crimes, as established by article 27 of the Rome Statute.

[67] ICC. Pre-Trial Chamber I. *Warrant of Arrest for Omar Hassan Ahmad Al Bashir*. Situation in Darfur, Sudan in the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir («Omar Al Bashir»). ICC-02/05/01/09. The Hague, 04 March 2009. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01514.PDF. Access in: 27 july 2023.

[68] ICC. Pre-Trial Chamber I. *Second Decision on the Prosecution's Application for a Warrant of Arrest*. Situation in Darfur, Sudan in the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir («Omar Al Bashir»). ICC-02/05-01/09. The Hague, 12 july 2010. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF. Access in: 27 july 2023.

[69] For this end, see, *e.g.*, WILLIAMS, Sarah; SHERIF, Lena. The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court. *Journal of Conflict & Security Law*, v. 14, n. 1, p. 71-92, Spring 2009; KIYANI, Asad. Al-Bashir & the ICC: The Problem of Head of State Immunity. *Chinese Journal of International Law*, v. 12, n. 3, p. 467-508, sep. 2013; SUMMERS, Mark A. Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to the Statute of the International Criminal Court. *Brooklyn Journal of International Law*, v. 31, n. 2, p. 463-493, 2006.

[70] AKANDE, Dapo. The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities. *Journal of International Criminal Justice*, v. 7, n. 2, p. 333-352, may 2009.

[71] CREUZ, Derek Assenço; SQUEFF, Tatiana Cardoso. *Os mandados de prisão contra Vladimir Putin e Maria Lvova-Belova e os seus desdobramentos*. 2023. Available at: https://sites.usp.br/netiusp/pt/os-mandados-de-prisao-contra-vladimir-putin-e-maria-lvova-belova-e-os-seus-desdobramentos/. Access in: 27 july 2023.

tion by the Office"[72]. However, as stated above, so far, the only charges are based on article 8 of the Rome Statute, which regards the commission of war crimes, particularly those inscribed in articles 8(2)(a)(vii), "unlawful deportation or transfer or unlawful confinement", and 8(2)(b)(viii),

> the transfer, directly or indirectly, by the occupying State of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.[73]

A war crime is a breach of international armed conflict law that entails state responsibility, under International Humanitarian Law, and individual criminal responsibility, under ICL[74]. The prosecution of war crimes has been progressively developed and enhanced since the post-Second World War scenario[75], in an increasingly ever-growing interplay between International Humanitarian Law and ICL[76]. According to current international law on the matter, war crimes differ from crimes against humanity on four accounts: they must be committed during an armed conflict; they may be committed against both civilians and enemy combatants; there is no requirement of commission as part of a widespread or systematic attack upon a civilian population; and, consequently, an isolated act could qualify as a war crime[77] (although in order to qualify as a war crime, criminal conduct must be closely related to the hostilities of the armed conflict[78]).[79]

Because articles 8(2)(b) and (e) of the Rome Statute have a mention to the "the established framework of international law" when it refers to "other serious violations of the laws and customs applicable in international armed conflict", some offences should be considered as war crimes for the purposes of the Statute only if they are regarded as such by Customary International Law. Hence, for example, the unlawful transfer or deportation of population (article 8(2)(b)(viii)) cannot be *ipso facto* be regarded as a war crime because the ICC will first have to establish whether under International Law they are considered as breaches of International Humanitarian Law[80], and whether their commission amounts to a war crime[81].

While the elements of article (8)(2)(a)(vii) were ascertained with relative ease, prohibiting all forcible transfers as well as deportations of protected persons from an occupied territory, the elements of article 8(2)(b)(viii) faced tough negotiations before reaching an agreement, with the final product reproducing the statutory language[82]. Forcible displacement may amount to

[72] ICC. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine*: "I have decided to proceed with opening an investigation". The Hague: ICC, 2022. Available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening. Access in: 05 july 2023.

[73] ROME Statute of the International Criminal Court. Rome, 1998.

[74] BOAS, Gideon; BISCHOFF, James L.; REID, Natalie L. *Elements of Crimes Under International Law*. Cambridge: Cambridge University Press, 2008. (International Criminal Law Practitioner Library Series). p. 215.

[75] MERON, Theodor. Reflections on the Prosecution of War Crimes by International Tribunals. *American Journal of International Law*, v. 100, n. 3, p. 551-579, 2006.

[76] SASSÒLI, Marco. Humanitarian Law and International Criminal Law. *In*: CASSESE, Antonio (ed.). *The Oxford Companion to International Criminal Justice*. Oxford: Oxford University Press, 2009. p. 111-120.

[77] So long as such single, isolated incident occurs in the context of an armed conflict, there is no general requirement under International Customary Law that a war crime takes place in the context of a widespread or systematic attack. However, a jurisdictional limitation was incorporated into the war crimes provision of the Rome Statute, limiting the Court's jurisdiction: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". ROME Statute of the International Criminal Court. Rome, 1998. article 8(1). This is a "product of a complex process of negotiation between States" and reflect "the compromises inherent in the process which created it". CULLEN, Anthony. War crimes. *In*: SCHABAS, William A.; BERNAZ, Nadia (ed.). *Routledge Handbook of International Criminal Law*. London/New York: Routledge, 2011. p. 139-153. p. 148.

[78] CASSESE, Antonio; GAETA, Paola (ed.). *Cassese's International Criminal Law*. 3. ed. Oxford: Oxford University Press, 2013. p. 77.

[79] METTRAUX, Guénaél. *International Crimes and the Ad Hoc Tribunals*. Oxford: Oxford University Press, 2006. p. 320-324.

[80] Grave breaches of International Humanitarian Law constitute war crimes. This logic is applicable in situations of international armed conflict, as well as to situations in which conflict breaks out on the territory of a State when a third State sends in its troops or one of the parties acts in the interests of another State has overall control over it. However, situations of internal unrest and strife are not generally covered by this system, unless such "protracted armed violence takes place between governmental authorities and organized armed groups or between such groups". GUTIERREZ POSSE, Hortensia D. T. The relationship between international humanitarian law and the international criminal tribunals. *International Review of the Red Cross*, v. 88, n. 861, p. 65-86, mar. 2006. p. 85-86.

[81] GARRAWAY, Charles. War Crimes. *In*: WILMSHURST, Elizabeth; BREAU, Susan (ed.). *Perspectives on the ICRC Study on Customary International Humanitarian Law*. Cambridge: Cambridge University Press, 2009. p. 377-398. p. 397; CASSESE, Antonio; GAETA, Paola (ed.). *Cassese's International Criminal Law*. 3. ed. Oxford: Oxford University Press, 2013. p. 81.

[82] DÖRMANN, Knut. War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes. *In*: VON BOGDANDY, Armin;

a war crime and/or a crime against humanity (article 7(1)(d)) under the Rome Statute; deportation "presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State"[83].

The *actus reus* of unlawful deportation or forced transfer of population is "(1) the displacement of persons by expulsion or other coercive acts; (2) without grounds permitted under international law; (3) from an area in which they are lawfully present"[84]. While reviewing the ruling on *Stakić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) determined there was no requirement of intent that this removal was permanent[85].

Insofar there was no charge put forth based on article 7, which regard the commission of crimes against humanity, the elements of forcible displacement are similar regardless of what crime they are framed as[86]. Although the concept of the protection and enforcement of "the laws of humankind" through international pathways is reminiscent of the 20th century[87], the current notion of crimes against humanity under the Rome Statute is more detailed than previous definitions and positively builds from previous experiences, in the sense that it does not require any nexus to armed conflict nor it requires proof of discriminatory motive[88].

The working definition of crimes against humanity presented by the Rome Statute picks up from where the ICTY Statute and the work of the Tribunal left off and provides a definition that takes into consideration the existence of a widespread or systematic attack against a civilian population and the mental state of the individual defendant[89]. Therefore, with regard to forced transfer or unlawful deportation, the main difference is a crime against humanity must be committed in a context of a systematic or widespread against a civilian population, while a war crime must be committed as part of a plan or policy or as part of a large-scale commission of such crimes in the context of an armed conflict. This means the Prosecutor's Office could still present charges of crimes against humanity against Putin, Lvova-Belova or other people involved in the Ukraine situation, as already hinted by Khan himself[90].

WOLFRUM, Rüdiger (ed.). *Max Planck Yearbook of United Nations Law*. Heidelberg: Max Planck Institute for Comparative Public Law and International Law, 2003. v. 7. p. 341-407. The author observes some of the questions raised during negotiations were «Is this crime limited to forcible transfers, although the Statute uses the formulation «transfer, directly or indirectly»?», «Is this crime limited to a transfer of population on a large scale?», «Must the economic situation of the local population be worsened and their separate identity be endangered by the transfer?», and «What link must be between the perpetrator and the Occupying Power?», which demonstrate the intrinsically complex and multilayered nature of forcible displacement under International Humanitarian Law and, more generally, under International Criminal Law.

[83] ICTY. *Prosecutor v. Krstić, Case No. IT-98- 33-T*. Judgement. Arusha, 02 August 2001. Available at: https://www.refworld.org/cases,ICTY,414810d94.html. Access in: 09 july 2023. para. 521. However, the ICTY has adopted a flexible interpretation of the cross-border requirement in the same ruling: "The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country, as illustrated in Article 49 of Geneva Convention IV and the other references set out above. Customary international law also recognises that displacement from 'occupied territory', as expressly set out in Article 49 of Geneva Convention IV and as recognised by numerous Security Council Resolutions, is also sufficient to amount to deportation. The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law." (para. 300).

[84] BOAS, Gideon; BISCHOFF, James L.; REID, Natalie L. *Elements of Crimes Under International Law*. Cambridge: Cambridge University Press, 2008. (International Criminal Law Practitioner Library Series). p. 68-75.

[85] ICTY. *Prosecutor v. Stakić, Case No. IT-97-24-A*. Judgement. Arusha, 22 March 2006. Available at: https://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf. Access in: 09 july 2023. para. 305-307.

[86] There are three elements particular to the crime against humanity of deportation or forcible transfer of population: (i) the perpetrator deported or forcibly transferred, without grounds permitted under International Law, one or more persons to another State or location, by expulsion or other coercive acts; (ii) such person or persons were lawfully present in the area from which they were so deported or transferred; (iii) awareness by the perpetrator of the factual circumstances that established the lawfulness of such presence. Regarding the war crime of unlawful deportation and transfer, there are also three specific elements: (i) the perpetrator deported or transferred one or more persons to another State or to another location; (ii) such person or persons were protected under one or more of the Geneva Conventions of 1949; and (iii) the perpetrator was aware of the factual circumstances that established that protected status. ICC. *Elements of Crimes*. The Hague: ICC, 2011.

[87] See BASSIOUNI, M. Cherif. Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining – the Need for a Specialized Convention. *In*: SADAT, Leila Nadya (ed.). *Forging a Convention for Crimes Against Humanity*. Cambridge: Cambridge University Press, 2011. p. 43-58.

[88] ROBINSON, Darryl. Defining "Crimes Against Humanity" at the Rome Conference. *American Journal of International Law*, v. 93, n. 1, p. 43-57, 1999.

[89] VAN SCHAACK, Beth. The Definition of Crimes Against Humanity: Resolving the Incoherence. *Columbia Journal of Transnational Law*, v. 37, p. 787-850, 1999.

[90] The statement includes the following excerpt: "We will not hesi-

Even though the issuance of the warrant of arrest against Lvova-Belova and, more importantly, Putin was received with great appraisal[91], there is doubt and even disbelief as to whether this warrant will have any practical effect and what is behind the charges put forth[92]. The next section seeks to provide a critical assessment of the situation, taking into consideration the ICC's role in promoting international peace and justice throughout its 25 years of operation and the role of international politics in the Court's (lack of) success in achieving its objective "to put an end to impunity for the perpetrators of" the "most serious crimes of concern to the international community"[93].

4 The Putin-Belova warrants of arrest in the light of the ICC's selectivity

As mentioned, the arrest warrants issued against Putin and Belova do not appear unreasonable from a normative perspective. It is well grounded in the ICC Statute and refers to a conflict that has evidently attracted international interest both for its gravity and consequences.

In fact, the cruelty and inhumanity of the ongoing war are worthy of mention. The numbers by official[94] and unofficial[95] bodies indicate a high number of victims and substantive material destruction. Forcibly displaced persons due to the conflict also came in huge waves and the resulting humanitarian crises are sensitive[96]. The economic effects of the war are substantial and spread across the entire world[97]. Furthermore, the forced transfer of children is certainly a serious crime against which the international community must unite. Having verified the occurrence of these facts, there would be little doubt about the possibility of criminal liability for those involved, even though not ignoring possibly justifying issues in legal, cultural or social fields that may be interrelated.

However, in addition to the particular position of the ICC against the immunity of Heads of State under its jurisdiction[98], already mentioned above (a position that is not yet pacified in International Law and which

tate to submit further applications for warrants of arrest when the evidence requires us to do so". ICC. *Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova*. Statement: 17 March 2023. The Hague: ICC, 2023. Available at: https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin. Access in: 08 july 2023.

[91] See, generally, the mainstream media's reaction: ROBERTSON, Nic. Putin's world just got a lot smaller with the ICC's arrest warrant. *CNN*, 19 March 2023; Putin arrest warrant: Biden welcomes ICC's war crimes charges. *BBC News*, 18 March 2023; BEAUMONT, Peter. What does the ICC arrest warrant for Vladimir Putin mean in reality? *The Guardian*, 17 March 2023; RICHARD, Lawrence. Zelenskyy: Putin's arrest warrant marks 'turning point,' he'll be held responsible for 'every destroyed life'. *Fox News*, 20 March 2023; LANDLER, Mark. Arrest Warrant From Criminal Court Pierces Putin's Aura of Impunity. *The New York Times*, 17 March 2023; EEAS PRESS TEAM. Russia/Ukraine: Statement by the High Representative following the ICC decision concerning the arrest warrant against President Putin. *European Union External Action*, 19 March 2023.

[92] See, for example, LAW, Tara. The ICC Has Issued a Warrant for Vladimir Putin. Will He Actually Be Arrested? *Time*, 17 March 2023; Russian attacks continue after ICC arrest warrant for Putin. *AlJazeera*, 18 March 2023; CORDER, Mike. War-crimes warrant for Putin could complicate Ukraine peace. *ABC News*, 02 April 2023; CAPLAN, Russell. Arrest warrant for Putin only exposes the cowardice of the ICC. *The Guardian*, 21 March 2023.

[93] ROME Statute of the International Criminal Court. Rome, 1998. Preamble.

[94] ICC. Office of the Prosecutor. *Report on Preliminary Examination Activities*. The Hague: Office of the Prosecutor, 2020. p. 69-70. Available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf. Access in: 30 july 2023. p. 69-70.

[95] FAULCONBRIDGE, Guy. *Ukraine war, already with up to 354,000 casualties, likely to last past 2023 - U.S. documents*. 2023. Available at: https://www.reuters.com/world/europe/ukraine-war-already-with-up-354000-casualties-likely-drag-us-documents-2023-04-12/. Access in: 30 july 2023.

[96] Data from UNHCR shows there are more than 6 million forcibly displaced persons fleeing from the war. UNHCR. *Operational Data Portal - Ukraine Refugee Situation*. New York: UNHCR, [2023] [last updated: 25 July 2023]. Available at: https://data2.unhcr.org/en/situations/ukraine. Access in: 01 aug. 2023.

[97] "The outlook for global acute food insecurity in 2022 is expected to deteriorate further relative to 2021. In particular, the unfolding war in Ukraine is likely to exacerbate the already severe 2022 acute food insecurity forecasts included in this report, given that the repercussions of the war on global food, energy and fertilizer prices and supplies have not yet been factored into most country-level projection analyses". FAO. *2022 Global Report on Food Crises*. Rome: FAO, 2023. Available at: https://www.fao.org/3/cb9997en/cb9997en.pdf. Access in: 30 july 2023.

[98] "The effect of absence of a rule of customary law recognising Head of State immunity, in relation to international courts, is not readily avoided through the backdoor: by asserting immunity that operates in the horizontal relationship between States, in a manner that would effectively bar an international court from exercising its jurisdiction over the person whose arrest and surrender it has requested. The law does not readily condone to be done through the back door something it forbids to be done through the front door". ICC. Appeals Chamber. *Judgment of the Appeals Chamber in The Prosecutor v Al-Bashir*. Summary of 6 May 2019. The Hague: ICC, 2019. para. 40. Available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/Jordan-Summary-Al-Bashir-Judgment.pdf. Access in: 30 july 2023. para. 40.

was widely criticized[99]), there are some hard questions regarding the Putin-Belova warrants of arrest which are not connected to the normative adequacy, but refer to questions of political nature, intrinsically bound to international criminal justice. Firstly, the investigation was carried out with astonishing speed when compared to other cases. Moreover, the choice of this particular situation to be handled on such an urgent basis and ahead of many other cases that were waiting for the ICC's attention and resources has sparked debate. One could wonder about the convenience of the Court's quick action in such a delicate political and military context.

The agility of the ICC's reaction to point out criminal responsibilities in a conflict that is still ongoing draws attention. The Prosecutor's decision to request authorisation for investigations took place, as it turned out, in March 2022[100], a few days after the Russian invasion of Ukrainian territory. It is true that preliminary analyses, according to the OtP, were already being carried out since 2014 and that the Prosecutor had previously informed the international community on the appropriateness of investigations[101]. Even so, however, the facts that gave rise to the arrest warrant, it seems, are not facts from that period, but from occurrences that took place from 24 February 2022 on, which would make all previous investigative work rigorously unnecessary.

The haste of the ICC is notable. In other cases, preliminary investigations took years and did not always conclude for the existence of criminal responsibility – or, at least, did not culminate in the request of arrest warrants – in such short notice. It is curious that in the short span of 12 months (if the Russian invasion is considered as the starting point; if one departs from the Prosecutor's request for investigation, it would be only one month) the OtP has been convinced of the responsibility of Putin and Belova regarding the commission of important and complex crimes, while in other cases, years have passed without the issuance of arrest warrants by the Court. Investigations into facts that allegedly took place in Burundi from April 2015 were only authorised in October 2017 (although preliminary investigations took place from April 25, 2016)[102]; crimes occurring in Bangladesh/Myanmar would have taken place since June 2010, especially in 2016 and 2017, but the investigation was authorised in November 2019 (although requested on 04 July 2019)[103]; crimes in the Philippines, which occurred from November 2011, started to be investigated in May 2021 and had their investigation authorised from September 15, 2021[104]; facts that occurred within Venezuelan territory since April 2017 gave rise to a referral by State Parties in September 2018 – such referral was notified to the Pre-Trial Chamber in April 2022, and in June 2023, the investigation (requested by the Prosecutor in November 2022) was authorised[105]. In any of these cases the ICC is yet to issue a warrant of arrest.

These are just a few cases that could be mentioned, but there are others known situations that are particularly more sensitive. In the situation of the Palestine, for example, which would be the object of the ICC for crimes committed since January 2015, the Prosecutor reported starting investigations in January 2015, but only in December 2019 did the Prosecutor's Office mentioned that "given the complex legal and factual issues attaching to this situation, […] she would be making a request to Pre-Trial Chamber I for a ruling to clarify the territorial scope of the Court's jurisdiction in this Situation"[106]. In other words: after years of investigation, even the OtP could not define whether the ICC had jurisdiction over that complicated situation. The Palestine situation has progressed mainly due to the es-

[99] See AKANDE, Dapo. *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*. EJIL: Talk!, May 6, 2019.

[100] ICC. *Situation in Ukraine*. ICC-01/22. The Hague: ICC, 2022. Available at: https://www.icc-cpi.int/situations/ukraine. Access in: 05 july 2023.

[101] ICC. *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*. Press Release: 11 December 2020. The Hague: ICC, 2020. Available at: https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine. Access in: 30 july 2023.

[102] ICC. *Situation in the Republic of Burundi (ICC-01/17)*. The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/burundi. Access in: 30 july 2023.

[103] ICC. *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (ICC-01/19)*. The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/bangladesh-myanmar. Access in: 30 july 2023

[104] ICC. *Situation in the Republic of the Philippines (ICC-01/21)*. The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/philippines. Access in: 30 july 2023

[105] ICC. Situation in the Bolivarian Republic of Venezuela I (ICC-02/18). The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/venezuela-i. Access in: 30 july 2023.

[106] ICC. Situation in the State of Palestine (ICC-01/18). The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/palestine. Access in: 30 july 2023.

calation of the conflict since 7 October and, arguably, the renewed international attention on the case.

In the Georgia situation, crimes within the jurisdiction of the ICC would have been committed at least since July 2008 (especially from July to August of that year). Even though the investigating body announced the start of its preliminary investigations in August 2008[107], it was only in October 2015 that the Prosecutor requested authorisation for investigation, which was only granted by the Pre-Trial Chamber in January 2016. One should mention that in both the Palestine and Georgia situations, powerful countries were directly involved and thus could hamper ICC investigative intentions. Nevertheless, the blatant speed divergence in preliminary investigating and issuing arrest warrants is embarrassing for the ICC. More transparent and precise time criteria could potentially avoid this perception[108].

It can be argued that most of those "less prestigious" cases are conducted *proprio motu* by the ICC Prosecutor, based on article 15 of the Rome Statute, and therefore demand greater care and attention – hence more time for the investigation. On the other hand, the Ukraine situation, referred by States-Parties (under article 13(a) of the Statute), would call for a more expeditious treatment. However, the Venezuela situation was also referred by a coalition of States-Parties and, thus, should not be treated differently than the situation in Ukraine[109]. In other words, the ICC's agility when dealing with the Ukraine situation (especially that of the OtP), draws attention and this factor cannot be neglected.

In addition to time, one could wonder why not only urgency, but priority was given to the situation in Ukraine. There is a notorious long queue of cases waiting for the ICC to act. Some of them have been waiting for almost fifteen years, such as the situation in Afghanistan. In this situation, crimes would have been committed since May 2003 and the ICC Prosecutor's Office had been preliminarily investigating since 2007. Even so, it requested authorisation for an investigation only in November 2017[110]. The Appeals Chamber authorised the investigation[111], but only after reversing the Pre-Trial Chamber II's decision of April 2019, which rejected the Prosecutor's request solely based in discussions around the difficult topic of the interest of justice[112]. One should not forget, also, the final position of the new Prosecutor on the situation: it is hard to believe that choosing to prosecute only certain groups, mainly the poor and less powerful ones, is in the interests of justice[113].

This delay by the ICC – which risks jeopardising the investigation, given the fact that evidence also deteriorates and tends not to be preserved over time[114]– sharply contrasts with the sense of urgency and priority given to other situations, like Ukraine. This problem should have been raised before in at least one other similar situation, in which something similar occurred. In the context of the Arab Spring, the Libyan situation also triggered a hasty ICC investigation. The conflict started in the aftermath of political manifestations against Muammar Gaddafi around February 2011 and his dic-

[107] ICC. Situation in Georgia (ICC-01/15). The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/georgia. Access in: 30 july 2023.

[108] KOTECHA, Birju. The International Criminal Court's Selectivity and Procedural Justice. *Journal of International Criminal Justice*, v. 18, n. 1, p. 107-139, mar. 2020. p. 137.

[109] ICC. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the referral by a group of six States Parties regarding the situation in Venezuela of 27 September 2018*. Statement: 27 September 2018. The Hague: ICC, 2018. Available at: https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-referral-group-six-states. Access in: 30 july 2023.

[110] ICC. *Situation in the Islamic Republic of Afghanistan (ICC-02/17)*. The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/afghanistan. Access in: 30 july 2023; ICC. Office of the Prosecutor. Public redacted version of "Request for authorisation of an investigation pursuant to article 15" of 20 November 2017. ICC-02/17-7-Conf-Exp. Doc. n. ICC-02/17-7-Red. The Hague: ICC, 2017.

[111] ICC. Appeals Chamber. *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*. ICC-02/17-138. The Hague, 05 March 2020. Available at: https://www.icc-cpi.int/court-record/icc-02/17-138. Access in: 30 july 2023.

[112] ICC. Pre-Trial Chamber II. *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*. ICC-02/17. The Hague, 12 Abril 2019. Available at: https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33. Access in: 30 july 2023.

[113] ICC. *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*. Statement of 27 September 2021. The Hague: ICC, 2021. Available at: https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application. Access in: 30 july 2021.

[114] The pre-trial Chamber already used this argument when rejecting the investigation in Afghanistan in a very clumsy way that could endanger the rule present in article 29 of the ICC. Pre-Trial Chamber II. *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*. ICC-02/17. The Hague, 12 Abril 2019. Available at: https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33. Access in: 30 july 2023. par. 93.

tatorial government ended overthrew in August of the same year. A transitional government was widely recognised in September 2011[115]. The situation was referred to the Prosecutor in February 2011 by the Security Council[116] and investigations started almost immediately, in March 2011. Arrest warrants were issued already on 27 June 2011 against Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. The ICC expeditious action pointed out the criminal responsibility of a Head of State who was still fighting against rebels largely supported by a coalition of Western States, mainly Europeans – all of this took place before the end or stabilization of the conflict[117].

The fact that it was a referral by the Security Council could perhaps justify the swiftness of the Prosecution. After all, it should be noted that the same urgency could not be identified in a third case. When the Security Council referred in March 2005 its first situation, Darfur (Sudan), the investigation started in July 2005[118], but the first arrest warrant was issued years later, in April 2007[119], followed by many others (including one against the former president Al-Bashir), always with a substantial delay.

There is clear risk that political interests have been playing a role behind the choices of the OtP since there are no clear criteria to guide the choice of which situations should be pushed forward and which situations deserve to wait – something that has already been criticised[120]. It is especially disturbing that it seems to exist perfect unison between the choices of the ICC and the interests of the Global North[121].

In addition to the delay in the Afghanistan situation (besides the frustration given the Prosecutor's selectivity), the Libya and the Ukraine situations should also draw attention to external influence. The political pressure exerted by the United States on the ICC due to the Afghanistan investigation cannot go unnoticed[122]. Perhaps this political pressure was the reason for both the delay and selectivity in the situation? Libya and Ukraine, situations handled with extreme haste when compared to other situations in the ICC's pool of cases, as demonstrated before, are also of interest to the Europe-US axis. In Libya, the support of Europe[123], USA and NATO in favour of Gaddafi's regime overthrow was openly signalled[124] with the dispatch of weapons,

115 UN. General Assembly Meeting Coverage. *After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country's Representative for Sixty-Sixth Session*. GA/11137. New York: UN, 2011. Available at: https://press.un.org/en/2011/ga11137.doc.htm. Access in: 30 july 2023.

116 UN. Security Council. *Resolution 1970 (2011)*. S/RES/1970 (2011). New York: UN, 2011. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement. Access in: 30 july 2023.

117 The unfolding of the process was, as is known, even more delicate. The debate between the Libyan government and the ICC that followed the opening of the case produced strains both within the ICC and in international relations, and certainly undermined the Court's authority. The Public Prosecutor's unrestricted and poorly regulated freedom of action was central to this problematic issue. And, at the end of the day, the accused have not yet been prosecuted by the ICC. See: ROACH, Steven C. How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy. *Global Governance*, v. 19, n. 4, p. 507-523, 2013. p. 516.

118 ICC. *Situation in Darfur, Sudan (ICC-02/05)*. The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/darfur. Access in: 30 july 2023.

119 The arrest warrant in Harun case was issued on 27 April 2007; in Al Bashir case, on 12 July 2010; in Hussein case, on 1st March 2012. ICC. *Situation in Darfur, Sudan (ICC-02/05)*. The Hague: ICC, [2023]. Available at: https://www.icc-cpi.int/darfur. Access in: 30 july 2023.

120 REYNOLDS, John; XAVIER, Sujith. 'The Dark Corners of the World': TWAIL and International Criminal Justice'. Journal of International Criminal Justice, v. 14, n. 4, p. 959-983, sep. 2016; KIYANI, Asad G. Third World Approaches to International Criminal Law. AJIL Unbound, v. 109, p. 255—259, 2015. A counter-critique, albeit related to the Ukraine situation, can be found in LABUDA, Patryk I. Beyond rhetoric: Interrogating the Eurocentric critique of international criminal law's selectivity in the wake of the 2022 Ukraine invasion. *Leiden Journal of International Law*, FirstView, p. 1-22, 2023.

121 In this sense, Justice Radhabinod Pal has done sterling work on the IMT for the Far East, denouncing the Japanese prosecutions as "vindictive retaliation", and stressing how impunity is reliant on position in the international system and the political agenda that surrounds it. CANTUÁRIA, Christian L. S.; SQUEFF, Tatiana C. De Radhabinod Pal ao TPI: reflexões sobre a responsabilidade penal internacional individual e a colonialidade no ordenamento internacional. *In*: BORGES, Alexandre W.; GASPAR, Renata A. (coord.); CASTRO, Felipe S. V. *et al.* (org.). *Uma releitura do DIN a partir do Sul*: Direito, Globalização e Cidadania - um tributo ao centenário de Paulo Freire. Uberlândia: LAECC, 2022. p. 41-61.

122 MORELLO, Carol. *U.S. will not give visas to employees of the International Criminal Court*. 2019. Available at: https://encurtador.com.br/lBLZ1. Access in: 30 july 2023; JOHN Bolton threatens ICC with US sanctions. 2018. Available at: https://www.bbc.com/news/world-us-canada-45474864. Access in: 30 july 2023.; SIMONS, Marlise; SPECIA, Megan. U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes. *NY Times*, 05 apr. 2019. Available at: https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html. Access in: 30 july 2023.

123 There is even a perceptible "Europeanization" of Ukraine both in the media and in science, which serves to reinforce Western values. VORBRUGG, Alexander; BLUWSTEIN, Jevgeniy. Making sense of (the Russian war in) Ukraine: On the politics of knowledge and expertise. *Political Geography*, v. 98, 102700, 2022.

124 EU. *Statement of the European Union High Representative for Foreign Affairs and Security Policy of 15 July. 2011*. Brussels: EU, 2011. Available at: https://www.consilium.europa.eu/uedocs/cms_Data/docs/

direct support and Security Council sanctioned bombings[125]. The triggering of the ICC jurisdiction came early to the stage, right with the first Security Council Resolution on the matter[126].

Likewise, there was open European support to Ukrainian forces, which took different forms in this conflict: weapons and training, but also information, money and embargoes that pushed forward the Ukrainian army against Russia. Arguably, it could not be any different as Putin's country expansion in direction of Western European territory is a potential threat to the political arrangements designed after the Cold War. It also compromises both the division of powers that drive European politics and traditional values essential to the European way of life. This is why classifying the president of Russia as a criminal (more than that: a war criminal) could represent a strong juridical blow able to legitimise European-American positions[127].

It cannot go overlooked that each situation comes with its own context and surrounding external disparities such as geopolitical dynamics and scale of conflict. The ICC factors in such differences while investigating international crimes, which undoubtedly leads to different approaches in terms of time, resources and personnel allocation. Yet, it is precisely such attention to context that proves and somewhat justifies criminal selectivity: such urgency and priority given to the Ukrainian case is not legally, but politically justified. There is a political context riddled with complex dynamics that is taken into consideration by the ICC (particularly by its Prosecutor) and results in choosing or prioritising some cases over others.

Needless to say, there are a plethora of reasons contributing to the duration of a case – issues regarding evidence, State cooperation and so on. However, such precise assessment is not readily accessible. While evidence issues (such as availability or access) might lead to delays in any specific case, the question remains whether a (political) decision could have been made to dedicate investigate efforts to address this problem. Furthermore, the disparity in delays is so significant that the delay itself could become the reason a case does not move forward, for example, due to the loss of evidence. The fact is: although many arguments can be made to justify the Prosecution's actions, few of them can be genuinely, let alone concretely verified.

From this perspective, therefore, the arrest warrant issued by the ICC would be extremely convenient and would justify both the urgency and the selectivity of the Court in the case. Moreover, one could also disapprove the institutional positioning adopted by the ICC in the case. After all, the fact that in the midst of an international conflict and about two weeks after the issuance of an arrest warrant against the leader of one of the parties in the war – precisely the one that puts the interests of the so-called Western world at risk – the President of the ICC (from Polish origin) meets and poses for pictures with the leader of the other party, the Ukrainian President, as occurred on 04 May 2023[128], does not give it a good look of an impartial justice system.

pressdata/EN/foraff/123891.pdf. Access in: 26 july 2023; UNIÃO Europeia abre escritório em reduto de rebeldes na Líbia. *G1*, maio 2011. Available at: https://g1.globo.com/mundo/noticia/2011/05/uniao-europeia-abre-escritorio-em-reduto-de-rebeldes-na-libia.html. Access in: 30 july 2023. In defense of the European position, see: STAVRIDIS, Stelios. "EU incoherence and inconsistency over Libya": evidence to the contrary. *Cahiers de la Mediterranée*, n. 89, p. 159-179, 2014. About the different interests on the Libyan war, see also: ROBINSON, Kali. Who's Who in Libya's War? *In*: *Council of Foreign Relations*, 18 June 2020.

[125] UN. Security Council. *Resolution 1970 (2011)*. S/RES/1970 (2011). New York: UN, 2011. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement. Access in: 30 july 2023; UN. Security Council. *Resolution 1973 (2013)*. S/RES/1973 (2011). New York: UN, 2011.

[126] UN. Security Council. *Resolution 1970 (2011)*. S/RES/1970 (2011). New York: UN, 2011. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement. Access in: 30 july 2023.

[127] See STRUETT, Michael J. The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court. *In*: ROACH, Steven C. (ed.). *Governance, Order, and the International Criminal Court*: Between Realpolitik and a Cosmopolitan Court. Oxford: Oxford University Press, 2009. p. 107-132 (on how the flexible design of the ICC advances the procedural aspects of legitimacy through the discursive dynamics of prosecutorial authority and discretion). On legal discourse as legitimation in the international arena, see, *e.g.*, STEFFEK, Jens. The Legitimation of International Governance: A Discourse Approach. *European Journal of International Relations*, v. 9, n. 2, p. 249-275, june 2003; BILLERBECK, Sarah von. No action without talk? UN peacekeeping, discourse, and institutional self-legitimation. *Review of International Studies*, v. 46, n. 2, p. 477-494, Oct. 2020; NUÑEZ-MIETZ, Fernando G. Legalization and the Legitimation of the Use of Force: Revisiting Kosovo. *International Organization*, v. 72, n. 3, p. 725-757, 2018.

[128] ICC. *President of Ukraine visits International Criminal Court*. Press Release of 04 May 2023. The Hague: ICC, 2023. Available at: https://www.icc-cpi.int/news/president-ukraine-visits-international-criminal-court. Access in: 26 july 2023.

Even if it is not possible to scrutinise the reasons of the OtP (and even those of the ICC in general) to affirm that the Court chose cases taking Western political interests into consideration, it cannot be ignored that in both situations the interest of powerful countries in the issuance of the arrest warrants was blatant. When an apparent pattern of case selection criteria stubbornly coincides with the interests of some specific countries, particularly those in the West, the international community needs to be alert to the risk that the international criminal justice system may not be as impartial as proclaimed.

After all, by choosing one case over others, the ICC is also selecting specific nationalities to protect, particular groups of victims to aid[129], special types of crimes to be deem intolerable (and thus prevented), where to spend huge amounts of financial resources and, of course, which ideologies and political positions are to be promoted.

Indeed, choosing a case is a great responsibility that implies an allocation of time, personnel and scarce resources. This is why picking a situation *in lieu* of another is always a dramatic choice by the Prosecutor who must decide between those who deserve to be protect by the ICC and those who do not deserve this protection (at least, not yet...). It is obvious that the ICC must choose which cases to trial as it is not possible to deal with all the situations that are referred to the Court. However, the lack of (transparent) criteria on the selectivity over which cases are selected[130] is an issue that calls for a clear and urgent solution.

Finally, another issue that needs to be mentioned is that this kind of arrest order could be a catalyst for the escalation of the war. After all, threatened with going to trial in international courts, the Russian leader could be faced with difficult choices and end up choosing to carry on with a conflict that, otherwise, could be extinguished or mitigated by other means – like politics and diplomatic negotiations. Therefore, such measure from the Court's part may lead to more victims, more economical damages and even the installation of a conflict of global proportions with serious risks of the use of unconventional weapons. This is thus an important question to be posed: is the isolation of a nuclear power, created by an arrest warrant, a risk worth taking?

Imagine the dilemma faced by a country that receives a visit from the President of Russia and that, at the same time, is part of the ICC: either it fails to comply with its international obligation and is subject to the mild sanctions that the Court may impose[131] or it carries out the arrest warrant and triggers a response, probably of military and potentially nuclear nature, from one of the world's greatest powers. This issue will probably surface very soon[132].

There is yet an alternative outcome that this arrest warrant may have no effect at all. The ICC and the legal community should be deeply concerned about that, as the absolute ineffectiveness of such an order would imply a tacit acknowledgment (and confirm the suspicion of most critical scholars) that the ICC is unable to enforce its rulings when the interests of powerful countries are at stake[133]. If cooperation with the ICC

[129] KIYANI, Asad. Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity. *Journal of International Criminal Justice*, v. 14, n. 4, p. 939-957, sep. 2016. To the author, group-based selectivity focuses on the group identity during the exercise of discretionary decision-making in the tribunal, *i.e.* "on differential prosecutions of similarly-situated offenders within states and situations".

[130] The OtP has published policy papers on case selection and prioritisation and the interests of justice. However, they are both broad and indeterminate, and cannot reasonably suppress the lack of transparency critique. ICC. Office of the Prosecutor. *Policy paper on case selection and prioritisation*. The Hague: ICC, 2016. Available at: https://www.icccpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_CaseSelection_Eng.pdf. Access in: 31 july 2023; ICC. Office of the Prosecutor. *Policy Paper on the Interests of Justice*. The Hague: ICC, 2007. Available at: https://www.icccpi.int/sites/default/files/ICCOTPInterestsOfJustice.pdf. Access in: 31 july 2023.

[131] Regarding the responses of the Court on the non-compliance of some states with cooperation in the Al-Bashir case, see the following decisions: ICC. Pre-Trial Chamber I. Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09-139-Corr. The Hague, 12 December 2011; ICC. Pre-Trial Chamber II. Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir. ICC-02/05-01/09. The Hague, 26 March 2013; ICC. Appeals Chamber. Judgement in the Jordan Referral re Al-Bashir Appeal. ICC-02/05-01/09 OA2. The Hague, 06 Mayo, 2019.

[132] JACKSON, Miles. *The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova – An Outline of Issues*. 2023. Available at: https://www.ejiltalk.org/the-icc-arrest-warrants-against-vladimir-putin-and-maria-lvova-belova-an-outline-of-issues/. Access in: 30 july 2023.

[133] HOROVITZ, Sigall; NOAM, Gilad; SHANY, Yuval. The International Criminal Court. *In*: SHANY, Yuval (ed.). *Assessing the Effectiveness of International Courts*. Oxford: Oxford University Press, 2014. p. 223-252.

is merely occasional, solely possible whenever citizens of poorer States or those who are not backed up by a superpower, a major part of the objectives described in the preamble of the Rome Statute would be dead letter. That would lead to the collapse of trust in the Court's ability of delivering justice, and the confirmation of its fierce selectivity would confirm that its performance is, in fact, episodic at best.

The question that remains is whether there is something to be done in the face of this worrisome selectivity. The next section discusses this characteristic as historical and inevitable to the international criminal justice. Firstly, it looks upon the normative instruments of international criminal courts designed to tackle this problem. Then, selectivity is discussed (i) under the light of the political dimension of International Law, and then (ii) as a natural element of criminal punishment.

5 The ICC's selectivity as a historical (and unavoidable) international criminal justice issue

The criticism to the apparent selectivity of the ICC is notorious and does not seem to have been adequately addressed by the Court's defenders[134]. A historical analysis of international criminal justice appears to demonstrate a certain inevitability of this selectivity, and a critical understanding of both Public International Law and punishment itself might offer important insight into the matter.

Selectivity is not merely a byproduct of the international criminal justice system, but instead a fundamental and structural feature. It impacts the creation and application of international criminal norms[135] despite raising issues about fair selection decisions, such as disproportionate focus on certain regions, one-sided criminal responsibility and impunity for some individuals[136]. While it is seen as an unavoidable feature of ICL[137], selectivity may also be justified due to limited resources and the need to prioritize cases based on expressive impact[138], as well as the influence of politics over prosecutorial discretion[139].

5.1 The historical selectivity of international criminal tribunals

The most critical doctrine has constantly stressed the selectivity of international criminal justice[140]. Since Nuremberg, international trials have been designed to target only a fraction of those responsible for universal crimes. In fact, the international community does not seem capable of prosecuting all individuals accountable for such crimes, considering their vast number and the intention of providing subsidiary justice that acts only when States cannot or do not wish to deliver criminal justice. It is within this context that the statutes of international tribunals have always established rules to allow for this voluntary limitation of action. In Nuremberg and Tokyo[141], this limitation was quite evident, and it selected only the highest authorities of the defeated countries as subject to criminal accountability.

Selectivity was, therefore, the rule. Although the Allied forces had also committed actions that certainly

134 See: KOTECHA, Birju. The International Criminal Court's Selectivity and Procedural Justice. *Journal of International Criminal Justice*, v. 18, n. 1, p. 107-139, mar. 2020; DEGUZMAN, Margaret M. Choosing to Prosecute: Expressive Selection at the International Criminal Court. *Michigan Journal of International Law*, v. 33, n. 2, p. 265-320, 2012; EZENNIA, Celestine N. The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime? *International Criminal Law Review*, v. 16, n. 3, p. 448-479, 2016.

135 ARMENIAN, Andre V. Selectivity in International Criminal Law: An Assessment of the 'Progress Narrative'. *International Criminal Law Review*, v. 16, n. 4, p. 642-672, 2016.

136 HAFETZ, Jonathan. Fairness, Legitimacy, and Selection Decisions in International Criminal Law. *Vanderbilt Law Review*, v. 50, n. 5, p. 1133-1171, 2017.

137 ZAKERHOSSEIN, Mohammad Hadi. *Situation Selection Regime at the International Criminal Court*: Law, Policy, Practice. Cambridge: Cambridge University Press, 2017.

138 DEGUZMAN, Margaret M. Choosing to Prosecute: Expressive Selection at the International Criminal Court. *Michigan Journal of International Law*, v. 33, n. 2, p. 265-320, 2012.

139 GREENAWALT, Alexander K. A. Justice Without Politics? Prosecutorial Discretion and the International Criminal Court. *N.Y.U. Journal of International Law and Politics*, v. 39, p. 583-673, 2007.

140 See, *e.g.*: PAVARINI, Massimo. La Pena Come 'Fatto Sociale' nel Sistema di Giustizia Penale Internazionale. *IUS17@unibo.it:* studi e materiali di diritto penale, n. 1, p. 191-196, 2008.

141 "...there shall be established an International Military Tribunal […] for the just and prompt trial and punishment of the major war criminals of the European Axis". *Charter of the International Military Tribunal*. London, 1945. Article 1. The limitation in the case of the International Military Tribunal for the Far East is somewhat less expressive and stems from a rather obvious interpretation of the Statute and Special Proclamation of the Supreme Commander for the Allied Powers on January 19, 1946, according to with only Japanese accused would be punished. International Military Tribunal for the Far East. *Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo*. Tokyo: IMTFE, 1946.

deserved investigation for the commission of war crimes or crimes against humanity, the very framework of the tribunals did not allow for such a possibility, and thus, the military tribunals of the Second World War only served to judge the defeated[142]. This was the "Nuremberg syndrome" referred to by Cassese[143]: despite crimes being committed on both sides, justice was wielded only against the losers of the war – and for undoubtedly political purposes.

As for the *ad hoc* tribunals for the former Yugoslavia[144] and Rwanda[145], a set of provisions created a significantly more efficient system of limitations, based on territorial, temporal and/or national criteria[146], combined with a case selection procedure to be carried out by the Prosecution. The Prosecutor would assess and select cases and accused persons based on their impression of the "existence of a sufficient basis to proceed"[147]. In these tribunals, therefore, the Prosecutor conducted a political verification of the cases to be prosecuted and then decided whether or not to submit them to court, making the highest prosecuting authority an important political actor in the international arena[148].

Despite the existence of some limitation, this political power was used quite extensively. There are countless critiques against the Prosecution of the *ad hoc* tribunals due to the selectivity of cases that lacked a legal rationale but seemed politically motivated[149]. In both the former Yugoslavia and Rwanda, crimes appear to have been committed by both sides of the conflict. However, the UN Courts deemed it pertinent to sectorise the prosecution, focusing on specific cases rather than addressing all the alleged crimes[150].

The issue of the former Yugoslavia has prompted some discussion in this regard[151]. First, since the NATO attack on Kosovo was not authorised by the UN Security Council, it could theoretically be characterised as aggression[152] under the jurisdiction of the ICTY. Additionally, there were strong indications of universal crimes committed in the context of the NATO bombings[153]. However, the Tribunal's Prosecutor, instead

142 ZOLO, Danilo. *La Giustizia dei Vincitori:* Da Norimberga a Baghdad. Roma-Bari: Laterza, 2006.

143 *"Ma tutti sanno che Norimberga si macchiò di una grave colpa: vennero processati e puniti solo i vinti. Uno dei 22 imputati riuscì a far parlare dei crimini degli alleati solo di sfuggita. L' ammiraglio Doenitz invocò il principio tu quoque per discolparsi dell' accusa di aver fatto colare a picco dai sottomarini tedeschi le navi commerciali delle Potenze alleate senza previo avvertimento, e di non aver salvato i naufraghi; egli dunque abilmente fece interrogare dalla corte l' ammiraglio statunitense Nimitz, il quale ammise che anche gli americani si erano comportati nello stesso modo*". CASSESE, Antonio. Il Processo a Sadam e i Nobili Fini della Giustizia. *La Repubblica*, 19 ott. 2005. Available at: http://ricerca.repubblica.it/repubblica/archivio/repubblica/2005/10/19/il-processo-saddam-nobili-fini-della-giustizia.html. Access in: 17 july 2023. p. 23.

144 Article 1 of the ICTY Statute: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute". UN. *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*. Geneva: UN, 2009.

145 Article 1 of the Statute of the International Criminal Tribunal for Rwanda: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute". UN. *Statute of the International Criminal Tribunal for Rwanda*. Geneva: UN, 1994.

146 KIRSCH, Phillippe QC; ROBINSON, Darryl. Referral by States Parties. *In*: CASSESE, Antonio, GAETA, Paola; JONES, John R. W. D. (ed.). *The Rome Statute of International Criminal Court*: a commentary. Oxford: Oxford University Press, 2002. v. 1. p. 619-625. p. 625.

147 Article 18 (1) of the International Criminal Tribunal for the Former Yugoslavia and article 17 (1) of the Statute of the International Criminal Tribunal for Rwanda.

148 As mentioned by KÖCHLER, "the prosecutor of these tribunals is de facto a political appointee". KÖCHLER, Hans. *Global Justice or Global Revenge?* International Criminal Justice at the Crossroads. Wien: Springer-Verlag, 2003. p. 23. On the recognition of the need for the wide freedom of the Prosecutor, see Judge Wald's partial dissenting Opinion in *Jelisic*: "Nowhere in the Statute is any chamber of the ICTY – International Criminal Tribunal for the former Yugoslavia - given authority to dismiss an indictment or any count there in because it disagrees with the wisdom of the prosecutor's decision to bring the case…. Any such decision based on 'judicial economy' inevitably reflects judges' views as to which cases are 'worthy' and which are not. That, however, is the job of the prosecutor who must calibrate legal and policy considerations in making her choices on how to utilize limited resources". ICTY. Partial Dissenting opinion of Judge Wald, Judgement. Jelisic case, IT-95-10-A, AC, The Hague, 05 July 2001. para 4.

149 For instance, CRYER, Robert. *Prosecuting International Crimes*: Selectivity and the International Criminal Law Regimes. Cambridge: Cambridge University Press, 2005. p. 213-220.

150 See, *e.g.*: CÔTÉ, Luc. Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law. *Journal of International Criminal Justice*, v. 3, n. 1, p. 162-186, mar. 2005; REYDAMS, Luc. The ICTR Ten Years On: Back to the Nuremberg Paradigm? *Journal of International Criminal Justice*, v. 3, n. 4, p. 977-9888, 2005.

151 ZOLO, Danilo. *La Giustizia dei Vincitori:* Da Norimberga a Baghdad. Roma-Bari: Laterza, 2006. p. 151-152. See, specially: ZOLO, Danilo. Il doppio binario della Giustizia Penale Internazionale. *Jura Gentium* – Rivista di filosofia del diritto internazionale e della politica globale, 2005.

152 See: DISSENHA, Rui Carlo. Do Iraque ao Iraque outra vez: o jus ad bellum no contexto internacional depois de 10 anos da invasão iraquiana. *Revista Jurídica (FIC)*, v. 4, p. 225-248, 2014.

153 HUMAN RIGHTS WATCH. *Civilian Deaths in NATO Air Campain*, v. 12, n. 1 (D), 2000. Available at: http://www.hrw.org/

of creating a new investigation system[154], concluded there was no case against NATO authorities. As a result, the process did not require an in-depth formal investigation[155].

The ICTR followed a similar path. In fact, the experience of international organisations and critical doctrines have already indicated that the conflict in Rwanda was not unilateral genocide, but rather both major groups were involved in mutual acts of genocide[156]. In light of this situation, the Tribunal's Prosecutor openly initiated investigations into other criminal groups (associated with the Tutsi), which contradicted the interests of the government at that time[157]. As an apparent result of this move, the Security Council promptly replaced the Prosecutor[158], leaving the crimes committed by the Rwandese Patriotic Front (RPF) and the Rwandese Patriotic Army (RPA) in the Rwandan context without any investigation.

In response to these difficulties and criticisms of previous experiences, the Rome Statute adopted a much more complex configuration for the selection of cases it intends to handle, which, to some extent, imposes clearer limits on the Prosecutor's discretion in choosing cases[159]. However, even though there are some limitations, the Prosecutor's freedom to choose which cases to prosecute remains the rule.[160]

Article 13 of the Rome Statute indicates that there are three ways for a case to be brought before the Court: by submission of a situation to the Prosecutor by a State Party to the Statute (Article 13(a)) or by the United Nations Security Council (Article 13(b)), and finally, *proprio motu* by the Prosecutor[161], meaning on their own initiative and without having been prompted by a third party (Article 13(c)). Out of the three possibilities, only those where the case is brought before the Prosecutor by a State Party or the UN Security Council are subject to some control – and even then, it is quite limited.

reports/2000/nato. Access in: 17 july 2023; Amnesty International. *NATO/Federal Republic of Yugoslavia - "Collateral Damage" or Unlawful Killings?* Violations of the Laws of War by NATO during Operation Allied Force. Doc. AI Index: EUR 70/18/00. London: Amnesty International, 2000; KÖCHLER, Hans. Memorandum on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by the 'International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. *In*: KÖCHLER, Hans. *Global Justice or Global Revenge?* International Criminal Justice at the Crossroads. Wien: Springer-Verlag, 2003. p. 353-356. p. 355.

154 CÔTÉ, Luc. Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law. *Journal of International Criminal Justice*, v. 3, n. 1, p. 162-186, mar. 2005. p. 181.

155 "On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences". ICTY. Office of the Prosecutor. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*. The Hague: ICTY, 13 June 2000. para. 90. On this topic, from a critical point of view, see CÔTÉ: "The first one resembles what is known as a'non liquet', with the small difference that it arrives even before a Judge is seized of the matter. It made it impossible to settle that question of law in a definite way. As a critic rightfully said: 'Difficulties in interpretation are not good excuse for not starting an investigation.' The second reason – anticipating difficulties to obtain evidence while no investigative means have yet been deployed by the Prosecutor –is even more worrisome and raises serious questions of credibility. The Committee recognized candidly that its sources of information were limited and came essentially from NATO, the organization responsible for the alleged crimes". CÔTÉ, Luc. Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law. *Journal of International Criminal Justice*, v. 3, n. 1, p. 162-186, mar. 2005. p. 181.

156 See the report AU. *Rwanda*: The Preventable Genocide. Togo: AU, 2000 (International Panel of Eminent Personalities (IPEP): Report on the 1994 Genocide in Rwanda and the Surrounding Events), especially chapters 6 e 22. See also AMNESTY INTERNATIONAL. *Rwanda:* Reports of killings and abductions by the Rwandese Patriotic Army, April-August 1994. London: Amnesty International, 1994. Available at: http://www.amnesty.org/en/library/info/AFR47/016/1994/en. Access in: 17 july 2023.

157 REYDAMS, Luc. The ICTR Ten Years On: Back to the Nuremberg Paradigm? *Journal of International Criminal Justice*, v. 3, n. 4, p. 977-988, 2005. p. 979.

158 As in the United Nations Security Council Resolution n. 1503 (2003): UN. Security Council. *Resolution n. 1503 (2003).* S/RES/1503(2003). New York: UN, 2003.

159 See: BAKIBINGA, David Baxter. Prosecutorial discretion and independence of the ICC prosecutor: concerns and challenges. *Revista Acadêmica Escola Superior do Ministério Público do Ceará*, v. 10, n. 2, p. 177-193, 2018. p. 184 *et seq*.

160 For further analysis of the political and operational limitations of the ICTY and ICTR, see ZOLO, Danilo. *La Giustizia dei Vincitori:* Da Norimberga a Baghdad. Roma-Bari: Laterza, 2006; KOSKENNIEMI, Martti. Between Impunity and Show Trials. *Max Planck of United Nations Law*, v. 6, p. 01-35, 2002; RODMAN, Kenneth A. How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR. *American Journal of International Law*, v. 110, p. 234-239, 2017; HUMPHREY, Michael. International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda. *Journal of Human Rights*, v. 2, n. 4, p. 495-505, 2003;

161 Article 15 of the Rome Statute. ROME Statute of the International Criminal Court. Rome, 1998.

Indeed, control over the Prosecutor's decision to initiate an investigation is only necessary in cases of *proprio motu* action. However, the initiation of proceedings and the issuance of arrest warrants are subject to the traditional control of an accusatory process, very similar to previous cases, with procedural differences only.

In the event of denial of investigation, more restricted criteria are established. If the Prosecutor deems it unsuitable to initiate an investigation or, after conducting an inquiry, to issue arrest warrants and open cases against the accused, then this can be done based on (i) the absence of reasonable grounds (lack of factual and legal elements) for the occurrence of a crime, (ii) inadmissibility of the case before the Court, or (iii) interests of justice. If the referral was made by the UN Security Council or a State Party, and the Prosecutor's decision is based on the absence of reasonable grounds or inadmissibility of the case before the Court, it will suffice to communicate the decision to the author of the referral – from which an appeal can be made to the Pre-Trial Chamber, which may only request the Prosecutor to reconsider their decision (Article 53(3)(a)) – but this request is not obligatory.

If, however, the sole reason for denying the initiation of an investigation or, after conducting it, the continuation of a case, are the interests of justice (iii), then this decision will need to be approved *ex officio* by the Pre-Trial Chamber and will only take effect after such confirmation (Article 53(3)(b)). The Prosecutor can, of course, reopen cases on the basis of new facts and information.

There is, therefore, a system of *checks and balances* concerning the control of the prosecution effectively present in the ICC experience[162], which represents a clear evolution compared to the past. However, there is still considerable leeway for the Prosecutor to choose, in a reasonably arbitrary manner, against whom to exercise international punitive power and, especially, whether to do so. Even when there is a clear review of the Prosecutor's decision – in the case of denial due to the interests of justice – it remains doubtful whether the Prosecution can be compelled to change its original choice and open a case.

In summary, although the Rome Statute demands a higher standard from the Prosecution – the only body capable of requesting the initiation of investigations, processes, and the arrest of an accused – than previous systems, there are no effective instruments to constrain the Prosecution's freedom of choice to prosecute. While positive control is certainly easier to occur, as a case can simply not be accepted by the Pre-Trial Chamber, negative control is practically non-existent: in the case of a denial of investigation or case initiation, there is little to be done beyond a request for reconsideration or non-confirmation by the Court, whose outcome remains unclear.

The Office of the Prosecutor has attempted to make case selection criteria more transparent by, for example, publishing a policy paper on the matter[163]. This, however, does not effectively counter (neither does it seek to do so) the textural openness of case selection and prioritisation criteria. While the OtP is frequently caught up between the "need for predictability and legal certainty on the one hand, and for pragmatism and case-by-case flexibility on the other hand"[164] and aims to ensure such selectivity is legally justified, financial limitations and political pressures, which are arguably non-legal issues at core, are tangles in the ICC's quest for perceived legitimacy.

Indeed, even though more elaborated, the Rome Statute never promised to eliminate the inherent selectivity present in previous experiences. The preamble itself makes it clear that the Court will not concern itself with all crimes but only with the "most serious crimes", a concept that is already selective by nature (the Statute does not specify when a crime is considered serious or not). This concept is reiterated throughout the text of the Statute, particularly in Articles 1 and 5.

[162] KIRSCH, Phillippe QC; ROBINSON, Darryl. Initiation of Proceedings by the Prosecutor. *In*: CASSESE, Antonio, GAETA, Paola; JONES, John R. W. D. (ed.). *The Rome Statute of International Criminal Court*: a commentary. Oxford: Oxford University Press, 2002. v. 1. p. 657-664. p. 660.

[163] See ICC. Office of the Prosecutor. *Policy paper on case selection and prioritisation*. The Hague: ICC, 2016. Available at: https://www.icccpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_CaseSelection_Eng.pdf. Access in: 31 july 2023.

[164] BÄDAGÅRD, Lovisa; KLAMBERG, Mark. The Gatekeeper of the ICC: prosecutorial strategies for selecting situations and cases at the International Criminal Court. *Georgetown Journal of International Law*, v. 48, p. 639-733, 2017. p. 731.

5.2 Is there reason in seeking to eliminate selectivity?

As previously determined, selectivity in criminal cases has not been effectively avoided by criminal justice delivered by international tribunals up until today, as the statutes themselves that regulate these international institutions leave room for unclear criteria regarding case selection.

In this context, it could be understood that selectivity is an inherent and inevitable characteristic of international criminal justice. In fact, this can be explained through a realistic understanding of the nature of norms created in the international arena, which are inherently political, as well as by analysing the very essence of punishment – an act that can and should be understood as a political exercise.

In International Law, understanding norms as a domain open to politics is not new. According to Koskenniemi[165], international norms can only succeed in conflict resolution when they include a political component in their structure capable of ensuring flexibility and, more importantly, profound legal indeterminacy[166]. This is how countries of diverse political species and genres accept to be bound by international treaties: the malleability of the international normative space ensures the broad possibility of its legal interpretation, which is crucial for building a viable international legal framework that allows for accommodating contradictory positions while maintaining legal defensibility[167].

There is no reason to assume that international criminal norms escape this fate. Although they may have unique characteristics, particularly for establishing individual responsibility in a domain traditionally oriented towards State responsibility and for verticalizing legal relationships in a historically horizontal field, the norms that establish crimes and penalties in international criminal tribunals are constructed within the international context. As such, they carry this genetic burden: they are formed just like any other international norm within a political context and inherently carry the political element within their structure.

Therefore, it is not surprising that the application of punishment in the international arena is delicate and complex, giving rise to puzzles that are resolved only with great interpretative difficulty. The realm of Criminal Law, representative of a direct relationship between the State and its citizens, has historically been constructed without excluding an Enlightenment perspective of limiting State violence and controlling punitive power, which advocates for certain rigidity and security that are incompatible with a highly politicised space[168]. Hence, when international norms deal with criminal perspectives, the challenges are greater than mere adjustments between States: the inherent political element seems to disrupt the security expected from punitive power, creating evident discomfort[169]. The selectivity of international criminal justice is just one of the consequences of this intricate interplay of political and legal considerations.

In national criminal justice systems, it is not admissible for punitive power to choose which criminals to punish. While there may be some room for manoeuvre for the legislator in primary criminalisation (when determining *what* to criminalise), this should ideally be done democratically. For example, the legislator can choose to criminalise the possession of a particular drug and not another – and this is evidently a political choice. However, once criminalised, it is not permissible to selectively punish one person in possession of such substance and not another. There is no legitimate political choice in this regard. This is because secondary criminalisation (the application of criminal norms), which may be occasionally selective (as reality shows), cannot be *voluntarily* selective based on a political criterion due to the expectation of equal treatment from the State towards its citizens. There is no political space for choice here, and unequal treatment regarding criminal norms in the national realm is even criminalised in several penal systems – doing otherwise would risk creating complete chaos in the criminal system.

165 KOSKENNIEMI, Martti. *The Politics of International Law*. Portland/Oxford: Hart International Publishers, 2011.

166 JOUANNET, E. Koskenniemi: A Critical Introduction. *In*: KOSKENNIEMI, Martti. *The Politics of International Law*. Portland/Oxford: Hart International Publishers, 2011. p. 01-32. p. 11.

167 KOSKENNIEMI, Martti. *From Apology to Utopia*: The Structure of International Legal Argument. Cambridge: Cambridge University Press, 2005. p. 591.

168 See: DISSENHA, Rui Carlo. Pelo Direito Penal Internacional em Detrimento do Direito Internacional Penal: sobre como o nome da disciplina afeta a sua função. *In*: RAMINA, Larissa; FRIEDRICH, Tatyana Scheila (org.). *Coleção Direito Internacional Multifacetado*. Curitiba: Juruá, 2014. v. 3. p. 255-304.

169 See also ROBINSON, Darryl. The Identity Crisis of International Criminal Law. *Leiden Journal of International Law*, v. 21, n. 4, p. 925-963, 2008.

As seen before in the international realm, selectivity is not an undesirable social and political effect. In fact, selectivity in international criminal tribunals is a central characteristic and a condition for their existence. International criminal tribunals cannot possibly judge all individuals responsible for crimes; they are mandated to focus solely on those responsible for the "most serious crimes" (whatever that means politically). As a condition for their existence, this rule is normatively determined and well accepted as a criterion for the system's efficiency. International criminal justice actively wants and is capable of choosing against whom to wield its authority. To Koskenniemi, without this selectivity, States would not accept the normative regulation of ICL and would not agree to be bound by this unique normative system[170]. The international criminal norm, because it is structurally laden with a political element, must be selective; otherwise, it would not function effectively.

On the other hand, the political nature of punishment itself is not ignored, as revealed by the understanding of critical criminology[171]. In the international realm, there is a strong tendency to perceive the social model as a unified system, even in the Durkheimian sense. However, it should be questioned whether the social fabric is, in reality, composed of a collection of groups that struggle for power among themselves – which would create a completely different political context.

The so-called unitary perspective tends to create the impression that internal conflicts are an uncomfortable dissonance within a system that is potentially constructed as perfect and capable of reaching a point of excellence where, in the future, society will be harmonious and stable. Deviations are punished because they diverge from the values derived from the need for unity. There is no doubt that this has always been the dream of post-war International Law and found room for development with the end of the Cold War and the emergence of human rights as a theoretical and ethical foundation. It is also no coincidence that ICL has substantially developed after the fall of the Berlin Wall. In this context, an international criminal court is fully justified as a bastion of strength capable of enforcing the principles that guide this harmonious world in the form of "legal interests" to be protected.

However, understanding a society as conflictual, composed of groups in a constant struggle for power, that can only find stability through a system where agreements are reached for mutual well-being, creates serious obstacles to the construction of universal values, advocated within the context of a unitary punitive power, centralised and guided by values that were less constructed and more recognized as eternal, pre-existing and universal[172]. In a dissenting society, rules are forged through tension among groups and are often predominantly determined by those in dominant positions of power, attempting to maintain the *status quo*. Punitive power, in particular, is frequently employed to enforce these norms and protect the interests of those in power[173]. After all, punitive power has a "strong component of institutional politics"[174].

It is in this context that a critical perspective of Criminal Law and, of course, punishment itself is developed, as both are construed within a society in conflict. Punishment is, in fact, the embodiment of punitive power designed with real purposes that differ from those publicly declared. While punitive power is proclaimed to be employed for the protection of universal values, punishment actually serves to safeguard (economic, political, religious, etc.) values deemed worth protecting by those in positions of power. Its main purpose is to maintain the *status quo*, albeit under the pretext of protecting universal values.

This critical perspective does not mean advocating for the unnecessariness of punishment (although some may do so[175]). After all, replacing criminal responses with any other response presents a risk that punishment may merely take on another form just as serious as criminal response[176]. However, punishment requires

[170] KOSKENNIEMI, Martti. The Politics of International Law. *European Journal of International Law*, v. 1, n. 1, p. 04-32, 1990. p. 28.

[171] See: BARATTA, Alessandro. *Criminologia Crítica e Crítica do Direito Penal*: Introdução à Sociologia do Direito Penal. 3. ed. Rio de Janeiro: Revan/Instituto Carioca de Criminologia, 2002.

[172] As stated by Koskenniemi, "The 'international community' remains still much more a 'floating signifier' whose point it is to articulate particular (political) claims in a universal garb rather than a sociological datum". KOSKENNIEMI, Martti. International Legislation Today: limits and possibilities. *Wisconsin International Law Journal*, v. 23, n. 1, p. 61-92, 2005. p. 90-91.

[173] See: ZAFFARONI, Eugenio Raúl. *Tratado de Derecho Pena:* Parte General. Buenos Aires: Ediar, 2006. v. 1.

[174] ALAGIA, Alejandro *et al. Direito Penal Brasileiro*: teoria Geral do Direito Penal. 2. ed. Rio de Janeiro: Revan, 2003. v. 1. p. 275.

[175] HOUSLMAN, Louk. *Peines perdues:* Le système pénal en question. Paris: Editions du Centurion, 1982.

[176] See ZAFFARONI, Eugenio Raúl. *Em busca das penas perdidas.* A perda de legitimidade do sistema penal. Rio de Janeiro: Revan, 1991.

strict control and regulation, which is why, in the national context and within democratic models, punishment demands prior, written, certain and strictly interpreted rules, as prescribed by the principle of legality, along with numerous procedural safeguards oriented towards equal treatment under Criminal Law.

There is no reason to understand the international society any differently. Although a critical analysis of the international context – including the application of punishment – may, to some extent, verge on heresy by questioning universal constructions such as the logic and universality of human rights[177], it is indeed difficult to justify the obscene division of economic and financial resources in the world today and the prevalence of black individuals from poor countries in the dock of the ICC.

This is not to say that there is no sense in punishing international criminals. It is merely to recognise that the need for punishment of these criminals is not a ready-made, pre-existing, universal and eternal fact. Instead, it is also a political move used as an instrument to uphold certain values that are upheld and reaffirmed with each punishment carried out. This means that the need for maintaining (some form of) selectivity, whether for legal or practical reasons, is directly linked to political matters, as electing case selection and prioritisation criteria invariably observes and adheres to a certain vision purported for international criminal justice. Therefore, the punishment of international crimes is not *inherently* universal but rather universally punishable *under certain circumstances* – as selectivity itself demonstrates.

In this sense, punishment, as a result of a political process shaped by social conflicts, provides new layers of understanding not only for punishment itself but for the challenges faced by international criminal justice. Among these challenges is the serious problem of justifying, according to so-called universal criteria, the selectivity adopted by the ICC. By acknowledging the inherently political nature of punishment and selectivity, the international community as a whole, and not the parcel that represents the Global North, can engage in more meaningful debate on the challenges faced by the ICC and work towards a more just and equitable system of international criminal justice. This includes addressing the tension between universal principles and the realities of diverse and complex political contexts in which international crimes occur.

6 Quid me vis facere?

The concept of a post-Western world[178] may well represent the understanding of an international society characterized by conflict, in which the use of punitive power is indeed another instrument for upholding and defending the *status quo*. One is not required to disagree with the values protected by this existing punitive power – as, in fact, this article does not aim to do. It is simply a matter of understanding, without the unabashed innocence of some internationalist scholars, that a new, much more complex international power correlation is gradually emerging, in which some new agents emerge and, even without structurally contradicting the currently prevailing values (defended by the ICC), gradually reconfigure the axiology of international society according to their own ambitions and projections of power.

The emergence of new centres of international power that diverge from the model advocated by the Europe-North America axis naturally tends to modify the current legal institutions. Especially where normative constructs are interwoven with politics, a redefinition of international powers could certainly imply a reconfiguration of the legal landscape. The post-Western world may, therefore, be emerging precisely in the context of the conflict in Ukraine, where the dissonance seems not only territorial but also military and economic, reflecting tension between the West and the rest[179]. It would not be surprising, then, that even the United States, traditionally resistant to the jurisdiction of the ICC, began to approach it[180] when the Court signalled support for Ukraine in the conflict, as it protects the values cherished by the Western world, including (and

[177] See, *e.g.*, KENNEDY, David. *The Dark Sides of Virtue*. Princeton and Oxford: Princeton University Press, 2004. Also: ZOLO, Danilo. *Cosmopolis*. Milano: Feltrinelli Editore, 2008.

[178] STUENKEL, Oliver. *Post-Western World*: how emerging powers are remaking global order. Cambridge: Polity Press, 2016.

[179] BRYANT, Joseph M. The West and the Rest Revisited: Debating Capitalist Origins, European Colonialism, and the Advent of Modernity. *Canadian Journal of Sociology*, v. 31, n. 4, p. 403-444, 2006.

[180] BERTRAND, Natasha; HANSLER, Jennifer. Biden to allow US to share evidence of Russian war crimes with International Criminal Court. *CNN*, 27 july 2023. Available at: https://amp-cnn-com.cdn.ampproject.org/c/s/amp.cnn.com/cnn/2023/07/26/politics/biden-russia-war-crimes-international-criminal-court-hague/index.html. Access in: 30 july 2023.

especially) by labelling as criminals anyone who challenges these values. This approach has been in place since Nuremberg and, therefore, should not cause embarrassment or astonishment.

The ICC, fundamentally a product of the liberal international order[181], is tangled with the crisis of the liberal legal model. As such, its inability to effectively respond to non-Western demands for justice is deeply intertwined with liberal internationalism's current state of international politics: the ICC's crises[182] are therefore not isolated issues, but rather symptoms of a larger pathology within the international legal order in which the rise of new global powers unavoidably shakes the foundations of (liberal) international criminal justice.

By adopting a clear position in the Russo-Ukrainian conflict, the ICC may be lending credence to the criticism of the punishment system as a means of protecting Western interests – the ICC not adapting to a new international legal order where non-Western powers are emerging and disrupting power dynamics posits the Court as a spokesperson of the past. It is not a matter of defending Putin-Belova as innocent of any crimes they may have committed. However, based on what has been discussed in this article, the characteristics of urgency and selectivity inherent in the issuance of the warrants of arrest for the two of them do not bring any comfort to those who expect an impartial action from international criminal justice.

From previous international criminal justice experiences, it does not seem possible to entirely eliminate case selectivity. However, it is necessary for the ICC to urgently develop a more transparent system for case selection and, obviously, be bound by it. The indication of criteria for its selective action, with clearer deadlines and pre-established priority grounds, is an essential move. This is not about seeking a formulaic procedure for cases, but an honest and predetermined pattern of case selection by the Prosecutor, subject to review and scrutiny, would be a great starting point on this path.

Perhaps the ICC could go further. Embracing the role of the Court as an effectively political institution, which implies a redesign of its nature and purpose of action, with a de-emphasis of its punitive function in favour of adopting a more transitional, conflict-settling or similar perspective, could do the Tribunal a great deal of good. As Koskenniemi stated, politics in international norms should not be seen as a degenerative element, but as a true condition of possibility[183], a decisive element that needs to be acknowledged[184]. This seems to be in line with the possibility of facing a post-Western world, where the forces at play are no longer as clear-cut and the values to be defended are no longer as crystalline as they were in the 1940 decade.

In the face of this new world reconfiguration, the ICC needs to rethink its role. Criminal policies, even international ones, are not only developed on accounts of more or less punishment. It is possible to envision a criminal policy with broader focuses, oriented, on one hand, towards crime prevention through understanding the criminogenic factors of universal crimes and coordinating international efforts to prevent these factors. On the other hand, the ICC can embrace its political element and see itself as an agent capable of thinking beyond punishment and towards building bridges for resolving disputes that lead to crimes. It is not feasible to oversimplify things to the extent of believing that universal crimes are solely the result of the culpable minds of a handful of actors[185]. This serves only a fetishized and deceptive view of international values and punishment. Universal crimes are complex figures that require complex solutions as well.

This does not mean refraining from punishment, as it may be necessary to some extent. However, it should not be expected to produce any of those comforting lies – retribution or prevention in their various forms – as described by Pavarini[186]. Punitive action cannot be

[181] KERSTEN, Mark. Forever Together or a Hope for Better? Liberalism and International Criminal Law. *Temple International and Comparative Law Journal*, v. 35, n. 1, p. 143-154, 2021.

[182] VASILIEV, Sergey. The Crises and Critiques of International Criminal Justice. *In*: HELLER, Kevin *et al.* (ed.)., *The Oxford Handbook of International Criminal Law*. Oxford: Oxford University Press, 2020. p. 626-651.

[183] KOSKENNIEMI, Martti. *From Apology to Utopia*: The Structure of International Legal Argument. Cambridge: Cambridge University Press, 2005. p. 565.

[184] KOSKENNIEMI, Martti. The Politics of International Law. *European Journal of International Law*, v. 1, n. 1, p. 04-32, 1990. p. 27-31.

[185] As cleverly mentioned by Kennedy: "the generation that built the human rights movement focused its attention on the ways in which evil people in evil societies could be identified and restrained. More acute now is how good people, well-intentioned people in good societies, can go wrong, can entrench, support, the very things they have learned to denounce". KENNEDY, David. The International Human Rights Movement: Part of the Problem? *Harvard Human Rights Journal*, v. 15, p. 101-125, 2005. p. 125.

[186] GUAZZALOCA, Bruno; PAVARINI, Massimo. *Saggi sul governo*

the main course of action and cannot be the sole international response available for victims in search of justice. It needs to be conducted as part of a more complex approach and carried out exceptionally, whenever possible, as a coordinating force for national punitive options rather than as a pressing and substitutive power. A good path for the ICC would be trailed in this context of adopting universal criminal policies, designed through mandatory interaction between punitive aspects and other international action plans (economic, political, social, etc...)[187], concurrently with the recognition of the ICC as a diplomatic soft power in the administration of punitive power that embraces a political role from which it will never be able to separate itself[188], albeit now with clearer criteria.

It is evident that adopting a more progressive and less punitive criminal policy is not a magical solution. But that is not the goal. In a world that may be undergoing serious political changes, the ICC's insistence on remaining static and oblivious to the criticisms that it is, indeed, a political institution does not serve to improve its image or enable it to fulfil its function, whatever it may be. The proposals presented here are intentionally broad because they reflect value-based options for the Court to redesign itself towards greater effectiveness. They may also hold the key to a more democratic and less colonialist international criminal model, capable of playing an important role in what is believed to be an inevitable global reconfiguration.

Maintaining the *status quo* is a risk that could ultimately turn the ICC into a purported enforcement system for Western values. By picking sides in an ongoing conflict, the ICC materializes the most serious form of what Cassese referred to as the "Nuremberg syndrome"[189], which could reduce the Court to nothing more than an endorsement of the values of those who have won (or intend to win) a war.

7 Concluding remarks

Selectivity in ICL is a tale as old as time. Nuremberg, Tokyo, the former Yugoslavia, Rwanda and now the ICC, they have all faced the selectivity critique – and, in general, they have all failed to rebuke it. While to some extent international criminal justice must be selective for its own sake, even to the detriment of its ultimate goal of ending impunity, not all ends justify the means. Criminal Law, whether national or international, functions according to an *ultima ratio* logic, but this, as many other things about ICL[190], seems to be amplified in the international arena. Be that as it may, this does not hinder international criminal actors – most importantly prosecutors – from waving the hammer of international criminal justice in an opaque, inadequate manner.

The conflict in Ukraine unveils more than meets the eye. While Ukraine arguably holds a 'liminal status' in the international order[191], the selectivity critique against the ICC has found renewed momentum due to the unbalanced attention to prosecuting Putin (and, to lesser extent, Belova). It is not a matter of whether they should be prosecuted or not (which certainly has a positive answer – they should, if they are found to be guilty as charged), but rather of *why* the ICC is keen in serving justice in unprecedented speed. This question is already complex as it is, but the involvement of the Court with one of the parties – by the Court's own choice to do so – makes it even more difficult to ascertain how the ICC might possibly state its impartiality while engaging in such dubious situations.

Ukraine's situation in International Law and before the ICC is certainly unique; it is possible to pinpoint several possible reasons to justify the Prosecution's expedited action on the matter: international pressure, in-

della penalità: letture integrative al Corso di Diritto Penitenziario. Bologna: Martina, 2007. p. 35. Also, on the reasons for punishment under a critical point of view: DONINI, Massimo; PAVARINI, Massimo. Silète poenologi in munere alieno! *In*: *Silète poenologi in munere alieno! Teoria dela pena e scienza penalistica, oggi*. Bologna: Monduzzi, 2006. p. 11-31.

187 DISSENHA, Rui Carlo. *Por uma política criminal universal*: uma crítica aos tribunais penais internacionais. Curitiba: IFDDH, 2016.

188 ROACH, Steven C. How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy. *Global Governance*, v. 19, n. 4, p. 507-523, 2013.

189 CASSESE, Antonio. Il Processo a Sadam e i Nobili Fini della Giustizia. *La Repubblica*, 19 ott. 2005. Available at: http://ricerca.repubblica.it/repubblica/archivio/repubblica/2005/10/19/il-processo-saddam-nobili-fini-della-giustizia.html. Access in: 17 july 2023. p. 23.

190 DISSENHA, Rui Carlo. Os fins da pena na Justiça Penal Internacional e a contribuição esclarecedora de Massimo Pavarini. *In*: CARVALHO, Salo de; GIAMBERARDINO, André; ROIG, Rodrigo Duque Estrada (org.). *Cárcere sem fábrica*: escritos em homenagem a Massimo Pavarini. Rio de Janeiro: Revan, 2019. p. 223-252.

191 LABUDA, Patryk I. Beyond rhetoric: Interrogating the Eurocentric critique of international criminal law's selectivity in the wake of the 2022 Ukraine invasion. *Leiden Journal of International Law*, FirstView, p. 1-22, 2023.

ternal politics, the nature of the conflict… All of these elements play a part in the ICC's so far unprecedented swiftness to investigate and prosecute. Yet, these elements are part of a complex political framework, which is integrated into international criminal rationale, that take into consideration an impressive number of factors (including those mentioned before) in order to make any decision. As such, these factors – which led to expedited action in Ukraine – may result in a different outcome in a different situation because of context and its intrinsic particularities. The outcome is therefore politically motivated.

What to do? Reflecting upon the past and (re)assessing the present in order to propose a brand new future for ICL demands a critical stance. It demands, furthermore, an "uneasy revolution"[192] that requires rebranding the foundation of the Court. The ICC, which is a criminal court at nature, must act accordingly to its core objectives: ending impunity and punishing those responsible for international crimes. As such, it is inevitably bound by selectivity. However, the political dimension of ICL should not be denied; rather, it should instrumentalised for the protection of persons – and not values – against international crimes. What this article proposes is that the ICC should embrace its political element and delve into its newly found status as an international society stakeholder with diplomatic potential to find novel, arguably more effective answers to atrocities. Furthermore, it should engage with other international organs such as the UN in a way that fosters universal criminal policies for the protection of humankind oriented not just by punishment, but by prevention, mediation and international cooperation. Indeed, accountability may look like punishment, but it may also look like redressing through other means, such as transitional justice, politics of memory and truth and peace agreements.

By selfishly and mindlessly holding on to its role as the expression of (and not the limit to) *ius puniendi* at the international realm, the ICC risks denying other pathways to peace and accountability, while engaging in a self-serving civilising mission[193] that denies local realities the chance to decide for themselves what is fittest for ending impunity and moving on as a society after atrocity. Of course, this is no easy task, as the Global North may not be content at giving up their own idealised version of what international criminal justice may look like. However, the path to justice for all – indeed, for *all* – is certainly one filled with obstacles. Un-marginalising the voices from the Global South and letting fresh perspectives emanate towards international criminal justice may be one possible way to overcome these challenges.

[192] SADAT, Leila Nadya; CARDEN, S. Richard. The New International Criminal Court: An Uneasy Revolution. *In*: PASSAS, Nikos (ed.). *International Crimes*. London: Routledge, 2003. p. 133-226.

[193] NIELSEN, Claire. From Nuremberg to the Hague: The Civilizing Mission of International Criminal Law. *Auckland University Law Review*, v. 14, p. 81-114, 2008.

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