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Alternative pathways to justice

The ICC arrest warrant against Putin is but one loud move among the many efforts taking place around the world to prosecute perpetrators

On 17 March, the International Criminal Court (ICC) finally attempted to hold Putin accountable for the grave human rights violations committed in the war against Ukraine. While the charges at this point are limited to the forcible transfer of Ukrainian children within Ukrainian territory and across borders to Russia, as war crimes under international law, they merely constitute the tip of the iceberg of the many crimes already committed. This move came to the surprise of many, including proponents of the work of the ICC. While the decision is widely applauded – except from within the Kremlin and its supporters – debates have arisen on the question of whether, how an actual arrest of Putin will follow the warrant to see the leader of one of the most powerful states in the world being tried in The Hague.

The warrant and the discourse it triggered seemed to have shaken the dust off the long-criticised international criminal justice regime. Since its establishment in 2002, the ICC has struggled to become active in the many situations in which war crimes, genocide or crimes against humanity have been committed. This inaction can be largely attributed to, on the one hand, the limited jurisdiction of the Court – only states that are ICC members fall under its jurisdiction, and powerful states such as the United States, Russia or China are – to no surprise - not among them. On the other hand, where a referral by the United Nations Security Council could authorise the Court's involvement, the powerful veto of some of its members is often used to shield either themselves or their allies and block any path to justice. As a result, in many conflicts around the world, impunity for heinous crimes persists, with perpetrators remaining in positions of power and an international community paralysed by political differences or legal boundaries.

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For a long time, the Court has also been struggling with its well-known – and perhaps well-deserved – reputation of having an indiscriminate focus on perpetrators from the

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Global South – especially African nationals – and on former colonial states. Many African states have hence accused the ICC of having an anti-Africa bias and expressed concerns that this record reflects deeper systemic issues within the Court's structure. The debate culminated in a 2017 resolution by the African Union urging its members to withdraw from the ICC altogether. The current move against Putin can be somewhat seen as an attempt by the Court to address this criticism.

The principle of universal jurisdiction

As much as this ICC warrant has been hailed as a step towards justice and demonstrating the might of the law, it is only one loud instance among the many smaller efforts that have been taking place around the world to bring perpetrators to justice. One of such efforts is another legal pathway that has long existed alongside the ICC and has received growing support from states, both in institutions and practice: the principle of universal jurisdiction. Universal jurisdiction allows states to individually investigate and prosecute grave international crimes, such as genocide, war crimes, crimes against humanity and torture, regardless of where they were committed or by whom.

In recent years, there have been incredibly successful instances of states making use of this principle: in January 2022, the Higher Regional Court in Koblenz, Germany, convicted Anwar R., a Syrian national who was heading investigations at the notorious military intelligence centre 'Branch 251' in Damascus, for crimes against humanity. He was then sentenced to life imprisonment. This verdict marks the first legal punishment for crimes committed in the Syrian context, a much-needed and important step towards justice for thousands of victims fleeing from or enduring Assad's continuing rule. Similar trials have taken place in Koblenz, Frankfurt, Munich and Stuttgart. In Sweden, the Netherlands, Spain, Switzerland, France and Argentina, among others, special investigation units and NGOs have been constructing cases to investigate individuals as well as so-called structural investigations into entire conflicts.

Universal Jurisdiction as complementary to the ICC

Despite the relatively limited attention these efforts receive in public

discourse, the value and opportunity universal jurisdiction provides should be recognised and taken advantage of.

Firstly, despite common concern, states' individual efforts in no way undermine or interfere with the work of the ICC. In fact, the ICC statute explicitly foresees its complementary role, emphasizing the primacy of national courts to uphold international justice. The arrest warrant against Putin as the head of state does not prevent states from individually pursuing structural or targeted investigations and collecting evidence, which can also feed into a future ICC trial. Under some conditions, this is much easier for states who have access to perpetrators, witnesses or evidence due to migration flows, as the Anwar R. case exemplifies: the trial was made possible due to the presence of the perpetrator who had come to Germany as a refugee, as well as witness accounts by other refugees who recognised him and documents smuggled out of Syria which served as evidence in the proceedings.

In the context of Ukraine, not much stands in the way of meeting these same legal requirements. Collecting testimonies from Ukrainians who have fled to other European states is one step into the that direction. While Putin may personally reduce any future travel to avoid the threat of an arrest, many low and medium-level Russian officials who have committed crimes in Ukraine will travel outside of Russia at some point. Thanks to the thorough investigations currently underway, their identification and the burden of proof of their crimes will be undeniable and easily accessible for future proceedings.

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Secondly, universal jurisdiction is not subject to the same conditions as the ICC: where the latter cannot act due to limited jurisdiction or political paralysis, states can use this pathway as an alternative to take action. There is no doubt that, in the practice of universal jurisdiction, political interests also come into play – especially in high-profile cases or where diplomatic relations are considered when prosecuting another state's national. The restrictions in Belgian and Spanish universal jurisdiction laws after NGOs' efforts to file complaints against US or Israeli senior officials demonstrated clearly that universal jurisdiction is not entirely free from political considerations.

Yet, similar allegations such as in the case of the ICC, that the practice of universal jurisdiction is a predominantly Western concept with a bias

towards the Global South, do not hold up here: the first-ever conviction of a former head of state under universal jurisdiction took place in Senegal; Argentina has been at the forefront of investigating not only government officials in Myanmar but also crimes committed in Spain under the Franco regime that remain unpunished due to Spain's amnesty laws. While the crimes committed by the Russian Federation and Russian soldiers in Ukraine have not only led to the ICC's arrest warrant against Putin but also to many individual states' efforts to collect evidence and prepare future court cases, including Germany, France, Sweden, Poland, the Baltic States, the United States, as well as the European Union. In fact, a study by Maximo Langer looking at all universal jurisdiction complaints completed since the 1960s concludes that the vast majority target non-African nationals.

Universal jurisdiction is no panacea to overcome the shortcomings in the existing international criminal justice framework. It remains selective and many attempts to enforce it have ended in blatant rejection of arrest warrants or extradition requests and in diplomatic tension rather than a fair trial. But the record shows that it can also provide a path to applying the law somewhat more equally regardless of geography, political power or membership. The ability of individual states to use their own courts and capacities to punish crimes should be seen as a chance to complement ICC efforts and bridge accountability gaps where they arise. The often-prevalent view that the ICC is the only actor to punish heinous crimes is misleading. While its mandate and current efforts should be supported, it is important to recognise other pathways that can contribute to the enforcement of a truly global accountability agenda.



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