

Accountability for Russian Crimes Is Best Achieved by Supporting Ukraine, Not the ICC

THE ISSUE

The International Criminal Court (ICC) recently issued an arrest warrant for Russian President Vladimir Putin, accusing him of war crimes. The U.S. should support efforts to hold Putin accountable. However, cooperating with or supporting an ICC investigation could give the impression that the U.S. recognizes and consents to the court's jurisdiction, thereby increasing the legal vulnerability of U.S. persons in the future and undermining the principle of state consent in international law. While the U.S. should not contest the ICC arrest warrant, it should retain its principled distance from the ICC and support Ukrainian efforts to pursue justice.

BASIC FACTS ON THE ICC

The ICC was established under the 1998 Rome Statute. The court is based in the Hague with an annual budget of \$180 million and more than 900 staff members. Currently, 123 countries have ratified the Rome Statute and recognize its jurisdiction. Most European countries are parties to the Rome Statute. The U.S. is not a party; nor is China or Russia.

The ICC has jurisdiction over war crimes, crimes against humanity, genocide, and (for those countries that have ratified the amendment) the “crime of aggression.” The ICC can exercise jurisdiction in a situation where crimes were committed on or after July 1, 2002, if the crimes were:

- Committed by a state party national, or in the territory of a state party, or in a state that has accepted the jurisdiction of the ICC; or

- Referred to the ICC Prosecutor by the U.N. Security Council pursuant to a resolution adopted under Chapter VII of the U.N. Charter.

In its history, the court has issued 38 arrest warrants that have led to 21 arrests. Another 14 people subject to arrest warrants remain at large. Charges have been dropped against several people who have died. There have been 31 cases before the court, resulting in 10 convictions and four acquittals.

CURRENT SITUATION

Neither Ukraine nor Russia is an ICC state party. However, Ukraine formally accepted ICC jurisdiction in its territory after the Russian invasions both in 2014 and in 2022. After a preliminary investigation, ICC Prosecutor Karim Khan announced on February 28, 2022, that he would open a full investigation into the situation in Ukraine as there was “a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed.”

On March 17, the ICC issued arrest warrants for Putin and Maria Lvova-Belova, the commissioner for Children's Rights in the Office of the President of the Russian Federation. Both are accused of the war crimes of unlawful deportation of population (children) and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.

These warrants are unlikely to be the last, given substantial evidence of additional Russian war crimes and crimes against humanity.

This paper, in its entirety, can be found at <http://report.heritage.org/fs246>

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While the ICC warrants have received much attention, Putin is unlikely to be arrested by the ICC and to face trial. The ICC has no authority to arrest anyone and relies on governments to seize and turn over people to it. Governments have proven reluctant to arrest heads of state, however, as heads of state historically enjoy immunity under international law.

For instance, even though the ICC issued an arrest warrant for President Omar Al Bashir of Sudan, he was never arrested—despite visiting many nations, including ICC member states, such as South Africa. Governments are even less likely to arrest the leader of a more powerful nation, such as Russia.

The ICC arrest warrant is more akin to grandstanding than a real threat to Putin’s freedom. While Putin might avoid traveling to some states, it is unlikely to prevent him from traveling altogether, especially to China and other countries that are not members of the court. Though the warrant is a significant validation of claims of Russian war crimes, it is unlikely to intimidate or punish Putin.

U.S. CONCERNS

The U.S. has supported, and should continue to support, accountability for the heinous crimes committed in Ukraine. However, this support should not lead the U.S. to support the ICC investigation.

The U.S. is not a party to the Rome Statute, and the long-held bipartisan position of the U.S. is that the ICC does not have jurisdiction over any country unless that country has ratified the Rome Statute, voluntarily submitted to the ICC’s jurisdiction, or been referred by the Security Council.

The U.S. adopted this position because it was concerned that the ICC might pursue politicized investigations against U.S. service members or elected officials.

- U.S. concerns are justified. ICC investigations have been launched into alleged U.S. war crimes in Afghanistan and Israel’s alleged war crimes in the Palestinian territories. In both instances, the ICC asserted jurisdiction over non-parties. Although the ICC prosecutor decided in 2021 to “deprioritize” U.S. crimes in Afghanistan, the risk remains.
- In both cases, the court ignored the complementarity standard outlined in the Rome Statute under which the ICC is to be a court of last resort and yield to national authorities. Both the U.S. and Israel investigate all credible allegations and have meted out punishment and convictions when warranted.

U.S. law circumscribes U.S. cooperation with the ICC for this reason, with exceptions. Nonetheless, the U.S. engaged with the ICC on some prosecutions before the Afghanistan investigation.

Recently, Congress passed legislation to allow U.S. cooperation with the ICC in respect to crimes in Ukraine. Nonetheless, the Pentagon has resisted efforts by the White House and State Department to cooperate, out of concern that an ICC investigation of a non-state party (Russia) absent a Security Council referral would create vulnerability for U.S. troops down the road.

RECOMMENDATION FOR THE U.S.

Instead of supporting the ICC, which is unlikely to provide the timely justice that Ukrainians deserve, the U.S. should assist Ukraine, which has already convicted Russian soldiers for crimes committed in Ukraine, in holding individual perpetrators to account.