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Judging Putin

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The publication of an [international arrest warrant](#) against Vladimir Putin on 17 March 2023 by the Second Pre-Trial Chamber of the International Criminal Court (ICC) has caused a stir. Although the institution is far from immune from criticism (it has long been accused of being "*strong with the weak and weak with the strong*"), this is a major change in the Court's policy as it is the first warrant ever issued against the sitting leader of a permanent member of the UN Security Council; a member who, moreover, in a chilling irony of history, played a [key role](#) in the Nuremberg Trial. In some respects, this is a gamble, given the many obstacles that stand between this historic event and a possible conviction of Vladimir Putin. But this arrest warrant is also a way to put the ICC back in the centre of the game, even though until now it seems to have been largely denied the possibility of judging the main perpetrator of the war of aggression against Ukraine and its disastrous humanitarian consequences.

FIRST CALLS FOR A SPECIAL COURT

In the months following the attack on 24 February 2022, the majority opinion seemed to be that a specific court should be set up, precisely to circumvent the legal difficulties that would arise from using the procedure before the International Criminal Court. On 28 February 2022, Philippe Sands called for the creation of such a court [in an article published in the Financial Times](#) to judge the crime of aggression for which Putin is responsible. Several [non-governmental organisations](#) have taken up a similar proposal, as have some international organisations such as [NATO](#) and the [OSCE](#). Via a [resolution dated 19 January 2023](#), the MEPs, in turn, called for the creation of a "special court" without, however, specifying the possible legal basis or operating procedures of such a court. It is with regard to this that the uncertainties are

numerous and, perhaps, even more insurmountable than those encountered before the International Criminal Court. Among the various proposals, none of them really allows for the removal of the far-reaching legal obstacles that arise in the face of such projects. A special court could take two different forms, but both seem extraordinarily difficult to implement effectively.

First, an international criminal tribunal might be considered based on the model of those established for the former Yugoslavia (1993) and Rwanda (1994). But the first difficulty is institutional in nature: both were created by the Security Council, in application of the competences granted to it by the United Nations Charter in the maintenance of international peace and security. The international legality of the establishment of these tribunals under the Charter was discussed at the time and was later [confirmed](#). However, it does not take a seasoned observer or connoisseur of international law to see the difficulty here: Russia, as a permanent member of the Security Council, has a veto. It would undoubtedly be led to use it against any move by the Council in this direction for Ukraine. The only eventuality would be a change of regime in Moscow, sufficiently marked for a new government to be willing to settle the liabilities of the Putin regime by accepting the creation of an ad hoc jurisdiction - abstention would suffice since this is not equivalent to a veto: it may be recalled in particular that China abstained from the vote on Resolution 955 of 8 November 1994 creating the International Criminal Tribunal for Rwanda. The prospect is therefore certainly not unthinkable. But it is unfortunately not the most likely.

This is why a second path could possibly be explored, that of the "mixed" jurisdictions that appeared at the turn of the century. Designed to avoid the

complaint that international justice is "out of touch" and too remote from local considerations, which can be decisive in the context of criminal law, these courts are special in that they involve both local and international judges. They usually sit in the territory of the State where the offence took place, with the government of that State being closely involved in the proceedings. In this sense, these courts are "hybrid" or "mixed" because they are both domestic and international. The international dimension makes it possible to objectify the debates and avoid vengeful justice, while the national dimension allows justice to be more acceptable to the population and more constructive in building a peaceful society, following events that are, as a rule, particularly tragic.

The first of these courts was established in Cambodia in 2003, to judge the atrocious crimes of the Khmer Rouge regime. Others were subsequently established: in East Timor (to address the 2005 violence following attempt at secession); in Kosovo (to address Serbian actions in the region in 1999); in Sierra Leone (for crimes committed by the dictator Charles Taylor in the context of the civil war); in Bosnia and Herzegovina (to address certain crimes committed during the 1992-1995 war); and in Lebanon (to address those responsible for the attack on Prime Minister Rafik Hariri in 2005).

However, this idea, perhaps even more so than the previous one, seems impossible to consider as it stands: these courts were all set up not by a Security Council resolution, but by an agreement between the United Nations and the government of the state concerned. The procedure therefore presupposes that the latter is committed to reconciliation and at least partial recognition of guilt. Again, only a radical change of regime in Russia would allow for this possibility.

A potential third way might then be considered. If the Security Council and the state agreement are blocked, what are the options? It seems that none of the proposals for a special tribunal for Ukraine have really addressed this technical difficulty. The main problem is structural: Russia, as a sovereign state, can only be subject to rules - and jurisdictions - that it has accepted. This is the cardinal principle and cornerstone of the entire international legal system.

Without an agreement with the Russian state, it is legally impossible to impose constraints on its president. The only solution would be to go through an international organisation of which Russia is a member and to whose decisions it has agreed to submit: the UN comes to mind. Of course, going through the Security Council seems illusory, but it is not the only body. Consideration could also be given to the General Assembly, which has already been given the right to take charge of international peace and security issues in the past instead of the Security Council when the latter was structurally blocked during the Cold War. By [resolution 377](#), adopted in 1950 and known as the "Peacekeeping Union", the General Assembly decided that it could take over from the Security Council if the latter "*fails to discharge its primary responsibility for the maintenance of international peace and security*" due to a lack of unanimity among its permanent members. This resolution is certainly a bold interpretation of the Charter, but one that seems consistent with its fundamental purpose: to ensure the maintenance of international peace and security.

Activated several times during the second half of the 20th century, this resolution was used again following the Russian aggression of February 2022. Hence the General Assembly was able to adopt a [first resolution](#) on 2 March 2022 then a [second](#) a year after the aggression on 23 February 2023. Given that criminal tribunals have been established by the Security Council as part of its peacekeeping mandate, and that this mandate can be taken over by the General Assembly in the event of a lack of unanimity among its permanent members, the question arises as to whether the General Assembly would not be in a position to act in this direction.

However, a significant adjustment must be made immediately: General Assembly resolutions are not binding, unlike those made by the Security Council. It is impossible to compel Russia by means of a text of this nature. Without goodwill on Moscow's part, the effect of such a resolution would be considerably limited. It therefore appears that the way to the creation of a specific jurisdiction is largely closed. This is why recourse to the existing International Criminal Court is undoubtedly the preferred option: it is the one

with the greatest chance of success - even if it remains low in absolute terms.

THE RETURN TO GRACE OF THE INTERNATIONAL CRIMINAL COURT?

With the publication of the arrest warrant of 17 March 2023, the International Criminal Court has reminded the international community of its importance. This initiative, however, raises questions as to the basis on which such a warrant might be issued, given that Russia is not a signatory of the [Rome Statute](#), by which the Court was established in 2002. More importantly, how could such a mandate be effectively implemented in such circumstances? There are, of course, some answers to these questions, although it is clear that uncertainties will remain.

The first legitimate question is that of jurisdiction. How can the ICC tackle the actions of the leader of a state that has not ratified its statute? This is even more so with Russia, which is one of the few signatory states to have decided to deprive its signature of any legal effect. In international law, a state's signature does not (in principle) constitute a commitment: it merely signifies objective recognition of the situation created by the treaty and only generates a general obligation of good faith towards it. By neutralising the effect of its signature, Russia intended to signify its rejection of the very existence of the Court. This is a point that the designers of the ICC were smart enough to anticipate. The Court has a special legal status: that of an international organisation.

Unlike other international jurisdictions, it has an objective personality whose existence alone is binding for all States, even non-State Parties. A parallel could be drawn with the European Union: the United States, Argentina or Australia are obviously not members as they are not parties to the founding treaties (Rome in 1957 and Maastricht in 1992, for the main ones). But they cannot contest its very existence: it is imposed on them as an objective reality. The same applies to Russia in relation to the International Criminal Court.

This is far from sufficient to be able to envisage the ICC's jurisdiction over the Russian leader. Recognising

the existence of an international court does not mean that a state recognises its jurisdiction over it. Neither Russia nor Ukraine is a party to the Statute. But there is a loophole: as of 2014, Ukraine agreed to give the Court jurisdiction over crimes within its jurisdiction and committed on its territory. This is a possibility recognised by Article 12(3) of the Rome Statute. Without going into detail here, it should be noted that 39 [signatory States](#) decided on the basis of this acceptance by Ukraine, to refer the situation to the Prosecutor's Office, thereby allowing a notable speeding up of the process. This includes all EU Member States. This procedure, however, does not change the state of the law: while it allowed the arrest warrant to be issued on 17 March, it does not make Russia liable for any obligation towards the International Criminal Court. But insofar as the crimes for which Putin is being prosecuted were committed on Ukrainian territory, the Court's jurisdiction is well established. The problem is therefore not one of principle: it lies in the concrete implementation of this historic decision.

Indeed, only the States that are party to the Rome Statute (there are 123 of them) are legally bound to cooperate with the Court. This means that, in principle, the presence of Vladimir Putin on the territory of one of them would automatically trigger the obligation for the local authorities to arrest him. The few precedents show, however, that such an obligation is rarely respected: for example, the former Sudanese president Omar Al Bashir, who has been under an arrest warrant since 2009, has been able to travel without being troubled [in a certain number of States](#), some of which are members of the International Criminal Court. Some states are also skilfully maintaining a degree of ambiguity regarding their relationship with Russia, which suggests that they are unlikely to be willing to make such a politically sensitive arrest, a position explicitly expressed by the Hungarian government. This is, however, the only legal course of action available. But there is no doubt that there are many obstacles.

They are first of all political in nature: by engaging in judicial proceedings, the ICC is resolutely placing Vladimir Putin on the side-lines of the international community, even if the recent visit of Chinese President

Xi Jinping to Moscow has mitigated this isolation - which can only be regretted. In any case, it seriously discredits his "humanitarian" discourse (it should not be forgotten that the invasion of Donbass officially aimed to liberate the oppressed populations and victims of "genocide" by the Ukrainian government) and prevents any normalisation of relations with Western countries. It is on this last point, in particular, that the consequences could be regrettable, as the path to negotiation seems almost definitively closed. For countries such as the member states of the European Union (apart from the United States, which shares with Russia a total aversion to the ICC), which remain the last bastions of multilateralism and the last defenders of the institutions that serve it in a world that is turning in on itself, it is in fact extremely problematic to consider discussions with a head of state who has been issued with an arrest warrant by the International Criminal Court: such a step would be seen as an open defiance of the Court, which the European countries have nonetheless supported in an unprecedented way in recent months. It is difficult to see how these two antagonistic positions can be reconciled. In this sense, the arrest warrant confirms that the situation will not be resolved with Vladimir. Putin: it will only be resolved by, or after, his departure from power.

This prospect raises a second obstacle of a legal nature, to the concrete implementation of the arrest warrant: as a sitting head of state, Vladimir Putin enjoys protection in the form of immunity, long recognised and indisputable under international law. The question would undoubtedly be posed in different terms if he were to be ousted from power, as his protection would be considerably weaker. But the question of immunity remains a key issue for the effective implementation of the mandate. The problem is technical, and this is probably not the place to discuss legal subtleties. However, it should be noted that the ICC Statute itself is ambiguous: while Article 27 provides that immunity must not prevent the Court from exercising its jurisdiction, Article 98 recalls that the Court cannot compel a State to act in contradiction with its international commitments in terms of immunity.

It should also be recalled that, as the law stands, there is no exception to immunity - of States and

their representatives - linked to the gravity of the acts performed. Although, in another case, the International Criminal Court stated that the benefit of immunity was [limited to national jurisdictions](#) and that it cannot be applied before international courts created by treaty, this position is hardly convincing. Hence history shows how [difficult](#) it is to bring a head of State in office to trial. As long as he is in power, the implementation of this mandate will therefore be very complex. It should also be noted that the same obstacle would block the path of a possible *ad hoc* jurisdiction, the mere creation of which would prevent the resolution of the thorny issue of immunity.

A SYMBOLIC DECISION?

To be clear, the chances of the ICC arrest warrant being effectively executed are slim, especially as long as Vladimir Putin remains in power. If he were to leave office one day (but this is increasingly doubtful), the prospects might brighten, but then we would have to rely on the cooperation of ICC member states to execute this decision. In any case, the publication of the arrest warrant, along with the General Assembly Resolutions that were adopted by an overwhelming majority in the main, objectifies the situation and confirms Putin's pariah status, whose world certainly shrank on 17 March 2023. Moreover, it is questionable whether the issue of the arrest warrant has already produced some effects, in view of the few returns of children in Ukrainian territory in the last few days. That being said, this return seems to be mainly due to the work of the associations more than to a real Russian political turnaround. But it is certain that the arrest warrant will at least have had the merit of shedding the light on these actions. Putin may well cry out for illegitimacy or instrumentalization, there is no remains no less that the facts are proven, and well-known all over the world.

Of course, Western heads of state are not perfect. No doubt some of them would even have deserved the same fate, especially those who were involved in the very risky Iraq war in 2003, launched without a Security Council mandate and punctuated by war crimes. But the fact that the ICC failed in the past should not lead

to excessive reactions. This is a welcome step forward, which is indeed a step forward. International criminal justice is a new thing: exceptional at Nuremberg, it has gradually become normalized and generalized. Since it now addresses the leader of a permanent member of the Security Council, it is further asserting its expansion. The policy of small steps forward in terms of such an important issue may seem frustrating. But it is known, in Europe more than anywhere else, that this is by far the most effective way of achieving cooperation between states.

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