RUSSIA AND THE (DE)COLONIZATION OF INTERNATIONAL LAW

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Abstract

This thesis presents a postcolonial content analysis of the Situations in Georgia and Ukraine. ICC prosecutors, for the first time in their organization's history, issued numerous arrest warrants for Russian nationals in the year following the 2022 invasion of Ukraine. By looking for the presence, remnants or absence of Russia's structural advantage in the procedure of these two emerging cases, we can make claims, under the TWAIL theoretical framework, about the current state of Russian structural power, including any signs of trends. This thesis demonstrates that, while Russian structural authority is currently waning more than gaining, there is insufficient evidence to determine whether a larger power transition is taking place or whether international law alone is theoretically capable of accomplishing this.

An Imperial Message

Franz Kafka

THE EMPEROR, so a parable runs, has sent a message to you, the humble subject, the insignificant shadow cowering in the remotest distance before the imperial sun; the Emperor from his deathbed has sent a message to you alone. He has commanded the messenger to kneel down by the bed, and has whispered the message to him; so much store did he lay on it that he ordered the messenger to whisper it back into his ear again. Then by a nod of the head he has confirmed that it is right. Yes, before the assembled spectators of his death -- all the obstructing walls have been broken down, and on the spacious and loftily mounting open staircases stand in a ring the great princes of the Empire -- before all these he has delivered his message. The messenger immediately sets out on his journey; a powerful, an indefatigable man; now pushing with his right arm, now with his left, he cleaves a way for himself through the throng; if he encounters resistance he points to his breast, where the symbol of the sun glitters; the way is made easier for him than it would be for any other man. But the multitudes are so vast; their numbers have no end. If he could reach the open fields how fast he would fly, and soon doubtless you would hear the welcome hammering of his fists on your door. But instead how vainly does he wear out his strength; still he is only making his way through the chambers of the innermost palace; never will he get to the end of them; and if he succeeded in that nothing would be gained; he must next fight his way down the stair; and if he succeeded in that nothing would be gained; the courts would still have to be crossed; and after the courts the second outer palace; and once more stairs and courts; and once more another palace; and so on for thousands of years; and if at last he should burst through the outermost gate -- but never, never can that happen -- the imperial capital would lie before him, the center of the world, crammed to bursting with its own sediment. Nobody could fight his way through here even with a message from a dead man. But you sit at your window when evening falls and dream it to yourself.[1]

[1] Franz Kafka, *An Imperial Message* (Praha, 1919).

Chapter One: Introduction

Crossing the border on February 24th, 2022, Russian troops, stationed there in large numbers over the previous year, entered Ukraine to brief, but lasting, initial successes. After sweeping through limited areas of Luhansk and Donetsk, as well as opening a northern front through Belarus, the Russian military reached Kharkiv and nearly Kyiv before being pushed back and consolidating gains in the Donbas over the following fall and winter.[2] Ukraine was not expected to have as much success as they had, but experience from the invasion of Crimea and a dedicated general mobilization allowed them to quickly turn their military into a modern, effective fighting force. Successfully counterattacking, Ukrainian forces advanced farther in the start of 2023, but Russian, as well as Wagner Group, forces have proven difficult to expunge from their positions in eastern Ukraine. In the space created by the initially back and forth but then locked nature of the conflict, other states and international organizations have had the opportunity to react to the invasion. Ranging from quiet and independent neutrality to complete condemnation and contribution of military aid, the international reaction to Russia's invasion was overwhelmingly negative. With this rare level of agreement, states enacted various levels of diplomatic withdrawal and far-reaching sanctions that have meaningfully affected Russian foreign currency reserves and ability to do business internationally.

In this economically and militarily uncertain space, there have been a series of high-profile indictments of Russian nationals by the International Criminal Court (ICC). First, of Mikhail Mayramovich Mindzaev, Gamlet Guchmazov and David Georgiyevich Sanakoev, as a continuation of the *proprio motu* investigation of the Situation in Georgia, and second, directly on Vladimir Putin and his Commissioner for Children's Rights, Maria Alekseyevna Lvova-Belova. Russia, already a historically tentative participant in the international community, has become an international pariah from western states in the face of their violations of humanitarian and military international law.[3] The Situations in Georgia and Ukraine, seemingly rejections of Russia's imperialist military policy, appear to fundamentally break with previous

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[2] "Interactive Time-Lapse: Russia's War in Ukraine," ArcGIS StoryMaps, June 30, 2023, https://storymaps.arcgis.com/stories/733fe90805894bfc8562d90b106aa895.

[3] Peter Dickinson, "Putin the Pariah: War Crimes Arrest Warrant Deepens Russia's Isolation," *Atlantic Council* (blog), March 19, 2023, https://www.atlanticcouncil.org/blogs/ukrainealert/putin-the-pariah-war-crimes-arrest-warrant-deepens-russias-isolation/; Peter Dickinson, "Europe's Last Empire: Putin's Ukraine War Exposes Russia's Imperial Identity," *Atlantic Council* (blog), February 1, 2023, https://www.atlanticcouncil.org/blogs/ukrainealert/europes-last-empire-putins-ukraine-war-exposes-russias-imperial-identity/.

ICC behavior. After two decades of only prosecuting African defendants, ICC prosecutors suddenly bringing forth arrest warrants of Europeans including the sitting Russian head of state, for the first time in its history is a profound shift. Not legally or procedurally improper, ICC prosecutors have a full caseload indicting war criminals on similar procedural grounds and have even indicted a sitting head of state in the past; however, in the twenty-year history of the ICC, only ever of African countries. Constructed by postcolonial theory as the legal equivalent of the IMF's predatory agent of economic hegemony, the ICC has not shied away from their exclusive focus on Africa in the past and done little to shake this neocolonial reputation. Themselves a colonial power, the Russian experience of international law used to be similar to that of the United States, which is to say, hands off until something particularly egregious happens and, even in such cases, diplomatic stonewalling and international pressure generally end questions before they can seriously be raised.[4] Usually the beneficiary of the ICC's avoidance of First World states, Russia is suddenly in their crosshairs in a way they have not previously experienced. Herein lies the crux of the matter: a neocolonial organization, for the first time in their history, turned on a former European colonial power. While this may seem unlikely given the theoretical underpinnings, it demands an investigation of our assumptions about Russia, the ICC and international law more generally. If the ICC feels like it can treat Russia the way it has historically treated Sudan, our colonial assessment of one of the actors may need an adjustment. ICC prosecutors finally following through on their commitment to equality under the law is a needed improvement to the current system, but the origins of this move are still in question. While outwardly appearing not, or even anti, colonial, the ICC's motivations may not be as fuzzy as first thought and demand further investigation before longstanding theoretical assumptions about their nature can begin to be challenged.

Questions and Aims

This thesis aims to examine the recent spate of arrest warrants of Russian nationals in the ICC from a third world perspective and investigate the implications for Russia and international law more generally. Not serving as merely a deconstruction of the recent ICC cases, this analysis will also be a critical investigation of their colonial etiology and how this effects the ongoing legal situation.

[4] Dickinson, "Putin the Pariah."

This thesis aims to answer the following questions:

What does the colonial nature of international law say about the recent surge of Russian prosecution in the International Criminal Court?

Does this represent a greater shift or transition for Russia?

Justification:

As I have been told, this is a somewhat unique perspective and requires some a complementary justification before beginning in earnest. This feels strange, because I see the application of postcolonial theory as the obvious starting point for modern Russian political analysis and the relative rarity of this approach hints at greater critiques of Western academia. Western Orientalized analysis of Russia has an interesting agency-denying effect that frees them from ownership of both their successes and failures, victories and atrocities.[5] By selectively given credit for achievements or blame for crimes when frame-convenient, monolithic narratives cast a dehumanizing shroud over Russia and its people to a deleterious effect on any potential analysis.

Humans can err, and Russia must be given equal agency for their military and imperial ambitions. Far from alone, other scholars in the past year have echoed this disappointing accusation for the persistent Western ignorance of Russian imperial ambitions, both historical and contemporary. Professor Botakoz Kassymbekova's criticism, published in Aljazeera earlier this year, echoes this observation:

> To understand Russia, one needs to listen to those who lived under Russian colonial rule. To understand former and current Russian colonies, one needs to listen to historians from these places and study their cultures, languages and histories, both written and unwritten. To appreciate the ways out of colonial dictatorships, one needs to study the successful transformations of states like Ukraine. This would require dismissing the myth of the 'artificial nation' and finally seeing Russia as an empire.[6]

By specifically applying postcolonial theory to Russia's legal situation, this analysis can combine this drastically needed perspective with extensively documented and politically significant cases that will

[5] Edward W. Said, *Orientalism*, 25. anniversary ed. with a new preface by the author (New York: Vintage Books: A Division of Random House, 1979), 251, https://monoskop.org/images/4/4e/Said_Edward_Orientalism_1979.pdf.

[6] Botakoz Kassymbekova, "How Western Scholars Overlooked Russian Imperialism," https://www.aljazeera.com/opinions/2023/1/24/how-western-scholars-overlooked-russian-imperialism.

define the Russian political situation long past the end of the war. Emerging information is a double-edged sword, and, despite the immediate relevancy, sample size is always going to be smaller than any researcher might prefer. There might only be two ongoing ICC atrocity crime cases against Russia, but their contemporary relevance and lack of other comparable legal cases increases their relative weight in the context of the international strategic situation.

Structure

Split into five chapters, this analysis will begin with an introduction, which includes questions and aims, justification, methodology, scope and limitations, before segueing into a review of relevant literature. Followed up with a brief background of the historical argument, chapter two is the connection between the theoretical claims and international case law, preparing for the application of these claims in the content analysis chapter. Chapter three, the content analysis itself, focuses on each case individually and is subdivided around the facts and rationale of each, mirroring case brief format. Chapters four and five, results and conclusion, first advance the results of the content analysis, then move on to answering the research questions and a discussion of their implications for the investigation as a whole. Concluded by a discussion of further research, this analysis opens the door for further methodological exploration of this and other relevant data.

Methodology

In order to detect changes in the international legal treatment of Russia and any potential transition, this thesis will undertake a critical content analysis of Russia's cases in the ICC, utilizing TWAIL's framework of third world states as the "recipients, not participants" of international law.[7] Russia's (in)ability to manipulate their legal outcomes places them on the continuum of first to third world international treatment. First World states, with international structural advantages, can avoid punishment for their crimes and third world states generally cannot. With this framework, changes in Russia or the ICC's ability to wield their colonial prerogative can be observed from the legal documents and decision-making processes from these two emerging cases. By elevating the subaltern, Russian

[7] Makau Mutua and Antony Anghie, "What Is TWAIL?," *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000): 35.

influence over international events can be identified by qualified actors and the continued hegemonic nature of the ICC can be analyzed in its proper context.

Scope

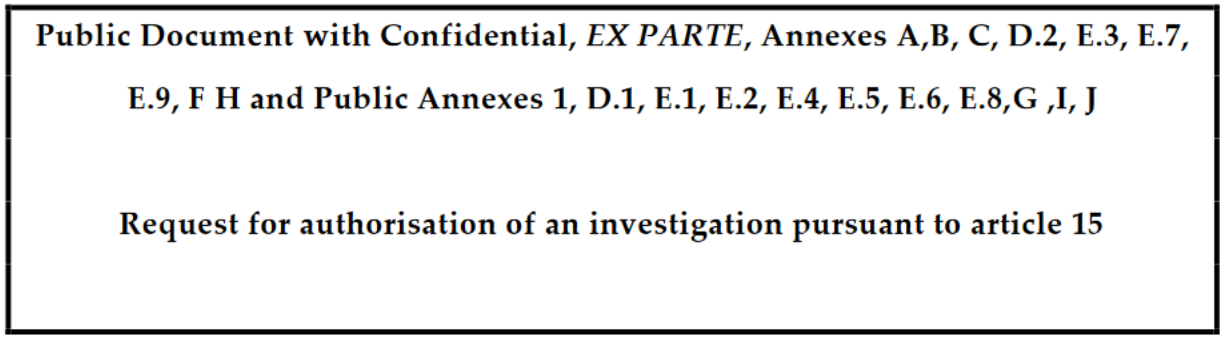
As with all intellectual pursuits of this manner, researchers must be skeptical of metanarratives of change or transition. While there are conclusions to be taken from the critical analysis of Russia's legal situation, conclusions of grander significance must be limited to what is immediately recognizable via the TWAIL standard and not extend to overly cinematic historical narratives. Part of far greater body of evidence on Russia's place in the world, this analysis is an inherently partial postcolonial assessment of the current state of Russian power. While legal records are some of the most revealing discursive artifacts produced by any culture, they can also be the most misleading without the proper contextualization necessary to understand why certain legal decisions end up breaking the way they do and what that ultimately says about the society. In this spirit, this work can only function alongside a variety of psychological, sociological and economic work that apply postcolonial lessons to these realms. Without these other works, our view of Russia, only seen though this legal framework, will be incomplete.

Limitations

Although ICC gives unprecedented levels of access to court documents and records through their online legal tools database, many court documents are heavily redacted or completely confidential.[8] Lots of evidence is publicly available, but anything time sensitive or relating to the arrest of an individual, inevitably the juiciest stuff, is not. In cases where lack of access might be an issue, secondary scholarly legal analysis can usually point to a commonly held interpretation of the court's reasoning, but it would not be out of the question for researchers to encounter significant problems with redacted documents. Luckily, this problem, when encountered here in the Situation in Ukraine, was easy to work around with secondary sources. Since the legal reasoning in question, not a reinterpretation of the evidence, is the intended object of this research, the public record generally does a good job.

[8] "ICC Legal Tools Database," ICC Legal Tools Database, n.d., https://www.legal-tools.org/.

ICC documents list all the sections that the public does not have access to in the title:



[9]

Literature Review

Subaltern studies star Gayatri Spivak defined the subaltern as the "difference from the elite," which, on top of continuing to frame subalternity in academia for the next several decades, proposed a uniquely applicable methodology to define subalternity in the world around it.[10] Spivak effectively separated the world into the powerful and powerless but forwent specific criteria in favor of the freedom to explore all possible avenues of exploitation in individual contexts. While beneficial to subaltern studies as a whole, scholars must narrow their field of view to construct an evidentiary framework around this unifying principle, requiring a more specific subfield by which to apply to Russia's situation.

Enter The Third World Approach to International Law (TWAIL), a self-identifying third world set of beliefs that has been working on formal legal terminology since the 1990s and can precisely explicate how the current rule of international law works counter to their sustained progress, extends colonial power structures and generally disenfranchises them from the current international order. Born out of a desire to critically review the corpus of international law enacted since the entrance of, what they consider, to be the "first generation of public international law from the third world, " TWAIL, first in their founding conference in 1997, came to the conclusion that international law, in its current state, is a "predatory system that legitimizes, reproduces and sustains the plunder and subordination of the third

[9] "Request for Authorisation of an Investigation Pursuant to Article 15," October 13, 2015, https://www.legal-tools.org/doc/460e78/pdf.

[10] Gayatri Chakravorty Spivak, *Can the Subaltern Speak?: Reflections on the History of an Idea* (Columbia University Press, 2010),27.

world by the West."[11] Specifically a post-World War Two western plan to maintain "global order" through an administration of human rights, international law is considered to be an imperial project that marked the end of direct colonial authority in favor of new systems of domination.[12] With direct colonial control increasingly phased out in favor of a different, parallel dependency, ex-colonial states "were still bonded—politically, legally and economically to the West," just, this time, with a modern system of dynamics by which to subjugate.[13] Unable to resist these fresh demands from their former colonial masters, third world states, armed with only the wafer thin promise of legal equality, entered into organizations of neo-colonial dependency because of international debt, legal trouble and political pressure. Sold as a positive extension of Westphalian sovereignty, this new system of dependency, reliant on trade agreements, rulemaking bodies and international courts, re-enshrines the old powerless at the bottom of the new hierarchy and inspires TWAIL's specific antagonism for the current international legal order.

Still preserving Spivak's basic premise, TWAIL describes the Third World as the difference from the center of international legal authority and finds evidence for this definition in the mountain of prosecutorial documents of Third World states and the general dearth of the First.[14] International legal attention, according to TWAIL's historical argument, flows away from the center of power toward the more vulnerable, from the first world to the third and rarely in the opposite direction. The First World, as the beneficiary of the heritage and ongoing remnants of colonial power structures, designed the legal institutions that the rest of the world adopted under the guise of internationalism but did not make themselves equally vulnerable.[15] From this original structural advantage, First World states built an international legal system that preserves their colonial prerogative and extends Marx's original construction of the law as a societally formalized system of ensuring exploitative economic relationships. By describing the one-sided reality of international power, TWAIL positions itself as both

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[11] Mutua and Anghie, "What Is TWAIL?," 31; James T Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography," *Loyola University Chicago LAW ECommons*, Faculty Publications & Other Works, 2011.

[12] Mutua and Anghie, "What Is TWAIL?," 34; Hussein Alatas, *The Myth of the Lazy Native: A Study of the Image of the Malays, Filipinos and Javanese from the 16th to the 20th Century and Its Function in the Ideology of Colonial Capitalism* (London: F. Cass, 1977), 7; Ngugi wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature*, Reprinted, Studies in African Literature (Oxford: Currey [u.a.], 2011), 4.

[13] Mutua and Anghie, "What Is TWAIL?," 34.

[14] Spivak, *Can the Subaltern Speak?*, 27.

[15] Homi K. Bhabha, *The Location of Culture* (London ; New York: Routledge, 1994), 20.

"counterhegemonic" and "antihierarchical," in an attempt to wrest the status quo from the arms of western hegemony and thrust it back to the people of the Third World.[16] Driven by their view of the "United Nations, and in particular its Security Council, as completely indefensible," TWAIL, shocked by the "the blatant disregard by the United Nations of crises in the Third World," explicitly places themselves as representatives of the bottom of the global hierarchy and work toward its eradication.[17]

In a much more tactful and impactful way than previous users, TWAIL uses the term Third World to describe the "stream of similar historical experiences across virtually all non-European societies that has given rise to a particular voice, a form of intellectual and political consciousness."[18] Echoing the words of Tanzanian President Julius Nyerere, TWAIL defines the third world as:

> The victims and the powerless in the international economy. . . . Together we constitute a majority of the world's population and possess the largest part of certain important raw materials, but we have no control and hardly any influence over the manner in which the nations of the world arrange their economic affairs. In international rulemaking, we are recipients not participants.[19]

As the recipients of international rulemaking, Third World states are held accountable to environmental and economic regulation all of the time, not just when convenient, and have to respect International Humanitarian Law while the First World seems to receive a never-ending supply of get out of jail free cards.

Postcolonialism as a Power Transition Theory

Built to distinguish the epistemological conditions of the lack of international power, TWAIL, and other postcolonial theories in general, are directly concerned with the transition of power between colonial and national "protagonists." [20] In an existence "marked by violence," the settler, in its violent search for its dialectical opposition, brings the native consciousness into existence through their exploitation of their newly acquired other.[21] By "dint … of bayonets and cannons," native resources are plundered and forcibly remitted in the same imperial style of old, but with a quasi-humanist sheen of

[16] Mutua and Anghie, "What Is TWAIL?," 36, 37.
[17] Mutua and Anghie, "What Is TWAIL?," 37.
[18] See Terminology
[19] Mutua and Anghie, "What Is TWAIL?," 35.
[20] Frantz Fanon, *The Wretched of the Earth*, 60th Anniversary, Book, Whole (New York, NY: Grove Press, an imprint of Grove Atlantic, 2021), 37.
[21] Fanon, *The Wretched of the Earth*, 36.

noble savagery that provides the narrowest glimmer of moral justification that these societies needed to function.[22] Under the colonial administration, indigenous or national consciousness begin to coalesce into recognizable political institutions that cry out for independence and the removal of the long-standing national remora. Colonized subjects, more than just made anew themselves by their contact with the settler society, form the beginnings of a state, in the western legal sense, by which to demand independence and forcibly take over from the colonial administration.[23] In their state of alienation, settlers lash out against their colonized subjects and repress the newly formed bud of national consciousness, only fueling the violence that is to come.

Violent from the outset, colonization relies on an effective subjugation of this native consciousness and can only be undone with a counter catharsis. ”Evok(ing) the searing bullets and bloodstained knives that emanate from it,” decolonization is “the total, complete, and absolute substitution of one “species” of man for another,” in which the native rises from object of the settlers alienation to fully aware and nationally conscious.[24] “After a murderous and decisive struggle between the two protagonists,” national power is transferred “without any period of transition” between the settlers and newly made natives.[25] A sudden and violent transfer of state authority between two colliding national entities, decolonization is only a few quibbles away from being a classical intrastate war by the strictest of definitions. Postcolonial theory, discussing the time after the defeat of the colonial administration, then becomes the leading authority on conflict driven governmental transition and the psychological, economic, sociological and, most importantly, legal effects on the two ejected consciousnesses. Through their exploration of the conditions and violent transfers of power at the bottom of the international sphere, postcolonial theory provides a potent framework for research into many other types of international conflict.

What Exactly is Transitioning?

In order to be applied to power transitions more generally and be adopted on a wider scale, TWAIL and Postcolonial theory must provide a unique and substantive improvement over similar and

[22] Fanon, *The Wretched of the Earth*, 36.
[23] Fanon, *The Wretched of the Earth,* 37.
[24] Fanon, *The Wretched of the Earth*, 37.
[25] Fanon, *The Wretched of the Earth*, 37.

competing theories. Similar in many foundational aspects except the ones that really matter, Power Transition Theory, as described by A.F.K. Organski in 1958, provides a similar methodological view of transition to Postcolonial Theory, but provides a clear warning of the problems of a noncritical view of power.[26] Quite widespread over the next sixty years, Power Transition Theory grew into a popular rationalist substitute for Balance of Power Realism that formed the basis of the scientific justification for international relations and conflict research during this period.[27] Organski disagreed with Balance of Power theorists about the nature of International Relations, envisioning a world with a hierarchical structure instead of typical realist anarchy.[28] Power Transition Theory adheres to its positivist and scientific view of power to determine whether states are moving between tiers in the global hierarchy, but, in a manner reminiscent of the critical critique of positivism, is uniquely placed to ignore colonial experience.[29]

Originating in the early literary debate between founding critical theorists and their ideological opposition, Horkheimer's, and then later Adorno and Habermas,' critique of positivism has become foundational to critical social science research.[30] To Horkheimer, and other founding Frankfurt School members, social science cannot be done unobjectively, and research in ignorance of this has "dubious validity."[31]

> Empiricism totally ignores thought, together with all the intellectual factors which, bound up with definite interests, sketch a living picture of reality. The concept of history, which is only intelligible from subjectively determined goals, belongs among those concepts which logical empiricism must inevitably misconstrue because of its behavioristic theory of man.[32]

Inherently alienated from the drives of other consciousnesses, researchers attempting to draw sociological or historiographical conclusions from their interpretation of the actions of other people will be misguided at best. In pursuit of "reducing the tension between [the theoretician's] own insight and (the) oppressed humanity in whose service he thinks," researchers should adopt a critical view of these

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[26] A. F. K. Organski, *World Politics* (Knopf, 1958).
[27] Jonathan M. DiCicco and Jack S. Levy, "Power Shifts and Problem Shifts: The Evolution of the Power Transition Research Program," *The Journal of Conflict Resolution* 43, no. 6 (1999): 676; Ronald L. Tammen, "The Organski Legacy: A Fifty-Year Research Program," *International Interactions* 34, no. 4 (December 11, 2008): 315.
[28] Tammen, "The Organski Legacy," 318.
[29] Tammen, "The Organski Legacy," 317.
[30] Frank Fischer et al., *Handbook of Critical Policy Studies* (Edward Elgar Publishing, 2015), 67.
[31] Max Horkheimer, "Der Neueste Angriff Auf Die Metaphysik," *Zeitschrift Für Sozialforschung* 6, no. 1 (March 1, 1937): 4.
[32] Horkheimer, "Der Neueste Angriff Auf Die Metaphysik," 4.

empirical conclusions and the systems of hegemony they extend while centralizing the experience of the subaltern.[33]

Power Transition Theory has come to define empirical International Relations research and popularized their positivist, and generally uncritical, interrogations of international power. Power, in the mind of power transition theorists, is the "ability to alter the behavior of other states and entities, and a power transition is a fundamental change in a state's ability to alter behavior."[34] Simplified into methodological absurdity from a critical standpoint, Power Transition Theory's evaluation of power in a purely empirical manner ignores the built in elements of structural domination that TWAIL and other postcolonial and critical theories were founded on describing. Unable to integrate the lived experience of the Third World, Power Transition Theory's view of transition as a directional change in power is still more applicable than might seem at first glance, as evidenced by its continued methodological significance.[35] While, according to Horkheimer, the statements of "more powerful" or "less powerful" will be society and context determinate, a permanent difference in the ability to affect a state's neocolonial prerogative, as attested to by generations of postcolonial scholars and Third World experience, outsources the inherently subjective analysis to the subaltern as much as possible. Using this as a definition to mark a potential transition, researchers can utilize the relevant critical framework, established by those more qualified, to draw conclusions from the data.

Terminology

International legal scholars, despite the variety of relevant nomenclature for the classification of international power, have taken to using the older terminology of "Third World."[36] Coined by Albert Sauvy in 1952, the *tiers monde* was originally constructed as a response to the outgrowth of the socialist world in Eastern Europe.[37] While conceptions of developed and underdeveloped can be found throughout the entire colonial period and beyond, Suavy's new tripartite characterization of the international community

[33] Max Horkheimer, *Critical Theory: Selected Essays* (New York: Continuum Pub. Corp, 1982), 221.
[34] Organski, *World Politics*.
[35] DiCicco and Levy, "Power Shifts and Problem Shifts," 676.
[36] Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography," 400.
[37] Carl E. Pletsch, "The Three Worlds, or the Division of Social Scientific Labor, Circa 1950-1975," *Comparative Studies in Society and History* 23, no. 4 (1981): 567; Alfred Sauvy, "Trois mondes, une planète," *Vingtième Siècle. Revue d'histoire* 12, no. 1 (1986): 81–83.

required a second developed world to distinguish itself from the first. After, perhaps unsurprisingly given the Eurocentric tendencies of scholars then and now, establishing the developed western world as the first and the socialist developed world as the first other, or second world, Sauvy knocks the underdeveloped world down all the way to third status. Castigated as a racist reproduction of a currently non-existent Cold War political division, many contemporary scholars have criticized the terminology of Third World for signaling an inferiority of large swaths of the international community as compared to western counterparts; however, it is for this exact reason why it remains a relevant distinction today.[38] TWAIL scholars use Third World specifically because it separates the dominant Eurocentric hegemonic construction of international law from the constructions of the subaltern. By setting the Third World up as an "alternative epistemic location," TWAIL is able to distinguish between the critiques, solutions and legal strategies of First and Third World states, elevating the subaltern over the dominant or hegemonic.[39] In this capacity, Third World is a subversive "anti-subordinating term whose aim … is to disrupt and hopefully dismantle the hierarchies on which unequal production about the knowledge of international law is produced and practiced."[40] It is precisely because of the racism and unrepresentative trichotomization of the current political order inherent to the term Third World that it can be constructed as the opposite, "provid[ing] the analytical tools to examine whether there are unequal economic, political, military or even racist underpinnings of our various rules, practices and scholarship."[41] Many alternative terms have fallen in and out of fashion since Sauvy, including developed and underdeveloped, the Marxist-inspired Core and Periphery, and the economic distinction of the Global North and Global South, all with their own individual inadequacies, essentialist oversimplifications and trappings of colonialism.[42] Regardless, the still oft criticized term of Third World remains the chosen vocabulary of TWAIL scholars, who, for the most part, are themselves from the Third World and use it in this subversive context, making it the most useful and meaningful terminology in this setting.

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[38] Themrise Khan et al., "How We Classify Countries and People—and Why It Matters," *BMJ Global Health* 7, no. 6 (June 1, 2022): 2, https://doi.org/10.1136/bmjgh-2022-009704.
[39] Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography," 401.
[40] Gathii, 401.
[41] Gathii, 401.
[42] Khan et al., "How We Classify Countries and People—and Why It Matters," 2; Nicholas Lees, "The Brandt Line after Forty Years: The More North–South Relations Change, the More They Stay the Same?," *Review of International Studies* 47, no. 1 (January 2021): 87, https://doi.org/10.1017/S026021052000039X.

Chapter Two: Historical Background

Third World Legal Vulnerability

As borne out by the historical record, TWAIL's definition of the Third World as the recipients of a hegemonically imparted western legal tradition can be seen in the body of international law from the very start of the current legal order.[43] From 15th century papal bulls to court decisions concerning tribal rights, all the way until the present day, international law has played a vital role in the justification and expansion of colonial practices and the exploitation of the Third World. Colonial international legal actions, as decided by the entire gamut of international presiding actors from the Pope to the UN Security Council, are about the colonized world, but never with them as an equal party. When colonial subjects were allowed legal representation, as with the treaties between Native American tribes and the U.S. government, indigenous groups were not treated as fully sovereign equals and forced to sign unequal and exploitative agreements, which, when inconvenient for the U.S. government, were routinely ignored.[44]

While there was some acknowledgement of aboriginal title in the early U.S. and Commonwealth states, most significantly in the Nonintercourse Acts and their history of enforcement, the Marshall Court explicitly alienated tribes from their lands in the 1823 Supreme Court case *Johnson v. McIntosh*. Nominally a contract dispute between two parties with separate titles to the same land, one from direct purchase from the Piankeshaw tribe and one from the U.S. government, *Johnson v. McIntosh* legally sanctioned the federal government's possession of tribal lands as the inheritors of the Crown's claim. Based on Chief Justice Marshall's appraisal of the international legal doctrine of discovery, the Crown derived ownership from the conquest of the applicable tribe or confederation and maintained their "exclusive right to extinguish the Indian title of occupancy."[45] Britain discovered and conquered the Piankeshaw tribal lands and therefore had legal ownership, subsequently passed to the US after the

[43] Ikejiaku, "International Law Is Western Made Global Law," 340.
[44] Arthur Spirling, "U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1784–1911," *American Journal of Political Science* 56, no. 1 (2012): 84–97; Cherokee Nation v Georgia, 30 U.S. Reports (Marshall Court 1831); "Cherokee Nation v. Georgia," Federal Judicial Center, n.d., https://www.fjc.gov/history/timeline/cherokee-nation-v-georgia.
[45] John Marshall, Johnson v Mcintosh, 21 U.S. Reports 543 (Marshall Court 1823), 545, 587.

Treaty of Paris, while tribal nations only retained a right to occupancy on their land. Native tribes, according to Marshall, could not sell land they did not legally possess.

Marshall, unlike most scholars today, did not trace the doctrine of discovery to early papal bulls, like the 1436 *Romanus Pontifex* or even early international documents like the 1494 Treaty of Tordesillas, instead basing his argument on his appraisal of customary international law. Since utilizing papal bulls as legal precedent would be anathema at any point in American history, Marshall notes that early Spanish colonial claims were based on discovery, not religious law or edict. From Spain's "discussions respecting boundary, with France, with Great Britain, and with the United States," the assessed customary practice of discovery and subsequent conquest were claimed to be internationally acknowledged forms of land transfer by which the native inhabitants could be alienated from legal ownership.[46] While the lack of Christianity of the native inhabitants was immaterial, their "savage" lifestyle and lack of "civilized" land use was responsible for their absorption through discovery.[47] Since the inhabitants were "savages," they never existed as sovereign independent states with legal ownership in the first place, and, consequently, the land they inhabited was considered discoverable and claimable.[48] According to Marshall's assessment of European history:

> All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers. Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.[49]

While modern scholars dispute Marshall's history, finding a greater level of indigenous ownership in British colonial policy than he reported, *Johnson v Mcintosh* became longstanding international legal precedent, used by Australia, New Zealand, Canada, and is still in effect in the United States today.[50] Marshall's doctrine of discovery, however customary it may actually be, was explicitly cited in the seizures

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[46] Marshall, Johnson v Mcintosh, 21 U.S. Reports, 574.
[47] Marshall, Johnson v Mcintosh, 21 U.S. Reports, 563,567, 590, 591.
[48] Marshall, Johnson v Mcintosh, 21 U.S. Reports, 563, 590.
[49] Marshall, Johnson v Mcintosh, 21 U.S. Reports, 567.
[50] Stuart Banner, "Why Terra Nullius? Anthropology and Property Law in Early Australia," *Law and History Review* 23, no. 1 (2005): 95; Blake A Watson, "The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand," *Seattle University Law Review* 34, no. 507 (n.d.), 512-515).

of aboriginal land in Australia, becoming a much more common feature of Australian legal procedure than anywhere else in the commonwealth.[51] Unlike the experience of tribes in North America, who had earned a begrudging amount of martial respect by the late 18th century, British residents "exhibited a far greater contempt for the Aborigines than British colonists showed toward indigenous peoples in other places," and alienated them from ownership purely by right of discovery and conquest instead of resorting to purchases or treaties.[52] Without the fear of military competition, settlers had more power over their colonized subjects and quickly did away with the legal fiction of equality that Native American tribes had paid for in blood. Despite the poisonous influence of the applied legal argument, colonial discovery and exploitative purchases are still upheld as the legal basis for the entire chain of land ownership in the following centuries. Marshall, not to his great credit, made the remarkably cogent point that this is the only feasible way to justify the transfer of land to the U.S. government. Without the customary international legal doctrine of discovery, colonialism has no satisfactory secular legal basis and would be considered wholly illegal, even to many past legal scholars attempting to justify it.

On top of abusive application of, potentially faux, international legal customs, international legal structures continue to play a key role in the exploitation of the Third World and their disenfranchisement from the promise of sovereign equality. Across a wide variety of international issues, legal structures are used as a cudgel against the potential development of Third World states and to reinforce old systems of servitude. Everything from financial institutions, like the IMF, promoting exploitative economic liberalization to environmental organizations doing nothing to prevent the rapacious plundering of Third World resources, international rulemaking bodies have been no help to Third World countries attempting to free themselves from structural dependency.[53] Without the power to force equal treatment, Third World states are subject to international organizations in ways incomprehensible to major powers. At the mercy of the legal whims of the First world, the Third World is the only part of the world that is consistently vulnerable to international prosecution. While there are similar criminal situations in other areas, ICC prosecutors, up until the second invasion of Ukraine, have only ever prosecuted and indicted African states and defendants. Ranging from terrorist attacks in Libya and Mali to atrocity crimes in

[51] Banner, "Why Terra Nullius?, 98.
[52] Banner, "Why Terra Nullius?, 104.
[53] Ikejiaku, "International Law Is Western Made Global Law," 349.

Sudan, the Democratic Republic of the Congo (DRC) and Central African Republic (CAR), ICC officials have fielded many complaints, especially from the African Union, about the apparent targeting of Africa from early on in their history.[54]

In certain cases, much to the disruption of the African Union, the ICC can, and has, ordered the arrest of a sitting head of state. In 2009 and 2010, ICC officials ordered an arrest warrant for then President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir.[55] First wanted for five crimes against humanity, including "murder, extermination, forcible transfer, torture, and rape," and two counts of war crimes, including "intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and pillaging," ICC prosecutors added three counts of genocide, "by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction," to the arrest warrant after more investigation could take place.[56] In office since 1993, al-Bashir was the highest elected official during the conflict and genocide in Darfur, and, after being indicted by the ICC in 2009, continued to serve in this capacity for the next decade, until his eventual ousting in 2019. Currently on trial for various offenses in Sudan and held in Kobar Prison outside of Khartoum, al-Bashir is not currently within the grasp of the ICC, both for political reasons, the ongoing negotiations with the new Sudanese regime and complementarity, the ICC's requirement to respect domestic proceedings.[57] However, during this interim period, many African countries, in violation of what the ICC's Appeals Chamber saw as their statutory duty, allowed al-Bashir free travel within their state and allowed him to attend formal state meetings and appearances. Kenya, Chad, Djibouti and South Africa all met publicly with al-Bashir before the ICC finally

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[54] "The International Criminal Court Forum," *The International Criminal Court Forum*, accessed June 6, 2023, https://iccforum.com/africa; Jean-Baptiste Jeangène Vilmer, "The African Union and the International Criminal Court: Counteracting the Crisis," *International Affairs (Royal Institute of International Affairs 1944-)* 92, no. 6 (2016): 1319; The Prosecutor v. Omar Hassan Ahmad Al Bashir (International Criminal Court January 12, 2010); The Prosecutor v. Ahmad Al Faqi Al Mahdi (International Criminal Court September 27, 2016); The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli (International Criminal Court August 15, 2017).2

[55] The Prosecutor v. Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09 (International Criminal Court January 12, 2010).

[56] "Al Bashir Case," International Criminal Court, n.d., https://www.icc-cpi.int/darfur/albashir.

[57] Yassir Abdulla and Raja Razek, "Omar Al-Bashir, Ousted Sudan President, Sentenced to 2 Years in Correctional Facility," *CNN World*, December 14, 2019, https://www.cnn.com/2019/12/14/africa/sudan-omar-al-bashir-prison-sentence-intl/index.html; "Sudan's Oldest Prison Attacked by Unidentified Persons, Some Inmates Escape," *TASS World*, April 23, 2023, https://tass.com/world/1608411.

bought suit to Jordan after their unwillingness to arrest him during a trip in 2017.[58] While the Rome Statute makes it clear that a sitting head of a state party may be investigated and indicted by the ICC, Jordan feels that, as an unsigned party, the head of state of Sudan should receive some form of sovereign immunity, and, consequently, they are not obligated to arrest him under international law. Since the case was referred by the UN Security Council, Jordan and the ICC fundamentally disagreed on the limits of the power conferred to the ICC by a Security Council referral. Asserting its dominance over complaints of racism from the African Union, the ICC Appeals Chamber ruled that, not only does the Security Council referral create an obligation to arrest, but no sovereign immunity exists at all, "regardless of whether the case was referred by the Security Council," or not.[59] More than just ignoring the complaints of the African Union, ICC judges spelled out why the complaints are legally invalid in the first place, causing great consternation and doing nothing to quell the swelling unrest.

In 2016, Burundi, South Africa and The Gambia all notified the ICC of their intention to withdraw from the Rome Statute, citing improper ICC obligations to detain foreign heads of state, a lack of international credibility and the court failing to deliver on its "aspiration to a universal vocation."[60] Unrepentant, ICC officials have admitted to an "exclusive focus [on Africa] but den(y) that the focus is inappropriate."[61] Many explanations for this have been given, from jurisdictional issues to the preponderance of self-reporting to the necessity for immediate action, but the overwhelming consensus of ICC officials is that the focus is justifiable.[62] Legally restricted by their mandate and the immediate political situation, ICC officials seem to have a reasonable legal argument for their exclusive focus on African defendants; however, the circumstances surrounding the creation of their mandate and informing the current political situation point to a sizeable structural power disparity between the first and third world. Even within the promise of equality inside the international legal system, African states

[58] "Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal" (International Criminal Court, May 2019).
[59] Ben Batros, "A Confusing ICC Appeals Judgment on Head-of-State Immunity," Just Security, May 7, 2019, https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/.
[60] Manisuli Ssenyonjo, "State Withdrawals from the Rome Statute of the International Criminal CourtSouth Africa, Burundi, and The Gambia," in *The International Criminal Court and Africa*, ed. Charles Chernor Jalloh and Ilias Bantekas (Oxford University Press, 2017), 221.
[61] Charles Achaleke Taku et al., "The International Criminal Court Forum," *The International Criminal Court Forum*, https://iccforum.com/africa.
[62] Taku et al., "The International Criminal Court Forum."

do not have comparable levels of sovereignty and share an outsized structural disadvantage reminiscent of their position in the colonial system.

First World Structural Immunity

On the opposite side of the spectrum of international power, the inverse is also true. The complete dearth of successful First World prosecution, outside of their utter nadir, is indicative of the presence of the structural power that the Third World lacks. More than just difficult to prosecute, the only two internationally important First World countries successfully prosecuted in the 20th century, Germany and Japan following World War Two, needed to be brought to their knees before any level of systemic prosecution of war and atrocity crimes could occur against their will and still had a level of ingrained structural power that Allied attorneys had to work around in potentially improper ways. Identified as a problematic element by the defense counsel at the time, both Nuremburg and Tokyo tribunals were complex affairs that, without the Allies' questionable interpretation of legal principles and immunity from similar prosecution, would not have fared so well for them in court and have inspired remarkably little precedent for their relative importance. At the time, Allied prosecutors were criticized for their "retroactivity and selectivity," charges that have since been adopted by historical scholarly consensus.[63] Despite never having been applied to individuals in the past and potentially in violation of *nullum crimen sine lege, nulla poena sine lege* or no crime without a law, no punishment without a law, many individual defendants were charged with crimes of aggression and prosecuted when the crimes were not codified in law at the time.[64] Aggression itself, since no binding "definitions (for) 'aggression,' 'act of aggression,' or 'war of aggression' have been established in international law" before or since, was not a consistently applied legal principle during the trial.[65] While judges at the time rejected this logic, with Judge Robert H. Jackson noting that "'Of course, it was under the law of all civilized peoples a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding fire arms to bare knuckles, made a legally innocent act?,'" the overridden *nullem*

[63] Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo," *European Journal of International Law* 21, no. 4 (November 1, 2010): 1089, https://doi.org/10.1093/ejil/chq070.
[64] LATIN TRANSLATION HERE
[65] Don E. Scheid, "Crimes Against Peace," in *Encyclopedia of Global Justice*, ed. Deen K. Chatterjee (Dordrecht: Springer Netherlands, 2011), 217, https://doi.org/10.1007/978-1-4020-9160-5_244.

crimen principle has become a binding feature of contemporary international law, in spite of this original precedent.[66]

Other judges, including alternate Judge Norman Birkett, recognized the other widely held criticism of the tribunals, its selectivity, observing that "'if it continues to apply only to the enemy, then I think the verdict of history may be against Nuremberg."[67] With the Allies particularly "vulnerable to countercharges over the Molotov-Ribbentrop Pact of 1939 and Anglo-French plans to breach Norway's neutrality in 1940," Allied immunity from prosecution inspired accusations of selectivity that remain the most biting criticism today.[68] Aggressive acts by the Allies, which fell under the same applied definition of crimes of aggression, were not prosecuted or allowed to be seriously debated in the court room. Even with Germany's loss of a war of attrition, their legal situation was not altogether lost based on the principles of international law, and, simultaneously, the Allied legal situation was only secured by their manipulation of the mandate of the tribunal. In the largest historical example of a tribunal prosecuting war crimes committed by a First World country, both sides would have received less punishment than expected, were it not for the, since unused and potentially untoward, Allied interpretation of the *nullem crimen* principle.

Commonly Exploited Loopholes

Both by the specific structural power of the First World and the nature of the *pacta sunt servanda* international system, First World states enjoy a wide range of privileges that allow them to skirt Third World realities. From the previously discussed Allied crimes during World War Two to Vietnam to Afghanistan, "international organizations are now virtually powerless to induce belligerents to comply with humanitarian principles, unless wholeheartedly supported in this endeavor by the world's great military powers."[69] Not exclusively limited to the elite of the First World, many states are able avoid and ignore unhelpful international legal decisions through a variety of mechanisms, the simplest of which being the strategic nonratification of applicable treaties. As long as the alleged crime does not concern a

[66] Scheid, "Crimes Against Peace," 219.
[67] Norman Birkett, "International Legal Theories Evolved at Nuremberg," in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (Oxford University Press, 2008), 307.
[68] Sellars, "Imperfect Justice at Nuremberg and Tokyo," 1090.
[69] Kent A. Russell, "My Lai Massacre: The Need for an International Investigation," *California Law Review* 58, no. 3 (May 1970): 707, https://doi.org/10.2307/3479613.

jus cogens or other customary violation, states cannot generally be legally compelled without originally acceding to the relevant treaty in the first place. Turkey might appear be enacting maritime delineation agreements in violation of UNCLOS, but, without their signature on UNCLOS itself, cannot conceptually be in violation of it based on the current international legal regime. While this might seem applicable to all countries, Third World states are often the victim of economic or political coercion and enjoy much less agency over these matters than First World states. Development funding or IMF loans come with strings, either in the form of internal reforms or accession to international agreements that deepen and maintain the current economic hierarchy.[70]

IMF conditionalities specifically have come to be regarded as a form of debt trap diplomacy, re-entrenching their recipients in poverty instead of lifting them out, with decades of quantitative economic analysis agreeing that:

> [IMF] structural reforms involve deep and comprehensive market-oriented changes to the economy that tend to raise unemployment, lower government revenue, increase costs of basic services, and restructure tax collection, pensions, and social security programs, leading to worsened poverty. Additionally, when we disaggregate structural reforms to their specific conditions, we find that nearly all have statistically significant and harmful effects, providing further evidence that structural reforms raise rates of poverty.[71]

Even in cases of jus cogens violations, rich and powerful states can generally avoid prosecution. The United States, as the West's foremost economic and military power, enjoys a particular immunity from international prosecution through a variety of structural and legal mechanisms. As a member of the UN Security Council and with unspoken economic and military consequences for deviation, U.S. officials simply ignoring a problem in official international fora usually leads to it going away. After the 1968 My Lai massacre in Vietnam, the first official atrocity crime admitted to by the U.S. government, there was no international investigation, and, when the massacre was brought to the UN General Assembly's

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[70] Glen Biglaiser and Ronald J. McGauvran, "The Effects of Imf Loan Conditions on Poverty in the Developing World," *Journal of International Relations and Development* 25, no. 3 (2022): 806–33, https://doi.org/10.1057/s41268-022-00263-1; William Easterly, "IMF and World Bank Strucutral Adjustment Programs and Poverty," in *Managing Currency Crises in Emerging Markets*, ed. Michael P. Dooley and Jeffrey A. Frankel (University of Chicago Press, 2003), https://doi.org/10.7208/chicago/9780226155425.001.0001; Ofer Eldar, "Reform of IMF Conditionality - A Proposal for Self-Imposed Conditionality," *SSRN Electronic Journal*, 2005, https://doi.org/10.2139/ssrn.871735; Bernhard Reinsberg et al., "The World System and the Hollowing Out of State Capacity: How Structural Adjustment Programs Affect Bureaucratic Quality in Developing Countries," *American Journal of Sociology* 124 (January 1, 2019): 1222–57, https://doi.org/10.1086/701703.

[71] Biglaiser and McGauvran, "The Effects of IMF Loan Conditions on Poverty in the Developing World," 807.

attention in 1969, was successfully ignored by the US to no significant international outcry or consequences.[72] While "numerous nongovernmental sources have charg(ed) that such [crimes] are widespread and are the result of basic United States military policies in Vietnam," no further investigation has ever taken place, outside of the internal military investigation during the court martial process.[73]

Certainly not diminished in the following decades, U.S. officials have had to expand this immunity into formal treaty obligations after the Rome Statute came into force in 2002. Even with the wide jurisdiction of the ICC, the Rome Statute itself contains language that allows countries to negotiate bilateral immunity agreements to circumvent their international legal obligations.

> Article 98(2) Cooperation with respect to waiver of immunity and consent to surrender *:* The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[74]

In most cases, the ICC usually requires the accession of at least one party to a crime to be within their jurisdiction; however, under article 98(2), if there is a preexisting immunity agreement, any prosecution requires the consent of both states. Bilateral immunity agreements supersede the ICC's jurisdiction and, without the explicit consent of the perpetrating state, completely silence potential international investigations before they can even begin. U.S. representatives have negotiated article 98 agreements with over one hundred states, most notably Afghanistan.[75] Afghanistan formally agreed before the start of the U.S.-Afghanistan conflict in accordance with the *nullem crimen* principle, that:

> The (G)overnment of Afghanistan recognizes the particular importance of disciplinary control by the United States military authorities over United States personnel and the Government of Afghanistan authorizes the United States of America to exercise its criminal jurisdiction over the personnel of the United States. The Government of Afghanistan and the Government of the United States confirms that without the explicit consent of the Government of the United States,

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[72] Russell, "My Lai Massacre" 707.
[73] Russell, "My Lai Massacre" 708.
[74] "Rome Statute of the International Criminal Court," § 98(2) (1998).
[75] Mabel Shaw, "Guides: International Criminal Court - Article 98 Agreements Research Guide: Introduction," https://guides.ll.georgetown.edu/c.php?g=363527&p=2456091.

> such personnel may not be surrendered to, or otherwise transferred to the custody of an international tribunal or any other entity or state.[76]

Even as an early signatory to Rome, Afghanistan was contractually obligated to protect any potential U.S. war criminals from the very start, heading off even the smallest possibility of U.S. prosecution. While other states also can make these agreements, U.S. immunity agreements, like IMF loans, are often conditionalities attached to other basic agreements, often occupying a singular clause or section of a clause in a larger agreement with other beneficial clauses or economic deals states may desire. Through economic and diplomatic means, U.S. war criminals are seldomly prosecuted anywhere but internally, even when under the nominal jurisdiction of the ICC.

Recent Russian Status

Russia, despite their longstanding negative framing from western states, has, like most other ostensibly powerful First World countries, successfully avoided the crosshairs of most international courts. Even when under investigation by the European Court of Human Rights (ECtHR) for charges dating back to the Second Chechen War, Russian evasive maneuvers are just as efficacious as ever before. The ECtHR, although regarded as one of the more effective international law courts, has not been consistently successful at changing Russian constitutional interpretation. Even on Russia's entrance to the Council of Europe, European officials recognized that they "lacked many of the fundamental legal protections required for the basic defense of human rights," but opted to allow their accession for integrative purposes.[77] Russian petitions immediately came pouring into the ECtHR, dominating the caseload of the organization for the next several decades and revolving around similar, steadfastly unresolved, issues. Despite the first world status of the vast majority of its members, the ECtHR has a good record of holding their feet to the fire for rights violations; however, Russia had been able to selectively enforce the decisions of the court domestically and not take their punishments very seriously, either ignoring them or using treaty provisions to attempt get out of them.[78] With no regard for the accrual of pecuniary damages, any Russian progress has been overshadowed by their strategic (ref)use of the opinions of the

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[76] Abdullah Abdullah, "Diplomatic Note" (Transitional Islamic State of Afghanistan Ministry of Foreign Affairs, December 12, 2002), 7, https://guides.ll.georgetown.edu/ld.php?content_id=38317158.

[77] William Pomeranz, "Uneasy Partners: Russia and the European Court of Human Rights," *Human Rights Brief* 19, no. 3 (January 1, 2012),19, https://digitalcommons.wcl.american.edu/hrbrief/vol19/iss3/3.

[78] Pomeranz, "Uneasy Partners," 19,20.

court. When the court proposed Protocol 14, a structural remedy for the for the influx of Russian petitions, in 2004, Russia held up the unanimous voting requirement for six years, until they received special guarantees about the use of Russian judges.[79] Nowhere near finished, Russian citizens continued to flood ECtHR offices with complaints that their government either paid off or ignored, never addressing the structural elements that caused the complaints. Following the invasion of Crimea in 2014, ECtHR officials formally suspended Russia's voting privileges in the Council of Europe. In true First World fashion, Russia simply boycotted the suspension out of existence and did not show up or pay membership fees for three years, until the suspension was abandoned in 2019. Finally expelled from the Council of Europe after the 2022 invasion of Ukraine, Russia was never made to take the punishments very seriously until far too late.[80]

In a similar vein, Russia's response to unfavorable ICC judgements have also reflected this pattern. Instead of complying with ICC judgments, Russia ignored them, before ultimately withdrawing from the Rome Statute itself in 2016. An early signatory, Russia managed to avoid serious challenge, although not investigation, until the invasion of Crimea, whereafter Russia's foundational unwillingness to address their structural problems became manifest to everyone involved.[81] Peaking in late November of 2016, Russian disagreements with the ICC finally came to head, when, instead of complying with ICC investigators, they notified the Court of their intent to withdraw. Criticizing the ICC for failing to "meet the expectations to become a truly independent, authoritative international tribunal," Russian complaints looked very much like an attempt to legally validate the claims of many African states.[82] International legal obligations are still not that easy to shirk, and this inspired a lively debate on Russia's

[79] Jennifer W. Reiss, "Protocol No. 14 ECHR and Russian Non-Ratification: The Current State of Affairs," *Harvard Human Rights Journal* 22, no. 2 (2009): 294.

[80] Julia Emtseva, "The Withdrawal Mystery Solved: How the European Court of Human Rights Decided to Move Forward with the Cases Against Russia," *EJIL: Talk!* (blog), February 8, 2023, https://www.ejiltalk.org/the-withdrawal-mystery-solved-how-the-european-court-of-human-rights-decided-to-move-forward-with-the-cases-against-russia/; "Russia Ceases to Be a Party to the European Convention on Human Rights on 16 September 2022."

[81] Sergey Sayapin, "Russia's Withdrawal of Signature from the Rome Statute Would Not Shield Its Nationals from Potential Prosecution at the ICC," *EJIL: Talk!* (blog), November 21, 2016, https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/.

[82] Sayapin, "Russia's Withdrawal of Signature from the Rome Statute Would Not Shield Its Nationals from Potential Prosecution at the ICC."

retrospective obligations, again through the *nullem crimen* principle. Russia may not a signatory anymore, but they were at the time the crimes in Georgia in 2008 and Ukraine in 2013-2014.[83]

From avoiding war crime punishments in World War Two to 21st century crimes in Chechnya, Russia has never had too much trouble using the same tactics of strategic refusal and advantageous structural support that the U.S. and other First World states use to avoid international prosecution; however, after the 2022 invasion of Ukraine, they seem to be at a crossroads. No longer an economic player on the level of other first world states, Russia has been treated increasingly like an international pariah, to their potential disadvantage. Now steeling themselves against significant international prosecution for the first time, Russia might be in the process of losing the level of international power and influence necessary to pull off these kind of maneuvers.

Chapter Three: Content Analysis

Situation in Georgia

Facts

A historical battleground between Georgian and Russian influence, South Ossetia and Abkhazia, small, fiercely independent regions adjacent to the Russo-Georgian border, have longstanding militant separatist traditions from their nominal sovereign in Tbilisi. After immediately having to contain multiple rebellions under Soviet Georgian authority during their integration into the USSR, Georgia caved to pressure from Soviet authorities and allowed South Ossetia to become an autonomous oblast in 1922.[84] Considered to be a somewhat ham-fisted and unsuccessful Soviet attempt at conflict resolution, every side of the conflict was ready to keep it alight following the breakup of the USSR and it was not long before local ethnic hostilities broke out into larger scale warfare. After fighting in the capital of Tskhinvali itself, South Ossetian forces, with Russian military support, pushed Georgian forces back from the city and established control over, what became, the borders of the Republic of South Ossetia. Finally agreeing to a Russian negotiated ceasefire in June of 1992, both sides remained mostly quiet for a decade of

[83] Sayapin, "Russia's Withdrawal of Signature from the Rome Statute Would Not Shield Its Nationals from Potential Prosecution at the ICC."
[84] Arsène Saparov, "From Conflict to Autonomy: The Making of the South Ossetian Autonomous Region 1918-1922," *Europe-Asia Studies* 62, no. 1 (2010): 99.

peacefully unresolved issues, until flare ups became more pronounced following the election of Mikheil Saakashvili in 2004.Swept into power by the Rose Revolution, Saakashvili was eager to implement anti-corruption reforms, but his zeal for integration of the separatist republics intensified pre-existing border skirmishes into small scale retribution killings over the next few years. With numerous unsettled incidents between Georgian and separatist combatants, tensions again escalated into war on August 1st, 2008.[85]

After, what their official story describes as, several days of initial fighting between the Georgian military and South Ossetian and Abkhazian forces, Russia, in support of South Ossetian forces fighting in the streets of Tskhinvali, announced their military operation against Georgia on the seventh of August. After sending a strike force through the Roki Tunnel, Russian forces, according to the Kremlin's official story, started shelling Georgian positions in Tskhinvali and nearby cities on the eighth. Later that day, Russian President Medvedev released a statement dictating Georgian crimes and the Russian impetus for the conflict.

> Last night, Georgian troops committed what amounts to an act of aggression against Russian peacekeepers and the civilian population in South Ossetia. What took place is a gross violation of international law and of the mandates that the international community gave Russia as a partner in the peace process… Civilians, women, children and old people, are dying today in South Ossetia, and the majority of them are citizens of the Russian Federation.[86]

After marching within forty kilometers of Tbilisi, Russia ostensibly caved to international pressure and officially agrees to a ceasefire on the 12th of August, but both sides continue fighting through September until early October. Gori, a city forty kilometers south east of the South Ossetian border, became a frenetic humanitarian situation in the early part of the war after days of Russian and South Ossetian shelling and weeks of occupation well into late August.[87] According to CSCE reports, one fifth of Georgian

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[85] Charles King, "The Russia-Georgia Conflict: What Happened and Future Implications for US Foreign Policy," Wilson Center, September 12, 2008, https://www.wilsoncenter.org/event/the-russia-georgia-conflict-what-happened-and-future-implications-for-us-foreign-policy; A. B. Sebentsov et al., "Economic Development as a Challenge for 'De Facto States': Post-Conflict Dynamics and Perspectives in South Ossetia," *Regional Research of Russia* 12, no. 3 (September 1, 2022): 414–27, https://doi.org/10.1134/S2079970522700277.

[86] "Statement on the Situation in South Ossetia," President of Russia, August 12, 2008, http://en.kremlin.ru/events/president/transcripts/1042.

[87] "Un Sounds Alarm on Humanitarian Conditions in Georgian City," UN News, September 2, 2008, https://news.un.org/en/story/2008/09/271492.

territory still remains under effective Russian occupation, with an increased Russian military presence inside the occupied regions after the war.[88]

Officially under ICC "analysis" since the end of the war, the ICC's investigation still had significant procedural hurdles to clear before meaningful investigation could occur.[89] An international conflict on recognized Georgian territory between the armed forces of two states, one of which is a party to the Rome statute, firmly places any crimes committed during or immediately surrounding the conflict under the jurisdiction of the ICC. Eight years after the end of the war, the ICC's required respect for national complementarity was finally considered to be satisfied, following the Georgian investigation finally fizzling out the year before. With domestic remedies exhausted and jurisdictional requirements satisfied, the court has three options by which to bring its jurisdiction to bear, pursuant to Article 13 of the Rome Statute:

> (a) A situation in which one or more of such crimes appears to have been committed is *referred to the*
> *Prosecutor by a State Party* in accordance with article 14
>
> (b) A situation in which one or more of such crimes appears to have been committed *is referred to the Prosecutor by the Security Council* acting under Chapter VII of the Charter of the United Nations; or
>
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15[90]

Without a referral from either party and no forthcoming UN Security Council referral, the ICC Office of the Prosecutor (OTP) went for the third option and decided to apply for a *proprio motu* investigation. Unlike many other international courts, ICC prosecutors can open investigations *proprio motu*, or on one's own initiative, but are required to submit applications to a pre-trial chamber for preliminary examination of case material and procedural compliance, pursuant to article 15.[91] Assigned to Pre-Trial Chamber 1, the, now officially titled, Situation in Georgia submitted their request for authorization under article 15 on the thirteenth of October 2015, but had to add and withdraw certain annexes several times

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[88] "The Russian Occupation of South Ossetia and Abkhazia," CSCE, July 16, 2018, https://www.csce.gov/international-impact/publications/russian-occupation-south-ossetia-and-abkhazia.
[89] Florence Olara, "ICC Prosecutor Confirms Situation in Georgia under Analysis," https://www.legal-tools.org/doc/1e947b/, August 20, 2008.
[90] "Rome Statute of the International Criminal Court," § 13 (1998).
[91] "Rome Statute of the International Criminal Court," § 15 (1998).

over the next several months.[92] On the twenty seventh of January 2016, Pre-Trial Chamber I released their decision to authorize the *proprio motu* investigation in agreement with the Office of the Prosecutor, including the separate decision of Judge Péter Kovács.

Adopting a limited view of their supervisory role, the majority opinion behind the authorization, only responsible under article 15(4) of the Statute to determine based on an "examination of the request and the supporting material", decided that it would be "unnecessary and inappropriate for the Chamber to go beyond the submissions [included] in the request."[93] Toward this end, Presiding Judge Joyce Aluoch and Judge Cuno Tarfusse concur with the OTP's assessment of the prospect of

> The war crimes of willful killing under article 8(2)(a)(i) of the Statute by South Ossetian forces against ethnic Georgians, destruction of property under article 8(2)(b)(xiii) of the Statute by South Ossetian forces of property belonging to ethnic Georgians, pillaging under article 8(2)(b)(xvi) of the Statute by South Ossetian forces of property belonging to ethnic Georgians and intentionally directing attacks against peacekeepers under article 8(2)(b)(iii) of the Statute, both by South Ossetian forces against Georgian peacekeepers and by Georgian forces against Russian peacekeepers.[94]

Also convinced of the possibility of the crimes against humanity of "murder…deportation (and)…forcible transfer of population," the majority opinion "considers that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed."[95] After reviewing the reasoning of the OTP to not include evidence for sexual violence or indiscriminate attacks on civilians, the chamber accepts the prosecutor's decision that a "conclusion could not be reached because "[i]n many instances, the information available is derived solely from one party to the conflict, is contradicted by information provided by the other, and no third party has been able to provide corroboration or to come to a relevant determination on the matter."[96] While the OTP has "gathered information on a limited number of reports of sexual and gender-based violence including rape… at this stage no clear information has emerged on the alleged perpetrators or the link between these crimes and the wider conflict."[97]

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[92] "Court Records | International Criminal Court," https://www.icc-cpi.int/case-records?f[0]=c_sit_code:1161.
[93] "Rome Statute of the International Criminal Court," § 15(4) (1998); Situation in Georgia: Decision on the Prosecutor's Request for Authorization of an Investigation, No. ICC-01/15 (International Criminal Court January 27, 2016), 16.
[94] Situation in Georgia: Decision on the Prosecutor's Request for Authorization of an Investigation, 14.
[95] Situation in Georgia: Decision on the Prosecutor's Request for Authorization of an Investigation, 14.
[96] Authorization of an Investigation, 15.
[97] Authorization of an Investigation, 15.

Finishing with an assessment of potential admissibility, the majority opinion decided that the Situation in Georgia also fulfills the admissibility criteria of article 17(1), which can strike down cases if …

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not
> to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint; or
> (d) The case is not of sufficient gravity to justify further action by the Court.[98]

With the last of the domestic Georgian proceedings ending in November 2014, Judge Aluoch and Judge Tarfusse agree that the sufficient degree of complementarity has been respected and the situation is admissible, even though there is an ongoing Russian investigation. Although "unable to determine that the national proceedings in Russia are inadequate under article 17(1)(b) of the Statute," the majority decided to authorize the investigation anyway, because the investigation "will naturally extend to issues of admissibility, and [will allow] the question to be authoritatively resolved at a later stage if needed."[99]

Despite concurring "with the conclusion of the Majority that crimes against humanity…and war crimes…appear to have been committed in the situation in Georgia," Judge Kovács, in his separate opinion, criticizes the apparently sloppy nature of the Prosecutors application, what he sees to be the logical missteps of the majority opinion and the problematic underlying legal question of the authorization.[100] Judge Kovács does not feel that the majority authorization opinion was written well, critiquing its "clarity," lack of comprehensive evidence and the rushed and uncritical nature of the preliminary examination; yet the main problem he identifies is the uncomfortable precedent it sets with the Pre-Trial Chamber's application of judicial control.[101] Since the "majority opted for an - for me - insufficient examination of law and facts," Judge Kovács is not convinced that they adopted proper judicial control over the Office of the Prosecutor. Not just supposed to lie down and roll over at the whims

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[98] "Rome Statute of the International Criminal Court," § 17(1) (1998).
[99] Authorization of an Investigation, 20-21.
[100] Péter Kovács, Situation in Georgia: Separate Opinion of Judge Péter Kovács, No. ICC-01/15-12-Anx-Corr (International Criminal Court January 27, 2016), 8.
[101] Kovács, Situation in Georgia: Separate Opinion of Judge Péter Kovács, 8-9, 2-3.

of the OTP, Pre-Trial Chamber I is supposed to reach its own conclusion about the evidence, in an effort to "prevent the abuse of power on the part of the Prosecutor."[102] With the "strictly limited" view of judicial control over the OTP described in the majority opinion, Judge Kovács found this to not be the case.[103] Without the ability to ""go beyond the submissions … in an attempt to correct any possible error on the part of the Prosecutor," the Pre-Trial Chamber cannot consider any outside evidence during the preliminary investigation and is reduced to reviewing the prosecutor's rationale instead of "the "reality" on the ground."[104]

From the lack of meaningful oversight, Judge Kovács finds logical inconsistencies in the prosecutor's application and pre-trial chamber's majority opinion. Specifically in regard to the crimes of indiscriminate or disproportionate attacks and rape/sexual violence, the OTP may be inconsistently applying their standard of evidence. By not reaching a determination because of "'inherent difficulties,' 'limited information', contradictions and lack of corroboration by credible third parties" for sexual violence but readily coming to a conclusion with similar information about war crimes, Judge Kovács accuses the OTP, and the majority opinion, of misrepresenting both Georgian and Russian crimes.[105] With over 70 collected interviews attesting to violence, Judge Kovács finds "there is a reasonable basis to believe that rapes occurred in the context of the attack," and, consequently, should be investigated like any other war crime.[106] Similarly, indiscriminate attacks against civilians, from both sides of the conflict, are treated with this newly heightened level of scrutiny. On August eighth, Georgian forces shelled Tskhinvali, with many reports of civilian casualties from the attacks; however, conflicting reports of South Ossetian military targets in the area lead to some investigative hesitation on behalf of the prosecutor.[107] Between the eighth and the twelfth of August, Russian forces engaged in potentially indiscriminate shelling of civilian objects, in and around "Tskhinvali, Kekhvi, Eredvi, Kvemo Achabeti, Kheiti, Karbi, the Gori city and surrounding villages," but, again, potential viability as military targets muddy the water.[108] After giving a wide procedural berth to the OTP for crimes against soldiers, violence against women and

[102] Kovács, Separate Opinion of Judge Péter Kovács, 2.
[103] Authorization of an Investigation, 4; Kovács, Separate Opinion of Judge Péter Kovács, 3.
[104] Authorization of an Investigation, 16; Kovács, Separate Opinion of Judge Péter Kovács, 10.
[105] Kovács, Separate Opinion of Judge Péter Kovács, 11.
[106] Kovács, Separate Opinion of Judge Péter Kovács, 15.
[107] Kovács, Separate Opinion of Judge Péter Kovács, 14.
[108] Kovács, Separate Opinion of Judge Péter Kovács, 13.

indiscriminate attacks against civilians are suddenly held to a higher threshold of certainty and are not guaranteed to be investigated in the future.

Finally assigned in 2018, Judge Kovács was elected as the presiding judge, but had the case reassigned to Pre-Trial Chamber III by the Presidency in 2020 before any proceedings could begin. Elected for three years and only two possible terms, 2021 was an election year and the presidency passed from Judge Chile Eboe-Osuji to Judge Piotr Hofmański in 2021.[109] Right away, newly elected President Hofmański dissolved Pre-Trial Chamber III and reassigned their cases back to Pre-Trial Chamber I, with Judge Kovács presiding. Unaware of the specifics of ICC interoffice politics or case load management strategy, the change in Presidential administration allowed the investigation to continue, finally bearing fruit on March tenth, 2022. Two weeks after the February invasion of Ukraine by Russian forces, ICC prosecutors applied for the arrest of three Russian or South Ossetian/Georgian nationals, Mikhail Mayramovich Mindzaev, Gamlet Guchmazov and David Georgiyevich Sanakoev for the crimes of unlawful confinement, torture, inhumane treatment, hostage taking and unlawful transfer.[110] Not quite the whole shebang of potential charges, this is still early in the case and, with more compliance and expanded access to evidence, could lead to more arrests in the future. Admittedly out of their clutches for the time being, the OTP stressed the unwillingness of the Russian and South Ossetian officials to comply with investigation as the primary reason for the immediate necessity of the warrant. By the end of June, Pre-Trial Chamber I had approved the OTP's application for warrants of arrest and issued paperwork for three arrests on the thirtieth.

Mikhail Mayramovich Mindzaev, "previously a senior police officer with the Ministry of Internal Affairs of Russia," is accused of crimes in connection to his tenure as the "Minister of Internal Affairs of the de facto South Ossetian administration," including:

(i) unlawful confinement (article 8(2)(a)(vii)-2 of the Statute);
(ii) torture (article 8(2)(a)(ii)-1 of the Statute);
(iii) inhuman treatment (article 8(2)(a)(ii)-2 of the Statute);

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[109] "The Presidency," International Criminal Court, n.d., https://www.icc-cpi.int/about/presidency.

[110] "Public Redacted Version of 'Corrected Version of the "Arrest Warrant for Mikhail Mayramovich Mindzaev"'" (International Criminal Court, June 30, 2022), https://www.legal-tools.org/doc/u8b65i/pdf; "Public Redacted Version of 'Arrest Warrant for Gamlet Guchmazov'" (International Criminal Court, June 30, 2022), https://www.legal-tools.org/doc/uyuuwn/pdf; "Public Redacted Version of 'Arrest Warrant for David Georgiyevich Sanakoev'" (International Criminal Court, June 30, 2022), https://www.legal-tools.org/doc/3notyi/.

(iv) outrages upon personal dignity (article 8(2)(b)(xxi) of the Statute);
(v) hostage taking (article 8(2)(a)(viii) of the Statute); and
(vi) unlawful transfer (article 8(2)(a)(vii)-1 of the Statute[111]

Between the eighth and twenty seventh of August 2008, Mindzaev, in his role as Minister of Internal Affairs, operated, what amounts to, a hostage taking scheme for prisoner exchanges. "Villagers perceived as ethnic Georgians (were) [randomly] arrested in the Tskhinvali area … by persons described as ethnic Ossetians dressed as policemen" in the immediate context of other attacks.[112] Taken to a detention center known as the "Isolator" without any proper legal subtext, Pre-Trial Chamber I finds that there are:

> Reasonable grounds to believe that the confinement was rather a collective measure, taken against a specific group of people, based on perceived ethnicity (namely, Georgian). In this respect, the Chamber notes that some persons … were randomly arrested in the street or arrested in groups (for example, as an entire household) and then detained together. At the moment of the arrest, the only question that appears to have been systematically asked is whether they were 'Georgian,' which they answered in the affirmative before being brought to the detention center.[113]

This is a euphemistically long way of saying that there was likely a policy of rounding up Georgians and detaining them. According to article 42 of Geneva IV, protected persons, pursuant to article 4, may only be detained "if the security of the Detaining Power makes it absolutely necessary."[114] Even when applying this lower standard to the South Ossetian detainment policy, there are reasonable grounds to believe that the confinement of several civilians was unlawful."[115] With "approximately 170 persons" detained in the Isolator, including "many women and elderly persons," there are reasonable grounds to believe that many of the detained were not immediate security threats, consequently making their detention a violation of article 8(2) of the Rome Statute concerning unlawful confinement.[116] Within the Isolator itself, detainees were subject to conditions that were "overcrowded; sanitary facilities were either nonexistent or did not allow for privacy and medical attention for those who required treatment was limited."[117] Some detainees were "forced to collect and/or to bury corpses with their bare hands."[118]

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[111] "Public Redacted Version of 'Corrected Version of the "Arrest Warrant for Mikhail Mayramovich Mindzaev,"'" 3.
[112] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 7.
[113] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 7.
[114] "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949," § 42 (1949).
[115] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 9.
[116] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 9.
[117] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 12.
[118] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 12.

During questioning, detainees were subject to beatings often "inflicted to obtain confessions of the detainees that they were reservists, as a form of punishment, or to coerce the detainees to comply with instructions."[119] For these reasons, the Chamber finds reasonable grounds to believe that the aforementioned mistreatment of the detained individuals amounted to unlawful confinement, torture, inhuman treatment and outrages upon personal dignity pursuant to article 8(2)(a)(ii),(vii) and 8(2)(b)(xxi) of the Statute. Also accused of hostage taking and unlawful transfer pursuant to article 8(2)(a)(viii), Mr. Mindzaev, "recall(ing) that the intention to hold civilian prisoners in order to use them for exchanges already seems to have been present at the moment of the arrests," "leveraged the detention of the protected persons by threatening to continue to detain them in order to compel Georgian authorities to release convicted criminals as a condition for their release."[120] Without the proper hostages to exchange with Georgian authorities, Mr. Mindzaev allegedly found some, further amounting to hostage taking and, when moved and exchanged, unlawful transfer of civilians.

As the Minister of Internal Affairs during the conflict, Mr. Mindzaev was in "charge of the entire police force."[121] Since, "at least some of the prison guards … who arrested the detained persons were indeed police officers. Under the South Ossetian system in place, these guards were therefore under the control of Mr. Mindzaev."[122] With several public statements from the President of South Ossetia and Mr. Mindzaev himself confirming this policy, the Chamber finds that there are "reasonable grounds to believe that Mr. Mindzaev is responsible for the crimes of torture, inhuman treatment, outrages upon personal dignity, hostage taking and unlawful transfer, pursuant to "article 25(3)(d)(ii) a as a contributor to a common purpose … article 25(3)(a) of the Statute as an indirect perpetrator or … under article 25(3)(c) of the Statute as an aider and abettor."[123] Not one of the arresting officers himself, Mr. Mindzaev, according to article 25 on individual responsibility, shall only be "criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if he:

> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

[119] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 12.
[120] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 15.
[121] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 18.
[122] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 18,19.
[123] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 21.

> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.[124]

According to the Chamber, Mr. Mindzaev is potentially directly and indirectly responsible under 25(3)(a), 25(3)(c) and 25(3)(d)(ii), whichever the prosecutor decides is most expedient.

Accused of the same crimes, Gamlet Guchmazov, a Russian and Georgian national, was the "'Head of the Isolator,' the 'prison chief', the 'chief of the detention facility'" and the second leg of the hostage exchange scheme triangle.[125] Reporting directly to Mr. Mindzaev and directly interacting with detainees, the Chamber finds "reasonable grounds to believe that Mr. Guchmazov was aware that some of the detained persons were civilians, who were not posing a security risk and therefore not detained in accordance with the Fourth Geneva Convention; and that he was therefore aware of the factual circumstances that established the protected status of these persons under IHL."[126] Mr. Guchmazov was "not only present when detainees were being mistreated. but also directly mistreated some, including by severely beating them. Mr. Guchmazov was also said to be present when a detainee was forced to [REDACTED]."[127] Mr. Guchmazov's actions also give the impression of being a direct perpetrator pursuant to article 25(3)(a), not an indirect perpetrator as pursuant to article 25(3)(c) or (d). The Chamber notes that, on top of his low likelihood to cooperate with court summons, 'the deliberate and callous nature of the crimes, their use as an instrument of policy, and their commission under the auspices of authority in South Ossetia," underscore the necessity of arresting Mr. Guchmazov.[128]

As the third and final member of the hostages for prisoner exchange triumvirate, David Georgiyevich Sanakoev, the South Ossetian Human Rights Ombudsman, was the South Ossetian official in charge of the hostage negotiations with Georgia. Reasonably found to be aware that many of the

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[124] Rome Statute of the International Criminal Court.
[125] "Public Redacted Version of 'Arrest Warrant for Gamlet Guchmazov,'" 18.
[126] "Arrest Warrant for Gamlet Guchamazov," 18.
[127] "Arrest Warrant for Gamlet Guchamazov," 19.
[128] "Arrest Warrant for Gamlet Guchamazov," 21.

detained persons were internationally protected persons, Mr. Sanakoev, more than in any other way, contributed to the commission of the crime with the aim of furthering the criminal activity."[129] As the lead negotiator, Mr. Sanakoev was "present at least on five occasions during exchanges of detainees, including the "moment when the civilian detainees were getting in the bus."[130] "Further satisfied that Mr. Sanakoev acted with the required intent and knowledge for the specific crimes set forth in this decision," the Chamber "finds that there are reasonable grounds to believe that Mr. Sanakoev is responsible for the crimes of hostage taking, pursuant to article 25(3)(d)(i), and unlawful transfer of civilians, pursuant to article 25(3)(c)."[131]

Rationale:

Either in Russian or South Ossetian territory, Mikhail Mayramovich Mindzaev, Gamlet Guchmazov and David Georgiyevich Sanakoev are all considered "unlikely to cooperate with a summons to appear," and so must be forcibly compelled.[132] Combined with Russia's historical unwillingness to work with the ICC, Russian control over the areas in which the defendants reside is the primary factor cited in the warrants necessitating arrest. Since trials *in absentia* are not allowed, the case against the three responsible for the taking, detaining, torturing and eventually trading civilians as hostages with the Georgian government is stuck at this stage before litigation can continue. With Russia unlikely to comply and with no enforcement capability outside of delegation, Rome's body of member states must work together to capture the accused and sit them in front of the trial chamber. While the rationale of why to arrest Mindzaev, Guchmazov and Sanakoev seems clear, the questions of why this crime and why now are much less so. By operating with an inconsistent approach to the variety of charges, Georgian, as well as Russian and South Ossetian, sexual violence and indiscriminate attacks on civilians can be minimized for more cut and dry war crimes to take center stage. The ICC has a lot of leeway to decide who, where and when to prosecute, so these decisions are naturally thoughtful, potentially strategic and certainly responsive to their international context. As expected in any other court, the prosecution is allowed to

[129] "Public Redacted Version of 'Arrest Warrant for David Georgiyevich Sanakoev,'" 14.
[130] "Arrest Warrant for David Georgiyevich Sanakoev," 15.
[131] "Arrest Warrant for David Georgiyevich Sanakoev," 15.
[132] "Arrest Warrant for Mikhail Mayramovich Mindzaev," 23; "Arrest Warrant for Gamlet Guchamazov," 21; "Arrest Warrant for David Georgiyevich Sanakoev," 16.

build their case, de-emphasizing potential friendly violations and centralizing certain Russian crimes for sake of the argument.

Situation in Ukraine

Facts:

No longer a subtle approach, ICC prosecutors, on the seventeenth of March 2023, issued arrest warrants for both Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, the Commissioner for Children's Rights, with charges relating to their treatment of Ukrainian children during the ongoing conflict.[133] Quickly pushing through sections of Donetsk and Luhansk, the Russian military occupied significant portions of Ukrainian territory, where, in concert with South Ossetian authorities, some administration began to take place.[134] First declaring their intent to open an investigation in the days following the 2022 invasion of Ukraine, ICC prosecutors still needed a referral from a state party, the Security Council or a *propio motu* preliminary examination to begin an investigation, as pursuant to article 13.[135] Neither Russia, after 2016, nor Ukraine are signatories to the Rome Statute; however, Ukraine, in 2014, declared temporary acceptance of ICC jurisdiction, first only involving crimes from 2013-2014, but then extending to an "open-ended basis" later that year.[136] Pursuant to article 12 sections 2 and 3 of the Rome Statute, states, if needed to prosecute or investigate potential crimes, may "accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9." [137] First referred to the OTP by Lithuania on March 1st, 2022, but closely followed by many more countries, the OTP opened an investigation through Ukraine's article 12(3) declaration the very next day.[138] Assigned to Pre-Trial

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[133] "Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova," International Criminal Court, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[134] Rodger Wicker, "Russia's Occupation of Georgia and the Erosion of the International Order," CSCE, July 16, 2018, https://www.csce.gov/international-impact/events/russias-occupation-georgia-and-erosion-international-order.

[135] "Rome Statute of the International Criminal Court," § 13 (1998).

[136] "Ukraine," International Criminal Court, https://www.icc-cpi.int/situations/ukraine; "Declaration of Acceptance" (Embassy of Ukraine, April 9, 2014); Pavlo Klimkin, "Declaration of Acceptance" (Minister For Foreign Affairs of Ukraine, September 9, 2015).

[137] "Rome Statute of the International Criminal Court," § 12 (1998).

[138] "Ukraine."

Chamber II, the prosecutors original application alleges that "there is a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine." [139]

Over the next week, ICC lead prosecutor Karim A. A. Khan received thirty-nine referrals and officially opened the investigation on March second, 2022.[140] Khan, over the following year, visited Ukraine on four separate occasions, to meet with President Zelenskyy, negotiate terms for "the approval by the Cabinet of Ministers of Ukraine of the Agreement on the Establishment of the Country Office of the International Criminal Court in Ukraine" and assist in the investigation itself.[141] In response to requests from civil society organizations in Ukraine, Khan also sponsored, alongside Eurojust, the publication of a set of "practical guidelines for documenting and preserving information on international crimes," in order to "protect the most vulnerable when engaging in documentation efforts."[142] The EU agency for judicial cooperation, Eurojust has relevant experience establishing effective cross border judicial systems in an equitable manner and is a natural partner for the Situation in Ukraine.[143] With mum as the word, Khan did not tip his hand to their legal strategy until September 2022, when the Prosecutor spoke to a UN Security Council meeting about his administration's intentions, including to investigate the "transfer of populations from Ukraine, including significant numbers of children."[144]

Despite actively investigating during the year after the opening of the investigation, this period was procedurally terribly slow in publicly available documentation. Pre-Trial Chamber II was recomposed

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[139] Karim A. A. Khan, "Annex I Public" (The Office of the Prosecutor, March 2, 2022), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2022_01687.PDF.

[140] "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," International Criminal Court, https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.

[141] "ICC Prosecutor Karim A. A. Khan KC Concludes Fourth Visit to Ukraine: 'Amidst This Darkness, the Light of Justice Is Emerging,'" International Criminal Court, March 7, 2022, https://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-fourth-visit-ukraine-amidst-darkness-light-justice.

[142] "ICC Prosecutor and Eurojust Launch Practical Guidelines for Documenting and Preserving Information on International Crimes," International Criminal Court, n.d., https://www.icc-cpi.int/news/icc-prosecutor-and-eurojust-launch-practical-guidelines-documenting-and-preserving-information.

[143] "Eurojust and the War in Ukraine," European Union Agency for Criminal Justice Cooperation, n.d., https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine.

[144] "Pointing to Dangerous Developments in Ukraine, Secretary-General Urges Cooperation with International Criminal Court, as Security Council Tackles Accountability | UN Press," United Nations Meetings Coverage and Press Releases, September 22, 2022, https://press.un.org/en/2022/sc15036.doc.htm; Karim A. A. Khan, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova," International Criminal Court, accessed, https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin.

and temporarily handed to a single judge, both for the "proper management, expeditiousness and efficiency of the proceedings" and "on the basis of workload." [145] With no local court on either side of the conflict to wait for, complementarity was not a concern. Reigniting in 2023, the OTP, with little warning outside of the brief mention in Judge Khan's UN Security Council address, announced the arrest warrants of Putin and Lvova-Belova on March seventeenth. However, unlike the Situation in Georgia, there is no long history of public paper trail to track. The brief history of applications, warrants and anything with relevant evidence, *i.e.,* the court's entire decision-making process, is all completely confidential.

Vladimir Vladimirovich Putin, sitting President of the Russian Federation, is wanted in connection with "the war crime(s) of unlawful deportation of population (children) … and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation," pursuant to articles 8(2)(a)(vii) and 8(2)(b)(viii).[146] Defined as the "transfer, directly or indirectly, by the Occupying Power 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," unlawful deportation and transfer is a specifically enumerated type of war crime in the Statute. Pre-Trial Chamber II found "reasonable grounds to believe that Putin bears individual criminal responsibility for the aforementioned crimes," and should be tried under article 25(3)(a), direct individual criminal responsibility, instead of 25(3)(b), (c) or (d), stages of indirect responsibility. [147] "For his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control," Putin can also be liable as a superior, a potential first for the court.[148] Generally tried as a direct or indirect participant pursuant to article 25(3), article 28 establishes that commanding officers have superior liability, if:

> (a)
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

[145] "Decision Designating a Single Judge" (International Criminal Court, June 20, 2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd18018f6d2.pdf; "Decision Replacing a Judge in Pre-Trial Chamber II" (International Criminal Court, February 21, 2023), https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1803bd96c.pdf.
[146] "Situation in Ukraine."
[147] "Situation in Ukraine."
[148] "Situation in Ukraine."

> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> (b)
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[149]

While this would have to endure a higher level of legal scrutiny to be proven in court, charges under article 28 bring a higher level of personal responsibility and, consequently, greater potential punishments.[150]

Maria Alekseyevna Lvova-Belova, the Presidential Commissioner for Children's Rights, is wanted in connection with the same crimes of unlawful deportation of population and unlawful transfer of population, both of children.[151] While not liable under article 28(b) like Putin could be, Lvova-Belova is still likely responsible under articles 25(3)(a) or (b), direct or the first stage of indirect liability. However, unlike Putin, Lvova-Belova's crimes seem much more direct. Credited by her staff for hugging over one thousand Ukrainian children, Lvova-Belova seems to have spearheaded and organized the deportation program, but her role in the context of Putin's own strategy is unknown.[152] A philanthropist, city councilor, Putin election surrogate and mother of nine, Lvova-Belova is a model women and mother in the eyes of Putin's regime and an ideal candidate for a high-ranking political position with children. After her political ambitions began to take off, her husband quit his job to become an orthodox priest, securing her this important second power base.[153] Suddenly in the spotlight after her appointment in October 2021, Russian media turned Lvova-Belova into a mythologized model of femininity, in the same way

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[149] "Rome Statute of the International Criminal Court," § 28 (1998).
[150] "Rome Statute of the International Criminal Court, Article 28," LII / Legal Information Institute, https://www.law.cornell.edu/women-and-justice/resource/rome_statute_of_the_international_criminal_court_article_28.
[151] "Situation in Ukraine."
[152] Anna Ryzhkova and Regina Gamalova, "'Just Call Me Masha,'" trans. Anna Razumnaya and Emily Laskin, *Meduza*, https://meduza.io/en/feature/2023/03/19/just-call-me-masha.
[153] Ryzhkova and Gamalova, "'Just Call Me Masha.'"

Putin's personal masculinity is a known concentration of his own public relations efforts.[154] Anecdotes about her younger self began to fly around the tabloids, apparently turning down dates with men who professed to "wanting fewer than three children" and getting her start from volunteering with disabled orphans in the Penza hospital.[155]

Both the charges stem from the same series of incidents surrounding the deportation of "at least hundreds" of Ukrainian children from occupied Ukrainian territory. [156] Ukrainian children, abducted from "orphanages and children's care homes," were put up for adoption in Russia, as the prosecutor alleges, as part of an official Russian policy to "permanently remove these children from their own country."[157] Even though the decisions and applications are redacted in their entirety, what evidence is publicly available is particularly damning.[158] All lawyers, from the most famous international justicers to the smallest ambulance chasers, must plead with their clients not to publicly brag about their crimes. Putin, seemingly without regard for the legal consequences, does the head of state equivalent of posting videos of a crime on Facebook, and announced this policy on Russian television during an appearance with Lvova-Belova on February sixteenth, 2023.[159] Only weeks before the ICC announced the new warrants, the minutes of the February meeting detailed all of the evidence that would be necessary. Putin invited Lvova-Belova to update the public on the fate of "маленьких наших граждан," or our little citizens, in the regions without infrastructure along and immediately behind the front.[160] Lovingly noting that they were not going to split up siblings, Lvova-Belova detailed the ongoing program to move Ukrainian children from these areas on convoys of trucks to Russian adoption agencies, where they could be better protected from the war.[161] Lvova-Belova herself adopted a fifteen year old Ukrainian from the program,

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[154]Amie Ferris-Rotman, "Putin's War on Women," *Foreign Policy* (blog), April 9, 2018, https://foreignpolicy.com/2018/04/09/putins-war-on-women/.

[155] Ryzhkova and Gamalova, "'Just Call Me Masha.'"

[156] Khan, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova."

[157] Khan, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova."

[158] Oona Hathaway et al., "European Journal of International Law: The Podcast," From Russia With War Pt. 2, n.d.

[159] Sergey Vasiliev, "The International Criminal Court Goes All-in: What Now?," *EJIL: Talk!* (blog), March 20, 2023, https://www.ejiltalk.org/the-international-criminal-court-goes-all-in-what-now/; *Владимир Путин Провел Рабочую Встречу с Уполномоченным По Правам Ребенка*, 2023, https://www.youtube.com/watch?v=pS5ugciaXtw.

[160] "Встреча с Уполномоченным по правам ребёнка Марией Львовой-Беловой," Президент России, February 27, 2023, http://kremlin.ru/events/president/news/70524.

[161] "Встреча с Уполномоченным по правам ребёнка Марией Львовой-Беловой."

on top of her existing nine children that make her Putin's model Commissioner for Children's Rights.[162] Putin, in the spirit of the meeting but hinting at the inferiority of Ukrainian and international concerns, professed that the love between a new foster mother and child is "самое главное," or the most important thing.[163] Forming the backbone of a potential future charge of cultural genocide, Putin and Lvova-Belova's meeting hints at a larger conspiracy to remove children as an attack on Ukrainian culture more generally, but, without the prosecutor's application, there is no way to know how far the OTP feels it can take this charge.

A known emphasis of International Humanitarian Law and a focus of the ICC and Khan's OTP administration in particular, the protection of children is a foundational feature of international humanitarian law.[164] Specifically identified as protected from conflict by Geneva IV, children are explicitly mentioned many times in the following protocols, intentionally to enshrine the "principle of the special protection of children during … armed conflict" in international custom.[165] Article 38(5) permanently expands the rights of protected persons to "children under fifteen years, pregnant women and mothers of children under seven years."[166] Under article 50, children living under occupation are guaranteed that:

> The Occupying Power shall, with the co-operation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children. The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it. Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.[167]

According to article 82, interned children may not be separated from their family, "except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section."[168] Coming to be regarded as

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[162] Ryzhkova and Gamalova, "'Just Call Me Masha.'"
[163] "Встреча с Уполномоченным по правам ребёнка Марией Львовой-Беловой."
[164] Hathaway et al., "European Journal of International Law: The Podcast."
[165] Denise Plattner, "Protection of Children in International Humanitarian Law," *International Review of the Red Cross* 24, no. 240 (June 1984): 142.
[166] "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949," § 38(5) (1949).
[167] "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949," § 50 (1949).
[168] "IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949," § 82 (1949).

customary, the four Geneva Conventions and Annexes' protections of children cannot be escaped, forming binding precedent for all states. [169]

Mentioned all over the Rome Statute as well, ICC officials have a wide mandate to prosecute crimes against children. Released in 2016, the ICC Policy on Children further enumerated their view of the legal protections of children as well as proper treatment of children during the investigative and judicial process.[170] In the text of the statute itself, article 6(e) includes the "forcibl(e) transfer of children from [one] group to another group" in the ICC's definition of genocide.[171] Identified as vulnerable victims of war and enslavement, the Rome Statute is procedurally and historically prepared to prosecute the "conscripting or enlisting (of) children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities, specifically identified as a war crime by article 8(b)(xxvi).[172]

Many ICC procedural firsts have also surrounded children, including the first ever ICC case, *The Prosecutor v. Thomas Lubanga Dyilo*. [173] Dealing with the protection of child soldiers, the Lubanga case set organizational direction for the protection of children from the very beginning. Hearing many hours of testimony from children conscripted into conflict, Pre-Trial Chamber II, "in convicting Thomas Lubanga, found that the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted in the conscription and enlistment of boys and girls under the age of fifteen, and their use to participate actively in hostilities." [174] "Found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities," Thomas Lubanga Dyilo was the first person arrested by the ICC and

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[169] Theodor Meron, "The Geneva Conventions as Customary Law," *The American Journal of International Law* 81, no. 2 (1987): 349.

[170] "International Criminal Court Policy on Children" (Office of the Prosecutor, November 2016), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.

[171] "Rome Statute of the International Criminal Court," § 6(e) (1998).

[172] "Rome Statute of the International Criminal Court," § 8(b)(xxvi) (1998).

[173] The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06 (International Criminal Court March 14, 2012).

[174] Alison Cole and Kelly Askin, "Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court," *American Society of International Law* 16, no. 12 (March 27, 2012), https://www.asil.org/insights/volume/16/issue/12/thomas-lubanga-war-crimes-conviction-first-case-international-criminal; Kai Ambos, "The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues," SSRN Scholarly Paper (Rochester, NY, 2012).

served fourteen years in prison, from his March of 2006 arrest until his release in March of 2020.[175] Ordered to pay ten million dollars of reparations to over four hundred victims, there are assuredly many more who did not receive their day in court.[176]

While the charges may not be controversial within the court, ICC prosecutors ordering the arrest of a non-party sitting head of state will re-spark many of the same battles fought during the al-Bashir case. Third party states, if they are a member of the ICC, now have a formal legal obligation to arrest Putin if he attempts to enter their territory. Only tentatively squared away by the al-Bashir precedent, the ongoing disagreement with the African Union over this potentially improper obligation has done considerable damage to the reputation of the ICC, so utilizing the al-Bashir precedent in this way is not firm legal ground. With an upcoming BRICS summit in South Africa, at this point still a state party to the Rome Statute, Putin's presence, or lack of, at the meeting will evaluate this precedent again.[177]

Rationale:

Like the three previous warrants, Putin and Lvova-Belova are considered unlikely to appear before the court; however, in this case, there are other reasons to proceed with their arrest. While the warrants themselves remain secret, "the Chamber considered that it is in the interests of justice to authorize the Registry to publicly disclose the existence of the warrants, the name of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the Chamber."[178] A form of leverage, Pre-Trial Chamber II hopes that the "public awareness of the warrants may contribute to the prevention of the further commission of crimes."[179] Publicizing impending charges, especially of a head of state, is a commonly used form of soft power dating back to antiquity.[180] Whether to provoke restraint or motivate disloyalty within Russia, international charges, as explicitly referenced in the ICC's press release, are being levied, at least partially, in an attempt to stop further war crimes.

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[175] "Lubanga," International Criminal Court, n.d., https://www.icc-cpi.int/drc/lubanga.
[176] "Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo Is Liable'" (International Criminal Court, July 18, 2019).
[177] Vasiliev, "The International Criminal Court Goes All-In."
[178] "Situation in Ukraine."
[179] "Situation in Ukraine."
[180] Joseph Plescia, "Judicial Accountability and Immunity in Roman Law," *The American Journal of Legal History* 45, no. 1 (2001): 53.

Chapter Four: Results

Not legally or procedurally overstepping their mandate, the ICC OTP seems to be doing everything in its power to make these cases stick. Not making it overly difficult, Russian war and other crimes are not particularly well hidden, or in the Situation in Ukraine, not hidden at all. Both procedurally adventurous and bordering on improperly strategic, the OTP seems to be harnessing every legal entitlement it can claim to move against Russia, including potentially misrepresenting evidence and utilizing disputed precedent. Both cases only bearing fruit after Russia had been internationally condemned for their actions, the timing of charges to align with Russia's loss in international status, to a TWAIL perspective, seems to range somewhere between opportunistic and strategic. Without acting improperly, the ICC can be responsive to changes in evidence and the international political situation; however, the new focus on Russia, previously entrenched within the legal trappings of the First World, is an unusual development. While Russia's invasions of Ukraine and Georgia are certainly due equal legal scrutiny, Russia actually facing international legal consequences, if they indeed do, would such a significant break from the traditional legal situation as to warrant a radical reevaluation of Russia and the ICC's place in the world.

Situation in Georgia:

A preexisting case that suddenly blossomed into multiple arrests only weeks after the invasion of Ukraine in 2022, the Situation in Georgia had been ongoing since 2015 and had clear procedural reasons to be acting on such a timescale. Finally breaking the color barrier, ICC Pre-Trial Chamber I issuing arrest warrants for Europeans is an important first for an organization that had come under intense criticism for their exclusive focus on Africa and seeming lack of respect for African sovereignty more generally. Ostensibly in favor of the potential decolonization of the ICC , the Situation in Georgia seems to be a legal rejection of Russia's imperial and colonial strategy of creating, manipulating and supporting foreign separatist movements that eventually formally vote to join Russia.[181] Known for successful divide and conquests in internally disputed territories like Chechnya and Dagestan, Russia, applying this well-worn stratagem to Georgia, was nearly successful on several occasions, with Georgian forces pushed out of

[181] "Russian Government's Fission Know-How Hard at Work in Europe | German Marshall Fund of the United States," https://www.gmfus.org/news/russian-governments-fission-know-how-hard-work-europe; Babak Rezvani, "Russia and the Georgian and Ukrainian Conflicts: Some Remarks," *Iran & the Caucasus* 22, no. 4 (2018): 408–17.

previously held land, now occupying a fifth of total Georgian territory.[182] In their applications, ICC prosecutors formally disregard the Russian pretenses for invasion and detail the premeditated nature of both the invasion and crimes in question. By acknowledging the Russian role in the invasion and actively charging their nationals with war crimes, the ICC is publicly identifying Russia's legal liability, attacking the very reason for the strategy in the first place. Intentionally muddying the rationale for the conflict, Russia, with a less united international context, might still be able to ignore the crimes out of existence in traditional fashion.

Not quite gone, Russia's colonial prerogative has not been totally excised and still plays a part in determining the strategy of the prosecution. Procedurally, Judge Kovács finds the rest of Pre-Trial Chamber I to be in dereliction of duty after they advocate for a lower standard of oversight that minimizes their role in the preliminary examination process. Without a meaningful article 15 review of *proprio motu* investigative material, Judge Kovács does not see what restrains the prosecutor's investigatory powers from free exercise.[183] Under the loosened oversight conditions imposed by the rest of the chamber, the prosecutor's application, according to Judge Kovács, is sloppy, thrice amended and suspiciously goal post moving based on the charge in question. Sparing his "comments on issues related to presentation," Judge Kovács finds that the prosecutor's arguments treat sexual violence and indiscriminate attack on civilians with a different standard of evidence than the other war crimes charges.[184] Unclear whether to further castigate Russia and South Ossetia or to protect Georgia, Judge Kovács believes that evidence for the indiscriminate attacks on civilians and sexual violence is being treated with a different degree of scrutiny by the OTP. Without getting into potential motivations himself, Judge Kovács' makes the bend of the procedural impropriety quite clear in his separate decision. Not problematic per se, the ICC's strategy seems to be making a concerted effort to go after Russian war criminals. Emblematic of Russia's struggle to wield its international structural power, the ICC prosecutor was able to ponder their argument and overcome these considerations without undue legal pushback, outside of Judge Kovács separate decision that mostly agreed on the facts. Technically a legal rejection of Russia's imperial ambitions and continued

[182] "The Russian Occupation of South Ossetia and Abkhazia."
[183] Kovács, Situation in Georgia: Separate Opinion of Judge Péter Kovács, 2.
[184] Kovács, Situation in Georgia: Separate Opinion of Judge Péter Kovács, 1.

colonial prerogative, Russia's pre-existing First World structural advantages still comes into play and have to be strategically dealt with, although the willingness appears to be there.

Situation in Ukraine:

Pre-Trial Chamber II released the arrest warrants for Putin and Lvova-Belova within a month of their televised meeting about the abduction and deportation program. Their detailed admissions, in the form of an attempted sympathetic piece for pro-war Russian audiences, described a program of child abduction from Ukrainian orphanages behind the front line or in occupied Russian territory. Often accompanied by Lvova-Belova herself, Russian agents had made nineteen trips to Ukrainian territory in heavy truck convoys at the time of the meeting, with more on the way.[185] Referred by signed parties under a special declaration of acceptance of jurisdiction, the prosecutor, without the need for a preliminary examination and potentially avoiding the al-Bashir precedent by occupying a different mode of admissibility pursuant to article 17(1), can make a specific, provable case that sticks to Putin, hopefully one that can survive Russia's structural advantages.[186] Whether unworried or simply unaware of the consequences, the Kremlin's decision to use this meeting as PR for the home front is strange in retrospect, but, in the greater context of an aggressive invasion of a neighboring country, is not the most unusual thing they have done this year. Almost a plea for the sake of the children, Khan, noting his administrations pre-existing priorities, desired that:

> Those responsible for alleged crimes are held accountable and that children are returned to their families and communities. As I stated at the time, we cannot allow children to be treated as if they are the spoils of war. Since taking up my position as Prosecutor, I have emphasized that the law must provide shelter to the most vulnerable on the front lines, and that we also must put the experiences of children in conflict at the center of our work.[187]

Difficult to find any procedural difficulties without access to the prosecutor's application's or opinions of the Chamber, Putin and Lvova-Belova, from their functional confession through TV appearance, really appear to have thrown one down the middle for the ICC this time. Without the prosecutor's applications or even resulting decisions, analysis is limited to publicly available evidence, but what is available

[185] "Встреча с Уполномоченным по правам ребёнка Марией Львовой-Беловой."
[186] "Rome Statute of the International Criminal Court," § 17(1) (1998).
[187] Khan, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova."

provides well beyond just reasonable grounds. Certainly not the full extent of Russia's coming charges from the ICC's Situation in Ukraine, the currently levied charges have been limited to only home runs that were admitted to on live television. At least halfway secure, the home run nature of the charges are only equaled by the disputed validity of the jurisdictional requirement to mandate the arrest of a sitting, unsigned head of state. Relying on the visibility of the charges to overcome the unpopularity of the ICC asserting itself, charges against Putin and Lvova-Belova ultimately rest on the al-Bashir precedent that created so much havoc in the African Union.[188] While the al-Bashir case specifically utilizes a referral from the Security Council, the Appeals Chamber made it very clear in their judgement that the obligation to arrest a sitting, unsigned head of state applies to every kind of admissibility criteria, not just those referred by the Security Council. If the prosecutor decides to bring charges pursuant to article 28(b), Putin's crimes could still be held to a higher level of scrutiny, where they again have the chance to muddy the procedural waters with privileged international position.[189]

Procedurally adventurous, ICC prosecutors are, at a minimum, resting their case on disputed precedent that they cannot reasonably expect the entire world to follow without complaint. These are certainly ambitious procedural grounds that could be safer if the prosecutor so chose. Fought over and partially ignored when the head of state was from Sudan, Russia, a wielder of whatever remains of their theoretical First World prerogative, should be able to filibuster or otherwise cover the case in a quicksand of procedural complaints and minor structural advantages that pushback the expected date of surrender to the court to never. Russia, unable to rebuff the charges with arguments with legal weight, fall victim to the ICC's procedural gambit in this first, admittedly pre-trial, stage of litigation. Immediately testable, Putin's visit to South Africa, still a member of the ICC but with a history of flaunting this obligation, for the BRICS conference in August will force the hosting country to choose between the two sides and whether to respect the Jordan Appeals precedent.[190]

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[188] Vilmer, "The African Union and the International Criminal Court," 1320,1321.
[189] "Rome Statute of the International Criminal Court," § 28(b) (1998).
[190] "South Africa Finalises 15th BRICS Summit Format," The Presidency, July 19, 2023, https://www.thepresidency.gov.za/press-statements/south-africa-finalises-15th-brics-summit-format; "Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral Re Al-Bashir Appeal" (International Criminal Court, May 2019); Nellie Peyton et al., "South Africa Says Putin to Stay Away from BRICS Summit," *Reuters*, July 19, 2023, sec. World, https://www.reuters.com/world/south-africa-putin-will-not-attend-brics-summit-by-mutual-agreement-2023-07-19/.

More of a controversial stand than first thought, the OTP's handling of the cases seemed determined to get something to stick. In the Situation in Georgia, the kind application of loose oversight standards from Pre-Trial Chamber I and the strategic minimization of sexual violence and indiscriminate attacks on civilians create the image of a modest application given every chance to succeed, despite the alleged faults in presentation. In the Situation in Ukraine, ICC prosecutors, in anticipation of pushback for the arrest warrants utilizing the al-Bashir precedent, chose the safest possible charges to balance out the impending challenge to ICC authority and the Jordan Appeals Chamber precedent. Built on procedurally adventurous grounds, the ICC's stand against the Russian abduction of children is a more direct attempt to flex the ICC's hegemonic muscles than seen before. Now with competing neocolonial prerogatives, the ICC's role as hegemonic actor is vying for domination with Russia's role as European imperial power. While yet incomplete, this clash of structural protection began with the ICC overturning decades of focus on Africa in favor of cases against Russia and has allowed significantly less Russian agency in the legal process than in the recent past. Not completely without structural advantage, Russia's status as a powerful country while the current international legal system was being formed can still be seen in the procedural lengths the prosecution has to go to to validate their claims. No longer able to influence international legal proceedings so far, Russian control over their international legal outcomes, has, at this stage of the case, waned.

Chapter Five: Conclusion:

Answering Research Questions

What does the colonial nature of international law say about the recent surge of Russian prosecution in the International Criminal Court?

Does this represent a greater shift or transition for Russia?

Russia, under real threat from the ICC and international criminal law for the first time in either party's history, appears to be losing some of their some of their remaining colonial authority, as defined by their (in)ability to dictate international legal outcomes in the current hegemonic order. According to the TWAIL framework of Third World states as the "recipients, not participants" of international law, Russia, a superpower at the time the hierarchy was organized, would ordinarily be expected to put up a

greater procedural fight than they did.[191] While certainly able to find the influences of their continued colonial prerogative in the legal documentation, the ICC's mobilization of charges against Russia has been more ambitious, procedurally adventurous and successful than ever before. Without the ability to go blow for blow with the economic powers of the age and suddenly under concerted attack from western sanctions, Russia, at the meniscus of their recent unpopularity, is being treated more like the Third World than the First by the ICC.

In the Situation in Georgia, the Russian imperial strategy to obfuscate the reasons for the invasion and the situation antebellum was legally rejected, resulting in the first three issued warrants for European defendants. ICC arrest warrants for Mikhail Mayramovich Mindzaev, Gamlet Guchmazov and David Georgiyevich Sanakoev, all citizens of Russia or Georgia/South Ossetia, are representative of a change in organizational direction of the ICC.[192] Whether strategic or simply noticing fresh changes in the international community and power structure, ICC prosecutors suddenly felt empowered to go after Russian nationals *proprio motu* after the 2022 invasion of Ukraine and quickly acted toward this end. Exclusively reserved for African war criminals in the past, the ICC, breaking from its established role as a hegemonic enforcer of the African legal order, decided that Russian war crimes were a step too far and deserved to be brought to justice. Not going down without a fight, Russia's contemporary colonial ability poked its head up several times to put the procedural kibosh on the proceedings but was generally pre-empted by the prosecutor. Allegedly minimizing some and centralizing other charges for strategic purposes, prosecutors also secured the application of a lower standard of oversight for preliminary examinations of its *proprio motu* jurisdiction, giving them a wide berth to choose charges as they see fit. Prosecutors deciding to construct their cases in the most effective manner is not specifically improper, given the history of the ICC, but displays the clash of colonial prerogatives that these trials are really about. Much like Germany at Nuremburg, a little push from strategic action on behalf of the hegemon may be needed to meaningfully enforce legal punishments on a First World country, even at their military

[191] Mutua and Anghie, "What Is TWAIL?," 35.

[192] "Public Redacted Version of 'Corrected Version of the "Arrest Warrant for Mikhail Mayramovich Mindzaev."'"; "Public Redacted Version of 'Arrest Warrant for Gamlet Guchmazov.'"; "Public Redacted Version of 'Arrest Warrant for David Georgiyevich Sanakoev.'"

and political nadir.[193] In the Situation in Georgia, ICC's hegemonic prerogative to accuse Russia has, at least so far, overcome Russia's ability to wriggle out of legal consequences.

In the Situation in Ukraine, the court decided it can treat Russia more like Sudan than the US. Without any of the evidence, applications or decisions, Putin and Lvova-Belova's public admission of the criminal program in question eases the investigative and procedural burden normally placed on the OTP. Basing the arrest warrants of Putin and Lvova-Belova on the al-Bashir and resulting Jordan Appeals precedent, the OTP is in for a political battle around the obligation to ignore head of state immunity. Previously ruling that head of state immunity does not apply to unsigned parties regardless of admissibility criteria, ICC judges ordering the arrest of Vladimir Putin is a valid legal interpretation of the Rome Statue and ICC's mandate. Aware of the adventurous nature of the case's procedural elements, the Prosecutor specifically chose these charges, as detailed in the television appearance and quasi-confession, to remove all traces of doubt about the commission of the crimes in question and only have to worry about the unresolved nature of the al-Bashir/Jordan Appeals precedent. Simplifying the clash of colonial prerogatives, ICC prosecutors are feathering the nest for the next stage of legal conflict, Putin's upcoming trip to, current Rome Statute signatory, South Africa for the BRICS summit.[194] Not clueless, the ICC is aware of the debate the al-Bashir arrest warrant sparked last time and the statistical unlikelihood of their surrender in a timely manner but has other motivations that warrant the warrants. By publicly accusing Russia, and Putin in particular, of these crimes, the OTP hopes to stop them from continuing to happen in the immediate future. A plea for the children, veiled underneath the primary function of hegemonic legal prosecution, is an unusual strategy, but, from the ICC and Prosecutor Khan's history of focus on the protection of children and as an emphasis of International Humanitarian Law more generally, perhaps they felt something had to be done.[195] Also not going down without a fight, Russian colonial prerogative in the Situation in Ukraine failed to overcome the procedural zeal of the ICC for the first time in their collective history.

[193] Sellars, "Imperfect Justice at Nuremberg and Tokyo," 1090.
[194] Peyton et al., "South Africa Says Putin to Stay Away from BRICS Summit."
[195] Khan, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova."

According to TWAIL, Russia, suffering procedurally in both cases, is at a low point of political power. Unable to enforce their built-in structural advantage on the ICC, Russia is suddenly under international legal pressure much in the way Sudan has been for decades. Not quite a shining rejection of the colonial nature of international law, the ICC's stand against Russia's imperial and neocolonial ambitions only applies to Russia's continued colonialism, not their own or anyone else's. Just as much of a hegemonic actor as before, the ICC appears to be turning the gun on Russia instead of Africa this time. As colonial and imperium-extending as ever, international law, from the Third World perspective, is specifically rejecting Russia's attempts to wield it in favor of the current hegemonic construction. Previously able to bounce back, the loss of this kind of structural authority invokes questions of how permanent this loss of power actually is.

Transition and Potentially Confounding Explanatory Factors

Russia permanently losing colonial power through legal means contradicts the violent nature of decolonization, likely indicating that the legal situation itself is not enough to justify a longer-term transition of power. The hegemonic sale of safe, legal decolonization is, from the postcolonial standpoint, a trap. Decolonization is none of these things and any promise of change without some kind of violence is inherently impermanent. More than just unlikely, TWAIL considers international law, in its current state, to be fundamentally unable to enact decolonization on its own, only able to reinforce the West's continued humanitarian domination of the Third World to its own great commendation. Without any firmer evidence or greater trend represented in international case law, a temporary loss of international power is not necessarily indicative of a greater transition. While it can be claimed that this is likely what the beginning of a Russian transition might look like, there are other possible reasonable interpretations that conflict with the transition or the more permanent loss of power narrative.

Agent of Hegemony

Informed by TWAIL's view of continuing colonial control, Russia's dip in structural authority might be more sensitive to the irritation of the West than real world changes in power. At least equally likely, the ICC could be showing its true colors as an agent of the enforcement of international hegemony. How could an outside observer tell the difference between the transition of Russia from the high table of international power from the hegemonic wish-casting of this same phenomenon? If the ICC is an imperial

agent, a wolf in a blue helmet designed to preemptively sanction a violent compellence power and simultaneously keep the moral high ground as TWAIL ultimately concludes, their reaction seems in line with this possibility. This could simply be a sign of a large, concerted effort from the West to decrease Russia's power, presented in an identical manner. If the hegemon throws its weight behind the idea, agreement from the international community is expected by the large majority of International Relations theories.[196] Instead of an actual sustained loss of their colonial authority, Russian losses in international court could be the representation of the West's desire for this to happen and resulting manipulation so that it appears to be so within the hegemonic arena. As at Nuremburg, the legal prosecution of First World states under international law probably requires some skullduggery to be done at all, so the hegemonic bending of the rules should continue to be the expectation. Without any separate constructions of international law of equal strength and acceptance, there is no way to guarantee the difference between reality and what the West wishes reality to be, based on one sided legal documentation alone. There are no other widely accepted international legal fora, independent from the current western hegemonic construction, to compare the conclusions of the ICC with.[197] In lieu of comparable non-hegemonic legal decision-making processes, the West's construction of international law is an untrustworthy source from which to be drawing larger claims.

Merely Ineffectual

Alternatively, ICC prosecutors could have given up the desire to arrest the individual entirely in favor of the utility of publicizing the charges. Aware of the low probability of the arrests occurring at any time in the immediate future, the OTP already admitted that the need to stop future war crimes is a function of their procedural strategy.[198] Potentially making threats they have no intention of keeping, the public function of the ICC's arrest warrants may be more important than the legal argument itself. Already partially known for being somewhat ineffectual, the ICC does not have a stellar record of making arrests of Third World criminals.[199] Al-Bashir was, for all the international and judicial consternation, never

[196] Nussaiba Ashraf, "Revisiting International Relations Legacy on Hegemony: The Decline of American Hegemony from Comparative Perspectives," *Review of Economics and Political Science*, March 11, 2020.
[197] John J. Mearsheimer, "The False Promise of International Institutions," *International Security* 19, no. 3 (1994): 7; Peer Schouten, "Theory Talk #42 - Amitav Acharya," August 10, 2011, http://www.theory-talks.org/2011/08/theory-talk-42.html.
[198] "Situation in Ukraine."
[199] Moses Phooko, "How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court," *Notre Dame Journal of International & Comparative Law* 1, no. 1 (May 1, 2011): 183; Sarah

surrendered to control of the ICC and remains in the pre-trial phase. Unsure how serious the ICC is internally about enforcing the charges, analytical claims, based on what could amount to international public relations efforts, should be limited. If the ICC does not take their own charges seriously enough to expect implementation, we should mistrust analytical claims of grander significance from them, regardless of their strategic eagerness and prosecutorial zeal. Even with the fundamental shift in organizational ambition toward Russia, a declawed legal body concerned with public appearances may not be the most analytically significant factor for Russia's future.

Even without any claims of transition, the ICC's first First World defendants are a significant shift for everyone involved. Still motivationally unclear from the legal documentation, a strategic refocus from two decades of African cases to first world criminals, armed with nuclear weapons, is a fundamental change in expectation. The ICC's rejection of Russia's colonial prerogative can be seen as a step toward the decolonization of international law; however, the ICC's own colonial nature still shows international law as a thoroughly western hegemonic construction, more responsive to the internationally powerful than those in need. Instead of making international law less colonial, ICC prosecutors are making international law less Russian, expunging the West's Other from their constructed system of international order.[200] By maintaining the system of domination that keeps the West on top, the ICC's rejection of Russia's colonial prerogative is almost an unintended consequence of the continuation of western hegemony.

The (F)utility of the Law

Showing the still emergent nature of critical knowledge in Security and International Relations scholarship, the international legal prosecution of war crimes, in pursuit of customary principles and moral good, begs the ever-present question on the mind of critical scholars of *Good for Whom?* If the current international legal bodies enforce First World hegemony, they would not be the first choice of political ally for the Third World in their struggle against the group of states that created and currently support them. Admittedly a pessimistic take but one shared by many, there is no theoretical basis from

Goodman, "The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations," *Inquiries Journal* 12, no. 09 (November 9, 2020): 1-3.

[200] Keith Chandler Prushankin, "Who's Afraid of the Lurking Bear: The Resecuritization of Russia in the Post Crimean United States National Security Discourse" (Prague, Charles University, 2017), 72.

postcolonial theory and other critically inspired fields for the transformative or revolutionary power of international law, especially on its own.

No matter how powerful, the belief that international legal organizations will or even can attempt to dismantle the master's house with the master's tools disregards foundational intersectional feminist theory. Audrey Lorde, herself concerned with the "consideration of the consciousness of Third World women" and as the leader of the movement to integrate this intersection of concerns into a broader interest group, warns of the risk of ignoring oppression in the background for the visible and convenient oppressions in the foreground.[201] If only focused on the moral high ground of the ICC's protection of civilians, there are many more frames of oppression extended by the ICC and western domination of the Third World that lurk under the surface and will be missed. As previously discussed in greater detail, Frantz Fanon advocates for the necessity of decolonial violence as a requirement to founding a healthy postcolonial society. In agreement about the importance of background oppressions, Fanon espoused the belief that the oppression of the entire colonized society supersedes the period of violence needed to effectively decolonize and fix the problem from the ground up.[202] Far from societally transformative violent revolution birthing an independent state, legal fictions of decolonization from the ICC, like other non-violent claims, are not sufficient to subvert international hegemony and would not appease Lorde or Fanon's ire at their obfuscation of Third World oppressions. These underlying oppressions, categorically ignored by international law as a consequence of their creators and mandate, cannot be addressed by this hegemonic construction of international law and do not bode well for the decolonial utility of international law in general.

While using the law on its own may seem like a less than productive endeavor, Russia and Ukraine have an accompanying military conflict that, when finished, has the promise to deliver the kind of greater conflict resolution required by both the international legal stalemate and postcolonial theory. However, even if Russia loses the war, their defense is not entirely out of legal options. Like all Security Council members, Russia, has some structural power enshrined in the Charter of the UN that is difficult to

[201] Audre Lorde, *Sister Outsider: Essays and Speeches*, *Crossing Press Feminist Series.* (Trumansburg, NY: Crossing Press, 1984), 111.
[202] Fanon, *The Wretched of the Earth*, 37.

touch.[203] Surrounding an emerging body of international legal scholarship on the difficulty of prosecuting Russian crimes, international legal scholars have proffered everything from strategies to work around the UN to complete reimaginations of the international order as remedy for these difficulties, but, as TWAIL will attest, legal action from hegemonic organizations that are not sufficiently empowered or interested in subverting First World hegemony in the first place are not the future of international legal decolonization.[204]

Suggestions for Further Research

Focused on Russia's legal situation, this analysis invokes greater and more fundamental questions about the nature of contemporary international law that cannot be explored herein. How effective of a tool is international law for enacting long-term change in these situations, or how effective is violence for that matter? What are the connections between imperial and colonial power and how are they applied in modern international legal institutions? Utilizing TWAIL's theoretical framework, future researchers can continue to apply this needed viewpoint to International Relations and begin to tackle these larger questions through different areas of critical investigation.

More than just theoretical questions about the nature of law, other definitions of power, outside of the strictly legal, can be interrogated as well. Immediately in the theoretical vicinity of this analysis, a postcolonial psychological evaluation of the effects of losing First or Third world status and how this relates to loss of colonies would inform many of the conditions that underpin the grander theoretical questions posed above. Even able to be combined with quantitative methodology, a search for discursive evidence of decline using the R programming language and large sets of publicly available news or government documentation would produce epistemologically complementary, but methodologically inverse, knowledge with similar implications for the important theoretical problems.[205]

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[203] "UN Charter," § 23-32 (1945).

[204] Theodor Meron, "Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes," *The American Journal of International Law* 112, no. 3 (2018): 433–51; Amitav Acharya, "Nonhegemonic International Relations: A Preliminary Conceptualization" (Bristol, October 2008).

[205] May McCreaddie and Sheila Payne, "Evolving Grounded Theory Methodology: Towards a Discursive Approach," *International Journal of Nursing Studies* 47, no. 6 (June 1, 2010): 781–93; Ana M. Aranda et al., "From Big Data to Rich Theory: Integrating Critical Discourse Analysis with Structural Topic Modeling," *European Management Review* 18, no. 3 (2021): 197–214.

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