

A Discussion on the Arrest Warrant on Russian Personals: From the Jurisdiction and Alleged Crime Perspective

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Abstract: This article sorts out the current situation of International Criminal Court investigation of situation in Ukraine, and based on latest developments, it discusses and studies the international criminal law issues involved in arrest warrant issued by Pre-Trial Chamber, mainly including court jurisdiction and its scope, connotation of alleged crime and its application in this case. This study mainly uses the method of literature research and also cites the conference rebroadcast video material on the official account. After the research, the paper summarizes the information about the status quo and makes comments on the decision of the current situation.

Keywords: international criminal law, war crime, jurisdiction, Ukraine

1. Introduction

Last year, shortly after the Winter Olympic Game, Russia rocked the world by declaring war on Ukraine. This situation attracted great attention around the world and the UN security council took action immediately by holding emergency meetings. But this time, the Security Council is destined to be unable to play a big role due to the permanent membership of Russia. Eventually, this armed conflict last for more than one year until now and we cannot see any clue about when and how this conflict will come to an end.

On March 17, 2023, Pre-Trial Chamber II of International Criminal Court issued warrants of arrest for Vladimir Putin and his Commissioner for Children's Rights in the Office of President Maria Lvova-Belova under the situation in Ukraine. This investigation concerning Ukraine started by Prosecutor Karim A. A. Khan KC after the very day on which Russian military operation took place in Ukraine.

Before this arrest warrant was issued, Prosecutor Karim has working on this case for a year—just after the military operation commenced. On February 28th, 2022, Prosecutor Karim announced he starts to seek authority to conduct investigation for situation in Ukraine. He pointed out that even if Ukraine does not belong to State Party to the Rome Statute of International Criminal Court, Ukraine claimed to accept ICC's jurisdiction on 2 alleged crimes under Rome Statue—war crime and crime against humanity and time period is from November 21, 2013 to now. And according to preliminary investigation for Situation in Ukraine, reason is also justified to investigate [1]. In conclusion, ground exists for investigating as long as he receives the authority's permission, from either approval from Pre-trial Chamber or referrals from State Parties.

Very soon, after his announcement, he received 39 state parties' referrals on March 2, 2022 and 2 more on March 11, 2022 [2,3]. Then he officially started his investigation and visited Ukraine four times and his Office participated in joint investigation team (JIT) for alleged core international crimes in Ukraine, with existing acceding parties including Lithuania, Poland and Ukraine [4].

After roughly one year of investigation, Prosecutor Karim mentioned evidence his witness for Russia's alleged deportation of children from Ukraine to Russian Federation or illegal transfer to other areas of temporarily occupied territories on his statement after the fourth trip to Ukraine [5]. According to his finding, the Pre-Chamber II issued arrest warrant which also reveal the end of this investigation procedure.

In this study, the author will first discuss the jurisdiction issue of the court and then focus on the alleged crime based on now-public materials.

2. Jurisdiction of International Criminal Court

Due to special characters of International Criminal Court, its jurisdiction is very different from others. Firstly, jurisdiction of International Criminal Court is supplementary. Only when the state does not act can International Criminal Court complement jurisdiction exercise by the state, that is, only when the state is unwilling, unable or takes no action, International Criminal Court can intervene in jurisdiction exercise. Also, although title of International Criminal Court includes the word "criminal", the Court only possess jurisdiction over core international criminal crimes which violate jus cogens. According to Article 5 of Rome Statute, International Criminal Court only transact genocide crimes, war crimes, crimes against humanity and aggression and there are only three ways to trigger jurisdiction.

In this part, the author will first summary methods to trigger jurisdiction of the Court and application within Ukraine situation.

2.1. Triggers of the Jurisdiction

According to the Rome statue there are three ways to trigger jurisdiction of the Court: Referrals from Security Council or State Parties and by prosecutor [6].

2.1.1. Referrals

2.1.1.1. Referrals from the Security Council

Paragraph 1 from article 7 and article 24 in UN charter specifies that security council shall shoulder responsibility to maintain international peace and safety while article 39 confirms that Security Council shall determine existing threat to peace, violation of peace, or act of aggression and article 41 and article 42 states that Security Council shall recommend or decide necessary measures to be taken for maintaining or restoring international peace and safety. Thus, referring situations that threat international peace and safety is among UNSC power scope.

Situation possesses more parameters than case, representing confines within which Prosecutor is to determine justification of initiating investigation which is preliminary examination [7]. UNSC can refer situations despite nationality of the accused, and place where crime occurred. For example, UNSC referred the situation in Darfur to ICC in Resolution 1593 (2005) on March 31, 2005, thus gave ICC jurisdiction over crimes listed in Rome Statute committed on territories of Darfur, Sudan, or by nationals from July 1, 2002 onwards [8].

Security Council's referral has two benefits. Firstly, referrals from UNSC grant ICC jurisdiction on situations take place outside state parties. It also increases the possibility of implementing ICC

request because in such a case, UNSC will force the relevant states cooperate with ICC if they refused to do so.

2.1.1.2. Referrals from the State Parties

As per provisions of Article 13 and Article 14 in Rome Statute, State party can refer situation to ICC to activate jurisdiction of International Criminal Court. Such a method is derived from national complaint mechanism in other treaties about human rights [9]. Regarding situation submitted by the State party, some scholars think that the prosecutor has the obligation to investigate, that is, prosecutor has no discretion to decide whether to refuse the investigation, he must determine justification of initiating investigation on any case, if so, he must initiate a preliminary examination [10,11].

Similar with the referrals from the Security Council, state parties' referrals also provide ground for ICC's jurisdiction on non-state parties.

2.1.2. Independent Investigation by Prosecutor

Article 13, paragraph 3, and Article 15 in Rome Statute stipulates prosecutor of International Criminal Court can initiate investigation on his own initiative. Triggering jurisdiction is to maintain independence and effectiveness of International Criminal Court and reduce political influence on the court.

However, different from referrals from UNSC and state parties, prosecutors have to initiate investigation on a crime which is a standard higher than situation. A crime refers to a concrete case but not potential cases in a situation [7]. There are also limitations on prosecutors launching investigations. If the prosecutor wants to start an investigation, he needs to obtain authorization from Pre-Trial Chamber. In addition, right of prosecutor to start investigation on his own initiative is also restricted by Security Council. Article 16 in Rome Statute states Security Council possess the right to suspend International Criminal Court for 12 months.

Some non-state parties claimed that they accept jurisdiction under the ICC in some specific time periods, such as Ukraine. But this claim does not trigger prosecutor's investigation and is considered as providing information for the prosecutors, otherwise, non-parties can obtain many potential benefits from the statute, which will be unfair to the contracting parties [12].

2.2. Application in the Ukraine Situation

2.2.1. Trigger of the Jurisdiction

In this case, Security Council is doomed to play little role. Security Council held 26 meetings last year but passed only one resolution. The reason for this is self-evident. Being permanent member of Security Council, Russia possesses power to veto over transactional matters. Therefore, in this case, referral by Security Council fails to trigger jurisdiction of International Criminal Court.

According to statement of Prosecutor, triggering jurisdiction of the case was Prosecutor Karim's independent investigation, after he started the investigation based on the declaration from Ukraine to accept Court jurisdiction over alleged crimes under Rome Statute within its territory, then 41 State parties referred situation to Office of Prosecutor in response to his appeal which is a rare situation, because there is no precedent that one case would attract such attention and referred by more than 1 state party [1]. As a result, even though this investigation first started as an independent Prosecutor investigation, but after the state parties referred situation to Prosecutor, route changed. After all, this case is triggered by state parties' referrals.

2.2.2. The Scope of the Jurisdiction

2.2.2.1. The Geographic Scope

After determining the type of trigger mechanism, here comes the problem, 41 state parties referred “Ukraine Situation” to the ICC. Before the military operation took place, the words self-claimed Donetsk People’s Republic (DPR) and Luhansk People’s Republic (LPR) appeared as early as the signing of Minsk Agreement in 2014, and on February 21, 2022, Russia recognized the existence of these two republics [13]. Does self-claimed Donetsk People’s Republic (DPR) and Luhansk People’s Republic (LPR) still belong to Ukraine and situation happened there is under the jurisdiction of ICC?

Legal scholars generally define the state as a person in international law with criteria as follows: (a) a permanent population; (b) a defined territory; (c) a government [14]. These three criteria are widely accepted. But there are endless discussions concerning about whether recognition from others constitute a state. Article 1 in Montevideo Convention on Rights and Duties of States 1933 is believed to lay down the best accepted formulation of the criteria of statehood in international law and confirmed capacity of establishing relations with others is solid criterion for statehood creation [15,16]. However, there are other scholars believe the fourth criterion should be sovereignty but not the ability to set up diplomatic relationship with other states [17].

Despite the controversial ideas concerning the creation of statehood, Donetsk People’s Republic (DPR) and Luhansk People’s Republic (LPR) fit in four criteria but not widely, they are recognized as states. Then what is the scope of territory of Ukraine proposed by the State party at this time? The author believe that this scope is determined by the attitude of state parties referring ICC situation. Right now, none of state parties referring ICC situation recognized Donetsk People’s Republic (DPR) and Luhansk People’s Republic (LPR) as two independent countries and thus, the scope is the territory recognized by state parties which is the old Ukraine.

2.2.2.2. The Time Period and Alleged Crime

According to the content of the state parties’ referral, Ukraine’s wishes, and past declaration are highly respected. 39 state parties determined to refer situation in Ukraine to prosecutor to facilitate investigation process and showed respect by limiting the time period and alleged crime correspond to the previous claim made by Ukraine government [18].

As a result, the time period is certain which is from 2013 until now, and the alleged crime are limited within war crime and crime against humanity. Also, even the situation provides reasonable ground, and Russian personnel cannot be held to account for crime against peace in ICC forum.

3. Analysis of the Alleged Crime

According to the arrest warrant of the ICC, both Vladimir Putin and Maria Lvova-Belova are accused of illegal deportation and transfer of Ukrainian children from occupied places of Ukraine to Russian Federation, which violated article 8(2)(a)(vii) and article 8(2)(b)(viii) of Rome Statute [19].

These two acts make up war crimes under Article 8, in this part, the author will first give a general introduction of the war crime term in the Rome Statute and then carefully analyze the clauses corresponding to the two crimes, and finally speculate whether the relevant persons may be convicted of this crime under ideal circumstances by integrating the currently published information.

3.1. War Crime

3.1.1. General Introduction and the Common Elements

War crimes is serious breaches of treaty or customary rules of international humanitarian law in armed conflict [20].

From a gravity perspective, a war crime must be a serious violation of international rules protecting important values with grave consequences for victims. Rules that are violated must belong to the customary law or treaty rules of international humanitarian law. These rules are mainly Hague Conventions of 1899 and 1907 and Geneva Conventions signed in 1949.

Article 8 stipulates many types of war crime, all these types of war crime have some common elements. In addition to the perpetrators engaging in certain criminal acts, the acts must be committed in armed conflict and be related to such a conflict, and the perpetrators must know facts of the armed conflict.

According to now widely accepted standard of armed conflict from decision of International Criminal Tribunal for former Yugoslavia appeal hearing on jurisdiction of Tadic case, which requires armed conflicts between countries or organized armed groups and the degree of violence should reach a certain level.

About the relationship between the conflict and the acts, a link between the acts and armed conflicts does neither mean that the armed conflict was root of criminal act nor that criminal act must have occurred in the conflict, but that criminal act must have occurred in armed conflict and in close proximity to hostilities [21].

Being aware of the conflicts is a mental element of war crime and is considered as an element that best distinguishes the domestic criminal crime and international criminal [21]. It is not a very strict requirement and can be fulfilled by the simple understanding of the exist of the armed conflict.

3.1.2. Illegal Deportation and Transfer from Occupied Areas

These two types of war crime are closely related to occupied territories. Both Article 8 2a(vii) and article 8 para 2 (b) (viii) primarily involve forcible movement of protected persons within territory (transfer) or expulsion from territory (deportation) (article 49 para 1 GC IV) and criminalized same conduct [22].

Comparing the elements of the above crimes, we can find the requirement are similar in general. the Article 8 (2) (a) (vii)-1 emphasis transfer and deportation of the protected and required the perpetrator's awareness of the protected status while this description is essentially equivalent to population within occupied territory in Article 8 (2) (b) (viii), only in some cases when alien get involved there will be difference in the application of the two articles. Since in the Ukraine Situation, alien don't play an important role, this section will skip the discussion concerning the alien issue. Thus, there is no need to separate the analysis of the two articles.

Scholars almost never discuss the unlawful transfer and deportation of children as a separate and highlight topic. Compared with the transfer of all residents, children are only a special group of people and the effect in determining whether it constitutes a war crime is not particularly significant. Therefore, this section will not discuss too much specifically about children but focus more on the general element this crime.

According to the word unlawful, this crime is a violation of another rule and there is need to explore the essence of this referred law. The prohibition of transfer and deportation of all or part population within occupied territory is considered as the norm of customary international humanitarian law applicable in international armed conflicts and is also found in the Fourth Geneva Convention [23].

Generally, deporting or transferring one or more people to another State or to another place constitutes the crime only when the person violates article 45 and 49 for protected persons in the sense of Part III, Section II of the Fourth Geneva Convention. Article 45 provided limitation on the States where the protected persons are transported and Article 49 prohibited the forced transfer which is against the will of the protected persons. The types of forced transfer including untenable living conditions, continued military operations against particular cities and a life in permanent fear and insecurity.

There is also exception that forced transfer is possible where safety of civilians is implicated, or compelling military excuses need evacuation and conditions is qualified to ensure such evacuation. Both Fourth Geneva Convention and Additional Protocol II provide for this exception. However, the exception of strictly necessary military reasons in no way covers movements for the purpose of persecuting the civilian population. And according to Fourth Geneva Convention, evacuation shall not cause the protected person to be displaced outside the territory of occupation, unless the above-mentioned displacement cannot be avoided due to material reasons. Also, the convention asked the state who transfer protected persons provide appropriate accommodation, including satisfactory situations of health, safety, nutrition and hygiene, with members from the same family indiscrete.

3.2. Analysis of Status Quo

After interoperating the terms of the relevant articles, now we can analyse the published information. In this section, major information source including the statement of the Prosecutor, reports from the OHCHR and report from Yale University.

3.2.1. Summary of Current Information

In order to protect the victims, the ICC didn't issue the arrest warrant and we cannot see directly the evidence collected by the Prosecutor office, but since deportation and transfer of the children is as above mentioned a grave breach of international humanitarian law and there are other international organizations also focus on Ukraine situation, we can take a glimpse from the OHCHR report and learn about the detail from the report written by the Yale University Humanitarian Research Lab.

The report on the human right situation in Ukraine gathered many types of human right violation in Ukraine including children transfer. According to the report, Russia moves and relocates civilians in general including unaccompanied Ukrainian children. These children were living in the institutionalised care, separated from or lost families. These children were transferred to Russian cities and resettled to social institutions or placed in foster care with Russian families [24]. There are also children from Kharkov region were sent to summer camp in Russia with the consent of their families, but they were not sent back in the due day. The report written by the Yale University Humanitarian Research Lab report similar situation but with bigger number and more detailed information about Russian institutions and the yale report pointed out the most camp receiving children from Ukraine also operate as a re-education centre. In the Yale report, they claimed that all level of Russian government is involved. The Prosecutor also showed his concern about the orphans who once lived in the care home for children but now missing [25,5].

3.2.2. Comments

Based on the reports we can conclude that Russia transferred both children with and without parents or guardians and also re-educate these children by the camp or by letting Russia families adopt the children and enrolled them in the Russian school [25].

Then concerning the element of crime, we can see that apparently, moving children is under the context of war and children are obviously protected persons according to the Geneva Convention.

Russia's movement of children and even the separation of children from their parents are all traceable behaviours and is admitted by the Russian Ambassador in the UN [5]. By the standards mentioned on the last section, Russia's behaviours fulfil the requirement of the Element of Crime.

Now, judging whether Russia's behaviour constitutes war crime of illegal deportation and transfer needs and war crime of deportation or transfer of all or part population of occupied territory within or outside this territory is to consider whether the requirements for exception are met.

The exception appears when these behaviours are for the necessary military reasons and guarantee the living condition of the moved people. According to the speech delivered by Mr. Vasily Nebenzya--the head of Russian Mission to United Nations--on April 5 Aarria Formula meeting, the movement of the children is to protect orphans and children lack enough care from their parents or guardians [26]. He pointed out in the area where the children are from, there are countless danger due to the war and hostilities. He also mentioned that the objections from the west are fractions of a grand view because there are millions of people are moving from their homes to escape flames of fear and the major of citizens are children traveling with their parents. And the movement of the orphans and unaccompanied children was conducted with full compliance with commitments under international humanitarian law.

Elaborate report from Yale University says living condition is highly guaranteed and even provide extra care for their health, sanitation and safety. And from the attitude revealed by countless speeches and statement from the Russia government, there is ground to support the idea that the children are evacuation but not forced transfer or deportation.

But still, the final decision depends on International Criminal Court. But there are countless and absolute evidence indicate the movements and action Russia while the evident for applying exceptions are not widely accepted and hope Russia can actively participate in this case in the future instead of only applying political discourses.

4. Conclusion

In the end of this shallow research on the recent case update concerning situation in the Ukraine situation from the international criminal law level, the author finds out that the trigger of jurisdiction is firstly by prosecutor's independent investigation and facilitated by the state parties' referrals. And jurisdiction scope conforms to claim made by Ukraine years ago and limit the alleged crime within war crime as well as crime against humanity. Actually, crime against peace is also an interesting and controversial issue but due to the limitation of the jurisdiction, there are no ground for this topic. In the second part, the paper talks about the substantive issues and confirm the behaviours of the Russia Federation are real according to the published reports but there are reasons to believe Putin and Maria are not guilty of war crime. However, although the case stands up to careful scrutiny of international law, it still shows stronger political character rather than legal character.

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