



The Travails of Prosecuting Serving Heads of State before the ICC: The Case of Omar Al Bashir and Vladimir Putin

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ABSTRACT

Even though the International Criminal Court (ICC) is more than two decades after the Rome Statute was ratified by state parties, prosecuting serving heads of state before its jurisdiction has been a nightmare, albeit the Court does not recognise immunities before its jurisdiction. Accordingly, waiving the personal immunity of serving heads of state has been one of the greatest contentions before the Court as seen in the Al Bashir case. While cooperation in matters of arrest and surrender to the Court remains another major concern, the fact that the treaty creating the Rome Statute is primarily binding only on state parties is another obstacle, since consent is required from non-state parties before any prosecution. This article argues that prosecuting President Putin will result in a debacle just like his counterpart Al Bashir given that the issue of immunities and cooperation is still a major concern. Unfortunately, until all states become parties to the Rome Statute, this issue of state cooperation with the Court is still far from over. Consequently, all states are urged to become party to the Rome Statute to minimise the travails of prosecuting serving heads- of-state.

Keywords: *Rome Statute, immunities, cooperation in matters of arrest and surrender, serving heads of state, Vladimir Putin, Omar Al Bashir.*

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INTRODUCTION

One of the greatest travails before the ICC has been the prosecution of serving heads-of-state, especially the head of state of a non-state party. The ICC was created to put an end to impunity for perpetrators of crimes against humankind committed under its jurisdiction.¹ These crimes include genocide, crimes against humanity, war crimes and the crime of aggression.² The ICC will have jurisdiction over these crimes notwithstanding the status, office and personality of perpetrators of these crimes.³ In other words, the ICC's jurisdiction does not respect any form of immunities attached to the office or status of a person in cases that involve international crimes under Article 5 of the Rome Statute.⁴

Article 27 of the Rome Statute declares clearly that the status and official capacity of government officials do not prevent them from criminal accountability under the Statute.⁵ It further states that any immunity and special rules of procedure that might be ascribed to the official capacity of a person, be it at national or

¹ International Criminal Court, *Rome Statute of the International Criminal Court* (International Criminal Court, 2011), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. See also paragraph four of the Preamble of the Rome Statute.

² Article 5 of the Rome Statute.

³ Lucas Buzzard, "Holding an Arsonist's Feet to the Fire?-The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir," *American University International Law Review* 24, no. 5 (2009): 901.

⁴ Article 27 of the Rome Statute.

⁵ Andrea Birdsall, "The Responsibility to Prosecute and the ICC: A Problematic Relationship?," in *Criminal Law Forum*, vol. 26 (Springer, 2015), 51–72.

international law will not preclude the Court from carrying out its prerogative.⁶ This substantive rule of the ICC means that state officials or any defender cannot rely on his or her official status while in office.⁷

Notwithstanding the removal of substantive immunity by Article 27 of the Rome Statute, Article 98 of the Rome Statute provides for the primacy of treaties in assessing immunities.⁸ This makes it difficult for the ICC to prosecute perpetrators of the crimes mentioned above especially if it concerns non-state parties to the Rome Statute. This difficulty arises from the fact that it is inconsistent under customary international law and in particular with respect to the law of diplomatic immunity, as well as the law of treaties.⁹ The political will of most states may also thwart the functioning of the Court.¹⁰ Therefore, despite the eloquent explanation of Article 27 of the Rome Statute, Article 98 of the same Statute seems to contradict its provision.¹¹ The reality is that, by virtue of this provision, the ICC may not proceed with any request for a surrender that is inconsistent with obligations under international law unless there is cooperation with the third state to waive the immunity.¹²

The Court has further limitations to those outlined above. The Court lacks direct coercive power, which facilitates the operation of domestic criminal courts.¹³ It relies on state cooperation,¹⁴ and especially states parties to the Rome Statute to arrest indicted officials since the Court does not have a police force to arrest and surrender perpetrators.¹⁵ Despite these limitations, the ICC has made some progress in ending impunity for serious international crimes.¹⁶ However, prosecuting serving presidents remains a nightmare. The personal immunity of both Vladimir Putin and Omar Al Bashir in their capacity as sitting heads-of-state will be examined in the discussion of this article. The position of state parties and non-state parties will also be analysed. The final section will examine the travails of prosecuting sitting heads-of-state.

The Personal Immunity of Vladimir Putin and Omar Al Bashir before the ICC

Sitting or serving heads of state are protected by personal immunity or immunity *ratione personae* recognised by customary international law. In other words, Vladimir Putin as the serving President of the Russian Federation and Al Bashir, (when he was the President of Sudan) are protected from prosecution through personal immunity. Accordingly, this personal immunity of the head of state is also for international crimes. An example is the *Gadhafi* case¹⁷ where Colonel Gadhafi, as Libyan president and others were tried in nonappearance by the Special Court of Assizes in Paris for the destruction of an aircraft and 170 passengers and crew on board. On appeal, the Court of Cassation terminated the proceeding and held as follows:

International custom precluded Heads of state in office from being the subject of proceedings before the criminal courts of a foreign state... In the current state of international law, complicity in a terrorist attack, however serious such a crime might be, did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of state in office.¹⁸

⁶ Article 27 of the Rome Statute.

⁷ Article 27(1) of the Rome Statute.

⁸ Article 98 of the Rome Statute.

⁹ Scott A Gilmore, "Immunity Disorders: The Conflict of Foreign Official Immunity and Human Rights Litigation," *Geo. Wash. L. Rev.* 80 (2011): 918.

¹⁰ The recent situation in South Africa, where the Court ordered that Al Bashir should not leave the country, was violated and former President Bashir evaded an ICC arrest warrant. Bashir was attending the AU 25 summit in South Africa and yet evaded the court order as discussed in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP) (2015).

¹¹ In the view of this article, there is no tension between Articles 27 and 98 of the Rome Statute. This is because the provisions deal with entirely different aspects. While Article 27 of the Rome Statute deals with criminal responsibility and waiver of the immunities of the state officials of all state parties before the ICC, Article 98 of the Rome Statute deals with cooperation and waiver of immunities belonging to the state officials of non-states parties in matters of arrest and surrender to the ICC.

¹² The proper interpretation of Articles 27 and 98 of the Rome Statute, with regards to this article, is that Article 27 of the Rome Statute is applicable automatically to all state officials whose state are parties to the Rome Statute. However, consent is required for its application to state officials of non-state parties and that Article 98 of the Rome Statute is not applicable to state officials whose state are parties to the Rome Statute. Therefore, the article applies only to state officials of non-state parties to the Rome Statute.

¹³ Yvonne M Dutton, "Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge," *Colum. J. Transnat'l L.* 56 (2017): 71.

¹⁴ Göran Sluiter, "Obtaining Cooperation from Sudan—Where Is the Law?," *Journal of International Criminal Justice* 6, no. 5 (2008): 871–84.

¹⁵ Dire Tladi, "When Elephants Collide It Is the Grass That Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic," *African Journal of Legal Studies* 7, no. 3 (2014): 381–98.

¹⁶ International Criminal Court, "Situations under Investigations," 2023, <https://www.icc-cpi.int/situations-under-investigations>.

¹⁷ *Djibouti v France*, (2008) I.C.J. Reports 177.

¹⁸ The decision of *Djibouti v France* (2008) ICJ Report 177. *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters*, where the ICJ stated as follow: "A Head of state enjoys in particular full immunity from criminal jurisdiction and inviolability" which protects him or her "against any act of authority of another state which would hinder him or her in the performance of his or her official duties."

The rationale for this immunity is to facilitate smooth functions and communication between states as far as international relations is concerned.¹⁹ This immunity is also essential for the conservation of peaceful collaboration and co-existence between states, even in private acts.²⁰ In the *Arrest Warrant* case, the court compared the functions of the Foreign Minister with those of other diplomatic representatives on the one hand and those of heads of state on the other and came to the following conclusion:

The court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. The immunity and inviolability protect the individual concerned against any act of authority of another state which will hinder him or her in the performance of his or her duties.²¹

It is certain that immunity *ratione personae* are absolute and inviolable from criminal jurisdiction.²² It protects the president even in those acts performed earlier as he came to office, during office and in private acts, even abroad.²³ Any attempt to waive this immunity by any state is equivalent to gross abuse of customary international law by that state or jurisdiction. The court in the *Arrest Warrant* case, paragraph 58, confirms this view by stating as follows:

It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according to immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs [or heads of state], where they are suspected of having committed war crimes or crimes against humanity.²⁴

Personal immunity can only be waived by the state that confers such immunity to the official.²⁵ This is because immunity *ratione personae* is procedural in nature. In other words, the immunity enjoyed by current heads of state in international law does not denote a barrier to unlawful action in certain circumstances. They may be responsible for international crimes when they are no longer in office.

METHODOLOGY

This study used qualitative research methods. Qualitative research methods aims to gather or collect and analyse non-numerical data in order to gain an understanding of the concepts and it includes: phenomenological, ethnographic, grounded theory, historical case study and action research. However, theoretical techniques were also explored in this study. The key methodological approaches of this investigation were literature surveys, the internet and other electronic sources and case studies. In other words, this study examined the Al Bashir decisions given by the Supreme Court of Appeal of South Africa and the ICC decision in the Jordan case regarding Al Bashir. Finally, articles related to the topic were analysed before concluding.

The Arrest Warrants of Vladimir Putin and Omar Al Bashir

Vladimir Vladimirovich Putin is the current President of the Russian Federation since 2012. He was born on 07 October 1952.²⁶ Vladimir Putin was also the President of Russia from 2000 until 2008. On 24 February 2022,

¹⁹ The Minister of Justice and Constitutional Development v The Southern African Litigation Centre (867/15) ZASCA 17 (15 March 2016) 84. The judge held that there is no exception to immunity and inviolability that head of state enjoy when visiting foreign countries and before foreign national Courts at this period of development in international law.

²⁰ The speech of former British Prime minister Gordon Brown, in 2010 where he said "There is already reason to believe that some people are not prepared to travel to this country for fear that such a private arrest warrant- motivated purely by political gesture-might be sought against them. These are sometimes people representing countries and interest with which the United Kingdom must engage if we are not only to defend our national interest but maintain and extend an influence for good across the globe; Britain must protect foreign leaders from private arrest warrant." *The Guardian*, 3rd March 2010. In the same light see Michael A Tunks, "Diplomats or Defendants-Defining the Future of Head-of-State Immunity," *Duke Lj* 52 (2002): 651. Here, he maintained that head of state immunity permit the leader to involve in official duties, which includes travelling abroad without fear of arrest, detention and other conduct which is inconsistent with his duties as head of state. Without this immunity they will be exposed to trial in foreign courts and the head of state will prefer not to travel abroad.

²¹ *Democratic Republic of Congo v Belgium*, (2002) I.C.J 14 February 2002 (N0.121) 54.

²² *Kalogeropoulou and Others v Greece and Germany* (2002) 129 *ILR* 537. Here, the ECHR holds that there is immunity in international law for crimes against humanity brought by one state to another.

²³ *Democratic Republic of Congo v Belgium*, (2002) ICJ 14 February 2002 (N0.121) 55, indicating that there is no difference between acts executed by a Minister of Foreign Affairs as a state servant and personal act. It is irrelevant whether these acts were executed before he or she came to power or during the term of office.

²⁴ *Democratic Republic of Congo v Belgium*, (2002) ICJ 14 February 2002 (N0.121) 58. *Schooner Exchange v Mcfaddon and Others*, (1812) 11 *US*. (7 cranch) 116, 137.

²⁵ *Democratic Republic of Congo v Belgium*. This paragraph maintained that after a person ceases to hold office, he or she will no longer enjoy the immunities accorded by international law in other states.

²⁶ Reuters, "Vladimir Putin - 20 Tumultuous Years as Russian President or PM," August 2, 2019, <https://www.reuters.com/article/us-russia-putin-timeline-idUSKCN1UZ185>.

the Russian Federation invaded Ukraine.²⁷ As the supreme military commander, he ordered the invasion of Ukraine. The crisis in Ukraine has been investigated by the Prosecutor of the ICC and Putin has been indicted for war crimes together with Ms, Maria Alekseyevna Lvova-Belova. Accordingly, Putin is allegedly responsible for war crimes of unlawful deportation of children population from occupied areas of Ukraine to the Russian Federation in accordance with Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute. These crimes were allegedly committed in Ukraine-occupied territory at least from 24 February 2022.²⁸ According to the ICC trial Chamber II, there are reasonable grounds to believe that Mr. Putin bears individual criminal responsibility for these crimes as follows: (a) for having committed the acts directly, jointly with others and/or through others under Article 25(3)(a) of the Rome Statute; and (b) through Putin failure to exercise control properly over civilians and military subordinate who committed the act, or allowed their commission and who were under his effective authority and control, pursuant to superior responsibility in accordance with Article 28(b) of the Rome Statute.²⁹ Conversely, Lvova-Belova has also been accused of committing war crimes of unlawful deportation of the population of children and the unlawful transfer of these children population from the occupied areas of Ukraine to the Russian Federation in accordance with Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.³⁰ Just like President Putin, the crimes were committed in the occupied territory of Ukraine by at least February 2022. Consequently, the ICC believes that there are reasonable grounds that Ms Lvova-Belova is criminally responsible for these crimes or jointly under Article 25(3)(a) of the Rome Statute.³¹

Omar Al Bashir is now the former head of state of Sudan. Al Bashir ruled Sudan for three decades.³² Bashir came to power in 1989 after overthrowing Sadiq al-Mahdi in a military coup.³³ He ruled Sudan as a whole until 2011 when North Sudan split from South Sudan officially and was able to stay in power for 30 years until the 11 April 2019 military ousting.³⁴ Al Bashir enjoyed immunity *ratione personae* as the President of Sudan, which is conferred by customary international law for both official and private acts.³⁵ Nonetheless, the ICC accused Al Bashir while a sitting President of Sudan of crimes against humanity and war crimes atrocities committed in Darfur, Sudan.³⁶

Accordingly, former President Al Bashir was accused by the ICC of five counts of crimes against humanity which include; murder, extermination, torture, forcible transfer and rape.³⁷ Al Bashir also faces three counts of genocide allegedly committed against civilians in the Darfur region from 2003 to 2008.³⁸ Consequently, the ICC issued two warrants of arrest against Al Bashir with the first issued on 24 March 2009 and the second on 12 July 2010.³⁹ Since the ICC could not try Al Bashir unless present at the ICC, the matter was referred to the UNSC by the ICC based on its relationship under Articles 2, 13(b) and 16 of the Rome Statute.⁴⁰ The Security Council, acting under Chapter VII of the Charter of the United Nations, referred the matter to the Prosecutor of the ICC.⁴¹ Consequently, both of these leaders were indicted as sitting presidents of

²⁷ International Criminal Court, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova," March 17, 2023, <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin#:~:text=On the basis of evidence,and transfer of Ukrainian children.>

²⁸ International Criminal Court, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova."

²⁹ International Criminal Court, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova."

³⁰ International Criminal Court, *Rome Statute of the International Criminal Court*.

³¹ International Criminal Court, "Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova."

³² BBC, "Omar Al-Bashir: Sudan Military Coup Topples Ruler after Protests," April 11, 2019, <https://www.bbc.com/news/world-africa-47891470>.

³³ BBC, "Omar Al-Bashir: Sudan Military Coup Topples Ruler after Protests."

³⁴ Nesrine Malik, "Omar Al-Bashir Is Gone. It Was Sudan's 30 Years of Anger That Ousted Him," *The Guardian*, April 11, 2019.

³⁵ Micaela Frulli, "The Draft Articles on Crimes against Humanity and Immunities of State Officials: Unfinished Business?," *Journal of International Criminal Justice* 16, no. 4 (2018): 775–93.

³⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*. <https://www.icc-cpi.int/darfur/albashir>

³⁷ Rebecca Schwartz, "South Africa Litigation Centre v. Minister of Justice & Constitutional Development: Balancing Conflicting Obligations-Prosecuting Al-Bashir in South Africa," *Tul. J. Int'l & Comp. L.* 24 (2015): 407.

³⁸ Lauren Kohn, "The Bashir Judgment Raises the Red Flag for the Rule of Law and the Judiciary," *South African Law Journal* 133, no. 2 (2016): 246–58.

³⁹ Alexander K A Greenawalt, "International Criminal Court: Decisions Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir & African Union Response," *International Legal Materials* 51, no. 2 (2012): 393–417.

⁴⁰ Cóman Kenny, "Prosecuting Crimes of International Concern: Islamic State at the ICC," *Utrecht J. Int'l & Eur. L.* 33 (2017): 120.

⁴¹ Article 13 (b) of the Rome Statute. See also Resolution 1593 (2005) adopted by the Security Council at its 5158th meeting on 31 March 2005, (S/RES/1593 (2005) [1], where the situation of Darfur was referred to the Prosecutor of the ICC.

their respective countries. While President Putin is still the incumbent President of Russia, Al Bashir is now the former president of Sudan.

The Immunity of Sitting Presidents under Rome Statute

Article 27 of the Rome Statute does not recognise the immunity of state officials, or any form of immunity attached to the official capacity of a person before the Court.⁴² In other words, if a person or state official is charged before the ICC, they cannot invoke any form of immunities granted under national or international law as a defence before the Court. However, immunities are recognised by foreign criminal jurisdiction as it safeguards the relationship between states if the accused is a current senior state official such as a head of state.⁴³ Consequently, the Rome Statute is a treaty, and immunities enjoyed by state agents of its founding members are waived. Therefore, all state parties after ratification of the Statute have consented to waive any form of immunities enjoyed by its officials before the ICC. With regard to non-state parties to the Rome Statute, the immunities of its officials could be waived by the home state if any of its officials is charged before the ICC for any of the crimes under its jurisdiction. In most cases, the personal immunity of the officials of non-state parties acts as a defence before the ICC while in office, while the functional immunities protect only the official acts of the same official. This defence is applicable only to officials of non-state parties because all the immunities enjoyed by the officials of contracting parties to the Rome Statute are waived upon ratification. Consequently, immunities granted by both national and international laws to the officials of state parties are not recognised before the ICC.⁴⁴ In other words, while state practice and *opinio juris* supported the existence of the immunity of senior state officials before foreign national criminal courts,⁴⁵ the ICC's Appeals Chamber in the *Jordan* case noted that there is neither state practice nor *opinio juris* that would support the existence of such immunities before an international criminal court.⁴⁶ Consequently, since the Rome Statute is a treaty, it is applicable to consented parties. Russia and Sudan are not state parties and therefore, the immunity of Putin is still applicable given the fact that he is the current president of the Russian Federation, and that of Al Bashir was also applicable when he was president of Sudan.

The Application of Articles 27(2) and 98 of the Rome Statute

While Article 27(2) of the Rome Statute is applicable only to state parties of the Statute and it does not recognise any form of immunities before the Court, Article 98 of the same Statute is applicable only to non-state officials. In other words, Article 27(2) of the Rome Statute prevents state parties from invoking any immunity under international law that its officials may enjoy before the ICC in their relationship with the Court on the one hand; it also prevents state parties from invoking immunity among themselves belonging to their officials in matters of arrest and surrender of any suspected officials before the Court on the other hand.⁴⁷ Therefore, while the vertical effect of Article 27(2) of the Rome Statute requires that all immunities; whether personal or functional enjoyed by state parties' officials be waived before the ICC, the horizontal effect of Article 27(2) of the same Statute requires the waiver of all the immunities enjoyed by their officials in matters before the Court in their relationship with one another.⁴⁸

According to Article 98 of the Rome Statute, immunities are only applicable to non-state parties before the ICC. This is so because all state parties have consented to waive all the immunities belonging to their officials before the Court.⁴⁹ Therefore, all state parties to the Rome Statute after ratification of the Statute cannot invoke any form of immunities before the Court. However, non-state parties may invoke the personal immunities of their officials before the Court while the officials are still in office.

DISCUSSION

The Obligation of Non-States Parties to Cooperate

Cooperation with the ICC in matters of arrest and surrender to the Court has been another nightmare. This has been difficult especially when the ICC is prosecuting a serving head of state. Since its creation, the ICC has

⁴² Article 27 of the Rome Statute.

⁴³ Aghem Hanson Ekor, "The ICC's Appeals Chamber Judgments in the Jordan Case Regarding Al Bashir and Ntaganda Case: Victories for the Fights against Impunity and Immunity for Serious Crimes," *Polit Journal* 1, no. 4 (2021): 150–56.

⁴⁴ Aghem Hanson Ekor, "Was the ICC Created for Africans? An Examination of Key Prosecutions before the Court Since Its Creation," *Global Journal of Human Social Science* XXII, no. II (2022): 73–80.

⁴⁵ Aghem Hanson Ekor and Paul S Masumbe, "Putin on Trial: The Reality of Heads of State Immunity before International Criminal Courts," *Polit Journal* 2, no. 1 (2022): 29–36.

⁴⁶ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019)113.

⁴⁷ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) 120.

⁴⁸ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) 132.

⁴⁹ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019) 130.

indicted three sitting heads of state namely, President Gaddafi of Libya, President Al Bashir of Sudan and currently, President Vladimir Putin of the Russian Federation. Unfortunately, in the case of the late President Gaddafi, he died before he was ever prosecuted. However, Al Bashir, now the former president of Sudan has not yet been prosecuted despite the arrest warrant. With regard to President Putin, it is very likely that he may never be prosecuted before the Court just like his counterparts. The main reasons for these challenges are (a) the Rome Statute creating the ICC is a treaty; (b) the obligations to cooperate with the Court are based on the status of the state; (c) only state parties are obligated to cooperate with the Court; and (d) non-state parties may only cooperate with the court by consent. Consequently, neither Russia nor Sudan are state parties to the Rome Statute. Accordingly, Article 98 of the Rome Statute provides as follows:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of the third State for a waiver of the immunity.
2. The Court may not proceed with a request for the surrender which would require the requested State to act inconsistently with its obligation under international agreement 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.⁵⁰

By virtue of Article 98(1) of the Rome Statute, any request which obliges a third state to act inconsistently with its responsibilities required by international law concerning the immunity of its state officials, will not be entertained by the Court unless the third state waives the immunity of the suspect and cooperate with the Court. Similarly, the Court may not also continue with any request of a sending state which requires such a state to act inconsistently regarding its commitments under international agreements unless permission is obtained from the sending state through consent to surrender.⁵¹ In other words, the immunity of the official will prevent the third state to arrest and surrender him or her to the Court despite the request made. This is one of the reasons why it has been difficult to arrest Al Bashir and of course Putin. Therefore, Article 98 of the Rome Statute requires non-state parties to either waive the immunity of the suspect and cooperate with the Court or consent to the jurisdiction of the Court before any arrest and surrender can be made. Consequently, the treaty principle of *pacta tertiis nec nocent nec prosunt* hinders non-state parties from cooperating with the Court. The simple meaning of this maxim *pacta tertiis nec nocent nec prosunt* is that a treaty is not binding on a third state deprived of its consent. It has also been established that the Rome

The statute is a treaty-based court. Consequently, Article 34 of the Vienna Convention on the Law of Treaties, states that, “A treaty does not create either obligations or rights for a third state without its consent”. Therefore, for Article 98(1) of the Statute to be applicable or create an obligation on a third state or non-state party, the state must have consented and waived the immunity of its official, and in this case, Vladimir Putin. Finally, the place of non-state parties regarding the arrest of serving heads of state was settled by Judge MJD Wallis of the SCA of SA as follows:

In those circumstances, I am unable to hold that at this stage of the development of customary international law, there is an international crime exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national courts.⁵²

Consequently, even though Article 27 of the Rome Statute does not recognise immunity before the ICC, the immunity enjoyed by the heads of state of non-state parties under customary international law is unaffected. For instance, the immunity enjoyed by President Vladimir Putin of the Russian Federation under customary international is not waived by Article 27 the of Rome Statute. On the contrary, Article 98 of the Statute recognised this immunity, thereby hindering his prosecution.

The Obligation of State Parties to Cooperate with the ICC

As indicated earlier, Russia is not a state party to the Rome Statute. All state parties are obligated to cooperate with the Court in matters of arrest and surrender of indicted officials.⁵³ State parties are further obligated to cooperate with the Court during investigations and prosecution of crimes within its jurisdiction. One such obligation is to cooperate with the Court fully regarding any investigation and prosecution of crimes within the

⁵⁰ Article 98 of the Rome Statute.

⁵¹ Article 98(2) of the Rome Statute.

⁵² *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (2016) (867/15) ZASCA 17 (15 March 2016) 103.

⁵³ Article 86 of the Rome Statute.

jurisdiction of the ICC.⁵⁴ Full cooperation with the Court is safeguarded in two ways: (a) states parties' waiver by virtue of Article 27 of the Rome Statute, the immunities of their respective state officials at the vertical level in their relationship with the Court; and (b) the immunities of other states officials at the horizontal level in their relationship within states parties to the Rome Statute.⁵⁵ Accordingly, all the immunities of state officials who are members or state parties to the Rome Statute are indeed waived at the vertical level in relationship with the Court,⁵⁶ and at the horizontal level in relationship with other state parties in respect of crimes within the jurisdiction of the Court.⁵⁷ Consequently, the state officials of any state party to the Rome Statute can be arrested and surrendered to the ICC by another state party without consent should there be any request by the Court to investigate and prosecute crimes within its jurisdiction.⁵⁸

Furthermore, the decision of the Supreme Court of Appeal of South Africa regarding South Africa's failure to arrest former President Al Bashir is instructive. The domestic court decided South Africa was obligated to arrest and surrender former President Al Bashir to the ICC under the Implementation Act of the Rome Statute.⁵⁹

The obligation of state parties to cooperate with the ICC is administered by Article 86 of the Rome Statute that authorizes state parties to cooperate fully with the Court regarding investigations and prosecutions of crimes within its jurisdiction.⁶⁰ The ICC also has the authority to request the cooperation of state parties and such requests could be made through diplomatic channels or other means designated by the state party upon ratification of the Rome Statute.⁶¹ Article 87(7) of the Rome Statute also proclaims that a state party that fails to comply with any requests to cooperate and thereby prevent the Court from executing its functions and powers can be referred to the Assembly of States Parties or the UNSC if the matter was referred to the Court by the Security Council.⁶² Moreover, the Court could also apply Article 89 of the Rome Statute to communicate a request for the arrest and surrender of an accused person or state officials,⁶³ to any state or territory where such a person is found as per Article 91 of the Rome Statute.⁶⁴ State parties are also compelled to obey a request to arrest and surrender any suspect to the ICC.⁶⁵ Arrest warrants are usually issued by the Pre-Trial Chamber after application by the Prosecutor in accordance with Article 58 of the Rome Statute and after finding reasonable ground to believe that such a person or state officials have committed crimes within the jurisdiction of the Court.⁶⁶ The warrant of arrest will contain among others the name of the person and the specific crime committed within the jurisdiction of the Court. Once again, neither the Russian Federation nor Sudan is a state party to the Rome Statute. Consequently, arresting Putin will mean that the state of Russia will have to cooperate with the Court and also comply with the obligations under Article 98 of the Rome Statute. In other words, the state of Russia will waive the personal immunity of President Vladimir Putin before he may be arrested by a state party. This is because Article 98 is applicable only to non-state parties and the immunity under customary international law must be waived before any arrest and surrender be executed. Similarly, should President Putin visit South Africa in the future then South Africa stands a better chance to arrest and surrender him to the ICC since South Africa is a state party to the Rome Statute. The fact that the Rome Statute is a treaty is another concern regarding the arrest and surrender of officials whose states are not parties to the ICC. The position of state cooperation was well stated by Judge MDJ Wallis of the SCA in South Africa regarding the Al Bashir visit as follows:

I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head-of-state immunity would not constitute a bar to the prosecution of international crimes in this country or

⁵⁴ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-302-06-07-2017 (2017) 47.

⁵⁵ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-302-06-07-2017 (2017) 76.

⁵⁶ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-302-06-07-2017 (2017) 77.

⁵⁷ *The Prosecutor v Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-302-06-07-2017(2017) 79.

⁵⁸ *The Prosecutor v Omar Hassan Ahmad Al Bashir* (2017) No. ICC-02/05-01/09-302-06-07-2017 (2017) 80.

⁵⁹ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) ZASCA 17 (15 March 2016) 103.

⁶⁰ Article 86 of the Rome Statute.

⁶¹ Article 87(1)(a) of the Rome Statute.

⁶² Article 87 and in particular Article 87(7) of the Rome Statute.

⁶³ As the case with President Al Bashir to various states as indicated above.

⁶⁴ Article 91 of the Rome Statute describing the content of the request to arrest and surrender the name of the person, convicted judgment and a copy of the arrest warrant.

⁶⁵ Article 89(1) of the Rome Statute.

⁶⁶ Article 58(1)(a) of the Rome Statute.

South Africa cooperating with the ICC by way of arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.⁶⁷

In other words, all state parties to the Rome Statute are compelled and obligated to cooperate with the Court whenever a request to arrest and surrender is made.

The Nightmare of Prosecuting Putin and Al Bashir before the ICC

Al Bashir was indicted by the ICC when he was the head of state of Sudan. Just like Russia, Sudan is not a state party to the Rome Statute which does not recognise head-of-state immunity before its jurisdiction.⁶⁸ Currently, Al Bashir is no longer the president of Sudan, and he has never been tried before the ICC despite the charges against him. Accordingly, the ICC has been unable to apprehend him. Consequently, even though the Rome Statute does not recognise immunity, Al Bashir's personal immunity as the head of state of Sudan hindered his arrest and surrender to the Court. In other words, the fact that head-of-state immunity is not recognised before the Court is not enough to prosecute a serving head of state. Cooperation by the home state and other state parties with the Court is necessary to successfully prosecute a serving head of state. In the case of *Al Bashir*,⁶⁹ neither Sudan nor African states that are parties to the Rome Statute were willing to cooperate with the ICC. Due to the situation in Darfur, Sudan was referred to the ICC Prosecutor by UN Security Council Resolution 1593 of 2005 in accordance with Article 13(b) of the Rome Statute.⁷⁰ Nevertheless, the situation in Ukraine was referred to the ICC Prosecutor by 43 states parties in accordance with Article 14(1) of the Rome Statute.⁷¹ The position of Russia and Vladimir Putin will be like that of Sudan and Al Bashir. Since the ICC indicted Putin for war crimes and crimes against humanity,⁷² President Putin might escape the ICC trial just like Al Bashir unless Russia cooperates with the Court. In other words, even though immunity is not recognised before international courts, the prosecution of serving heads of state, without corresponding cooperation in matters of arrest and surrender to Court, will almost be mission impossible. Consequently, some of the reasons for this are: (a) head-of-state immunity is still recognised by domestic jurisdictions; (b) heads of state immunity is recognised by foreign national criminal courts and customary international law; (c) heads of state immunity before an international criminal court is determined by the statute creating the court and not customary international law.⁷³ These are some of the travails of prosecuting serving heads of state before the ICC. Therefore, cooperation with the Courts is a non-negotiable condition for the prosecution of senior state officials such as heads of state before the Court.

CONCLUSION

The ICC has issued an arrest warrant for President Vladimir Putin for war crimes committed in Ukraine under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute. Just like Al Bashir, President Putin will have to limit his travel plans especially across Europe and the United States. Putin will be arrested should he visit a state that has ratified the Rome Statute. Accordingly, the Court expects all state parties to the Rome Statute to comply and cooperate in the arrest and surrender of President Putin to the Court for charges against him. Consequently, the arrest and surrender of Putin will encounter similar challenges to that of Al Bashir because: (a) just like Sudan, Russia is not a state party to the Rome Statute and has not ratified the treaty; (b) the personal immunity of President Putin as serving president of Russia will hinder his arrest and surrender to the Court; and, (c) the state of Russia, just like Sudan will not cooperate with the Court regarding the arrest and surrender of Putin. President Vladimir Putin will now be compelled to travel only to friendly countries that will not honour the arrest warrant issued by the ICC. South Africa was again in the spotlight since it hosted the leaders of Brazil, Russia, India, and China (BRICS) in a summit from 22 to 24 August 2023. However, President Putin did not attend the summit. South Africa as a state party to the Rome Statute was expected to arrest President Putin had he attended the summit. Just like when Al Bashir attended the African Union (AU) summit held in South in

⁶⁷ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) ZASCA 17 (15 March 2016) 103.

⁶⁸ Article 27 of the Rome Statute.

⁶⁹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*.

⁷⁰ UN Security Council, "Resolution 1593 (2005) / Adopted by the Security Council at Its 5158th Meeting, on 31 March 2005," UN Nations Digital Library, 2005, <https://digitallibrary.un.org/record/544817>.

⁷¹ International Criminal Court, "Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova," March 17, 2023.

⁷² International Criminal Court, "Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova."

⁷³ Aghem Hanson Ekori, "The ICC or the ACC: Defining the Future of the Immunities of African State Officials," *African Journal of International Criminal Justice (AJICJ)*, 6 no. 1, 2020, 50-72.

2015, where South Africa refused to cooperate with the Court in the arrest of Al Bashir despite a clear request from the Court and the decision of the local court to arrest him. Accordingly, by virtue of Article 127(2) of the Rome Statute, a state withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing state had the duty to cooperate. In other words, state parties are still obligated to arrest and surrender President Putin to the ICC even after withdrawal because withdrawal from the Court does not mean absence of obligation to cooperate for at least one year upon granting of the notice. Consequently, state parties are obligated to cooperate with the Court regarding any investigations and proceedings under Article 86 of the Rome Statute.⁷⁴ However, the reality is that South Africa is still a state party to the Rome Statute despite an attempt to withdraw from the Rome Statute and will be obligated to arrest President Putin should he visit or attend future BRICS summit in South Africa.⁷⁵ Similarly, Al Bashir is now the former President of Sudan, and his arrest is still pending more than a decade since it was issued. It is therefore certain that President Vladimir Putin may never be arrested even when he will no longer be the President of the Russian Federation. State cooperation with the ICC is one of the greatest obstacles that the Court will have to overcome in order to successfully prosecute serving heads-of-state as seen in the Al Bashir and Putin cases. Unfortunately, not every state is a party to the Rome Statute, and so, one of the solutions to cooperation with that Court is that every state becomes a party to the Rome Statute and since this is not likely, enforcement of arrest warrants against powerful leaders will remain elusive, so are circumstances where cooperation can be compelled.

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⁷⁴ By virtue of Article 127 (1) of the Rome Statute, state party's withdrawal take effect one year after the date of receipt of the notification. This means that even if SA is granted notice to withdraw, its obligation to cooperate with the Court will only expire after one year.

⁷⁵ BusinessTech, "ANC Walks Back Announcement That South Africa Is Exiting the International Criminal Court," April 26, 2023, <https://businesstech.co.za/news/government/683119/anc-walks-back-announcement-that-south-africa-is-exiting-the-international-criminal-court/>.

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