



States Cooperation in Arresting Senior State Officials and Sitting Heads of State under International Criminal Law: *Quo Vadis* ICC

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ABSTRACT

Albeit the Rome Statute does not recognise the immunity of incumbent presidents before the International Criminal Court (ICC), prosecuting sitting presidents of non-parties states has become a debacle. Accordingly, despite the decisions of the Supreme Court of Appeal of South Africa and the Pre-Trial Chamber II of the ICC against non-compliance of South Africa and Jordan respectively in the arrest of Al Bashir as the serving President of Sudan, Al Bashir has never been tried even now as a former president because no state is willing to arrest and surrender him. The main defence for not cooperating with the Court is that the serving president, especially of non-states parties still enjoys immunity recognised by customary international law. Accordingly, while Article 27 of the Rome Statute is not applicable to non-state parties as argued by these states, Article 98 is applicable even though these arguments have been categorically rebutted by the Court. Consequently, since the Al Bashir case remains a prototype for state cooperation and the prosecution of serving heads of state before the ICC, this might become the fate of Vladimir Putin as serving head of state of the Russian Federation. This article used qualitative research methods and argues that without state cooperation in matters of arrest and surrender of sitting heads of state and other senior state officials to the ICC, the court's effort to realise justice for crimes against humanity will remain largely unsuccessful under international criminal law.

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INTRODUCTION

State cooperation with the International Criminal Court (ICC) in matters of arrest and surrender to the Court has been one of the greatest struggles ever since the Court came into force more than two decades ago.¹ The main issue has been arresting serving heads of state, especially in cases where the state whose officials have been indicted is not a state party to the Rome Statute.² As such Al Bashir and currently Vladimir Putin stand out as example par excellence since they were indicted as serving Presidents and their respective states are not party to the Rome Statute. While Al Bashir is now the former President of Sudan, Vladimir Vladimirovich Putin is currently the serving President of the Russian Federation since 2012.³ He was born on 07 October 1952. On 24

¹ Dimitris Liakopoulos, "International Cooperation, Legal Assistance and the Case of Lacking States Collaboration within the International Criminal Court," *Revista CES Derecho* 10, no. 1 (2019): 374–417.

² Brenda Nanyunja and Windell Nortje, "Justice Delayed but Not Denied: The Prosecution of Thomas Kwoyelo for International Crimes in Uganda," *Potchefstroom Electronic Law Journal* 26 (2023): Published-on.

³ Paola Gaeta, "Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissène Habré Case," *J. Int'l Crim. Just.* 1 (2003): 186.

February 2022, he invaded Ukraine.⁴ As the supreme military commander, he ordered the Russian forces to attack 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 2022.⁵

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 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.⁶ Conversely, Omar Al Bashir has ruled Sudan for three decades.⁷ Al Bashir came to power in 1989 after overthrowing Sadiq al-Mahdi in a military coup.⁸ 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.⁹ Al Bashir enjoyed immunity *ratione personae* as the President of Sudan, which is conferred by customary international law for both official and private acts.¹⁰

Nevertheless, the ICC accused Al Bashir while a sitting President of Sudan of crimes against humanity and war crimes atrocities committed in Darfur, Sudan.¹¹ 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.¹² Al Bashir also faces three counts of genocide allegedly committed against civilians in the Darfur region from 2003 to 2008.¹³ 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 2010.¹⁴ 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.¹⁵ The Security Council, acting under Chapter VII of the Charter of the United Nations, referred the matter to the Prosecutor of the ICC.¹⁶ The Security Council's referring of the situation of Darfur, Sudan to the Prosecutor of the ICC seems to have waived the immunity *ratione personae* of former President Al Bashir given the fact that Sudan is not a state party to the Rome Statute. Al Bashir has travelled to many countries after the issue of his arrest warrant without being apprehended. Some of these countries are state parties to the Rome Statute while others are non-state parties. Particularly, two of these countries are South Africa and the Arab Republic of Jordan, both of which are states parties to the Rome Statute and the ICC judgment of their non-compliance will be examined in this article and their effects on Putin's arrest warrant and state cooperation. In other words, the main argument of this article is that the trait and precedent of

⁴ ICC, "Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova," <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-..>, n.d.

⁵ "ICC Issue Arrest Warrant for Putin," <https://www.aljazeera.com/news/2023/3/17/icc-issue-arrest-warrant-for-russias-putin-over-ukraine-crimes-..>, 2023.

⁶ 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.>

⁷ See Omar al-Bashir: Sudan military coup topples ruler after protests, available at: <https://www-bbc-com.cdn.ampproject.org>. Accessed July 12, 2023.

⁸ BBC, "Omar Al-Bashir: Sudan Military Coup Topples Ruler after Protests," April 11, 2019, <https://www.bbc.com/news/world-africa-47891470>.

⁹ Nesrine Malik, "Omar Al-Bashir Is Gone. It Was Sudan's 30 Years of Anger That Ousted Him," *The Guardian*, April 11, 2019.

¹⁰ 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.

¹¹ The Rome Statute of the International Criminal Court circulated as document A/CONF.183/9 of 17 July 1998 and came into force on 1 July 2002 (Rome Statute), available at: <https://www.icc-int/resource-library>. Accessed July 12, 2023.

¹² 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.

¹³ 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.

¹⁴ 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.

¹⁵ Cómán Kenny, "Prosecuting Crimes of International Concern: Islamic State at the ICC," *Utrecht J. Int'l & Eur. L.* 33 (2017): 120.

¹⁶ 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, available at: <https://digitallibrary.un.org/record/5448117>. Accessed July 12, 2023.

state cooperation in the Al Bashir case with ICC will be more beneficial to the Russian Federation and work to the disadvantage of the Court given that state cooperation and consent to jurisdiction for international crimes is a fundamental principle of a sovereign state.

In this regard, after indicating the research method immediately below this part, Part III of this article will examine state cooperation with the ICC in matters of arrest and surrender to the Court. Part IV will examine Al Bashir's decision and state cooperation. Finally, Part V will look at the lessons from the Al Bashir case as far as state cooperation is concerned and the likelihood of a replay of the Putin situation and the article will be concluded.

METHODOLOGY

This study used qualitative research methods. A qualitative research method is a research method that aims to gather or collect and analyse non-numerical data 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. The study examined the Al Bashir decisions handed 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 also analysed before the conclusion.

DISCUSSION

State Cooperation in Matters of Arrest and Surrender under the Rome Statute

The Rome Statute was created by a treaty.¹⁷ As a treaty, only state parties are directly responsible for any request made by the Court regarding any matter of arrest and surrender of indicted officials to the Court.¹⁸ According to Article 86 of the Rome Statute, state parties are expected to cooperate fully with the Court in its investigations and prosecution of crimes within the jurisdiction of the Court.¹⁹ Consequently, by virtue of Article 87 of the Statute, the Court shall make requests to state parties for cooperation and transmit the request through diplomatic channels or any other channel as designated by the state party.²⁰ Where a state party fails to comply with a request to cooperate with the Court, thereby preventing the Court from executing its mandate, the Court may refer the matter to either the Assembly of State Party (ASP) or the Security Council (SC) where the matter was referred to the Court by the SC as was in the Al Bashir case.²¹ An example where a state party to the Rome Statute failed to cooperate with the Court could be seen in South Africa's decision.²²

In addition, the Court may also invite non-state parties of the Rome Statute to cooperate on the basis of an ad hoc agreement or an agreement.²³ Finally, intergovernmental organisations may also cooperate with the Court in this regard. Russia is not a state party to the Rome Statute and no ad hoc agreement has been made between the Court and Russia regarding the arrest and surrender of President Putin to the Court. Consequently, the Russian Federation will not cooperate with the Court for the arrest of President Putin. According to the Russian Federation, the Rome Statute and the ICC are only applicable to state parties and serving presidents are protected by customary international law immunity. Most importantly, Russia is one of the five permanent members of the United Nations Security Council (UNSC) and any moves or attempts by the UNSC to adopt a resolution in support of Putin's arrest warrant by the ICC will be vetoed by Russia and China, another permanent member of the UNSC.

¹⁷ Rome Statute creating the International Criminal Court (the ICC), Rome Statute of the International Criminal Court circulated as document A/CONF.183/9 of 17 July 1998 and came into force on 1 July 2002 (Rome Statute), available at: <https://www.icc-int/resource-library>. Accessed June 29, 2023.

¹⁸ Roger O'Keefe, "Quid Not Quantum: A Comment on How the International Criminal Court Threatens Treaty Norms," *Vand. J. Transnat'l L.* 49 (2016): 433.

¹⁹ Beth Van Schaack, "State Cooperation & the International Criminal Court: A Role for the United States?," *Santa Clara University Legal Studies Research Paper*, no. 5-11 (2011).

²⁰ Article 87(1)(a) of the Rome Statute.

²¹ Article 87(7) of the Rome Statute.

²² *The Prosecutor v. Omar Hassan Ahmad Al Bashir No. ICC-02/05-01/09-302- 06-07-2017(2017)* [139], where the Court held that South Africa domestic courts have already found South Africa to be in breach of its obligations under its domestic legal framework and in the subsequent paragraphs finds that South Africa failed to comply with its obligation to arrest and surrender former President Omar Al Bashir, while he was in South Africa for the AU summit, as requested by the Court in line with Article 87(7) of the Rome Statute and referral to the Assembly of State parties or the Security Council.

²³ Article 87(6) of the Rome Statute.

Consequently, the Russian Federation considered the 1496 rest warrant of President Putin null and void.²⁴ Just as in the Al Bashir case, majority of the supporters of Putin's arrest warrant are the Western states and states aligned with Western interests. The global South is implicitly against the arrest warrant of President Putin. For example, Africa and the African Union (AU) may not like the war in Ukraine but the arrest warrant against a serving president is very unpopular and against the views adopted by the AU. This was seen in the AU's support for Al Bashir when he was served with an arrest warrant as the serving President of Sudan. Similarly, South Africa and the BRICS nations (Brazil, Russia, India, China and South Africa) may not cooperate with the Court in the arrest of Putin despite the fact that some of the BRICS states are parties to the Rome Statute.²⁵ The one argument maintained by states in support of the Russian Federation is that President Putin is a serving head of state and therefore benefits from immunity recognised by customary international law. This view is stated in line with the fact that the Russian Federation has not ratified the Rome Statute and is unaffected by its jurisdiction.²⁶

The Impact of the Al Bashir Case and State Cooperation on Putin's Trial

Al Bashir's case and state cooperation in his arrest warrant is a prototype for state cooperation that President Putin may likely benefit from and a quagmire that the ICC may encounter in arresting Putin. In this regard, the decision of the Supreme Court of Appeal (SCA) of South Africa and the Jordan decision all relating to Al Bashir will be examined.

The SCA Decision in the Al Bashir Case and Its Impact on Putin's Arrest Warrant

The decision of the North Gauteng High Court of South Africa was against the state for failure to arrest,²⁷ detain, and surrender Al Bashir when he attended the AU summit held in June 2015.²⁸ The High Court order, which was varied on appeal was that the conduct of the state in failing to take the necessary steps to arrest and detain Al Bashir after his arrival in South Africa on 13 June 2015 to attend the AU summit was inconsistent with its obligation under the Rome Statute.²⁹ South Africa has domesticated the Rome Statute under its national laws. As usual, the main submission of the state of South Africa was that the head of state enjoys personal immunity under customary international law by virtue of their office and is therefore not subject to criminal or civil jurisdiction in any other country.³⁰

According to the ICC, South Africa was aware of its obligations under the Rome Statute, which was to arrest and detain President Al Bashir of Sudan for his surrender to the Court. Consequently, based on the submissions, the SCA concluded that there is no longer any sovereign immunity for *ius cogens* violations. However, the SCA further reiterated that at this stage in the development of customary international law, there is no international crime exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before national courts.³¹ In other words, heads of state still enjoy immunity from prosecution under customary international law before the jurisdiction of a foreign national court. However, the implementation of the Rome Statute by South Africa in its domestic law has changed the decision. The judge of the SCA held that South Africa was under obligation to cooperate with the Court in the arrest and surrender of Al Bashir when he was in the country for the AU summit in 2015.³²

According to the decision of the SCA, based on the fact that South Africa has domesticated the Rome Statute, all forms of immunity including heads of state immunity no longer constitute a bar to the prosecution of international crimes or cooperating with the ICC, through arrest and surrender of a person charged with such

²⁴ "After Arrest Warrant for Putin, Russia Opens Case against ICC," https://www.aljazeera.com/news/2023/20/arrest-warrant-for-putin-russia-opens-own-case-against-icc?traffic_source=keepReading, 2023.

²⁵ Daily Maverik, "Vladimir Putin in SA: A Diplomatic and Legal Dilemma," <https://www.dailymaverick.co.za/article/2023-04-03-vladimir-putin-in-south-africa-a-diplomatic-and-legal-dilemma-for-the-government/>, 2023.

²⁶ ICC, "States Parties to the Rome Statute," https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, n.d.

²⁷ Dire Tladi, "Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga," *African Human Rights Law Journal* 16, no. 2 (2016): 310–38, <https://doi.org/10.17159/1996-2096/2016/v16n2a1>.

²⁸ See Southern Africa Litigation Centre V Minister of Justice and Constitutional Development & Others 2015(5) SA (GP).

²⁹ Rebecca A Shoot, "Navigating between Scylla and Charybdis: How the International Criminal Court Turned Restraint into Power Play," *Emory Int'l L. Rev.* 33 (2018): 133.

³⁰ Lilian Chenwi and Franziska Sucker, "South Africa's Competing Obligations in Relation to International Crimes," *Constitutional Court Review* 7, no. 1 (2015): 199–245.

³¹ G N Barrie, "AL-Bashir and the Tale of Two Cities: The Law of Rome and the Law of Pretoria," *Journal of South African Law/Tydskrif Vir Die Suid-Afrikaanse Reg* 2017, no. 1 (2017): 149–66.

³² Johan D van der Vyver, "The Al Bashir Debacle," *African Human Rights Law Journal* 15, no. 2 (2015): 559–79, <https://doi.org/10.17159/1996-2096/2015/v15n2a16>.

crimes, especially when request for arrest and cooperation has been made by the Court.³³ The lesson learned from this decision is that President Putin may only visit a state that is not a party to the Rome Statute. Even though President Putin did not attend the last BRICS summit in South Africa, the mood seems to suggest that the state of South Africa appears to be indifferent to the issue of cooperating with the Court.³⁴ In all, despite the decision from the SCA, the government of South Africa is not willing to cooperate with the Court in future arrest warrants. By implication, states are not willing to cooperate with the Courts in matters where a serving head of state is involved especially the AU Member states and the League of Arab states as indicated in the Jordan decision by the Appeals Chamber of the ICC.³⁵

ICC Appeals Chamber Decision in Jordan Case and Its Impact on Putin's Arrest Warrant

As indicated earlier, the Hashemite Kingdom of Jordan is a state party to the Rome Statute. On 29 March 2017, Al Bashir attended a summit hosted by Jordan yet, Jordan did not arrest and surrender him despite his indictment by the ICC. In other words, the Kingdom of Jordan as a member state to the Rome Statute did not cooperate with the Court in accordance with Article 87(7) of the Statute. This matter was brought before the Pre-Trial Chamber II and the judgment was that Jordan had failed to cooperate with the Court in arresting President Al Bashir of Sudan despite the fact that the Court requested his arrest.³⁶ The grounds for Jordan's appeal were as follows: (i) that the Chamber has made a mistake with respect to matters of law in its conclusion with the immunity of Al Bashir in that Article 27(2) of the Rome Statute excludes the application of Article 98, and that Article 98 of the Rome Statute establishes no rights to states parties; (ii) that the Chamber has blundered with respect to matters of law in concluding that the UNSC resolution 1593 of 2005 affected Jordan's obligations under customary international law to accord immunity to President Omar Hassan Ahmad Al Bashir.³⁷ After a thorough and careful examination of the matter, the Appeals Chamber decided that Jordan failed to comply with its obligation under the Rome Statute.³⁸

Despite the decision against the non-compliance by Jordan and cooperation with the Court in the arrest of Al Bashir, the fact that Sudan did not waive the immunity of Al Bashir and further refused to cooperate with the Court is of paramount importance. Accordingly, the AU Member states are equally against the decision of the Appeals Chamber and support the view and stance taken by Jordan in not arresting Al Bashir.³⁹ Moreover, the League of Arab States also supported Jordan for not arresting Al Bashir and cooperating with the Court despite being a state party to the Rome Statute. Consequently, both the AU Member States, and the Arab League States are not prepared to cooperate with the Court in cases that involve the arrest and surrender of any serving president. By inference, these states may not cooperate with the Court in the arrest and surrender of President Putin. In other words, the African continent and the Arab League are not ready to cooperate with the Court in Putin's matter given the fact that they recognised the customary rule of heads of state immunity accorded by international law to all serving heads of state. More importantly, the fact that the Russian Federation is a non-state party to the Rome Statute further complicates and hinders the cooperation issues.

The views submitted by the AU, the League of Arab States, and some scholars all in defence of non-cooperation and in support of Jordan seemed to have gained more grounds than the decision of the Appeals Chamber given the fact that Al Bashir has still to appear before the Court even now as a former president. The AU maintained that there is a general rule in international law that heads of state enjoy immunity and that Al Bashir as head of state of Sudan enjoys full immunity because Sudan is not a state party to the Rome Statute.⁴⁰ On their submission, the League of Arab States avers that Article 27(2) of the Rome Statute is not applicable to Sudan at the horizontal level with other states and that Article 98(2) is applicable to Sudan given the fact that Sudan is a non-state party to the Statute.⁴¹

³³ Dire Tladi, "Complementarity and Cooperation in International Criminal Justice," n.d.

³⁴ Business Live, "State May Find a Way out of the International Criminal Court," <https://www.businesslive.co.za/bd/national/2023-05-02-sa-considers-extending-diplomatic-immunity-for-visiting-heads-of-state/>, n.d.

³⁵ Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?," *Journal of International Criminal Justice* 7, no. 2 (2009): 315–32.

³⁶ C F Swanepoel, "The Prosecutor v Omar Hassan Ahmad Al-Bashir, International Criminal Court, July 2017," *De Jure* 51, no. 1 (2018): 173–84.

³⁷ Jean-Marc Thouvenin, "Heads of State and Other Officials and the International Criminal Court: A Commentary on Article 27 of the Rome Statute of the International Criminal Court," *Kazan UL Rev.* 1 (2016): 58.

³⁸ The Appeals Chamber Judgment in The Prosecutor v. Omar Hassan Ahmad Al Bashir No. ICC-02/05-01/09 OA2 06-05-2019 [162].

³⁹ Ndubisi Christian Ani, "Implications of the African Union's Stance on Immunity for Leaders on Conflict Resolution in Africa: The Case of South Sudan and Lessons from the Habré Case," *African Human Rights Law Journal* 18, no. 2 (2018): 438–62.

⁴⁰ Se Eun Lee, "Head of State Immunity: The Ongoing Debate and Implications for the Future Development of International Criminal Law," *Austl. Int'l LJ* 24 (2018): 119.

⁴¹ Alexis Ian P Dela Cruz, "Not All Roads Lead to Rome: Philippine Official Immunities and the Rome Statute," *Phil. LJ* 88(2014):267.

Moreover, scholars and commentators such as Gaeta, Newton and O’Keefe were all against the decision of the Appeals Chamber and therefore in support of Jordan in their respective submissions. O’Keefe contends that the Court had not obtained Sudan’s waiver of the inviolability and immunity entitled to Al Bashir, the Court has acted contrary to Article 98(1) of the Rome Statute.⁴² Newton argues that there is no consistent state practice and *opinio juris* regarding the arrest of Al Bashir by states under international law. Gaeta asserts that the rule removing immunity under Article 27(1) of the Rome Statute does not extend to judicial cooperation and therefore Article 98(1) is applicable to Sudan.⁴³ She further maintained that Sudan and Jordan are not obliged to cooperate with the Court in the arrest and surrender of Al Bashir. Finally, Gaeta emphasised that UNSC Resolution 1593 did not place Sudan in a position to act as a state party to the treaty with regard to the jurisdiction of the Court. In all, since Russia is in an analogous position as Sudan with no membership to the Rome Statute, the decision of the Court applies to Putin as well. However, the AU Member states, and the League of Arab States may not cooperate with the Court just like in the Al Bashir matter, should there be any request from the Court to cooperate in the arrest of President Putin. In other words, if the Court relies on states to cooperate in the arrest and surrender of Putin, then the proceeding for his prosecution is in a long queue as seen in the Al Bashir case.⁴⁴ The fact that Russia is not a party to the Rome Statute will influence Putin’s prosecution negatively.

CONCLUSION

Al Bashir is no longer the serving president of Sudan. However, he was indicted by the ICC as a serving or sitting president. Since the Al Bashir case remains a prototype for state cooperation under the Rome Statute in general and as an example for non-state parties to cooperate with the ICC in matters of arrest and surrender, many lessons would be learned by the Russian Federation since both states are not parties to the Rome Statute. Accordingly, despite the fact that Resolution 1593 of 2005 referred the situation of Darfur to the Prosecutor of the ICC, and this resolution urged Sudan to fully cooperate with the Court, Sudan did not cooperate.⁴⁵ Similarly, in 2015, the Court also encouraged South Africa as a state party of the Rome Statute to cooperate in arresting Al Bashir yet South Africa did not cooperate despite being obligated to do so.⁴⁶ Consequently, the Russian Federation is even in a better position not to cooperate because Russia is one of the five permanent members of the UNSC,⁴⁷ with a military might superior to Sudan. In addition, in the South African decision, the ICC’s Pre-Trial Chamber II held that the Security Council imposed an obligation on Sudan to cooperate with the Court in arresting Al Bashir because the jurisdiction of the Court was triggered and that Sudan’s rights to cooperate are analogous to those of a state party to the Rome Statute, Sudan did not cooperate with the Court and there were no consequences.

This equally meant that the Russian Federation would not cooperate with the Court even if a similar attempt could be made through a resolution, it would be vetoed by Russia and China leaving the resolution with no effect and force. In other words, state cooperation with the Court has a higher impact than a Security Council resolution. The fact that the Court does not recognise immunities is immaterial, and if a state refuses to cooperate, any indictment may never materialise. According to the Pre-Trial Chamber II decision against Sudan that the immunity of Al Bashir is irrelevant, and that Article 98 of the Rome Statute is not applicable to Sudan because there is no immunity to be waived, Sudan did not still cooperate and maintained that Al Bashir’s immunity under customary international law is applicable. This view is supported by both the AU in their argument against Al Bashir’s indictment and the Russian Federation. In fact, the Russian government was against the indictment of Al Bashir because of his immunity recognised by customary international law. Indeed, the sovereignty of states and their consent remain a fortress against the prosecution of international crimes before the ICC. Consequently, without state cooperation in matters of arrest and surrender to the Court, it would be practically impossible to prosecute senior indicted officials like serving presidents.⁴⁸ State cooperation with the ICC is

⁴² Michael Ramsden and Isaac Yeung, “Head of State Immunity and the Rome Statute: A Critique of the Ptc’s Malawi and Drc Decisions,” *International Criminal Law Review* 16, no. 4 (2016): 703–29.

⁴³ The Prosecutor v. Omar Hassan Ahmad Al Bashir No. ICC-02/05-01/09 OA2 06-05-2019 [90].

⁴⁴ Dapo Akande, “The Immunity of Heads of States of Nonparties in the Early Years of the ICC,” *American Journal of International Law* 112 (2018): 172–76.

⁴⁵ See generally Security Council Resolution 1593 of 2005, accessed 05 July 2023 available at: <https://www.icc-cpi.int/sites/default/files/N0529273.pdf>. Accessed July 05, 2023.

⁴⁶ See generally Article 86 of the Rome Statute obligating all states parties to cooperate in matters of arrest and surrender to the Court.

⁴⁷ Eki Omorogbe, “The African Union and the International Criminal Court: What to Do with Non-Party Heads of State?,” *University of Leicester School of Law Research Paper*, no. 17–09 (2017).

⁴⁸ Mathias Forteau, “Immunities and International Crimes before the ILC: Looking for Innovative Solutions,” *American Journal of International Law* 112 (2018): 22–26.

encouraged for the proper functioning of the ICC. This is so because lack of cooperation in matters of arrest and surrender of indicted senior state officials especially sitting heads of state sustains this uncertainty on the Court's quest for justice under international criminal law and further beg answers to the question of *Quo Vadis* ICC?

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