

STATE COOPERATION AND JURISDICTIONAL IMMUNITIES: THE EVERLASTING CHALLENGES TO THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL JUSTICE

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Abstract: *Starting from the analysis of “Situation in Ukraine” before the International Criminal Court (ICC) and the arrest warrant regarding Vladimir Putin this article focuses on the main challenges to the Court effectiveness, such as the State cooperation in its investigations and proceedings, in order to suggest some critical solutions, including the limited in absentia proceedings which could also be applied in the future to enhance the role of the ICC and the international criminal justice more in general.*

Key words: *International Criminal Court, Jurisdictional Immunity, Proceedings in Absentia, State Cooperation, War Crimes*

1. Introduction

The recent arrest and subsequent repatriation of Libyan General Osama Elmasry/Almasri Njeem by the Italian authorities despite the existence of an Arrest warrant issued by the International Criminal Court (ICC)’s Prosecutor (ICC Pre-Trial Chamber I, 2025) has renewed the political and academic debate on the effectiveness of international criminal justice in the absence of States cooperation in the investigation and prosecution of crimes, within the jurisdiction of the Court, allegedly committed by individuals acting as heads of State or Government.

This debate, started with the 2009 ICC Arrest warrant against Sudanese President Omar Al-Bashir’s, was resumed in the case involving the criminal responsibility of Russian President Vladimir Putin for the crimes (allegedly) committed in the “Situation in Ukraine” and, more recently, by Israeli Prime Minister Benjamin Netanyahu for starvation and other grave violations in Gaza (Oriolo, 2024, p. 122).

Moving from the analysis of the “Situation in Ukraine” before the ICC (Section 2), this article focuses on the main challenges to the Court effectiveness, such as the State cooperation in its investigations and proceedings (Section 3), and the immunity from

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criminal jurisdiction of States organs (Section 4), in order to suggest some critical solutions including using the *in absentia* proceedings (Section 5), which could either be applied in the future to enhance the role of the ICC and international criminal justice in general or just be used in really specific circumstances or adopting a more “positive approach” of complementarity (Section 6).

2. The “Situation in Ukraine” before the ICC

On March 17th, 2023, the Pre-Trial Chamber II of the ICC issued a warrant of arrest for Russian President, Vladimir Vladimirovich Putin, as “allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute” for crimes committed in Ukrainian occupied territory (ICC, 2023). According to the Pre-Trial Chamber II President Putin could incur in individual criminal responsibility for the aforementioned crimes, (i) for having committed the acts directly, jointly with others and/or through others (Article 25(3)(a) of the Rome Statute), and (ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (Article 28(b)) of the Rome Statute (*ibid.*).

In contrast with the arrest warrant issued by the ICC, a 2020 Russian presidential decree provides immunity for crimes committed in the context of the conflict in Ukraine, “in violation of Russia’s international legal obligations” (see Human Rights Watch 2022). At the moment of writing a waiver of his immunities seemingly impossible.

In regard to the relationship between Russia and the ICC, Russia signed the ICC Statute in 2000, but it has not ratified it yet, not becoming a State Party. The lack of the ratification by Russia has as its consequence that, neither the obligations of cooperation under Article 86 nor the irrelevance of the official capacity under Article 27 are binding for the Russian Federation.

Nevertheless, the ICC arrest warrant against Vladimir Putin confirms the view that the non-ratification of the Statute by a State does not exclude the possibility that the ICC might investigate and judge the crimes committed by its nationals (Oriolo, 2008, p. 176).

The reactions to the warrant against the President of the Russian Federation have been varied, with bitter reactions from Russian officials and with welcoming regards specifically by Josep Borrell and Joe Biden (Focillo, 2024, p. 23).

The heterogeneity of the ICC’s State Parties’ reactions to the warrant heightens the difficulty of the completion of the proceedings against Putin, compromising the Court’s authority with reasonings that see the *raison d’état* as paramount in regards to the prosecution of individuals allegedly responsible of *crimina juris gentium*, a situation that shows itself in the case of the visits that these individuals make to ICC State Parties, like in the case of Omar al-Bashir’s visits abroad, such as the one that saw him travel to South Africa in 2009 (Battaiotto, 2023).

3. The Duty of States Party to the Rome Statute to Cooperate with the ICC: Article 86 Put to the Test

According to Article 27 (2) of the Statute of Rome, immunity from criminal jurisdiction, including that of Heads of State, does not bar the ICC from “exercising its jurisdiction over such a person”.

Further, State parties and those that have accepted the Court's jurisdiction are duty-bound to arrest and surrender individuals subject to ICC warrants, regardless of official position or nationality (ICC, 2024b). Namely, Article 86 of the Rome Statute expressly obliges State parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”.

Pre-Trial Chamber II has also highlighted that the Court operates independently of the involvement of State in the case of serious international crimes, recalling that “the Court performs functions that align with the general interests of the international community by exercising jurisdiction over the most serious international crimes, which include grave breaches of fundamental norms of international law” (ICC, 2024b).

All the proposals for the prosecution of the crimes allegedly committed by Vladimir Putin have assumed the ability to pierce the veil of the immunity afforded to Heads of State (Lemos, 2023).

In this perspective, in the event of a visit to a State Party to the ICC, according to the duty to cooperate with the ICC for State Parties to it, Vladimir Putin should, in theory, be arrested (Yaman, 2023), with one of the reasonings seen behind the issuing of and the public communications regarding the warrant being the will to isolate President Putin because going abroad to a non-friendly country would be too risky (Battaiotto, 2023). The importance of an arrest in this case, and in all cases before the ICC, is caused by the existence of important limitations to trial someone before the ICC *absente reo*, limitations that will be discussed in Section 5 of this work.

The political issue behind the ICC's arrest warrants, in the case of Vladimir Putin but also in the case of the other ones, is that not all the State Parties are always ready to cooperate with the Court. For example, as for the relations between Russia and Hungary it can be helpful to state that Vladimir Putin has been described, even before the issuing of the warrant, as one of Viktor Orbán's closest friends (Heller, 2019, p. 32).

So, in the view of Hungarian Prime Minister Viktor Orbán, there are no reasonable motivations to see President Putin as a war criminal; with Gerley Gulyas, Minister of the Prime Minister's Office stating, that “We can refer to the Hungarian law and based on that we cannot arrest the Russian President ... as the ICC's statute has not been promulgated in Hungary” (CNN, 2023).

The issue of executing the arrest warrant during Putin's trip to a State party to the ICC has repeatedly come to political and doctrinal attention. For example, in August 2023 Vladimir Putin, in order to participate in the BRICS Summit held in Johannesburg from the 22nd to the 24th of that month, planned a State visit to South Africa, a State Party to the Rome Statute. For this Summit it was expected that South Africa would not arrest the Russian Head of State, following the same (lack of) action displayed by it when Omar al-Bashir visited the country (Yaman, 2023). The President of South Africa Cyril

Ramaphosa argued that “South Africa has obvious problems with executing a request to arrest and surrender President Putin” (BBC, 2023) but, at the end, South Africa did not have the problem of deciding whether to arrest President Putin or not, by announcing, on July 19th 2023, that he would participate in the summit via videoconference, with Russian Minister for Foreign Affairs Sergej Lavrov attending in person in lieu of the President. The Arrest warrant issued by the ICC, “has, due to his role, been problematic for Vladimir Putin’s travels abroad, an essential part in the work of any head of state”, and this has been possible to see in the event of his annulled visit to South Africa, with Vladimir Putin not traveling to a State that has ratified Rome Statute until September 2nd, 2024, doing so by visiting Mongolia (Foccillo, 2024, p. 23).

Similarly, during President Putin’s 2024 visit to Mongolia, on October 24th, 2024 national authorities refusing to arrest him opposing the view that Putin enjoys immunity and privileges according to the existing international customary norms and legal principles and that proceeding with the request would result in breach of Mongolia’s pre-existing legal obligations.

Due also the seriousness of Mongolia’s failure to cooperate with the Court, the Chamber deemed it necessary to refer the matter to the Assembly of States Parties” (ICC, 2024b) under Article 87(7) of the Rome Statute, that stated “Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council”.

Mongolia justified its (in)action stating that it recognized that President Putin, as a sitting head of state of a third country, is entitled and shall enjoy immunity *ratione personae* and *ratione materiae* (ICC Pre-Trial Chamber II, 2024), that it “ha[d] not identified any rule in customary international law that excludes or renders the immunity of heads of state inapplicable when their arrest is sought by an international criminal court” (*Ibid.*).

The Chamber replying to this reasoning by stating that “personal immunity of officials, including Heads of third States, is not opposable in proceedings before the Court, nor a waiver of immunity is required under Article 98 of the Statute” (*Ibid.*), voiding Mongolia’s justification and the possibility of the existence of immunity before the ICC.

Further, the ICC has added that “Article 27 of the Statute has the effect of removing any and all international law immunities of officials, including Heads of State, and binds to that effect States Parties, as well as States that have accepted the Court’s jurisdiction, not to recognize any kind of immunity or apply special procedural rules that they may attach to any persons” (*Ibid.*), coming to the conclusion that “Whether these persons are nationals of States Parties or nationals of non-States Parties is irrelevant” (*Ibid.*). This non-cooperation with the ICC by Mongolia has been deemed as “into question the obligation to arrest individuals brought by the issuing of the warrant” and “potentially putting into question the International Criminal Court’s potential for effective action in bringing to trial individuals accused of international crimes” (Foccillo, 2024, p. 23).

4. Jurisdictional Immunities before the International Criminal Court

Despite the immunity before his own State's jurisdiction afforded clearly to President Putin, as discussed *supra*, his immunities before international courts, the ICC in this particular case, are not as assured.

As for the irrelevance of official capacity in prosecuting *ius cogens* crimes, the prevalent view is that "apart from prosecution in their own country, heads of state may only be prosecuted in an international court" (Lemos, 2023).

As clarified above, in the Rome Statute, Article 27(1) states that "the Statute applies equally to all persons without any distinction of any kind and that official capacity does not constitute an exception to this rule", and with Article 27(2) clarifying this situation stating, "that immunities do not prevent the Court from exercising its jurisdiction over a person".

As it is known, in the *Arrest Warrant* case (Congo v. Belgium) the International Court of Justice (ICJ), ruled that that immunity from jurisdiction does not equate to impunity, and it could not exonerate the person to whom it applied from all criminal responsibility. In the ICJ view, while jurisdictional immunity was procedural in nature, criminal responsibility was a question of substantive law. Jurisdictional immunity might well bar prosecution for a certain period or for certain offences. For example, an organ of a State may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction such as the International Criminal Court (ICC), arrest Warrant, para. 61).

Similarly, the ICC Appeals Chamber's in the *al-Bashir* case clarified that Article 27(2) of the Statute "prevents States Parties from: [...] 'raising any immunity belonging to it under international law as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect)'; and (ii) 'invoking any immunity belonging to them when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect)'" (Judgment in the Jordan Referral re Al-Bashir Appeal, 2019).

The Appeal Chamber's "finding that there is no Head of state immunity under customary international law has drawn much criticism" (Giuffré & Prosperi, 2023), with scholars seeing this decision as taking "away the rights of non-party states under international law" (Akande, 2019), and others arguing that "if there is no immunity for heads of State ... then there seems to be little substance left for Article 98(1) of the Rome Statute, which prevents the Court from requesting surrender (or other assistance) if it would require a state to violate the state immunity of another" (Bartos, 2019); criticisms that don't prevent a conclusion that suggests that under the ICC Vladimir Putin does not enjoy immunity.

5. *In Absentia* Proceedings for Joseph Kony: A Possible Breakthrough in the Case of Vladimir Putin?

A fundamental issue that puts in jeopardy the completion of the proceedings against Vladimir Putin before the ICC stems from the prohibition of trials *in absentia* ex Article 61(1) of ICC Statute, which states that, at the hearing predisposed for the confirmation

of charges “shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel”.

The only case in which the hearing can be held “in the absence of the person charged”, ex Article 61(2), is the one in which the person has “[w]aived his or her right to be present; or”, if the indicted person has “[f]led or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held”.

The latest hearing, at the time of writing, for the confirmation of charges *in absentia rei* is the one regarding the Kony Case, held on October the 15th, 2024. On March 4th, 2024, ICC Pre-Trial Chamber II issued a decision on the Prosecutor’s request to hold a confirmation of charges hearing in the case against Joseph Kony (suspected of 36 counts of war crimes and crimes against humanity allegedly committed in Uganda) in the absence of the suspect, should he not appear, and set the date for this hearing, to commence on 15 October 2024.

The reasoning behind this decision is the qualification of Joseph Kony as a “person who cannot be found” (ICC, 2024a) because Joseph Kony’s “whereabouts remain currently unknown despite steps to secure his appearance having been undertaken by the Registry and other relevant stakeholders since the issuance of the warrant and continuing to be undertaken” (ICC Pre-Trial Chamber, 2024).

In this perspective, the Case regarding Joseph Kony cannot be used as a precedent in the proceedings against Vladimir Putin because, whilst Joseph Kony is the Head of the Lord’s Resistance Army, which has been designated by the United States of America as a terrorist organization (Reeker, 2001), Vladimir Putin is a Head of State, a role that makes his whereabouts often widely and publicly known, especially during his official visits abroad and his public appearances, making him, at the moment, a “person who cannot be arrested” due to the immunities afforded to him in Russian domestic law and by the ones afforded to him by third States and non-compliant State Parties to the ICC, and not a “person who cannot be found”.

Seeing as a waiver of his right to appear before the Court from Vladimir Putin seems unlikely, *in absentia* proceedings in his case look like an unrealistic solution to the issues discussed above regarding the non-compliance with Article 86.

6. Conclusions: A Positive Approach of Complementarity to Fight against Impunity

The absence of national and international immunity before the International Criminal Court, as described in Article 27 of the Statute of Rome and the duty to cooperate with the Court dictated to its State parties under Article 86 should make the arrest of indicted individuals a non-existent issue. In the last years this seemingly foregone conclusion has been recently put to the test in the cases regarding Putin and Elmasry, who have been in the territory of States that have ratified the Rome Statute but have not been arrested, with both being still *at large*, using the Court’s definition.

Mongolia, being preceded by South Africa and Jordan, amongst others, in regard to Omar al-Bashir (Nuba Reports, 2016), have been accused of violating their duties under Article 86 of the Rome Statute as Parties to the ICC. Mongolia and Italy are just the tip of

the iceberg, with declarations issued by governments that state that indicted individuals would be welcome in the territory of States that are, in theory, obliged to follow Article 86. The government of Hungary is one of the governments that have declared that they would not arrest indicted individuals, and, in 2025, it has announced that it will withdraw from the Rome Statute (ICC, 2025).

The *in absentia* proceedings commenced against Joseph Kony under Article 61 (2) of the Statute of Rome, might seem, at first glance, a possible solution to the issues discussed above.

The reality is, however, that Putin, al-Bashir, Elmasry, and Netanyahu, alongside their indicted compatriots, can, technically, “be found” and the non-arrests of the first three void the “all reasonable steps have been taken to secure his or her appearance before the Court” that are required for *in absentia* confirmations of charges under Article 61 (2) of the Statute, making this solution not realistic in the cases discussed above.

These situations could be seen as a violation of the principle of *pacta sunt servanda*, with States not performing their duties under international treaties in force (in this case the Statute of Rome), which bind these States.

The understanding of the nature of these violations, be it political, geopolitical or economic, is not a *conditio sine qua non* for an analysis of the possible consequences of these behaviours, which risk strengthening the culture of impunity based on the existence of international immunities for individuals, weakening not only the International Criminal Court and its work, but, more importantly, the whole concept of an effective international criminal justice system.

An improvement in State compliance with the Court could come from the strengthening the cooperation between the ICC and the States with a more “horizontal” relationship, favoring a “positive approach” of complementarity. Positive complementarity strategy was adopted by the ICC OTP since 2010 and signifies a more engaged collaboration between national jurisdictions and the Court, focused on enhancing the efficiency of legal state systems in investigating and prosecuting offenses, regardless of any adverse evaluations by the domestic criminal justice system.

As observed by scholars, positive complementarity necessitates that the Court, especially the Office of the Prosecutor, engage *more actively* and *closely* with national jurisdictions, not just before and after domestic criminal processes, but also by playing an essential role during state prosecutions against offenders (Oriolo, 2012).

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