

## **Dissecting International Criminal Courts' Arrest Warrants: Puissant or Paper Tiger?**

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### **Introduction**

March 17, 2023 will go down as a red-letter day in the annals of our world as the day when a sitting President of one of the UNSC's permanent members was slapped with an arrest warrant on war crimes charges. Since the ICC has time and again been criticized as the African Criminal Court given its propensity to indict African Heads of States (HoS) and Governments owing to alleged perpetration of international crimes, this arrest warrant issued against Russian Federation's President Vladimir Vladimirovich Putin might help assuage the same to a great extent.

Although the prevailing sense is of disbelief that a sitting President has been slapped with an arrest warrant by the ICC, it's not the only instance where a sitting HoS has been issued one. In addition to the arrest warrants against Omar al Bashir, the President of Sudan, several other HoS were issued one.

On June 27, 2011, the Libyan HoS, Muammar Gaddafi, was issued one for "alleged commission of crimes against humanity (CAH) of murder and

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persecution” from February 15, 2011 onwards in Libya by employing State apparatus as well as security forces of Libya.<sup>1</sup> The case was, however, dropped due to his death. Another one was issued against Laurent Gbagbo, the former President of Côte d’Ivoire, on November 23, 2011 for “alleged commission of CAH of murder, attempted murder, rape, other inhumane acts and persecution in the violence between December, 2010 and April, 2011” in Côte d’Ivoire post elections.<sup>2</sup>

Apart from these, the SCSL circulated one against Charles Taylor, who was then the President of Liberia, on March 7, 2003. He was ultimately arrested by the Nigerians near the border of Cameroon and handed over to Liberia where he was formally arrested by the UNMIL to stand trial in Freetown where ended up being convicted.<sup>3</sup> Similarly, Slobodan Milošević, the then President of Serbia was slapped with an arrest warrant by the ICTY on May 27, 1999.<sup>4</sup>

This paper seeks to understand the efficacy of the ICC’s arrest warrants, particularly against sitting HoS. Apart from contemplating the execution of the warrant against Putin by juxtaposing it with the fate of those issued against Bashir, this paper also explores the legal nuances pertaining perceived

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<sup>1</sup> Case Information Sheet- Prosecutor v. Saif Al-Islam Gaddafi ICC-01/11-01/11, (Apr. 10, 2023, 8:06 PM), <https://www.icc-cpi.int/sites/default/files/2022-08/GaddafiEng.pdf>.

<sup>2</sup> Case Information Sheet- Prosecutor v. Laurent Gbagbo and Charles Blé Goudé ICC-02/11-01/15, (Apr. 10, 2023, 8:34 PM), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/gbagbo-goudeEng.pdf>.

<sup>3</sup> Charles Taylor, RESIDUAL SPECIAL COURT FOR SIERRA LEONE (Apr. 10, 2023, 8:22 PM), <https://rscsl.org/the-scsl/cases/charles-taylor/>.

<sup>4</sup> President Milosevic and Four other Senior Fry Officials Indicted for Murder, Persecution and Deportation in Kosovo, (Apr. 10, 2023, 8:49 PM), <https://www.icty.org/en/sid/7765>.

immunity of HoS, both under international criminal law (ICL) and customary international law (CIL). The paper sums it all up by providing alternate options that the ICC could employ to secure co-operation in the event of non-execution of arrest warrants by States which are parties and those which are not as well.

### **Provisions pertaining Arrest Warrants under the Rome Statute**

Before delving into the specificities of the execution of the arrest warrants or non-execution thereof, it is pertinent to comprehend the provisions relating to them in the Rome Statute (RS). After initiating investigation, PTC may at any time be requested by the Office of the Prosecutor (OTP) to issue an arrest warrant.<sup>5</sup> The application includes details of the concerned person, alleged crimes, concise statement of facts, summarised evidence and other information forming reasonable basis and lastly, the Prosecutor's reasons as to why he believes in the necessity of the arrest.<sup>6</sup>

Accordingly, the PTC issues arrest warrant containing the concerned person's details, crimes based on which it is issued and a concise statement of facts.<sup>7</sup> However, PTC shall issue such arrest warrant only upon satisfaction of the existence of reasonable to believe the concerned person has perpetrated an international crime. Apart from that, the PTC also has to be satisfied of the need of the arrest "to ensure his appearance at the trial, or that he doesn't obstruct or endanger the investigation or the court proceedings or prevent the

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<sup>5</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 257 (Cambridge University Press 2007).

<sup>6</sup> Rome Statute of the International Criminal Court art. 58(2), Jul. 17, 1998, 2187 U.N.T.S. 3.

<sup>7</sup> *Id.*, art. 58(3).

person from continuing with the commission of that crime or a related crime.”<sup>8</sup>

It is notable that PTC may be requested by the Prosecutor to suitably amend the warrant which PTC will oblige on satisfaction of the existence of reasonable grounds to do so.<sup>9</sup> Once issued, the arrest warrant stays in force until further orders of the Court<sup>10</sup> and on this basis the Court requests States to arrest and surrender or provisionally arrest the concerned individual.<sup>11</sup>

A State which is party to the RS has to immediately act to arrest the concerned person on receiving such request from the ICC.<sup>12</sup> What is notable is that the ICC can request even non-State parties to arrest and surrender the concerned person if he is present on their territory.<sup>13</sup> The written request has to contain the arrest warrant, details of the concerned person sufficient to identify him, his probable location, and such documents, statements or information necessary for the process of surrender in the requested State.<sup>14</sup> Regarding request for provisional arrest in urgent cases, it has to be made by any medium with the ability to deliver a written record containing details of the concerned person sufficient to identify him and his probable location, concise statement

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<sup>8</sup> *Id.*, art. 58(1).

<sup>9</sup> *Id.*, art. 58(6).

<sup>10</sup> *Id.*, art. 58(4).

<sup>11</sup> *Id.*, art. 58(5).

<sup>12</sup> *Id.*, art. 59.

<sup>13</sup> *Id.*, art. 89(1).

<sup>14</sup> *Id.*, art. 91.

of the facts and alleged crimes, statement that an arrest warrant against him exists, and that a request for his surrender will follow.<sup>15</sup>

### **Arrest Warrant against Vladimir Putin**

It is pertinent at this juncture to understand the law applied to Ukrainian situation concerning which the arrest warrant has been circulated. Ideally, the ICC's jurisdiction extends to States who become signatories to its Statute. However, a non-signatory State can also become amenable to its jurisdiction by lodging a declaration to its Registrar accepting its jurisdiction i.e. through Art. 12(3) declarations.<sup>16</sup>

It is through this modality that the Prosecutor has invoked the ICC's jurisdiction in the Russia-Ukraine conflict. Ukraine, a non-signatory to the RS, via two declarations, has accepted the ICC's jurisdiction. The first one was related to ICC exercising jurisdiction on "alleged crimes committed on Ukrainian territory between November 2013 and February 2014."<sup>17</sup> The second one widened this jurisdiction to cover alleged crimes committed after February 20, 2014 as well.<sup>18</sup>

Apropos the ongoing conflict between Ukraine and Russia, a day after Russian invaded Ukraine, the OTP issued a statement that they would closely

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<sup>15</sup> *Id.*, art. 92.

<sup>16</sup> *Id.*, art. 12.

<sup>17</sup><https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> (last visited Mar. 31, 2023).

<sup>18</sup>[https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine\\_Art\\_12-3\\_declaration\\_08092015.pdf#search=ukraine](https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine) (last visited Mar. 31, 2023).

monitor the developments.<sup>19</sup> Three days later, on February 28, 2022, the OTP decided to launch an investigation pursuant to preliminary examination which evidenced a reasonable basis to do so.<sup>20</sup>

Starting with Lithuania, by March 02, 2022, the OTP received State Party referral of the situation from 39 States party to the RS under Art. 13.<sup>21</sup> Throughout March and April, 2022, 4 more countries made State referrals thus taking the total to an unprecedented 44 State party referrals.<sup>22</sup> Pursuant to this, the OTP decided to seek authorisation to start investigation into the “alleged CAH and war crimes” in Ukraine from November 21, 2013 onwards and the ICC’s Presidency assigned the situation to PTC II to deal with such request as and when it is made by the OTP.<sup>23</sup>

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<sup>19</sup> Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have been closely following recent developments in and around Ukraine with increasing concern.”, (Mar. 20, 2023, 10:10 PM), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following>.

<sup>20</sup> Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.” (Mar. 20, 2023, 10:11 PM), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

<sup>21</sup> Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (Mar. 20, 2023, 10:14 PM), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

<sup>22</sup> <https://www.icc-cpi.int/situations/ukraine>.

<sup>23</sup> ICC Presidency assigns the Situation in Ukraine to Pre-Trial Chamber II (Mar. 20, 2023, 10:16 PM), <https://www.icc-cpi.int/news/icc-presidency-assigns-situation-ukraine-pre-trial-chamber-ii>.

Thereafter, the investigation commenced and after four visits by the Prosecutor to Ukraine, the OTP requested for issuance of arrest warrants. On finding reasonable basis to do so, PTC II issued the arrest warrants on March 17, 2023. Two arrest warrants have been issued,<sup>24</sup> one against Putin and the other against his Commissioner for Children's Rights Maria Alekseyevna Lvova-Belova, based on "individual criminal responsibility and superior responsibility for their alleged perpetration of war crimes under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the RS." While Article 8(2)(a)(vii) criminalizes war crime of unlawful deportation considered a grave breach of the Geneva Conventions, Article 8(2)(b)(viii) criminalizes the transfer of one's own civilian population into the occupied territory or the deportation of the occupied population within or outside the occupied territory; considered a serious violation of laws and customs governing international armed conflicts. PTC II has issued these arrest warrants pursuant to the Prosecutor's application after satisfying itself that reasonable grounds exist to believe that the suspects have unlawfully deported Ukrainian children from occupied Ukrainian territory to Russian territory.

### **Arrest Warrants Against Omar Hassan Ahmad Al-Bashir and their Fate**

On March 31, 2005, the UNSC adopted Resolution 1593, whereby it referred the situation in Darfur, Sudan, since July 01, 2002 to the ICC's OTP and

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<sup>24</sup> Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 20, 2023, 10:05 PM), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

decided that the Sudanese Government and other parties to the conflict there, shall cooperate with and assist the ICC and the OTP.<sup>25</sup>

Pursuant to the investigations by the Prosecutor and upon his application, PTC I issued “two arrest warrants against Bashir on March 04, 2009 and July 12, 2010 respectively for alleged commission of war crimes, CAH and genocide allegedly committed in Darfur between March 2003 and July 14, 2008.”<sup>26</sup>

Accordingly, the ICC under Part 9 of the RS relayed the requests for Bashir’s arrest to the States Parties including Malawi, Chad, Uganda, Democratic Republic of Congo (DRC), Nigeria, South Africa and Jordan, first on March 05, 2009 and next, on August 16, 2010. What is to be noted here is that several countries, both signatories and not to the RS, did not execute said arrest warrants against Bashir. Notable countries include Egypt, UAE, India, Saudi Arabia, inter alia.

Concerning Malawi, on receiving information that Bashir was going to attend a summit of COMESA in Lilongwe on October 14, 2011, the ICC’s Registrar transmitted a note verbale to Malawi October 13, 2011 reminding it of its legal obligations to arrest and surrender him if he entered its territory. However, Malawi could not be less bothered to reply.

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<sup>25</sup> S.C. Res. 1593, ¶ 2, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

<sup>26</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (Mar. 4, 2009), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009\\_01514.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01514.PDF); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (July 12, 2010), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010\\_04825.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF).



Pertaining Nigeria, on July 15, 2013, the PTC was informed by the OTP that Bashir had reached Abuja to participate in the African Union's (AU) "Special Summit on HIV/AIDS, Tuberculosis and Malaria" scheduled between July 12 to 16, 2013. However, the Nigerian President's spokesperson clearly stated that the question of arresting and surrendering him did not arise as he was there for an AU event and AU had taken a resolution to not execute the arrest warrants issued against him.<sup>27</sup>

Apropos DRC, on being notified that Bashir was going to attend COMESA summit in Kinhasa, the PTC asked DRC to arrest and surrender him. Despite this, DRC let Bashir leave and on being asked for explanation for not cooperating with the ICC, they forwarded unconvincing reasons such as paucity of time and how Bashir was invited by AU and not by DRC etc.<sup>28</sup>

Similarly, in case of South Africa, owing to media reports that Bashir was going to attend an AU Summit in Johannesburg from June 07, 2015 to June 15, 2015, the ICC's Registrar, on May 28, 2015 requested it to arrest and surrender him if he entered South African territory. Unlike Malawi, on June 11, 2015, South Africa contacted the ICC's Registry and requested an urgent meeting with the goal of entering into Article 97 consultations which accordingly took place on June 12, 2015. The very next day Bashir entered South Africa. However, despite the ICC's request, South Africa did not do as

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<sup>27</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria, ¶ 5 (July 15, 2013), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013\\_04947.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_04947.PDF).

<sup>28</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶¶ 5, 11, 12 (Apr. 9, 2014), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014\\_03452.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_03452.PDF).

requested when he was present there between June 13, 2015 and June 15, 2015.<sup>29</sup>

In case of Uganda, owing to media reports that Bashir was scheduled to attend President Museveni's inauguration ceremony in Uganda on May 11, 2016, the ICC's Registrar a note verbale to Ugandan authorities to arrest and surrender him if he travels to Uganda. However, Uganda ignored it and Bashir visited and exited Uganda as scheduled. More than a month later, on June 24, 2016, Uganda reverted with a note verbale to the ICC containing submissions on not arresting and surrendering Bashir. It argued that inviting and hosting him was essential to maintain good relations with its neighbouring countries and it was abiding by AU's decision that its members shall not cooperate to arrest and surrender Bashir pursuant to Article 98 concerning immunities.<sup>30</sup>

Apropos Jordan, pursuant to media reports that Bashir was going to attend the 28<sup>th</sup> Arab League Summit in Amman scheduled on March 29, 2017, the ICC's Registry, on February 21, 2017, transmitted a note verbale to Jordan to provide information concerning the visit and requesting it to arrest and surrender him upon entering its territory. Jordan responded on March 24, 2017 that it had not received any official confirmation from Sudan regarding

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<sup>29</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶¶ 5, 7, 11, 15, 16 (July 6, 2017), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017\\_04402.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_04402.PDF)

<sup>30</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ¶¶ 4, 5, 7 (July 11, 2016), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016\\_04947.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04947.PDF).

Bashir's attendance. On March 28, 2017, Jordan sent another note verbal informing the ICC that Bashir would attend the Arab League's Summit and that it was commencing Article 97 consultations. However, they stressed on Bashir's perceived immunity and implied that they would not be violating it. Thus, Bashir escaped arrest despite being on Jordanian territory.<sup>31</sup>

Chad has hosted Bashir multiple number of times despite ICC's repeated requests of co-operation in arresting and surrendering him. The first time ICC requested them was when Bashir visited Chad in July 2010. Since Chad failed to do the needful, the PTC informed the UNSC and the ASP through a decision in August 2010.<sup>32</sup> The second time was when the Registry informed the PTC of his visit to Chad in August 2011 to grace the inauguration ceremony of Chad's HoS, Idriss Deby Itno. Although the Registry had requested Chad to arrest and surrender Bashir through a note verbale, Chad turned a deaf ear to it. Additionally, when the PTC rendered its decision requesting Chadian authorities to submit their observations on their alleged failure to conform with the co-operation requests, they did not respond and when they did stuck to how they were mandated to follow African Union's decision to not arrest Bashir.<sup>33</sup> The third time was in February 2013 when the

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<sup>31</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶¶ 5, 6, 7, 8 (Dec. 11, 2017), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017\\_07156.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_07156.PDF).

<sup>32</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, (Aug. 27, 2010), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010\\_05769.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_05769.PDF).

<sup>33</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the

Prosecutor apprised the PTC of Bashir's impending visit to Chad and Libya. However, despite two note verbales being sent by the Registry urging it to arrest and surrender him, the visit was made. The fourth occasion arose on March 2013 regarding Bashir's impending visit as notified to the PTC by the Prosecutor.<sup>34</sup> To put it succinctly, Chad continued to host Bashir sans any effort to arrest him despite ICC's repeated requests.

Apart from States parties to the RS and therefore, obligated to execute its arrest warrants, there are a plethora of non-member States which have refused to co-operate with the ICC likewise. According to a news report in 2016, he had travelled 75 times to 22 countries since the issuance of the arrest warrants against him.<sup>35</sup>

Egypt, a non-State party has hosted Bashir multiple times since the arrest warrants. Egypt has cited concerns about the immunity he enjoys as HoS and the need to respect Sudan's sovereignty as to why it has not arrested him. Egypt also argued that the charges are politically motivated and the Court is

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cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ¶¶ 3, 7 (Dec. 13, 2011), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012\\_04203.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_04203.PDF).

<sup>34</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ¶¶ 7, 9, 10, 14, (Mar. 26, 2013), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013\\_02245.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_02245.PDF).

<sup>35</sup> 75 trips to 22 countries in 7 years: An indicted war criminal's travels, NUBA REPORTS, (Apr. 10, 2023, 5:42 PM), <https://nubareports.org/bashir-travels/>.

biased against African leaders. They have even called upon the UNSC to suspend ICC's investigation against him.<sup>36</sup>

Saudi Arabia, another non-State party has hosted Bashir including at the 29<sup>th</sup> Arab League Summit held in Dhahran on April 15, 2018.<sup>37</sup> They have also refused to arrest al-Bashir, citing concerns about the immunity he enjoys as HoS. Saudi Arabia is a close ally of Sudan and has provided the country with financial and military support, which may have impacted its decision not to arrest him.

United Arab Emirates, also a non-signatory has similarly declined to arrest him, citing concerns about his perceived immunity as HoS and the consequent need to respect Sudan's sovereignty.<sup>38</sup> The UAE has also been a key supporter of Sudan, providing the country with economic and military aid.

India is also a non-signatory State specifically requested to arrest and surrender Bashir on the basis of Art. 89(1) of the RS as well as the UNSC Resolution concerning the Darfur situation.<sup>39</sup> This request was placed in the backdrop of the 3<sup>rd</sup> India-Africa Forum Summit which Bashir attended on

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<sup>36</sup> Ethiopia, Egypt want UN to suspend al-Bashir's ICC arrest warrant, AFRICA NEWS, (Apr. 7, 2023, 8:10 PM), <https://www.africanews.com/2017/06/10/ethiopia-egypt-want-un-to-suspend-al-bashir-s-icc-arrest-warrant/>.

<sup>37</sup> Sudan's al-Bashir to participate in Arab summit, SUDAN TRIBUNE, (Apr. 7, 2023, 8:20 PM), <https://sudantribune.com/article63323/>.

<sup>38</sup> Abandoned by the UAE, Sudan's Bashir was destined to fall, REUTERS, (Apr. 8, 2023, 11:34 AM), <https://www.reuters.com/investigates/special-report/sudan-bashir-fall/>.

<sup>39</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-252, Request for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir to the Republic of India, (Oct. 26, 2015), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015\\_20279.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_20279.PDF).

October, 29, 2015.<sup>40</sup> Bashir attended the Summit on a formal invitation extended by India which was delivered to him in person by Gen. V. K. Singh, the then Indian State Minister of External Affairs as Special Envoy in Khartoum.<sup>41</sup> However, India chose not to respond to it. Several reasons led to India not executing the warrants but the primary ones concern immunity of HoS and political as well as economic relations with Sudan. India's position on immunity is more in line with the traditions of international law as opposed to ICC's position which reflects a departure from this traditional view. Apart from that, India's political relations with Sudan pre-date its independence while the bilateral trade between the two countries is worth over 1500 million US dollars.

The failure of these countries to arrest and surrender al-Bashir has been a significant obstacle to the ICC's efforts to hold him accountable for his alleged crimes. While some countries have cited concerns about the immunity attached to HoS as a reason for their non-cooperation, others may have been influenced by political or geopolitical considerations.

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<sup>40</sup> India to host Sudanese President Omar al-Bashir at India-Africa Summit despite ICC warrants, THE ECONOMIC TIMES, (Apr. 12, 2023, 9:49 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/india-to-host-sudanese-president-omar-al-bashir-at-india-africa-summit-despite-icc-warrants/articleshow/49310403.cms?from=mdr>.

<sup>41</sup>India-Sudan Bilateral Relations, (Apr. 12, 2023, 10:01 AM) [https://mea.gov.in/Portal/ForeignRelation/India\\_Sudan\\_\\_2019.pdf](https://mea.gov.in/Portal/ForeignRelation/India_Sudan__2019.pdf).

## **Immunity of Heads of States under Rome Statute vis-à-vis Customary International Law**

A close scrutiny of the attitude of the States towards execution of arrests warrants against Bashir evidences the conundrum between Articles 27 and 98 in terms of immunity accredited to HoS and difference in the concept of immunity pertaining HoS under ICL vis-à-vis CIL.

To appreciate the relevance of Article 27 of the RS, it is pertinent to travel back in time and understand its genesis in the Nuremberg<sup>42</sup> and Tokyo Charters<sup>43</sup> wherein it is clearly stated that the perpetrators' official position does not absolve them of their individual criminal responsibility. However, apropos its role in the mitigation of the penalty imposed upon them, there is a stark difference between the two Charters. While the Nuremberg Charter categorically denies it, the Tokyo Charter makes room for it. The same sentiment is echoed in the Statutes of the ICTY<sup>44</sup> and the ICTR<sup>45</sup> that the accused's official position shall not relieve him of his criminal responsibility.

Article 27 of the RS literally strips HoS of any immunity that CIL may have bestowed upon them. It clearly states that one's official capacity shall neither amount to exemption from individual criminal responsibility nor lead to a reduced sentence. Apart from that, the ICC's jurisdiction is not fettered by any immunity attached to official capacities under national laws as well.

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<sup>42</sup> Charter of the International Military Tribunal art. 7, Aug. 8, 1945.

<sup>43</sup> Charter of the International Military Tribunal for the Far East art.6, Jan. 19, 1946.

<sup>44</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), May 25, 1993.

<sup>45</sup> Statute of the International Tribunal for Rwanda art. 6(2), Nov. 8, 1994.

However, the clear cut absence of immunity as seen above is clouded by another provision i.e. Article 98 which was relied upon by South Africa and Jordan when faced with proceeding under Article 87(7) at the ICC for failing to execute the arrest warrants against Bashir.<sup>46</sup> Both the countries advanced such interpretation of Article 98 that required consent of Sudan to waiver of Bashir's immunity and they maintained that sans such consent, their act of arresting Bashir would amount to violation of his immunity guaranteed under CIL.

ICC held that since the jurisdiction in the given matter had been activated by UNSC referral<sup>47</sup> as per Article 13(b) and as Sudan had been mandated to fully co-operate with the Court, therefore, the question of fulfilment of Article 98 did not arise as it was subsumed by Article 27. In other words, there was no immunity to be claimed for Omar al Bashir by Sudan and consequently, by other States as there was no immunity to be waived off by Sudan to begin with. The ICC further stated that since Article 98 is not directed towards the signatory States but to the Court, no substantive rights or additional duties follow therefrom for the States.

Apropos Article 27(2), the Court held it to possess dual effect, viz. vertical and horizontal. On the one hand, it prohibits States Parties from refusing to arrest and surrender owing to immunity, and, on the other, it prevents States Parties from invoking any national immunity if other States Parties arrest and surrender the concerned person. In other words, Article 27(2) not only eliminates immunity vertically i.e. before the ICC itself but also horizontally i.e. before national authorities. Additionally, Article 27(2) not only removes

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<sup>46</sup> *Supra* note 29, *supra* note 31.

<sup>47</sup> *Supra* note 25.



immunity from being an impediment to ICC's jurisdiction but also omits immunity from arrest.<sup>48</sup> Thus, both South Africa and Jordan were found to be in non-compliance with their obligation to arrest and surrender Bashir to the Court.

The ICJ has also discussed at length the immunities enjoyed by former or incumbent foreign affairs ministers. The case had arisen out of Belgian arrest warrant issued against the incumbent Foreign Affairs Minister of DRC, Abdulaye Yerodia Ndombasi, for the alleged commission of grave breaches of the Geneva Conventions and CAH.<sup>49</sup> While noting that immunity did not amount to impunity and that it was also separate from individual criminal responsibility, the ICJ noted four scenarios wherein immunities enjoyed by Foreign Ministers did not impede criminal prosecutions, viz.<sup>50</sup>

- a. when they are prosecuted by their own State
- b. when they are prosecuted by a foreign States pursuant to waiver of their immunity by their own State
- c. upon cessation of office, when they are prosecuted for acts committed preceding to or succeeding to their term of office in addition to acts committed in private capacity while in office
- d. when they are prosecuted by international criminal tribunals and courts which enjoy jurisdiction such as the ICTY, ICTR and ICC

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<sup>48</sup> *Supra* note 29, ¶¶ 74, 75.

<sup>49</sup> Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium), 2002 I.C.J. 3 (Feb. 14).

<sup>50</sup> *Id.*, ¶ 61.

## **Conclusion**

A thorough analysis of the fate of the arrest warrants against Bashir help us foresee the fate of the arrest warrant against Putin. Despite the best intentions of the ICC and all the modalities available in the RS to obtain co-operation in the execution of arrest warrants issued by it by both State Parties and non-State Parties, it is crystal that execution or non-execution is ultimately a prerogative of the State concerned. That brings us at this juncture where we seek to ruminate on what other measures could be adopted by the ICC to compliance with its decisions. Firstly, the exertion of diplomatic pressure by the ICC wherein the ICC can employ its diplomatic channels to engage with the government of the concerned State and urge them to co-operate with the ICC. Secondly, sanctions whereby the Court requests the international community or the UNSC to impose sanctions on the State that refuses to co-operate with the ICC as was done in the case of Sudan. Lastly, the Court can also refer the issue to its Assembly of States Parties for undertaking measures such as suspending the voting rights of the erring member State.