



BOFAXE

Heads of States Before the ICC (Part 1)

On the Arrest Warrant against Putin and Its Consequences

— On the 17th of March 2023, the International Criminal Court (ICC, Court) issued an arrest warrant for Russian President Vladimir Putin and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights, for alleged war crimes under Article 8(2)(a)(vii) and (b)(viii) of the Rome Statute (RS), accusing them of deporting children from occupied territories.

This arrest warrant raises the hope of many, who had been waiting for months, even years, for a reaction from the international community that would hold Russia accountable for its invasion of Ukraine, but also for its annexation of Crimea. This arrest warrant is seen as the manifestation of solidarity by the international community and could ultimately help the International Criminal Court to overcome its ongoing crisis (Sterio, pp. 468 ff.). For the first time in the history of the Court, an arrest warrant was issued against a national of the permanent members of the United Nations (UN) Security Council. By doing so, the Court embarked on a path, which brings with it new challenges, e.g. the possibility to trial Putin and other perpetrators in front of foreign domestic courts (as discussed here and here), the political dimension of an arrest warrant (as discussed here) and the interplay between immunity and the obligation of third states to cooperate with the ICC (as discussed here).

This blogpost will address the implications of the arrest warrant and will analyse how it affects Putin's immunity before the ICC. More precisely, the article will discuss issues of immunity raised by the arrest warrant and will explore the nature of immunity of heads of state. Additionally, it will examine whether this immunity applies in relation to another member state to the RS, and whether that state has an obligation to cooperate.

Back to the Roots

Questions concerning immunity before the ICC always played a significant role. It was always a balancing act between preserving state sovereignty and the desire for accountability of perpetrators, which committed the most serious of crimes. To better understand the implications of the arrest warrant against Putin, it is necessary to look at the fundamental legal reasoning and the legal framework of immunity.

Immunity as a legal construct (Sucharitkul, para. 17) fulfils many functions. First, it is rooted in the sovereignty of states and the fact that equal states are not allowed to bring other states before domestic courts (Sucharitkul, para. 20). Second, since states cannot act without their state organs, this immunity also extends to them, and enables them to carry out their state functions without any restrictions. Whereas immunities for diplomats are enshrined in treaty law (see e.g. Article 31 Vienna Convention on Diplomatic Relations), the immunity of other state organs, especially of heads of states, derives from customary international law (Kolodkin, para. 30). Immunity can be divided in two categories, the *ratione personae* and *ratione materiae* immunity (Kolodkin, para. 78). *Ratione personae* immunity as the oldest form of immunity derives from state sovereignty and extends to acts performed by a state official in his/her private and official capacity. However, the immunity *ratione materiae*, as a "functional immunity", only extends to acts performed by a state official to fulfil the function of the State (Kolodkin, para. 80).

A president, as a head of state, has therefore immunity from the jurisdiction of other states. This immunity grants the president absolute immunity during the period of his/her presidency for any acts committed. Exceptions under domestic law would run contrary to the very essence of immunity. Putin, as the President of the Russian Federation, enjoys thus absolute immunity while he is the head of state. A waiver of Putin's immunity is not in question, as it is not in the interest of the Russian Federation. Putin's immunity was reaffirmed by the bill of 2020, which granted Putin and his family lifelong immunity from prosecution. Following the general rules of immunity, after his presidency, Putin would not enjoy immunity. The bill of 2020 is however an attempt to avoid the lack of immunity following the end of his presidency.

BOFAXE

Heads of States Before the ICC (Part 2)

On the Arrest Warrant against Putin and Its Consequences

— The Applicability of Immunity in Relation to the ICC

The pressing question is whether *ratione materiae* immunity would also apply before the ICC in this particular case. Historically, exceptions have been made in the case of serious human rights violations. According to the International Court of Justice, an exception of immunity *ratione materiae* can be made in the cases of war crimes as well as crimes against humanity and the exceptions have been recognised throughout the history of the Nuremberg Tribunals, the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (Arrest Warrant Judgement, para. 58).

In this context, Article 27 (1) RS must be considered first. Article 27 (1) RS 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. In addition, Article 27 (2) RS clarifies that immunities do not prevent the Court from exercising its jurisdiction over a person. The ICC can exercise its jurisdiction over Putin only if he is physically present in front of the ICC. The road to get him there is long and complex, as exemplified by the ICC's Al-Bashir Judgement. This judgement is however in this particular case for the assessment of Putin's immunity of significance because the ICC addressed immunity issues on a horizontal and vertical level. First, it seems worth looking at the vertical relationship (ICC, Al-Bashir Judgement, para 121) between Russia and the ICC. Russia's non-membership to the RS could influence the vertical relationship. In that regard, the main issue is whether the requested state may refuse an extradition based on the existing immunity and thus does not have to comply with its obligation to cooperate under Article 86 RS. The ICC has stated that the immunity provisions of Article 27 RS must be read in conjunction with the duty to cooperate. An obligation to cooperate as laid down in Article 86 RS is only applicable to members of the RS (Article 12(1) RS). Russia, however, is a non-member and consequently not bound by the rules and obligations of the RS under Article 34 Vienna Convention on the Law of the Treaties (VCLT). Alternatively, the Security Council could refer the case under Article 13(b) RS, which establishes the Court's jurisdiction over UN Member States. Such a scenario seems unlikely due to Russia's veto power in the Security Council. As a result, Russia is not obliged to comply with the arrest warrant on the vertical level. Nevertheless, an arrest warrant can still have a political effect within the state. It might weaken the support within Russian society regarding the war and Putin's political standing. Particularly, the journalist Marina Ovsyannikova, a critic of the Kremlin, is hopeful, that a kind of resistance will start within the Russian elite.

Second, the horizontal relationship (ICC, Al-Bashir Judgement, para. 127) between a non-member state and a third member state to the RS must be analysed. The third state is obliged to cooperate according to Article 86 RS. As the scope of the obligation is not clear, an interpretation according to Article 31(1) VCLT is needed. The ICC follows the example of numerous *ad hoc* tribunals that have been set up to exercise jurisdiction "over persons for the most serious crimes of international concern" to put an end to the impunity of perpetrators (see Article 1 RS and the fifth preambular paragraph). Following a consequentialist interpretation a requested member state may not invoke the existing immunity in the *inter partes* relationship between the respected states (ICC, Al-Bashir- Judgement, para. 3). Any other interpretation would not be in accordance with the object and purpose of the Court and would be paradox, as the ICC is dependent on the cooperation of states as their 'helping hand'. Consequently, the court's functioning would be rendered inoperable.

Therefore, in the event of a potential mission to a member state of the RS, an arrest by that member state based on the obligation to cooperate would be in compliance with international law. In August 2023, Putin plans a trip to South Africa, which is a member state to the RS. Even if it can be assumed that the execution of an arrest will again be refused by South Africa, as it was the case in the Al-Bashir case, it can still be hoped that the case has led to some form of enlightenment. Maybe the decision of the South African parliament to stay a member to the RS is an expression of such a realization. The unwavering support for the ICC within the member states is also a signal such in interpretation.

Conclusion

These considerations show that there is no unambiguous answer to the questions arising around immunity, and a clear distinction of the horizontal as well as the vertical level must be made. Overall, a proceeding in front of the ICC brings both shadow as well as light and demand one thing from the international community: Patience and time. However, it is also clear that the arrest warrant is not just a kind expression of solidarity on the international parquet, it is more an expression of political pressure to end the ongoing war. Might this arrest warrant bring the long-awaited "wind of change"?