Understanding the interaction between head of state immunity and the ICCs jurisdiction when issuing arrest warrants

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Abstract

Head of state immunity has remained a constant source of debate for many years. Alongside this debate the International Criminal Court has worked to cement its role in international criminal law while combating impunity. The purpose of this thesis is to examine the relationship between head of state immunity and the ICC's jurisdiction to issue arrest warrants against active heads of state. This thesis also examines the scope of obligations that state have to the ICC when carrying out arrest warrants. The nature of jurisdiction and the ICCs role are discussed and analysed in this thesis. Both ratione materiae immunity and ratione personae immunity are explained and analysed. Case law is used to supplement the findings of the thesis and to further examine the relationship between head of state immunity and ICC jurisdiction. The most recent entry into the debate surrounding head of state immunity is the ongoing prosecution of Vladimir Putin. When he made plans to travel to South Africa to attend the BRICS conference concerns were raised over South Africa’s obligations to arrest Vladimir Putin fearing a repeat of South Africa’s refusal to arrest Omar Al-Bashir. The results of this thesis show that under normal circumstances a member of the ICC cannot arrest a third-party head of state due to their conflicting obligations to respect head of state immunity. However, when a situation has been assigned to the ICC by the United Nations Security Council, article 27 of the Rome statute is applicable to non-Signatory states. Customary law also includes several other ways of circumventing head of state immunity. International law does allow for arrest warrants to be carried out against an active head of state. Arresting a head of state is complicated by the fact that the ICC must secure cooperation from states. In some cases, states refuse to cooperate, and they are referred to the United Nations Security Council or Assembly of State Parties. This referral has never led to any economic or political sanctions for the offending state. Thus, while there exists a strict obligation to cooperate with the ICC on paper, state practice shows that states have a great degree of freedom when dealing with requests from the ICC.
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**Abbreviations**

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<td>ICC</td>
<td>International criminal court</td>
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<td>Assembly of state Parties</td>
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1 Introduction

1.1 Background

On March 17th, 2023, the International Criminal Court (ICC) issued an arrest warrant for two individuals, Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova. These arrests were issued in relation to the alleged abduction and illegal transfer of children from Ukraine to Russia. This is the fifty-second case that the ICC has brought against an individual but only the third time an active head of state has been prosecuted by the ICC.¹

The rarity of such an indictment is not surprising as an acting head of state has never been arrested and prosecuted during their time in office. This is because an acting head of state is granted both functional and personal immunity from prosecution by other states. It is an aspect of customary international law that functions to ensure sovereign equality. This means that no state can impose its sovereignty over another through its national legal system. Jurisdictional immunity is in direct conflict with the ICCs mission to prosecute international criminals without being restrained by borders or the official positions of those in power. The document that governs the ICCs behaviour and rules is known as the Rome Statute and states that a person’s official capacity as a head of state is in no way an exception to prosecution by the ICC.² Furthermore, the ICCs primary mission as an institution is to put an end to impunity and prosecute the perpetrators of the most serious international crimes regardless of official position.

This conflict remains an issue for the international community who are divided between their obligations to the ICC and customary international law. This issue has most recently been in the public eye when Vladimir Putin planned to visit South Africa for the BRICS conference during the summer of 2023. South Africa being a member of the ICC would have been obligated to arrest Vladimir Putin if he entered the country. While Putin did not enter South Africa to attend the BRICS conference the government of South Africa had initially stated that arresting Putin would constitute an act of war and would conflict with the state’s constitution.³ This situation poses two questions that this thesis will attempt to answer. Are states obligated

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² Rome Statute article 27
to cooperate with the ICC and what are the consequences if states refuse to cooperate with the ICC?

This case is one of several recent attempts to crack down on head of state impunity by the ICC. These other cases are ongoing attempts of prosecution against Omar Al Bashir as well the case against Uhuru Kenyatta. These cases are examples of the ICCs attempts to crack down on impunity and punish heads of state guilty of war crimes. This also presents interesting interactions between head of state immunity and the ICCs jurisdiction which forms the basis of the studies’ research questions.

1.2 Purpose and research questions

The purpose of this essay is to analyse the legal framework that bind nations when cooperating with the ICC in the execution of arrest warrants against heads of state. To study the relationship between these legal concepts the thesis will analyse international law, international case law, and customary law to answer the primary research question of this thesis.

*What is the relationship between head of state immunity and the ICC exercise of jurisdiction in issuing arrest warrants against a head of state and how is it resolved within international law?*

To complement this research question, the thesis will also analyse states decisions to comply with the ICCs arrest warrants. This will be done by discussing the legal obligations to cooperate with the ICC in the issuing of arrest warrants.

*What obligations do member states have to cooperate with the ICC after an arrest warrant has been issued and what are the consequences if they do not cooperate?*

1.3 Definitions and Delimitations

The scope of this thesis is outlined through its purpose and research questions. The sources used in this thesis follow the same outline to produce a coherent and relevant piece of legal research. In the same vein it is now necessary to define the legal principles that will be frequently discussed in this thesis. The definition of international criminal law is grounded in the core crimes directly regulated under international law: genocide, crimes against humanity, war
crimes, and aggression. The purpose of this thesis is to research the ICCs jurisdiction in issuing arrest warrants for war crimes. The nature and definition of the war crimes alleged by the ICC fall outside of the scope of this essay`s research questions. These crimes will only be discussed to give relevant context to the arrest warrants and why they were issued.

This thesis discusses jurisdiction both within the context of international courts and national courts as both are obligated to carry out the ICCs arrest warrant. The distinction between these courts is based on the ICCs founding document. Jurisdiction refers to the courts authority to create law and precedent and impose them on individuals and institutions. This is described as jurisdiction to prescribe while the enforcement of the laws and precedent is described as the jurisdiction to enforce. This thesis primarily discusses jurisdiction to enforce the law in the form of the ICCs issuing of arrest warrants. However, jurisdiction to prescribe will also be relevant in discussing previous case law and the Rome statute.

The arrest warrant for the crime of unlawful deportation and transfer of children mentions two individuals, Vladimir Putin, and Maria Lvova Belova. This thesis will not discuss the involvement of Maria Lvova Belova. As this thesis will only study the immunity for heads of state.

1.4 Methodology

This thesis is structured as a qualitative legal analysis of a variety of legal sources but primarily case law and international treaties. The thesis discusses and analyses these sources to accurately describe de lege lata. Furthermore, the thesis is interested in clearing the ambiguities that are created when international law and politics come into conflict. This is done by analysing how the concept of immunity and the ICCs jurisdiction interact within the context of international criminal law. This thesis aims to achieve this goal through a comparative analysis of case law and state practice to identify the arguments that undergird the conflict between ICC jurisdiction when issuing arrest warrants and head of state immunity.
1.5 Material

This thesis makes use of a wide variety of sources to discuss and analyse current international criminal law. The Rome Statute and ICC Statute are both primary sources central in researching de lege lata. The Rome statute regulates the legal sources available to the ICC. These sources as well as other legal codes from organizations such as the United Nations Security Council and the Assembly of State Parties will also be discussed and analysed. This is because these primary sources are crucial to answering the primary research question of this thesis. These sources regulate how the ICC may exercise its jurisdiction and how immunity is treated by international institutions such as the ICC. Furthermore, these sources grant a greater understanding of what exceptions exist for head of state immunity.

These sources also help to illustrate the obligations that states have to each other and to the ICC. This is crucial when answering this thesis’s research questions as it grants an understanding of the extent to which states are bound by their obligations to cooperate with institutions such as the ICC. Furthermore, this thesis will incorporate judgements from the ICC and national courts to analyse current state practice when carrying out arrest warrants against heads of state. The material used in this thesis will be bound by the scope and purpose described in 1.3. These cases will also serve to illustrate the issues present when the ICC requests cooperation when carrying out an arrest warrant against a head of state.

Other cases that bring up the issue of immunity such as the arrest warrant case and the Pinochet case will also be discussed but the primary focus of this thesis will be on Putin and Al-Bashir. This is because cases against active head of states are rare in international law. It also because the facts of both cases share a great deal of similarities.

This thesis also makes use a wide variety of literature, research papers, and blogs. This is because the limits of head state immunity are a somewhat controversial issue. Therefore, it is useful to chart the different theories and arguments that surround this issue. These sources also describe legal concepts that are not defined in the primary sources such as functional and personal immunity. These sources also grant context to cases that have not yet been discussed or judged by the ICC or any other legal institution. Overall, these sources fill in the gaps present in the primary sources and legal cases as well as granting nuance to arguments and ideas presented in those sources.
1.6 Outline

In the following sections, the purpose and research questions will be answered by analysing international law. This will be done by first investigating the concept of jurisdiction both by itself and in the context of the ICC’s role in international law. After this the thesis will discuss the scope of the ICC’s jurisdiction, and it’s interactions with non-member states. Following this the question of immunity will be discussed by investigating customary international law. This will be followed by an analysis of the current prosecution of Vladimir Putin as well as previous case precedent from the Al-Bashir and Kenyatta cases. After this the interaction between immunity and ICC jurisdiction when issuing arrest warrants against heads will be analysed and discussed. This analysis will also discuss the limits of obligations that states have when cooperating with ICC. Finally, the results of this discussion will be used to answer both the primary and secondary research questions of this thesis.

2 Jurisdiction

On a general level jurisdiction within international law is the power of the state to regulate or otherwise impact upon people, property and circumstances while still respecting the basic principles of sovereign equality.\(^4\) Jurisdiction is vital to states as it is an exercise of authority which allows states to create, alter, and terminate legal arrangements with other states. The exercise of jurisdiction differs from state to state and is dependent on the legal system of the state. However, in most instances jurisdiction is divided into two main categories. The capacity to create new legislation whether through a judicial, legislative, executive institution is called prescriptive jurisdiction. While the capacity to ensure compliance with such actions through executive or judicial means is called enforcement jurisdiction.\(^5\)

In international law there are several jurisdictional principles that attempt to chart the extent of jurisdiction. Two of these theories are the territorial principle and the nationality principle. Jurisdiction is exercised primarily within the territorial bounds of the state, but may extend further based on the nationality of the perpetrator or the location of the crime committed. The territorial principle is a foundation of international law which gives states the right to legislate

\(^4\) Shaw, p. 665.
\(^5\) Ibid
and govern without external interference within their own borders. The logical consequence of this principle is that a state has jurisdiction over all crimes committed within its borders. This applies to foreign nationals committing crimes in a state which they are a citizen of. Vice versa this principle also prevents the prosecution of crimes committed outside a state’s borders even if they are committed against that the states own citizens. This system of jurisdiction may at first seem convenient as both victim and perpetrator as well as any witnesses will all be in the same country, making it easier to bring all persons to, trial. However this situation can quickly become complicated in the case of competing jurisdictions. For example, if the perpetrator fires a gun across a border on an individual in the neighbouring state, then both states would have jurisdiction to prosecute this crime. The state where the gun was fired would have what is called subjective territorial jurisdiction while the latter state would have objective territorial jurisdiction. This also applies in multinational cases of conspiracy, Immigration crimes, or airline bombings. When examining which of the competing jurisdictions take precedent, the courts in question, weigh the circumstances of the crime to determine which jurisdiction the most substantial or significant element of the crime occurred.

The territorial jurisdiction principle is quite easy to grasp as it fits many peoples preconceived idea of what a state is. A land mass sectioned off by its borders and controlled by its government. But a state is also a collection of people that live within those borders, and it is crucial that a link between all three aspects is established to ensure the states continued existence. The link between people, borders, and the government is established through the concept of nationality which is protected in numerous international treaties and conventions. In international law nationality plays a key role in determining an individual’s rights and obligations. For instance, a state cannot prosecute a foreign national for a crime that was not committed in their own territory. Despite the crucial nature of nationality within international law there are large differences between states in how nationality is treated. Both in what rights, privileges, and obligations go along with it and how it is granted. When it comes

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6 See e.g. the separate Opinion of Judge Guillaume in Cong v. Belgium, ICJ Reports, 2002, pp. 3, 36; 128 ILR, pp. 60, 92.
8 Lockerbie case, CR 92/3, pp. 11-12
9 La Forest J in Libman v. The Queen (1985) 21 CCC (3d) 206
10 Introduction to International criminal law p. 48
12 Shaw p. 660
to how nationality is granted, international law generally leaves this issue open to the jurisdictions of individual states.\textsuperscript{13} However some attempts have been made to better define the concept of nationality in international law precedent. In the Nottenbohm case the ICJ defined nationality based on state practice as: “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”\textsuperscript{14} For many countries these rights and duties extend to criminal law and grant states jurisdiction over their nationals regardless of where the crime occurred. This form of jurisdiction has primarily been adopted by countries with Continental European legal systems.\textsuperscript{15} However common law countries will still prosecute nationals who have committed serious crime abroad such as treason and murder.\textsuperscript{16}

Another jurisdictional principal present in international criminal law is the universality principle. Under the universality principle all states have the jurisdiction to investigate and prosecute certain crimes. These crimes are particularly offensive or harmful to the international community and it is therefore in the interest of all states to prosecute them.\textsuperscript{17} Historically universal jurisdiction was developed to prosecute piracy. The principle was applied for several different reasons such as: that pirates were not states entities and thus did not fall under the regular jurisdiction of any state,\textsuperscript{18} that pirates were Hostis Humanis Generis or enemies of all mankind,\textsuperscript{19} and that the act of piracy was deemed so heinous that all state had jurisdiction to prosecute.\textsuperscript{20} However, in recent years the principle has also been applied to war crimes, crimes against peace, and crimes against humanity.\textsuperscript{21} The application of universal jurisdiction on war crimes grew as a consequence of World War II. From 1945 onwards articles were adopted to allow international court’s jurisdiction over war crimes and crimes against and humanity.\textsuperscript{22} The Geneva Conventions of 1949 would also grant universal jurisdiction for grave breaches of international law.\textsuperscript{23} In 1968 the UN general assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The

\textsuperscript{13} Nationality Decrees in Tunis and Morocco PCIJ, Series B, No. 4, 1923; 2 AD, p.349.
\textsuperscript{14} ICJ Reports, 1955, pp. 4, 23; 22 ILR, pp. 349, 360.
\textsuperscript{15} Shaw p. 661
\textsuperscript{16} Ibid
\textsuperscript{17} Cryer 4th edition p. 668
\textsuperscript{19} Ibid p. 989
\textsuperscript{20} Ibid p. 995
\textsuperscript{21} Shaw p. 668
\textsuperscript{22} See Article 6 of the Charter of the International Military of 1945. See also UN Resolution 95(I)
\textsuperscript{23} Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, article 129 of Geneva Convention III, and article 146 of Geneva Convention IV
Convention removed statutory limitations for war crimes and crimes against humanity, categorizing them as a separate and graver category of crimes in international criminal law.\textsuperscript{24} This convention also established personal responsibility for state actors responsible for carrying out these crimes.\textsuperscript{25}

The idea of universal jurisdiction and personal responsibility would continue to develop in international tribunals such as the ICTY and ICTR. This would later be codified in the 1998 Rome Statute defining the jurisdiction of the ICC as covering the “most serious crimes of concern to the international community as a whole”.\textsuperscript{26} Article 25 of the statute also goes on to establish personal responsibility for crimes committed within the ICCs jurisdiction regardless of the official position of the perpetrator. The International Law Commission is an institution responsible for codifying international law and would continue to establish the applicability of universal jurisdiction on crimes such as aggression, genocide, crimes against humanity, and war crimes.\textsuperscript{27} The commentary to this Draft Code also states that national courts of states parties are able to exercise the “broadest possible jurisdiction” over crimes under the principle of universal jurisdiction.\textsuperscript{28}

In conclusion jurisdiction is the ability to exercise power and authority when making decisions on laws and policy. Jurisdiction is based on state practice and international treaties, but it is also influenced by jurisdictional principals. In international criminal law, states generally have sole jurisdiction over their own internal affairs but there are several exceptions to this rule. For instance, under the nationality principle states may prosecute their nationals even when their crimes were committed in another country. The interactions between these principles form the basis of the current legal landscape of jurisdictions. However, in the modern era an increasing amount of international criminal law is being handled by international institutions.

\textsuperscript{24} The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Article 1  
\textsuperscript{25} The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Article II  
\textsuperscript{26} The Rome statute article 5  
\textsuperscript{27} Draft Code of Crimes against the Peace and Security of Mankind in 1996, Articles 16, 17, 18, 19, 20  
3 The concept of immunity in international law

This section will discuss the concept of the immunity of heads of state. It will discuss both personal immunity and functional immunity. The discussion will largely be based on the application of immunity in international law as well as interpretations of different legal scholars. As part of the ICCs role, it is granted jurisdiction to enforce the articles of the Rome Statute on its member states. This is part of the ICCs enforcement jurisdiction.

Immunity is a legal privilege granting certain persons exception from legal requirements, prosecution, or other penalties enacted from statutes or national laws. Immunity is rarely all encompassing and typically only grants exceptions within a certain role or area. Immunity has several different purposes such as protecting officials carrying out sensitive duties such as police and other government officials. Immunity is granted to these officials so they may act within the boundaries of their role without fear of judicial pressure. In the international context immunity is granted to high-ranking government officials such as heads of state, leaders of government, and diplomats. The origin of immunity can largely be traced back to diplomatic immunity as it was necessary for diplomats to be granted exemptions from the laws of their host country to carry out their duties. Similar reasons exist for the immunity granted to heads of state. Another reason for granting immunity to heads of state is to ensure equality between sovereigns. Sovereign equality is a legal principle that asserts that states cannot interfere with another state’s internal affairs. A consequence of this principle is that states cannot prosecute heads of states as that would greatly affect that country’s internal governance. The concept of immunity for heads of state is a product of customary international law and grants immunities to those performing acts of state (functional immunity) and those holding a particular office (personal immunity). The origins of both dates back thousands of years to when it was a diplomatic necessity to ensure the safe passage of envoys between states.

30 Ibid
32 Ibid
33 Shaw p. 697
34 Ibid
Functional immunity (or immunity ratione materiae) is granted to acts committed on behalf of a state. Functional immunity does not grant blanket protection to the officials committing these acts. It does not protect officials from prosecution against acts they commit in their private capacity. This form of immunity is directly linked to the principle of sovereign equality. In this context this means that a state’s action cannot be judged by another state without the consent of the judged state.  

Personal immunity (or immunity ratione persone) does not protect specific acts committed by state officials. Rather it grants complete immunity to a smaller group of officials for as long as they serve in a representative role for their state. Unlike functional immunity which protects official acts indefinitely, personal immunity only protects officials for as long as they inhabit their role. Personal immunity makes no differentiation between crimes committed in a private or state capacity.

Both forms of immunity grants privileges to state officials but it is the state who is the true beneficiary as this immunity protects its official acts and enables it to carry out its diplomatic missions. Much like a ship cannot sail without the crew a state cannot act without its officials and it is only because of this that immunity is granted to state officials. However, a state can waive immunity for any official regardless of the official’s own intent.

3.1 Functional Immunity

Heads of state are granted both personal and functional immunity to carry out their duty as representatives of their state. This grants broad protections from prosecution for heads of state while both in and out of office. However, case law has shown that this protection is by no means absolute. The case of former head of state Augusto Pinochet shows the limits of functional immunity in international criminal law. Pinochet would apply to quash the warrants for his arrest based on his functional immunity as a former head of state. The case was heard in the United Kingdom due to Spain issuing an extradition request for torture while Pinochet was

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36 Shaw p.696
37 Shaw p.698
39 Ibid
visiting the United Kingdom. It was eventually brought to the house of lords where it was heard and then due to procedural reasons reheard. In the second hearing each of the seven judges motivated their decision to extradite differently. However, the most conservative interpretation still states that former heads of state can be prosecuted for crimes where official involvement is a necessary element of the crime as it is in the 1984 Torture Convention. This is best described by one of the judges, Lord Millet:

“International law cannot be supposed to have established a crime… and at the same time to have provided an immunity which is co extensive with the obligation it seeks to impose.”

Another broader reading of the Pinochet decision is that granting functional immunity to an act and then specifically condemning that act as an international crime is a cumbersome contradiction. Therefore, functional immunity cannot be applied to international crimes or at the very least so called “core crimes”. The Pinochet decision does not give a definite interpretation of the limits to functional immunity in international law. However, the national UK courts have taken a narrow interpretation of the decision as only applicable to the use of Torture Convention.

The limits of functional immunity have also been discussed in several other cases. For instance, during the Nuremberg trials a common defence for the atrocities that took place during the war were that they were official acts and therefore protected by functional immunity. This argument was dismantled by the Nuremberg tribunal as they argued that war crimes fall outside of states competency. Therefore, an official cannot gain functional immunity for his or her actions by claiming that they were ordered by the state. This interpretation is built on the idea that it would be an unacceptable contradiction if international law both protects and punishes the same exact actions. Furthermore, individuals cannot hide behind state authority when their duty to follow international law transcends their national obligations. This interpretation of the limits of functional immunity has been supported by both the International Law Commission (ILC) and the General Assembly as Principle III of the Nuremberg Principles. The ILC has found that

41 R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3) [1992] 2 All ER 97, HL. P. 179.
functional immunity does not protect core crimes and that individuals acting as part of a state can bear individual criminal liability.\textsuperscript{43}

More recently this interpretation has also affected the judgements of international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY). For example, in the Blaškić trial that although functional immunity is a “well-established rule of customary international law with the exception that those responsible for war crimes, crimes against humanity and genocide… cannot invoke immunity for national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity”.\textsuperscript{44}

There seems to be consensus among international courts on exceptions to functional immunity although there are still doubts as to the scope of these exceptions. In the Pinochet case some of judges agreed that isolated acts of torture would not be sufficient to dismiss functional immunity. In that case the torture needed to reach the scale of a crime against humanity to be able to dismiss functional immunity. In the Italian case Lozano, an American soldier in Iraq opened fire on a car containing an Italian agent as it was speeding towards a checkpoint. The Italian court found that the American soldier had not committed a war crime due to the behaviour of the car approaching the checkpoint. More importantly however the court affirmed on a general level that functional immunity does not supersede the prosecution of international crimes. However, the court also suggested that these international crimes must pass a certain threshold by being odious or inhuman or involve scale or planning.\textsuperscript{45} This idea of a threshold for international prosecution seems to be somewhat shared by the ILC. The ILC has included genocide, crimes against humanity, and war crimes as exceptions to functional immunity in its draft articles on immunity from foreign criminal Jurisdiction.\textsuperscript{46}

\textsuperscript{43} International Law Commission, Immunity of state Officials from Foreign Criminal Jurisdiction, UN doc. A/72/10 (2017) paras. 71-4.

\textsuperscript{44} Blaškić, ICTY AC, 29 October 1997, para. 41. See also Furndzija, ICTY TC II, 10 December 1998, para. 140.

\textsuperscript{45} Antonio Cassese, "The Italian Court of Cassation Misapprehends the Notion of War Crimes" (2008) 6 JICJ 1085-8.

\textsuperscript{46} International Law Comission (2017) Immunity of state Officials from Foreign Criminal Jurisdiction.
3.2 Personal Immunity

Personal immunity is generally treated as absolute. Meaning individuals that have been granted this immunity cannot be prosecuted or even detained on any grounds. This form of immunity is primarily granted to heads of state. The reason for the absolute nature of personal immunity is largely due to the important role that heads of state play in diplomatic relations. A head of state is the representative of the state they serve and as such prosecuting a head of state would also mean prosecuting the state which they represent, in complete disregard to the principle of sovereignty equality.

While personal immunity is by its nature more absolute than functional immunity there have been attempts to argue for exceptions to personal immunity. Due to mounting pressure or incentives, exceptions personal immunity has been considered for cases of murder and plots against monarchs. In each of these cases it was concluded that the advantages of the status quo the systems flaws and disadvantages. This is due to the essential nature of personal immunity in diplomatic relations. This view of personal immunity has been tried in several cases against controversial figures such as Fidel Castro and Muammar al Qaddafi. In the Qaddafi case the French Cour de Cassation found that personal immunity applied to heads of state even for acts as severe as terrorism. Other states have come to similar conclusions about the extent of personal immunity in the Fidel Castro case.

The concept of personal immunity is also discussed in the Arrest Warrant case. The judgement in that case carves out several exemptions to personal immunity for serious crimes. Firstly, the offender may be tried in their national court system; secondly, they may be prosecuted if their home country waives their immunity; thirdly, they may be prosecuted once they cease to hold office for crimes committed in a private capacity; finally they may be

48 Ibid
49 Ibid
50 Cryer 2nd edition p. 518
51 Ibid
52 Ibid
Prosecuted by international courts when such courts holds relevant jurisdiction.\textsuperscript{56} While on the whole this judgement is in line with previous precedent upholding absolute personal immunity certain elements of the case have been questioned. For instance, some commentators have questioned whether state practice supports the ICJs assertion that ministers enjoy personal immunity when on “private visits”.\textsuperscript{57} There are many reasons why this assertion was questioned. Firstly, the majority of judges in the arrest warrant case dissented or distanced themselves from this assertion.\textsuperscript{58} Secondly previous discussion on immunity for state visitors only discussed the granting of immunity on official visits.\textsuperscript{59} When a host state has not invited or consented to the visit of an official, it is not reasonable to assume that full immunity is applied implicitly.\textsuperscript{60} Thirdly the necessity of immunity for carrying out of official duties cannot be applicable when officials travel in a private capacity for holidays.\textsuperscript{61}

The extent of personal immunity has created issues for states that wish to hold officials accountable for criminal actions perpetrated across borders. To avoid individuals acting with complete impunity states have created international tribunals and empowered them to supersede personal immunity. For instance, in the case of the ICC, states arties relinquish complete immunity for their officials by signing and ratifying the Rome statute.\textsuperscript{62} This system of relinquishing immunity for international crimes has not gone without criticism. The African Union has argued that heads of state should be exempt from prosecution by international tribunals.\textsuperscript{63} Kenya has also suggested that an exemption for heads of state be added to the Rome statute.\textsuperscript{64} Neither has led to any change in the current system.

There are many reasons why heads of state are not exempt from international courts. The primary reason is that it would conflict with the central purpose of the ICC.\textsuperscript{65} The International Criminal Court aims to hold perpetrators of the most serious crimes accountable for their actions.

\textsuperscript{56} Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgement, 14 February 2002 [2002] ICJ Reports 32, para. 61.
\textsuperscript{58} Seven out of the thirteen judges dissented or distanced themselves according to (Cryer p 519.)
\textsuperscript{59} Convention on Special Missions 1969, Art. 21; US Restatement (Third) of Foreign Relations Law, s. 464, note 14
\textsuperscript{60} Cryer p. 519
\textsuperscript{61} Arrest Warrant para. 55
\textsuperscript{62} Rome statute article 27
\textsuperscript{63} African Union, Ext/Assembly/AU/Decision 1 (October 2013) para. 10.
\textsuperscript{64} Kenya Proposal of Amendments, UN Doc. C.N.1026. 20113.TREATIES.XVIII.10 (14 March 2014)
\textsuperscript{65} An Introduction to International Criminal Law and Procedure, second edition p.552
and ensure that even those at the highest level of power do not escape justice. \(^{66}\) If prosecutorial exemptions were granted for heads of state, it would defeat this purpose and encourage further abuses of power from the perpetrators of these crimes.\(^ {67}\) However, prosecuting a head of state can have disastrous consequences for a country’s development, governance, and stability.\(^ {68}\) It is therefore necessary to weigh these factors against each other to find an appropriate time and place for judicial intervention.\(^ {69}\)

### 3.2.1 Relinquishing personal immunity

There are two main legal avenues for relinquishing personal immunity. The first avenue is through decisions made by the UN Security Council. The second avenue is ratification of the Rome statute. The UN Security Council can relinquish personal immunity through a chapter VII decision.\(^ {70}\) All members of the UN charter have consented to the UN Security Council having the power to relinquish personal immunity in this way. The UN Security Council is also given discretion in determining appropriate measures to maintain or restore international peace and security through the use of force according to Article 42 or without force according to Article 41 of the UN Charter. \(^ {71}\) UN members are obliged to cooperate with these measures from the council according to Article 25 and 48 and these obligations supersede even other treaty commitments. \(^ {72}\) The consequence of these articles are that when the Security Council establishes ad hoc Tribunals such as the ICTY and ICTR they established the principle that official positions of defendants are not a bar to prosecution. \(^ {73}\) Furthermore, the Security Council ordered all states to cooperate fully with the requests from the ad hoc tribunals, regardless of whether these requests are in conflict with previously established immunities. States under investigation by these tribunals were also unable to use personal immunity as a

\(^{66}\) Ibid

\(^{67}\) Ibid

\(^{68}\) Ibid p. 553

\(^{69}\) Ibid

\(^{70}\) Ibid

\(^{71}\) Ibid

\(^{72}\) UN Charter, Arts. 25, 41, 49 and especially Art 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present charter shall prevail".

\(^{73}\) ICTY Statute, Art. 7(2); ICTR Statute, Art. 6(2).
defence due to their obligations under the UN Charter.\textsuperscript{74} This has generally been accepted as a valid method of removing personal immunity from alleged perpetrators.\textsuperscript{75}

The ICC statute also provides a method of relinquishing personal immunity. States that ratify the Rome statute are obliged to cooperate fully with the ICC. When the ICC requests the surrender of an individual from a member state that state must cooperate regardless of whether that individual has been granted immunity.\textsuperscript{76} Furthermore, article 27(2) of the Rome statute states clearly that: “immunities or special personal rules which may attach to the official capacity of a person… shall not bar the Court from exercising its jurisdiction”. When ratifying these articles states accept that the immunities which their officials normally enjoy in international law do not prevent the ICC from prosecuting these officials.\textsuperscript{77}

Article 27 is not the only article in which immunity is mentioned in the Rome statute and should also be discussed together with article 98(1). Article 98(1) states that the ICC will not proceed with requests for surrender if such a request would conflict with previous obligations to a third state unless the ICC can obtain a waiver of immunity from that third state. These articles appear contradictory to one another as article 27 rejects immunity before the ICC while article 98 upholds immunity. This is because these articles deal with the issue of immunity in different situations. Article 98(1) deals with a situation where the ICCs request conflicts with obligations to a third state outside of the ICC system. While article 27 deals with situations where there is no conflict between the requested obligations to the ICC and a potential third state. It is generally accepted that the result of these articles is a regime wherein state parties agree to relinquish the immunities of their own officials before the ICC while still respecting the immunities of states outside the ICC system.\textsuperscript{78}

The authors Robert Cryer, Darryl Robinson and Sergey Vasiliev expand upon this interplay by presenting three scenarios for how article 27 and article 98(1) can interact.\textsuperscript{79} These scenarios stem from a situation in which a state obligated to cooperate with the ICC is asked to surrender:

\textsuperscript{74} Koller, “Immunities of Foreign Ministers” (n. 66 above) 35-6; Gaeta, “Official Capacity” (n. 64 above)989
\textsuperscript{76} ICC Statute, Art. 86 (obligation to cooperate), Art 89(surrender of persons to the court)
\textsuperscript{77} The Rome Statue and Domestic Legal Orders (Rome, 2000) vol. 1;
\textsuperscript{78} Cryer p. 523
\textsuperscript{79} Ibid
its own officials, an official of another state party, or an official of a non-state party. In the first scenario Article 98(1) does not apply and the requested state is obliged to cooperate without reservation.\textsuperscript{80} In the second scenario the dominant opinion is that a state does not need a waiver from the third state party.\textsuperscript{81} This is because the ICCs jurisdiction removes the issue of immunity between states as they have both relinquished immunity for their officials when cooperating with the ICC. Therefore, there are no conflicting obligations in this scenario. The same reasons apply for third states that have voluntarily accepted the same obligations as state parties through an ad hoc agreement with the ICC.\textsuperscript{82} In the third scenario where an official is granted immunity by a third state then immunity would persist unless that state willingly relinquished the immunity of that official. That immunity must then be respected according to article 98(1). This is primarily due to the voluntary and horizontal nature of the ICC as it is unable immunities from states that have not accepted its jurisdiction.\textsuperscript{83}

Even if a third-party state refuses to cooperate and relinquish immunity for its officials there are still other methods to successfully execute a request for surrender. The most effective of these methods are Security Council Referrals. However, it is still under debate whether immunities are stripped when the Security Council refers an issue to the ICC prosecutor and order all relevant state to cooperate fully. This question has been discussed in cases such the Al-Bashir case. When examining the issue of noncompliance by member states hosting Al-Bashir without arresting him the Pre-Trial Chamber of the ICC found that Al-Bashir was not immune from arrest or surrender to the ICC. However, the judges used different interpretations of international law to reach this conclusion for each state.\textsuperscript{84} In the case of Malawi and Chads failure to arrest Al-Bashir the Pre-trial Chamber motivated their conclusion by referencing the Taylor theory which states that personal Immunity does not apply before international courts.\textsuperscript{85} In the case of the failure to arrest by the DRC the Pre-Trial Chamber found that the UN Security Council had “implicitly waived” Al-Bashir’s immunities.\textsuperscript{86} The obligations imposed by the Security Council remove the possibility for Sudan to oppose any ICC proceedings on the basis

\textsuperscript{80} Ibid p. 523
\textsuperscript{81} Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford, 2003) See also Al Bashur Arrest Warrant

\textsuperscript{82} The Rome statute Articles 88 and 27
\textsuperscript{83} Shaw p.670

\textsuperscript{84} Manuel Ventura “Prosecutor v Al-Bashir (2017) 111 AJIL 1007.

\textsuperscript{85} Al Bashir Arrest Warrant, ICC PTC 1, 12 December 2011 (ICC-02/05-01/09-139) (the Malawi decision); Al Bashir Arrest Warrant, ICC PTC I, 13 December 2911 (ICC-02/05-01/09-140) (the "Chad decision")

\textsuperscript{86} Al Bashir, ICC PTC II, 9 April 2014 (ICC-02/05-01/09-140) ("the DRC decision")
of immunity. Some authors such as Manuel Ventura have suggested that this interpretation is able to reconcile the conflicts between immunity, the authority of the Security Council, and the Rome statute.\(^{87}\)

The legal interpretations given in each case have not been without controversy and have been debated in legal literature.\(^{88}\) For instance in the case concerning South Africa and Jordan it was found by the ICC Pre-Trial chamber that the Security Council’s order to cooperate fully with the ICC is sufficient to strip immunities from officials.\(^{89}\) An objection to this interpretation has been raised by some, arguing that a referral by the Security Council does not alter the legal positions of states in relation to the ICC.\(^{90}\) This argument ignores the basis of the obligation as it does not arise from the referral itself but rather from the decision of the Security Council under chapter VII of the UN charter.\(^{91}\)

Another objection to the interpretations of international law proposed by the Pre-Trial Chamber is that the ICC cannot create obligations for non-state parties as its authority is reliant on treaties.\(^{92}\) However this argument also fails to accurately determine the source of these obligations. As again the source of the obligation is the Chapter VII resolution ordering full cooperation. The source of the obligation does not change when the Security Council demands that states cooperate with the ICC. However, the content of the obligation does change in accordance with ICCs mission. Similar complaints alleging that these interpretations transform a state into a party of the Rome statute have also been made.\(^{93}\) However, a state ordered to cooperate with the ICC does not automatically become party to the Rome statute. The state is expected to act according to the treaty but only in regard to the specific situation which was referred by the UNSC. The state does not take on any additional obligations outside of this scope.\(^{94}\)

\(^{87}\) Manuel Ventura, “Prosecutor v Al-Bashir” (2017) 111(4) AJIL 1007, 1011.
\(^{89}\) ICC-02/05-01/09-397
\(^{92}\) Cryer 4\(^{th}\) edition p. 525.
\(^{93}\) Ibid
\(^{94}\) See e.g. SC Res. 1373(2001). And see e.g. Case Concerning the Questions of Interpretation and application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States), Provisional Measures, ICJ, 14 April 1992, para. 42.
Still others have argued that the obligation to “cooperate fully” does not explicitly describe the loss of personal immunity. The current state of jurisprudence has yet to conclusively dismantle this argument. However, there are reasons to be sceptical of this line of thinking. For instance, as was discussed earlier the order to cooperate made by the Security Council obligate states to act in line with the Rome statute. States must therefore accept that immunities may not be used as a defence before the court according to article 27(2) of the Rome statute. More convincing than this is the fact that the term “cooperate fully” was used by the Security Council in the ICTY and ICTR, and in both cases it was broadly understood to also strip immunities before those courts. Still some have argued that the order to cooperate fully with the ICC only applied only to “the Government of Sudan and all other parties to the conflict in Darfur”. Other states and organizations were “urged” to cooperate fully but had no obligation to do so. In this system states that are not parties to the ICC are permitted to arrest and surrender Al-Bashir to the court as the Sudan’s immunities have been removed when placed in front of the ICC.

3.2.2 Conclusions

In conclusion the laws surrounding immunity are complex and not without controversy. However, both functional and personal immunity serve important functions within international law and politics. Having a greater understanding of the purpose of these immunities allows us to better understand the interplay between immunity and jurisdiction. Functional immunity protects the official actions of states made by its officials while personal immunity protects officials critical to the governance of a state or who represent the state in an international context. As a result, functional immunity covers a much smaller scope and has far more exceptions than personal immunity. Personal immunity is far more absolute and allows for fewer exceptions. Relinquishing personal immunity is largely a voluntary decision made by states when ratifying international treaties such as the Rome statute. States outside of these judicial systems do not lose their immunities and state parties are expected to respect the immunities of third states. States can still have their immunities involuntarily relinquished due to their obligations to the UN Security Council under chapter VII of the UN charter.

95 SC Res. 827(1993), para. 41, and SC Res. 935(1994), para. 2
96 Cryer 4th edition p. 526
97 SC Res. 1593(2005), para 2
4 The ICCs cooperation with non-member states when carrying out arrest warrants

4.1 The ICCs relationship with member states

Cooperation is the basis for all international criminal proceedings. Unlike other international organizations such as the UN the ICC lacks its own police force, military, and investigative units. It is therefore fully dependent on the cooperation of its members to investigate, detain and transport perpetrators of international crimes. 99

The relationship between the ICC and the 123 member states is regulated by the Rome statute. The Rome statute states in article 86 that states are obligated to fully cooperate in the investigation and prosecution of crimes within the jurisdiction of the court. States can independently choose to cooperate with the ICC however, if need be, the court can also send a request for cooperation. The terms of this request are described in article 87 of the Rome Statute. Article 87 allows the ICC to request the opening of prosecutions, investigations, as well as request that authorities share documents relating to these proceedings. The court can make requests directly to states through diplomatic channels.100 Furthermore, the court can ask for information or documents directly from intergovernmental agencies.101 Article 87 also allows the court to make requests for cooperation to non-member states102. This will be discussed further in chapter 4.3. If a state fails to comply with a request for cooperation made by the court, then the ICC can find that the state is refusing to comply and refer the matter to the Assembly of State Parties (ASP). If the security council had originally requested an investigation into this matter by the ICC, then the matter can also be referred to the security council.103

The issue of state cooperation with the ICC is a delicate matter. The court must respect the sovereignty of other states while still maintaining its effectiveness as an institution. After a finding of non-cooperation is made by the ICC it is up to the ASP or the security council to decide what the consequences should be for the uncooperative state. Under normal circumstances when a state fails to uphold its obligations under a treaty such as the Rome statue

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99 Cryer 2nd edition p. 518
100 Rome Statute Article 87 (1(a))
101 Ibid (6)
102 Ibid (5)
103 Ibid (7)
then it is removed from that treaty. While this is possible for members of the ICC. The ICC is fully dependent on its members to function thus removing members weakens its ability to pursue its goal and prosecute criminals. While it is theoretically possible for the ASP or the UNSC to reprimand recalcitrant behaviour it has yet to be done and the likelihood of it happening in the future is slim. This does not mean that there are no consequences for states that refuse to cooperate. Customary international law allows states to act independently to apply economic or political pressure to signal their discontent with another state’s actions. These actions would be far from the judicial nature of the ICC and risk closing the door to future cooperation with states.104

States obligation to cooperate with the ICC can sometimes conflict with other international obligations such as immunity or competing requests for cooperation. In the case of competing requests for cooperation the Rome statute establishes a variety of factors that must be weighed against each other to determine which request for cooperation should be adhered to.105 Generally if two requests for extradition were made to a member state, then the ICCs request has priority as long as the court has found the request admissible according to articles 18 and 19.106 If a determination regarding the cases admissibility has not been made by the ICC then the state may begin dealing with the request but cannot extradite a person until a determination has been made by the ICC. In some cases, the requesting state may have prior international agreements on the extradition of prisoners. In such cases the requested state may have several factors. These factors are (a) the respective dates of the requests (b) the interests of the requesting state including, when relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and (c) The possibility of subsequent surrender between the court and the requesting state.107

In regard to other matters of cooperation such as identification, the sharing of documents and evidence, and execution of search and seizures108 member states must consult the ICC if any prior international legal obligations conflict with their obligations to the ICC.109 If assistance
cannot be offered to the ICC without breaking a prior international agreement, then the ICC can modify the request as to not conflict with other obligations. 110 Article 93 also allows member states to deny a request for the disclosure of documents if such an action would threaten those states national security.111 However regardless of the reason for denial the state must investigate whether or not their alternatives means of cooperation conflict with national security or international obligations.112 If a request is denied, then the state must give a written explanation as to the reasons why the request cannot be fulfilled to the prosecutor or the Court.113

4.2 ICC cooperation with non-member states

The ICC can request aid and cooperation from states that have not ratified the Rome statute. According to article 87 of the Rome statute the ICC may request such aid through ad hoc arrangements or agreements. Non-member states are not bound by the ICC in the same manner as their members but if they refuse to cooperate within the terms of the agreement then the ICC can inform the ASP or the security council.114 These agreements are of a more reciprocal nature than the relationship between members states and the ICC. States agree to allow the ICC to act within its borders in exchange for assistance in tackling serious crimes such as war crimes and crimes against humanity. They are not bound by a previous statute but have rather negotiated the terms for which the ICC may act within its borders.115

The most common form of these arrangements with non-member states are the international tribunals created to deal with specific conflicts before the establishment of the ICC. These include the ICTY and the ICTR.116 The model of cooperation between states party to the ICTY or ICTR mirrors the relationship between the ICC and its members. Cooperation with non-state parties has historically not been an issue for these tribunals. This is because most states are part of the UN and are thus obligated to cooperate with the tribunals.117 The ICC is independent from the UN and non-members are thus obligated to cooperate in the same manner. However, in situations where a case has been referred to the ICC by the UN Security Council the UNSC

110 Ibid
111 Ibid art 93(4)
112 Ibid art 93 (5)
113 Ibid art 93(6)
114 Rome statute article 87(5(a-b))
115 Cryer 2nd edition p. 583
116 Cryer 2nd edition p. 515
can obligate UN members to cooperate with the ICC.\textsuperscript{118} This has been done in several cases such as the Darfur case but is by no means common or uncontroversial.\textsuperscript{119} In general, the ICCs relationship with non-member states is built on voluntary cooperation. This is also the case for international institutions such as the EU, and SFOR, The ICC remains independent from the UN but retains a special relationship with it via a Relationship agreement.\textsuperscript{120}

The cooperation of non-member states has proved essential to the ICCs efforts to combat serious international crimes.\textsuperscript{121} While this cooperation is built primarily on voluntary agreements and ad hoc arrangements there are some instances where states must cooperate with the ICC. For example, when the UNSC refers a situation to the ICC prosecutor it also creates an obligation for all UN members to cooperate fully with the ICC.\textsuperscript{122} However, the consequences of non-compliance for non-member states are not at all clear in current international law.\textsuperscript{123}There are systems in place for reporting noncompliance, but these systems amount to little more than public condemnation. The reason for this light-handed approach from the ICC and the UNSC seems to be part of a difficult balancing act. These institutions are reliant on the continued cooperation of these states and must balance that against their goal of tackling impunity and prosecuting international crimes.\textsuperscript{124} A more heavy-handed approach by the ICC or UNSC could damage their current working relationships with non-member states and potentially deter states from any future cooperation with these institutions.

\subsection*{4.3 Initiating prosecutions in the ICC}

There are three ways that a case can be initiated by the prosecutor of the ICC the first is state party referral. State party referral is when a country that has ratified the Rome Statute refers an alleged atrocity or war crime to the ICC prosecutor. There are certain restrictions on what kind of crimes can be referred, for example the crimes must have been committed on the territory of the state party making the referral or on the territory of another state party or by a national from

\begin{thebibliography}
\bibitem{118} Ibid
\bibitem{119} Cryer p. 584 second edition
\bibitem{121} An Introduction to International Criminal Law and Procedure, second edition p.553
\bibitem{122} Ibid
\bibitem{123} Ibid
\bibitem{124} Ibid
\end{thebibliography}
the referring state party or another state party. Examples of investigations started through state party referral are the situations in the Democratic Republic of Congo,125 Uganda,126 Central African Republic,127 Mali,128 and Gabon129.

The second way in which a matter can be referred to the ICC prosecutor is a UN Security Council referral. The UN Security Council may refer alleged crimes committed in any country to the ICC prosecutor by passing a resolution authorized by the UN charter. This means that the crime does not have to have been committed on or against a member of the ICC. The drawback of this type of referral is that it can be vetoed by any member of security council. Examples of such referrals by the UN security council are March 2005 when the UNSC referred the situation in the Sudan to the ICC130 and in February 2011 when the UNSC referred the situation in Libya to the ICC.131

The final way in which an investigation can be opened into alleged international crimes is that the prosecutor may start a preliminary examination proprio motu. The prosecutor may open such a preliminary examination when the crimes occur on the territory or by a national of any state party or on the territory or by a national of a non-state party that has consented to the ICCs Jurisdiction as in the case with Ukraine. In order to open up an investigation after the preliminary examination the prosecutor must receive approval from ICC judges in order to open up a formal investigation. Examples of Proprio Mortu investigations are the preliminary examinations into Afghanistan132 and Iraq133. When the ICC begins an investigation into a case, the ICC prosecutor starts a preliminary examination of the case. During this examination the ICC prosecutor must determine whether the alleged crimes satisfy the four criteria of jurisdiction in the Rome statute. The four criteria are temporal, territorial, subject matter, and personal jurisdiction.134

125 ICC-01/04
126 ICC-02/04
127 ICC-01/05
128 ICC-01/12
129 ICC-01/16
130 2005 UNSC Resolution 1593-Sudan Referral
131 2011 UNSC Resolution 1970-Libya Referral
132 ICC-02/17
133 ICC 2015 preliminary Investigation-Iraq
Temporal jurisdiction refers to a cutoff point in ICC jurisdiction. The ICC is unable to exercise jurisdiction over any crimes committed before the Rome Statute was ratified on 1st of July 2002. Territorial jurisdiction generally refers to states right to freely exercise jurisdiction within their own borders. However, since the ICC is an institution without borders the ICC can only exercise jurisdiction within the territory of states that have ratified the Rome Statute. The ICC exists to prosecute grave international crimes. Due to this, the ICC prosecutor must determine that an alleged crime falls within the scope of the ICC as defined by the Rome Statute. This requirement is called subject matter jurisdiction, and the alleged crime must be either a war crime, crime against humanity, genocide, or crimes of aggression.

The final jurisdictional criteria that the prosecutor must find to be present in their preliminary examination is personal jurisdiction. The ICC can only exercise jurisdiction over natural persons over the age of 18. They may not exercise jurisdiction over entities such as corporations, states, or other institutions. They may however prosecute individuals within those groups. Personal jurisdiction also restricts the ICCs jurisdiction to only nationals from a state that has ratified the Rome Statute or consented to ICCs jurisdiction.

When all these criteria are met the prosecutor continues their preliminary examination to determine if there are competing jurisdictions in the case. This is first done through an admissibility assessment. During this assessment the prosecutor examines whether any other courts have jurisdiction over the case. The ICCs role in international law is to be a court of last resort complementing the efforts of jurisdictions under the complementarity principle. If the prosecutor finds that another court is genuinely able and willing to prosecute the alleged perpetrator then they cannot continue their investigation or bring it before the ICC. Finally

135 Rome statute article 54
136 Ibid
137 Ibid
138 Ibid
139 Ibid
140 Rome Statute article 54
141 Ibid
142 Ibid
143 Ibid
144 Ibid
146 Ibid
147 Ibid
148 Ibid
149 Ibid
the prosecutor must weigh the gravity of the decision to investigate the alleged crime and whether or not it is in the best interests of justice. The ICC prosecutor weighs the gravity of the alleged crime by examining the scale, nature, manner, and impact of those crimes. The ICC prosecutor uses their own discretion to decide whether a continued investigation is in the best interest of justice.

When the prosecutor has finished their preliminary investigation, they may open a formal investigation into the alleged crimes. During the formal investigation the prosecutor will cooperate with state parties to further its investigation. As part of the investigation states may be asked to allow access to documents, provide personnel, locate witnesses, and identify crime sites. The prosecutor is legally required to gather as much evidence as possible through whatever means necessary during this stage.

Once enough evidence has been collected and there are reasonable grounds to believe that an individual is guilty of the crime alleged the prosecutor may request that the Pre-trial chamber of the ICC issue either a summons or an arrest warrant. The Pre-trial chamber can issue an arrest warrant for several reasons although the primary reason is always to ensure that the suspect appears at trial. The court may also choose to issue an arrest warrant if they believe that the suspect will tamper with the ongoing investigation or continue the alleged crime or similar acts. The ICC is dependent on the cooperation of its members to execute these arrest warrants, but it is also capable of drafting cooperation agreements with non-member states. This was done recently in the Bosco Ntaganda case where the ICC was able to ensure cooperation from both the United States and Rwanda.

The source of the ICCs jurisdiction is the Rome Statute which has been ratified by 123 countries. Each member state voluntarily submits to the ICCs jurisdiction and is obligated to cooperate with the court when requested. The Rome Statute also governs how and when the

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ICC may exercise its jurisdiction. Before a case is brought to trial the prosecutor must assess if the case falls under the ICCs jurisdiction based on several criteria in the Rome Statute. These criteria are based on jurisdictional principles such as territory, subject matter, time. These criteria exist to ensure that the cases ICC handles are of grave importance and do not conflict with competing jurisdiction.

4.4 Arrest warrants

When the prosecutor has opened a case and has begun investigating an instance of a war crime being committed in a member state or other states in which they have consent to have jurisdiction they are able to request cooperation in a number of different ways. One of which is by issuing an arrest warrant or summons to appear. This action is regulated in article 58 of the Rome Statute and is described as follows: at any time after the initiation of an investigation the pretrial chamber shall on the application of the prosecutor issue a warrant of arrest of a person if having examined the application and the evidence or other information submitted by the prosecutor, it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court according to section B of article 58. The arrest of the person must be deemed necessary by the court or at least appear necessary in order to ensure one of three things. First to ensure the persons appearance at trial, second to ensure that the person does not obstruct or endanger the investigation or the court proceedings, and third parties where applicable, to prevent the person from continuing with the commission of that crime or related crime which is within the jurisdiction of the court, and which arises out of the same circumstances.

Article 58 also regulates the content of the application for an arrest warrant made by the prosecutor such as the name of the person, specific references to crimes, a concise statement of the facts which are alleged to constitute the crime a summary of evidence and most importantly the reason why the prosecutor believes that the arrest of this person is necessary. Furthermore, the content of the arrest warrant is also regulated in article 58. The arrest warrant

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160 Ibid
161 Ibid
162 Ibid
163 Ibid
164 Rome statute article 58
165 Ibid
must contain the name of the person and other relevant identifying information specific. This information includes a concise statement of the facts which are alleged to constitute those crimes.\textsuperscript{166} Once an arrest warrant has been made the court may request the provisional arrest or the surrender of the person under article 92 of the Rome statute.

5 ICC cases

Apart from the Rome Statute modern international criminal law is based on case law and customary law. There are several cases which have been influential in creating the landscape of International Criminal law. This section will discuss case precedent related to immunity for heads of state and ICC jurisdiction. These cases include Al Bashir, Kenyatta, the Belgian arrest warrant case, and the Pinochet case. The Al Bashir and Kenyatta cases both deal with heads of state and are most similar to the case of Putin and will therefore be discussed in greater detail while the Belgian arrest warrant case and the Pinochet case will give some context to important legal principles such as immunity, jurisdiction, and sovereignty equality.

5.1.1 Putin’s arrest warrant

On the 21\textsuperscript{st} of February 2022 roughly 8 years after the annexation of Crimea Vladimir Putin addresses the world in a televised address and announces his support and recognition of two breakaway regions in Ukraine, Donetsk, and Luhansk. Three days later the 24\textsuperscript{th} of February Putin announces a “Special Military Operations” in Ukraine to protect these breakaway regions from alleged Ukrainian aggression under article 51 of the United Nations Charter. Moments later missile and artillery strikes would rain down on Ukrainian cities marking the beginning of a war that has now lasted for almost two years killed hundreds of thousands of people and displaced millions more.\textsuperscript{167}

The response from the international community was swift and all encompassing. Sanctions were leveraged on Russian imports and exports while assets were seized from both private Russian citizens as well as diplomats, government officials, and government affiliated

\textsuperscript{166} Ibid
institutions such as the Wagner group and Russian state media. These sanctions had a chilling effect on the Russian economy and making the Russian state effectively a pariah in the eyes of most of the global community. Yet despite the sanctions and continued pressure Russia has continued its invasion of Ukraine and shows no signs of peacefully backing down from its current position.\textsuperscript{168}

During the onset of the war the sanctions had begun to apply pressure to the Russian economy, but the war was still escalating. Attacks on civilians had become more frequent with the use of cluster ammunitions and missile attacks against civilian targets. After successfully retaking much of the territory lost during the initial invasion the Ukrainian military and Ukrainian police uncovered evidence of atrocities and war crimes committed by the Russian army in places such as Bucha. After evidence had been uncovered the Ukrainian government petitioned the International Criminal Court (ICC) to investigate war crimes committed by Russia during the war. Thus, pressure was once again applied against the Russian government, not through economic sanctions but through international law.\textsuperscript{169}

It would however not only be the atrocities in Bucha or the bombing of civilians that led the ICC to open its investigation into Russian war crimes. On the 2\textsuperscript{nd} of March 2022 the Chief prosecutor of the ICC had announced that they were opening an investigation into the situation in Ukraine based on referrals from several states\textsuperscript{170} party to the ICC. The chief prosecutor stated that the scope of the investigation into Ukraine would encompass all allegations of war crimes, crimes against humanity, or genocide committed within Ukraine from November 2013 onwards. On the 17\textsuperscript{th} of March 2023 the ICC Pre-Trial Chamber issued the first arrest warrants from the investigation into Ukraine. These arrest warrants were for the president of Russia Vladimir Putin and the commissioner for Childrens Rights Lvova-Belova. These individuals


\textsuperscript{169} Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain, Japan, North Macedonia, and Northern Ireland.
have been accused of bearing responsibility for the unlawful deportation and transfer of children from occupied Ukraine to the Russian federation.\(^{171}\)

After this arrest warrant had been announced by the ICC the institution received backlash from several state actors. Unsurprisingly Russian spokesperson Dmitry Peskov criticized the arrest warrant as being “outrageous and unacceptable”.\(^{172}\) Peskov also stated that Russia does not recognize the jurisdiction of the ICC in this matter or any other case.\(^{173}\) Other officials such as the Serbian president Aleksandar Vucic\(^{174}\) and Chinese foreign affairs spokesperson Wang Wenbin criticized the political ramifications of the arrest warrant. Wang Wenbin stated that the ICC needed to respect head of state of immunity and not engage in politicization or double standards.\(^{175}\)

Despite the active arrest warrant against Vladimir Putin, he was invited by South Africa to attend the 2023 BRICS summit. This caused some controversy both in the international community and internally in South Africa. As signatories to the Rome Statute, it seemed likely that South Africa had to fulfil its obligations to arrest Putin. However, due to South Africa’s general attitude in inviting Putin the outcome of the visit remained an open question. Internally the ruling African National Congress faced back lash from opposition leaders stating that if the government did not arrest Putin, then they would order local police forces to arrest him if he entered their province.\(^{176}\) Despite domestic and international pressures South Africa continued to support its decision to invite Vladimir Putin by announcing in May 2023 that they would be granting him diplomatic immunity during his visit.\(^{177}\) South Africa had a difficult legal dilemma here as they had conflicting obligations as head of the BRICS summit and as a member of the ICC.\(^{178}\) Ultimately South Africa chose to resolve this dilemma by coming to a mutual


\(^{173}\) Ibid


\(^{176}\) "Putin will be arrested if he visits, says a South African opposition leader". The Telegraph. 28 April 2023.


\(^{178}\) "South Africa's diplomatic dilemma with Putin". Deutsche Welle. 2 June 2023.
agreement with Russia where the Russian foreign minister would attend instead of Vladimir Putin.\(^{179}\)

The case of Vladimir Putin remains unresolved. The case remains in the Pre-Trial stage but there has been no indication of the investigation being advanced by the prosecutor. The arrest warrant is still active but as of yet no attempt to arrest him as been made. The current state of this case is essentially a standoff between the ICC and the Russian government. The Russian government maintains that the ICC lacks jurisdiction over its head of state and that it is unable prosecute Putin due to his immunity. However, they have yet to challenge the ICCs arrest warrant by entering the borders of any ICC member states. South Africa’s recent mutual agreement with Russia also seems to indicate a level hesitancy in entering ICC member states. This does seem indicate that the Russian and perhaps Putin himself views the execution of the arrest warrant as very real possibility if they were to enter an ICC member state.

### 5.1.2 Al Bashir

The Al-Bashir is a significant case in the history of ICC case precedent. The case revolves around the legal proceeding against Omar Hassan Ahmad Al-Bashir for allegations of crimes against humanity, war crimes, and genocide committed in Darfur, Sudan, between 2003 and 2008.\(^{180}\) The ICC issued two arrest warrants against Omar Al-Bashir the first on 4 March 2009 and the second on 12 July 2010.\(^ {181}\) The Pre-Trial chamber motivated the arrest warrant on the basis on the fact that there were reasonable grounds to believe that Al-Bashir had committed the crimes alleged.\(^ {182}\) Following this a number of attempts to secure cooperation from members\(^ {183}\) of the ICC in the arrest of Al-Bashir were made. However, despite both external pressure from the ICC and internal pressure from several judicial systems and NGOs none of these attempts were successful.\(^ {184}\) Al-Bashir has yet to be brought before the ICC and the case remains in the Pre-Trial stage until he can be brought before the Court in the Hague.\(^ {185}\) The


\(^{180}\) International Criminal Court, The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09

\(^{181}\) Ibid

\(^{182}\) Ibid

\(^{183}\) A non-exhaustive list: Angola, Mali, Kenya, South African, Nigeria, the Democratic Republic of Congo, Ethiopia, Egypt, Morocco, Zambia, Rwanda and Chad.

\(^{184}\) Ibid

\(^{185}\) Ibid
states that refused to cooperate with the ICC were referred to the ASP or the UNSC awaiting further consequences.\textsuperscript{186} However as of now no consequences have been dealt against the states that refused to comply with the ICC.\textsuperscript{187}

Despite not reaching the trial stage this case has had a significant impact on international criminal law and the ICCs status. This is primarily due to the attempts to detain Omar Al-Bashir by other states. These attempts have demonstrated the level of cooperation that the ICC has with both independent and member states. As well as the failure of that cooperation in the execution of arrest warrants. This failure to cooperate has been show in a number of cases against various states but the most recent therefore most enlightening is the case against Jordan in 2019. In it the case against Jordan the ICC was tasked with interpreting conflicting international obligations when arresting a head of state.\textsuperscript{188} In the proceedings the ICCs central question was whether head of state immunity was applicable when an executing an arrest warrant. It’s important to note here that while Jordan was a member of the ICC at the time Sudan was not. This meant that the ICC had to determine whether the effects article 98(1) of the Rome statute prevented Jordan from executing the arrest warrant against a third state despite the resolution from the UNSC to cooperate fully with the ICC in the arrest of Al-Bashir.

In the end the ICC found that head of state immunity did not prevent Jordan from carrying out its obligation to arrest Al-Bashir. The ICC also found waiver described in article 98(1) of the Rome statute did not have to be attained as there was no state immunity to be waived.\textsuperscript{189} The court motivated their findings in two ways. The first being that state immunity does not apply when a case is brought before the ICC or any international tribunal. This is in line with previous proceedings concerning the non-cooperation of Malawi\textsuperscript{190} and Chad\textsuperscript{191}, and was based on article 27(2) of the Rome statute which states that immunities will not bar prosecutions brought before the ICC. The court further argued that this argument was in line with customary international law. The second way in which the court motivated its decision was by pointing to the effect of the UNSC resolution compelling all UN states to cooperate fully. According to the court the resolution put forth by the UNSC has placed Sudan under the same cooperation regime.

\textsuperscript{186} https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF
\textsuperscript{187} https://voelkerrechtsblog.org/the-climax-of-the-al-bashir-saga/
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\textsuperscript{191} ICC-02/05-01/09-151
as members of the ICC. More specifically the court found that Sudan would be obligated to cooperate under the cooperation regime set out in article 86 of the Rome statute. This cooperation regime would mean that the ICC would not need to request a waiver from Sudan and that Al-Bashir could not use his immunity to prevent prosecution due to article 27(2) of the Rome statute.

The case against Jordan and its failure to cooperate with the ICC is one of many in a long line of failed attempts to arrest Omar Al-Bashir. However, as the most recent case it paints strong picture of how the ICC is currently interpreting the relationship between immunities and court jurisdiction in issuing arrest warrants. Furthermore, it addresses and discusses much of the previous cases and arguments that have been brought before the ICC. All in all, it sets the stage for future prosecutions against heads of state and shows clear avenues for combatting immunity for acting heads of state. Although it also shows a worrying lack of consequences for states fail to adequately cooperate with the ICC. Al-Bashir is no longer an acting head of state, but this case will undoubtedly have major implications for the heads of state in international criminal law.

5.1.3 Kenyatta

The Kenyatta case refers to the attempted prosecution of Kenyan President Uhuru Kenyatta in 2012 by the ICC. Kenyatta was charged with crimes against humanity that occurred in the aftermath of Kenya's presidential election in 2007-2008. More than 1,200 people were killed and hundreds of thousands of people were forced to become refugees because of the violence.192

The prosecution accused the Kenyan government of failing to turn over vital evidence, phone records and bank statements belonging to the president that it claims could have established a link between Mr. Kenyatta and the Mungiki criminal organisation, which the president allegedly commissioned to carry out the killings.193 After assigning the situation to the Prosecutor the ICC approved the opening of an investigation into the crimes committed in Kenya in 2010.194 Following this the Prosecutor would issue a summons to appear to several individuals accused of crimes against humanity including Kenyatta. Initially the government of

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192 Case Information sheet the prosecutor v. Uhuru Kenyatta p.1
194 Case Information sheet the prosecutor v. Uhuru Kenyatta p.2
Kenya challenged the admissibility of this case being brought before the ICC. The challenge was denied in the appeals court and in an unprecedented move president Kenyatta relinquished his power and attended the pre-trial status conference at the Hague.

Despite this initial cooperation from the Kenyan the president the ICC prosecutor withdrew the charges in 2014. This withdrawal was done to a lack of evidence on the part of the ICC prosecutor. The prosecution’s case hinged on several vital key witnesses. However, in 2013 many of these witnesses withdrew stating fears surrounding their own safety. Other witnesses were withdrawn due to questionable trustworthiness. Some had admitted to lying in previous testimonies or being involved in bribery schemes. Many of the witnesses that withdrew were later described as being insiders having intimate knowledge of the Kenyan government’s actions during 2007-2008. These revelations seriously damaged the credibility of the remaining witnesses as well as the prosecutor’s case. In the end the prosecutor withdrew the case in 2014. This withdrawal has been criticised as revealing the flaws present in the execution of international criminal law. The main flaws being severe procedural issues when gathering evidence and an overreliance on state cooperation. As discussed previously failures to sufficiently protect witnesses from being identified or threatened seriously the jeopardised the case that the prosecutor was attempting to build against Kenyatta. However, this case also highlighted the risks on relying on state cooperation to carry out important tasks such as gathering and protecting witnesses.

According to the BBC the case against Kenyatta was the most high-profile case failure in ICC history. The dismissal of the charges put into question the legitimacy of the ICC as it raised several questions around key issues such as immunity, state cooperation, and obstruction. The most concerning aspect of this case was the vulnerability that the ICC showed towards obstruction of justice and witness tampering. Overall, the case was seen as a massive failure on the part of the ICC prosecutor and serves as a reminder of the challenges in prosecuting a head of state.

195 Case Information sheet the prosecutor v. Uhuru Kenyatta p.2
200 Ibid
6 Analysis and conclusions

6.1 The interaction between head of state immunity and arrest warrants

The ICC was created to combat the most serious international crimes such as crimes against humanity, war crimes, and genocide. To do this they exercise their jurisdiction to investigate, prosecute, and punish individual perpetrators. The ICC relies on its members to carry out many of these actions. The ICC does so by requesting cooperation in many different areas. One of which being the execution of arrest warrants. The purpose of this thesis is to answer the question how the execution of these arrest warrants interacts with the concept of immunity. This thesis has attempted to answer this question by researching international law. In this section the findings of this research will be discussed and analysed to answer the primary question of this thesis.

Firstly, jurisdiction is defined as the exercise of authority in the making of legal decisions and judgments. A state's jurisdiction allows it to create laws and regulations and to punish certain actions within its own territory. The ability to create new legislation is called prescriptive jurisdiction while the application of those laws is known as enforcement jurisdiction. Jurisdiction also allows states to enter, alter, and leave treaties and arrangements with other states. In international criminal law the exercise of a state’s jurisdiction is bound by several principles and norms. For instance, sovereignty immunity ensures that no state can exercise its jurisdiction on the internal affairs of another state. Other principles such as the nationality and territorial principle dictate where and when a state may exercise its jurisdiction.

On a general level jurisdiction within international law is the power of the state to regulate or otherwise impact upon people, property and circumstances while still respecting the basic principles of state sovereignty, equality of states, and non-interference in domestic affairs. Jurisdiction is vital to states as it is an exercise of authority which allows to create, alter, terminate legal arrangements with other states. The exercise of jurisdiction differs from state to state and is dependent on the legal system of the state. However, in most instances jurisdiction is divided into two main categories. The capacity to create new legislation whether through a

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201 Shaw p. 665
A judicial, legislative, executive institution is called prescriptive jurisdiction. While the capacity to ensure compliance with such actions through executive or judicial means is called enforcement jurisdiction.\textsuperscript{202}

To give a quick overview of definitions again. Immunity is a legal principle that grants individuals exemptions from legal penalties and prosecutions that are derived from either statutes or national law. There are different types of immunity such as personal which is granted for individuals holding certain roles and functional immunity which protects certain actions within the scope of their position. Immunity exists to protect individuals that are essential to either a state’s governance or diplomatic relations. Immunity is respected by the international community as part of international legal precedent.

In international law the general rule is that a state or its institutions jurisdiction cannot be exercised over an individual who has been granted immunity. However, there are exceptions to this rule. For example, an individual with functional immunity can be prosecuted for actions that were not a part of their official role. It is more difficult to prosecute an individual with personal immunity, but it is by no means impossible. Like functional immunity the state that granted the immunity can also voluntarily revoke that immunity. This can be done in several different ways such as by treaties or by ratifying statutes such as the Rome Statute. The Rome statute includes language that removes immunities as a defence when in front of the ICC.\textsuperscript{203} In cases that have been referred to the ICC prosecutor by the United Nations Security Council UN members can be told by the UNSC to cooperate fully with the ICC. In such a case, the members must cooperate in line with the requirements of the Rome Statute and must thus also remove immunity from individuals placed before the ICC. International customary law is somewhat conflicted in this area. As immunity is fundamental to international relations it is considered inviolable. This is largely due to the principle of sovereignty equality which states that a state cannot enforce its own jurisdiction on another state. The result of this is a system of jurisdictions in which immunity takes precedence over jurisdictions in most situations. Exceptions do exist depending on the type of immunity. For example, there are far greater exceptions for functional immunity. These exceptions include core crimes such as war crimes, crimes against humanity, and genocide. Personal immunity grants broader protections and bars almost all attempts at

\textsuperscript{202} Ibid
\textsuperscript{203} Article 27 Rome Statute
prosecution. To circumvent this, states may be requested by the UNSC to relinquish immunity for a specific case. However, this process still requires a degree of international cooperation.

The findings from case law are somewhat more conflicted than those from international criminal law legislation. For instance, in the Al-Bashir case the ICC maintained that it had jurisdiction to prosecute the then president of Sudan Omar Al-Bashir but failed to secure cooperation in executing the arrest warrant against him. Many of the states\textsuperscript{204} that refused argued that they were obligated under international law to respect Al-Bashir’s head of state immunity and could therefore not arrest him. However, in the most recent case of non-cooperation in Jordan the ICC once again confirmed that jurisdictional immunity is not a barrier to prosecution. Although the decision in the Jordan case was partly motivated by the involvement of the UNSC the ICC also reiterated that immunity does not bar prosecution by international courts or tribunals in general. While case law especially in the Sudan case show that the ICC has ability to carry out an arrest warrant against a head of state it also demonstrates the many practical issues involved in carrying out such an arrest warrant. This difficulty in carrying out arrest warrants is especially apparent in the Kenyatta case. In the Kenyatta case the prosecution collapsed primarily due to a lack of evidence. There were strong suspicions of witness tampering and intimidation that picked apart at the prosecution’s case. This demonstrates the difficulty in targeting heads of state in a pre-trial investigation. However apart from the procedural difficulties in targeting a head of state securing cooperation from states is a massive hurdle for institutions such as the ICC. This was seen primarily in the Al-Bashir case but also in the case of Vladimir Putin. Both cases show a legitimacy crisis at the heart of the ICC. The ICC struggled to convince it owns members that it had lawful jurisdiction over heads of state and that despite their immunity the ICC was a legitimate court to hear these cases in. However, the most recent case against Vladimir Putin does seem to indicate that the ICC has found its footing. South Africa has shown a much greater level of apprehension in hosting Vladimir Putin than it showed when hosting Al-Bashir. Perhaps this shows that arresting an acting head of state is no longer just theoretically possible but also achievable.

\subsection*{6.1.1 Conclusion}

In conclusion the ICC continues to strive towards goal of ending impunity in international criminal law, but it has yet to reach the mark. At present heads of states are protected by

\textsuperscript{204} See: ICC-02/05-01/09-140, ICC-02/05-01/09-140, and ICC-02/05-01/09-139
personal immunity and their actions during their time in office are protected by functional immunity. In current international criminal law functional immunity can be stripped or circumvented in several ways while personal immunity is much harder to combat. Functional immunity does not protect crimes that were committed outside of an official’s role. Functional immunity does not protect crimes that violate jus cogens such as war crimes, crimes against humanity, and genocide. Article 27(2) of the Rome Statute states that neither personal immunity nor functional immunity can be used as a bar to prosecution. This applies primarily to signatories of the Rome statute but can also to states that agreements with the ICC or who have been compelled by the UNSC to cooperate fully with the ICC. State practice differs somewhat from what is described in the Rome statute though. As some states still maintain that the ICC does not have jurisdiction to prosecute individuals with immunity. This has been a subject of debate in case law as states have refused to cooperate with ICC arrest warrants and the ICC has repeatedly been forced to protect its jurisdiction and legitimacy. The ICCs resolve and interaction between its jurisdiction and head of state immunity is again being tested in the ongoing prosecution of Vladimir Putin. Based on an analysis of current international criminal law my conclusion is that Putin’s immunity would not prevent him from being prosecuted, but whether that is achievable or not is an entirely different question.

6.2 Obligations and consequences of non-cooperation with the ICC

Secondary to the primary research question, this thesis also aims to answer the following secondary research question. “What obligations do member states have to cooperate with the ICC after an arrest warrant has been issued and what are the consequences if they do not cooperate”? To answer this question this thesis has looked at current international criminal law and court precedent.

To start off with international law, this thesis has primarily been focused on two institutions the ICC and the UN. Both institutions have founding treaties that dictate the behaviour of their members as well as interactions with non-members. In the case of the ICC states must cooperate fully with the ICC when requested according to article 86 of the Rome Statute. Article 87 defines the terms and way such a request can be made. The ICC can request cooperation for many tasks such as gathering information, interviewing witnesses, and most importantly for this thesis executing arrest warrants. When the ICC requests state cooperation through the execution of an arrest warrant the requested state has already agreed to cooperate with the ICC
by ratifying the Rome statute. Thus, they are obligated under the treaty to cooperate fully with
the request. If they choose not to cooperate or unable to do so then they are subject to
consequences described in the Rome statute. The ICCs first tool in dealing with recalcitrant
behaviour is an investigation into the states refusal or inability to cooperate. After the
investigation the ICC can make a finding that the state refused to cooperate and refer the matter
to the ASP. The matter can also be referred to the UNSC if they were the institution that
originally referred the case to the ICC.

In international law the path to referring a case of non-cooperation to the ASP or UNSC is
clearly drawn out in the Rome Statute. However, the possible consequences that can result from
such a referral are largely uncharted territory. Possible consequences for non-cooperation
include economic sanctions, condemnation, or having treaty privileges revoked. It is
theoretically possible for a state to be reprimanded after a finding of non-cooperation has been
made. However, there have been no cases of such consequences being given out to any state.
This goes back to the fact that the ICC is reliant on cooperation from its members and must
therefore weigh its desire to prosecute alleged perpetrators against the ability to convince states
to cooperate in future cases.

The findings of the analysis of international criminal case law showed similar results.
Specifically, in the case of Al-Bashir multiple states were requested to arrest the former
president but none of them did so. In each of these cases this led to no consequences for the
recalcitrant state. The Kenyatta case also highlighted similar failings in the ICCs inability to
prosecute high profile perpetrators. The findings from international law and precedent are both
in line with the general norms and principles of international law. As the principle of sovereign
equality protects states from having vertical authority exercised on them. This principle also
means that states cannot be forced to act in a certain way due to the influence of another state.
This makes it much more difficult for institutions such as the ICC and UNSC to enforce norms
and laws on unwilling states. This is also another where these institutions must balance the
ability to enforce statutes and agreements against the risk of deterring future cooperation.

Unfortunately, the result of this balancing act is an institution unable to exercise vertical
authority over its members. To put it in harsher terms, the ICC as an institution that does not
have the ability to force any action from any state whether it be a member or not. Its role in
international law is to act as an arbitrator between states. The rulings made by the ICC are
enforced voluntarily under horizontal authority. This may help to explain many of the criticisms that the ICC has faced over the years such as that it focuses its prosecutions largely on developing nations in Africa. Or that it is unable to exercise authority over countries like the US with its enormous influence on international affairs and who have agreements with other countries to protect their officials from arrest, extradition, and prosecution. This creates an international law system based on power and influence rather than a system of laws and consequences. In the case of Russia such a system is likely to result in Putin remaining at large. Any attempt to bring Putin to justice would invariably lead to massive political fallout. Only a few nations in the world might be able to weather such a storm but even fewer would find such an action worth the enormous cost. The failure to arrest Al-Bashir highlights the reluctance of many nations to prosecute heads of state when it is against their own self-interest. In the case of Al-Bashir the political pressure was significant but nowhere near the level it is with Putin. Any country that attempts to prosecute Putin risks not only political pressure but also war. A fact that Russia has made no attempt to hide or present with any subtlety. All this points to one inevitable conclusion. if justice is ever achieved, in the case of Vladimir Putin it will come long after he has left office.

**Conclusion**

Despite difficulties in attaining cooperation with states the decision to issue an arrest warrant against Vladimir Putin is not without merit. The decision will likely lead to further isolation and condemnation of Russia in the eyes of the international community. On one hand there is a risk that this will also lead to difficulties in negotiating peace between Russia and Ukraine as Putin will be unable to attend any negotiations outside of Russia without fear of arrest. On the other hand, the ICCs arrest warrant puts pressure on states that actively give financial or military aid to Russia’s ongoing war in Ukraine. These situations are still hypothetical, and it remains to be seen what effects the ICCs arrest warrant will have on Russia and international law in general.

There is much left to be learned in future research of ICC jurisdiction, jurisdictional immunities, and state cooperation. Future research may focus on potential repercussions against recalcitrant states and how such repercussions could be implemented. Treaty repercussion is a tool that the ICC has continually refused to use. However, with the increase of non-cooperative states the ICC may be forced to enforce repercussions in order to protect its legitimacy and prevent further
recalcitrant behaviour. Therefore, it is in the interest of international law to have a better understanding how and when these repercussions might be used by the ICC.
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