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EXAMINING THE AFRICAN PERSPECTIVE ON THE IMMUNITIES OF STATE OFFICIALS FROM THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

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Abstract:

The recent issuance of an arrest warrant by the International Criminal Court against Russian President Vladimir Putin for his responsibility for war crimes committed during the Russian-Ukrainian war has brought attention to the issue of state officials' immunities before the International Criminal Court. This case has sparked intense debates between Africa and the International Criminal Court, as Africa has presented arguments in response to those adopted by the International Criminal Court. In this paper, we will present the African arguments and conduct a legal analysis of them, with the aim of assessing their strength and resilience in the face of the International Criminal Court's arguments.

Keywords: International Criminal Court; Africa, immunity; state officials; impunity; international criminal justice.

Introduction:

In the past century, the international community has faced increasing pressure to combat the impunity of perpetrators of the most serious international crimes against humanity from punishment. Despite the establishment of several specialised courts to prosecute these individuals, the recognition of the necessity of creating a permanent International Criminal Court(ICC) to address such crimes persisted due to the threat they posed to international peace and security. This acknowledgment culminated in the entry into force of the court's statute in 2002, marking a significant development in international law primarily aimed at combating impunity and ensuring justice for victims of the gravest international crimes against humanity.

Africa stands out as the region with the largest support base for the ICC and the most represented region. African countries constitute more than 1/3 of the parties to the Rome Statute,

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with Senegal being the first country to ratify the Rome Statute. Furthermore, African countries have played an active role since the establishment of the International Criminal Court, with African states fulfilling their commitments to the ICC under the Rome Statute to such an extent that they have incorporated regional instruments to ensure the inclusion of these commitments in the laws of the region's countries. One such instrument is the Constitutive Act of the African Union (AU) for the year 2001, which granted the AU the right, in Article 4, paragraph 8, to intervene within the borders of member states for the purpose of prosecuting international crimes falling under the subject-matter jurisdiction of the International Criminal Court.

Despite these efforts, the African continent has witnessed an increase in the rate of conflicts accompanied by the commission of such crimes, often perpetrated by individuals in positions of power, either to attain or maintain authority. The high human cost of these crimes has led those responsible to face criminal prosecution in the courts of European countries as part of their practice of the principle of universal jurisdiction. This prosecution has made the relationship between African countries and those states challenging, eventually turning into cases that have come under the consideration of the International Court of Justice. African countries perceive that the principle of universal jurisdiction has been misused or applied in a manner that contradicts the equality of sovereignty and the independence of states.

This contagion has spread to the relationship between African countries and the International Criminal Court, transforming it from harmony to tension. In the eyes of Africa, the court has become selective, unfairly targeting African nations and being perceived as a neocolonial institution aiming to prosecute African officials. The cases where the initiatives of referral from African countries shifted to other parties, such as the Prosecutor (Kenya case) and the United Nations Security Council (Sudan and Libya cases), have contributed to the accusations against African officials, marking the onset of tension in the relationship.

The case of Sudan, including the charges brought by the ICC against the then-president Omar Al-Bashir and the subsequent rejection by the court of the AU's request to suspend proceedings against President Al-Bashir, along with the AU's directive for its members not to cooperate with the ICC regarding the arrest of President Al-Bashir, brought to the forefront issues related to ending impunity, respecting the immunities of state officials, and cooperation with the Court, which were controversial issues between the ICC and Africa.

In addressing the main issue of the strength and credibility of African arguments justifying the immunities of state officials before the International Criminal Court, we can explore several sub-questions: **What were Africa's justifications for defending these immunities? Do these justifications have a legal basis? Was the African perspective on this issue realistically manifested?**

The first topic: African Arguments

African countries and the AU found themselves in a complex dilemma regarding the former president Omar Al-Bashir's case and his immunities before the International Criminal Court, facing challenges in reconciling justice and accountability demands within the international system. They presented diverse arguments to justify these immunities, ranging from legal arguments related to the International Criminal Court's statute and the international legal framework to political arguments based on the political and strategic challenges confronting African countries in dealing with the ICC and issues of international criminal justice. In our study, we will focus on the African legal arguments that served as responses to the International

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Criminal Court's decisions[1] regarding the alleged failure of African states parties to cooperate with the Court in the arrest and surrender of Al-Bashir.

First requirement: Customary International Law Recognises the Immunity of Heads of State and Senior Officials.

According to the AU, customary international law (CIL) grants heads of state and other high-ranking state officials' immunity during their term in office. This immunity applies not only to proceedings before foreign local courts but also to international courts[2]. Accusing these individuals is in conflict with the stance of CIL regarding their immunity. The AU's decision on Africa's relationship with the ICC states that accusing sitting heads of state contradicts CIL regarding the immunity of heads of state and other senior officials. The resolution emphasises that the AU is redefining principles derived from national laws and CIL, through which immunity is granted to heads of state and other high-ranking officials during their tenure[3].

This formulation materialised with the AU's adoption of the Malabo Protocol in 2014, expanding the jurisdiction of the African Court on Human and Peoples' Rights to adjudicate international crimes. In doing so, the AU took a different stance from other international criminal courts[4] by including the immunity clause (Article 46A bis of the Protocol)[5]. This clause clarifies the African understanding of immunities under CIL and aligns with the AU's policy on the sequencing of peace and justice[6]. Thus, the immunity clause serves as a codification of the customary rule recognising such immunities.

In addition to the AU's justification, African governments, who are parties to the ICC (Malawi, Chad, the Democratic Republic of Congo, and South Africa), justified their refusal to arrest and surrender Sudanese President Omar Al-Bashir while he was on their territories by arguing that complying with the court's requests would require a violation of the immunity of a head of state under CIL. They contended that the court's requests placed them in a situation where their international law obligations, respecting the immunity of President Al-Bashir, conflicted with their obligations towards the court as parties to it. They also emphasised that Sudan, as a non-party, had not waived the immunity of its president, aligning with the AU's stance on the immunity of President Omar Al-Bashir[7].

Second requirement: The Rome Statute of the ICC is Unable to Remove the Immunity Granted by International Law to Non-Party States.

Article 27 of the Statute Applies Only to the States Parties.

According to the AU, Article 27, which states that official capacity as a head of state or government shall not bar the ICC's jurisdiction, is a treaty provision applicable only to party states. The rules of CIL regarding immunities remain unchanged for non-party states. Article 27 and similar provisions in the statutes of international courts are exceptions to CIL on immunities and apply only between treaty parties. They do not create rights or obligations for a third state. Therefore, the duty of cooperation by party states in arresting and surrendering a head of state or official only applies between parties, and there is no such duty for non-party states. Compliance with cooperation requests in the latter case would constitute a breach of international law obligations, placing responsibility on the cooperating state[8].

Firstly: Article 98(1) Acknowledges the Immunities of Non-Party States.

In 2012, the AU adopted a resolution stating that Article 98(1) recognizes that the Statute is unable to remove the immunity granted by international law to non-party states[9].

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Three requirement: Cooperating with the ICC and the Immunity of State Officials Pose a Legal Dilemma.

To discuss this point, we decided to talk specifically about the South African position, as it actually faced a real dilemma. The visit of Sudanese President Omar Al-Bashir to attend the AU summit held from June 13 to 15, 2015, sparked political tensions within the country and led to legal confrontations between the government and the judiciary.

On June 13, 2015, South Africa was reminded by the ICC of its commitment under the Rome Statute to arrest and surrender former Sudanese President Omar Al-Bashir[10]. The decision was activated the following day by the South African Supreme Court requesting its government to take all necessary measures to prepare for the arrest and detention of Al-Bashir, pending an official request for his surrender by the International Criminal Court. The Supreme Court of South Africa also ordered all necessary measures to prevent his departure. However, the South African government failed to comply with these orders and argued to justify its failure to arrest and detain Al-Bashir and to fend off the charge of facilitating his departure from South Africa, stating that it was caught in a legal dilemma consisting of conflicting international commitments.

- Its commitment to recognising Al-Bashir's immunities as a head of state not party to the Rome Statute, as well as its commitment to its agreement with the AU to grant immunity from arrest and detention to all attendees at the AU summit.
- Its commitment to the arrest and surrender of Al-Bashir in accordance with the decision of the International Criminal Court[11].

Despite the rejection by the High Court and the Supreme Appellate Court of South Africa of the arguments put forth by the South African government, which viewed its failure to arrest President Al-Bashir as an illegal act[12], the government continued to assert that it acted legally in prioritising Al-Bashir's immunities over its obligations towards the International Criminal Court. This stance persisted even before the Pre-Trial Chamber of the International Criminal Court, which, in turn, dismissed those arguments and found that it was the duty of the South African state to comply with the court's request and proceed with the arrest and surrender of Al-Bashir[13].

Four requirement: UN Security Council Referral is not a Removal of Immunities.

The AU's supplementary report to the Appeals Chamber of the ICC regarding Jordan's non-compliance with the arrest and surrender of Al-Bashir presented the AU's interpretation of Resolution 1593 (2005) concerning the referral of the situation in Sudan to the ICC by the UN Security Council(UNSC). This interpretation was provided in response to the International Criminal Court's interpretation, described as an exceeding and circumvention of Article 98 of the Statute and the obligations of non-party states to Sudan as a non-party state (a third state)[14]. The interpretation included:

- Referring to the necessity of interpreting the resolution in light of ordinary language, as well as the subject and purpose of the decision and its drafting history.
- Emphasising that the resolution does not explicitly or implicitly waive Sudan's immunities.
- Noting that the duty to cooperate extends only to the government of Sudan and other parties to the conflict in Darfur, and that the duty to cooperate does not extend to non-party states to the Statute, and that the term "urge" in the resolution means:
    - All concerned states and other regional and international organisations have been encouraged, but not obligated, to provide full cooperation.
    - The cooperation of state parties should align with Article 98(1), meaning they must respect their obligations under international law towards Sudan.

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- The UNSC, in its resolution, did not opt for imposing a legally binding decision on all UN members regarding the referral of the situation in Darfur. Instead, it chose to impose full cooperation with the ICC on Sudan[15].

The second topic: Evaluating the Arguments

We will review, through the following, an analysis of the legal African arguments that have been presented to justify granting immunity to state officials before the ICC who face charges of committing international crimes within the Court's subject matter jurisdiction. This is to understand and examine in detail the legal bases that have been relied upon.

First requirement: The Position of CIL Regarding the Immunity of State Officials from the Jurisdiction of International Criminal Courts

The principle of state immunity arises from the theory of state sovereignty and its equality with other states within the international community. This principle protects states from the jurisdiction of foreign states, and the immunity of state officials before foreign courts is considered part of customary laws and principles governing international relations. The history of state officials' immunity dates back centuries, expressing the principle of sovereignty and granting immunity to representatives of states in the international arena.

If CIL recognises this immunity before the courts of foreign states, does it also recognise it before international criminal courts? As mentioned earlier, the African continent answers this question affirmatively, as reflected in the immunity clause in the Malabo Protocol. However, does this answer have a legal basis?

Firstly: Analysis of the Immunity Clause:

Article 46 A bis, reiterated, of the Malabo Protocol states:

> *"no charges shall be commenced or continued before the court against any serving AU head of state or government or anybody acting or entitled to act in such capacity or other senior state officials based on their functions during their tenure of office"*

- So, from our reading of the article, it seems to indicate that it prohibits the African Court on Human and Peoples' Rights from taking any judicial action or proceeding against the individuals specified in the article. This can be inferred from the phrase "No charges shall be commenced or continued before the Court."
- As for the individuals covered by immunity, they fall into two categories:
  - **First category**: heads of states, heads of governments, and anyone acting or entitled to act in such capacity.
  - **Second category**: high-ranking officials in the state based on their functions. This phrase suggests that, due to the variation in individuals covered by this provision from one country to another, it is left to each state to determine them. In other words, they are identified according to the constitutional system of the state.
- As for the type of immunity provided by the immunity clause in the Malabo Protocol, it closely resembles personal immunity rather than functional immunity, and this can be attributed to several reasons:

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If functional immunity provides state officials with an objective defence for official acts, the immunity clause does not explicitly mention that, whereas personal immunity protects both official and private actions. Personal immunity is inherently a procedural privilege and serves as a barrier to the exercise of judicial jurisdiction, which must be considered at the outset of legal proceedings. This is clearly reflected in the phrase "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government…"

From the previous analysis, it appears that this clause grants personal immunity to state officials throughout their tenure in office before the African Court on Human and Peoples' Rights.

Secondly: The Immunity Clause Reflects a Rule of CIL

To determine the existence of a rule of CIL requires verifying the presence of its two constituent elements: the existence of general practice and the acceptance of this practice as law (opinio juris)[16]. To ascertain the constituent elements, an evaluation of the evidence related to each element is necessary[17].

In terms of the criterion of general practice, its basis lies in the practices of states, which can take various forms and include both physical and verbal actions. These practices may involve refraining from certain actions under specific circumstances. It is essential for the practice to be general, meaning it must have sufficient prevalence and representation, as well as consistency. There is no specific duration required for the practice, as long as it is considered general[18].

As for the acceptance of practice as a law (opinio juris), it requires the practice in question to be associated with a sense of legal right or legal obligation. It also requires distinguishing it from mere common use and custom.

- **Verifying the Presence of the Two Constitutive Elements of the Customary Rule Reflected in the Immunity Clause.**

➢ **Verifying the Existence of Countries' Practices in Accordance with This Clause:**

The observer of this clause finds that it reflects the practices of states towards the customary rule acknowledging personal immunity for state officials from foreign criminal jurisdiction[19]. However, regarding practices reflecting the immunities of state officials before international criminal courts, it is essential that the verifications take place within the practices of those courts[20]. Despite the different methods of establishing such courts, they share an international character in their creation[21], making the verification valid. Practices of the courts are required to be general and accepted as a law, following by the acceptance of states for the decision and its acknowledgment in their subsequent jurisprudence[22]. In addition to this condition, the existence of the customary rule for a long period is not a strict requirement, even though it may give rise to widespread practice[23].

In terms of evaluating the general practice of courts, it is essential to verify the extent of the involvement of relevant courts in the practice. The practice should have sufficient diffusion, representation, and consistency. This means that the practice should be widespread, relatively uniform, and stable.

Those who closely examine the practices of international criminal courts (such as Nuremberg, Tokyo, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone(SCSL), The Special Tribunal for Lebanon (STL), and the International Criminal Court(ICC)) confirm that the immunity of state officials, regardless of its nature, personal or functional, before

international courts has been repeatedly rejected since World War II[24], despite the shortcomings associated with these practices:

- ✓ Indeed, the practices of the courts ((ICTY), (ICTR), and (SCSL)) initially had binding laws and decisions only for the concerned states. However, in the case of Taylor in the SCSL, we find elements supporting practices that favour the absence of immunity for these officials. The court relied on its international character to reject the defence's claim that the arrest warrant against the then President of Liberia constituted a violation of personal immunity rules. Similarly, there were no objections to the ICTY issuing an arrest warrant against President Slobodan Milosevic, nor were there objections to arrest orders issued by the ICTR [25].
- ✓ It's true that despite the contributions of the Nuremberg and Tokyo tribunals to the development of international criminal law[26], serving as pioneering initiatives for prosecuting high-ranking military and political leaders, only soldiers and lower-ranking officials were actually brought to trial.
- ✓ The ICC, on the other hand, has issued numerous indictments and arrest warrants against officials of various countries. However, it has faced criticism, objections, and scepticism about its credibility. Accusations of selectivity and politicisation, particularly from the Africans' perspective.

As for the constituent element of opinio juris, alongside the relativity of general practice that can be described through the practices of international criminal courts, it can be said that this practice is also associated with a relative sense of legal obligation. This is highlighted by:

- ✓ The practices of Nuremberg included referring high-ranking officials for trial and subjecting only the soldiers and lower-ranking officials to prosecution.
- ✓ The practices of the International Criminal Court, where legal commitment may be influenced by doubts about the court's credibility, have been impacted by the policies of its chief prosecutors, especially Luis Moreno Ocampo. There have been concerns about Ocampo's policies towards the African continent[27]. Similarly, the current chief prosecutor, Karim Khan, has faced criticism for attempting to exempt Americans from prosecution for crimes committed in Afghanistan, along with other issues[28]. Additionally, there are concerns about Khan's policies in the Ukraine case, where he seeked to refer the case to the court and accused only the Russian party, despite the fact that in war, no party can be exempted from involvement in international crimes, especially war crimes. The reality has shown that the Russo-Ukrainian war is not a war between a powerful state and a weak state; rather, it is a proxy war (involving Russia and NATO countries) on Ukrainian soil.

Given this relativity, it can be said that these practices do not reveal the existence of a customary rule but can be considered as practices gradually contributing to the crystallisation of a new customary rule. Two additional factors that reinforce our adoption of this conclusion are:

- The judgment issued by the International Court of Justice in the case of the Democratic Republic of the Congo and Belgium, regarding the issuance of the Belgian authorities on April 11, 2000, and its international dissemination for the arrest of Mr. Yerodia Abdoulaye Ndombasi, the then Minister of Foreign Affairs for the Democratic Republic of the Congo, is another factor that reinforces our previous conclusion. The court held

that the immunity enjoyed by a current or former foreign minister under international law does not constitute a barrier to criminal prosecution under certain circumstances. It listed cases where such individuals could be subject to criminal proceedings before some international criminal courts, including the former Yugoslavia and Rwanda tribunals and the International Criminal Court[29]. However, this cannot be considered as establishing a customary rule, as the decision did not address this issue and did not provide any explanations about it. It can be seen as a mere reference to the differences between these tribunals and the courts of foreign states, without explaining why. Nevertheless, this decision can be taken as evidence to reinforce our previous conclusion.

- The diligence of the International Law Commission in its second report on the immunity of state officials from foreign criminal jurisdiction, presented by the Special Rapporteur of the International Law Commission in its sixty-fifth session held in August 2013, is another aspect to consider. The report outlined issues to be addressed over the next five years, including the treatment of the immunity of state officials from the jurisdiction of international criminal courts (paragraph 7(d)). In paragraph 11, the report acknowledged that this topic remains a subject of dispute, with no consensus reached on the majority of issues related to the substantive aspects and the prominent position occupied by the debate on the consequences that may arise from recent developments in the field of international criminal law. This includes the incorporation of this new area into the broader framework of contemporary international law as a whole[30].

Based on the above, it can be said that international law does not recognise immunity for state officials before international criminal courts. However, there is a customary rule in the process of formation. As for the immunity clause in the Malabo Protocol, it can be said that if it does not reflect a customary rule recognising the immunity of state officials before international criminal courts, then this clause remains in two positions; it is either an expression of the objection of African states, putting them in the position of the persistent objector, or in the position of the particular CIL, when the conditions of these two positions are met.

Second requirement: The Ability of the Rome Statute of the International Criminal Court to Lift the Immunities of State Officials

If CIL neither recognises nor denies the immunities of state officials before international criminal courts, does the International Criminal Court's statute have the power to remove them? If the answer is yes, what is the scope of this power?

We will try to analyse this power by examining the impact of Articles 27 and 98(1), which address the issue of immunity:

Firstly: Analysis of the Impact of Article 27:

Article 27 is one of the legal provisions concerned with the jurisdiction of the court in terms of personal jurisdiction. It states:

1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

2. *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*

From our reading of the article, we find that Article 27 expresses the court's commitment to achieving justice by emphasizing the principle of equality of individuals before the law, which is achieved by the absence of discrimination based on official capacity. In addition, it prohibits the use of immunities associated with official capacity to exempt from criminal responsibility, mitigate punishment, or undermine the court's jurisdiction. Thus, Article 27 embodies a reaffirmation of the principle of non-impunity stated in the preamble of the court's statute. However, does this commitment mean that the scope of losing immunities under Article 27 includes the immunities of officials of both state parties and non-state parties?

In referring to the jurisprudences of the International Law Commission, we find that it explicitly addressed the issue of immunity of state officials from foreign criminal jurisdiction in the drafts of the articles it adopted in its seventy-third session in 2022. Specifically, in the draft of Article 1 dedicated to the scope of the draft articles, paragraph 3 emphasised the separation and independence of these draft articles from the legal systems applicable to international criminal courts and tribunals. Furthermore, in explaining paragraph 3, it indicated that treaty-based legal systems applicable to international criminal courts do not apply under treaty law except to the relations between parties to the agreement establishing a specific ICC or tribunal. However, this does not imply any judgement regarding any other obligation that could be imposed on states under international law, especially by the UNSC or any other international organization[31]. This explanation aligns with Article 34 of the Vienna Convention on the Law of Treaties.

Indeed, based on the aforementioned, it can be concluded that the statute of the court cannot create obligations for non-party states. Therefore, Article 27 implies that states parties lose their immunities, meaning that upon ratifying the Rome Statute, the consenting states have waived the immunities of their officials.

According to most authors, the waiver of immunity should be interpreted not only to affect the relationship between the state party and the ICC but also the relationship between different states parties. This interpretation ensures that Article 27 retains practical significance because if its impact is limited to the relationship between the state party and the ICC, it would be practically useless. In such a case, the court would need to obtain a waiver of immunity from the state party when requesting cooperation from other states parties for the arrest and surrender of an official[32]. This interpretation also justifies the existence of Article 98(1). The understanding that the impact of Article 27 extends to the immunities of non-party states makes Article 98(1), which falls under the section on international cooperation and judicial assistance, titled "Cooperation," regarding the waiver of immunity and consent to surrender, either redundant or contradictory to Article 27.

Secondly: Analysis of the Impact of Article 98 (1)

Article 98(1) states that: "*The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".*

Through our reading of Article 98(1), we find that:

- Its subject relates to requests for cooperation and the immunities of non-party states, as indicated by the terms cooperation and third state.
- Article 98(1) protects the sovereignty of the state by recognising the rules related to governmental and diplomatic immunities and exempting a party state in the Rome Statute from the arrest and surrender of a person from a non-party state to the International Criminal Court[33]. This is because the article provides states parties with the opportunity to arrange their international obligations, predating their accession to the Rome Statute, to be superior to those towards the International Criminal Court.
- The article includes an acknowledgement that a party state may have other international obligations that override its duty to cooperate with the ICC[34]. Thus, the Rome Statute does not explicitly or implicitly grant states parties the authority to disregard the immunities of non-party states.
- To further support the previous analysis, Article 98 specifically has a background behind its formulation. When drafting the Rome Statute, the negotiating states showed great care in addressing potential conflicts between the Rome Statute and existing international obligations. The issue of a state party finding itself in a position where its obligations under international law conflict with its obligations to cooperate with the ICC is plausible and controversial. Therefore, Article 98 was added as a solution to future disputes that may arise between the obligations of states parties regarding international criminal justice and their diplomatic commitments.

Based on the above, it can be said that Article 98(1) is an attempt to strike a balance between international criminal justice and the rights and international obligations of states. This article recognises the immunities of non-party states in the context of cooperation with the International Criminal Court. It also demonstrates that while the court and its operations are governed by the statute, the statute remains a treaty that should be interpreted in light of other rules of international law. This indicates a direction towards achieving a balance between the independence of the court and respecting the rights of states.

Thirdly: The Impact of the Contradiction Between Articles 27 and 98 on African Arguments

The International Criminal Court, in its decisions related to the refusal of cooperation by African countries, specifically Malawi and Chad, acknowledged that, in addition to the role played by immunity when the Court seeks cooperation regarding the arrest of a head of state, there is an inherent tension between Articles 27 and 98[35].

So, if we consider the validity of the contradiction between Articles 27 and 98, it requires interpreting Article 27 within the context of the Rome Statute without Article 98. This would make Article 27 binding only on the States Parties, and consequently, the jurisdiction of the Court would be applicable only to the officials of the States Parties. On the other hand, if we acknowledge their non-contradiction, which entails interpreting Article 27 in the context of the existence of Article 98(1), it contributes to emphasizing the principle of no impunity adopted by the Court. It also highlights individual criminal responsibility, which remains applicable to both states parties and non- party states. Thus, the Court would have jurisdiction over officials of non-party states, but this jurisdiction would be undermined by their immunities, requiring the Court to seek a waiver of those immunities to exercise its jurisdiction.

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Although Article 98(1) undermines the jurisdiction of the Court, it highlights the Court's respect for the principle of state sovereignty. This principle is evident from the inception of the Rome Statute, starting with the Court adopting complementary jurisdiction and extending to the respect for the immunities of officials of non- Party States when requesting cooperation from States Parties regarding the arrest and surrender of these officials.

In sum, recognising the contradiction between Articles 27 and 98 strengthens African arguments, while the absence of contradiction reinforces the principles adopted by the Court. Even though the Rome Statute does not strip the immunity of officials of non-party states, it confirms the Court's jurisdiction to prosecute individuals from non-party states as long as the Court is competent for their conduct. However, the arrest and surrender of the accused located on the territory of States Parties remain subject to the framework of Article 98(1).

Three requirement: The Impact of the Referral to the UNSC on the Immunities of Officials of Non-Party States

The issue of granting the UNSC the right to refer cases to the ICC is one that has not been without complexities and legal challenges. It has been a subject of intense debate between supporters and opponents of granting this right, as recognised in the final drafting of the Rome Statute in Article 13(b).

Despite the positive impact of this recognition, which lies in granting the court indirect universal jurisdiction, extending its personal and territorial jurisdiction to include non-party states, and thus achieving the principle of accountability within the framework of international criminal justice, However, we cannot ignore that this recognition may carry implicit threats to the independence and neutrality of the court due to a combination of factors: the political nature of UNSC decisions; the fact that resolutions of the UNSC are expressions of the will of the international organisation and are taken for the purpose of maintaining international peace and security, making these decisions binding on all member states. All these factors surrounding these decisions make the existence of unified interpretative standards or a legal framework, as is the case with treaty interpretation[36], of utmost importance. This is to ensure a precise understanding of UNSC decisions and to direct interpretations away from doubts and threats that may affect the independence and neutrality of the court.

Despite the absence of a specific global legal framework designed specifically for interpreting the decisions of the UNSC, there are guiding principles on how to understand these decisions. These principles were included in an advisory opinion issued by the International Court of Justice in the Namibia case. In this advisory opinion, the Court attempted to interpret the decisions of the UNSC, emphasising that when interpreting these decisions, it is essential to address two fundamental questions: Does the decision have a binding effect? And what is the content of this effect?

As for the first question, the court deemed that it should be carefully analysed before reaching a conclusion regarding its binding effect. As for the second question, an analysis of the binding effect must be conducted on a case-by-case basis, taking into consideration all circumstances that may assist in determining the legal outcome of the decision[37].

From this advisory opinion, it is evident that achieving an analysis of these decisions with an understanding of their binding effects requires the use of clear language by the UNSC, leaving no room for ambiguity[38]. Therefore, the interpretation of decisions should be based on ordinary language. As for Resolution 1593 (2005)[39], it did not explicitly waive the immunities

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associated with Sudanese officials, and the resolution cannot be interpreted as an implicit waiver[40]. If referral decisions cannot be considered implicit waivers of the immunities of the referred state officials, can a referral decision actually include an explicit waiver of these immunities? Does the UNSC have the legal authority to waive these immunities? We will try to answer these questions below.

In the context of the International Criminal Court's arguments regarding the obligation of cooperation and the immunity of non-party state officials, specifically in the case of Sudan, one argument is that, according to Article 103 of the United Nations Charter, the UNSC has the authority to override CIL. However, upon revisiting Article 103[41], it is observed that it does not refer to the principles of CIL. Additionally, the drafters of the Charter intentionally decided to ensure that the Charter does not exceed all international obligations but only surpasses international agreements, not extending to CIL. Therefore, member states of the United Nations are not obligated to comply with all directives issued by the United Nations and commitments of the same substantive content[42]. Furthermore, the United Nations Charter does not contain a provision for the UNSC to waive immunities.

And assuming that the UNSC can indeed waive the immunity of state officials, it would be expected that it would lift the immunity when adopting the basic regulations for courts it established are approved. Therefore, the issue of lifting immunity by the UNSC should not be unprecedented. However, the jurisprudence of the Yugoslav Tribunal proved otherwise[43]. In the Blaškić case, for example, the Appeals Chamber of the ICTY was tasked with considering whether the court had the authority to issue arrest warrants and binding orders for Croatian state officials. It's worth noting that, according to UNSC Resolution 827 (1993), Croatia was legally obligated to cooperate. Despite this, the ICTY ruled that the Croatian officials still enjoyed functional immunity, and therefore, direct summonses could not be issued to them[44].

In the case of Sudan, the lack of cooperation by Sudan, as mandated by the UNSC, means that Sudan has violated its obligations under the Charter only. This does not affect Sudan's stance towards the court or other countries[45]. Therefore, Sudan remains the only entity with the legal authority to waive the immunities associated with President Al-Bashir[46]. Sudan's commitment to cooperating with the ICC does not rise to the level of the UNSC waiving the immunities of Sudanese Officials[47].

In this context, Resolution 1593 (2005) has only impacted the relationship between Sudan and the ICC and has not established obligations for all parties or between the states parties and Sudan. Sudan remains a third state for the purposes of the International Criminal Court's statute[48]. In other words, the resolution did not modify the obligations of the state parties to the court or Sudan. The obligations of the states parties regarding the arrest and surrender of Al-Bashir are determined by the domestic laws of those countries, as concluded by the jurisprudence of the South African High Court[49].

Based on everything discussed earlier, it can be said that:

- The impact of UNSC referrals lies in making all provisions of the International Criminal Court's statute applicable to the referred cases. In other words, the referral grants jurisdiction to the court, meaning that the court takes actions of investigation and prosecution, and it's not the UNSC that provides the procedure for conducting the investigation and prosecution.[50]
- The absence of a legal framework for analysing and interpreting the decisions of the UNSC, as is the case with treaty interpretation, makes the issue of directing concerned states to cooperate with the ICC contingent on the direction of the UNSC in determining

the obligations associated with the referred state. It can establish a commitment to cooperation with the International Criminal Court, either for all United Nations member states or selectively for some states. The UNSC can also provide details on the impact of non-cooperation in any referral or regarding a specific country[51].

- The legal impact of referring a non-party state to the ICC cannot be compared in all aspects to that of a party state. This is because there are rights and obligations associated only with the party state, such as the right to nominate candidates for judicial appointments, participation and voting in the Assembly of States Parties, and contributing to the court's budget. Therefore, referring a non-party state has the practical effect of granting the court jurisdiction, meaning the immunities of those officials cannot be used as a defence or bar to the court's jurisdiction. As for issues related to cooperation and associated with the referred state, they remain distinct from matters related to the court's jurisdiction[52]. The legal and practical impact of Resolution 1593 (2005) on the immunities of Sudanese officials lies in making their immunities not applicable as a defence or obstacle to the jurisdiction of the International Criminal Court. However, the resolution did not explicitly or implicitly waive the immunities of Sudanese officials. The referral did not affect the immunities in the context of requests for the surrender of Sudanese officials because, despite certain legal obligations towards the court due to the resolution and within the limits set by the UNSC, the resolution did not establish enforceable legal obligations between the non-party referred state and the party state or any other state[53].

Four requirements: The Challenges of Cooperation Between African Countries and the International Criminal Court: Are They Genuine Legal Challenges or Just Political Considerations?

The importance of choosing to present and discuss South Africa's experience has increased for several reasons, such as the possibility of a repetition of the scenario if Russian President Vladimir Putin visited the country to attend the BRICS summit (August 2023), where the ICC issued an arrest warrant against him for war crimes in Ukraine[54]. Putin is the second head of state indicted by the court after Sudanese President Omar Al-Bashir. Additionally, there are other considerations, such as the stances of Russia and South Africa regarding these accusations, which must be addressed and analysed to understand the challenges of cooperation in this context.

- Regarding Russia, it denied the International Criminal Court's accusations and considered the court's decision invalid because Russia is a state not party to the ICC and, therefore, does not recognise its jurisdiction. Additionally, Russia opened a criminal investigation against the prosecutor of the court, Karim Khan, and three judges for issuing allegedly illegal decisions aimed at arresting the Russian President and the Commissioner for Children's Rights[55].
- As for the stance of the South African government, it has refused to condemn Russia since the start of the war in Ukraine, maintaining a neutral position and preferring dialogue to resolve the crisis. South Africa also granted diplomatic immunity to officials attending the BRICS summit (August 2023), justifying it as a customary measure for organising international conferences[56]. In the legal response submitted by the government on June 27, 2023, to a lawsuit filed by the opposition Democratic Alliance party seeking to compel the government to arrest Putin if he sets foot on South African soil, three key points were highlighted:

- **The first point**: South Africa has clear challenges in implementing the arrest and extradition request for President Putin.
- **The second point**: Russia has made it clear that the arrest of its current president would be considered a declaration of war.
- **The third point**: the government has initiated proceedings before the ICC under Article 97 of the Rome Statute, which allows states to request exemption from the obligation to arrest due to impediments preventing them from doing so[57].

Through the justifications of the South African government, we find that it did not repeat the argument that it faced a legal dilemma, making us wonder if there was indeed a legal dilemma in the case of the Sudanese president and whether a legal solution has recently been found. What is this solution? Or was there no legal dilemma at all, but rather a political dilemma that it tried to escape? If that's the truth, can Article 97, which it invoked, get it out of its political dilemma?

In the case of the Sudanese president, the Supreme Court of South Africa issued a decision stating that, under international law, the state party is not allowed to disregard immunities associated with a third state or its officials when requested to cooperate by the International Criminal Court[58]. The Supreme Court of Appeal of South Africa also pointed out that Article 27 of the Rome Statute does not allow states parties to the Court to ignore immunities in the context of judicial assistance. It found that South Africa's commitment to the ICC to surrender individuals enjoying immunity from non-party states was not found in the Rome Statute or CIL but was found in the domestic laws of the state[59].

As the Article 232 of the South African Constitution states that CIL is the law of the Republic unless it conflicts with the constitution or parliamentary law. Meanwhile, Article 4(2) of the International Criminal Court Act (a national law in South Africa) specifies that personal immunity is not a valid defence for committing international crimes or a reason for mitigating punishment. This aligns with Article 27 of the Rome Statute. This means that thereby South Africa prioritises the International Criminal Court's Act over CIL, prohibiting the recognition of personal immunity when it conflicts with the ICC's Act. Consequently, the South African judiciary concluded that the government must comply with the arrest and surrender of the Sudanese president[60].

In light of a legal solution recognized by the domestic laws of South Africa, it can be argued that the government's actions were an attempt to navigate a political dilemma with the AU and Sudan. Therefore, we find that the government's justifications differ in the case of the Russian president from what was presented in the case of Sudan, except for the invocation of Article 97[61] in both situations. So, what is the solution that this article might offer?

Through our reading of the article, we find that its purpose is to facilitate the implementation of cooperation requests sent to the states parties, where it is the responsibility of these states to consult with the ICC without delay in case problems arise in the execution. Paragraphs A, B, and C of the article presented three cases of such problems:

The first case: insufficient information to execute the request. It's worth noting that a standard has been defined to determine this deficiency in the materials (87[62], 96[63], 91 (2)[64]) of the Rome Statute.

The second case: According to the request, and despite the recipient state's best efforts, it is impossible to determine the location of the requested individual, or the person present in the state is not the one specified in the request.

The third case is that the execution of the request conflicts with the recipient state's commitment under a pre-existing treaty.

In the latter case, this is one of the prominent situations that warrant consultations in a matter involving the immunity of state officials. This has been substantiated by actual events. South Africa not only used Article 97 in the case of the Russian president but also applied it in the case of the former Sudanese president, Omar Al-Bashir, as mentioned earlier. After failing to arrest him and in a hearing held by the ICC to determine whether South Africa violated its obligations by not apprehending Al-Bashir and whether there was justification for non-compliance, South Africa challenged the court directly. Among the arguments presented in South Africa's direct appeal was the accusation that the court mishandled its request for consultations and that the consultations themselves were also mishandled[65].

In the context of this issue, in May 2016, South Africa submitted a proposal to the Assembly of States Parties containing suggestions for enhancing the procedures for implementing Article 97. The Assembly of States Parties established a working group in June 2016[66] to study the request in consultation with the court. This working group reached a decision[67] that was presented for discussion at the sixteenth session of the Assembly of States Parties.

It's worth noting that one of the key points in South Africa's proposal is the identification of the authorities responsible for consultations on the part of the requesting state. Priority was given to the Presidency (the President, the First Vice President, or the Second Vice President), with the option for the Presidency to request another judicial entity to carry out consultations. The proposal, however, remained silent on the obligation of the receiving state of the request to cooperate during the consultations[68].

Despite the working group's decision to adopt South Africa's proposal regarding the authorities responsible for consultations, it would have been more appropriate to give greater importance to the judiciary, especially considering the legal aspects of the consultation process and the fact that the other party in consultations is a judicial entity. However, the team raised an important issue by emphasising that the request for consultations, the consultations themselves, and any resulting outcomes would only have a suspensive effect on cooperation if an order was issued by the competent chamber. This specific point makes the government of South Africa obligated to cooperate with the court during the consultations.

Therefore, the repeated use of consultations by the government of South Africa in the case of the Russian president can be seen as a way to accuse it of evasion[69]. It has previously been accused of using consultations as a way to evade, gain time, and allow former Sudanese President Omar Al-Bashir to attend the AU Summit and leave without being arrested[70].

Based on the previous discussion, it appears that using Article 97 is not considered an ideal solution in the case of Russian President Vladimir Putin, especially since there have been no official statements confirming that Russia would consider the arrest of its current president as a declaration of war. Therefore, it can be said that the government of South Africa has found itself in a political dilemma both domestically and internationally. Domestically, the credibility of the government is at stake before the people, while internationally, the repercussions of this visit may lead to sanctions imposed by NATO countries. Additionally, securing the visit of the Russian president adequately to prevent access to him requires great potential, especially considering that neighbouring countries to South Africa are aligned with NATO and, as mentioned earlier, are parties to the Russian-Ukrainian war, adds to the complexity of the situation.

All these factors we mentioned earlier, along with other considerations related to the Russian perspective on the visit of the Russian president, have led the government of South Africa to enhance its diplomatic efforts. The outcome of these efforts was the non-attendance of the Russian president at the BRICS summit in August 2023.

Conclusion:

The experience of the ICC with African officials has highlighted the urgent need to understand and discuss the immunities of these officials before the court. It also emphasises the importance of understanding the African perspective on this issue. In our study on this subject through this paper, we have arrived at a set of conclusions:

- This passage discusses the interaction between international criminal law and diplomatic immunity. It highlights the challenges countries face in balancing their commitments under international treaties, such as the Rome Statute, and their diplomatic relations.
- The arguments presented by Africa in favour of the immunity of non-party states before the ICC were inconsistent and varied. This inconsistency reflects the inconsistent arguments made by the ICC regarding immunity.
- African arguments relied on legal principles that prioritised sovereignty over the principle of impunity. Balancing these principles is crucial when dealing with the immunity of officials of non-party states in the context of cooperation with the International Criminal Court.
- CIL neither recognises nor denies the immunity of officials from non-party states before the International Criminal Court. However, the alignment of the laws of states parties with the ICC's Statute and the accession of major nations to it can contribute at the creation of a customary rule that denies such immunities.
- As international society evolves and opinions on immunity and combating serious international crimes vary, the stance may undergo transformations in response to developments. Ultimately, CIL remains a flexible foundation that can be applied adaptively based on the circumstances and political-legal developments within the international community.
- The immunity of officials from non-party states cannot be eliminated by the ICC's Statute, and the characterization of a contradiction between Articles 27 and 98 reinforces African arguments.
- Article 98(1) reflects the International Criminal Court's respect for state sovereignty and its attempt to balance international criminal justice with the rights and obligations of states. However, the practical application of cooperation with the ICC has revealed legal and political challenges that have impacted achieving these balances.
- Despite the powers granted to the UNSC under the UN Charter and the ICC's Statute, it has not been given the authority to lift immunities. Furthermore, UNSC referral resolutions activate the ICC's jurisdiction over non-party states but do not transform the referred non-party state into a state party. Therefore, the referred non-party state remains a third state according to the ICC's Statute.
- The circumstances in Africa may necessitate immunity for African officials, but the nature of these officials and their inclination to hold onto power make the African Court on Human and Peoples' Rights a pro forma court protecting them from the jurisdiction of the International Criminal Court.
- The ICC can avoid suspicions of selectivity and politicisation by upholding the principle of no impunity. This is achieved by dedicating the principle of equality to the law,

ensuring the equal trial of all individuals, not only regardless of their official capacities but also irrespective of their nationalities and affiliations. The Palestinian case, including the court's prosecution of Israeli officials who committed horrific crimes against the defenceless Palestinian people, can be considered as an experience that may remove or confirm the suspicions addressed to it.

- Until a customary rule denying immunity for officials from non-party states before the ICC is established, these immunities remain intact. Even if the referral is made by the UNSC, individuals like Omar Al-Bashir enjoy legal immunity, as does Russian President Vladimir Putin. However, this does not exempt them from international criminal responsibility. In the case of the Russian president, the ICC's jurisdiction is undermined and primarily relies to practice it on the cooperation of states parties.

The establishment of the ICC within a unipolar system posed challenges to its functioning and independence. The shift towards a multipolar system raises questions about the court's future and effectiveness. From my perspective, the challenges facing the ICC will persist regardless of the global system. Therefore, African nations should seek African solutions that better align with African aspirations and ensure the separation of international criminal justice from political agendas. This could involve enhancing cooperation among African nations to combat international crimes and working on the development of international criminal justice mechanisms within Africa.

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[1] Decision Pursuant to Article87(7)of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir,ICC-02/05-01/09-139,Pre-Trial Chamber I ,12 December 2011 ; Decision Pursuant to Article87(7)of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir,ICC-02/05-01/09,Pre-Trial Chamber I ,13 December 2011; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Hassan Ahmed Al Bashir's Arrest and Surrender to the court,ICC-02/05-01/09,Pre-Trial Chamber I ,09 April 2014; Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Hassan Ahmed Al Bashir,ICC-02/05-01/09,Pre-Trial Chamber I ,13June 2015.

[2] the Decision on Africa's Relationship with the International Criminal Court(ICC),Ext/Assembly/AU/Dec 1 October 2013, para9.

[3] Ibid, Para 9.

[4] Protocol on Amendments to the Protocol on the Statute of African Court of Justice and Human Rights, adopted 27 June 2014

[5] In addition to that, the Malabo Protocol expanded the scope of international crimes to include, alongside traditional international crimes (genocide, war crimes, crimes against humanity, and the crime of aggression), new crimes such as unconstitutional change of government, piracy, terrorism, corruption,

and others. The Protocol also extended beyond individual criminal responsibility to hold companies accountable for committing international crimes. Furthermore, the Protocol broadened the concept of complementarity, making the African Court on Human and Peoples' Rights a complementary court not only to national courts but also to regional sub-courts (such as the courts established through economic integration to try international crimes in Africa, like the African Extraordinary Chambers in the Senegalese courts established by the East African Community (EAC), which witnessed the first African trial of a former African head of state, former Chadian President Hissène Habré).

[6] Abraham G, 'Africa's evolving continental court structures: at the crossroads?'(2015)SAILA,available at https://aprmtoolkit.saiia.org.za/documents/academic-papers/524-africa's-evolving-continental-court-structures-at-the-crossroads/file,(accessed on 07july 2023).

[7] Manisuli Ssenyonjo, state withdrawal notifications from the Rome Statute of the ICC: South Africa, Burundi and the Gambia, p100, available at https://link.springer.com/content/pdf/10.1007/s10609-017-9321-z.pdf, (accessed on 02 June 2023)

[8] press release 02/2012 on the Decision of Pre-Trial Chamber of the International Criminal Court(ICC) pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan,9 January 2012.

[9] AU Assembly, Decision on the progress of the report of the commission on the implementation of the assembly decisions on the international criminal court(ICC), January2012, Assembly/AU/Des397(XVIII), Para 6.

[10] Prosecutor v. Omar Hassan Ahmed Al Bashir,13 June 2015, ICC, Pre-Trial Chamber II, Decision following the prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, icc-02/05-01/09-242

[11] Guénaël Mettraux, John Dugard, and Max du Plessis, Heads of State Immunities, International Crimes

and President Bashir's Visit to South Africa, international criminal law review , 2018, p579, available at : https://brill.com/view/journals/icla/18/4/article-p577_577.xml?language=en&ebody=pdf-67975,(accessed on 20 June)

[12] Ibid, p580

[13] Op cit, p580

[14] Gerhard Kemp, Immunity of High- Ranking Officials Before the ICC – Between International Law and Political Reality, International Criminal Justice Series book series (ICJS,volume 23),p80.

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[15] ICC,The Prosecutor v Omar Hassan Ahmed Al Bashir ,The AU's Submission in the "Hashemite Kingdom of Jordan's Appeals Against the 'Decision under Article 87(7) of the Rome Statute on the Non –compliance by Jordan with the request by the court for the arrest and surrender of Omar Al Bashir',16July 2018 ,ICC-02-/05-09/370,paras 44-55;AU Supplementary Submission in the Jordan-Appeal, above n 66,paras 17-25

[16] It means the presence of a sense of legal right or legal obligation.

[17] The Report of the International Law Commission on the work of its seventieth session (30April-1June and 2 July-10 August 2018), General Assembly Official Records seventy- third Session Supplement No(A/73/10), Chap5, para 65.

[18] Ibid, para 65.

[19] examples about state's practices see: the report of the Report of the International Law Commission on the work of its seventy- third session (18April-3June and 4 July-5 August 2022), General Assembly Official Records Seventy-seventh Session Supplement No(A/77/10), Chap6, footnotes (971, 977, 978, 979, 986, 987 ,988), pp252-257.

[20] Decisions of international courts and judicial bodies, especially the International Court of Justice, are considered a secondary source for determining the rules of CIL.

See the Report of the International Law Commission on the work of its seventieth session (30April-1June and 2 July-10 August 2018), General Assembly Official Records seventy- third Session Supplement No(A/73/10), Chap5, chap 5, p158.

[21] The ICC was established by a treaty, while the tribunals for Rwanda and the former Yugoslavia were created through resolutions of the UNSC. The Special Courts for Sierra Leone and Lebanon were established based on agreements between the United Nations and the respective governments of the states involved.

[22] The Report of the International Law Commission on the work of its seventieth session (30April-1June and 2 July-10 August 2018), General Assembly Official Records seventy- third Session Supplement No(A/73/10), Chap5, pp109-110.

[23] Ibid, pp109-110

[24] It's the same argument that the ICC relied on in its decisions regarding the obligations of Malawi and Chad to justify the impact of CIL regarding immunity. This is because CIL creates a general exception to the immunity of heads of state before international courts, and therefore, there is no conflict between the obligation to arrest Al-Bashir and CIL. For more details, see: Malawi Decision (ICC-02/05-01/09-139, Pre-Trial Chamber I ,12 December 2011), and the Republic of Chad (ICC-02/05-01/09, Pre-Trial Chamber I ,13 December 2011).

[25] Antonio Cassese, international criminal law, legal publications sadir, Lebanon,2015, p 580.

[26] Contributing to shaping the principles and rules of international criminal law.

[27] Despite the acquittal of the Chief Prosecutor of the International Criminal Court, Luis Moreno Ocampo, of allegations related to receiving money during his tenure at the court, any financial link can raise doubt or even inquiry (investments in Panama, tax evasion, consultancy for individuals associated with perpetrators of international crimes). Whether these connections existed before or after taking office, they fuel scepticism towards the court's policies and orientation, particularly in targeting the African continent. This can have a lasting impact on casting doubt and suspicion on the credibility of the court, even in cases where accusations lack legal basis.
For more information on the topic, you can see the following links: https://mourassiloun.com/node/2002; https://www.afrigatenews.net/article

[28] Kharfia Saadna, US Strategy To Immunize Its Citizens Before The International Criminal Court–Afghanistan Case, Journal of Legal and Political Thought, University of Laghouat, Volume 7, Number 1, 2023,pp 1108–1113.

[29] Antonio Cassese, International Criminal Law, p587.

[30] The Report of the International Law Commission on the work of its Sixty–fifth session (06 May–7June and 8 July–6 August 2013), No(A/68/10),Chap7,para 6.

[31] The Report of the International Law Commission on the work of its seventy– third session (18April–3June and 4 July–5 August 2022), General Assembly Official Records Seventy–seventh Session Supplement No(A/77/10), Chap6, paras 19–26.

[32] Mark Klamberg, Commentary on the Law of the International Criminal Court, Torkel Opsahl Academic Publisher Brussels (2017), pp277–278.

[33] Manisuli Ssenyonjo, Op cit, p34

[34] Guénaël Mettraux, John Dugard, and Max du Plessis, Op cit, p 619

[35] Manisuli Ssenyonjo, Op cit, p100, see also Malawi decision (n192), para 37.

[36] The rules of interpretation are outlined in the Vienna Convention on the Law of Treaties.

[37] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970) Advisory Opinion ICJReports16(21June 1971).

[38] Ibid

[39] In the second paragraph (2) of Resolution 1593, it states that the government of Sudan and all parties to the conflict in Darfur are obliged to fully cooperate with the Court and the Prosecutor. It further specifies that non–party states to the Rome Statute have no obligation under the Statute but encourages all states and international and regional organisations to cooperate fully. As for the issue of

immunity, the resolution makes no mention of it whatsoever, See Security Council Resolution 1593, DOC.S/RES/1593(2005).

[40] It's worth noting that the Appeals Chamber of the ICC has not submitted requests to the UNSC or its members regarding the interpretation of Resolution 1593. Meanwhile, two permanent members, Russia and China, have stated that, from their perspective, the immunity of the head of state remains in existence regardless of any decision by the UNSC, see: Gerhard Kemp, Immunity of High- Ranking Officials Before the ICC – Between International Law and Political Reality, International Criminal Justice Series book series (ICJS,volume 23),p80.

[41] The article 103 states that: "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.

[42] A Kiyani, Al-Bashir and ICC: The problem of head of state Immunity, Chinese Journal of International Law,2013, p478.

[43] G Guénaël Mettraux, John Dugard, and Max du Plessis, Heads of State Immunities, International Crimes and President Bashir's visit to South Africa, International Criminal law review, 2018, p604.

[44] Ibid, pp604-605

[45] Dopo Akande, The Immunity of Heads of States of Non Parties in The Early Years of ICC, Cambridge University Press, 2018, pp4-5.

[46] Gerhard Kemp, Op cit, p69.

[47] Dopo Akande, Op cit, pp4-5

[48] N Dyani Mhango, South Africa's Dilemma: Immunity laws, International Obligations, and the visit by Sudan's President Omar Al Bashir, Washington International Law Journal ,2017 ,557-559.

[49] Guénaël Mettraux, John Dugard, and Max du Plessis, Op cit, p602

[50] D Akandi, The Legal Nature of UNSC Referrals: Impact of the SC Referral on Al Bashir's Immunities, Journal of International Criminal Justice,2009, p 340.

[51] Guénaël Mettraux, John Dugard, and Max du Plessis, Op cit, p609

[52] Guénaël Mettraux, John Dugard, and Max du Plessis, Op cit, p608

[53] Ibid, pp609-610.

[54] The ICC issued arrest warrants on March 17 for both Russian President Vladimir Putin and Maria Alexeyevna Lvova-Belova, the Commissioner for Children's Rights in the Russian President's office. This is based on their responsibility for the war crime of forcibly deporting Ukrainian children from the occupied Ukrainian territories to Russia.

[55] In response to the arrest warrant for Putin, Moscow opened an investigation against judges of the ICC,see https://www.aljazeera.net/news/2023/3/20/.

[56] South Africa granted similar immunities during the AU Summit held in Johannesburg in 2015, upon the request of the AU. This was done to secure the visit of Sudanese President Omar Al-Bashir.

[57] Carien du Plessis.South Africa asks ICC to exempt it from Putin arrest to avoid war with Russia. https://www.reuters.com/article/safrica-russia-icc-idUSKBN2YY1E7/30/08/2023/18:14

[58] Guénaël Mettraux, John Dugard, and Max du Plessis, Op cit, p602.

[59] Ibid, p618.

[60] Minister of Justice and Constitutional Development and Others v the Southern Africa Litigation Centre and Others, 2016(3) SA317 (SCA).

[61] The Article states that: 'Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia: (a) Insufficient information to execute the request;(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

[62] Article 87 includes the general provisions for cooperation requests.

[63] Article 91 outlines what a request for arrest and surrender should include.

[64] Paragraph 2 of Article 96 specifies what other forms of assistance requests under Article 93 should include, which, in turn, covers other forms of cooperation.

[65] Jeremy Julian Sarkin, Will the ICC Be Able to Secure the Arrest of Vladimir Putin When He Travels?, International Human Rights Law Review, 2023,pp51-52.

[66] The Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court, Fifteenth session of Assembly of States Parties (16-24 November 2016), ICC-ASP/15/35.

[67] The Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court, Sixteenth session of Assembly of States Parties (4-14 December 2017), ICC-ASP/16/29.

[68] Amnesty International, ICC Recommendations to The 15th Session of The Assembly of States Parties (16 to 24 November 2016). pp 11-12, available at:https://www.amnesty.org/en/wp-content/uploads/2021/05/IOR5351302016ENGLISH.pdf, (accessed on 5 September 2023).

[69] Shabas observes that Article 97 'declares something that the parties to the Treaty of Rome will do based on good faith in any case.' If problems arise under this article, consulting with the court to resolve the issue is a clear step that demonstrates good faith and would be inconsistent with the Treaty of

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Rome for a state party to simply postpone the implementation of the agreement, ignore a request, or refuse to implement it when such problems arise, see: The International Bar Association.IBA ICC and International Criminal Law Programme :A Guide for States Parties.https://www.ibanet.org/document?id=ICC-Report-Rome-Statute-October-2021 .p160

[70] Jeremy Julian Sarkin, Op cit, p51.

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2. Rome Statute of the International Criminal Court ,1998.
3. Vienna convention on the law of treaties,1969.
4. Protocol on Amendments to the Protocol on the Statute of African Court of Justice and Human Rights, 2014.

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